

# Report of Public Comments

<b>Title:</b>	<b>Preliminary Issues Report on Registrar Accreditation Agreement Amendments</b>		
<b>Publication Date:</b>	10 February 2012		
<b>Prepared By:</b>	Staff		
<b>Comment Period:</b>		<b>Important Information Links</b>	
Open Date:	12 December 2011		Announcement
Close Date:	13 January 2012		Public Comment Box
Time (UTC):	23:59		View Comments Submitted
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<b>Section I: General Overview and Next Steps</b>			
<p>The Preliminary Issue Report on RAA Amendments was published in response to the Board Resolution (2011.11.10.18.32) in Dakar (the “Dakar RAA Resolution”) regarding amendments to the Registrar Accreditation Agreement. In the Dakar RAA Resolution, the Board directed negotiations on the RAA to be commenced immediately, so as to result in proposed amendments to be provided for consideration at ICANN’s meeting in Costa Rica in March 2012.</p> <p>Under the Dakar RAA Resolution, the negotiations should address the recommendations made by law enforcement, those made by the GNSO RAA drafting team (RAA Final Report) as well as other topics that would advance the twin goals of registrant protection and DNS stability. The Board also requested the creation of an Issue Report to undertake a GNSO policy development process (PDP) as quickly as possible to address the negotiation topics that are suited for a PDP.</p> <p>The Preliminary Issue Report will be updated to reflect the information submitted through the Public Comment Forum in the form of a Final Issue Report to be presented to the GNSO Council.</p>			

## Section II: Contributors

*At the time this report was prepared, a total of nine (9) community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.*

### Organizations and Groups:

<b>Name</b>	<b>Submitted by</b>	<b>Initials</b>
IACC	Andy Combs	AC
RySG	David Maher	DM
IPC	Steven Metalitz	SM
RrSG	Graham Chynoweth	GC
ALAC	ICANN At-large Staff	ALAC
NCSG	Robin Gross	RG
NCUC	Konstantinos Komaitis	KK
IP Justice	Robin Gross	RG/IP

### Individuals:

<b>Name</b>	<b>Affiliation (if provided)</b>	<b>Initials</b>
Dr. Milton Mueller		MM
Wendy Seltzer		WS

## Section III: Summary of Comments

*General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).*

All contributors supported the initiation of a policy development process (PDP) to consider at least certain appropriate, if not all amendment topic proposals listed in the Preliminary Issue Report to improve the RAA, and several endorsed the “sense of urgency” expressed by the Board to address the necessary amendment topics to improve the RAA.

However, among the submissions received there were differing opinions with regard to the proposed PDP process in the Preliminary Issue Report which would group the topics into four separate but concurrently conducted PDPs. Some contributors supported this process while others expressed concern about whether adequate community and staff resources could be provided to support four concurrent PDPs. One contributor recommended that a mechanism be introduced to ensure that the concurrent implementation of different policies that arise from the separate PDPs can occur coherently and in a way that does not diminish consumer trust in the DNS.

Only a few contributors among the submissions received commented on the direct negotiations between ICANN and the registrars – the comments received on this issue were generally split between supporting the negotiations as a mechanism to expeditiously address the amendment topics and those not supporting the negotiation process because it limited input from other community stakeholders. Those who did support the negotiations expressed concern over the lack of transparency regarding the content and progress of the negotiations. One contributor stated its position that input from advisory groups, stakeholder groups and other members of the community must be distilled into a single set of positions and communicated to the registrars by a single negotiating authority; having multiple parties at the contract negotiations would result in a less efficient, less transparent negotiation process, as well as potentially confuse the rights of the actual existing parties to the contract.

A few contributors addressed the issue of how the amendment topics should be addressed given that they are subject to both the direct negotiations and any initiated PDP. One contributor agreed “in principle” with the Preliminary Issue Report suggestion “that once a determination has been made that a specific topic will be addressed in the negotiations, that issue should be ‘removed’ from further consideration under the PDP.” However, the contributor expressed concern about whom and on what criteria would determine whether a particular amendment topic is effectively addressed in the negotiations. Another contributor expressed its concern that if the policy issues are not appropriately sequenced or, addressed without consideration of implementation issues, the resulting rate of change to registrar business practices could diminish consumer confidence and trust. With regard to the proposed amendment topics, one contributor noted that because the significant enhancements with regard to registrant protections and enforcement capabilities in the 2009 RAA are relatively new in terms of operational implementation, there should not be a rush to further optimize such protections and capabilities without yet understanding the scope of the impact of such changes.

A limited number of comments were submitted with regard to specific amendment topic areas:

### **Expansion of Registrar Obligations**

Some contributors expressed privacy and civil liberty concerns about the proposals to expand the amount of data registrars are required to collect and validate and the new obligations for privacy and proxy services, as well as the concern over additional burdens on registrars which would likely increase costs that would in turn be passed on to registrants. One contributor believes that the proposed obligations on privacy and proxy Services “could stretch ICANN’s contractual limits,” which raises significant legal and policy challenges to the current model. Several contributors expressed concern that establishing an obligation for registrars to investigate malicious conduct imposes and increases ancillary responsibilities and “improper intermediary liability” which would have “chilling effects on online expression,” can stifle innovation and growth in the Internet economy, as well as unfairly distribute the costs and burdens involved.

### **Registrar Code of Conduct**

One contributor raised the question as to whether the topic that staff should draft a registrar code of conduct if registrars fail to do so by a certain time is a PDP topic, while another contributor stated their view that the only option that will move registrars toward adoption after what it believes is a decade of resistance, is to have

ICANN draft a code of conduct and require registrars to comply either as a condition for accreditation renewal or through other appropriate incentives during the term of an existing accreditation.

### **Relationship Between WHOIS Studies and RAA Amendment Process**

One contributor supported the Preliminary Issue Report recommendation that any amendments related to Whois data should await the results of the various Whois studies commissioned by ICANN and the GNSO, while two other contributors stated their position that there should be no further delay to a PDP on Whois issues pending the outstanding studies. Another contributor agreed with staff that any PDP relating to Whois should address the recommendations of the Whois Review Team, to the extent that such recommendations have not been effectively addressed through the direct negotiation process to amend the RAA or through some other channel.

### **Freedom of Expression Impact Analysis**

Two comments were submitted supporting a freedom of expression impact analysis. One contributor suggests that the analysis should include consultation with experts in privacy and human rights, especially the right of free communications; and should also consider both direct and indirect impacts on expression, with special consideration of jurisdictional differences in the definition of “law enforcement” and the threats online speech may face. Another contributor, while applauding the GNSO’s call for this analysis, expressed its concern that given a registrar’s role in implementing policy and its position as a conduit to registrants, a registrant’s freedom of expression could be inhibited because of a registrar’s fear that it could be de-accredited for not taking action in response to a law enforcement agency request to disclose some information resulting from activity outside of the registrar’s jurisdiction.

### **Other Related Issues to the RAA Amendment Process**

One contributor expressed its concern that the “picket fence” boundaries must not be eroded through the various mechanisms available to amend the RAA, and believes that a conscious effort should be made to articulate what “bucket” any policy element belongs in, and that “continued vigilance” is required to ensure that the other change mechanisms identified in the Preliminary Issue Report, such as the substitution of a new form of RAA and/or imposing additional requirements on registrars in connection with accreditation for new gTLDs “are not used to route around the protections embodied in the ‘picket fence.’” Another contributor believes that the “long held, community consensus regarding the importance of carefully analyzing on which side of the ‘picket fence’ an issue falls, must continue to be embraced.”

One contributor commented that all aspects of the RAA must reflect “the spirit, if not the letter, of the consensus policy positions of the global multi-stakeholder community, while another contributor raised a concern they believe is shared by “many others” in the ICANN community about the “way in which the Board seems to have been stampeded into RAA amendments by a few GAC members.” The contributor stated its position that the GAC as an advisory committee can make the community aware of certain concerns, but is in no position to bypass ICANN’s PDP process or has no authority to demand changes to the RAA. Another contributor believes that given the concern about jurisdictional, freedom of expression and implementation

issues raised by some of the GAC's requests, a PDP may be the only appropriate action rather than quickly addressing these issues in response to GAC criticism in the context of the pending RAA amendment process.

## Section IV: Analysis of Comments

*General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.*

### General View of the RAA Amendment Process

ALAC stated its position that it supports an RAA that “substantially conserves the policy objectives of the ICANN community judged to be in the global public interest already severally agreed,” including the At-Large perspectives on consumer protection, assurance, security and maintenance of the benefits accrued from the fair use of the Internet names and number resources by ordinary Internet users. In addition, ALAC reiterated its position that the RAA and its related matters are subject to the transparency and accountability framework of the AoC and that therefore, all aspects of the RAA must reflect “the spirit, if not the letter, of the consensus policy positions of the global multi-stakeholder community.” *ALAC*

IP Justice expressed its concern that law enforcement, governments and special interests should not be able to obtain Internet policies in “back-room” deals and believes that ICANN decisions must be made in a transparent manner “that is accountable to democratic processes and takes into account human rights and due process protections.” *RG on behalf of IP Justice*

The RrSG stated its commitment to working with other ICANN stakeholders to “continue to improve and innovate in the area of registrant protections and the RAA.” However, the RrSG noted that because the 2009 RAA’s significant enhancements with regard to registrant protections and enforcement capabilities are relatively new in terms of operational implementation, it is concerned that the adoption of new policies or provisions could be “unhelpful, ineffective or even potentially harmful to interests important to all parties” if there is a “rush to further optimize such protections and capabilities without yet understanding the scope of impact of such changes.” *GC on behalf of the RrSG*

The IPC believes that the objective of the RAA amendment process – whether through negotiations, PDPs, or both, is to “make the RAA a clear, enforceable, statement of how those entities empowered by ICANN to participate in the gTLD registration marketplace must conduct business in order to protect consumers; to enable effective enforcement of laws, including intellectual property laws; to strengthen accountability and transparency in the domain system; and to preserve stability and security.” *SM on behalf of the IPC*

The RrSG stated its position that although the dual-track nature of the current RAA amendment process where the issues are being concurrently negotiated between ICANN and registrars and discussed in the GNSO context is necessary given the circumstances within the community, the RrSG strongly believes that this process “cuts against a value that should guide the RAA amendment process,” and should not be a model that is repeated in the future. Specifically, the RrSG believes that the RAA amendment process should result in transparent and consistent contractual relationships between ICANN and registrars, registrars and registrants, and a consistent registrar regulatory environment that in turn, enhances consumer trust in the DNS and domain name

registrations. The RrSG believes that the dual-track process will create concurrently existing different versions of the RAA and also, contractual inconsistency and business practice instability due to the 2009 changes, the pending 2011 changes, and any additional changes brought about by ensuing PDPs, which will result in the greater likelihood of negative experiences for registrants and diminished consumer trust. *GC on behalf of RrSG*

### **Initiation of PDP/Use of Multiple PDPs**

The IACC supports in principle the proposed PDP process to address the RAA amendment topics, but “can only endorse the proposal in principle” because many of the amendment topics noted in Annex 2 of the Preliminary Issue Report may also be included in the negotiations between ICANN and the registrars. *AC, on behalf of the IACC*

Wendy Seltzer commends the ICANN Board for initiating a PDP to send the RAA amendment questions to the GNSO Council for policy development. Ms. Seltzer believes that the multi-stakeholder GNSO is the proper place to address RAA amendments because “the Registrar obligations that impact Registrants and Internet users must be subject to community debate and decision.” *WS*

Note The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

Dr. Milton Mueller, speaking as a member of the Executive Committee of the Noncommercial Stakeholders Group, stated that changes to the RAA are important policy issues and therefore, should be handled by the GNSO and not through bilateral negotiations between ICANN and the registrars, and not “through unilateral dicta from the GAC and law-enforcement agencies.” *MM, as a member of the Noncommercial Stakeholders Group Executive Committee*

The Noncommercial Stakeholders Group supports the initiation of a legitimate, inclusive PDP that includes all stakeholders, including governments and law enforcement agencies not just because it’s a matter of fairness, but also because it is “eminently practical when dealing with the globalized jurisdiction where no single government can claim to be a legitimate representative of all the people and businesses involved. *MM, as a member of the Noncommercial Stakeholders Group Executive Committee*

Note: The above comments submitted by Dr. Mueller were supported by the Policy Committee of the Non-Commercial Users Stakeholder Group (submitted by RG), the Non-Commercial Users Constituency (submitted by KK), IP Justice (submitted by RG), and Wendy Seltzer.

The RySG agrees with the staff recommendation to divide the amendment topics into concurrently operating multiple PDPs, but believes that “it would be wise” to conduct a preliminary survey to determine the viability of staffing four separate but concurrent PDPs in order to ensure that neutral leadership and adequate staff support can be provided for each Working Group. The RySG is concerned about scheduling challenges if some individuals try to serve on multiple Working Groups. *DM on behalf of the RySG*

With regard to the specific staff recommendations for dividing the amendment topics into four separate PDPs, the RySG is concerned about whether the first topic category – RAA amendments for Registrar Duties, Responsibilities and Obligations, covers too much to be accomplished within a reasonable period of time. The

RySG suggests that either this PDP be divided into two separate PDPs or, divide it into two PDPs that operate one after the other, the first covering high priority items and the second covering medium priority items. *DM on behalf of the RySG*

The ALAC fully endorses the recommendation for several PDPs and urges the GNSO to initiate and conclude the PDP's recommended in the Preliminary Issue Report "in the shortest possible time," for adoption as defining contractual terms for all gTLD registries, including those expected to be raised in the new round. The ALAC also endorses all twenty-four topics defined under the four recommended PDPs under the headings of Registrar Obligations/Duties, Privacy and Proxy Services/Resellers, Whois Data and Contract Administration, as necessary subjects for consensus decision-making. *ALAC*

The ALAC encourages the GNSO's quick and positive response to the Issue Report and to assure the At-Large participation in the PDP "so that peripheral but highly complementary matters to these amendments can be aired and possibly addressed by the community." *ALAC*

The IPC believes that if the current direct negotiations do not achieve effective resolutions for many of the issues raised in the Preliminary Issue Report, than an expedited PDP should be planned for, along with other mechanisms to make the necessary RAA improvements. *SM on behalf of the IPC*

The IPC noted that the recommendation for a series of parallel PDPs is an ambitious one, which will make considerable demands on ICANN staff, GNSO volunteers and the Internet community. However, the IPC does not object in principle to the concept of parallel processing of the amendment topics. The IPC agreed with the ICANN Board that this project should take a high priority and be pursued with a "sense of urgency" to develop more effective rules in the public interest for domain name registration practice; and in this spirit, believes that this process should be structured to enable the fastest possible progress on the greatest number of high priority issues. The IPC "strongly supports" the Preliminary Issue Report recommendation that the "GNSO council consider whether any...pending projects or future projects should be revised or suspended pending the outcome of the RAA negotiations and the RAA-related PDPs." *SM on behalf of the IPC*

The RrSG endorsed ICANN staff's recommendation "that the Proposed Amendment Topics be divided into 4 separate PDPs as a unified approach would likely be too cumbersome to produce timely results." Although the RrSG believes the issues should be dealt with independently, it recommended that a mechanism be introduced to ensure that concurrent implementation can occur "coherently and in a way that does not diminish consumer trust in the DNS and their domain name registrations." *GC on behalf of the RrSG*

### **Final Issues Report**

The IACC supports the staff recommendation that the proposed issues are within the scope of the ICANN PDP process and that the GNSO should proceed with a PDP concerning uniform implementation of a thick Whois requirement upon all registries. *AC, on behalf of the IACC*

None of the recommendations in the 18 October 2010 Report can be said to have community consensus because the GNSO failed to achieve consensus. *WS*

Note: The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

Dr. Milton Mueller, speaking as a member of the Non-commercial Stakeholder’s Group Executive Committee believes that the way registrars handle the personal, financial and technical data of their customers, and the way they interact with law enforcement agencies “is a policy issue of the highest order.” Dr. Mueller expressed the concern that certain government law enforcement agencies are not committed to due process, individual liberty or privacy, and that even legitimate governments at times may engage in illegitimate, extra-territorial assertions of their authority or abuses of due process. Dr. Mueller urged ICANN to take into account that although the demand of LEAs to have access to information “that makes their jobs easier” is a legitimate concern, the demands of law enforcement have always been constrained by the procedural and substantive rights of individuals in democratic countries. *MM, as a member of the Noncommercial Stakeholders Group Executive Committee*

Note: The above comments submitted by Dr. Mueller were supported by the Policy Committee of the Non-Commercial Users Stakeholder Group (submitted by RG), the Non-Commercial Users Constituency (submitted by KK), IP Justice (submitted by RG), and Wendy Seltzer.

The RySG suggested that the Final Issue Report should include an indication for all the individual topics in Annex 2 that may be dealt with in the direct negotiations between ICANN and the registrars, in order to help the GNSO evaluate whether the recommended four topic categories are realistic. The RySG suggested that these indications be provided either in the Summary of Proposed Amendment Topics or in the table of topics. *DM on behalf of the RySG*

The RrSG believes that the issue of Whois verification should be subject to a PDP. *GC on behalf of the RrSG*

### **Direct Negotiations Between ICANN and Registrars**

The IACC supports direct negotiations between ICANN and the registrars to the extent that the topics raised in Annex 2 of the Preliminary Issue Report can be adequately addressed and more expeditiously resolved through such a process. *AC, on behalf of the IACC*

The IACC is concerned about the lack of transparency “which characterizes” the direct negotiations, and the lack of input from other interested members of the ICANN community. As a result, the IACC expressed its doubt that many of the most important issues will be addressed through the negotiations or, adequately addressed. *AC, on behalf of the IACC*

While some terms may be appropriate for bilateral negotiation, “ICANN should take its side of the negotiations from the community.” *WS*

Note: The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

The RrSG “wholeheartedly” supports ICANN’s multi-stakeholder model and welcomes the important input from all advisory committees, stakeholder groups, and other community members. However, the RrSG believes that a process in which multiple parties are involved in the contract negotiations results in a less efficient, less

transparent negotiation process and would also, as a legal matter, potentially confuse and/or cloud the rights of the actual, existing parties to the contract. Therefore, the RrSG strongly believes that such input must be distilled into a single set of positions adopted in accordance with ICANN procedures that are communicated to registrars by a single negotiating authority. *GC on behalf of the RrSG*

The private negotiation process between ICANN and the registrars “creates confusion and raises the danger of a lack of representation in the evolution of a solution.” In the view of the Noncommercial Stakeholders Group, “the conclusions of a PDP would override any private agreements made.” *MM, as a member of the Noncommercial Stakeholders Group Executive Committee*

Note: The above comments submitted by Dr. Mueller were supported by the Policy Committee of the Non-Commercial Users Stakeholder Group (submitted by RG), the Non-Commercial Users Constituency (submitted by KK), IP Justice (submitted by RG), and Wendy Seltzer.

The IPC commended the ICANN Board for initiating immediate negotiations with accredited registrars, and for the “sense of urgency” on significant amendments to the RAA expressed in its resolutions. However, the IPC expressed its disappointment about the “near complete opacity” of the negotiations to date. The IPC cited to two visits to the wiki pages set up to report on the negotiations and amendment topics on 10 January 2012, and pointed out that some negotiating sessions had not been reported on, and the available reports contained very little information. *SM on behalf of the IPC*

#### **Relationship Between Negotiations and PDPs**

The IPC agrees with the Preliminary Issue Report statement that every one of proposed amendment topics is “within the scope of the ICANN policy process and the GNSO,” and thus can be addressed through the PDP process. However, the IPC notes each of these topics could also be addressed through direct negotiations with the registrars and could be approved by the Board without the need for a “protracted PDP.” *SM on behalf of the IPC*

The IPC noted some confusion in the Preliminary Issue Report as to the relationship between the direct negotiations and any PDP, as reflected in the Report’s statement that “one or more PDPs ...may run in parallel to the RAA negotiations.” The IPC points out that this would not be possible if the negotiations are concluded by Feb. 19 (the deadline for any proposed RAA amendments to be published for consideration prior to the official opening of the Costa Rica meeting) as mandated by the Board. *SM on behalf of the IPC*

The IPC agrees “in principle” with the Preliminary Issue Report suggestion “that once a determination has been made that a specific topic will be addressed in the negotiations, that issue should be ‘removed’ from further consideration under the PDP.” However, the IPC expressed concern about who and on what criteria would determine whether a particular amendment topic is addressed in the negotiations, as well concern over the need to ensure the topic is addressed in a “meaningful” manner, is “in the global public interest,” and advances “the twin goals of registrant protection and stability.” *SM on behalf of the IPC*

The RrSG believes that using the appropriate process – i.e., either through direct negotiations, a PDP, through a

code of conduct, or testing in the new gTLD program for the different types of changes to the RAA is essential. *GC on behalf of the RrSG*

The RrSG expressed two concerns with regard to the timing and manner of addressing the amendment topics. Given that fact gathering and/or policy development work related to several of the topics are pending or imminent, the RrSG believes it is premature at this point whether some of the issues fall within or outside of the picket fence and thus, premature for changing registrar business practices through the direct negotiation process between ICANN and registrars. The RrSG is also concerned that given the breadth and scope of the amendment topics, it is essential to appropriately sequence and address implementation issues related to the amendment topics in order to ensure that the rate of change in registrar business practices does not diminish consumer confidence in the DNS, consumer experience with domain name registrations or consumer trust. *GC on behalf of the RrSG*

### **Picket Fence Issues**

The RySG expressed its concern that the “picket fence” boundaries must not be eroded through the various mechanisms available to amend the RAA. In raising this concern, the RySG states that “realistically, substantive ‘policy’ addressing any of the specified issues categories is likely to contain both elements that fall within the ‘picket fence’ and elements that do not.” To address this concern, the RySG believes that a conscious effort should be made to articulate what “bucket” any policy element belongs in, and that “continued vigilance” is required to ensure that the other change mechanisms identified in the Preliminary Issues Report, such as the substitution of a new form of RAA and/or imposing additional requirements on registrars in connection with accreditation for new gTLDs “are not used to route around the protections embodied in the ‘picket fence.’” *DM on behalf of the RySG*

In agreeing with the ICANN staff’s assessment that there are several appropriate approaches to either amend or produce a new form of the RAA, the RrSG believes that the “long held, community consensus regarding the importance of carefully analyzing on which side of the ‘picket fence’ an issue falls, must continue to be embraced.” *GC on behalf of the RrSG*

### **Alternatives for Producing Binding Changes Through ICANN’s Policy Processes**

In response to options provided in the Preliminary Issue Report on alternatives for producing binding changes through ICANN’s policy processes, the IPC stated its view that any other RAA change beyond adopting binding consensus policies becomes “binding” upon all registrars that sign up to it, whether upon accreditation renewal, substitution of a new form of agreement, or through the use of incentives to encourage registrars to sign up to new provisions before the expiration of their current agreement. *SM on behalf of the IPC*

The IPC believes that in addition to providing strong financial incentives for registrars to sign onto additional obligations prior to the expiration of their current agreements, ICANN should also strive to be more proactive and creative with additional incentives. The IPC suggested that ICANN utilize new gTLDs by requiring registrars to accept new obligations for all of its sponsored gTLD registrations as a prerequisite for that registrar to enter

into any appendix agreement covering a new gTLD. *SM on behalf of the IPC*

### **Validation of Registrant Data**

Wendy Seltzer, speaking as a non-commercial Internet user and privacy advocate, expressed her great concern about the proposed requirements for registrars to validate registrant data beyond the requisites for obtaining payment for domain registrations because: 1) the lack of consensus on privacy protections for personal data; 2) the costs of validating the data would likely be passed along to registrants, would raise their costs and perhaps exclude some would-be registrants; 3) the proposed fields are significantly overbroad. *WS*

Note: The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

Dr. Mueller, writing as a member of the Non-commercial Stakeholder's Group Executive Committee, believes that the demands of LEAs to make registrars collect, maintain and validate data raises civil liberties issues, and "is reminiscent of what China and South Korea have called a 'real names' policy, which makes all participation in Internet communication contingent upon giving government authorities sensitive personal identification and a blanket authority to discontinue service should any wrongdoing be suspected." Dr. Mueller also expressed concerns that such demands would place enormous cost burdens on registrars. *MM, as a member of the Noncommercial Stakeholders Group Executive Committee*

Note: The above comments submitted by Dr. Mueller were supported by the Policy Committee of the Non-Commercial Users Stakeholder Group (submitted by RG), the Non-Commercial Users Constituency (submitted by KK), IP Justice (submitted by RG), and Wendy Seltzer.

### **Privacy and Proxy Service Obligations**

Wendy Seltzer believes that the proposed obligations on privacy and proxy services "could stretch ICANN's contractual limits," and will also threaten the privacy and safety of individuals who utilize domain names to provide lawful but unpopular online speech. With regard to contractual limits, Ms. Seltzer believes that any attempt to control third-party services by restricting the business opportunities of registrars raises significant legal and policy challenges to the current model. Making registrars liable as overseers for every registration and use of a domain name or to require disclosure obligations of privacy providers "would interfere with recognized privileges, such as attorney-client confidentiality." *WS*

Note: The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

### **Registrar Code of Conduct**

The RySG raised the question as to whether the topic that staff should draft a registrar code of conduct if registrars fail to do so by a certain time is a PDP topic. The RySG requested that if staff believes this is a PDP topic, that it provide the rationale in the Final Issue Report. *DM on behalf of the RySG*

With regard to registrars adopting a code of conduct, the IPC stated its view that the only option that will move registrars toward adoption after what it believes is a decade of resistance, is to have ICANN draft a code of

conduct and require registrars to comply either as a condition for accreditation renewal or through other appropriate incentives during the term of an existing accreditation. *SM on behalf of the IPC*

#### **PCI Compliance Requirement for WHOIS Data**

The RySG believes that the PCI compliance requirement in the registration process needs more explanation because the RySG has been unable to identify payment card industry standards that relate to billing validation, including the PCI-DSS program referred to in Table A.1.b as Item 2a under registrar validation obligations. In addition, the RySG believes that this topic is outside the scope as subject matter for the RAA. *DM on behalf of the RySG*

#### **Relationship Between WHOIS Studies and RAA Amendment Process**

The IACC rejects any effort to further delay a PDP on Whois issues pending outstanding studies. *AC, on behalf of the IACC*

Wendy Seltzer agrees with the Preliminary Issue Report that any amendments related to Whois data should await the results of the various Whois studies commissioned by ICANN and the GNSO. *WS*

Note: The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

The IPC urged that any delay in action or reform of the RAA with regard to Whois-related issues because of the pendency of, or planning for the Whois studies must be avoided. The IPC expressed its concern that the staff's suggestion in the Preliminary Issue Report that any PDP on Whois issues must wait until after the Whois studies are completed will be used as a delaying tactic by those who oppose "these needed reforms." *SM on behalf of the IPC*

The IPC agrees with staff that any PDP relating to Whois should address the recommendations of the Whois Review Team, to the extent that such recommendations have not been effectively addressed through the direct negotiation process to amend the RAA or through some other channel. *SM on behalf of the IPC*

#### **Registrar Duty to Investigate Malicious Conduct / Registrar Intermediary Responsibility**

Wendy Seltzer believes that establishing an obligation for registrars to investigate malicious conduct imposes an "improper intermediary liability" which would have "chilling effects on online expression." Ms. Seltzer stated that such a duty would "open an avenue for denial of service attacks on unpopular but lawful speech and raise the specter of takedown with due process for such speakers." *WS*

Note: The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

In citing the OECD report "the Role of Internet Intermediaries in Advancing Public Policy Objectives," Dr. Mueller raised the concern that increasing the amount of "ancillary responsibilities" on registrars "can stifle innovation and growth in the Internet economy, as well as unfairly distribute the costs and burdens involved." Dr. Mueller further stated that "Registrars who are expected to react instantly to any demand that comes to them from anyone claiming to be law enforcement will reduce their risk and liability by acceding to what may

be unjust demands and sacrificing the rights of their users.” *MM, as a member of the Noncommercial Stakeholders Group Executive Committee*

Note: The above comments submitted by Dr. Mueller were supported by the Policy Committee of the Non-Commercial Users Stakeholder Group (submitted by RG), the Non-Commercial Users Constituency (submitted by KK), IP Justice (submitted by RG), and Wendy Seltzer.

### **Freedom of Expression Impact Analysis**

The RrSG applauded” the GNSO’s call for a freedom of expression impact analysis because it believes that protecting freedom of expression “is inherently important to the successful implementation of ICANN’s mission and its values,” and because failure to ensure freedom of expression on the Internet “surely and savagely cuts against the interests of global Internet users, diminishes the security, stability and resiliency of the DNS and retards competition, consumer trust and consumer choice.” However, the RrSG expressed its concern that given a registrar’s role in implementing policy and its position as a conduit to registrants, a registrar’s fear that it could be de-accredited for not taking action in response to a law enforcement agency request to disclose some information resulting from activity outside of the registrar’s jurisdiction could have a chilling effect on a registrant’s freedom of expression. *GC on behalf of the RrSG*

Wendy Seltzer suggested that the analysis should include consultation with experts in privacy and human rights, especially the right of free communications; and should also consider both direct and indirect impacts on expression, with special consideration of jurisdictional differences in the definition of “law enforcement” and the threats online speech may face. *WS*

Note: The above comments by Wendy Seltzer are supported by the NCUC (submitted by KK).

### **Role of GAC in PDP**

Dr. Mueller, speaking as a member of the Non-commercial Stakeholders Group Executive Committee, raised a concern he believes is shared by “many others” in the ICANN community about the “way in which the Board seems to have been stampeded into RAA amendments by a few GAC members.” Dr. Mueller states the position that the GAC as an advisory committee can make the community aware of certain concerns, but is in no position to bypass ICANN’s PDP process or has no authority to demand changes to the RAA. Dr. Mueller also expressed the concern over “the failure or refusal of the law enforcement agencies...to liaise with noncommercial users or civil liberties groups.” *MM, as a member of the Noncommercial Stakeholders Group Executive Committee*

Note: The above comments submitted by Dr. Mueller were supported by the Policy Committee of the Non-Commercial Users Stakeholder Group (submitted by RG), the Non-Commercial Users Constituency (submitted by KK), IP Justice (submitted by RG), and Wendy Seltzer.

The RrSG expressed its commitment to work with ICANN to adopt RAA amendments and/or initiate PDPs that address concerns raised by the GAC. Although the RrSG understands and agrees with the assessment of certain GAC representatives that ICANN’s ability in making timely decisions is not effective, the RrSG believes

that the use of existing organizational mechanisms to address stakeholder concerns such as the policy development process, is still “the most constructive way to address the concern about timely decision taking/ ‘effectiveness.’” The RrSG expressed its concern that placing too much emphasis on fast decision taking/effectiveness among ICANN’s other competing institutional goals (e.g., accountability to multiple stakeholders) runs the risk of undermining the organizations long term stability; and that “repeated use of one-off, ad-hoc decision making processes without efforts to amend existing processes to deal with new pressures/needs, in the long run, reduces overall institutional confidence.” *GC on behalf of the RrSG*

With respect to the issues raised by the GAC and the law enforcement agencies, the RrSG agrees that some decisions may be taken quickly in the context of the pending RAA amendment process. However, the RrSG also stated that “given the concern about jurisdictional, freedom of expression and implementation issues raised by some of the GACs requests, the RrSG is also of a belief that a more thoughtful, traditionally inclusive decision taking process (e.g., a PDP) may be the only appropriate action.” *GC on behalf of the RrSG*