

9 October 2019

Keith Drazek, GNSO Council Chair

Subject: ICANN Transfer Policy - Gaining Registrar Form of Authorization

Dear Keith,

I write to bring to your attention a policy implementation issue that the Registrar Stakeholder Group (RrSG) has encountered concerning the requirement for a Gaining Registrar to send a Form of Authorization to the Transfer Contact (Gaining FOA) under Section 1.1 of Appendix G to the Temporary Specification for gTLD Registration Data.

This requirement was replicated in the EPDP Phase 1 Final Report, which has now been approved by the Council and adopted by the ICANN Board.

As detailed in attached Annex A, this requirement was added by ICANN staff, despite the CPH TechOps Group specifically proposing that the Gaining FOA should no longer be required. The rationale is that under the GDPR, the Gaining Registrar does not have consent to process this information (i.e., send an email to an individual that is not its customer). Furthermore, registrars find it is technically impossible to send the gaining FOA because many email addresses are unavailable (i.e., return an email with a link to a web form), resulting in failed transfers.

The RrSG has attempted to resolve this matter with ICANN org but to no avail. The Council is in the process of scoping the Transfer Policy review; however, a number of RrSG members have open cases with ICANN Contractual Compliance regarding the Gaining FOA.

Therefore, we are seeking Council's assistance and ask the Council to raise this issue with the ICANN Board. To this end, we have taken the liberty of preparing a draft letter from the Council to the ICANN Board for your consideration. The proposed letter asks the ICANN Board to: (1) refer this matter to the impending Transfer Policy review (which could be in the form of a new PDP), and (2) instruct ICANN org to defer any Gaining FOA compliance enforcement until the matter is settled in the Transfer Policy review.

Please let me know if you have any questions or require any further information regarding this request.

Sincerely,

Owen Smigelski
Registrar Stakeholder Group Vice Chair, Policy

APPENDIX A – Problem Statement from the Registrar Stakeholder Group

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

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

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

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

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

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

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

Additional notes:

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

4. As identified by TechOps white paper, and as occurs in other gTLD transfers when the email address is not present in whois, the AuthInfo code is sufficient to confirm the intent of the registrant to transfer. The losing registrar FOA confirms this intent. The TechOps white paper has broad support of registrars and registries, and complies with the Temp Spec and Final Report recommendations (because the email address in registration data is not available in whois).

5. There is no evidence in IRTF Status Report of an increase in unauthorized transfers under the Temp Spec, and registrars are not aware of any such increase.

6. Most registrars do not have email addresses present in port 43 whois.

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

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

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

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

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

The research and testing for item six above took about thirty minutes to perform. With the current 2,457 ICANN-accredited registrars, it would take approximately

1,228.6 hours to complete the initial analysis (which would need to be continually updated and monitored). This represents 153.56 business days or 7.6 business months. The effort needed to determine whether the email field is present represents a herculean task that will likely be incomplete, with false positives and negatives, and represents an incredible cost (in both time and money).

Registrars cannot justify, nor should ICANN expect, dedicating such significant manual efforts for compliance with a temporary policy requirement. Additionally, it is well known in ICANN (org and community) that even if the gaining FOA is sent, it does little to prevent unauthorized transfers (which almost always involves hijacking of registrar accounts or email accounts).

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

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

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

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

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

The only way around this would be for each registrar to execute with every other registrar some sort of agreement/document where they jointly claim/attest they are not selling info to one another under this method. That itself would be impossible to accomplish without ICANN spearheading the effort. As bizarre as this requirement

sounds, it is the accepted understanding of the CCPA by privacy experts and there is no change to the current CCPA language in sight. Also, other states are following suit with similar proposals (including Hawaii, Maryland and Massachusetts), which will likely present further barriers to sending gaining FOAs.

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

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

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