Draft letter to the ICANN Board
regarding the WHOIS Review Team Final Report
27 August 2012

Dear all:

I hereby forward to the full Council the latest draft letter to the ICANN Board regarding the WHOIS Review Team Final Report, wherein we attempt to flag potential ambiguous recommendations and assist the Board in determining which Review Team recommendations are matters of GNSO policy development versus which
recommendations are matters of staff implementation or negotiation with contracted parties.

Achieving full consensus of the Council may prove difficult given the divergence of viewpoints expressed in our small group, which we hope to have accurately encapsulated in our draft below. The proposed text below was supported by myself and Wolf-Ulrich, and we have also included comments from Jeff and Wendy in red font within brackets.

I would like to thank Jeff, Wendy, Wolf-Ulrich and Thomas for their input and assistance in this matter, and I look forward to working with everyone toward finalizing a letter for submission to the ICANN Board by the August 31, 2012 deadline.

Thank you,

Brian

Brian J. Winterfeldt
Partner
bwinterfeldt@xxxxxxxxxxx<mailto:bwinterfeldt@xxxxxxxxxxx>
Steptoe

Steptoe & Johnson LLP - DC
1330 Connecticut Avenue, NW
Washington, DC 20036
www.steptoe.com<http://www.steptoe.com/>

TO: ICANN Board
FROM: Chair of the GNSO Council
VIA: GNSO Liaison to the ICANN Board

I hereby forward to you the written public input of the GNSO Council on the WHOIS Review Team Final Report pursuant to your resolution (2012.06.23.26) from the meeting in Prague, Czech Republic, requesting that the GNSO provide such input by 31 August 2012.

As you are aware, the WHOIS Review Team's scope, guided by the Affirmation of Commitments, was to review the extent to which ICANN's WHOIS policy and its implementation are effective, meet legitimate needs of law enforcement and promote consumer trust. To this end, the Final Report, which issued on 11 May 2012, contained sixteen recommendations.

During its meeting on 20 July 2012, the GNSO Council considered the substance of the WHOIS Review Team Final Report, as well as how to respond to the Board's request. The GNSO Council recognizes, given the hard work and public input already incorporated into the Final Report, that there is a reasonable expectation by the Review Team for its recommendations be implemented as soon as practicable. [[The NCSG disagrees. Please cut this sentence. The Review Team can make recommendations but it can't expect implementation simply by dint of its hard work. The NCSG has previously stated that any implementation requires GNSO policy development. "The NCSG believes all recommendations require GNSO Policy Development."]] However, the GNSO Council also recognizes that a small number of the Review Team's recommendations may require future GNSO policy development. Accordingly, the written input this letter is intended to clarify potential ambiguity and assist the Board in determining which Review Team recommendations are matters of GNSO policy development versus
which recommendations are matters of staff implementation or negotiation with contracted parties.

Recommendation Two - Single WHOIS Policy. The Review Team's second recommendation calls for the Board to oversee creation of a single WHOIS policy document, and reference it in agreements with Contracted Parties, as well as clearly document the current gTLD WHOIS policy as set out in the gTLD Registry & Registrar contracts & Consensus Policies and Procedure.

The GNSO Council notes that this recommendation carefully avoids the phrase "policy development." It asks for documentation of the existing policy set forth in the contracts and consensus policies. It does not ask for the GNSO council to review or develop any policies. Accordingly, the GNSO Council believes that this is not a recommendation for further GNSO policy development.

[[The RySG agrees that if this recommendation means creation of a single policy document that just summarizes all current relevant WHOIS policies, then no PDP is required. However, if this recommendation requires the creation of a new single policy, then a PDP should be required.]]

Recommendation Three - Outreach. The Review Team's third recommendation calls for ICANN to ensure that WHOIS policy issues are accompanied by cross-community outreach, including outreach to the communities outside of ICANN with a specific interest in the issues, and an ongoing program for consumer awareness.

The GNSO Council views this recommendation as a modifier, or supplement, to a number of other recommendations in the Final Report. Accordingly, the GNSO Council believes that this is not a recommendation necessitating GNSO policy

development.

6. [[Recommendation Six - Data Accuracy. The sixth recommendation of the Review Team instructs that ICANN should take appropriate measures to reduce the number of WHOIS registrations that fall into the accuracy groups "Substantial Failure" and "Full Failure" (as defined by the NORC Data Accuracy Study) by 50% within 12 months and 50% again over the following 12 months.

The RySG believes that the recommendation to undertake "appropriate measures" to reduce the number of WHOIS registrations that fall into these accuracy groups may require a PDP depending on what these measures are.]]

Recommendation Ten - Data Access – Privacy and Proxy Services. The Review Team's tenth recommendation essentially calls for ICANN to initiate processes to regulate and oversee privacy and proxy service providers; processes should be developed in consultation with all interested stakeholders and note relevant GNSO studies; a possible approach to achieving this would be to establish an accreditation system for all proxy/privacy service providers, and consider the merits (if any) of establishing or maintaining a distinction between privacy and proxy services; goal is to provide clear, consistent and enforceable requirements for the operation of these services consistent with national laws, and to strike an appropriate balance between stakeholders with competing but legitimate interests—including privacy, data protection, law enforcement, the industry around law enforcement and the human rights community.

The GNSO Council acknowledges that this recommendation can be read to describe a GNSO policy development process. However, in recognition of the contemporaneous negotiation of the RAA, the GNSO Council recommends that—notwithstanding any GNSO policy development process on this recommendation—ICANN retain its authority to unilaterally impose regulation of privacy and proxy services pursuant to the RAA in the event that no consensus policy has been reached in a reasonably time frame, such as twelve months from 31 August 2012.

[[The RySG strongly believes that ICANN can only initiate a process to regulate and oversee privacy and proxy service providers through a PDP process. The RySG believes that the entirety of the Review Team's tenth recommendation does in fact require a PDP without any artificial time constraints imposed.]]

Recommendation Twelve - Internationalized Domain Names. The Review Team's twelfth recommendation calls for ICANN to task a working group within six months of publication of their report, to determine appropriate internationalized domain name registration data requirements and evaluate available solutions; at a minimum, the data requirements should apply to all new gTLDs, and the working group should consider ways to encourage consistency of approach across the gTLD and (on a voluntary basis) ccTLD space; the working group should report within a year.

The GNSO Council acknowledges that the work of the Internationalized Registration Data Working Group “IRD WG” is already underway in regard to this recommendation.

The GNSO Council welcomes comments from the Board concerning this input.

Stéphane Van Gelder
Chair, GNSO Council