Report of Public Comments

IAG Initial Report and Proposed Revisions to the ICANN Procedure for WHOIS Conflicts with Privacy Laws	
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Staff Contact:	Jamie Hedlund	**Email:**	jamie.hedlund@icann.org

Section I: General Overview and Next Steps

Section II: Contributors

At the time this report was prepared, a total of 21 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:

Name	Submitted by	Initials
Electronic Frontier Foundation	Jeremy Malcolm	EFF
International Trademark Association	Gabriel Torres	INTA
Internet Infrastructure Coalition (i2Coalition)	Christian Dawson	I2C
Intellectual Property Constituency	Greg Shatan	IPC
Registries Stakeholder Group	Stéphane Van Gelder	RySG
Centre for Communication Governance at National Law University, Delhi	Aarti Bhavana and Pushan Dwivedi	CCG-NLUD
Business Constituency	Steve DelBianco	BC
Electronic Privacy Information Center	John Tran	EPIC
At-Large Advisory Committee	Holly Raiche and Carlton Samuels	ALAC

Individuals:

Name	Affiliation (if provided)	Initials
Ron Baione-Doda		RBD

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).

Based on the topics covered in the Initial Report on the Implementation Advisory Group Review of Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws, several common themes could be discerned from among the comments received, and each of these themes is explained in more depth below.

1. Proposed Alternative Trigger.
2. Feasibility of Obtaining Written Support from a Government Agency.
3. Written Legal Opinion Trigger.
4. ICANN's Role in Investigating a Contracted Party Request Trigger.
5. Additional Comments.

1. Proposed Alternative Trigger

A number of comments were received with regard to the proposed alternative trigger, which allows a contracted party to seek a written statement from the government agency charged with enforcing its data privacy laws indicating that a particular WHOIS obligation conflicts with national law and then submit that statement to ICANN. While most comments generally support the alternative trigger, some of the feedback received indicates concern over requiring a written statement from a governmental agency, as these statements may not be easily attained, especially by smaller registries and registrars who may not have the resources to obtain such advice.

> "IPC supports the Proposed Alternative Trigger set forth in the Initial Report, which received majority support. The Alternative Trigger would relax the current trigger in the Procedure, but without straying from the required "credible demonstration" standard, by allowing the contacted party to seek a written statement from the relevant government agency charged with enforcing local privacy laws, without having to wait for a proceeding or action to be instituted. In that way, the source of information regarding the potential conflict would come from the most authoritative source, while reducing the burden on the contracted party." (IPC)
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> "The Alternative Trigger would also assist in identifying the specific provision that was potentially in conflict with existing law, and the fact that the opinion was coming from the government entity responsible for enforcing the relevant local laws in question would satisfy the requirement that the contracted party demonstrate that it is 'legally prevented' from complying with its obligations." (IPC)
>
> "While IPC still supports the Procedure in its current form, it regards the Alternative Trigger as a reasonable accommodation of concerns that requiring a contracting party to wait until it is subjected to an action, proceeding or investigation is too limiting. (On the other hand, since no contracting party has ever had to invoke the proceeding, the question remains whether such concerns are wholly theoretical." (IPC)
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> "The RySG agrees that a single trigger is not sufficient. Alternative triggers should be included in the Procedure. We commend the IAG on its inclusion of an Alternative Trigger, however we suggest this does not go far enough. The suggested Alternative Trigger may prove insufficient

in situations where national law forces the contracted party to remedy after a single violation (examples include a ban on the business operations or monetary fine) without being given an opportunity to first examine possible cures." (RySG)

"The RySG would like to see a second Alternative Trigger allow Contracted Parties to submit to ICANN the English translation of the national law, the text of national law in the local language, and a high level description of the perceived conflict between the national law and the procedures and the related terms of the Registry Agreement (RA) or Registrar Accreditation Agreement (RAA)." (RySG)

"While Proposed Alternative Trigger is an improvement on the existing procedure, it requires individual requests for exemptions on the basis of a written statement from a governmental agency. These statements may not be easy to acquire, as governmental agencies are not always easily accessible, making it difficult for the contracted party. Further, requiring individual requests for exemptions is not a logistically sound option. If an exemption has been granted for a particular conflict with local privacy laws, it should automatically apply to all contracting parties that fall within the jurisdiction of the local law. We also support the proposal that regional laws on privacy must also be recognised, not just national laws, making the text 'applicable *local* law' appropriate." (CCG-NLUD)

"The 'alternative trigger' proposal wrongfully shifts the burden of complying with privacy laws to registrars and government agencies. According to ICANN, the original goal of the PDP was "to facilitate reconciliation of any conflicts between local/national mandatory privacy laws or regulations and applicable provisions of the ICANN contract."[8] However, ICANN's current proposed amendments would not further that goal. Under the IAG's "alternative trigger" proposal, a registrar would "seek a written statement from the government agency charged with enforcing its data privacy laws indicating that a particular WHOIS obligation conflicts with national law and then submit that statement to ICANN."[9] This proposal fails to address privacy law conflicts for several reasons." (EPIC)

"First, the proposal wrongfully shifts the burden of assessing compliance with privacy laws to individual registrars. Many registrars do not have the capacity or resources to seek consultations from data protection agencies. Moreover, the proposal would improperly relieve ICANN of its duty to ensure that the organization's contracts comply with privacy laws. ICANN stores and processes the personal information of registrants, and therefore has a duty to safeguard that information. Additionally, ICANN exercises unique power and influence as an Internet governance body. Any procedure that relieves ICANN of the duty to ensure that its contracts are consistent with privacy laws is fundamentally flawed." (EPIC)

"The ISG report proposes an "Alternative Trigger' (Appendix 1) or a Written Legal Opinion (Dual Trigger) (Appendix 2). The Alternative Trigger process is far simpler and preferable. Indeed, the language suggests that the process might be used to reconcile ICANN WHOIS requirements with relevant privacy law more generally, and not on just on a case by case basis." (ALAC)

"There are, however, difficulties with the Alternative Trigger proposal, as follows. It relies on advice from law firms (whose advice would not bind the relevant privacy agency), or on agencies themselves (who are most often reluctant to provide such advice). The onus is on individual registries/registrars to invoke the process. There are many smaller

registries/registrars that would not have the resources to fund such advice, particularly if it is needed on a case by case basis. Because laws/regulations on the handling of personal information vary from area to area (whether national or regional), different registries/registrars will be bound by different sets of requirements – in order to comply with the same contractual terms." (ALAC)

2. Comments relating to the feasibility of obtaining written support from a government agency.

Even though one comment expresses that it is feasible to request input from a government agency to indicate that a particular WHOIS obligation conflicts with national law, most comments express that it is not reasonable for a contracted party to obtain this information given that governmental agencies are not always easily accessible and may be reluctant to provide a written statement.

"A government agency charged with interpreting and enforcing local privacy laws would be better placed to provide a view on whether there would be a conflict between a contracted party's WHOIS obligations and local laws, such that the contracted party would be legally prevented from complying." (IPC)

"It should be feasible for a contracted party to request input from a government agency charged with enforcement of local privacy laws. For example, the UK data protection authority offers an audit facility to verify whether or not a company or organizations data protection procedures are compliant with national law. Another example is that of the Spanish Data Protection Authority, which issued an advisory opinion in 2009 with regard to a change in the registry agreement for .cat regarding WHOIS. So the charge by some that DPAs and other enforcement authorities do not provide such input is not borne out in reality. In the event that a contracted party is unable or unwilling to provide an authoritative opinion on the existence of a conflict between local privacy laws and a contracted party's WHOIS obligations, this would cast doubt on the existence of any conflict that would result in the legal prevention of a contracted parties' compliance." (IPC)

"It might not be possible to obtain the opinion of the relevant governmental agency outside of enforcement of the privacy law. Such enforcement may include penalties such as a ban on operations, or financial punishment. Similarly, the opinion of the relevant agencies might be formed only when the proposed law becomes effective and upon publication, which gives no opportunity to comply with the law in advance without breaching an ICANN contract." (RySG)

"It is not feasible for a contracted party to obtain an opinion from the relevant governmental agency. First, government agencies are not always easily approachable. Second, they may be unwilling to provide a written statement explaining why the contractual obligations conflict with the local privacy laws. There should be no need to involve governmental enforcement agencies merely to state the applicable local law." (CCG-NLUD)

"The BC has some concerns regarding the practicality of getting the necessary documentation from the relevant government authority. The BC would suggest that if a contracted party is unable to obtain the appropriate documentation after reasonable good faith efforts, it be allowed to file for an exception and have ICANN make an additional written request from the government for their view. Given the rarity of the need for exceptions (none have been sought to date) and the improvement of this approach over the current approach of requiring

governments to initiate all requests, this proposal, as amended, is a reasonable evolution of the current policy." (BC)

"It is not reasonable to expect government agencies to provide advisory opinions on private contracts. As a practical matter, data protection authorities lack the resources and legal authority to provide such opinions. Unless an agency has reason to investigate a particular registrar, the agency has no incentive to insert itself into the contracting process. Likewise, a registrar that is not under investigation has no incentive to bring itself to the attention of a data protection authority. In practice the "alternative trigger" would be no different than the current trigger. In addition, many countries do not have data protection authorities. In those countries—the United States, for example—the addition of an "alternative trigger" would not provide any additional mechanism to identify a conflict." (EPIC)

"ICANN cannot supersede local jurisdictions, which have differing laws regarding when a law enforcement request must remain confidential. It is not always feasible for a provider to credibly demonstrate to ICANN that it is legally prevented by local/national privacy laws or regulations from fully complying with applicable provisions of its ICANN contract regarding the collection, display, and distribution of personally identifiable data via WHOIS. Thus, a provider must be able to operate within the allowances of its local jurisdiction regarding disclosure to customers. ICANN must recognize that different global jurisdictions have differing laws that address the confidentiality of law enforcement requests." (I2C)

3. Comments relating to the written legal opinion trigger.

A set of comments address the addition of a trigger consisting solely of a nationally recognized law firm opinion. The firm's opinion must state that national laws or statutes in the country of incorporation of a contracted party will affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS. While one comment expresses that the opinion of a nationally recognized law firm may in itself be a trigger, two comments state that a law firm's opinion is not credible enough to constitute the sole trigger as a firm's advice might be biased towards the interests of its clients.

"It should not. The opinion of a nationally recognized law firm is clearly not sufficient by itself to credibly demonstrate that a party is legally prevented from complying with its WHOIS obligations. The interpretation of specific laws by a law firm, whether nationally recognized or not, does not sufficiently demonstrate that the contracted party is "legally prevented" by national laws from complying with its WHOIS obligations since such opinions may be subjective in nature and reflect an interpretation of the law in a light most favorable to the law firm's client that is requesting and paying for it. Because of the nature of legal advocacy for the interests of the client, there is an inherent bias in such opinions that would skew the analysis towards construing the law in a way most likely to lead to the grant of a waiver on behalf of a client. Therefore, such opinions by definition are inherently biased and therefore fall short of a credible demonstration of neutral legal analysis. Even if a law firm is instructed by a neutral third party, a firm's advice might well be colored by the interests of its other clients. We also note that the meaning of "nationally recognized" is not clear. To the extent that this refers to a national registration or license requirement, the consequent "recognition" is highly unlikely to operate as a statement of the firm's competence to opine on the issue in

question or its objectivity." (IPC)

"IPC notes that this lower threshold, which is contained in Section 2 of the Data Retention Specification of the 2013 RAA, has resulted in inconsistent application, a lack of clarity as to the legal basis of the request, and, as a result, a lack of transparency regarding the standard for the granting of such waivers." (IPC)

"Even independent legal analysis would not provide the required level of certainty to demonstrate the required legal prevention. The underlying policy requires not just the possibility of a conflict, but a credible demonstration of legal prevention. For that, IPC takes the view that more should be required in the form of a clear position on the part of an entity charged with enforcing relevant national laws that the contracted party would be in violation of such laws as a result of complying with its WHOIS obligations." (IPC)

"IPC recalls and agrees with the earlier comments of the European Commission to the extent that they emphasize that "the decision of granting of an exemption to implementation of the contractual requirements concerning the collection, display and distribution of WHOIS data should remain exclusively based on the most authoritative sources of interpretation of national legal frameworks." (IPC)

"The underlying policy refers specifically to potential conflicts between "national/local" privacy laws and WHOIS obligations. IPC notes the Minority View calling for recognition of potential conflicts on a regional basis. Once again, this is incompatible with the underlying policy, not only because that policy specifically refers to national/local laws, but also because in reality, such laws are enforced on a national or local basis, and therefore to be credible a demonstration would require a clear nexus to the local/national law, and not interpretation by entities that lack enforcement authority." (IPC)

"An opinion provided by a nationally recognized law firm may in itself be a trigger. Please note our proposed edits to section 1.3.2 to replace *"nationally recognized law firm"* with a law firm licensed in the jurisdiction in question." (RySG)

"No. A law firm opinion is not credible enough to constitute the sole trigger. Conflicting opinions between different law firms, in addition to the volume of law firms in a country, makes this an ill-suited measure." (CCG-NLUD)

While some state that the opinion of a nationally recognized law firm is not sufficient, two comments express that a nationally recognized law firm opinion can credibly demonstrate that a party is legally prevented by local law from complying with its WHOIS obligations; however, additional clarity is requested on what exactly constitutes a "nationally recognized law firm."

"No. An opinion from a nationally recognized law firm could not amount to a credible demonstration that a party is legally prevented from complying with its WHOIS obligations, for the reasons outlined above." (IPC)

"Yes we think a law firm opinion can demonstrate conflict with WHOIS obligations. However, we know of no objective or standard method which allows a law firm's status as "nationally recognized" to be ascertained. Consequently, rather than talking about "nationally recognized law firm", we suggest the phrase *"a law firm licensed to practice in the country whose national*

laws or statutes affect the compliance of the Contracted Party triggering the Procedure." (RySG)

"Yes, a law firm opinion can credibly demonstrate that a party is prevented from complying with the contractual obligations because of a conflict with the local law. However, this would be more appropriate as one of many trigger options available to the contracted parties. We also reiterate the need for clarifying the meaning of nationally recognised law firm." (CCG-NLUD)

"An additional trigger has been proposed by some, which requires the contracting parties to provide written legal opinion from a nationally recognised law firm stating that there exists a conflict between the contractual agreement and existing national laws.[9] We support this option as it provides an additional avenue for triggering the conflicts process. However, some clarity is needed on what exactly constitutes a 'nationally recognised law firm': there are thousands of law firms in some countries. In this case, would a legal opinion from any one of them trigger the conflict procedure? Would this include opinions from practicing independent counsels, or only firms? We reiterate our concern about requiring individual requests for exemptions and recommend that if an exemption has been granted for a particular conflict with local privacy laws, it should automatically apply to all contracting parties that fall within the jurisdiction of the local law. We also support the proposal that regional laws on privacy must also be recognised, not just national laws, making the text 'applicable *local* law'[10] appropriate." (CCG-NLUD)

In regard to whether the public comment period should be incorporated in the procedure, all the comments received express that while the opportunity for public comment remains an essential part of the process, subjecting a law firm opinion to public comment (including from the relevant GAC member, if any) might not be the best way to enhance credibility.

"Subjecting such an opinion to public comment would not remedy this deficiency. While additional input from the public and/or the relevant GAC member might be informative, it would simply compound one opinion with additional opinions, from entities and parties which are even less likely to be in a position to determine whether a bar to compliance in fact exists." (IPC)

"While IPC takes the view that public comment would not adequately or knowledgeably address the adequacy or insufficiencies of a law firm opinion, the opportunity for public comment remains an essential part of the process, after the Procedure has been triggered. Given the interests that would be impacted by any waiver, it is essential to provide a full opportunity for public comment in any case in which ICANN proposes to release a registrar or registry from any aspect of its WHOIS obligations. ICANN should also commit to publishing an objective analysis of such comments, and a thorough explanation of the reasons why all such comments are either accepted or rejected in reaching ICANN's final decision with respect to a WHOIS conflicts proceeding." (IPC)

"The existing Procedure comes closest to meeting the "credible demonstration" standard required by the underlying policy by requiring specific action in the form of an investigation, litigation, regulatory proceeding or other government or civil action. An opinion from a law

firm, whether supplemented by input from the public or relevant GAC member would impose a significantly looser standard, one which does not come close to complying with the underlying policy." (IPC)

"Public comments might not be the correct way to establish the fact of the breach of the national law. The ability to do so in some jurisdictions lies outside of the scope of licensed activities for law firms and belongs to the field of activities of the relevant Telecom and/or Privacy Regulator, Law Enforcement Agencies or Courts." (RySG)

4. Comments relating to ICANN's role in investigating a contracted party request trigger.

Five comments discuss whether it is appropriate to trust ICANN to investigate whether a request from a contracted party satisfies the grounds to trigger the procedure. While some comments express support for the inclusion of the contracted party request trigger and ICANN's role in investigating the request, others state that the list of supporting material that the requesting party should provide in making its request is vague and undefined. Therefore, an investigation by ICANN would not meet the required standard for demonstrating whether a contracted party is being prevented from complying with its WHOIS obligations.

"An investigation by ICANN would not be sufficient to establish a credible demonstration of a contracted party being legally prevented from complying with its WHOIS obligations, and would therefore not meet the requirements of the underlying policy." (IPC)

"A framework that appoints ICANN as an arbiter of whether a collection of information submitted by a registrar/registry or group of registrars/registries satisfies the grounds for triggering the procedure would amount to an open-ended and imprecise means of defining what an appropriate standard might be. In order to adequately balance the interests at stake, and ensure that safeguards are in place to satisfy the underlying policy, it is important that the elements required to trigger the Procedure are clearly described therein, and that ICANN is not required to make a judgment call based on a collection of evidence that, taken together, may or may not meet the required standard." (IPC)

"ICANN has an important role to play, however, once the Procedure has been triggered, by evaluating the information submitted by the contracted party, which would include (as per the current Procedure) obtaining input from the relevant GAC representative (pursuant to advice from the GAC), and engaging the Office of ICANN's General Counsel, to evaluate the dissonance between requirements of local laws and contractual provisions, with a view recommending an appropriate resolution." (IPC)

"With regard to the proposed "Contracted Party Request", which places ICANN in the position of determining whether the contracted party had met the required standard for triggering the Procedure based on a collection of evidence and outside input, IPC refers to its comments in response to question 4. IPC notes that the GNSO Council and ICANN Board specifically defined a policy and outlined the parameters of a procedure which would not place ICANN in the position of determining whether a conflict exists. Rather, it clearly contemplates ICANN's role in the process as beginning only once the Procedure has been triggered. In particular, the Consensus Policy Recommendation identifies the first goal of the procedure as "Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture." It does not

contemplate ICANN playing a substantive role in in the process of making a credible demonstration that a conflict exists. The requirements set forth for registrars and registries have been set purposefully, and to adjust the framework to enable ICANN to play an adjudicating role prior to the Procedure being triggered would be facially inconsistent with the underlying policy. IPC notes that the proposed "Contracted Party Request" includes a non-mandatory requirement for the registrar or registry to submit written support/approval from a competent data protection agency with enforcement authority. The non-mandatory nature of this requirement is the most significant difference between this proposal and the Alternative Trigger, which is centered on the input from a government agency with enforcement authority. If this requirement were made mandatory, it is submitted that this proposal would overlap with the Alternative Trigger, and therefore come closer to complying with the underlying policy. However, the Alternative Trigger is a clearer means of reaching the same destination." (IPC)

"The affected Contracted Party should be able to trigger the Procedure if it can provide ICANN with detailed information on the nature of breach and the applicable laws. Breach of a national law, or the demonstrable threat of such a breach submitted by a Contracted Party, should be enough to trigger the Procedure. ICANN should not be in a position to refuse to investigate a request for relief." (RySG)

"No, it is not appropriate to trust ICANN to determine if a request for relief fulfills the ground to trigger the conflict procedure. A private organisation should not be tasked with the obligation to protect civil liberties, including privacy and data protection, through establishment of relevant criteria and procedures." (CCG-NLUD)

"The Business Constituency supports inclusion of the Contracted Party Request Trigger as an alternative to having governments alone drive the conflict resolution process. We support the list of supporting material the requesting party should provide in making its request. Such material will ensure a continued high threshold and also provide a strong factual basis for any exceptions." (BC)

"We also support a transparent and public process for the consideration of the request, as outlined in the proposal." (BC)

"The BC generally supports ICANN's role in investigating and determining the appropriateness of an exemption. We support the IAGs proposals in relation to the Contracted Party Trigger for the opportunity for groups to provide public comment and additional expert input." (BC)

"As is the case in the current policy, exceptions should be narrowly applied and granted in a way that preserves as much underlying contractual language as possible within the scope of the governing legal framework. Exemptions and modifications should be geographically specific, and should not be extended to registrants and registrations not covered by the conflicting national law." (BC)

"As the Business Constituency has stated in previous filings, the ICANN community should serve as a check against abuse of the conflict resolution process. The BC supports allowing constituency groups to provide comment and input in the exemption/modification process. Given the low volume of conflict-resolution requests, the additional time needed to engage in the public comment process should not impede a fast resolution. ICANN also should collect

and analyze data on the effectiveness of the new Procedure, and publish information annually to support community engagement." (BC)

"We also support the proposed Contracted Party Request Trigger with the following edits:

- The requirement to provide *"written support by all other registries and/or registrars potentially affected by the legal conflict or justification for why they are the only affected party"* should be described as recommended, and not mandatory. An affected party may not be able to identify and reach agreement with all relevant parties in a limited time frame.

- *"Written support or non-objection to the request from the relevant GAC member or relevant government agency if the jurisdiction does not have a GAC member"* should be modified to allow a representative of a relevant government agency notwithstanding whether that jurisdiction has a GAC representative. A particular GAC representative might not represent the relevant privacy agency and might not have powers to reflect the privacy agency's opinion/reading of the national law." (RySG)

5. Additional comments.

Additional feedback was received in response to what other trigger(s) would amount to a credible demonstration that a party is legally prevented from fully complying with applicable provisions of its ICANN contract regarding its WHOIS obligations. Three of the comments received indicate support for an alternative WHOIS policy cited in the Minority Views section of the Initial Report (Appendix 4), whereby ICANN should adopt, globally, international Best Practices in the matter of Privacy policy and Data Protection.

"We support Christopher Wilkinson's alternative WHOIS policy[3] to the extent that we agree that ICANN must adopt and universally apply international best practices for privacy and data protection, instead of attempting to assess and comply with different local or national laws in different jurisdictions. ICANN being a technical body responsible for the coordination of the domain name system, will be over-extended in terms of capacity and resources if it takes on the task of determining the circumstances in which a registrar or registry can comply with the local privacy laws. Further, such a task would fall outside its mandate. The most suitable set of norms for ICANN to apply would be those emerging from international legal institutions. In this context, we recommend that the contractual obligations in connection with the WHOIS policy should incorporate norms from the United Nations General Assembly Resolution 68/167 on Right to Privacy in the Digital Age,[4] and should be updated in view of any upcoming relevant reports by the UN Special Rapporteur on the Right to Privacy. Any additional detailed norms that may be necessary for clarity may be incorporated from the EU Data Protection Directive. It is our recommendation that these practices be adopted, and suitably modified, from the United Nations General Assembly Resolution 68/167, the EU Data Protection Directive, and the Guidelines issued by the Article 29 Data Protection Working Party of the European Union towards the implementation of 'Right to be Forgotten'[6] (contained in Article 12 of the EU Data Protection Directive). The guidelines by Article 29 Data Protection Working Party provide valuable guidance on instances where privacy and data protection norms should allow for disclosure of protected information for specific, limited exceptions. The 2013

Registrar Accreditation Agreement (RAA) has been criticised for being in violation of local privacy laws.[7] Given that the obligations set out in the RAA will affect all fresh contracts with registrars, as well as renewed contracts, we find it imperative to reconsider the functioning of the entire WHOIS Policy in its current form within the RAA." (CCG-NLUD)

"To minimise the likelihood of conflict with privacy laws, we have recommended raising the standard to the best global practices on privacy. We also recommend a periodic review and update of the WHOIS specifications in the RAAs to ensure that such conflict remains unlikely. This model will ensure that ICANN respects internationally recognised human rights equally and consistently around the world, and does not create frameworks for differential protection of human rights in different countries." (CCG-NLUD)

"The ALAC supports both of the proposals made by Christopher Wilkinson (Appendix 4) which address the issues raised. The first is – at the least – a 'block exemption' for all registries/registrars in the relevant jurisdiction. This would eliminate the 'case by case' approach to the issue and provide certainty for all registries/registrars (whether large or small) in that area. A better approach is his call for a 'best practice' policy on the collection, retention and revealing of WHOIS information. This would ensure that, regardless of the jurisdiction of the registrar/registries – and registrants – all would receive the same privacy protection." (ALAC)

"In short, the very notion of a policy under which ICANN can grant "permission" to a contracted party to comply with its own applicable local law evinces an almost comical degree of hubris on ICANN's part. That such a policy can only be invoked at the point where a contracted party is actually under investigation by its local data protection authorities for contravening the law takes the policy beyond comedy into farce." (EFF)

"Rather than requiring registries or registrars to comply with ICANN policies that infringe applicable local law, "ICANN should adopt, globally, international Best Practice in the matter of Privacy policy and Data Protection" that would obviate the need for any WHOIS Conflicts Procedure. We acknowledge that this is part of a broader discussion on the Next-Generation gTLD Registration Directory Services to Replace WHOIS, on which we have also provided comments. In the meantime, the WHOIS Conflicts Procedure can only be regarded as a stopgap measure to ensure that ICANN's contractual arrangements are suspended to the extent that these would otherwise lead a contracted party into infringing data protection law." (EFF)

"ICANN should revise the RAA consistent with widely adopted privacy laws and standards. ICANN's conflict procedure, focused on considering how privacy law might be consistent with the RAA contracts, is exactly backwards. ICANN should instead revise the RAA consistent with broadly adopted privacy laws and internationally recognized privacy standards." (EPIC)

"The 'Data Retention Specification' section of the RAA is incompatible with a recent ruling of the Court of Justice of the European Union (CJEU). In *Digital Rights Ireland*, the CJEU set out clear and strict criteria about data retention that apply in every jurisdiction in the European Union*."* (EPIC)

"As EPIC has previously urged, ICANN should look to the OECD Privacy Guidelines when revising the WHOIS privacy provisions in the RAA.[14] The OECD Privacy Guidelines offer

important international consensus on and guidelines for privacy protection. The OECD Privacy Guidelines establish eight principles for data protection that are widely used as the benchmark for assessing privacy policy and legislation.[15] They provide a well thought-out solution to challenging questions about international consensus on privacy and data protection that directly implicate WHOIS policies and practices. More importantly, the OECD Privacy Guidelines serve as a basis for a sensible WHOIS policy." (EPIC)

"Finally, we note that the recent decision of the Court of Justice of the European Union which invalidated the Safe Harbor arrangement could be directly applicable to the practices of ICANN concerning the collection and use of personal data. As the Court made clear in that judgment, the processing of data of Europeans must comply with the European Union Data Protection Directive, 95/46, and Articles 7, 8, and 47 of the Charter of Fundamental Rights. The Court's judgment also indicates that any one of the national data protection agencies in the European Union could enforce privacy and data protection rights." (EPIC)

A number of suggested improvements and alternatives relating to the WHOIS Conflicts Procedure were also received. One public comment states that potential conflicts with privacy law could be avoided if more attention is given to the initial data collection phase. Furthermore, another comment suggests that each contracted party should be entitled in good faith to self-assess its own understanding of applicable law and that ICANN should bear the burden of investigating a request if it believes a contracted party is in non-compliance with its contractual requirements.

"We believe this is an important goal to focus on and note that, perhaps, part of this goal should be to exert more effort in assisting registrars to avoid conflicts with privacy laws at the outset. This can be accomplished by helping ensure the proper steps are taken by registrars to obtain data by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject. In our view, if more effort is placed on this initial step, less burden or emphasis will be required for a backstop procedure to handle WHOIS conflicts with privacy laws. In sum, requiring registrars to allow for informed consent on the initial data collection process should obviate the need for a procedure at the backend to handle many of the conflicts problems ICANN is attempting to solve here. It shouldn't be the case that the community immediately jumps to the conclusion that a conflict with privacy law is unavoidable. More focus should be devoted to the initial data collection processes to avoid potential conflicts rather than how to handle the conflicts that could have reasonably been avoided at the outset." (INTA)

"To determine whether the locally applicable data protection law conflicts with the contracted party's obligations is not a particularly difficult question, nor one that needs to be answered directly by the government. Rather, each contracted party should be entitled to rely on its own understanding of applicable law in balancing its compliance with contractual and legal obligations – as it does in so many other areas of its business, such as ensuring compliance with local censorship, licensing, and consumer protection laws. This understanding may be informed by legal advice, but it ought not to be necessary for every contracted party operating from the same jurisdiction to obtain legal opinion that merely restates well-established law and practice. Rather, the onus should fall on ICANN, if it believes that a contracted party's failure to execute its contractual requirements is unconnected to its local legal obligations, to obtain a legal opinion on the matter that would justify it in taking enforcement action under its agreement with that party." (EFF)

"Thus the WHOIS Conflicts Procedure can be quite narrow: it should simply affirm that contracted parties may, in good faith, self-assess their own obligations under applicable local law, and forbear from executing contractual provisions that are in breach of those obligations. The document would then set out a procedure whereby ICANN could obtain a legal opinion as a precondition of taking any enforcement action against a contracted party alleged to be in non-compliance with its contractual requirements for reasons unconnected with local law." (EFF)

"Notwithstanding this clear directive, the Initial Report includes two Minority Views attacking the merits and validity of the underlying policy. IPC reiterates its view that the policy which underlies the WHOIS conflicts procedure is a sound and successful example of the bottom-up, multi-stakeholder process in action. It requires that the Procedure be narrowly limited to those circumstances where the contracted party is in an unequivocally clear position of not being able to legally comply with its contractual obligations. This is the standard endorsed by the GNSO Council and Board taking into account the strong and broad public interest in the accountability and transparency of the WHOIS framework. The focus of the IAG's work and eventual recommendation must remain targeted to finding potential improvements to the Procedure, in conformity with the underlying policy. The IAG is clearly not the appropriate venue for those seeking to undermine the merits of the existing policy, and we caution against the hijacking of the IAG's resources and agenda to further that cause when there are other routes for supporters of that position to follow, if they so choose. IPC commends the IAG for its efforts to find ways to improve the effectiveness of the procedure in line with the original policy recommendations." (IPC)

One public comment suggests that the current policy needs to be improved and clarified to address the privacy concerns that may arise related to the IANA transition and WHOIS compliance with requests for customer information.

"The fact that this policy hasn't been used once since 2005 could lead one to believe WHOIS is 100% compliant with all requests for customer information. Therefore, maybe this policy needs to be strengthened or clarified to ensure customer privacy with specific language relating to requests from authorities and requests from countries that lack any discernable democratic structure. Once the U.S. Government transfer occurs, customers may seek clarity on whether or not WHOIS changed its policy of compliance with requests for information from governments that don't have a stringent set of privacy laws. The internationalization and corporatization of the transition process may cause some people to confuse the privacy issue, and they may not purchase domains thinking that foreign governments will now have better legal authority to request WHOIS information they previously were prevented from seeing, because of the U.S. government's previous role in ownership and oversight of the system." (RBD)

One comment expresses concern over the proposed processes explaining that procedures assume ICANN has a role in determining whether a contracted party is complying with the local law and that the solution should not involve an investigation before the process is triggered.

"Unfortunately, the Task Force charged with implementing the policy adopted a 'solution' that is virtually unworkable and has never been used. Under the 'solution' the registrar/registry should notify ICANN within 30 days of situations (an inquiry, litigation or

threat of sanctions) when the registry/registrar can demonstrate that it cannot comply with WHOIS obligations due to local or national privacy laws. There are two fundamental reasons why the policy is unworkable. The first is the bizarre outcome that registrars and registries must seek ICANN permission to comply with their applicable local laws. The second obvious flaw is that it means registrars/registries must wait until there is an 'inquiry or investigation etc of some sort before the process can be triggered." (ALAC)

"This Implementation Working Group (IWG) was formed to 'consider the need for changes to how the procedure is invoked and used'. The difficulty with that approach is that it does not address the basic flaws in the processes proposed: it still assumes that ICANN has a role in determining registry/registrar compliance with applicable local law and it still believes that solution lies in legal events that 'trigger' a resolution process. It is also not clear why GAC advice is included in both proposed 'triggers.' The expertise of individual GAC members relates to ICANN's remit: domain names, IP addresses and protocols." (ALAC)

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.

1. Overview

A relatively small number of comments were filed in response to the Notice posted on 5 October 2015. Those that were submitted, while generally short, were consistent with the divided views of the Implementation Advisory Group members. Among the comments submitted, five were from civil society, two represented intellectual property rights holders, two represented business interests, and one was filed by the Registry Stakeholder Group. No comments were submitted from the registrar community although they were represented on the IAG.

As detailed below, there appears to be some level of consensus on one recommendation only. There are sharply diverging views on most of the other issues raised in the comments. The comments do not appear to support any significant changes to the current WHOIS Conflicts Procedure.

Consistent with the Initial Report, the comments focused primarily on whether and how to supplement the existing triggers for invoking the WHOIS Conflicts Procedure. Some comments related to matters beyond the IAG's scope and mission. The IAG's mandate is to review the Procedure applicable to the situation in which a registrar or registry can credibly demonstrate that it is legally prevented by local/national privacy laws or regulations from fully complying with applicable provisions of its ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service. As further explained below, these comments do not appear germane to the review and possible modifications of the existing Procedure. The remainder of the analysis will focus on the community input on the proposed alternative triggers.

2. Alternative Trigger

There appears to be general consensus support among the commenters for adding an alternative trigger to the Procedure. As noted above, the proposed alternative trigger would allow a contracted party to seek a written statement from the government agency charged with enforcing its data privacy laws indicating that a particular WHOIS obligation conflicts with national law and then submit that statement to ICANN. While most comments generally support the alternative trigger, some of the feedback received indicates concern over requiring a written statement from a governmental agency, as these statements may not be easily obtained, especially by smaller registries and registrars who may not have the resources to obtain such advice. These concerns appear to be largely speculative as there is little to no evidence of actual attempts to secure a written statement from a relevant government agency. The IAG may wish to consider recommending the adoption of the proposed alternative trigger and an assessment of the utility of this trigger at the next review of the Procedure.

3. Law firm Opinion

As noted above, a set of comments addressed the addition of a trigger consisting solely of a nationally recognized law firm opinion. The firm's opinion must state that national laws or statutes in the country of incorporation of a contracted party will affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS. Commenters were sharply divided on whether this trigger would meet the policy's requirement of a credible demonstration of legal prevention from complying with the WHOIS requirements. The IAG was similarly divided on this question. There does not appear to be adequate support for recommending the adoption of this trigger.

4. Contracted party's request for ICANN investigation

This proposed trigger was even less popular than the law firm opinion. Parties opposed it on various grounds as described above. It seems unlikely that the IAG would include this proposed trigger in its recommendations.

5. Adoption of an alternative WHOIS Policy

As noted above, three of the comments received indicate support for an alternative WHOIS policy cited in the Minority Views section of the Initial Report (Appendix 4), whereby ICANN should adopt, globally, international Best Practices in the matter of Privacy policy and Data Protection. These comments recommend actions that are outside the mission and scope of the IAG. The review of the instant WHOIS Conflicts Procedure is narrowly focused on possible revisions to the Procedure that would still be consistent with the underlying WHOIS Conflicts policy. As such, the comments on the broader WHOIS policies do not appear to be germane to this matter. They are perhaps better suited to the GNSO PDP on a Next-Generation Registration Directory Service in which the community is considering major revisions to the existing WHOIS Policy.