# Chapter 4: Implementation of WHOIS policy – ICANN’s Compliance Efforts

## Introduction

When the WHOIS Review Team formulated its scope (see Chapter 2), it committed to review the effectiveness of ICANN in “enforcing its existing policy relating to WHOIS, subject to applicable laws”. This inevitably led to a focus on the activities and effectiveness of ICANN’s Compliance department.

This section sets out what we found. It starts with a description of the Compliance Department and what it does. Then it highlights issues raised in stakeholder feedback. It records the Review Team’s interaction with the Compliance Department, and sets out our findings and recommendations.

This section has been substantially rewritten as a result of feedback from public comment, and ongoing dialogue with ICANN staff, and developments within the Compliance function, since publication of our draft report in December 2011.

## What is the Compliance Department, and what does it do?

ICANN was set up in 1998, and implemented a system of accredited registrars. The primary object of this was to introduce competition into the .com registration market. 14 years later, there are more than 900 accredited registrars – although cross ownership and affiliations mean that there are fewer operational entities – and this represents a significant change in market structure from the late 1990s, when only one registry, Network Solutions, was entitled to make registrations in .com on behalf of customers. Large, successful, registrar businesses have been established, and comprise a variety of business models. In short, ICANN has successfully introduced competition into the gTLD domain name registration market.

It may come as a surprise that, despite having contractual relationships with registries and registrars from its earliest days, it was not until December 2006 that ICANN set up a dedicated Compliance function. By January 2007, there were 2 staff: a Director and a Specialist. By March 2010, the team had expanded to 10 people. It then suffered a series of staff losses, carried vacant positions for extended periods, and was to some extent reliant on temporary staff. This phase lasted until approximately late 2011, when a series of appointments were filled. As at March 2012, there were 12 staff in the Compliance Department[[1]](#footnote-1).

The work of the Compliance Department is described on ICANN’s website, and the Review Team had a detailed presentation on their work at its meeting of January 2011 [see slides at Appendix [ ]. Broadly, the work of the Compliance team can be summarized as:

* Conducting audits (eg compliance with requirements to make WHOIS available, and with the annual WHOIS Data Reminder Policy (WDRP))
* Investigating complaints of non-compliance (eg responses to WHOIS Data Problem Reporting Service (WDPRS) notifications)
* Escalating cases where informal efforts to bring parties into compliance have failed.

## How effective is ICANN’s contractual compliance effort, relating to WHOIS?

#### Feedback from stakeholders

Part III of this report (Chapter 6: Understanding the Needs of Stakeholders) sets out stakeholder feedback on the perceived effectiveness of ICANN’s WHOIS compliance function (see pages [ ] ff].

In summary, the effectiveness of ICANN’s compliance effort in ensuring access to accurate and complete WHOIS data was questioned in numerous submissions, both by law enforcement, domain industry representatives, and representatives from supporting organisations including the Intellectual Property Constituency, Commercial Stakeholder Group, and from ICANN’s compliance team members.

Stakeholder feedback identified the following gaps:

* Poor performance on achieving an acceptable level of data accuracy.
* The need for published key performance measures (together with achievement against these objectives), to allow the community to assess the effectiveness of the compliance effort going forward.

#### The Review Team’s interaction with the Compliance Department, and analysis of effectiveness

In July 2011 the WHOIS Review Team reviewed the content of the Compliance Team’s web pages, and the effectiveness of its work in detail, as set out in our letter to the Senior Director of Compliance, of [ ] at Appendix [ ]. The letter catalogues the WHOIS Review Team’s interaction with the Compliance Department through 2011.

The draft report made detailed findings on compliance, which are summarized as[[2]](#footnote-2):

*Strengths:*

* The Compliance Team’s operating principles are good and need to be more widely communicated.
* There are examples of good compliance interventions, eg 2010-11 Registrar WHOIS Data Access Audit. The scope of the intervention was limited, well understood, and there was evidence that the Compliance Team worked with registrars to help them become compliant, only using termination in one instances where collaborative efforts had failed.

*Areas for improvement – compliance gaps*

* Communication:
	+ Locating information about Compliance on ICANN’s website was difficult. Pages, when located, were laden with jargon and assume prior knowledge of the ICANN environment.
	+ Reporting of compliance activities was far from timely (eg “monthly” newsletters and “semi-annual” reports were not published at all in 2011).
	+ Key documents (eg NORC 2010 Data Accuracy Study) were missing or only possible to find with specific URLS.
	+ Acronyms for two flagship interventions (WDRP and WDPRS) are confusingly similar, and create an unnecessary communication challenge for ICANN.
	+ The number of WHOIS Data Problem Reports is unacceptably low, indicating a low level of awareness of the service.
* Resources
	+ The Compliance team has inadequate workflow systems or automation to enable them to keep on top of existing workload.
	+ The team has struggled to fill operational roles for extended periods.
* Data Accuracy
	+ There has been no follow up from ICANN Compliance on the NORC WHOIS Data Accuracy Study 2009/10. Whilst it is understood that the study was undertaken on the GNSO’s initiative, it is clearly relevant to the work of Compliance (as indicated by the Compliance Team’s inclusion of the study in the presentation of their work to the WHOIS Review Team, January 2011).
	+ The WHOIS Data Reminder Policy is ineffective in achieving its goal of improving accuracy of data. Despite considerable efforts by both ICANN Compliance and Registrars in sending out annual notices, and monitoring this, the lack of follow-up renders the entire action ineffective. Simply put, no one knows what impact the policy has in improving the accuracy of WHOIS data

In our draft report we highlighted as a major challenge the lack of clarity as to who is personally responsible within the organisation for WHOIS in all its aspects: service, policy, compliance. An example of this is that it was only in March 2012, approximately 18 months since the formation of the WHOIS Review Team, that we learned that the Compliance Department was under the oversight of John Jeffrey, ICANN’s General Counsel. Despite this, we had no interaction with Mr Jeffrey throughout our program, apart from advice on managing conflicts of interest in November 2010, and a call with staff in which he participated on 22 February 2012.

Our draft report concluded with *Key observations for the future:*

* *“The Compliance Team has developed a set of operating principles which, in the WHOIS Review Team’s opinion, provide a useful framework for organizing, and communicating the Compliance Team’s actions.*
* *“The Compliance Team has to date been inadequately resourced. Open positions have remained vacant for long periods. Recent strengthening of the Team is welcome. This needs to be followed by the publication of plans for measurable, targeted improvements and reporting of progress against those targets.*
* *“Given that demand will always exceed available resources, the compliance effort must be strategically focused on achieving measurable, stated objectives and should be proactive rather than reactive.”*

#### Positive developments since July 2011

Since we reviewed the Compliance Team’s work in July 2011, there have been a number of positive developments.

A Senior Director of Compliance, Maguy Serad, was appointed in April 2011. The WHOIS Review Team met with Ms Serad and members of her team at the Dakar ICANN meeting, October 2011. We had a verbal update on progress (eg work on reviewing the website). The meeting was positive, but members of the WHOIS Review Team were concerned that no progress or plans seemed to have been made to address the findings of the NORC WHOIS Data Accuracy Study 2009/10.

The WHOIS Review Team welcomes the recent re-working of the Compliance pages on the ICANN website, particularly the statement of vision, mission and approach, and the Program Overview. These statements are clear, concise, and place the Compliance team’s work in context. It is now easier to locate resources on the website, and the publication of FAQs is also helpful.

Recently, there is evidence that staff have been recruited into the team, and that some longstanding vacant positions have been filled.

These are positive steps, and the WHOIS Review Team looks forward to the continuation of this forward momentum.

#### Issues arising from the public comment

In general, public comment on the draft recommendations was positive:

**WHOIS Data Reminder policy (draft recommendation 2)**

Stakeholders generally confirmed that the WHOIS Data reminder policy was ineffective[[3]](#footnote-3). Others noted that a Policy Development Process would be necessary to change the WHOIS Data Reminder Policy, a consensus policy, and that results of such process are not determined by the ICANN Board[[4]](#footnote-4). ICANN staff felt that the Review Team may have misunderstood the WHOIS Data Reminder Policy requirements, and noted that *“ICANN currently has no contractual authority to require registrars to track changes or provide ICANN with the necessary data for the recommended metrics”.*

**Strategic priority and compliance (draft recommendation 3)**

Stakeholders generally supported the draft recommendation that WHOIS be made a strategic priority, that sufficient resources be allocated to the Compliance team, and that a senior member of the executive be responsible for overseeing compliance[[5]](#footnote-5).

Others noted that WHOIS is only one of many issues: “*many items on ICANN’s policy agenda may be considered more worthy of the community’s time and attention*” and “*no evidence is offered in this report to support prioritizing WHOIS over other issues of importance.”[[6]](#footnote-6)* One stakeholder group[[7]](#footnote-7) questioned our use of the term “regulator” to describe ICANN’s role.

ICANN staff agreed “*that WHOIS is a strategic priority and designating a member responsible for overseeing WHOIS is feasible*…*WHOIS remains a strategic priority that has been allocated increased resources*”. Staff comments told us that ICANN’s General Counsel had assumed responsibility for the Compliance function in 2010.

Some commentators questioned whether the current organisational structure, which located Compliance within the organisation, was appropriate. One called for the appointment of an independent “Compliance Czar”[[8]](#footnote-8). This theme was also developed in the Public Forum during the Costa Rica ICANN meeting (March 2012, where two commentators questioned the appropriateness of having the General Counsel responsible for Compliance[[9]](#footnote-9):

*“I think it’s time to take a very close look at moving compliance out of the legal department and have it report independently to the Board. Because the fact of the matter is that the General Counsel who heads the legal department has an ethical and fiduciary obligation to the corporation to minimize risk. And as a fundamental matter, that is going to be antithetical in many cases to an aggressive enforcement of contracts. [Applause]”[[10]](#footnote-10)*

Our assessment of these comments was that broadly, there was support for WHOIS as a strategic priority, albeit balanced with other issues. There were concerns expressed as to whether Compliance was correctly positioned within the organisation. The Review Team was also concerned to note that ICANN Staff comments seemed to assume that the organisation was already fulfilling the draft recommendation, which was not our view.

The Review Team also noted stakeholder comments which called for more transparency around Compliance, for example in the publication of metrics[[11]](#footnote-11). Throughout our review period, although we were provided by ICANN staff with many, many documents, and detailed presentations, we found it difficult to obtain basic information about the Compliance function. For example:

* **What are the staff figures through time?** We received contradictory answers to these questions:
	+ In January 2011, we were told that staff numbers in Compliance had been 10 in 2010, and had reduced to 6 by 2011 (see Appendix [ ])
	+ On 14 March 2012, we were informed that staff numbers had steadily increased over time, and that there were 4 staff in 2010, and 8 in 2011 (see Appendix [ ]). We understand that these figures may have formed the basis of the CEO’s statements to the Federal Trade Commission in his letter of 10 January 2012[[12]](#footnote-12) and comments in meetings with the GAC during the Costa Rica meeting.
	+ Having queried this, we received a corrected report (20 April 2012), which correlated more closely with the picture given in January 2011, but with higher numbers for 2011. This document does, however, confirm that some positions remained vacant for several months in 2011 (eg Senior Director, Manager, Manager – Singapore).
* **What is the budget vs actual spend on compliance activities over time?** We asked for this information on 21 March 2012. On 20 April, we received the following:

*The figures below are for the Compliance activities (i.e. Function) across the entire ICANN organization, which includes the Compliance department, as well as other areas of the organization that contribute to the Compliance activities.*

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While the budget figures above indicate that actual spend in 2011 decreased by $400,000 from the previous period, the Review Team finds the financial information unsatisfactory for a number of reasons. The data is presented in too summary a form to allow for meaningful analysis, and our requests for clarification of the proportion of these figures which represent contributions from other departments, and how this was calculated were (as at 27 April 2012) not readily available, and remain unanswered. We find this extraordinary, as the summary data produced must have been derived from some underlying figures.

Why does this matter?

As part of ICANN’s public purpose, it is required to adhere to high standards of accountability and transparency. This basic information on a core function ought to be in the public domain, so that the community is able to hold the organisation properly to account. Organisational charts, showing lines of reporting and accountability internally, performance measures, and metrics on performance against targets should also be readily available, along with unambiguous financial information.

## Findings

Despite substantial efforts made, and dedicated staff, the Compliance function has suffered from lack of resources, and has struggled to maintain organisational priority.

Our concerns over whether the structure, and leadership is helping. Evidence of recent investment is welcome, but there remains much to do.

We find that basic information, for example on staffing, budget vs actual spend, and key performance metrics, remain difficult to obtain.

We have an open mind about whether the Compliance function should be located within the organisation or not. There is much to be said for structural independence. However, we note that the costs and upheaval associated with such a restructure (both human and financial) would be great. We believe that it should be possible to effect improvements through clearer lines of accountability particularly for Compliance’s leadership, and much greater transparency.

Finally, we note the sensitivity from some sections of the community about use of the term “regulator” to describe ICANN’s role within the industry. We have tried to avoid the term in our final recommendations. However, we do not fully understand the sensitivity: ICANN is part of a self-regulatory ecosystem. It accredits some actors (registries and registrars) and requires certain behaviours of them. It has an operational function to enforce contractual requirements. These activities can be properly described as regulation in the sense of private sector, self-regulation. If they were not done effectively, they would need to be done by someone – or something – else.

## Recommendations:

ICANN should act to ensure that its compliance function is managed in accordance with best practice principles, including that:

1.       There should be full transparency regarding the resourcing and structure of its compliance function. To help achieve this ICANN should, at a minimum, publish annual reports that detail the following relevant to ICANN’s compliance activities: staffing levels; budgeted funds; actual expenditure; performance against published targets; and organizational structure (including the full lines of reporting and accountability).

 2.      There should be clear and appropriate lines of reporting and accountability, to allow compliance activities to be pursued pro-actively and independently of other interests. To help achieve this, ICANN should appoint a senior executive whose sole responsibility would be to oversee and manage ICANN’s compliance function. This senior executive should report directly and solely to a sub-committee of the ICANN Board. This sub-committee should include Board members with a range of relevant skills, and should include the CEO. The sub-committee should not include any representatives from the regulated industry, or any other Board members who could have conflicts of interest in this area.

1. See Appendix [ ] ICANN staff’s document “Contractual Compliance Staffing v4” 20 April 2012. [↑](#footnote-ref-1)
2. Some of the findings relating to Compliance in the draft report more properly relate to other areas (eg the need to develop a shared understanding of the purpose of WHOIS, and what is meant by “data accuracy”) and are omitted here. [↑](#footnote-ref-2)
3. Chinese Internet Network Information Centre (CNNIC); ICANN’s Business Constituency (BC); UK Government; GNSO Registrar Stakeholder Group (RrSG). US Government appears to support, and recommends that the Compliance Function develop metrics to more effectively track Registrar compliance with all of the RAA provisions related to WHOIS accuracy and accessibility. [↑](#footnote-ref-3)
4. gTLD Registries Stakeholder Group (RySG). [↑](#footnote-ref-4)
5. Intellectual Property Constituency (IPC); Canadian Internet Registration Authority (CIRA); BC; UK Government; RrSG; Internet Service Provider and Connectivity Providers Constituency (ISPCP); US Government. [↑](#footnote-ref-5)
6. Non-Commercial Users Stakeholder Group (NCSG). [↑](#footnote-ref-6)
7. RySG [↑](#footnote-ref-7)
8. UK government [↑](#footnote-ref-8)
9. Kieren McCarthy, Dot-Nxt, Inc; Kristina Rosette, Vice-President IPC [↑](#footnote-ref-9)
10. Kristina Rosette, ICANN Public Forum, <http://costarica43.icann.org/node/29713> p87. [↑](#footnote-ref-10)
11. US Government; UK Government; BC; Internet Society of China (“ICANN should build a third-party audit mechanism and submit audit results annually”). [↑](#footnote-ref-11)
12. Rod Beckstrom to Jon Leibowitz, 10 January 2012 <http://www.icann.org/en/news/correspondence/beckstrom-to-leibowitz-10jan12-en> Footnote 9 : “Today’s Contractual Compliance team has four additional members than it did a year ago, nearly doubling in size”. While this may be an accurate statement, it does not acknowledge that staff numbers in 2011 (a “year ago”) were around half that of the previous year 2010.” [↑](#footnote-ref-12)