

From: Dean Marks

Date: Friday, April 24, 2020

To: Maarten Botterman, Matthew Shears

Subject: Follow-up from ICANN67 Joint Session of the Board and the CSG

Dear Maarten and Matthew,

Thank you for the time that you and your fellow Board members took during the virtual ICANN67 meeting last month to hold the joint session with the CSG. We appreciated the opportunity to present our constituencies' views and priorities. Moreover, we appreciated the Board's engagement on the issues and the frank discussion that was held.

In addition to the verbal exchanges, a number of questions and points were raised in the Zoom chat that we did not have time to discuss. You graciously agreed that we could compile those questions and send them to you as a follow-up to our meeting. We have now done so and they are attached here.

Please know that the purpose of these questions and our fundamental goal is to work productively and constructively with the Board and ICANN org (as well as the community) to address ongoing challenges and issues. We recognize that issues such as domain name abuse and the reconciliation of consensus policies with various laws, such as the GDPR, are complex and difficult. We look forward to not only continuing our conversations, but also working with you and the community towards solutions.

I would also like to extend a personal thank you to Matthew for co-chairing and leading the joint session and congratulations from the entire NCPH on his recent re-election to Board Seat 14.

Kind regards,
Dean (on behalf of the CSG)

Dean S. Marks

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Follow-up Questions from ICANN67 Joint Meeting of the Board and the CSG

SPECIFICATION 11 (3)(a) REGISTRY AGREEMENT (“RA”) AND SECTION 3.18 REGISTRAR ACCREDITATION AGREEMENT (“RAA”)

In order to ensure the current Board has the appropriate historical context for the evolution and implementation of Specification 11 of the RA, the CSG has compiled a timeline, which provides important details about the origin of the language as present in Specification 11(3)(a) and the manner in which this part of the RA was adopted by the New gTLD Program Committee and subsequently the ICANN Board.

Timeline

April 10, 2012 – The Board establishes the New gTLD Program Committee¹ (“NGPC”) largely due to the highly conflicted nature of sitting Board members.

February 5, 2013 – The Base Registry Agreement is posted for public comment. Specification 11 is introduced, but contains no language concerning contractual obligations: (i) to prohibit Registered Name Holders from engaging in abuse or illegal activity, and (ii) to impose consequences for such abuse or illegal activity.²

April 11, 2013 – The GAC issues its Beijing Communique³, which included the following relevant Safeguard Advice for New gTLDs:

Annex 1, Section 5:

Making and Handling Complaints – Registry operators will ensure that there is a mechanism for making complaints to the registry operator that the WHOIS information is inaccurate or that the domain name registration is being used to facilitate or promote malware, operation of botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law.

Annex 1, Section 6:

Consequences – Consistent with applicable law and any related procedures, registry operators shall ensure that there are real and immediate consequences for the demonstrated provision of false WHOIS information and violations of the requirement that the domain name should not be used in breach of applicable law; these consequences should include suspension of the domain name.

April 23, 2013: ICANN publishes a public comment on the GAC advice.⁴

¹ <https://www.icann.org/resources/board-material/resolutions-2012-04-10-en>

² <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>

³ <https://gac.icann.org/contentMigrated/icann46-beijing-communique>

⁴ <https://www.icann.org/public-comments/gac-safeguard-advice-2013-04-23-en>

April 29, 2013: Despite knowing that a public comment on the GAC advice was pending, ICANN published the "Final" RA for public comment.⁵ We note that Spec 11 (3)(a) is totally absent from this "Final" RA.

July 2, 2013: NGPC adopts the GAC Safeguard Advice.⁶ Specifically, please also note the scorecard (Annex 2 of Resolutions 2013.0.02NG09-207.07.02.NG10).⁷ Pages 24 and 25 address the Safeguard Advice, which is substantially equivalent to the advice noted by the GAC in Annex 1, Sections 5 and 6 in the Beijing Communique.

July 3, 2013: Despite substantive changes to Specification 11 of the Registry Agreement, the ICANN Board adopted the Base Registry Agreement, without further public comment.⁸

The timeline is particularly interesting when we consider the following elements:

1. The final form of Specification 11 is almost word for word identical to the GAC advice, which had the intent of ensuring that ICANN incorporated safeguards into the RA, which should be "subject to contractual oversight."
2. ICANN's NGPC hastily adopted this language without substantive community input on the proposed language.
3. Despite the origin of the language and the intent of the GAC, ICANN Org continues to maintain that the language, as drafted, provides them with limited ability to enforce the GAC Advice ICANN received.

Ultimately, the language from Specification 11(3)(a) of the RA wasn't the result of any policy development process. Instead it was crafted and adopted by the Board in response to GAC Advice. In adopting the language and adding it to the RA, the Board indicated that it was within ICANN's remit to take on responsibility and oversight with respect to abuse, including the illegal and abusive activities set forth in Specification 11(3)(a) of the RA.

Therefore, it is perplexing that the Board now seems to be taking such a narrow interpretation of the language and backing away from any substantive enforcement responsibility for the actions that the language (including the language from Section 3.18 of the RAA) obligates registrars to undertake. Instead the Board now seems to be of the view that ICANN's sole responsibility is ensuring that the relevant language is in the various agreements (RRA and agreement with RNHs) and that with respect to the "investigate and take appropriate action" provision of Section 3.18 of the RAA, it is in the discretion of the registrar to determine what "appropriate action" means.

⁵ <https://www.icann.org/public-comments/base-agreement-2013-04-29-en>

⁶ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-07-02-en#1.c>

⁷ <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-item-1d-02jul13-en.pdf>

⁸ <https://www.icann.org/news/announcement-2013-07-03-en>

With these important historical details in mind, we have the following questions that came up in the chat during the ICANN67 Joint Session of the Board and the CSG:

1. If registry operators are not imposing meaningful consequences on registrars for failing to “provide (consistent with applicable law and any related procedures) consequences” for prohibited activities as set forth Specification 11(3)(a) of RA, and the Board takes the position that the Registry-Registrar Agreement (“RRA”) is “a voluntary agreement between registry operators and registrars and its terms are not binding on ICANN org (who is not a party to the RRA)” then doesn’t that render the terms of Specification 11(3)(a) essentially aspirational and without consequence?
2. Specifically, is it the Board and ICANN org’s position that the scope of ICANN org’s enforcement powers with respect to Specification 11(3)(a) is restricted solely to ensuring that the registry operator includes in its RRA with registrars the language described in Specification 11(3)(a)?
3. In its February 12, 2020 letter to the BC (“Letter”), the Board stated that “ICANN org expects registry operators to enforce their Registry-Registrar Agreements (RRAs) with registrars and registrars to in turn enforce their registration agreements with RNHs.” What steps does the Board think ICANN org should take to ensure that these expectations are met?
4. The Board noted in its Letter that “the RAA does not define with any specificity what ‘reasonable and prompt steps to investigate and respond appropriately’ means.” Does this suggest that the Board and ICANN org take the position these terms are essentially without meaning and therefore unenforceable by ICANN?
5. The Board also noted in its Letter that “the RAA does not prescribe the specific consequences that registrars must impose on domain names that are the subject of abuse reports. ICANN org has no contractual authority to instruct registrars to delete or suspend domain names.” However, given that ICANN imposes on registry operators the obligation to include in their RRAs a provision that requires registrars to include in their agreements with Registered Name Holders a provision that sets forth suspension of a domain name as a consequence for engaging in prohibited activities, why does the Board and ICANN org not consider domain suspension as a substantive part and enforceable consequence of the “respond appropriately” obligation in Section 3.18 of the RAA?
6. On what basis has the Board determined that it is beyond ICANN org’s remit to enforce application of and consequential implementation of the substantive requirements set forth in Specification 11(3)(a) of the RA and Section 3.18 of the RAA as opposed to merely ensuring that the applicable language is inserted into the contracts?
7. During our discussion, the concept of a gap was raised by the Board between the assumptions and understandings of the CSG as to what the contractual provisions mean and how they can be enforced to address abuse in a substantive and meaningful manner versus how ICANN org and

Compliance interpret the provisions and their understanding of the extent of the terms' enforceability as written and the extent of ICANN's remit to enforce the terms. Does the Board have further thoughts about how this gap can be best addressed?

8. Would the Board consider directing ICANN org to prepare an Advisory about RA Specification 11(3)(a) and RAA Section 3.18 such as it did for RA Specification 11(3)(b)? See: <https://www.icann.org/resources/pages/advisory-registry-agreement-spec-11-3b-2017-06-08-en>
9. If the Board and ICANN org believe that current contractual language and/or policies limit the ability to address domain name abuse, then what do the Board and ICANN org think is needed for ICANN org to take on a more proactive and substantive role in addressing domain name abuse, particularly in light of its Mission to facilitate, *inter alia*, the security and stability of the DNS?
10. There was some guidance given by the Board during the discussion that if gaps exist, then they may need to be addressed by policies (and thus presumably undertaken by a PDP). Has the Board considered that if the gaps are contributing to alarming increases in abuse, then a years-long PDP may not be sufficiently timely? We note that the Board and ICANN org have stepped in to address other gaps without, or as a prelude to, a full-scale PDP when they believe it has been necessary to adapt to the Internet ecosystem, such as in the context of the Temporary Specification on gTLD Registration Data.
11. During our meeting, there was some limited discussion about whether the gaps could potentially and/or partially be addressed by revising the language of the RA and the RAA. Will the Board seek to have ICANN org solicit priorities from the community about revising contract provisions to better address domain name abuse?
12. Would the Board consider directing ICANN org to perform regular audits on compliance with respect to Specification 11(3)(a) of the RA and Section 3.18 of the RAA? If not, what measures will the Board take to ensure that it provides contractual oversight of the safeguards requested by the GAC?

DOMAIN NAME ABUSE AND VOLUNTARY FRAMEWORKS

1. The Board encouraged the BC "to enter into discussions with the Registrar Stakeholder Group and/or individual registrars to define the problem set and develop best practices." Reference was also made during the CSG Board joint meeting to the voluntary Framework to Address Abuse. What does the Board suggest with respect to those contracted parties who have not signed up to such voluntary frameworks and who do not adhere to best practices or otherwise participate in the Registrar Stakeholder Group?
2. With respect to the voluntary frameworks, is consideration being given as to how ICANN org can monitor and report on the level of substantive compliance with such frameworks or best

practices, or the impact of such frameworks on actually addressing domain name abuse?

3. Given the Board's acknowledgement that "DNS abuse is a significant and growing problem," are voluntary frameworks and best practices an adequate means of addressing the growing problem? Or should other methods, such as revisions to the relevant contracts and changes to ICANN org's compliance approach, be considered?

PRIVACY PROXY SERVICES ACCREDITATION ISSUES ("PPSAI") CONSENSUS POLICY

1. Given that the EPDP Phase 2 work has completed with respect to its deliberation on privacy/proxy related issues and that the EPDP team appears to be recommending the restarting of the PPSAI IRT, would the Board consider directing ICANN org to re-start the PPSAI IRT with the goal of proceeding to implementation of the privacy/proxy consensus policy adopted unanimously by the Board four years ago?
2. The CSG thinks that, at a minimum, the members of the PPSAI IRT should be reconvened to start working again and, in particular, to consider the various issues that are still open, including but not limited to any raised by the work of the EPDP, and to develop a work plan for completing the remaining implementation work. Would the Board consider directing ICANN org to permit and facilitate the meeting of the members of the PPSAI IRT so that such discussions can begin?