

ICANN BOARD PAPER NO. 2015.09.28.2e

TITLE: Registrar Accreditation Agreement – Waiver of Insurance Requirement

PROPOSED ACTION: For Board Approval

EXECUTIVE SUMMARY:

The Registrar Accreditation Agreement requires registrars to maintain Commercial General Liability (“CGL”) insurance with policy limits of at least US \$500,000.¹ ICANN has received feedback that the insurance requirements in the 2013 and 2009 Registrar Accreditation Agreements (RAAs) do not serve their intended purpose of protecting registrants and, in fact, appear to provide no protection to registrants whatsoever. In addition, feedback indicates that the insurance requirements impede entry to the registrar marketplace in developing countries, particularly in Africa and South America.

The Board is being asked to consider waiving the RAA requirement that registrars maintain a Commercial General Liability insurance policy of at least US\$500,000.

Key points supporting this request include:

- Research shows that CGL insurance generally does not extend to the provision of professional services, and so does not further the requirement’s original policy goal of providing registrants with a remedy if they are harmed by a registrar’s wrongful acts. CGL insurance policies generally protect businesses against claims for bodily injury and property damage that occur on their premises, as well as for advertising and personal injury liability in some cases.

¹ The 2009 and 2013 RAA CGL insurance requirements are based on language in ICANN’s Statement of Registrar Accreditation Policy (“Accreditation Policy”). The Accreditation Policy requires applicants for registrar accreditation to obtain “commercial general liability insurance . . . in an amount sufficient, given the registration volume reasonably projected by applicant, to provide domain-name holders reasonable compensation for losses caused by the applicant's wrongful covered acts. A policy limit in the amount of US\$500,000 or more will be deemed sufficient, although a lesser limit will be accepted upon a showing that it provides for reasonable compensation in the circumstances.” The ICANN Board adopted the Accreditation Policy in March, 1999.

- Public comments provided no evidence that a registrant harmed by a registrar's wrongful acts has ever used the CGL insurance requirement as a means to remedy the harm.
- Public comments demonstrate that CGL insurance is difficult, impossible, or unduly expensive to obtain in many regions, particularly in Africa, South America, and parts of Asia.
- The CGL requirement in the RAA is based on language in ICANN's Statement of Registrar Accreditation Policy (the "Accreditation Policy"). Therefore, the Policy Development Process would be an appropriate avenue for the community to replace the existing insurance requirement with a more meaningful requirement. Imposing a new insurance requirement could have significant impacts on many stakeholders, so imposition of a replacement insurance requirement might be best left to the consensus building process.
- The Accreditation Policy allows staff to reduce the amount of CGL coverage a registrar must carry, but the RAA itself explicitly requires liability limits of \$500,000. Thus, a formal waiver of the RAA's insurance provision would be required if ICANN were to effectively reduce the requirement to zero. The Accreditation Policy does not empower staff to require an alternative form of insurance if a waiver is issued, however.

STAFF RECOMMENDATION:

Staff recommends that the Board approve a waiver of the RAA's CGL insurance requirement in the 2013 RAA and 2009 RAA. Staff further recommends that the Board formally notify the GNSO Council of this development. The Board may wish to request the GNSO to consider undertaking a review of the insurance requirement in the Statement of Registrar Accreditation Policy.

Any changes to this insurance requirement to better deliver on its intended policy goals, while not disadvantaging registrars from developing countries, might most appropriately be referred to the GNSO for policy development. Approval by the Board of a waiver of the insurance requirement would further ICANN's efforts to promote

registrar competition in a global environment and give the GNSO the opportunity to consider whether a replacement insurance requirement would be appropriate. Based on all of the information received to date, it is not believed that the approval of a waiver by the Board would have any negative impact on registrants or other stakeholders.

PROPOSED RESOLUTION:

Whereas, ICANN’s Statement of Registrar Accreditation Policy (“Accreditation Policy”), adopted in 1999, provides that registrars must have and maintain commercial general liability (“CGL”) insurance policies with limits of at least US\$500,000, or a lesser amount if the registrar can demonstrate that a lower limit would still provide for reasonable compensation in the event of a covered loss;

Whereas, Registrar Accreditation Agreements require that registrars maintain coverage at the US\$500,000 level (without reference to the Accreditation Policy’s potentially lower limits);

Whereas, ICANN received feedback that the RAA’s CGL insurance requirements do not further the Statement of Registrar Accreditation Policy’s intent for the CGL insurance requirement of providing registrants with a remedy in the event of a registrar’s wrongful covered acts and poses an obstacle for the development of the registrar market in developing countries;

Whereas, ICANN solicited two rounds of public comments on this topic in [May 2014](#) and [January 2015](#).

Resolved (2015.09.28.xx), the CGL insurance requirement in the 2009 and 2013 RAAs is waived, and the President and CEO, or his designee(s), is directed to take the necessary steps to implement this resolution.

Resolved (2015.09.28.xx), the GNSO is requested to consider whether policy work on replacement insurance requirements should be undertaken in light of the Statement of Registrar Accreditation Policy.

PROPOSED RATIONALE:

Why the Board is addressing the issue now?

The 2009 and 2013 Registrar Accreditation Agreements require registrars to obtain Commercial General Liability insurance with a policy limit of at least US\$500,000. This requirement is based on language in ICANN's Statement of Registrar Accreditation Policy, which states that registrars must have and maintain commercial general liability (CGL) insurance policies with limits of at least US\$500,000, or a lesser amount if the registrar can demonstrate that a lower limit would still provide for reasonable compensation in the event of a covered loss. The RAA requirement does not incorporate the Statement of Accreditation Policy's flexibility for lower policy limits.

CGL insurance policies generally protect businesses against liability claims for bodily injury and property damage that occur on their premises, as well as for advertising and personal injury liability in some cases. However, most CGL policies would exclude coverage for errors and omissions by the registrar. In other words, domain name holders generally would not be able to receive compensation from an insurance company (under a CGL policy) for negligent acts by the registrar, such as accidentally deleting or failing to renew a registration, or allowing a domain name to be hijacked.

This insurance requirement poses both financial and practical challenges for some entities that seek to become an ICANN-accredited registrar. Comments from the community suggest that this requirement disproportionately disadvantages registrars and prospective registrars in places where this type of insurance is unduly expensive and/or nonexistent.

Thus, the Board is taking action at this time to approve a waiver of the existing CGL insurance requirement in the 2009 and 2013 RAAs because Commercial General Liability insurance requirements do not seem to further their intended policy goals and pose an undue burden to prospective registrars. Despite considerable public consultation, there is no evidence that the CGL requirement has provided any benefit to registrants.

Which stakeholders or others were consulted?

ICANN has received feedback from prospective registrars that the required insurance in their region is difficult or impossible to obtain. ICANN conducted a workshop discussing this and other topics related to underserved regions at the Singapore ICANN meeting in 2014. ICANN has consulted with an outside insurance consultant, as well as many current and prospective registrars. ICANN solicited two rounds of public comments on this topic in [May 2014](#) and [January 2015](#). As part of the Board's action, the Board is encouraging the GNSO to examine this issue.

What concerns or issues were raised by the community?

Community members have reported to ICANN that the existing insurance requirement can be difficult or impossible to meet in many jurisdictions, particularly in jurisdictions outside North America and Europe. Some people commented that CGL insurance is not available at all in some countries and, although available in other countries, the \$500,000 limit might be excessive (and therefore commercially infeasible), relative to market conditions, the cost of living, and the risks of doing business in the respective region. In addition, some commenters questioned whether the requirement remains necessary given ICANN's institutional improvements in other areas, such as compliance enforcement and data escrow. Some community members have suggested ICANN might provide new and existing registrars with a list of insurers who are known to serve existing registrar businesses so that registrars can secure the insurance required to gain ICANN accreditation.

Other community members, however, have cautioned that registrants could be left unprotected if the CGL requirement is waived.

What materials did the Board consider when making this decision?

In reaching this decision, the Board considered two reports of public comments on this issue, published on [2 September 2014](#) and [3 April 2015](#) and Board reference materials. The Board also considered the [Statement of Registrar Accreditation Policy](#), as well as the 2009 and 2013 Registrar Accreditation Agreements.

What factors did the Board find to be significant when making this decision?

The existing insurance requirement does not serve its originally intended purpose of protecting registrants from wrongful acts by registrars. Furthermore, the requirement is inhibiting competition in underserved regions of the world. Because the original insurance requirement was a matter of ICANN policy, the GNSO is the appropriate body to decide whether a replacement requirement is appropriate.

What are the fiscal impacts of this decision?

This decision has no fiscal impact on ICANN. Eliminating the requirement could reduce costs to registrars and prospective registrars who elect not to maintain commercial general liability insurance.

What are the impacts of this decision on the community?

Based on all of the information received to date, it appears that there will be no negative impact on registrants, other stakeholders, or the global public interest if the Board approves the waiver of the insurance requirement.

This decision will have a positive impact on prospective and existing registrars, particularly those in regions where CGL insurance is unduly expensive or impossible to obtain. The impact is likely to be primarily financial, but may also encourage additional applications for registrar accreditation from both developed and developing countries.

Approval by the Board of a waiver of the insurance requirement will further ICANN's efforts to promote registrar competition in a global environment and give the GNSO the opportunity to consider whether a replacement insurance requirement would be appropriate.

What are the impacts on the security and stability of the Internet?

Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS.

Signature Block:

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Date Noted: 28 September
2015

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