RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-3
5 JUNE 2018

The Requestor, Astutium Limited, seeks reconsideration of ICANN organization's decision to issue a Notice of Termination (Termination Notice) of the Requestor's 2013 Registrar Accreditation Agreement (RAA) with ICANN organization.[1] Specifically, the Requestor alleges that, in deciding to issue the Termination Notice, ICANN organization: (i) relied on faulty data and misunderstandings; and (ii) failed to adhere to applicable policies and procedures. The Requestor also alleges that ICANN organization published defamatory statements on its website that impacts the Requestor's business reputation. The Requestor asks that ICANN organization "cancel" the termination.

I. Brief Summary.

The Requestor entered into the RAA with ICANN organization on 5 October 2014. On 17 December 2017, ICANN organization's Contractual Compliance Team (Contractual Compliance) received a complaint concerning claimed WHOIS inaccuracies regarding the domain name <tomzink.com> (Complaint), which is registered with the Requestor. Consistent with its approach and process,[2] Contractual Compliance validated the Complaint to ensure that it was within the scope of the RAA and consensus policies before forwarding the Complaint to the Requestor. Thereafter, Contractual Compliance engaged in a series of discussions with the

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[1] Request 18-3, § 2, at Pg. 2, *available at* https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-request-redacted-30mar18-en.pdf.
[2] *See* Contractual Compliance Approach and Process webpage, *available at* https://www.icann.org/resources/pages/approach-processes-2012-02-25-en.

Requestor through the Informal Resolution Process regarding the claimed WHOIS inaccuracies, but the Requestor did not resolve the issues raised in the Complaint.

Following unsuccessful informal resolution of the Complaint, on 27 February 2018, Contractual Compliance escalated the matter to the Formal Resolution Process[3] by sending the Requestor a Breach Notice resulting from the Requestor's failure to: (i) take reasonable steps to investigate and correct claimed WHOIS inaccuracies regarding the domain name <tomzink.com>; (ii) validate and verify WHOIS contact information; and (iii) maintain and make available to ICANN organization registration data and records relating to the Requestor's communications with the Registered Name Holder (RNH) of the domain name <tomzink.com>.[4]

The Requestor was to cure the deficiencies identified in the Breach Notice by 20 March 2018. The Requestor did not respond, despite several follow-up attempts by Contractual Compliance prior to the cure date.[5] Consistent with its Formal Resolution Process, Contractual Compliance then issued a Termination Notice on 21 March 2018 for failure to cure the issues raised in the Breach Notice.[6] The termination was scheduled to become effective 20 April 2018.

On 28 March 2018, the Requestor filed Reconsideration Request 18-3 (Request 18-3), seeking urgent reconsideration of ICANN organization's decision to issue the Termination Notice.[7] However, the Requestor failed to provide an explanation in Request 18-3 as to why the matter was urgent for consideration, as required under the Bylaws. As a result, ICANN organization afforded the Requestor the option of either supplementing its submission to explain

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[3] *See id.*
[4] Notice of Breach, at Pg. 1, *available at* https://www.icann.org/uploads/compliance_notice/attachment/1003/serad-to-golding-27feb18.pdf.
[5] Notice of Termination, at Pg. 5, *available at* https://www.icann.org/uploads/compliance_notice/attachment/1013/serad-to-golding-21mar18.pdf.
[6] *See generally*, Notice of Termination. *See also* Formal Resolution Process – General Guidelines, *available at* https://www.icann.org/en/system/files/files/formal-resolution-07mar17-en.pdf.
[7] *See* Attachment 2, at Pg. 1.

the urgency, or converting Request 18-3 into a reconsideration request under the normal reconsideration process.[8] The Requestor chose the latter option.[9]

Pursuant to the Bylaws, Request 18-3 was submitted to the Ombudsman, who issued his substantive evaluation on 5 May 2018.[10] The Ombudsman concluded that Request 18-3 did not warrant "a recommendation by the BAMC or the Board to take any of the actions as requested by Requestor."[11]

The BAMC has considered Request 18-3 and all relevant materials, including the Ombudsman's evaluation, and recommends that the Board deny Request 18-3 because: (i) ICANN organization complied with established policy(ies) when it issued the Termination Notice; (ii) ICANN organization did not rely on faulty data or misunderstandings when it issued the Termination Notice; and (iii) ICANN did not publish any defamatory statements concerning the Requestor on its website.

II.   Facts.

A.   The RAA.

On 5 October 2014, the Requestor and ICANN organization executed the RAA.[12] The RAA sets forth ICANN organization's and the Requestor's obligations regarding registrar accreditation.

Relevant to Request 18-3, the RAA requires the Requestor to "comply with the obligations specified in the Whois Accuracy Program Specification" (WAPS) to maintain and

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[8] *See id*., at Pg. 2.
[9] *Id*., at Pgs. 3-4.
[10] Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3, *available at* https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-evaluation-icann-ombudsman-request-04may18-en.pdf.
[11] *Id*., at Pg. 8.
[12] 2013 Registrar Accreditation Agreement, *available at* https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en.

confirm accurate contact information for its RNHs.[13] The Requestor is required to "take

reasonable steps to investigate" any inaccuracies about which it is notified concerning the

contact information associated with a Registered Name sponsored by the Requestor.[14] In those

circumstances, WAPS requires the Requestor to verify or re-verify any incorrect information.[15]

If, within 15 calendar days, the Requestor "does not receive an affirmative response from the

[RNH] providing the required verification, [the Requestor] shall either verify the applicable

contact information manually or suspend the registration."[16]

The Requestor also is required to maintain "all written communications constituting

registration applications, confirmations, modifications, or terminations and related

correspondence with Registered Name Holders," and must make such data available to ICANN

organization upon reasonable notice.[17]

Finally, Section 5.5.4 of the RAA provides that ICANN organization can terminate the

RAA before its expiration if the Requestor "fails to cure any breach of [the RAA] within twenty-

one (21) days after ICANN gives [the Requestor] notice of the breach."[18]

B.   The WHOIS Complaint and Contractual Compliance's Informal Resolution Process with the Requestor.[19]

On 17 December 2017, Contractual Compliance received the Complaint concerning

WHOIS inaccuracies regarding the domain name <tomzink.com>, which is registered with the

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[13] RAA, § 3.7.8.
[14] *Id.*
[15] RAA, WAPS §§ 1, 4.
[16] *Id.*, §§ 4, 5.
[17] RAA, §§ 3.4.2.2; 3.4.3.
[18] *Id.* § 5.5.4.
[19] While communications between the contracted party and Contractual Compliance are kept confidential during the Information Resolution Process (as Contractual Compliance states in response to Frequently Asked Question No. 32), here, because the Requestor put at issue its communications by filing the Request with a complete record, and because the Bylaws require the BAMC and Board to rely upon public information in making their recommendation and determination, respectively, the communications between Contractual Compliance and the Requestor in the ticket will be made public in this instance.

Requestor.[20] Consistent with its process,[21] Contractual Compliance reviewed the Complaint, and confirmed that the claims implicated the Requestor's obligations set forth in the RAA. Contractual Compliance then initiated the Informal Resolution Process by issuing the first compliance notice to the Requestor on 20 December 2018.[22] The Complaint in its entirety was attached to the first compliance notice.[23]

In the first compliance notice, Contractual Compliance requested that the Requestor provide the following information by 18 January 2018 to demonstrate compliance: (i) WHOIS inquiries the Requestor sent to the RNH and any responses; (ii) emails the Requestor sent to the RNH to verify the email addresses and any affirmative responses; (iii) confirmation of the actions taken by the Requestor in response to the WHOIS inaccuracies; and (iv) the Requestor's validation of the WHOIS data format if any of the data was updated during the course of the Requestor's investigation, or if the RNH changed.[24]

The Requestor responded on 5 January 2018 that the Complaint was "bogus," "incomplete," and "rubbish" and that "[n]o action [was] necessary."[25]

Contractual Compliance emailed the Requestor on 19 January 2018 that its response was incomplete, and that evidence of verification and validation of the Complaint was required.[26] Contractual Compliance explained that verification "is the process by which a registrar confirms or corrects the accuracy of Whois data by contacting and receiving an affirmative response from

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[20] Attachment 1, FVW-625-17043: WHOIS Inaccuracy complaint re: tomzink.com, at Pgs. 36-38.
[21] *See* Contractual Compliance Approach and Process webpage, *available at* https://www.icann.org/resources/pages/approach-processes-2012-02-25-en.
[22] Notice of Termination, at Pg. 4
[23] *Id*.; Attachment 1, at Pgs. 33-36.
[24] Attachment 1, at Pgs. 33-36
[25] *Id*. at Pgs. 30-31. *See also* Notice of Termination, at Pg. 4.
[26] Attachment 1, at Pgs. 28-30. *See also* Notice of Termination, at Pg. 4.

the [RNH]" and that validation "is the process by which a registrar ensures that the format of Whois data is consistent with standards."[27]

On 24 January 2018, the Requestor responded stating only that it had contacted the registrant "and had them update/correct/check the records"; however, the Requestor did not provide the validation or verification information requested by Contractual Compliance.[28] Contractual Compliance thereafter confirmed that the Requestor had updated the WHOIS information, but because the requested verification and validation information remained outstanding, Contractual Compliance again requested that it be provided.[29]

On 29 January 2018, the Requestor again refused to provide the requested information, claiming that Contractual Compliance failed to review the Complaint prior to commencing the contractual compliance process, and asked that Contractual Compliance escalate the issue to management.[30] On 31 January 2018, Contractual Compliance repeated its request that the Requestor provide evidence of validation and verification, to which the Requestor did not respond.[31]

On 8 February 2018, Contractual Compliance issued a second compliance notice to the Requestor, identifying the requirements for the Requestor to demonstrate compliance.[32]

On 10 February 2018, the Requestor responded to the second compliance notice. The Requestor stated that there was no requirement to demonstrate compliance; that it would not provide details of private communications with third parties; that it had already confirmed that

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[27] Attachment 1, at Pg. 28.
[28] *Id*., at Pgs. 27-28.
[29] *Id*., at Pgs. 25-27; Notice of Termination, at Pg. 4.
[30] Attachment 1, at Pg. 24.
[31] *Id*., at Pgs. 21-24; Notice of Termination, at Pg. 4.
[32] Attachment 1, at Pgs. 18-21; Notice of Termination, at Pg. 4.

the inaccuracies in the Complaint had been corrected; and that no validation was done or required.[33]

On 15 February 2018, Contractual Compliance contacted the Requestor using the primary contact phone number and left a voicemail with the details of the Requestor's noncompliance; Contractual Compliance also attempted to contact the Requestor at the primary contact mobile number, but the call would not connect.[34] The Requestor did not respond.[35]

On 16 February 2018, Contractual Compliance sent a third compliance notice to the Requestor, and advised that "[f]ailure to respond to this notice by 23 February 2018 will result in a notice of breach being issued."[36] The Requestor responded on 16 February 2018, and again on 17 February 2018, but Contractual Compliance determined that the communications were insufficient to demonstrate compliance because the Requestor did not provide Contractual Compliance with the requested information and records.[37] Specifically, the Requestor refused to provide evidence of WHOIS validation and verification pursuant to the WAPS requirements, as well as information regarding the Requestor's obligations concerning retention and inspection of RNH and Registration Data.[38]

On 23 February 2018, Contractual Compliance contacted the Requestor via the primary contact phone number and provided the Requestor with details regarding the Complaint. Contractual Compliance also tried unsuccessfully to contact the primary contact mobile number.[39] The Requestor never responded.[40] Consistent with its process, Contractual

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[33] Attachment 1, at Pg. 18; Notice of Termination, at Pg. 4.
[34] Attachment 1, at Pgs. 17-18; Notice of Termination, at Pg. 4.
[35] *See* Notice of Termination, at Pg. 4.
[36] *Id*.; Attachment 1, at Pgs. 14-17.
[37] Attachment 1, at Pgs. 9-10, 13-14.
[38] *Id*., at Pgs. 9-14.
[39] *Id*., at Pg. 9; Notice of Termination, at Pg. 5.
[40] *See* Notice of Termination, at Pg. 5.

Compliance then conducted a compliance check on 26 February 2018 to identify whether there were other areas for which the Requestor was noncompliant.[41]

C. Contractual Compliance's Formal Resolution Process: Breach Notice and Termination Notice.

Under the Contractual Compliance process and approach, the Formal Resolution Process "begins when contracted parties have either failed to collaborate effectively during the informal resolution process or otherwise continue to be non-compliant after attempts at informal resolution have been unsuccessful."[42] On 27 February 2018, Contractual Compliance issued the Breach Notice via email, facsimile, and courier to the Requestor.[43] According the Breach Notice, the breach resulted from the following:

> (1) "failure to take reasonable steps to investigate and correct claimed Whois inaccuracies regarding the domain name <tomzink.com>, as required by Section 3.7.8 of the RAA"; (2) "failure to validate and verify Whois contact information, as required by Sections 1, 2, and 4 of the Whois Accuracy Program Specification ('WAPS') of the RAA"; and (3) "failure to maintain and make available to ICANN organization registration data and records relating to dealings with the Registered Name Holder ('RNH') of the domain name <tomzink.com>, as required by Sections 3.4.2 and 3.4.3 of the RAA."[44]

The Breach Notice also identified three additional areas in which the Requestor had been deemed non-compliant:

> (1) "failure to provide domain name data in the specified response format, as required by Section 1.4 of the Registration Data Directory Service (Whois) Specification of the RAA ('Whois Specification') and the Advisory: Clarifications to the Registry Agreement, and the 2013 [RAA] regarding applicable Registration Data Directory Service (Whois) Specifications ('Clarifications')";

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[41] *Id*.
[42] *See* Formal Resolution Process – General Guidelines, *available at* https://www.icann.org/en/system/files/files/formal-resolution-07mar17-en.pdf.
[43] *See generally*, Notice of Breach.
[44] *Id.,* at Pg. 1.

(2) "failure to include a link in its registration agreement to its renewal fees and post-expiration renewal fees (if different), as required by Section 4.1 of the Expired Registration Recovery Policy ('ERRP')"; and (3) "failure to publish a correspondence address on [the Requestor's] website, as required by Section 3.17 and Section 7 of the Registrar Information Specification ('RIS') of the RAA."[45]

Attached to the Breach Notice was a more detailed explanation of the Requestor's breaches and areas of non-compliance, as well as a chronology of the communications between Contractual Compliance and the Requestor.[46]

Contractual Compliance requested that the Requestor cure the breaches by 20 March 2018, 21 days from the date of issuance of the Breach Notice.[47] Contractual Compliance advised that if the Requestor failed to timely cure the breaches and provide the requested information, ICANN organization might terminate the Requestor's RAA.[48]

In accordance with the Contractual Compliance Formal Resolution Process, the Breach Notice was published on the Notices webpage at https://www.icann.org/compliance/notices.[49]

One week before the 20 March 2018 cure deadline, on 13 March 2018, Contractual Compliance sent a reminder email to the Requestor.[50] The Requestor did not respond.[51]

Accordingly, pursuant to Section 5.5.4 of the RAA, on 21 March 2018, Contractual Compliance issued the Termination Notice via email, facsimile, and courier.[52] The Termination Notice reiterated the six breaches/areas of noncompliance referenced in the Breach Notice.[53]

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[45] *Id.*, at Pgs. 1-2.
[46] *Id.*, at Pgs. 4-6.
[47] *Id.*, at Pg. 2.
[48] *Id.*, at Pg. 3.
[49] *See* Complaints and Disputes FAQ, Question 32, *available at* https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#top.
[50] Notice of Termination, at Pg. 5.
[51] *Id.*
[52] *See generally id.*; *see also* RAA, § 5.5.4.
[53] Notice of Termination, at Pgs. 1-2.

The termination was scheduled to become effective 20 April 2018, but has since been suspended pending resolution of Request 18-3.[54]

D. Request 18-3.

The Requestor submitted Request 18-3 on 30 March 2018 as a request for urgent reconsideration.[55] The Requestor challenges ICANN's decision to issue the Termination Notice, claiming that this decision "is based on faulty data, misunderstandings and an overall failure of ICANN staff/policies/procedures,"[56] and states that it "would like to see" "the RAA termination cancelled"; "the processes/staff which led to the termination letter reviewed"; and "the libelous claims now published on [ICANN organization's] website updated with an apology/retraction."[57]

The BAMC considered whether Request 18-3 should be considered on an urgent basis, as required under the Bylaws,[58] and concluded that Request 18-3 did not meet the requirements for urgent reconsideration.[59] The Bylaws require the Requestor to include a "discussion of why the matter is urgent for reconsideration,"[60] which the BAMC found the Requestor did not do.[61] The BAMC offered the Requestor the opportunity to provide additional information as to why the request was urgent for reconsideration or offered to instead treat Request 18-3 as a standard reconsideration request.[62] On 4 April 2018, the Requestor agreed that Request 18-3 could be

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[54] *See* https://www.icann.org/compliance/notices.
[55] *See* Request 18-3, § 7, at Pg. 3.
[56] *Id.*, § 5, at Pg. 2.
[57] *Id.*, § 8, Pg. 3.
[58] ICANN Bylaws, Art. 4, § 4.2(s) & 4.2(t).
[59] *See* Attachment 2, Pg. 2.
[60] Bylaws Art. IV, § 4.2(s).
[61] *See* Attachment 2, Pg. 2.
[62] *Id.*

processed under the standard Reconsideration process.[63] The termination process has been put

on hold pending resolution of Request 18-3.[64]

### E.	The Ombudsman's Substantive Evaluation.

In accordance with the Reconsideration process, ICANN organization transmitted

Request 18-3 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the

ICANN Bylaws. On 5 May 2018, the Ombudsman submitted his substantive evaluation to the

BAMC pursuant to Article 4, Section 4.2(l)(ii) of ICANN's Bylaws.[65] The Ombudsman

concluded that "nothing [the] Requestor has set forth in Request for Reconsideration 18-3 merits

a recommendation by the BAMC or the Board to take any of the actions as requested by [the]

Requestor."[66]

Accordingly, the BAMC reviews Request 18-3 pursuant to Article 4, Sections 4.2(l)(ii)

and 4.2(q).

### F.	Relief Requested.

The Requestor asks the BAMC to:

1. Cancel the termination of the RAA;

2. Review "the processes/staff which led to the termination letter;" and

3. Update "the libelous claims now published on [ICANN organization's] website

   with an apology/retraction."[67]

## III.	Issue Presented.

The issues are as follows:

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[63] *Id.* at Pgs. 3-4.
[64] *See* https://www.icann.org/compliance/notices.
[65] ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(ii); *see also* Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3.
[66] Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3, at Pg. 8.
[67] Request 18-3, § 8, at Pg. 3.

1. Whether ICANN organization complied with applicable Commitments, Core Values, and established policies when it issued the Termination Notice;

2. Whether ICANN organization relied on faulty data or misunderstandings when it issued the Termination Notice; and

3. Whether ICANN organization published defamatory statements on ICANN organization's website, in violation of the applicable Commitments, Core Values, and established policies.

IV. The Relevant Standards for Reconsideration Requests and The Contractual Compliance Process.

A. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information."[68]

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.[69] Within 15 days of receipt of the Request, the Ombudsman submits to the

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[68] ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).
[69] ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

BAMC his or her substantive evaluation.[70] Denial of a request for reconsideration of ICANN

organization action or inaction is appropriate if the BAMC recommends and the Board

determines that the requesting party has not satisfied the reconsideration criteria set forth in the

Bylaws.[71]

On 3 April 2018, the BAMC determined that Request 18-3 is sufficiently stated and sent

Request 18-3 to the Ombudsman for review and consideration. The Ombudsman concluded that

nothing the Requestor has set forth in Request 18-3 merits a recommendation by the BAMC or

the Board to take any of the actions as requested by the Requestor.[72] The BAMC has considered

Request 18-3, the Ombudsman's substantive evaluation of Request 18-3, and all other relevant

materials, and issues this Recommendation.

B.   The Contractual Compliance Process.

Contractual Compliance adheres to a defined approach and process to ensure compliance

with contractual obligations.[73] The processes, established in collaboration with the different

ICANN stakeholders, ensure consistency for all parties involved, including ICANN

organization's personnel, contracted parties and complainants."[74]

The Informal Resolution Process "allows [Contractual Compliance] to work closely with

registrars and registries to help them understand their contractual obligations and overcome any

contractual compliance challenges and issues they may have." Contractual Compliance

"attempts to resolve contractual compliance matters informally before pursuing formal remedies

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[70] ICANN Bylaws, 22 July 2017, Art. 4, 4.2(l)(ii).
[71] ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).
[72] Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3, at Pg. 8.
[73] *See* About Contractual Compliance's Approach and Processes webpage, *available at*
https://www.icann.org/resources/pages/approach-processes-2012-02-25-en.
[74] *See* Complaints and Disputes FAQ, Question 31, *available at* https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#top. *See also* Overall Compliance Approach, *available at*
https://www.icann.org/en/system/files/files/overall-03oct14-en.pdf.

available under the agreements."[75] The Informal Resolution Process involves the following

steps:

> 1. Contractual Compliance reviews all complaints it receives, regardless of the source, to ensure that the complaints are within the scope of the relevant ICANN agreement and consensus policies.
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> 2. If needed, Contractual Compliance follows up with the reporter for additional information.
>
> 3. Contractual Compliance informs the reporter that it has sent the complaint to the contracted party.
>
> 4. Contractual Compliance works with registrars and registries to resolve contractual compliance matters via 1-2-3 inquiry/notice or an escalated notice.
>
> 5. Contractual Compliance reviews responses from contracted parties and as needed, consults with other departments in the ICANN organization and Public Technical Identifiers (PTI).
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> 6. If the complaint reaches the third notice, or escalated notice, Contractual Compliance: (a) informs internal groups of potential enforcement escalation; (b) conducts a full compliance check to identify other non-compliance areas; (c) conducts a data escrow audit; and (d) refers the matter to the Enforcement team.
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> 7. Once resolved, Contractual Compliance informs both the reporter and the contracted party via a closure notice.[76]

The Formal Resolution Process commences when contracted parties have either failed to

sufficiently collaborate during the Informal Resolution Process or otherwise continue to be

noncompliant after attempts at informal resolution have been unsuccessful.[77] Notices sent during

the Formal Resolution Process are published on https://www.icann.org/compliance/notices, and

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[75] *See* Complaints and Disputes FAQ, Question 32.
[76] *See* Informal Resolution Process Infographic, *available at* https://www.icann.org/en/system/files/files/informal-resolution-07mar17-en.pdf.
[77] *See* Formal Resolution Process Infographic, *available at* https://www.icann.org/en/system/files/files/formal-resolution-07mar17-en.pdf.

Contractual Compliance updates the progress of each enforcement action.[78] The Formal

Resolution Process involves the following steps:

> 1. Contractual Compliance prepares the notice, consults with other departments in the ICANN organization, sends the notice to the contracted party and publishes it on Notices page.
>
> 2. Contractual Compliance reviews responses from contracted parties and as needed, consults with other departments in the ICANN organization and PTI.
>
> 3. Contractual Compliance may grant an extension based on the remaining efforts to cure the breach, the proposed plan and complexity of the issues.
>
> 4. Contractual Compliance may progress to other enforcement actions on a case-by-case basis.
>
> 5. Once resolved, Contractual Compliance informs both the reporter and the contracted party via a closure notice.
>
> 6. Contractual Compliance updates the Notices page to reflect the status of the enforcement action.[79]

Pursuant to Section 5.5.4 of the 2013 RAA, the RAA may be terminated before its

expiration by ICANN organization if the "Registrar fails to cure any breach of this Agreement

within twenty-one (21) days after ICANN gives Registrar notice of the breach."[80]

V.   **Analysis and Rationale.**

    A.   **Contractual Compliance Complied with Applicable Policies and Procedures When it Issued the Termination Notice Based on the Requestor's Failure to Cure the Areas of Non-Compliance Identified in the Breach Notice.**

The Requestor claims that Contractual Compliance's decision to issue the Termination

Notice was based on an "overall failure of ICANN staff/policies/procedures."[81] As discussed in

detail below, Contractual Compliance adhered to the applicable policies and procedures when

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[78] *Id.*
[79] *See id.*
[80] *See* RAA, § 5.5.4.
[81] Request 18-3, § 5, at Pg. 2.

addressing each of the six areas of noncompliance identified in the Termination Notice. Accordingly, the BAMC concludes that the Requestor's claims are unsupported and do not warrant reconsideration.

1. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to take reasonable steps to investigate and correct WHOIS inaccuracies.*

The Requestor claims that the Complaint regarding the <tomzink.com> domain name contained inaccuracies that "were clearly and obviously faults in the ICANN reporting process;" that the Requestor nonetheless contacted the registrant and updated the inaccuracies; and that Contractual Compliance's "demands for copies of communications to 'demonstrate compliance' are both unreasonable and unnecessary."[82] The Requestor also claims that Contractual Compliance did not manually review the Complaint and instead automatically forwarded it to the Requestor. The Requestor's claims are factually incorrect and do not support reconsideration.

As detailed above, Contractual Compliance follows a defined approach and process to ensure compliance with contractual obligations.[83] Upon receipt of a complaint, the complaint is evaluated to ensure that it is within the scope of the relevant RAA and consensus policy. Once validated, the complaint will be forwarded to the sponsoring registrar, which must take reasonable steps to investigate and correct inaccurate data as part of the Informal Resolution Process.[84] In the course of evaluating Request 18-3, ICANN organization confirmed that Contractual Compliance does not modify complaints, except to redact reporter-related data associated with requests for anonymity, even if it determines that portions of the complaint are

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[82] Request 18-3, § 9, at Pgs. 4-5.
[83] *See* About ICANN's Contractual Compliance Approach and Processes webpage, *available at* https://www.icann.org/resources/pages/approach-processes-2012-02-25-en.
[84] *See* About WHOIS Inaccuracies webpage, *available at* https://www.icann.org/resources/pages/inaccuracy-2013-03-22-en.

16

inaccurate. Registrars are free to explain why portions of a complaint do not need to be addressed, but the fact that a portion of a complaint is inaccurate does not waive the need to address the accurate/in-scope portions of the complaint.

Contractual Compliance requests information and records from the relevant registrar to confirm the registrar has complied with WAPS, including: (1) "copies of correspondence between registrar/reseller and reporter/registrant"; (2) "steps taken to investigate the claimed inaccuracy or suspend [the] domain"; and (3) "evidence of [the] registrar's validation and verification of WHOIS information."[85]

Here, Contractual Compliance followed this process with respect to the Complaint at issue in Request 18-3. Upon receipt of the Complaint, Contractual Compliance evaluated and confirmed that the Complaint was within the scope of the relevant RAA and consensus policies. During this process, Contractual Compliance identified that while some portions of the Complaint may have been inaccurate, the Complaint contained other portions that were within scope. Thus, Contractual Compliance initiated the Informal Resolution Process by sending the first compliance notice to the Requestor, attaching the entire Complaint.[86]

On 24 January 2018, the Requestor informed Contractual Compliance that it had contacted the registrant and fixed the inaccuracies.[87] However, although some of the WHOIS information for the domain name <tomzink.com> had been updated since Contractual Compliance forwarded the Requestor the related WHOIS Complaint, other deficiencies remained, including that information in the Administrative and Technical fields (such as street

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[85] *See* ICANN Community Forum 61, at Slides 21-22, *available at* https://www.icann.org/en/system/files/files/presentation-compliance-registrar-outreach-13mar18-en.pdf.
[86] *See* Notice of Termination, at Pg. 4.
[87] Attachment 1, at Pgs. 27-28.

names) appeared to belong to the Requestor rather than the registrant.[88] Additionally, the Requestor had not validated the postal address under WAPS to ensure it was in a proper format for the applicable country as defined in the UPU Postal addressing format templates.[89]

The Requestor also did not provide Contractual Compliance with evidence of the required registrant verification under WAPS Sections 1, 2 and 4 or validation under WAPS Sections 1 and 2. As part of the verification, Contractual Compliance requested the following, which Requestor did not provide: (1) copies of correspondence between registrar and registrant; (2) evidence that the email verification occurred and that an affirmative response from the RNH was received; and (3) the method and result of the Requestor's validation for format of the updated WHOIS data.[90]

Because the efforts undertaken by the Requestor were insufficient to demonstrate compliance, Contractual Compliance attempted to continue resolving the deficiencies informally through the issuance of second and third compliance notices between 8 February and 26 February 2018 before pursuing formal remedies available under the RAA.[91] The Requestor failed to sufficiently cure the breaches during the Informal Resolution Process, thus leading Contractual Compliance to escalate the matter to the Formal Resolution Process by the issuance of the Breach Notice on 27 February 2018.[92] As noted above, the Requestor never responded to the Breach Notice, despite outreach efforts from Contractual Compliance to the Requestor.[93] As a result, Contractual Compliance was forced to escalate the matter to termination in accordance with its process and Section 5.5.4 of the RAA.

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[88] Contractual Compliance staff confirmed this fact during investigation of Request 18-3.
[89] *See, e.g.*, Attachment 1, at Pg. 25.
[90] *Id.*, at Pgs. 21-22.
[91] Notice of Termination, at Pgs. 4-5.
[92] *Id.*, at Pg. 5.
[93] *Id.*

Accordingly, the BAMC concludes that ICANN organization adhered to applicable policies and procedures when reviewing and processing the Complaint, issuing the Breach Notice, and issuing the Termination Notice when it determined that the breaches had not been cured within 21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA. The Requestor fails to provide any evidence to the contrary.

<blockquote>

2. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to validate and verify WHOIS contact information, as required by WAPS.*

</blockquote>

The Requestor challenges Contractual Compliance's decision to issue the Termination Notice based on the Requestor's failure to validate and verify WHOIS contact information, as required by WAPS. Specifically, the Requestor claims that Contractual Compliance "misunderstand[s] … the technologies involved," that "[v]alidation of client submitted data is done prior to acceptance of that data, and [that] manual 'eyeballing' of the data is not a general requirement."[94] The Requestor explained that "[i]n the event of certain specific data being updated (and subject to it not already having been verified on other domains) automated processes are then invoked as needed in accordance with [WAPS] 1.f."[95]

Again, the Requestor's claim is factually incorrect and does not warrant reconsideration. WAPS Section 1 requires the Requestor, upon "any change in the [RNH] with respect to any Registered Name sponsored by" the Requestor, to "[v]alidate the presence of data for all fields required under Subsection 3.3.1 of the Agreement in a proper format," and validate that other contact information is in the proper format.[96] It also requires the Requestor to verify "the email address of the [RNH] … by sending an email requiring an affirmative response through a tool-

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[94] Request 18-3, § 9, at Pg. 5.
[95] *Id.*
[96] RAA, WAPS § 1.

based authentication method…."[97] Within 15 days of receiving "any changes to contact

information in Whois …, [the Requestor] will validate and, to the extent required by Section 1,

verify the changed fields in the manner specified in Section 1 above. If [the Requestor] does not

receive an affirmative response from the [RNH] providing the required verification, [the

Requestor] shall either verify the applicable contact information manually or suspend the

registration…."[98] WAPS Section 4 requires that if the Requestor "has any information

suggesting that the contact information … is incorrect[,] … [it] must verify or re-verify as

applicable…." If the Requestor does not receive an affirmative response, it "shall either verify

the applicable contact information manually or suspend the registration."[99]

As detailed above, Contractual Compliance requested this information from the

Requestor throughout the Informal Resolution and Formal Resolution Processes. The Requestor

refused to provide the requested information. To date, Contractual Compliance has not received

evidence of verification or validation, as required under WAPS Sections 1, 4, and 5.[100]

Accordingly, the BAMC concludes that Contractual Compliance adhered to applicable

policies and procedures in issuing the Termination Notice based on the Requestor's failure to

validate and verify WHOIS contact information, as required by WAPS.

> 3. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to maintain and make available to ICANN registration data and records relating to the Requestor's communications with the RNH of the domain name <tomzink.com>.*

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[97] *Id.* § 1.f.i.
[98] *Id.* § 2.
[99] *Id.* § 4.
[100] *See* Notice of Termination, at Pg. 5. This was further confirmed with Contractual Compliance staff during investigation of Request 18-3.

The Requestor challenges Contractual Compliance's decision to issue the Termination Notice based on the Requestor's failure to maintain and make available to ICANN organization registration data and records relating to the Requestor's communications with the RNH of the domain name <tomzink.com>. As explained above, Sections 3.4.2 and 3.4.3 of the RAA require the Requestor to maintain records "relating to its dealings with Registry Operator(s) and [RNHs]," including correspondence, and to make those available for inspection and copying to ICANN upon reasonable notice.[101] If the Requestor "believes that the provision of any such data, information or records to ICANN would violate applicable law or any legal proceedings, ICANN and [the Requestor] agree to discuss in good faith whether appropriate limitations, protections or alternative solutions can be identified to allow the production of such data."[102]

Here, the Requestor claims that EU privacy laws limit the types of data that can be exported to the United States, and contends that it is prohibited from providing ICANN organization the requested data by such privacy laws.[103] Yet, during correspondence with Contractual Compliance, the Requestor never raised EU privacy law as a basis for withholding the requested information.[104] On 10 and 16 February 2018, the Requestor stated "we don't provide details of private communications to 3rd parties," but did not provide a reason for withholding such communications.[105] These statements do not reference any concerns regarding privacy laws.

Because the Requestor never raised any concerns regarding EU privacy laws, there was no reason, let alone an obligation, for Contractual Compliance to discuss with the Requestor

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[101] RAA §§ 3.4.2, 3.4.3.
[102] *Id.* § 3.4.3.
[103] Request 18-3, § 9, at Pgs. 6-7.
[104] *See generally*, Attachment 1.
[105] *Id.*, at Pgs. 13-14, 18.

appropriate limitations, protections or alternative solutions to allow the production of such data. Rather, Contractual Compliance acted consistently with its obligations when it (i) continued to seek records of the verification and validation that the Requestor performed to address the inaccuracies in the Complaint; and (ii) issued the Breach Notice and Termination Notice when it did not receive that information.

Accordingly, the BAMC concludes that Contractual Compliance adhered to applicable policies and procedures when it issued the Breach Notice and Termination Notice pursuant to Section 5.5.4 of the RAA for Requestor's failure to maintain and make available to ICANN organization registration data and records relating to the Requestor's communications with the RNH of the domain name <tomzink.com>.

4. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to provide domain name data in the specified response format, as required by the RAA.*

The Requestor challenges Contractual Compliance's decision to issue the Termination Notice based on its failure to provide domain name data in the format required by the RAA. Specifically, the Requestor claims that "all necessary changes to meet staff requirements (which go above and beyond the documented specification) were met in advance of the arbitrary deadline," and that Contractual Compliance's statement that the Requestor "'continues to be out of compliance' indicates they did not check."[106] The Requestor also claims that Contractual Compliance was "introducing through the 'backdoor' new contractual requirements through 'advisories.'"[107]

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[106] Request 18-3, § 9, at Pg. 8.
[107] *Id.*

However, as indicated above, at the time the Breach Notice was issued, Contractual Compliance conducted a full compliance check to identify whether there were any additional areas of non-compliance, as was its process when the Complaint reached the third compliance notice,[108] and confirmed that there were three additional areas of non-compliance as identified in the Breach Notice.[109] Contractual Compliance did not create additional backdoor requirements, but rather complied with its process when identifying other areas of noncompliance. Contractual Compliance therefore followed its established policies and procedures when it issued the Termination Notice following the Requestor's failure to cure the breaches identified in the Breach Notice.

Accordingly, the BAMC concludes that ICANN organization adhered to applicable policies and procedures when reviewing and processing the Complaint, and issuing the Breach Notice and Termination Notice when it determined that the breaches had not been cured within 21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA.

> 5. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to include a link in its registration agreement to its renewal fees and post-expiration renewal fees.*

The Requestor challenges Contractual Compliance's decision to issue the Termination Notice based on its failure to include a link in its registration agreement to its renewal fees and post-expiration renewal fees. Section 4.1 of the Expired Registration Recovery Policy (ERRP) provides that the Requestor "must make [its] renewal fees, post-expiration renewal fees (if different), and redemption/restore fees reasonably available to registered name holders and

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[108] *See* Informal Resolution Process, *available at* https://www.icann.org/en/system/files/files/informal-resolution-07mar17-en.pdf.
[109] Notice of Breach, at Pgs. 1-2.

prospective registered name holders at the time of registration of a gTLD name."[110] Such fees

must "[a]t a minimum … be clearly displayed on [the Requestor's] website and a link to these

fees must be included in [the Requestor's] registration agreements"; the fees must also be

displayed on the Requestor's resellers' websites.[111]

The Requestor claims that it complied with Section 4.1 of the ERRP because its fees are

displayed on every page of its website.[112] However, Contractual Compliance was unable to

locate a link to the Requestor's renewal fees on its website and post-expiration renewal fees in

the Requestor's registration agreement.[113]

Accordingly, the BAMC concludes that ICANN organization adhered to applicable

policies and procedures when reviewing and processing the Complaint, issuing the Breach

Notice, and Termination Notice when it determined that the breaches had not been cured within

21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA.

6. *Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to publish a correspondence address on Requestor's website.*

The Requestor challenges Contractual Compliance's decision to issue the Termination

Notice based on its failure to publish a correspondence address on its website. The Requestor

claims that "[n]o breach has occurred" because the Requestor's website "has a 'Contact' link at

the top of every page, has telephone numbers on every page, contains multiple methods of

communication (email, telephone, ticket, fax post) listed and clearly shows [its] address at the

bottom of every page."[114] However, the Requestor's correspondence address on its website must

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[110] ERRP § 4.1, *available at* https://www.icann.org/resources/pages/errp-2013-02-28-en.
[111] *Id.*
[112] Request 18-3, § 9, at Pg. 8.
[113] *See* Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2. This fact was confirmed by Contractual Compliance staff during investigation of Request 18-3.
[114] Request 18-3, § 9, at Pg. 9.

be the same as the address provided in its RIS.[115] Contractual Compliance was unable to locate

the correspondence address provided in the Requestor's RIS on the Requestor's website, and was

therefore unable to verify that it matched the RIS.[116] Accordingly, consistent with the RAA and

Contractual Compliance's process, Contractual Compliance issued the Termination Notice.

The BAMC concludes that ICANN organization adhered to applicable policies and

procedures when reviewing and processing the Complaint, issuing the Breach Notice, and

issuing the Termination Notice when it determined that the breaches had not been cured within

21 days of the Breach Notice, pursuant to Section 5.5.4 of the RAA.

Ultimately, Contractual Compliance complied with applicable policies and procedures

when it concluded that Requestor did not cure any of the six areas of breach of, or

noncompliance with, the RAA within 21 days following the issuance of the Breach Notice.

Accordingly, reconsideration is not warranted.

B.   **The Requestor Has Not Demonstrated That Contractual Compliance Relied on Any False or Inaccurate Information When It Issued the Termination Notice.**

The Requestor claims that Contractual Compliance's decision to issue the Termination

Notice "is based on faulty data [and] misunderstandings," and that it is "based on faulty premises

such that it is unreasonable and grounds for reconsideration."[117] However, the Requestor has not

identified any false or inaccurate information that Contractual Compliance purportedly relied

upon when it decided to issue the Termination Notice. The only apparent reference to reliance

on false or misleading information is the Requestor's claim that ICANN organization

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[115] RAA, § 3.17; RAA, RIS § 7.
[116] Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2.
[117] Request 18-3, § 5, at Pg. 2; § 7, at Pg. 3.

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"misunderstands … the technologies involved" in the Requestor's automated validation process of registrant contact information.[118] That is not a basis for reconsideration.

Nor is there evidence that Contractual Compliance relied on any false or misleading information: Contractual Compliance received a Complaint and engaged in a series of communications over the course of two months with the Requestor in an attempt to resolve the breaches informally before escalating the matter to Breach Notice. If Contractual Compliance was in fact relying on faulty data and misunderstandings as the Requestor contends, surely the Requestor could have alerted Contractual Compliance within the 21 days afforded to the Requestor to cure the identified breaches; the Requestor did not make any such clarifications. The BAMC concludes that this allegation, without more, is insufficient to demonstrate that Contractual Compliance relied on any false material information when it decided to issue the Termination Notice.

> **C.** **The Requestor Has Not Demonstrated That ICANN Organization Published Defamatory Statements on Its Website or Violated Its Commitments by Publishing Defamatory Statements on Its Website.**

The Requestor claims that ICANN organization published defamatory statements on its website, which the Requestor asserts "impact [the Requestor's] reputation of [its] business and the action itself represents a risk to both [the Requestor] and more importantly to [its] registrants."[119] More specifically, the Requestor claims that certain statements in the Termination Notice are "defamatory and libelous,"[120] the result of "malicious falsehood,"[121] and "published by [ICANN organization] purely for defamation purposes."[122] The Requestor also

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[118] *Id.*
[119] Request 18-3, § 5, at Pg. 2.
[120] *Id.*, § 9, at Pg. 4.
[121] *Id.*, § 9, at Pg. 9.
[122] *Id.*

claims that ICANN organization published "defamatory provably false claims of contract breach."[123]   However, the Requestor does not provide sufficient information as to why any statements are defamatory, or any other information that would provide a basis for reconsideration.

As discussed above, Notices sent during the Formal Resolution process are published on https://www.icann.org/compliance/notices, and ICANN updates the progress of each enforcement action.[124]   To the extent that the Requestor is alleging that the publicly available Breach and Termination Notices contain libelous statements, the BAMC again finds such argument unconvincing.   ICANN organization takes defamation claims seriously and, as a result, reviewed the Breach and Termination Notices, and confirmed that there is no evidence that the breaches identified or any statements contained in the Notices are false or defamatory. Accordingly, the Requestor has not identified any element of ICANN's Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN organization, and reconsideration is not warranted on this ground.

VI.   Recommendation.

The BAMC has considered the merits of Request 18-3, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) or rely on any false or inaccurate relevant information when it issued the Termination Notice following Requestor's failure to respond to the Breach Notice.   Accordingly, the BAMC recommends that the Board deny Request 18-3.

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[123] *Id*., § 7, at Pg. 3.
[124] *See* Complaints and Disputes FAQ, Question 32, *available at* https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#32.