GNSO Issues Report
Inter-Registrar Transfer Policy: Clarification of Reasons for Denial of a Transfer Request

STATUS OF THIS DOCUMENT

This is the Issues Report on Clarifications on reasons for denial in the Inter-Registrar Transfer Policy, produced by ICANN staff for submission to the GNSO Council.

SUMMARY

This report is submitted to the GNSO Council in response to the motion passed by the Council on 20 September 2007: "ii) Pursuant to section 1.b of Annex A of ICANN's Bylaws, that the GNSO Council initiate the formal GNSO Policy Development Process by requesting the creation of an issues report evaluating issues raised by the working group document "Points of Clarification Inter-Registrar Transfer Policy (see http://gnso.icann.org/drafts/Transfer-Denial-Clarifications-23aug07.pdf)."

1   EXECUTIVE SUMMARY

1.1   This issues report addresses a limited set of issues associated with the Inter-Registrar Transfer Policy. The Inter-Registrar Transfer Policy (see http://www.icann.org/transfers/policy-12jul04.htm) is an existing consensus policy developed through the GNSO's policy development process (PDP), and is now being reviewed by the GNSO.

1.2   To initiate the review of the policy, the GNSO formed a Transfers Working Group to examine and recommend possible areas for further policy work. The group created a broad list of policy issues covering several areas (see http://gnso.icann.org/mailing-lists/archives/council/pdfxg9m5otShO.pdf) which could be addressed by the GNSO.

1.3   The group also identified a focused subset of issues which could be addressed through further clarifications to certain provisions in the existing policy (see http://gnso.icann.org/drafts/Transfer-Denial-Clarifications-23aug07.pdf). The Inter-Registrar Transfer Policy enumerates nine reasons for which a registrar of record may deny a request to transfer a domain name to a new registrar. The Working Group noted that the language is unclear on a subset of these reasons, which has resulted in varying interpretations and practices among registrars. The Transfers Working Group has also explored possible ways to clarify the language used in this set of provisions.

1.4   The four clauses in question (from Section 3, articulating reasons for which a Registrar of Record may deny a transfer request) are:

1.4.1 No payment for previous registration period (including credit card charge-backs) if the domain name is past its expiration date or for previous or current registration periods if the domain name has not yet expired. In all such cases, however, the domain name must be put into "Registrar Hold" status by the Registrar of Record prior to the denial of transfer (Reason #5 in the policy).

1.4.2 A domain name was already in "lock status" provided that the Registrar provides a readily accessible and reasonable means for the Registered Name Holder to remove the lock status (Reason #7 in the policy).

1.4.3 A domain name is in the first 60 days of an initial registration period (Reason #8 in the policy).

1.4.4 A domain name is within 60 days (or a lesser period to be determined) after being transferred (apart from being transferred back to the original Registrar in cases where both Registrars so agree and/or where a decision in the dispute resolution process so directs) (Reason #9 in the policy).

1.5 The launch of a dedicated policy development process limited to consideration of these issues has been confirmed by the General Counsel to be properly within the scope of the ICANN policy process and within the scope of the GNSO.

2   OBJECTIVE

2.1   This report is submitted in accordance with Step 2 of the Policy
Development Process described in Annex A of the ICANN Bylaws
(http://www.icann.org/general/bylaws.htm#AnnexA).

2.2   In this context, and in compliance with ICANN Bylaw requirements:

a. The proposed issue raised for consideration:

Specific clarifications to the Inter-Registrar Transfer Policy.

b. The identity of the party submitting the issue:

GNSO Council.

c. How that party is affected by the issue:

The GNSO is responsible for developing and recommending to the
ICANN Board substantive policies relating to generic top-level
domains. The GNSO includes various constituencies, which are
affected in various ways by issues relating to inter-registrar
transfers. These issues are discussed in further detail in Section 4
below.

d. Support for the issue to initiate the PDP:

The Council voted at its meeting on 20 September 2007 to request
an issues report. Staff is complying with this request and is not
aware of any formal expressions of support for the initiation of a
PDP on this topic.

e. Staff recommendation:

Staff's recommendation is that the Council initiate a targeted PDP
aimed at providing constructive clarifications to these provisions of
the Inter-Registrar Transfer Policy. As required by the Bylaws, staff
has examined the following areas:

i. Whether the issue is within the scope of ICANN's mission statement:

ICANN's mission statement includes the coordination of the allocation of certain types of unique identifiers, including domain names, and the coordination of policy development reasonably and appropriately related to these technical functions.

ii. Whether the issue is broadly applicable to multiple situations or organizations:

The Inter-Registrar Transfer Policy is applicable to every transfer of a domain name between ICANN-accredited registrars, in all gTLDs that have implemented the policy. Thus, it affects a high percentage of gTLD registrants (individuals and organizations).

iii. Whether the issue is likely to have lasting value or applicability, albeit with the need for occasional updates:

Clarifications to the existing Inter-Registrar Transfer Policy will have lasting value and applicability, as the policy will continue to apply to gTLD registries and registrars.

iv. Whether the issue will establish a guide or framework for future decision-making:

Clarifications to the existing Inter-Registrar Transfer Policy may establish a guide or framework which would be applicable in other areas.

v. Whether the issue implicates or affects an existing ICANN policy.

Clarifications to the existing Inter-Registrar Transfer Policy clearly affect the existing policy.

2.3 Based on the above, the launch of a dedicated policy development process limited to consideration of the issues in the working group's document "Points of Clarification Inter-Registrar Transfer Policy (http://gnso.icann.org/drafts/Transfer-Denial-Clarifications-

23aug07.pdf) has been confirmed by the General Counsel to be properly within the scope of the ICANN policy process and within the scope of the GNSO.

2.4   In accordance with step 2(f) of the policy development process, the Staff Manager shall distribute the Issue Report to the full Council for a vote on whether to initiate the PDP.

3   BACKGROUND

3.1   Process background

3.1.1   On 12 February 2003, the GNSO Council's Transfers Task
Force released its Final Report and Recommendations on
Policies and Processes for Gaining and Losing Registrars
(http://www.icann.org/gnso/transfers-tf/report-12feb03.htm).

3.1.2   At its meeting on 20 February 2003, the GNSO Council voted
unanimously to accept the Final Report of the GNSO Transfers
Task Force and to forward it to the ICANN Board as a
consensus-policy recommendation (see
http://gnso.icann.org/dnso/notes/20030220.GNSOteleconf-
minutes.html).

3.1.3   The report was posted on the ICANN website on 4 March 2003,
with a call for public comment (see
http://www.icann.org/riodejaneiro/transfers-topic.htm).   The
report was also discussed at the ICANN public forum on 26
March 2003, with public comment received (see
http://www.icann.org/riodejaneiro/video.htm).

3.1.4   On 25 April 2003, the ICANN Board voted to approve the
recommendations in the report, and authorized staff to
implement the policy recommendations in consultation with
registries, registrars, and other knowledgeable parties (see
http://www.icann.org/minutes/minutes-25apr03.htm).

3.1.5   On 12 July 2004, ICANN announced the adoption of the Inter-
Registrar Transfer Policy (see
http://www.icann.org/announcements/advisory-12jul04.htm),
with an effective date of 12 November 2004.

3.1.6   On 12 January 2005, ICANN posted a notice requesting public
input on experiences with the Inter-Registrar Transfer Policy
(http://www.icann.org/announcements/announcement-
12jan05.htm). Staff used the public comments along with its
experiences in responding to questions and complaints to
create a Staff Report on Experiences with the Inter-Registrar
Transfer Policy, posted on 14 April 2005 (see
http://www.icann.org/transfers/transfer-report-14apr05.pdf).

3.1.7   On 12 May 2005, the GNSO Council decided "to form a working
group with a representative group of volunteers from the GNSO
to review the staff report in order to seek clarification, further
information and provide guidance for the 6 month review and to
report back to the Council at its meeting on 2 June 2005." (see
http://gnso.icann.org/meetings/minutes-gnso-12may05.htm).

3.1.8   On 17 September 2007, the chair of the Transfers Working
Group provided the Council with a set of documents as the
outcome of the group's work (see http://gnso.icann.org/mailing-
lists/archives/council/msg03895.html). These documents
included: (i) a draft advisory containing reminders and
clarifications about the policy; (ii) a broad list of policy issues on
which the GNSO might wish to do further work; and (iii) a list of
issues focused on Section 3 of the policy, for which a focused

PDP aimed at clarifications to these issues would be recommended.

3.1.9   At its meeting on 20 September 2007, the GNSO Council voted in favour of the following motion:

i) The GNSO Council will issue the working group report entitled "Advisory Concerning Inter-Registrar Transfer Policy" (see: http://gnso.icann.org/drafts/Transfer-Advisory-23aug07.pdf) for constituency and community review and comment for a period of no less than 14 days, and;

   i.a) pursuant to this comment period, all material commentary will be summarized and reviewed by Council

   i.b) pursuant to the review by Council that the current, or an amended form of this report be provided to Staff for posting to the ICANN web site as a community advisory.

ii) Pursuant to section 1.b of Annex A of ICANN's Bylaws, that the GNSO Council initiate the formal GNSO Policy Development Process by requesting the creation of an issues report evaluating issues raised by the working group document "Points of Clarification Inter-Registrar TransferPolicy". see: (http://gnso.icann.org/drafts/Transfer-Denial-Clarifications-23aug07.pdf)

iii). That the GNSO Council form a short-term planning group to analyse and prioritize the policy issues raised in the report "Communication to GNSO on Policy Issues Arising from Transfer Review" (see: http://gnso.icann.org/drafts/Transfer-Policy-Issues-23aug07.pdf) before the Council further considers a PDP on any of the work discussed in the report."

3.2   Issue Background

3.2.1   Prior to the adoption of the Inter-Registrar Transfer Policy, provisions on transfers between registrars were included in an exhibit to the Registry-Registrar Agreement (see for example

http://www.icann.org/tlds/agreements/biz/registry-agmt-appf-11may01.htm).

3.2.2   Prior to the development of the Inter-Registrar Transfer Policy, ICANN noted a high volume of end-user complaints regarding difficulties in transferring domain names between registrars, and a lack of consistency regarding transfer procedures across registrars.

3.2.3   As noted in the Task Force report (see http://www.icann.org/gnso/transfers-tf/report-12feb03.htm), competition among registration service providers provides consumers with the benefits of choice among a variety of registrars with differentiated services and prices. A guiding principle of the Task Force was that domain name registrants should be able to choose a registrar who can serve their needs and should be able to move from one registrar to another when they desire to do so.

3.2.4   The Task Force report summarized its requirements in terms of the words Security, Transparency, Stability, and Portability, and noted that "any recommendation approved for implementation as policy must meet these four standards and achieve balance between them."

3.2.5   Many of the discussions in the community around interpretation of these provisions have also made reference to principles of security, transparency, stability, and portability. For discussions among registrars on these particular topics (http://gnso.icann.org/mailing-lists/archives/registrars/), see for

example mailing list discussions occurring from 22 Oct – 24 Oct
2004, 5 Oct – 7 Oct 2006, 20 Sep - 1 Oct 2007.

3.2.6   Along with the list of issues discussed in this report, the GNSO's
Transfers Working Group produced a broader list of issues on
which the GNSO might wish to initiate further policy work (see
http://gnso.icann.org/mailing-
lists/archives/council/msg03895.html). This issues report is not
intended to address all possible issues related to the transfer
policy, but only those relevant to the reasons for denial of a
transfer request specified in Section 3 of the policy.

3.2.7   Independent of the Transfers Working Group's deliberations,
ICANN staff posted a "Notice of Intent to Issue Advisory
Regarding the Inter-Registrar Transfer Policy" on 19 September
2007 (see http://www.icann.org/announcements/announcement-
19sep07.htm). The staff did not perform a review of the entire
policy, but aimed to respond to and provide clarity on two
particular issues raised by members of the community (the auto-
renew grace period and changes to Whois information) within
the existing policy. The proposed Advisory was posted for
public comment through 19 October 2007, with the intention that
staff would evaluate the input received before deciding how to
proceed. This effort does not preclude any actions that the
GNSO wishes to take relating to these issues. Staff will
continue to support the GNSO's policy work on the Inter-
Registrar Transfer Policy, and implement any approved
recommendations that result from a policy development
process.

4   DISCUSSION OF PROPOSED ISSUES

4.1   Overview

The issues which are the subject of this report concern four points occurring in Section 3 of the Inter-Registrar Transfer Policy, in the list of reasons for which a Registrar of Record may deny a transfer request. These are:

- o Denial for nonpayment (reason 5)
- o Denial for lock status (reason 7)
- o Denial for 60 days of initial registration period (reason 8)
- o Denial for 60 days after previous transfer (reason 9)

4.2   Denial for nonpayment

4.2.1 The current language (describing a reason for which a registrar of record may deny a transfer request) reads:

No payment for previous registration period (including credit-card chargebacks) if the domain name is past its expiration date or for previous or current registration periods if the domain name has not yet expired. In all such cases, however, the domain name must be put into "Registrar Hold" status by the Registrar of Record prior to the denial of transfer.

4.2.2 An element of confusion regarding this provision is due to the use of the terms "previous" and "current" registration periods, which are

not defined within the policy. Additionally, the current language references the "expiration date" as a point of distinction between when a transfer request may or may not be validly denied for nonpayment. However, particularly in the case of a registration that is auto-renewed by the registry, the expiration date recorded and displayed by the registry (triggered by payment from the registrar to the registry, under applicable terms from the Registry-Registrar Agreement) may differ from the expiration date according to the registrar's records (triggered by payment from the registrant to the registrar, under applicable terms from the registration agreement). As the expiration date is not a consistent value, there can be various meanings attached to this provision.

4.2.3   In the case of an auto-renewal transaction, the majority of gTLD registries offer an "Auto-Renew Grace Period" to registrars (currently 45 days). If a domain name is deleted or transferred away during this period, the registrar may obtain a credit for the auto-renewal fee from the registry. In the case of an auto-renewal transaction, the registry will add one year to the registration, meaning that a name within the grace period may be considered to be within a "current registration period," or "has not yet expired." However, since the auto-renewal transaction between the registry and registrar is not final and can be reversed during the grace period, the name may also be considered to be "past its expiration date."

4.2.4   The policy further states that:

Instances when the requested change of Registrar may not be denied include, but are not limited to:

- Nonpayment for a pending or future registration period.

ICANN has typically considered the Auto-Renew Grace Period to be a "pending or future registration period" (see http://www.icann.org/announcements/proposed-advisory-19sep07.htm). However, staff has supported the referring of this issue to the GNSO because it is desirable for the policy to contain a greater degree of clarity on this point.

4.2.5 The policy also states that:

The Registrar of Record has other mechanisms available to collect payment from the Registered Name Holder that are independent from the Transfer process. Hence, in the event of a dispute over payment, the Registrar of Record must not employ transfer processes as a mechanism to secure payment for services from a Registered Name Holder. Exceptions to this requirement are as follows:
(i) In the case of non-payment for previous registration period(s) if the transfer is requested after the expiration date, or
(ii) In the case of non-payment of the current registration period, if transfer is requested before the expiration date.

4.2.6 Referring to the Task Force's Report (http://www.icann.org/gnso/transfers-tf/report-exhd-12feb03.htm) for the intention behind the policy language, the Task Force Report stated that:

"The general principle seems to be if a registrar can obtain a refund for the registry fee following a transfer during the 45 day grace

period, than the registrar should not be able to deny the transfer for non-payment."

4.2.8   It should be noted that while the registry may offer a grace period to registrars following an auto-renewal transaction, registrars are under no obligation to offer a corresponding grace period to their customers. It is a common practice for registrars to include terms in the applicable registration agreements in which the registrant consents to various post-expiration practices, such as auctions or assignment to third parties (see for example "Advisory: Registrar Expired Name Market Developments," http://www.icann.org/announcements/announcement-21sep04-1.htm). However, registrars are required by the Expired Domain Deletion Policy (see http://www.icann.org/registrars/eddp.htm) to provide notice to registrants of their deletion and auto-renewal policies, and of any material changes to these policies.

4.2.9   The current provision in the Inter-Registrar Transfer Policy also provides that prior to denying any transfer requests for nonpayment under this clause, a registrar must have placed the domain name on "Registrar Hold" status. This does not appear to be the usual practice, with many registrars using "Registrar Lock" status instead. It should be noted that "Registrar Hold" removes the name from the zone and causes it not to resolve, while a name in "Registrar Lock" may continue to function but will not be able to be transferred. As part of the discussion regarding this provision, it may be helpful to consider whether one is preferable to the other in instances of nonpayment.

4.3   Denial for lock status

4.3.1   The current language (describing a reason for which a registrar of record may deny a transfer request) reads:

> A domain name was already in "lock status" provided that the Registrar provides a readily accessible and reasonable means for the Registered Name Holder to remove the lock status.

4.3.2   Referring to the Task Force's Report (http://www.icann.org/gnso/transfers-tf/report-exhd-12feb03.htm) for the intention behind the policy language, the following Q/A occurs:

> 9. "Some Registrars liberally employ the 'Registrar lock' function as it relates to the domain names they register for Registrants. This often means that Registrants *can't* transfer their domain name in a predictable way. Do the Task Force recommendations consider this?"
>
> A. Through extensive discussion within the Task Force and further consultation with the community after the Interim Report, the Task Force formed a minor series of amended recommendations that simply requires Registrars to provide Registrants with simple and transparent mechanisms by which Registrants can simply unlock or lock their domain name using accessible processes established by the Registrar.
>
> Analysis: The Task Force heard this concern from several user groups. Earlier versions of this report contained substantially more stringent recommendations, however further discussion within the Task Force and outreach to various stakeholders

within the DNSO only drew the lack of consensus on the older recommendations into focus. Accordingly the Task Force re-crafted its recommendations in order to support the principles that were supported by consensus.

4.3.3 In the current environment, registrar policies and practices vary with regard to means available to registrants for removing a Registrar Lock status. As a prerequisite to a registrar's denial of a transfer request for this reason, the policy requires that registrars provide a "readily accessible and reasonable means for the Registered Name Holder to remove the lock status." In staff's investigation of complaints about an inability to unlock a name, it is necessary to review the circumstances on a case by case basis, and apply an interpretation as to whether the registrar's practice is reasonable.

4.3.4 ICANN continues to receive complaints from registrants noting difficulty in unlocking names (see data from 2006 at http://www.icann.org/compliance/pie-problem-reports-2006.html). ICANN could more efficiently enforce this provision if there were a test available for what is "reasonable or readily accessible." Adoption of a common test or standard would also facilitate uniform enforcement of this provision.[1]

4.3.5 In instances where a domain name is in Registrar Lock status, a transfer that is initiated by a potential gaining registrar will be

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[1] As an example of such a test or standard, Section 5 of the policy includes the following in regard to provision of the authInfo code: "Registrars may not employ any mechanism for complying with a Registered Name Holder's request to remove the lock status that is more restrictive than the mechanisms used for changing any aspect of the Registered Name Holder's contact or name server information."

automatically rejected at the registry level, without an explicit denial by the registrar of record. This makes it difficult for a registrar of record to comply with the requirement to provide the registrant and potential gaining registrar with the reason that the transfer was denied. It may be helpful for the policy language to reflect the process that occurs in the case of this type of denial.

4.4   Denial for 60 days of Initial Registration Period

4.4.1   The current language (describing a reason for which a registrar of record may deny a transfer request) reads:

A domain name is in the first 60 days of an initial registration period.

4.4.2   As there is no definition for "an initial registration period" included in the policy, this provision has been subject to varying interpretations. It is unclear whether there is only one initial registration period associated with a domain name, or whether there may be multiple initial registration periods, as in the case for example of a change of registrant. No information has been located in regard to the original intention of the Task Force on this provision.

4.5   Denial for 60 days after Previous Transfer

4.5.1   The current language (describing a reason for which a registrar of record may deny a transfer request) reads:

A domain name is within 60 days (or a lesser period to be determined) after being transferred (apart from being transferred back to the original Registrar in cases where both Registrars so agree and/or where a decision in the dispute resolution process so directs).

4.5.2   No references were located relating to the original intention of the task force regarding this provision. It can be inferred from the name of the policy that the language refers to an inter-registrar transfer, and this is the position taken in the draft Advisory developed by the Transfers Working Group. However, in order to ensure uniformity in compliance, it may be beneficial to consider providing additional clarity on this provision in the policy itself.

4.5.3   A change of registrant or other changes to registration data may be considered by some registrars to constitute a "previous transfer." Limiting the definition narrows the scope of circumstances in which a registrar may deny a transfer request, while allowing for broader definitions gives a registrar greater latitude. As noted by some registrars, a transfer requested soon after a change of registrant may indicate possible fraudulent activity, a case in which a registrar may wish to deny the request, although other registrars have noted that there are also legitimate reasons for a change of registrant to precede a transfer request. It should be noted that "evidence of fraud" is already a separate reason for denying a transfer request (Reason #1).

4.5.4 Additionally, a greater capacity for multiple transfers within a set amount of time complicates the dispute resolution process, requiring more registry and registrar resources to resolve problem cases.

4.5.5 The Transfers Working Group has also noted that a reference in this provision to its inclusion or noninclusion of bulk transfers (in accordance with Part B of the policy) could be beneficial. ICANN has typically considered a bulk transfer under Part B of the policy to be a "previous transfer;" however, staff supports the referring of this issue to the GNSO because it is desirable for the policy to contain a greater degree of precision on this point.

4.6 Additional comments

This Issues Report does not propose options for solutions to these issues. However, the Transfers Working Group has developed language that may be used as a starting point for further discussions in the document entitled "Denial Clarifications" (see http://gnso.icann.org/mailing-lists/archives/council/msg03895.html).

5   DISCUSSION OF POSSIBLE POLICY OUTCOMES

5.1   If a policy development process is initiated on the issues discussed in this report, the probable outcome would be the presentation to the Council of new terms modifying the existing Inter-Registrar Transfer Policy. If the Council and the Board of Directors approved the proposed modifications, this would result in a revised Inter-Registrar Transfer Policy being posted, with notice provided to all relevant parties.

5.2   If a policy development process is not initiated, or if there are no changes recommended at the conclusion of a PDP, the result would be that the status quo would continue.

5.3   The presumption is that a PDP in accordance with the issues addressed in this report should not result in additional changes to the policy beyond the four areas noted, since the scope of the PDP would be limited to the clauses discussed in Section 4.

6   STAFF RECOMMENDATION

6.1   Staff has confirmed that the proposed issues are within the scope of
the policy development process and the GNSO. It is reasonable from
the staff's perspective to expect that greater precision and certainty
around the terms of the Inter-Registrar Transfer Policy would be
beneficial to the community generally, particularly for registrants, as
well as those parties (gTLD registries and registrars) who are obligated
to comply with the policy provisions. Staff therefore recommends that
the GNSO Council proceed with a policy development process limited
to consideration of the issues discussed in this report.

6.2   Staff notes that there is a broader set of issues identified by the
Transfers Working Group (see http://gnso.icann.org/drafts/Transfer-
Policy-Issues-23aug07.pdf) that concern the Inter-Registrar Transfer
Policy, and also supports the GNSO's consideration of further work on
these.