# WHOIS and Data Protection Policy (incl. Accuracy)

Laureen Kapin (US Federal Trade Commission)
Gabriel Andrews (US Federal Bureau of Investigation)
Chris Lewis-Evans (UK National Crime Agency)
Kenneth Merrill (US Department of Commerce, NTIA)

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ICANN | GAC
Governmental Advisory Committee

# Agenda

1. **Background on WHOIS and Data Protection**

2. **Draft gTLD Registration Data Policy** (EPDP Phase 1 Implementation)

3. **Simplified WHOIS Disclosure System** (ex SSAD light, EPDP Phase 2 Rec.)

4. **Registration Data Accuracy**

5. **Proposed Contractual Amendments** (RDAP + BRDA)

# WHOIS and Data Protection: Importance to the GAC

**Why this is important for the GAC**

Per the GAC Principles Regarding gTLD WHOIS Services (28 March 2007), recalled in the GAC Abu Dhabi Communiqué (1 Nov. 2017), the GAC noted they "*continue to reflect the important public policy issues associated with WHOIS services*" including that "*WHOIS data [...] is used for a number of legitimate activities, including:*

1. *Assisting law enforcement authorities in **investigations and in enforcing national and international laws**, assisting in **combating against abusive use** of internet communication technologies;*

2. *Assisting businesses, other organizations, and users in **combating fraud, complying with relevant laws, and safeguarding the interests of the public**;*

3. *Combatting **infringement and misuse of intellectual property**; and*

4. ***Contributing to user confidence in the Internet** as a reliable and efficient means of information and communication by helping users identify persons or entities responsible for content and services online."*

**And still relevant when considering compliance with Data Protection Law**

The GAC advised the ICANN Board "*it should use its best efforts to create a system that continues to facilitate the legitimate activities recognized in the 2007 Principles, including by:*
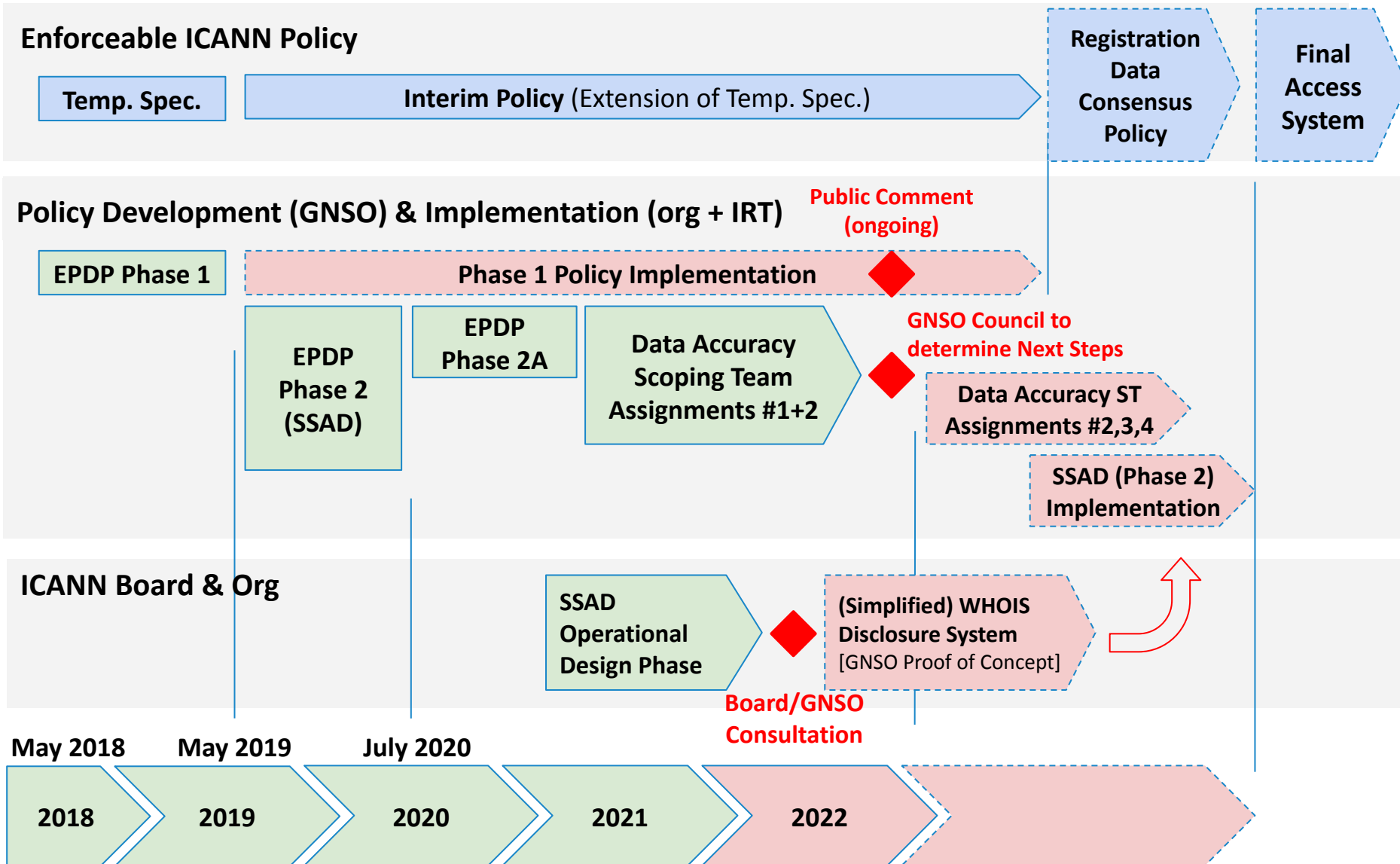
1. ***Keeping WHOIS quickly accessible for security and stability purposes**, for consumer protection and law enforcement investigations, and for crime prevention efforts, through user-friendly and easy access to comprehensive information to facilitate timely action.*

2. ***Keeping WHOIS quickly accessible to the public** (including businesses and other organizations) for legitimate purposes, including to combat fraud and deceptive conduct, to combat infringement and misuse of intellectual property, and to engage in due diligence for online transactions and communications"*

# WHOIS and Data Protection: Background

**Efforts to Define a New Policy Framework for Registration Data Services in Compliance with Data Protection Law**

- Expedited Policy Development Process (EPDP) Launched to replace the Temporary Specification (17 May 2018) now incorporated as the Interim gTLD Registration Data Policy (20 May 2019) which the GAC observed created *"potentially thousands of distinct policies depending upon the registrar involved"* in the Barcelona Communiqué (25 Oct. 2018) and letter to the ICANN Board (24 April 2019)

- **EPDP Phase 1 Policy Development** (Aug. 2018 - Feb. 2019) **and Implementation** (May 2019 - ongoing)
  - Foundation of new policy framework (purposes, data elements, etc.). Mostly adopted by ICANN Board (15 May 2019)
  - Implementation timeline delivered following GAC Advice in Montreal, and Follow-up during ICANN71, ICANN72
  - ICANN Board listed the remaining milestones in Scorecard on ICANN72 GAC Advice (16 Jan. 2022)
  - **Ongoing** Public Comment on the proposed Registration Data Consensus Policy for gTLDs (**closing 31 October 2022**)

- **EPDP Phase 2 SSAD Policy Dev.** (May 2019 - Jul. 2020), **Operational Design Phase** (Mar. 2021 - Jan. 2022), **Proof of concept**
  - EPDP Phase 2 Final Report published on 30 July 2020. GAC submitted a Minority Statement (24 Aug. 2020)
  - GAC Advice in the ICANN70 Communiqué (25 Mar. 2021) and response to Board Clarification Questions (6 Oct. 2021)
  - ICANN Board directed ICANN to conduct an Operational Assessment of the GNSO Recommendations (25 Mar. 2021)
  - ICANN org delivered its Operational Design Assessment (25 Jan. 2022) now subject to Board/GNSO consultation.
  - GNSO Council requested (27 Apr. 2022) the ICANN Board pauses consideration of the SSAD Policy Recommendations to allow work on a proof of concept. ICANN Board confirmed (9 Jun. 2022) its decision to pause consideration of the recommendations.
  - **Ongoing** community consideration of ICANN org's proposed simplified WHOIS Disclosure System Design (13 Sep. 2022)

- **EPDP Phase 2A Policy Development** (Dec. 2020 - Sep. 2021) **and Implementation** (Mar. 2022 - ongoing)
  - Focus on treatment of data from legal (vs. natural) entities and pseudonymized emails: Final Report (3 Sep. 2020)
  - GAC submitted a Minority Statement (10 Sep. 2021) and requested its consideration by the Board (9 Feb. 2022)
  - ICANN Board adopted the recommendations (10 Mar. 2022) and directed ICANN to implement.

- **Registration Data Accuracy Scoping Team for potential GNSO Policy Development** (Oct. 2021 - ongoing)
  - Accurate registration data is important to the prevention and mitigation of DNS abuse (ICANN72 Communiqué)
  - The GAC stressed the importance of delivering on all four tasks in a timely and effective manner.
  - **Ongoing** GNSO Council consideration of preliminary recommendations (5 Sep. 2022).

# WHOIS and Data Protection: Timeline to New Framework

**Enforceable ICANN Policy**

Temp. Spec. | Interim Policy (Extension of Temp. Spec.) | Registration Data Consensus Policy | Final Access System

**Policy Development (GNSO) & Implementation (org + IRT)**

Public Comment (ongoing)

EPDP Phase 1 | Phase 1 Policy Implementation

EPDP Phase 2 (SSAD) | EPDP Phase 2A | Data Accuracy Scoping Team Assignments #1+2

GNSO Council to determine Next Steps

Data Accuracy ST Assignments #2,3,4

SSAD (Phase 2) Implementation

**ICANN Board & Org**

SSAD Operational Design Phase

(Simplified) WHOIS Disclosure System [GNSO Proof of Concept]

Board/GNSO Consultation

May 2018 | May 2019 | July 2020

2018 | 2019 | 2020 | 2021 | 2022

Legend: Completed | Ongoing | Uncertain Timeline

# Draft Registration Data Consensus Policy

**Ongoing Public Comment Proceeding**

- **ICANN org seeks input until 31 October 2022** in a [Public Comment proceeding](#) on:
  - [Draft Registration Data Consensus Policy for gTLDs](#), sets out requirements for collection, transfer, and publication of gTLD registration data (result of collaboration between ICANN org and EPDP Phase 1 IRT)
    - *it does not address disclosure (subject of the subsequent EPDP Phase 2)*
  - [Updates to 18 existing policies and procedures](#) that were impacted by the Registration Data Consensus Policy (due to EPDP Phase 1 Recommendation 27)

- **Next Steps**
  - ICANN org and the IRT will consider comments to update and finalize the policy.
  - Current expectation of publication Q1 2023, to become effective in Q4 2024 (540 days transition)

**Preparation of GAC Comments**

- GAC Small Group on WHOIS/GDPR/EPDP actively reviewing the documents and preparing to draft a GAC Comment

- Envisioned timeline for GAC Consultation
  - Draft GAC Comment to be circulated  **3 October 2022**
  - Possible GAC Webinar  3-7 October 2022 (Date to be confirmed)
  - Deadline for review and input  **21 October 2022**
  - ICANN org Deadline for Comments  31 October 2022

# Draft Registration Data Consensus Policy

**Possible Concerns**

- EPDP Phase 1 policy recommendation were **intended to be swiftly followed by EPDP Phase 2 policy recommendations**, with a view to providing an integral set of policy and corresponding access/disclosure system (SSAD).

- **Interactions with** the proposed design for a **simplified WHOIS Disclosure System** needs to be reviewed. ICANN's recent [design paper](#) points to risks on registrar participation in this system once Phase 1 is implemented because Registrars may choose a different  method/format of requests.

- Distribution of data controllership responsibilities are not known, as **Data Processing Agreements are still being negotiated** between ICANN org and the Contracted Parties (Phase 1, Rec. 19)

- Impacts on **Privacy Proxy** Accreditation Services Policy Recommendations (implementation suspended) need to be assessed

- Up to 3 business days for registrars to respond to "**Urgent Requests for Lawful Disclosure**" (Section 10.6) *circumstances that pose an imminent threat to life, serious bodily injury, critical infrastructure, or child exploitation in cases where disclosure of the data is necessary in combatting or addressing this threat*

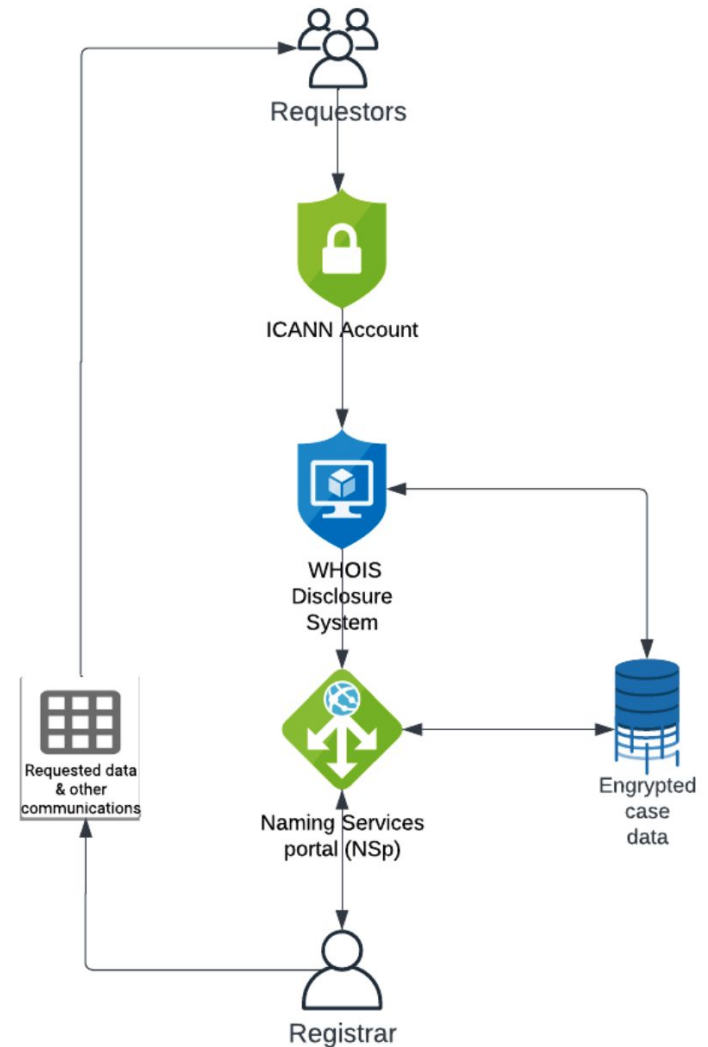# Simplified WHOIS Disclosure System

**Background**

- **EPDP Phase 2 recommended a Standardized System for Access and Disclosure (SSAD)** after several years of deliberations. Significant concerns remained as the GNSO Council recommended it to the ICANN Board.
  - The GAC provided a GAC Minority Statement (24 August 2020) as did many stakeholder groups.
  - The GNSO Council requested (24 Sep. 2020) a consultation with the ICANN Board to discuss "*the financial sustainability of SSAD and some of the concerns expressed within the different minority statements*"".

- ICANN org's Operational Design Assessment of the SSAD recommendations concluded that a **complex set of systems and processes would be required, with a wide range of costs and fees** due to uncertain demand
  - ICANN Board had requested an Operational Design Phase (25 March 2021) to inform its consideration
  - ICANN org's Operational Design Assessment (ODA) was delivered along with concerns and questions by the ICANN Board to the GNSO Council (24 January 2022)
  - The GNSO shared its concerns (27 April 2022) that "*the ODA does not provide enough information to confidently determine the cost / benefit of the SSAD recommendations*" and requested the Board pauses consideration of the recommendations to allow for work to continue on a proof of concept.

- **Proof of Concept**: from SSAD-light to (simplified) WHOIS Disclosure System
  - ICANN org suggested a simplified SSAD Light Design in a Concept Paper (6 April 2022) which led to discussions in a GNSO Small Group around and during ICANN74
  - ICANN Board confirmed a pause in considering SSAD (9 June 2022) while the proof of concept is explored
  - ICANN org just published a Design Document (13 Sep. 2022) for a simplified WHOIS Disclosure System

# Simplified WHOIS Disclosure System

**Proposed Design for a Simplified "WHOIS Disclosure System"**

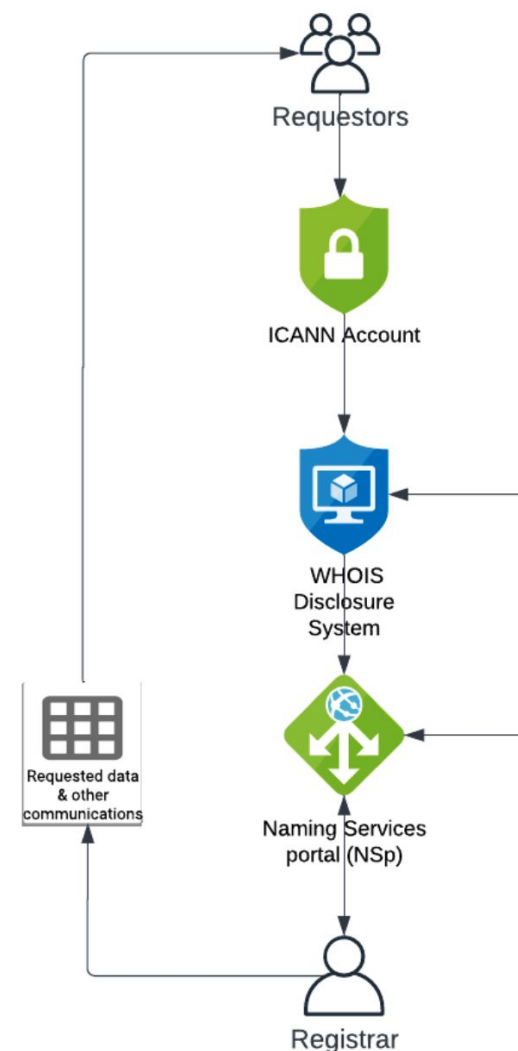**Key Features** per ICANN org Design Document

- Central portal for intake of requests

- No cost to requestors

- No authentication / identify verification of requestors

- Only Registrars to respond to requests for disclosure of data (does not include requests directed at Registries)

- Requests are automatically routed to the appropriate registrar's Naming Services portal (used by ICANN for other services to CPs)

- All requestor/registrar communications (including disclosure of data) to take place outside of the system

- 9-months timeline for delivery thanks to leverage of existing ICANN systems (e.g. ICANN Account, Naming Services Portal)

- Data collected to be analyzed and presented after 1-year of operation

# Simplified WHOIS Disclosure System

**Proposed Design for a Simplified "WHOIS Disclosure System"** (continued)

- **Risks** and related concerns
  - Uncertainty as to adoption by Registrars (participation is voluntary)
  - Lack of awareness may lead to low requestor usage (ICANN org acknowledged promotion of the systems needs to be discussed further)
  - Misconceptions about guaranteed data disclosure may deter usage
  - May not produce actionable data for consideration of SSAD (due to potential lack of use and/or requests made directly to Registrars)
  - System does not yet include functionality for law enforcement to request confidentiality for their requests (per Phase 2, Rec. 12)

- **Feedback** from Community Discussion during ICANN75 and observations
  - The Intellectual Property Constituency (IPC) Chair encouraged ICANN to rename this to a "Request System" given that it does not require any disclosure of data
  - Business Constituency (BC) pointed to a flaw in not logging requests that are directed at non-participating registrars

- **Timing**: There is "a short window of opportunity" for the GNSO small team to provide feedback by October 10th for possibility of implementation in the first quarter 2023 (start of the 9-months estimated delivery time frame)

# Registration Data Accuracy (1/2)

**GAC Positions to Date**

- In the ICANN72 GAC Communiqué, the GAC expressed support for the GNSO Scoping Team's assignments:
    1. enforcement and reporting
    2. measurement of accuracy
    3. effectiveness
    4. impact and improvement

- In the ICANN73 GAC Communiqué, the GAC "*emphasized the importance of holding contracted parties accountable for their compliance with the existing accuracy requirements, as well as the importance of increasing transparency about compliance, in order to inform an evidence-based analysis of these issues*" while noting that "*maintaining accuracy must be considered along with any policy's impact on the privacy needs of all registrants, including those registrants with enhanced privacy needs.*"

- In the ICANN74 GAC Communiqué, the GAC called for the Scoping Team to move toward resolution of Assignment 1, stressing that "*contractual requirements are not limited to accurate but also reliable data,*" while welcoming continued work on the development of a Registrar Survey and "*additional and complimentary work items, such as testing of accuracy controls in a manner that is not dependent on access to personally identifiable data.*"

# Registration Data Accuracy (2/2)

**Interim Report to the GNSO Council**

- On 6 September, the Scoping Team's Interim Report was delivered to the GNSO covering:
  - assignment #1: a "Current Description" of Accuracy
  - assignment #2: Possible ways to measure the current state of accuracy that require or do not require access to registration data.

- The report includes three recommendations in total:

  1. **A Registrar Survey be conducted** on the status of accuracy of their domains under management.

  2. **A Registrar Audit be considered** regarding procedures for determining the accuracy of registration data.

  3. **A pause of the Scoping Team's work on _only_ those proposals that require access to registration data** until such time when it is sufficiently clear whether proposals that require access to registration data are a viable path to assess the current state of accuracy.
     The Scoping Team further recommends the GNSO Council:
     - Request ICANN org to proceed with their outreach to the EDPB as a matter of urgency
     - Request ICANN org to(proceed with a Data Protection Impact Assessment in connection with the scenario(s) in which the processing of data takes place
     - Call out the importance of finalizing the Data Processing Agreement between ICANN and Contracted Parties

# Contractual Amendments for Public Comments

**Overview**

- **RDAP =** Registration Data Access Protocol, a new technical protocol for conducting WHOIS lookups.

- **RDAP Focused Changes** proposed by ICANN org to **Registrar Accreditation Agreement** (redline) and **Base Registry Agreement** (redline)
    - **"Whois"** protocol (Port 43) is being retired, replaced by RDAP
        - 180 days RDAP "ramp up" period
        - ~360 days later, WHOIS "sunset"s
    - **"RDDS" (Registration Data Directory Services)** is introduced into the contracts, encompassing both the older WHOIS Data Directory Service and the newer RDAP Directory Service.

- **Bulk Registration Data Access (BRDA) to ICANN** (Base Registry Agreement, Specification 4.3.1)

    - Modification to allow ICANN to use "Thin" Registration Data to *"analyze the operational stability of the DNS"*

        - This important change is expected to improve ICANN's Domain Abuse Activity Reporting (DAAR)

**Preparation of GAC Comments**

- Envisioned timeline for GAC Consultation
    - Draft GAC Comment to be circulated    **3 October 2022**
    - Possible GAC Webinar    3-7 October 2022 (Date to be confirmed)
    - Deadline for review and input    **14 October 2022**
    - ICANN org Deadline for Comments    24 October 2022