DOMAIN NAME RIGHTS COALITION

Comments of the Domain Name Rights Coalition
And WHOIS 1 Review Team Vice-Chair

These are comments from the Domain Name Rights Coalition and Kathryn Kleiman, Vice-Chair of the First WHOIS Review Team. We appreciate the hard work of the RDS/WHOIS 2 Review Team building on the efforts of the WHOIS 1 Review Team before. In our comments below, we join you in applauding the recommendations of the WHOIS Review 1 which have resulted in success -- and the easier ability to contact domain name registrants via email and/or phone for the purposes of sharing technical issues or other concerns. We also appreciate discussions with the RDS/WHOIS 2 Review Team in Panama City and Barcelona, and your request for input, concerns and comments.

Overview:
Our comments will address issues in order of importance and concern to noncommercial domain name registrants in the "Registration Directory Service (RDS)- WHOIS2 Review Draft Report" (Draft Report). We express concerns with the following recommendations and suggest that they be deleted or substantially revised:

BY.1	
CM.2	CM.4
R4.1	R4.2
LE.1	LE.2

Introductory Note: A Missing Concern for Registrants

We read a lot in the Draft Report about the interests of those who *use* WHOIS data -- the domain name registration data of domain name registrants. Yet, we read little about the importance of domain name registrants to the ICANN process, and the rights and protections to which they are and should be entitled.

Domain name registrants are the base of the ICANN pyramid with registrars, then registries than ICANN sitting atop the 168 million+ gTLD domain name registrant base. Every dollar collected by ICANN from a registry or registrar comes from those domain name registrations. Registrants are the "customers" of the Domain Name System -- a finding of the WHOIS 1 RT which was noted by RDS/WHO2.

Most service providers find it important to keep their customers happy and satisfied. In this case, as the use of platforms rise, and the registration rate of domain names seems to be declining, it is especially important to keep our customer base. The way to do this -- to preserve the economic structure of the Domain Name System -- is to treat Registrants with respect.

We further note noncommercial domain name registrants, and all registrants, use their domain names for a range of communications -- including individual speech, organizational outreach, corporate communication, and others. Deleting domain names -- thereby taking down potentially hundreds of webpages, email addresses and listservs -- can generate substantial commercial, political and expressive costs. This remedy must not be imposed without concrete proof that the domain itself is causing some greater harm.

We ask that the Final Report highlight more strongly the important role of domain name Registrants, and highlight their rights as protected data subjects in the DNS. We also ask that the recommendations of the Draft Report that potentially call for mass takedowns of domain names because years ago (and possibly for safety reasons) a Registrant did not enter an accurate physical address is an outdated and harmful idea.

We also ask that the Final Report reflect more of the history of the WHOIS databases and the robustness of the debate that has taken place throughout the history of ICANN. That ICANN inherited a system from the National Science Foundation, with the names and addresses of many university directors of Information Technology is a well-known fact. That we were told since 2001 by the Data Protection Authorities of the European Union that this collection and publication of data was illegal is also an established fact. For the RDS/WHO2 Draft Report to call for "brute force" enforcement of accuracy -- at the cost of cancelling potentially thousands (or more) gTLD domain names is ill-advised. Such recommendations, we respectfully submit, are:

a) beyond the scope of the recommendations of the WHOIS 1 Review Team (which focused on "contactability" with the verified phone or email), and

b) untimely as the EPDP reviews whether the collection of these 30+ year old fields even makes sense in the 21st Century.

We list below the recommendations we strongly oppose and those we applaud.

I. We Strongly Oppose the Following Recommendations and Ask that They be Deleted or Significantly Modified in the Final Report

A. BY.1 Should Be Removed

We are deeply concerned about the deletion of protections for Registrants from New ICANN Bylaw Section 4.6(e)(ii) and ask that this recommendation be removed. It would eliminate "*the reference to 'safeguarding registrant data' in ICANN Bylaws section 4.6(e(ii)...*" **We find this recommendation to be a dangerous and short-sighted.**

The current ICANN Bylaw is a balanced one. Section (e)(ii) provides:

> "e) Registration Directory Service Review
> * * * *
> (ii) The Board shall cause a periodic review to assess the effectiveness of the then current gTLD registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data ("Directory Service Review")."

The current Bylaw is fair and balanced -- with protection of the data subject as well as those who would have a legitimate and legal need to access their data. These New ICANN Bylaws were adopted pursuant to intensive discussions of the ICANN Community and are part of the balanced accountability processes and protections created.

To remove "safeguarding registrant data" will:

a) Harm the trust of domain name registrants (who impart their individual and organizational data (personal and sensitive) to their registrars, registries and indirectly to ICANN) with clear expectations of it being safeguarded, and

b) Go against the tide of modern society. In the world of "big data," governments and regulatory agencies everywhere are rushing to protect and "safeguard" the data of their citizens and customers. Safeguarding registrant data is a way of building trust and loyalty. It is the law of the European Union, the basis of the dozens of signatories to Convention 108 (including EU, Russia, Turkey, Morocco, Senegal, Uruguay and Argentina), and the basis of NTIA's just closed *Request for Comment* on *Developing the Administration's Approach to Consumer Privacy.* In NTIA's Request for Comment, the organization wrote:

> "Every day, individuals interact with an array of products and services, many of which have become integral to their daily lives. Often, especially in the digital environment, these products and services depend on the collection, retention, and use of personal data about their users. Users must therefore trust that organizations will respect their interests, understand what is happening with their personal data, and decide whether they are comfortable with this exchange. Trust is at the core of the United States' privacy policy formation."

To remove or change this Bylaw protection would violate key promises made in the ICANN Transition, and fundamental commitments of the ICANN Community to its foundation of domain name registrants. The publicity of such a change, alone, would undermine confidence in the DNS. This is not a wise way to treat a valued group of customers. ***We request deletion of this extraordinary Bylaws request.***

B. RDS/WHOIS 2 Must Not Order Procedures that Likely Will Result in the Deletion of Massive Numbers of Older Domain Name Absent Some Proof of Illegality -- Not Merely that a Piece of Data is Missing (CM.2 should be removed).

> Draft Recommendation CM.2 Proposes:
> "The ICANN Board should direct ICANN Organization to assess grandfathered domain names to determine if information is missing from the RDS (WHOIS) Registrant field. If 10-15% of domain names are found to lack data in the Registrant field, then the ICANN Board should initiate action intended to ensure that all gTLD domain names adhere to the same registration collection requirements within 12 months."

What CM.2 appears to propose is that domain names registered (and renewed) before the 2013 RAA and will be deleted if they are missing any data from the "Registrant field" (e.g., name, address, phone, fax and email). *If this is a true and accurate reading of the draft CM.2, then we submit that: (1) it does beyond the scope of the WHOIS 1 RT recommendation of "contactablity" and (2) violates basic standards of due process and common sense.*

(1) To "ensure that all gTLD domain names adhere to the same registration data collection requirements within 12 months" seems to imply that the RDS/WHOIS 2 is going beyond the standard of the WHOIS 1 RT -- "contactability" (a verified email or phone) -- to an "all registrant information must be accurate standard. It is often not possible or fair.

(2) Many address fields are inaccurate or incomplete for a good reason. First, in some parts of the Global South, formal addressing systems still are being worked out. Addresses in many parts of the world today remain based on location -- e.g., "the third house from town post office on the right." Such an address is unlikely to pass any automated screening process of ICANN Staff. *Is the RDS/WHO2 really recommending that these domain names -- legacy domain names registered and used for years with no problem -- be deleted?* Such deletions would disproportionately impact Registrants from the developing world who are already under-represented in the online space. It may also impact users who are sharing local educational and community resources, such as telehealth centres and schools. These are the domain names we most need to hear from, who have long operated without problem. They should not be exposed to deletion.

Second, given the required global publication and availability of the WHOIS databases for so many years, many legacy registrants engaged in minority political, religious, ethnic, gender or sexual speech may not have chosen to post their physical addresses or other identifying data online*. Is the RDS/WHO2 recommending deletions of the older domain names of mosques, synagogues and churches, some even taken off their local maps for safety reasons, and dedicated to posting time of weekly services and community gathering, from the WHOIS for failure to list a field of the domain name registration data?* Both the UN Special Rapporteur on Freedom of Expression and the Inter-American Commission on Human Rights have declared that the right to freedom of expression includes a right to communicate anonymously online. ICANN should not engage in actions which undermine the viability of that right.

(3) Finally, CM.2 and the review of grandfathered domain names with the possibility of mass deactivations should be tabled pending completion of the EPDP's work. After 30 years of trying

to collect the BITNET domain name registration fields by rote, ICANN is now reviewing whether these fields are even needed! Perhaps in a virtual world, the physical address may be jettisoned as one of the least needed fields we collect today. It would be a tragedy to have deleted some of our longest standing legacy domain name registrants, possibly serving large communities, because of slightly-inaccurate registration data, especially when the registrant is otherwise contactable.

> C) R4.1 "The ICANN Board should direct ICANN Contractual Compliance to proactively monitor and enforce RDS (WHOIS) data accuracy requirements to look for and address systemic issues. A risk-based approach should be executed to assess and understand inaccuracy issues and then take the appropriate actions to mitigate them."
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> R4.2 "The ICANN Board should direct ICANN Contractual Compliance to look for patterns of failure to validate and verify RDS (WHOIS) data as required by the RAA. When such a pattern is detected, an audit should be initiated to check if the Registrar follows RDS (WHOIS) contractual obligations and consensus policies. Sanctions should be applied if significant deficiencies in RDS (WHOIS) data validation or verification is identified.

Are these recommendations for proactive monitoring -- apparently across all registrant data fields - timely or needed at this point in time? They are certainly dangerous recommendations for registrants! As noted above, the EPDP is reviewing a 30-year registration data collection and processing system -- one created by BITNET and superimposed on a global DNS when Network Solutions, Inc., and which ICANN took over without change or review.

As the ICANN Community engages actively and with an extraordinary effort in the EPDP, which includes a review of what registrant data fields are appropriate in 2018 and ahead, why would the RDS/WHO2 be calling on the ICANN Board and Staff to mine the existing WHOIS database for "errors"?

These "errors," as pointed out above, and recognized by both the WHOIS1 and RDS/WHO2 Teams, may well have been created for legitimate safety, anti-spamming, privacy, free expression, and human rights reasons. As the ICANN Community researches, analyzes and debates the "WHOIS database of 2020," we should not be taking extraordinary efforts to review, cull and delete registrations of the WHOIS database of 1995.

As noted above, unless there is some proof of illegality, then long-standing domain name registration, where the Registrant is otherwise "contactable," should not be suspended or deleted due to failure of some data element to be included or fully accurate. Such proactive monitoring -- together with the threats of wholesale deletions of domain names that it raises -- is not consistent with the WHOIS 1 RT recommendations, the 21st century world that increasingly protects data subjects against the dangers of "big data," and the principles of human rights (and due process) to which ICANN, in the Transition, committed itself.

R4.1 and 4.2 should be removed as untimely and beyond scope, or narrowed in express language, to a more narrowly-tailored intent of the RDS/WHO2.

III. RDS/WHO2 Recommendations Go Far Beyond the "Periodic Review" and Whether the Current (and Future) WHOIS Meets the "Legitimate Needs of Law Enforcement."

The RDS/WHO2 seems one-sided in its recommendations LE.1 and LE.2, and we request that, if kept, they be expanded to include Data Protection Authorities (who also serve as law enforcement authorities in their jurisdictions). However, there are reasons why these broad and one-sided recommendations should be deleted altogether:

1) ICANN's New Bylaws require only "periodic review" of the legitimate needs of law enforcement. Requiring the ICANN Board to engage in "regular data gathering through surveys and studies" "to be conducted by ICANN" is to require ICANN to devote far more resources to the law enforcement data gathering process than necessity demands. "Periodic" is at regular and recurring intervals; "Regular" is done or happening frequently. In an era of tight budgets, slowed domain name registration, and high costs, it is more efficient to stay with the carefully-negotiated Bylaw language, and not create a continuous or near-continuous cycle of expensive and time-consuming surveys.

However, if RDS/WHO2 is recommending surveys for law enforcement, then it should include Data Protection Authorities in these surveys, since the DPAs are authorities charged with the enforcement of their countries' data protection laws. Further, they are regularly engaged in an ongoing discussion -- and ongoing legal development -- with their national law enforcement on the tensions and balances of data protection law with access to the data by other law enforcement organizations. This is a real-time issue, in evolution through governments and the courts today, and ICANN must be in a position to receive comprehensive information about the full and complex situation -- not the complaints of one side (who may be legitimately and legally shut out of data they had access to in the past).

In all events, Data Protection Authorities must be included in all surveys to Law Enforcement, and the questions must be expanded to include those pertaining to the tension, under the GDPR and other laws, between traditional law enforcement requests and data protection law enforcement responses. ICANN must be in a position to learn how the laws are evolving, and what compromises are being reached domestically. It is not for us to "recreate the wheel" or change, slow or halt how data protection law is evolving.

Any future surveys need to explore all sides of these complex issues -- from all law enforcement and related parties involved -- but only on a "periodic" basis.

2) Finally, RDS/WHO2 should delete LE.2: "The ICANN Board should consider extending and conducting such surveys and/or studies (as described in LE.1) other RDS (WHOIS)

users working with law enforcement on a regular basis". This recommendation is untimely and has the potential to run roughshod over the work of the EPDP.

We do not know to what extent "other RDS (WHOIS) users working with law enforcement" can legally access personal and sensitive domain name registration data under the GDPR, Convention 108, and the over 100 national laws which govern data protection. It seems extraordinary and unfair to the Board and to the ICANN Community to pass this undefined term on with a mandate while the EPDP is charged with looking at these same issues, including access of third parties to the future RDS data.

It is far better, clearer and fairer to allow issues connected to law enforcement access to RDS data, including gatekeeping questions of how "law enforcement" should be defined, to be determined by the EPDP, who are specifically designated with this task and are under significant pressure to come to a resolution. Developing an alternate framework, which may conflict with the EPDP's eventual results, will make their task more challenging. We ask for LE.2 to be removed.

IV. Recommendation CM.4 is Unnecessary

It is hard to study a system in motion, and we sympathize with the challenges the RDS/WHO2 faces. *But why would the RDS/WHO2 advise that "The ICANN Board should direct ICANN Organization to publicize and encourage use of the Bulk WHOIS inaccuracy reporting tool" when it is unclear whether this is a tool needed or wanted?*

There have been "only 3 have reported inaccurate RDS (WHOIS) records in the last year" and only 10 individuals/entities are registered for it, according to your Draft Report. *Perhaps this is a sign the tool should be deleted rather than promoted?*

V. Question: Why Hasn't Abusive Use of the ARS Been Investigated by the RDS/WHO2?

Given that ICANN Contractual Compliance in this area, and ARS, are both new, we are concerned that the RDS/WHOIS2 team did not raise a single question about harassment, abuse or misuse of the WHOIS complaint process. There are certainly reports in CircleID and among the ICANN Community of WHOIS complaints being used as parts of patterns of abuse and harassment.
See e.g, *ICANN Compliance Lends a Hand to a Violent Criminal While Trashing a Legitimate Business* by John Berryhill, Oct 23, 2015, with over 12,000 hits on CircleID, http://www.circleid.com/posts/20151023_icann_compliance_lends_a_hand_to_a_violent_criminal/

We note that, as a matter of ICANN rules (and for reasons no one can fathom), the filer of a WHOIS accuracy complaint is not disclosed to the Registrant -- thus creating a completely unfair playing field. Any individual, organization or corporation can file a complaint seeking the review, correction and disclosure of WHOIS information -- for any reason -- but the individual,

organization or corporation against whom such a complaint is filed can discover nothing about the filer -- even when there is other evidence to support an allegation of harassment or a campaign against the Registrant (most likely for the speech she/he/it posts online).

Fair is fair, and this approach violates basic due process rights, as well as having the potential to shield harassing or vexatious complainants from accountability. It is also problematic from the perspective of transparency, absent any legitimate justification for any harm that will accrue through the disclosure of the complainant's identity. Both complainant and registrant should be disclosed. We ask for a recommendation to support this fair and balanced conclusion.

Further, as the watchdog and reviewer, it was well within the RDS/WHO 2's scope to investigate misuse of the still-new ARS tools and systems, and review and share with the Community how abuse and misuse are handled. Since RDS/WHO2 is wrapping up its work, we ask that this point be noted as an area for review by future RDS/WHOIS review teams. Accuracy complaints should not be a tool of harassment, and Registrants should be able to discover the identity of those who seek to harm their organizations, companies or speech.

VI. Some Reflections on the WHOIS 1 Review Team

The RDS/WHO2 builds atop the work of the WHOIS 1 Review Team -- we thank you for your long, intense and hard work. We also note and thank the WHOIS 1 RT for its intensive and challenging efforts over 18 months in 2010-11. We would like to complement the WHOIS 1 Review Team on a job well done. Its main recommendations appear to be not only adopted, but embraced, by the ICANN Community. Positive aspects of the WHOIS 1 Review Team's work that we would like to specifically point to include:

1) "Contactability" -- that each domain name have a verified phone number or email address (at the preference of the registrar) at registration and renewal. Now adopted as part of the 2013 RAA and implemented today, this set of recommendations is a highly successful process.

2) The WHOIS 1 Review Team heard, and reported, perspectives from a wide variety of stakeholders who submitted their need for privacy in the WHOIS, including:

   "**Individuals** – who prefer not to have their personal data published on the Internet as part of a WHOIS record;
   Organizations – such as religious, political or ethnic minorities, or those sharing sensitive information (such as sexual health information or politically controversial information); and
   Companies – for upcoming mergers, new product or service names, new movie names, or other product launches."

   This wide variety of privacy needs, for legal, safety, security and other reasons, is now much more recognized and understood by the ICANN Community.

3) It is a lot easier to understand the WHOIS Policy for gTLDs today than it was in 2010. Among other positive developments, the 2013 Registrar Accreditation Agreement worked through a number of issues regarding WHOIS registration and adopted a WHOIS accuracy program (verifying email or phone) which will be discussed further below. We now have the Temporary Specification and the Expedited Policy Development Process and are hard at work on a permanent policy.

Concerns about EWG Reports and the unqualified support the RDS/WHO2 gives to it: The EWG Report came on the heels of the WHOIS 1 RT Report, and did not have the same unqualified support of the Community or embrace of its recommendations. In its kudos to the Expert Working Group report in the RDS/WHO2 Final Report, we would ask that the RDS/WHO2, in fairness, acknowledge the many deep and lengthy concerns raised by members of the ICANN Community, including a former Board members. These concerns include issues raised about many new sections that the EWG first introduced in the final report (without public input), numerous unanswered questions about internal conflicts and inconsistencies within the EWG Report, and the ongoing problem that the EWG does not factor into compliance with the GDPR (it is also worth noting that, at the time, deep concerns with the GDPR's predecessor, the EU Data Protection Directive, were also raised.)

4) WHOIS1 Rec #3: Outreach
It is surprising to see the RDS/WHO2 notation in 3.4.4 that 'there is little strong evidence that any outreach targeted at non-ICANN audiences was contemplated or carried out." It may be that members of RDS/WHO2 misunderstood the outreach that the WHOIS 1 RT intended. By way of explanation, the WHOIS1 RT wrote:

> "We found great interest in the WHOIS policy among a number of groups that do not traditionally participate in ICANN's more technical proceedings. They include the law enforcement community, Data Protection Commissioners, and the privacy community more generally. Further we found interest among those in supporting organizations and advisory committees including the SSAC, GAC, ccNSO, ASO, who may or may not closely follow proceedings in the GNSO, where much of the WHOIS discussion takes place."

That was 2010. ***Virtually all of the groups above have been actively, and in many cases almost continuously, engaged with ICANN on RDS/WHOIS issues since the date of the WHOIS 1 RT Final Report.*** For example, law enforcement, through and with the vibrant GAC Public Safety Working Group, has an active and embedded liaison on this issue within the ICANN Community, with ongoing discussion, panels, surveys and input.

Further, the Data Protection Commissioners, UN Special Rapporteur on the Right to Privacy and Council of Europe's Data Protection Unit Head all participated in a well-organized and well-publicized High Level meeting moderated by Senior ICANN Board Member Becky Burr designed to help the ICANN Community better understand the requirements of the then-

upcoming GDPR deadline on May 25, 2018 (ICANN58 Copenhagen). Some members of these groups attended other ICANN meetings where they met actively with Stakeholder Groups, and even joined the RDS Working Group. Like law enforcement, the data protection community in the last 6 years has become dramatically more engaged with ICANN on these issues.

Finally, the SSAC, GAC and ccNSO are actively engaged. SSAC has written major reports on the issue; GAC holds regular meetings and discussions, and the ccNSO provides much in the way of guidance and examples (most recently with Norway's ccTLD, .NO, presenting revisions to its WHOIS policy at Tech Day (ICANN63 Barcelona)).

This is clearly a success story for outreach, engagement, and fostering discussion with ICANN, as a diverse cast of participants were brought in and became involved with this issue.

Conclusion:
We thank the RDS/WHOIS 2 Review Team for its hard work. There is nothing easy about being a member of a review team -- it is a labor of love on behalf of the ICANN Community. We appreciate your efforts, time away from family, and lost hours at work.

That said, we would respectfully ask the RDS/WHO2 to conclude its work without any further studies. We were surprised to hear in an open meeting in Barcelona that some members of the RDS/WHO2 are considering other studies which might lead to further recommendations. Among the most important aspects of any work process is knowing when to call things complete. There are many other efforts involving changes to the RDS/WHOIS underway. It is time to allow the Community to focus on these other WHOIS policy developments.

To follow up on these comments, we request a meeting with the RDS/WHOIS 2 Review Team to discuss our concerns in greater detail -- and work together to find a path to new recommendations.

Respectfully submitted,

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