

# **GNSO gTLD Registry Stakeholder Group Statement**

**Issue:** Proposed Final New gTLD Applicant Guidebook

Date: 19 November 2010

## **EXECUTIVE SUMMARY**

The Registry Stakeholders Group (RySG) continues to analyze the proposed final new gTLD Applicant Guidebook (AG) as it submits these comments for consideration. First, and foremost, we support the introduction of new gTLDs and believe the time has come to introduce further competition into the marketplace. The following are comments from the RySG based on the new additions to the AG added by ICANN staff since the publication of DAG v. 4 and reflect what we, as registry operators, believe to be issues that are critical to operational stability and that represent significant business impacts for new gTLD registry operators. We believe that these issues, which are highlighted in the Executive Summary, must be addressed and we hope that ICANN provides the latitude to allow further amendment to the AG even beyond the ICANN Cartagena meeting, if necessary. The RySG stands ready to engage with Staff to ensure resolution of these items with no impact on the projected timetable for the new gTLD round. We believe use of the “TDG” legal group may be the appropriate forum to resolve these issues in a timely fashion.

1. **Consideration of Public Comments by Independent Evaluators.**

- The AG provides no methodology for the Independent Evaluators to weigh public comments in their evaluation of an application. The manner in which Independent Evaluators factor in public comment could materially affect the outcome for an applicant.
- The AG provides no explicit opportunity for applicant to provide rebuttal comments in response to comments that are critical of its application.

**Recommended revision:**

The AG should allow an explicit rebuttal comment opportunity, allowing an applicant to review comments filed “against” its application, for a short period of no more than 5 days. The shortness of the reply comment period is to allow the application in question to remain “on schedule” in the review process.

The AG should define the clear methodology that Independent Evaluators will use to weigh public comments in the evaluation of an application.

## 2. Pricing for Registry Services

- The AG contains notice requirements for price increases (30 days notice for initial registrations; 180 days notice for renewals)
- These rules would create a disparity between new TLD and existing TLD pricing policy and practices
- In any event, ICANN has established that there will be no price caps for new TLD contracts and has decided to allow full vertical integration of registries and registrars, absent market power and a determination by a competition authority in instances where market power may be a factor. As such, ICANN's framework provides no basis for ICANN to dictate registry pricing policies and practices.

### **Recommended revision:**

Remove pricing provisions.

## 3. Registry Code of Conduct

- The Registry Code of Conduct scope of application is unclear. As written, it would possibly apply beyond the operation of the new gTLD string in question.

### **Recommended revision:**

The Registry Code of Conduct should be revised to explicitly apply only to the new gTLD string, not other (existing) TLDs.

## 4. Termination of Registry Services Agreement

- A. The new gTLD Registry Agreement may be terminated by ICANN conviction of an officer or Board member for financial activities with no clear opportunity to cure.

### **Recommended revision:**

The new gTLD Registry Agreement should provide an explicit opportunity to cure this basis for termination.

B. Failure to meet DNS DNSSEC SLAs based on new measurement methodologies

**Recommended revision:**

Revise language to state: "propagation will be initiated within 60 minutes" not "completed within 60 minutes".

5. Continued Registry Operations Instrument

- The AG calls for 3 years operating expenses in either an irrevocable letter of credit or an irrevocable cash escrow deposit
- This requirement could tie up significant amount of funds and could hamper all new gTLD registries

**Proposed revision:**

Allow ICANN Staff to work with RySG to identify workable alternatives that don't unduly burden new entrants but that also provide adequate resources for continuity purposes.

Issue Document URL: <http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>

Regarding the issue noted above, the following comments represent the views of the ICANN GNSO gTLD Registries Stakeholder Group (RySG) as summarized at the end of this document. The RySG positions were arrived at through a combination of RySG email list discussion and RySG meetings (including teleconference meetings).

Editorial notes:

- For simplicity in this document, the New gTLD Applicant Guidebook, Proposed Final Version is abbreviated as AGv5. Other versions of the guidebook will be abbreviated similarly (e.g., AGv4).
- Text shown in quotation marks (“”) is quoted directly from AGv5; **red font** indicates that a quote is new language in AGv5.
- The comments are organized by module and within modules they are provided under the applicable section of AGv5.

They RySG appreciates the improvements that were made to AGv5 in response to public comments and other input regarding AGv4 but believes that some significant problems

were left unresolved and some new issues were introduced in AGv5. The comments that follow address the latter two areas.

## **Module 1, Introduction to the gTLD Application Process**

### 1.1.2.3 Initial Evaluation

- AGv5 establishes a process for batch processing priority but does not explain what that will be. In order to help applicants plan for the possibility of batching, it is imperative that ICANN detail the exact method in which batching might be employed. General descriptions such as "The process will be based on an online ticketing system or other objective criteria" give little information to applicants as to whether a first to file or similar timing method will be employed. If a first to file or similar method is to be used, applicants need to know that well ahead of the application window opening.

### 1.1.2.5 Public Comment

- ICANN Staff has experience with comment periods that the independent evaluators do not. As comments will presumably be reviewed and used by the independent evaluators, will there be guidelines given to them on how to treat comments, especially those that may fall outside the purpose of the comment period? Guidelines for the methodology evaluators' use in assessing and weighing comments in the various stages (i.e. evaluation; objection) should be established.
  - The RySG recommends that experts should not be permitted to consider evidence and arguments outside the confines of the objection proceeding and the papers submitted by the parties thereto; it would be a derogation of fundamental fairness to consider extraneous evidence.
- The initial comment period is 45 days but open to extension. Who makes the determination that a comment period will be extended and what criteria will be used?
- Will applicants be given a chance to respond to comments, especially those filed at the closing of the public comment period? We think it is important for applicants to have a chance to respond to comments so that the evaluators can hear from all sides in the process. Will comments and reply or "rebuttal" comments affect the timing of evaluation (i.e. will the application's "place-in-line" be impacted? If yes, what criteria will be used to establish the new place-in-line?

### 1.1.2.7 Dispute Resolution

- The third paragraph says, "Public comments may also be relevant to one or more objection grounds. (Refer to Module 3, Dispute Resolution Procedures, for the

objection grounds.) The DRSPs will have access to all public comments received, and will have discretion to consider them.”

- The RySG repeats the comment above for 1.1.2.5: “The RySG recommends that experts should not be permitted to consider evidence and arguments outside the confines of the objection proceeding and the papers submitted by the parties thereto; it would be a derogation of fundamental fairness to consider extraneous evidence.”

#### 1.1.2.8 String Contention

- “In the event of a community priority evaluation (see Module 4, String Contention Procedures), ICANN will provide the comments received during the public comment period to the evaluators with instructions to take the relevant information into account in reaching their conclusions.”
  - We are concerned that this language could be interpreted by some that in order to score higher in the community priority evaluation; you need to generate thousands of comments on behalf of your application. Clarifying language should stress that while breadth of support may be a factor, quality of comments trumps waves of form comments. ICANN should define what “relevant” information is.

#### 1.2.3.1 Community-Based Designation – Definitions

3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.

○ “Appropriate security verification procedures” requires clarification, particularly given the status of the HSTLD work group. How will “appropriate” be measured? Using what standards?

## **Module 2, Evaluation Procedures (including Evaluation Criteria)**

#### 2.2.1.1 String Similarity Review

- The RySG submitted the following comments on this section of AGv4: “Strings that may be judged to be similar but in a non-detrimental way should not be eliminated in Initial Evaluation, but in case that does happen, the opportunity for correcting the possible error should be provided. The focus should be on a good user experience; it is very possible that two strings could be similar but not create confusion and instead provide for a better user experience.”
  - There was no response to these comments or any changes in AGv5.
  - The RySG strongly believes that a legalistic application of string similarity requirements that does not take into account the user experience would be a very unfortunate mistake.

## **Module 3, Dispute Resolution Procedures (including fees and rules)**

### 3.2.1 Objection Filing Procedures

- How soon after filing will ICANN publish filed objections? This section only states that it will “regularly update”.
  - The RySG recommends that ICANN publish within 5 calendar days of the filing of an objection.
- Will there be a central repository for all filed objections? This section states only that “ICANN and/or the DSRPs will publish”.
  - The RySG recommends that there be one central repository (i.e., ICANN) for all objections and comments.

### 3.4 Dispute Resolution Principles (Standards)

- What’s the burden of proof for the objector?
  - Clarity should be provided in the guidebook.

### 3.4.2 Legal Rights Objection

- How much weight will be given to different types of trademark rights? For example, how much relative weight will be provided to US trademark registrations, pending US trademark registration applications, common law trademark rights, foreign (outside of the US) trademark registrations and pending applications and arbitrary trademarks versus descriptive trademarks?
  - Clarity should be provided in the guidebook.

## **Module 5, Transition to Delegation (including Base Agreement, URS, Clearinghouse, PDDRP, RDRP)**

### Base Agreement

- Section 2.9 Registrars
  - Regarding this section, the RySG believes that detailed answers to the following questions should be provided before the applicant guidebook is finalized:
    - In 2.9(b) what will trigger referral of competition issues to competition authorities? How will the triggers be developed and by whom?
    - How will existing registries be able to participate in the opportunity for vertical integration?

- What specific conditions and requirements would apply if an existing registry decides to transition to the new form of the agreement?
- How will such conditions and requirements be determined and by whom?
- Section 2.10 Pricing
  - The changes to Section 2.10(a) properly acknowledge that in order for new and existing registries to be successful, Registries must be able to engage in promotional, marketing and discount programs including but not limited to offering refunds, rebates, discounts, marketing and advertising funds, bundling and incentive programs. However, Section 2.10(b) by requiring all that “Registry Operator must have uniform pricing for registration renewals (i.e. the price for each domain registration renewal must be identical to the price of all other domain name registration renewals, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs)...” ICANN would unduly and unnecessarily restrict the ability of registries to engage in seasonal and targeted marketing programs and/or respond to changes in market conditions with the potential effect of actually reducing the ability of registries to compete on price. The proposed language would not provide new registries with the flexibility in pricing and marketing needed to compete in what is likely to become a crowded marketplace. The RySG proposes that Section 2.10(b) be revised so as follows so as to allow Registries to engage in marketing and promotional programs directed at encouraging renewal registrations in the same manner as 2.10(a) would allow such programs for new registrations:

“2.10 (b) With respect to renewal of domain name registrations, Registry Operator shall provide each ICANN accredited registrar that has executed Registry Operator’s registry-registrar agreement advance written notice of any price increase (including as a result of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars) of no less than one hundred eighty (180) calendar days. Notwithstanding the foregoing, with respect to renewal of domain name registrations: (i) Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to a price for which Registry Operator provided notice within that past twelve (12) months, and (ii) Registry Operator need not provide notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Registry Operator must have uniform pricing for registration renewals (i.e., the price for each

domain registration renewal must be identical to the price of all other domain name registration renewals), and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs (but excluding the application of any refunds, rebates, discounts, product tying or other programs of a limited duration that are clearly and conspicuously disclosed to the registrar when offered), unless the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to a higher renewal price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price to such registrant.”

- Why is ICANN dictating pricing policies and practices at all? There are no price caps in the newTLD contracts. ICANN approved 100% vertical integration except where there is “market power.” These provisions should be removed from the AG in their entirety.
- This section adds that the Registry and not ICANN will bear the cost of any audit of compliance with the Vertical Integration Code of Conduct; as written, if a registry is Vertically Integrated, all audit costs are to be borne by the Registry, not just the costs related to compliance with the Code of Conduct.
  - Is this a mistake?
  - Was the intent to make vertically integrated registries pay for just the code of conduct costs of the audit?
    - If so, the wording needs to be fixed.
    - If not, then this becomes a disincentive to vertically integrate; this seems inconsistent with the Board’s support for vertical integration.
- Section 2.11 Audit
  - AGv5 added that the Registry and not ICANN will bear the cost of any audit of compliance with the Vertical Integration Code of Conduct (as written, if a registry is Vertically Integrated, all audit costs are to be borne by the Registry not just the costs related to compliance with the Code of Conduct.
    - As written, it is unclear that if the Registry Operator controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates, whether the Registry Operator must automatically bear all audit costs are just those that relates to Registry Operator’s compliance with Section 2.14 (Code of Conduct). Please clarify that only those cost that relate to compliance with Section 2.14 are to be automatically imposed on the Registry Operator.
- Section 4.3 Termination by ICANN

- In 4.3(d) the termination provisions would allow ICANN to terminate the agreement in the event attachment or similar proceedings are commenced and not dismissed within 30 days, without any of the protections otherwise applying to a termination. This is problematic. First, the commencement of such a proceeding may be irrelevant (*e.g.*, a collection proceeding) to any proper grounds for termination and, indeed, may be completely frivolous. Second, nothing in litigation reliably can be done within 30 days. A court or arbitrator might imply limitations on ICANN’s rights under this provision, but the limitations are not express in the proposed agreement.
  - The termination language should be changed at least as follows: “(ii) attachment, garnishment or similar proceedings are commenced against Registry Operator and represent a substantial threat to continued operation of the registry by the operator, and not dismissed within thirty (60) days of their commencement” ...
- 4.3(e) says, “ICANN may, upon thirty (30) calendar days’ notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7, subject to Registry Operator’s right to challenge such termination as set forth in the applicable procedure.”
  - The RySG appreciates the response to recommendations made by the RySG regarding AGv4 to include the right for a registry to appeal in 4.3(e).
  - But we note the following concern:
    - The current draft of Section 4.3(e) continues the right to terminate arising out of a dispute resolution procedure, without the safeguards included in existing registry agreements or the other termination provisions of the proposed registry agreement. There is no reason for this distinction in the risk to which a registry might be subject based on a good faith dispute. In the current draft, ICANN has added new language that the right to terminate is subject to the registry operator’s right to challenge the termination as set forth in the applicable procedure. This addition does not provide any meaningful protection.
    - The language of this provision should be changed as follows, which will make it consistent with other termination protections: “ICANN may, upon thirty (30) calendar days’ notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7, subject to Registry Operator’s right to challenge such termination as set forth in the applicable procedure, if an arbitrator or court has finally determined that Registry Operator is in fundamental and material breach of such Section 2 of the Specification, and Registry Operator fails to comply with such

determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.”

- 4.3(f) adds the right to terminate if Registry has an officer convicted of a felony or any misdemeanor or related to financial activities, fraud or breach of fiduciary duty “or is the subject of a judicial determination that ICANN deems as the substantive equivalent of any of the foregoing.”
  - These new grounds for termination are ill defined as they do not require knowledge or culpability on behalf of the operator, and do not require that the conduct relate to the registry business.
  - Where is the “cure” provision for this right to terminate?
  - The language of this provision should be revised as follows: “(f) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer that is convicted of a felony or of a misdemeanor related to financial activities, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or (ii) any member of Registry Operator’s board of directors or similar governing body is convicted of a felony or of a misdemeanor related to registry operator’s activities, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty related to those activities.”
- Section 4.4 Termination by Registry
  - In comments on AGv4, the RySG noted that termination of the agreement by a registry for an ICANN breach that is not cured is not a very viable option and would leave various issues unresolved; the RySG also suggested service level agreements be established for ICANN.
    - No changes were made in AGv5 in these regards and no response was provided by ICANN Staff.
    - The RySG repeats the same concerns.
- Section 4.6 Effect of Termination
  - We note that ICANN has added language stating a Registry Operator’s right to operate the registry for a TLD ceases immediately upon expiration or termination. We request that language be added to allow for the automatic extension of a term if the Registry Operator and ICANN are negotiating a renewal in good faith.
- Section 5.2 Arbitration
  - While we applaud the allowance of additional arbitrators when exemplary or punitive damages or operational sanctions are being sought, we believe that this should be extended to situations where the monetary relief sought exceeds \$1 million. Furthermore, as the decision to seek punitive or exemplary damages is solely within

ICANN’s control, fairness and due process considerations should provide that extending the hearing beyond a single day should not require both parties to agree. In these cases either party should be able to request that the hearing be extended beyond a single day which request the arbitrator must grant if reasonable. “Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, or monetary relief in an amount in excess of \$1,000,000, or (ii) the parties agree in writing to a greater number of arbitrators. In either case of clauses (i) or (ii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties’ filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for an additional number of days if (i) agreed upon by the parties or (ii) directed by the arbitrator (either upon the reasonable request of either party or on the arbitrator’s determination that additional time is required.)”

- Section 6.2 Cost Recovery for RSTEP
  - In comments to previous versions of the guidebook, the RySG said repeatedly, “Registry operators urge ICANN to reconsider this provision in light of the strongly negative affect it could have on innovation in the TLD space.”
  - The RySG again repeats this concern because it goes counter to one of ICANN’s main objectives for new gTLDs, i.e., innovation.
- Section 7.3 Defined Terms
  - No changes were made to the definitions of security and stability as recommended by the RySG in its AGv4 comments.
  - The RySG repeats its recommendations and makes reference to detailed explanation in our comments to AGv4, which can be found at <http://forum.icann.org/lists/4gtld-base/pdf2xe8EOAIf3.pdf> (See the RySG comments on Section 7.3 of the base agreement.)
- Section 7.5 Changes in Control, Assignment and Subcontracting
  - ICANN will be deemed to consent if it fails to act within 60 days of receipt of written notice.
    - We note that while the Registry Operator is only required to give 30-day notice of a Change in Control or material subcontracting arrangement, ICANN has 60 days to notify Registry Operator that it does not consent. We suggest that the last sentence of 7.5 be revised to read as follows:

“If ICANN fails to expressly provide or withhold its consent to any direct or indirect change of control of

Registry Operator or any material subcontracting arrangement within thirty (30) (or if ICANN has requested additional information pursuant to the preceding sentence, within sixty (60)) calendar days of the receipt of written notice of such transaction from Registry Operator, ICANN shall be deemed to have consented to such transaction.”

- In response to previous versions of the guidebook, the RySG made several suggestions for which there has been no response or changes made in AGv5.
  - The RySG continues to believe that the issues raised and the suggestions made were constructive and that the guidebook would be improved if adjustments were made.
  - Please see the detail of those comments in the Section 7.5 of the base agreement at <http://forum.icann.org/lists/4gtld-base/pdf2xe8EOAIf3.pdf>.
- Specification 2 Data Escrow Requirements
  - Part A – Technical specifications
    - 3.1 Deposit Format - This section discusses data escrow format as described in draft RFC, but to our knowledge there is not and has never been a finalized RFC related to data escrow. What will be the required timeframe to update data escrow upon subsequent RFCs, assuming a final RFC is approved? Without specific requirements in this regard, there is likely to be a high variance across registries.
    - 3.2 Extensions - This section is highly generic with little framework around what registry services require escrowing: “ICANN and the respective registry shall work together to agree on such new objects’ data escrow specifications.” This leaves this open and subject to variances in application of the rule.
    - 4. Processing of Deposit Files - These requirements may be very difficult to integrate into a full end to end solution with the escrow agent.
    - 7. Notification of Deposits - This is going to be an onerous process and seems redundant; if ICANN is being notified by the escrow provider of the deposit then why does the registry operator need to do the same? What happens when the registry operator notifies of a submission and the escrow operator provides a conflicting report? How do you implement the following: “the Deposit has been inspected by Registry Operator and is complete and accurate”? Is a person expected to inspect it each day?
  - Part B – Legal Requirements

- Escrow Agent: It seems odd that ICANN wouldn't publish requirements for escrow agents to help streamline registry implementation timelines. What are the criteria that ICANN will use when determining whether an escrow agent is authorized to enter into agreement? This process seems inefficient.
    - Experience of registries has shown that deposits are subject to technical issues at the agent's end, the registry end, or during transmission. The language seems really aggressive in terms of allowing ICANN to access the escrow data given possible failure in transmission without much time for remediation or even mention of an issue with the escrow provider
- Specification 3: Format and Content for Registry Operator Monthly Reporting **and** Specification 6: Registry Interoperability, Continuity, and Performance Specifications
  - In DAGs 1-4, Service Level Requirements (SLAs) were based on existing TLD measurement methods. Registry response times have always been measured within the infrastructure under the control of the registry, typically from the time transactions are received until the responses are available (gateway-to-gateway). This is done because measuring EPP and RDPS (WHOIS server) response times across the Internet depends upon Internet traffic, routing, and network latency – factors that registries have no control over. In other words, the long-standing SLA measurement scheme measures the responsiveness of a *registry system*, not the responsiveness of the *Internet*.
  - However, DAG5 says that ICANN is abandoning the existing model, and introduces a new plan for ICANN to measure EPP and RDPS SLAs across the Internet. DAG5 says: “Drafting note to community on change from v4: The requirement for an SLA report was removed given ICANN's plan to build an SLA monitoring system, as described in Specification 6, that would produce those results directly. ICANN plans to periodically publish results from the SLA monitoring system in order to allow the registrants and other interested parties access to this information.” It is also important to note that ICANN has had terms in existing TLD agreements allowing it to measure DNS performance remotely, but this has never been implemented, and if it had been the only DNS SLA metric, no DNS performance would have been reported.
  - The impact of this new plan is that registry performance reporting will be inconsistent between SLA performance that is visible to the registry and that which is visible to ICANN, and not accurate to actual performance. This could easily result in erroneous SLA violations and

contract breach when a registry is actually operating in a fast and highly available fashion. Measurements under his new plan may yield highly variable results for any given registry depending upon network conditions, and will yield higher numbers than currently seen in ICANN registry reports. Today, registries and registrars choose to optimize response time performance by selecting strategic locations for their data centers. By turning the model upside-down, the new system will disadvantage the registry operators that are located farther from ICANN's monitoring system, or are located in developing countries that do not have high bandwidth. While ICANN plans to publish the results publicly, the new system will offer no real consistency and no basis for comparison, making some registries look worse (or even non-compliant) than others without basis.

- While the new measurement system would yield higher response times, ICANN has not increased the DAG4 EPP and RDPS SLA metrics to compensate. We do not know of any method to establish what thresholds might be reasonable under the proposed new system.
  - In the DNS update SLAs (60 minutes from successful EPP transaction to updates resolving in all Namerservers) ICANN has not provided any consideration for DNSSEC signing activity or considered SLA impacts related to DNSSEC operations at all. Further, this SLA approach will likely discourage registries from deploying DNS servers in developing regions where SLA risks increase due to network latency or unavailability that is not under the control of the registry operator.
  - Violation of contractual SLAs is a justification for ICANN to cancel the registry contract or designate a successor operator, or to levy escalating penalties. We do not see how ICANN can impose penalties for SLA violations when registries have no control over what is being measured or whether the violation is due to faulty monitoring, network latency or registry performance.
  - The RySG therefore requests a return to the historical methods. If ICANN's goal is to verify the functioning and general responsiveness of registry systems (as ICANN does now by pinging registrar WHOIS servers), there is no impediment to doing that separately, and outside the contractual framework. Further, we question whether ICANN has the need or ability to meet all of the operational requirements for connecting to the registry SRS, including maintaining ACL's certificates, login credentials, system updates, etc.
- Specification 4: Specification for Registration Data Publication Services.

- Paragraph 2.1.1 says that Registry Operators will make zone files available as per the Zone File Implementation Plan (“ZFA Plan”). The contract provides a link to the ZFA Plan, which has not been finalized. Since the ZFA is an extra-contractual document that could be changed over time, and registry operators will be required to adhere to it, the RySG would like an assurance that changes to the ZFA will go through an appropriate process. Provision of zone files is a registry service, as mentioned in Specification 6 section 2, which normally would be subject to GNSO Consensus Policy process.
  
- Specification 5 Reserved Names
  - This specification contains no mention of ongoing discussions around Single character IDN gTLDs or allowance of 2 character IDN gTLDs at the second level.
    - The RySG recommends that this be corrected.
  
- Specification 6: Registry Interoperability, Continuity, and Performance Specifications
  - 1. Standards Compliance
    - IDN: There is no guidance given regarding timelines in implementing new RFC’s or updates in guidelines.
  - 5. Emergency Thresholds. The failure of one full escrow deposit is still a violation, and grounds for cancelling the registry contract and designating a successor operator. As the RySG noted in its DAG4 comments, such failures may not be the fault of the registry operator (such as due to a problem on the escrow provider’s system, or an Internet transit issue). The contract should not hinge upon one deposit.
  - 5. This section contains a new change: “Breach of the Registry Agreement caused by missing escrow deposits as described in Specification 2, Part B, Section 6.” Such escrow deliveries are grounds for the ICANN to cancel the registry contract. However, Specification 2, Part B, Sections 6.1 through 6.3 refers to the release of escrow deposits *by the escrow agent*. This makes the registry operator responsible for a failure by the escrow provider, over which the registry operator may have no control. The RySG supports responsible and professional escrow management, but does not believe that the registry contract should be breachable by a party other than the registry operator.
  - 5. The “Emergency Thresholds” now refers to DNSSEC “proper resolution”. This concept is undefined, and we do not know what this threshold means.



vary among registrars in order to account for differences among them.

- Specifically, section 1.a. of the proposed Code provides that neither the registry operator or any affiliate, subcontractor or other related entity shall “directly or indirectly show any preference or provide any special consideration to any registrar.” This provision is ambiguous and potentially would prohibit current beneficial practices of registries and registrars and would limit the ability of new gTLDs to innovate and experiment. Among other things, this provision does not account for differences among registrars or allow a registry to consider whether all registrars have an equal opportunity to qualify for registry programs.
- Indeed, this language, interpreted literally, could prohibit quantity discounts or numerous promotional programs that are advantageous to registries and registrars alike, because they differentiate among the needs of different registrars. Also because of the broadness of the phrase “any preference or provide any special consideration” and its applicability to subcontractors (and not just subcontractors engaged in providing registry services) and related entities, the prohibition may be deemed viral in nature thereby (i) discouraging companies with established businesses from becoming registries or providing back-end registry services and (ii) restricting the field of potential subcontractors for not only registry operations but all services for which at a registry may subcontract.
- ICANN has recognized the need to differentiate among parties so long as all parties are provided comparable opportunities. ICANN has long had an obligation of “equitable treatment” of registries in its registry agreements, including obligations not to apply policies “arbitrarily” or “inequitably,” nor to subject operators to “disparate treatment.” In explaining that the terms for equitable treatment do not require the same treatment for all operators, ICANN states (at page 135 of the Analysis of Public Comment, February 2009) that “‘equitable treatment’ does not mean that every TLD will have the same agreement. Specifically, existing Registry Agreements are not alike in all respects and include *distinctions to address differing business and market concerns*. ICANN’s current Registry Agreements differ from each other markedly in some respects....”

- The draft Code shows no apparent recognition of these principles and thus would be a source of uncertainty and could be competitively harmful.
- To accommodate the above, the language of the draft registry agreement and Code should be revised as follows:
  - o AGv5 Base Agreement Section 2.14: “Registry Operator shall comply with the Registry Code of Conduct as set forth in the specification at [see specification 9] with respect to Registry Services within the designated TLD.”
  - o Code, 1: Registry Operator will not, and will not allow any parent, subsidiary or, Affiliate, ~~subcontractor or other related entity~~ (each, a “Registry Related Party”) to:
    - Code, 1.a.: “directly or indirectly show any preference or provide any special consideration to any registrar in the designated TLD unless the same opportunities to qualify for such preferences or considerations are reasonably available to all registrars.”
  - A second aspect in which the Code is objectionable is that it allows discrimination in the sharing of data with related vertical parties. It appears to be the aim of sections 3 and 4 to limit the sharing of data between registrars and related registries. However, these sections attempt to do so by prohibiting the sharing of “proprietary” or “confidential” data. This is illusory protection for other registries because the decision as to what to treat as “proprietary” or “confidential” is voluntary and virtually without limit. Also, treatment of information as non-“confidential” or non-“proprietary” with respect to one registry does not legally mean that the same information cannot be confidential or proprietary as to others.
    - As a result, sections 3 and 4 should provide that the registry operator shall not permit the sharing of data from the registrar “unless that same data is reasonably available to all registries.”
    - In addition, a new Section 7 should be added as follows:
      - o 7. Nothing set forth herein shall limit the ability of any Registry Operator or Registry Related Party, or subcontractor to enter into arms-length transactions in the ordinary course with a registrar with respect to products and services other than the Designated TLD.

- The code of conduct says that a registry cannot register domain names in its own right, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD.
  - As currently written the code of conduct places an unnecessary burden on dot Brand applicants/operators who choose to vertically integrate by forcing them to use a third party registrar for the registration of domains that they intend to use for internal purposes. We suggest lifting this requirement or at a minimum define for which purposes the domains could NOT be used if registered through an owned or closely affiliated registrar. The continued requirement to use a third party registrar for dot Brand TLDs could have the unintended effect of suppressing interest from the brand community towards applying for a brand TLD.”

### Post Delegation Dispute Resolution Procedure (PDDRP)

- Section 6 standards
  - The conditions for safe harbors are uncertain in scope and depend on “encouragement” and “inducement,” which could be vague and could prohibit general promotion. “Encouragement” must be specific to the alleged infringing registration. Accordingly, we would revise Section 6 as follows:
 

“A registry operator is not liable under the PDDRP for any domain name registration that: (i) is registered by a person or entity that is unaffiliated with the registry operator; (ii) is registered without an the intentional direct or indirect encouragement, inducement, initiation or direction specifically related to the challenged registration, of any person or entity affiliated with the registry operator; and (iii) provides no direct or indirect benefit to the registry operator other than the typical registration fee (which may include other fees collected incidental to the registration process for value added services such as enhanced registration security).”
- Section 9 Threshold Review
  - The Current draft of the PDDRP provides that threshold reviews are to be conducted by a single individual chosen by the PDDRP provider who may not also serve on the PDDRP panel. Having the PDDRP provider conduct the threshold review defeats the purpose of such review; threshold reviews need to be conducted by a party independent of the PDDRP provider.
  - We recommend that the Threshold Provider be separate from both the Provider and the Expert Panel to avoid even the appearance of automatic

satisfaction of the Threshold Review criteria and movement to the Expert Panel (and more fees for the Provider).

- Section 21 Challenge of a Remedy
  - Although we believe that all parties agree that any challenge under this section will involve a de novo review, we suggest the following to further clarify and avoid future issues:

Section 21.4 “The registry operator may challenge ICANN’s imposition of a remedy imposed in furtherance of an Expert Determination that the registry operator is liable under the PDDRP, to the extent a challenge is warranted, by initiating dispute resolution under the provisions of its Registry Agreement. Any arbitration shall be determined in accordance with the parties’ respective rights and duties under the Registry Agreement. Neither the Expert Determination nor the decision of ICANN to implement a remedy is intended to prejudice the registry operator in any way in the determination of the arbitration dispute, [which shall consider all issues de novo](#). Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement.”

- Section 22 Availability of Court or Other Administrative Proceedings
  - Although this should be understood, it may be helpful to further clarify that the review rights are cumulative:

Section 22.1 “The Trademark PDDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability. [All procedures for the review or challenge of any determination of liability or remedies in this PDDRP are cumulative and not intended to be to the exclusion of any other form of review or challenge provided herein.](#)”

### Registry Restriction Dispute Resolution Procedure (RRDRP)

- Section 9 – Response to the Complaint
  - Unlike the PDDRP, there is an Administrative Review completed by the Provider (without a formal Threshold Panel), which may be acceptable. However, also unlike the PDDRP, the Registry Operator must pay a filing fee to respond to the Complaint. This might be an oversight because the RRDRP does not also provide for a return of filing fees if the Registry Operator ultimately wins (see costs below).
  - We recommend that at least the requirement that a Registry Operator must pay to respond should be amended to be identical to the PDDRP:
    - Section 9 of the RRDRP should mirror Section 10 of the PDDRP.
- Section 13 – Costs

- Similar to the PDDRP, this section was dramatically amended to be nearly identical. This would be acceptable, if the Registry Operator did not have to pay fees up front (See Response to Complaint above).
- We recommend that if the Registry Operator has to pay fees to respond (contrary to our recommendation above), that those fees be returned to it if it wins:
  - “13.4 If the Provider deems the Registry Operator to be the prevailing party, the Registry Operator shall be entitled to a refund of its filing fees.”
- Section 20 Challenge of a Remedy
  - Section 20.4 reads, “The registry operator may challenge ICANN’s imposition of a remedy imposed in furtherance of an Expert Determination that the registry operator is liable under the RRDRP, to the extent a challenge is warranted, by initiating dispute resolution under the provisions of its Registry Agreement. Any arbitration shall be determined in accordance with the parties’ respective rights and duties under the Registry Agreement. Neither the Expert Determination nor the decision of ICANN to implement a remedy is intended to prejudice the registry operator in any way in the determination of the arbitration dispute. Any remedy involving a termination of the Registry Agreement must be according to the terms and conditions of the termination provision of the Registry Agreement.”
    - Although this is likely understood, it may be helpful and void future issues to further clarify that this is reviewed de novo.
- Section 21 Availability of Court or Other Administrative Proceedings
  - This sections says the following:
    - “21.1 The RRDRP is not intended as an exclusive procedure and does not preclude individuals from seeking remedies in courts of law, including, as applicable, review of an Expert Determination as to liability.
    - 21.2 The parties are encouraged, but not required to participate in informal negotiations and/or mediation at any time throughout the dispute resolution process but the conduct of any such settlement negotiation is not, standing alone, a reason to suspend any deadline under the proceedings.”
  - Although this should be understood, it may be helpful to further clarify that the review rights are cumulative.
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## **Level of Support of Active RySG Members for this statement**

There was Supermajority support for this statement in the RySG as summarized below:

- # of Members in Favor: 11
- # of Members Opposed: 0
- # of Members that Abstained: 0

- # of Members that did not vote: 2
- Minority Position(s): N/A

### General RySG Information

- Total # of eligible RySG Members<sup>1</sup>: 14
- Total # of RySG Members: 13
- Total # of Active RySG Members<sup>2</sup>: 13
- Minimum requirement for supermajority of Active Members: 9
- Minimum requirement for majority of Active Members: 7
- # of Members that participated in this process: 13
- Names of Members that participated in this process:
  1. Afilias (.info & .mobi)
  2. DotAsia Organisation (.asia)
  3. DotCooperation (.coop)
  4. Employ Media (.jobs)
  5. Fundació puntCAT (.cat)
  6. Museum Domain Management Association – MuseDoma (.museum)
  7. NeuStar (.biz)
  8. Public Interest Registry - PIR (.org)
  9. RegistryPro (.pro)
  10. Societe Internationale de Telecommunication Aeronautiques – SITA (.aero)
  11. Telnor (.tel)
  12. Tralliance Registry Management Company (TRMC) (.travel)
  13. VeriSign (.com, .name, & .net)
- Names & email addresses for points of contact
  - Chair: David Maher, [dmaher@pir.org](mailto:dmaher@pir.org)
  - Vice Chair: Jeff Neuman, [Jeff.Neuman@Neustar.us](mailto:Jeff.Neuman@Neustar.us)
  - Secretariat: Cherie Stubbs, [Cherstubbs@aol.com](mailto:Cherstubbs@aol.com)
  - RySG representative for this statement: Keith Drazek, [kdrazek@verisign.com](mailto:kdrazek@verisign.com)

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<sup>1</sup> All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the “effective date” set forth in the operator’s or sponsor’s agreement (RySG Articles of Operation, Article III, Membership, ¶ 1). The RySG Articles of Operation can be found at <<http://gnso.icann.org/files/gnso/en/improvements/registries-sg-proposed-charter-30jul09-en.pdf>>. The Universal Postal Union recently concluded the .POST agreement with ICANN, but as of this writing the UPU has not applied for RySG membership.

<sup>2</sup> Per the RySG Articles of Operation, Article III, Membership, ¶ 6: Members shall be classified as “Active” or “Inactive”. A member shall be classified as “Active” unless it is classified as “Inactive” pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a RySG meeting or voting process for a total of three consecutive meetings or voting processes or both. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a RySG meeting or by voting.