**PROPOSED LANGUAGE UPDATING SECTION 1.3.3 OF THE WORKING GROUP’S INITIAL REPORT**

As noted in the Initial Report, the Working Group was unable to achieve consensus on the important question of “whether domain names that are actively used for commercial transactions should be prohibited from using P/P services.” In contrast to many other questions on which the WG was able to reach provisional conclusions, the split of views on this question[[1]](#footnote-1) was sufficiently intractable that it was decided to pose three questions to the public.[[2]](#footnote-2)

The first question asked whether “registrants of domain names associated with commercial activities and which are used for online financial transactions [should] be prohibited from using, or continuing to use, P/P services.” Responses to the two remaining questions were contingent on support for a positive response to the first question, i.e., a viewpoint that such registrants should no longer be allowed to use P/P services (“If you agree with this position [the prohibition], do you think it would be useful to adopt a definition of commercial or transactional to define those domains for which p/p service registration should be disallowed? If so, what should the definitions be?”)

A Sub Team of the Working Group analyzed the thousands of comments received that either directly responded to the first question posed, or that appeared to the Sub Team to be highly relevant to it (such as the many comments that endorsed statements that support *“the use of privacy services by all, for all legal purposes, regardless of whether the website is “commercial”).”* Numerically, an overwhelming majority of these comments answered the question posed in the negative and supported no restrictions on the use of P/P services.

Several commenters, representing significant groups of stakeholders, noted that a yes-or-no response to the question posed was difficult because the Working Group did not present an agreed-upon definition of terms such as “commercial activities” or “online financial transactions.” In other words, it is difficult to assume that the many commenters who answered (in effect) that registrations used to engage in “commercial activities” or to carry out “online financial transactions” should continue to be allowed to use P/P services would necessarily have answered the question the same way with regard to all conceivable definitions of these terms. This point is well taken, and perhaps the public sentiment would have been different had an agreed-upon definition been supplied as part of the first question. On the other hand, according to the Sub Team’s analysis of responses to Question 2, in which the public was asked to propose definitions of “commercial” and “transactional,” but only if they agreed with the concept of introducing a prohibition on use of P/P services for such purposes, many such respondents believe that defining commercial and transactional will be difficult at best, and some believe it to be impossible[[3]](#footnote-3).

In fact the question was not posed in the context of an agreed definition of these terms, and the Working Group’s job following the public comment period was to analyze and draw conclusions from the answers provided to the questions asked. This analysis takes place in the context of a status quo in which there are no restrictions on uses to which domain names registered using these services may be put.

Under these circumstances, the Working Group does not believe that the accreditation standards for P/P services should require service providers to deny the use of these services to registrants who wish to use them to engage in commercial activities or online financial transactions. This conclusion seeks to reflect the clear majority of opinions expressed in the comments, but also rests on pragmatic grounds: because it will certainly be difficult (at best) to achieve a consensus definition of critical terms that must be defined in order to incorporate this principle into accreditation standards, the Working Group does not support delaying the adoption and implementation of an accreditation system until such a consensus can be reached.

The Working Group notes that at least some significant current providers of these services have adopted and do enforce similar restrictions on who may use their particular services. The Working Group’s conclusion that such a prohibition should not be incorporated into accreditation standards at this time is not meant to discourage accredited providers from adopting and implementing such policies if they so choose (and if other relevant criteria, such as publication of terms of service and grounds for termination of the service, are fulfilled). The Working Group also notes that at least some registrants engaged in commercial transactions using domain names registered through P/P services are doing so to carry out illegal activities or other abuses that may provide a basis for disclosure or publication under the rest of the accreditation standards, or under terms of service adopted and published by accredited providers. In other words, the Working Group’s conclusion that registrants engaged in commercial or transactional activities should not be considered per se ineligible to use p/p services should have no impact on a particular registrant’s eligibility (or not) to do so on other grounds.

The Working Group also considered the suggestion that during the implementation phase of the accreditation system, priority be given to the development of an illustrative framework mechanism for how complaints that a particular domain name is being used to carry out online financial transactions for commercial purposes should be submitted, processed, evaluated, and acted upon. Concerns that a blanket prohibition against the use of P/P services associated with a domain name used to carry out online financial transactions for commercial purposes would have a chilling effect could be adequately addressed by developing an additional disclosure framework. Requests for further legal analysis of when disclosure is warranted in these situations could find its home here. This could be an appropriate use of implementation resources.

An alternative approach would be for ICANN to review, after the accreditation system had been in operation for a year or two, the factual issues of (1) the extent to which accredited service providers were disclosing or publishing contact details of registrants who were using these registrations to carry out commercial or transactional activities, and the reasons for such actions, and (2) the development of common or convergent practices among accredited service providers, and whether there was potential for adoption of best practices in this sphere. The review could also assess the development of relevant national or international law in this area, and specifically to what extent national laws prohibit or restrict the use of P/P services by registrants engaged in defined commercial or transactional activities.

1. See Annex F of the Initial Report for statements from WG members setting out the contrasting views. See also pp. 48-49 of the initial report for summaries of opposing views. [↑](#footnote-ref-1)
2. Notably, this issue is the only one characterized in the initial report as a “specific topic on which there is currently no consensus within the WG.” Initial report, at 15. [↑](#footnote-ref-2)
3. The Working Group acknowledges that because (as noted below) some services currently impose restrictions on commercial uses of proxy registrations, making the needed definitions and distinctions is apparently possible, but seeks to fairly represent the sentiments of the public comment by including that statement here. [↑](#footnote-ref-3)