

31 October 2019

Mr. Cherine Chalaby
Chair, ICANN Board of Directors

Subject: ICANN Transfer Policy - Gaining Registrar Form of Authorization

Dear Cherine,

On behalf of the GNSO Council, I am writing to you regarding ICANN's Transfer Policy, which has been superseded in part by the Temporary Specification for gTLD Registration Data ("Temporary Specification") (see <https://www.icann.org/resources/pages/transfer-policy2016-06-01-en>) and the General Data Protection Regulation ("GDPR").

The Registrar Stakeholder Group ("RrSG") has identified a critical problem with the implementation of Section 1.1 of Appendix G to the Temporary Specification and requested that the GNSO Council ask the Board to refer the issue to the Transfer Policy review and instruct ICANN Org to defer compliance enforcement until this issue is settled.

By way of background, the purpose of ICANN's Transfer Policy is "*to promote and encourage robust competition in the domain name space, ...to provide a straightforward procedure for domain name holders to transfer their names from one ICANN-accredited registrar to another should they wish to do so*", (see <https://www.icann.org/resources/pages/registrars/transfers-en>).

Appendix G of the Temporary Specification provides:

1. Until such time when the RDAP service (or other secure methods for transferring data) is required by ICANN to be offered, if the Gaining Registrar is unable to gain access to then-current Registration Data for a domain name subject of a transfer, the related requirements in the Transfer Policy will be superseded by the below provisions:

1.1. The Gaining Registrar is not REQUIRED to obtain a Form of Authorization from the Transfer Contact.

1.2. The Registrant MUST independently re-enter Registration Data with the Gaining Registrar. In such instance, the Gaining Registrar is not REQUIRED to follow the Change of Registrant Process as provided in Section II.C. of the Transfer Policy.

According to the RrSG¹, the language above that requires a Gaining Registrar to send a Form of Authorization ("Gaining FOA") where the email address is available was added by ICANN staff, notwithstanding the CPH TechOps Group's specific proposal that the Gaining FOA should no longer be required as many registrars believe under the GDPR, the Gaining Registrar does not

¹ The Registrar Stakeholder Group has provided a Problem Statement to the Council detailing the significant implementation challenges and operational complications in the attached Appendix A.

have consent to process this information (i.e., send an email to an individual that is not its customer).

The RrSG also pointed out that, even where the registrant email field exists in the WHOIS output, the email does not go directly to the registrant due to the use of web forms or pseudonymized email addresses. If a registrar implemented such a system, there is no guarantee that the email will reach the registrant. In short, registrars are unable to build a reliable automated process to continue processing the large volume of transfers between registrars, which will, in turn, defeat the purpose of the Transfer Policy.

The RrSG observed that the vast majority of ICANN-accredited registrars are no longer sending the Gaining FOA post Temporary Specification, and there appears to be no evidence of an increase in unauthorized transfers since May 2018. Thus, not sending the Gaining FOA did not appear to be problematic until a recent change in ICANN Compliance's approach - instead of sending an inquiry to a registrar in response to a specific complaint, ICANN Compliance would ask registrars to confirm their "general practice":

"Confirmation whether as a general practice your registrar no longer sends the Gaining FOA for any inter-registrar transfer, and if so, when this practice began".

The GNSO Council is mindful that there was very little time for ICANN-accredited registrars to implement the Temporary Specification (adopted by the ICANN Board on 17 May 2018 and became effective a week after on 25 May 2018) and the EPDP Phase 1 was working under an extremely compressed timeline to deliver its Final Report. It also appears that no policy impact assessment or feasibility study was conducted on either the Temporary Specification or the EPDP Phase 1 Recommendations to date, which may explain why this issue has not surfaced earlier.

Thus, the GNSO Council respectfully requests the ICANN Board of Directors to (1) refer this matter to the impending Transfer Policy review (which could be in the form of a new PDP), and (2) instruct ICANN Org to defer any Gaining FOA compliance enforcement until the matter is settled in the Transfer Policy review.

Sincerely,

Keith Drazek
GNSO Chair

APPENDIX A – Problem Statement from the Registrar Stakeholder Group

The Gaining Registrar FOA issue continues to cause implementation concerns and compliance issues for many registrars (possibly a majority). The RrSG would like to see the issue addressed during the implementation of the Phase 1 EPDP Team Final Report as a matter of urgency.

Leading up to the announcement of the Temporary Specification, there was disagreement between CPH TechOps and ICANN Org as to whether the Gaining Registrar should be required to send the Gaining FOA to the registrant.

See:

[Letter from Tobias Sattler to Akram Atallah](#) dated 1 May 2018

[Letter from Akram Atallah to Tobias Sattler](#) dated 4 May 2018

[Letter from Tobias Sattler to Akram Atallah](#) dated 7 May 2018

The [Letter from Tobias Sattler to Akram Atallah](#) stated:

“Given the tight timeline and our shared interest in preserving the security and efficiency of transfers after 25 May 2018, the registrars engaged in the CPH TechOps subcommittee note our intention to move forward with implementation of the transfer process as described in our 1 May 2018 correspondence.”

Additional notes:

1. Appendix G of the Temporary Specification and Recommendation 24 of the EPDP Team Final Report states that [until RDAP is effective] if Gaining registrars are not able to “gain access to then-current Registration Data for a domain name subject of a transfer” then the Gaining FOA is not required.
2. The Temp Spec defines “Registration Data” as “data collected from a natural and legal person in connection with a domain name registration.”
3. Under the Temp Spec, the email address provided as registration data is almost never present in WHOIS. What is in WHOIS varies widely by registrar, and is usually obfuscated, redacted, replaced by a web form URL, an auto-responder email address (for a web form), or an otherwise unmonitored email address. This would result in a majority of Gaining registrar FOA emails failing because the required affirmative action to confirm the transfer would not occur. It is not possible to determine whether an email address is unavailable in a manner that is commercially practical (e.g., cost effective, accurate, and not leading to delays in transfer process).
4. As identified by TechOps white paper, and as occurs in other gTLD transfers when the email address is not present in WHOIS, the AuthInfo code is sufficient to confirm the intent of the registrant to transfer. The losing registrar FOA confirms this intent. The TechOps white paper has broad support of registrars and registries, and complies with

the Temp Spec and Final Report recommendations (because the email address in registration data is not available in WHOIS).

5. There is no evidence in IRTP Status Report of an increase in unauthorized transfers under the Temporary Specification, and registrars are not aware of any such increase.
6. Most registrars do not have email addresses present in port 43 WHOIS.

Based upon a recent research, most registrars do not display current registration data for the email field, and thus the Gaining FOA is not required.

To ensure that transfers do not fail due to Gaining FOA delivery failure (which require an affirmative action to effect the transfer), a registrar needs to determine in advance which registrars have valid emails that deliver to the contact before any changes to internal transfer processes can be made. This needs to be done via port 43 WHOIS (which can be automated). Registrars cannot use port 80 WHOIS for transfers because captchas that require human efforts prevent automation.

A recent review of the port 43 WHOIS data for the top ten registrars (based upon domains under management or DUM) to determine whether or not there is an email address present indicated, out of these registrars, only two had email addresses present (with a third that may have a honeypot address present).

For these ten registrars, only 2 will have Gaining FOAs delivered to the appropriate contacts. These ten registrars collectively represent approximately 119.9 million DUM (November 2018), out of approximately 195 million gTLD registrations (see <https://www.verisign.com/assets/domain-name-report-Q12019.pdf>). The vast majority of domain names do not have email addresses present in WHOIS data, and any requirement to send Gaining FOAs would be for a minority of domain names (and likely a small minority of domain names). It is impractical to insist on implementing a Gaining FOA in light of this data.

7. There are too many registrars to determine in advance which registrars have email addresses present in port 43 WHOIS.

The research and testing for item six above took about thirty minutes to perform. With the current 2,457 ICANN-accredited registrars, it would take approximately 1,228.6 hours to complete the initial analysis (which would need to be continually updated and monitored). This represents 153.56 business days or 7.6 business months. The effort needed to determine whether the email field is present represents a herculean task that will likely be incomplete, with false positives and negatives, and represents an incredible cost (in both time and money).

Registrars cannot justify, nor should ICANN expect, dedicating such significant manual efforts for compliance with a temporary policy requirement. Additionally, it is well known in ICANN (org and community) that even if the Gaining FOA is sent, it does little to prevent

unauthorized transfers (which almost always involves hijacking of registrar accounts or email accounts).

8. Sending the Gaining FOA will violate the California Consumer Privacy Act (CCPA) and other privacy laws.

The CCPA will be effective 1 January 2020, and registrars are undertaking efforts now to ensure compliance with this law.

The CCPA governs, among other things, “selling” of personal information (PI). It has been drafted to interpret “selling” as broadly as possible and does not require a monetary exchange. The CCPA will apply to the Gaining FOA. The workaround that would be necessary due to the Temporary Specification requires a Gaining registrar to create a special system whereby the losing registrar will provide WHOIS info directly to them. This is would be considered “selling” under the CCPA.

Thus, the CCPA would require all registrars who participate in this arrangement to:

- a. Provide a 12 month look back (as of Jan 1, 2020, looking back to Jan 1, 2019) listing everyone that they have “sold” info to under this method. This would require reporting on large numbers of domain names (which would likely be higher due to transfers that did not complete). Such efforts would be cost prohibitive to implement.
- b. Enable a “Do Not Sell” button that would block all ability to “sell” info, including the use of this method for FOA. This would further frustrate the Gaining FOA process.

The only way around this would be for each registrar to execute with every other registrar some sort of agreement/document where they jointly claim/attest they are not selling info to one another under this method. That itself would be impossible to accomplish without ICANN spearheading the effort. As bizarre as this requirement sounds, it is the accepted understanding of the CCPA by privacy experts and there is no change to the current CCPA language in sight. Also, other states are following suit with similar proposals (including Hawaii, Maryland and Massachusetts), which will likely present further barriers to sending Gaining FOAs.

ICANN needs to provide registrars with an explanation how the Gaining FOA will comply with the CCPA, or the efforts that ICANN will undertake to ensure the Gaining FOA will comply with the CCPA.

9. After the GDPR came into effect a large volume of inter-registrar transfers began to fail because the registrant email was unavailable, frustrating the primary purpose of the Transfer Policy (which allows registrants the right to freely transfer). Registrars investigated ways to get around this problem but found it was not possible to determine whether an email address is unavailable in a manner that is commercially practical.

10. Many registrars believe that registration data is never available from a legal perspective because under various privacy regulations, such as the GDPR, we do not have consent to process this information (i.e., send an email to an individual that is not our customer, such as an admin contact or when the account holder initiates a transfer on behalf of a 3rd party registrant that is not a customer).