

## GNSO gTLD Registries Stakeholder Group Statement

**Issue:** Revised New Registry Agreement Including Public Interest Commitments

**Date:** 26 February 2013

Public Comment URL:

<http://www.icann.org/en/news/public-comment/base-agreement-05feb13-en.htm>

This statement is submitted on behalf of the gTLD Registries Stakeholder Group (RySG) regarding the proposed changes to the registry agreement contained in the Final New gTLD Applicant Guidebook (“New Draft”) issued by ICANN on February 5, 2013. The RySG statement, which was arrived at through a combination of RySG email list discussion and RySG meetings (including teleconference meetings) represents a consensus position of the RySG, as further detailed at the end of the document.

### **Executive Summary**

Although the RySG appreciates the opportunity to provide comments on the proposed changes to the Revised New gTLD Agreement posted on February 5, 2013, we are extremely perplexed by the content and timing of this proposal, and the process through which ICANN intends to pursue these changes.

Timing. ICANN published the New Draft nearly nine months after new gTLD applicants spent hundreds of millions of dollars in anticipation of the introduction of new gTLDs based on the standard new gTLD Registry Agreement published on 4 June 2012 (the “Final Agreement”). Registry operators, new gTLD applicants, and members of the ICANN community have already been asked to consider a plethora of last minute changes, including new rights protections mechanisms, protections for specific organizations, changing clearinghouse specifications. They have endured technical glitches, ever changing deadlines, and unexplained delays.

Now, eight years after the new gTLD process began, but only two months before ICANN plans to recommend delegation of the first new gTLD<sup>1</sup>, ICANN is proposing further, fundamental changes in material provisions of the Final Agreement and seems intent to drive these substantive changes without due consideration. Despite the fact that the changes in the Final Agreement could have a material effect on those business plans, ICANN is asking affected applicants and the community to forgo careful consideration in exchange for finally getting to the “starting block.” While this may be a good negotiating tactic for ICANN, applicants perceive this move as the proverbial “gun to the head” and an abuse of ICANN’s position.

With respect to process, while we understand the reason some of the revisions were proposed (such as spec 11), we disagree with the timing, implementation and failure to define the proposed language. It also appears that ICANN intends to ignore the policy development processes mandated by its bylaws. Nor does it appear that ICANN has considered using the very mechanism developed by the community and contained in the Final Agreement to affect contract changes of this sort – the Special

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<sup>1</sup> See CEO video blog entry on February 13, 2013 (<http://www.icann.org/en/news/press/kits/video-chehade-new-gtld-13feb13-en.htm>).

Amendment process. Section 7.6 of the Final Agreement provides for automatic amendment of registry agreements following good faith consultation with a working group of the RySG, formal submission of any proposed amendments to the RySG, and the approval of a specified portion of the affected registries. We would welcome use of the Special Amendment procedure or future bottom-up policy discussions to consider some of these topics, including, for example, the Public Interest Commitments, associated dispute resolution processes, and the implementation of the expert working group on Directory Services (after such recommendations and have been finalized and are submitted through the Consensus Policy process). But we see no justification whatsoever for ICANN's decision to invent an entirely new mechanism to alter the results of a two year bottom-up multi-stakeholder policy process on that issue alone.

Finally, the RySG strenuously opposes some of the proposed changes including, in particular, the proposed expansion of ICANN's existing rights to impose new obligations on registry operators without mutual negotiation or consent. The Final Agreement implements the concept of adherence to "Consensus Policies" constrained by a "picket fence", which embodies the fundamental bargain between ICANN and contracted parties, and which is the source of ICANN's legitimacy. The "picket fence" bargain gives ICANN the right to impose Temporary and/or Consensus Policy on registry operators without negotiation or consent and without compensation or consideration, so long as those policies address issues within the so-called "picket fence." This extraordinary provision already gives ICANN rights far beyond those normally provided for in commercial agreements, including government contracts.

New executives and members of the Board may not be aware of the fact that in 2008, ICANN made a proposal similar to the new February 5 language – though more limited – attempting to expand its unilateral power to amend the registry agreement. That proposal was highly contentious when proposed in 2008, and thoroughly rejected over the course of a truly multi-stakeholder bottom-up process.

In Seoul, Korea, in October 2009, where the provision was finally discussed by the Board, ICANN's then-current Board Chairman summed it up by stating that, *"as a lawyer, [I] would not advise anyone to sign"* a contract containing that provision. The ICANN Board agreed with that assessment, based on ICANN staff's appreciation of *"the contractual uncertainty that registry operators would face when entering into a contract that may be changed without their consent as contemplated by version 3 of the draft registry agreement."* See <http://sel.icann.org/node/6762> (Part 2, Page 20). Nothing has changed in the intervening four years that justifies recycling a proposal that has been thoroughly debated and universally rejected.

As the following comments clearly demonstrate, the timing and content of the proposed changes, and the manner in which those changes are being considered, circumvent the ICANN policy development process, call into question ICANN's commitment to the multi-stakeholder process, and jeopardize the success of the new gTLD program by failing to provide the kind of certainty that supports necessary investment in new businesses. While the RySG commits to participate in an appropriate amendment process, we urge the Board to direct staff to move forward with the launch of new gTLDs using the Final Agreement.

## I. Unilateral Right to Amend the Agreement

### A. Original Proposal

ICANN first sought to expand the Board's authority to unilaterally amend the registry agreement in October 2008, when it published Version 1 of the new gTLD Applicant Guidebook.<sup>2</sup> The draft registry agreement contained in that document, like the New Draft, gave the ICANN Board the right to impose new obligations on registries over their objection and without going through the policy development process. But unlike the New Draft, ICANN only sought authority to use that expanded authority in circumstances "justified by a substantial and compelling need related to the security or stability of the Internet or the Domain Name System."

The RySG rejected the 2008 proposal as completely unacceptable,<sup>3</sup> arguing that:

- (1) The unilateral right to amend would make it more difficult for applicants to attract capital and measure the commensurate amount of capital required to sustain operations; it would also make it more difficult for existing Registry Operators to prioritize necessary investment for continued operations against what may be an unnecessary operational change for specific purpose TLDs;

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<sup>2</sup> Section 7.2 of the Agreement included in the October 2008 Guidebook (<http://archive.icann.org/en/topics/new-gtlds/draft-agreement-24oct08-en.pdf>) stated: "ICANN will publicly post on its web site for no less than thirty (30) days notice of any proposed changes, modifications or amendments to this form of registry agreement. Following such public notice period during which ICANN will consider input from affected Registry Operators, Registry Operator will be provided notice of the final terms of any changes, modifications or amendments to the terms of this Agreement, and/or the requirements, specifications, or processes incorporated into this Agreement at least ninety (90) days prior to the effectiveness thereof by the posting of a notice of effectiveness on ICANN's web site. Any such proposed changes, modifications or amendments may be disapproved within sixty (60) days from the date of notice of effectiveness of the change by either (i) two thirds in number of the registry operators subject to the change or (ii) a two-thirds vote by the council of the ICANN Generic Names Supporting Organization (GNSO) pursuant to the GNSO's procedures (as the same may be modified from time to time) followed with respect to the review and consideration of new Consensus Policies. In the event that such modification or amendment is disapproved pursuant to the process set forth herein, the ICANN Board shall have thirty (30) days to override such disapproval if it can show that the modification or amendment is justified by a substantial and compelling need related to the security or stability of the Internet or the Domain Name System."

<sup>3</sup> In response to version 1 of the Guidebook, the RySG voiced its strong opposition to the proposed unilateral right to amend by virtue of an ICANN Board overriding a decision by the RySG to not adopt an ICANN-proposed amendment, by commenting: *This provision is completely unacceptable. . . ICANN may argue that the override rights protect registry operators from ICANN's over-reaching, but that is not the case.* The RySG further argued: First, there is no justification for shifting the burdens in the way this provision does. Currently, ICANN can force certain changes on stability and security grounds, but ICANN has to first make the case that Consensus Policy is needed. . . Under the arrangement proposed by ICANN, however, ICANN can impose any changes it wants, and the burden is on registries to block those that regulate activities outside the picket fence. Second, even if such burden shifting could be supported, the requirement of a vote of two-thirds of the number of registries to overturn such changes is not an effective check in an environment involving hundreds, if not thousands, of TLDs employing many different business models....Registry operators do not believe there is any justification for giving ICANN unilateral authority to require registry operators to bear costs and adopt irrelevant business models." See <http://forum.icann.org/lists/gtld-guide/msg00054.html>.

- (2) The current Consensus Policy mechanism is sufficient for critical changes and ensures that any implementation is appropriately balanced across multiple constituencies and stakeholder groups. In addition, truly important and time-sensitive issues can be addressed via Temporary Policies which can, at a later stage, can become permanent changes through Consensus Policies; and
- (3) As a matter of principle, unrestrained and unilateral change of terms and conditions by one party is an unsuitable approach for private contracting. Even governments that have a right to amend an agreement are bound by certain regulatory processes and procedures, including the provision of just compensation when such a change is required.

The RySG continued to object when the same basic right to amend was included in subsequent versions<sup>4</sup> of the Guidebook. In response to the RySG objections and the discussions that took place at the ICANN meeting in Seoul in late 2009, the ICANN Board of Directors directed staff to form a working group made up of legal representatives from ICANN (both in-house and external counsel), the registries and other legal representatives from the community. That group had an active archived mailing list, held a number of conference calls and met in person in Marina del Rey in April 2010.

Over the course of these discussions and meetings, the Working Group identified a compromise solution that was published for comment on May 27, 2010<sup>5</sup>. In the analysis document that accompanied

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<sup>4</sup> Version 3 of the Guidebook, Section 7.2 stated: "In the event that the amendment is disapproved by the affected registry operators pursuant to the process set forth in clause (e) above, the ICANN Board of Directors by a two-thirds vote shall have thirty (30) calendar days to override such disapproval if: (i) in the case of any amendment relating to the fees payable to ICANN hereunder, the amendment is justified by a financial need of ICANN and (ii) in the case of any other amendment, the amendment is justified by a substantial and compelling need related to the Security or Stability (as such terms are defined in Section 8.3) of the Internet or the Domain Name System, in which case, the proposed amendment shall be effective immediately upon expiration of such thirty (30) calendar day period. If the ICANN Board of Directors does not override such disapproval, the proposed amendment shall have no force or effect. See <http://archive.icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-04oct09-en.pdf>.

Furthermore, the RYSG that it *"has repeatedly and strenuously objected to the concept of ICANN's unilateral ability to amend the terms and conditions of the Registry Agreement. RySG believes this is unreasonable, an abuse of power, and puts at risk the contracting scheme that has served the community well in providing certainty, but also allowing flexibility to amend within the bounds of the consensus policy process. . . The v3 Registry Agreement does not provide adequate protection – rather, the whole concept of unilateral amendments must be removed."* For completeness, RySG repeated earlier arguments it has made against this concept:

*[The RySG] strongly objects to the proposed paradigm whereby ICANN could make unilateral changes to Registry Agreements at any time. The ability of one party to make changes to a contract is contrary to fundamental contract principles: there must be a meeting of the minds, and there must be certainty as to duties and obligations. [RySG] does not regard the proposed safeguards as a suitable check on this abuse of power. ICANN wants to be able to implement changes quickly without having to individually re-negotiate each registry agreement. While it may want this flexibility as a matter of administrative convenience, it must remember that there are two parties to each contract – ICANN must not use its position to force feed contract changes, particularly when it already has the Consensus Policy mechanism by which to enact critically important changes.*

the “Special Amendment” compromise, ICANN acknowledged the legitimacy of registry concerns about unilateral amendment authority, and described the proposed compromise:

*After further consultation with the working group, ICANN has proposed a compromise provision. Pursuant to the new provision, ICANN will have no ability to unilaterally amend the registry agreement. Rather, after consultation with and vetting by a working group, ICANN may propose amendments to the Registry agreement that, if approved in the manner set forth below, would automatically amend all registry agreements that contain the new amendment provision. The working group is constituted from representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments.*

That “Special Amendment” compromise was posted for public comment and later included in the Final Applicant Guidebook in January 2012, which each applicant relied on deciding to submit the more than 1900 applications, and to write checks to ICANN totaling over \$350 million. The “Special Amendment” process was supported by the ICANN community, ICANN staff and the ICANN Board of Directors. This agreed-upon strategy provided a means to amend the registry agreements in a predictable and stable bottom-up fashion while at the same time preserving the principle of mutuality of contracts. In addition, it gave ICANN a mechanism to amend the new gTLD registry agreements for those topics that were outside the Consensus Policy process, while still preserving the ability to impose Temporary Policies on registries if there was a substantial and compelling need for issues involving the security and stability of the Domain Name System. With both registries and ICANN in support of the new “Special Amendment” compromise, the issue was put to rest so that one could concentrate on other important implementation issues necessary to move forward with the new gTLD process.

#### B. Proposed 5 February 2013 Amendments

On February 5, 2013, nearly **five years** after originally proposed, and **three years** after a bottom-up compromise position was agreed to by the community, without notice, consultation, or justification, ICANN re-introduced the notion of granting ICANN a unilateral right to amend the gTLD Registry Agreement.<sup>6</sup> Whatever ICANN’s reasons may be, this proposal remains as unacceptable today as it was in 2008. To repeat the RySG comments from 2008-2009, the RySG believes that the unilateral right to amend any private contract constitutes an unreasonable abuse of power and puts at risk the contracting

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<sup>5</sup> See <http://archive.icann.org/en/topics/new-gtlds/registry-agreement-amend-process-comments-28may10-en.pdf>

<sup>6</sup> The proposed language states:

*Section 7.6(c). Notwithstanding the provisions of Section 7.6(b), in the event that a Special Amendment does not receive Registry Operator Approval, such Special Amendment shall still be deemed an “Approved Amendment” if, following the failure to receive Registry Operator Approval, the ICANN Board of Directors reapproves such Special Amendment (which may be in a form different than submitted for approval by the Applicable Registry Operators, including any revisions thereto based on comments from the Applicable Registry Operators) by a two-thirds vote (a “Supermajority Board Approval”) and such Special Amendment is justified by a substantial and compelling need. The “Amendment Effective Date” of any such Approved Amendment shall be the date that is ninety (90) calendar days following the date on which ICANN provides notice to Registry Operator of the Supermajority Board Approval.*

scheme that has served the community well, particularly in terms of, providing legal security and certainty, while providing for a certain flexibility to amend registry agreements within the bounds of the consensus policy process. Once more, even governments that have a right to amend an agreement are bound by certain regulatory processes and procedures, including the provision of just compensation when such a change is required, not to mention other limitations applicable to the so-called “adhesion” or standard form contracts.

In the event of any emergencies or threats to security and stability, ICANN already does have the right to propose Temporary Policies by a supermajority of the Board if such measures are necessary to maintain the stability or security of the Registry Services. The proposed amendments would make it more difficult for registry operators to attract capital and to plan for their capital requirements. The current Consensus Policy mechanism is sufficient for critical changes and ensures that any implementation is appropriately balanced across multiple constituencies and stakeholder groups. As already stated above, truly important and time-sensitive issues can be quickly addressed via Temporary Policies, which can, at a later stage, become permanent changes through Consensus Policies. And, keep in mind that the Final Agreement gives ICANN authority to make amendments supported by a specific percentage of the registry operators effective across the entire group.

### C. Concluding remarks on this section

We are in the midst of dramatic change in the administration of the top-level domain name system. All businesses – whether for profit or nonprofit - require a measure of predictability, stability and certainty of contracts. Public and multi-national company applicants are subject to regulatory regimes that cannot be reconciled with the expanded unilateral authority ICANN is seeking. In deciding whether or not to utilize new gTLDs for their critical infrastructure assets, a key goal of the new gTLD program, registries cannot be subject to the whim of one private entity, even those acting under the guise of public interest, regardless of how well intentioned that private entity purports to be.

In order to ensure the stability, predictability and reliability of the domain name system, ICANN *must* respect the longstanding arrangement that legitimizes its status with contracted parties. We recognize that this can be challenging given staff and board changes, and the determination of those who are not happy with the outcome of policy development to exploit all avenues of taking another bite at the apple. The failure to proceed in good faith to implement fully informed decisions of the past undermines the private-public partnership and ultimately the multi-stakeholder model

## II. Use of only 2013 Accredited Registrars (Specification 11, Section 1)

ICANN has added a new Specification 11 (Public Interest Commitments) to the Final Agreement which, as proposed, raises concerns for both registries and registrars, particularly with respect to Section 1. That provision requires Registry Operators to agree to use only ICANN accredited registrars that have executed the Registrar Accreditation Agreement (RAA) approved by ICANN Board on some date later this year (or any subsequent form of RAA approved by the ICANN Board of Directors). This requirement is problematic for several reasons.

First, negotiations for a new RAA are still ongoing and it remains uncertain what the final terms will be. Until these negotiations conclude and the Registrar Stakeholder Group is able to assess the impact that the new RAA will have on registrars, both large and small, it is unfair to force registries to choose only registrars that have signed the new agreement.

Second, Section 1 also undermines the objectives of the new gTLD program. Registrars operating under the terms of the existing RAA and have not signed the new RAA can still sell names in existing TLDs, which are likely to continue to account for most of their revenues. This would also create incentives to focus on existing TLDs with some registrars potentially electing to remain under the old agreement and forgo selling new gTLDs entirely. Consequently, the intended public benefits of consumer choice and competition may actually be undermined by such specification, bearing in mind that new gTLDs will undergo additional limitations while no such restrictions apply for current TLDs.

Finally, the parenthetical in Section 1, as currently written, would allow the ICANN Board to dictate, with no input from registrars or the community, subsequent terms of the RAA. As long as the ICANN Board approves a new RAA in whatever form it chooses, new gTLD registries must exclude registrars that don't sign the agreement from selling domain names. Consumers would be harmed by not being able to use their registrar of choice and possibly having to transfer existing names away from their registrars. For all of these reasons, the parenthetical must be deleted.

### **III. Addition of the Public Interest Commitments and associated dispute resolution process (Section 2.17 and Specification 11)**

The RySG is deeply concerned about several other aspects of the newly proposed language as outlined below.

#### **A. Time Constraints in Filing PICs**

The RySG believes that the timeline for submitting comments to the general notion of Public Interest Commitments (PICs) and the associated dispute resolution process coupled with the ICANN strong-armed approach in requiring applicants to submit PICs by March 5<sup>th</sup> is completely unreasonable. Not only has the community not had any time to digest whether or not the process laid out by ICANN for addressing additional public interest concerns is proper or even necessary, but given the lateness in this new 11<sup>th</sup> hour change, applicants are feeling "blackmailed" into submitting additional commitments, despite ICANN's statements that such filings are voluntary. Organizations that have expressed in their application their mission of operating in the public interest feel compelled to file PICs for fear of retribution from ICANN or the governments if they fail to do so regardless of the whether or not there is an actual need for the PICs.

Moreover, the RySG notes that the overall objection period ends just eight days after the period in which an organization has to file its PICs. This means that the GAC or individual governments could submit objections after PICs are submitted. Stated differently, as we understand it, PICs were meant to address and mitigate government concerns with applications, yet applicants are expected to file their PICs before they even know formally whether the governments have a specific objection. Moreover, potential objectors will be put into a position of deciding whether to file their objections based on PICs that been published for just one week and that can be amended post-deadline.

Understanding that a primary reason for introducing the PICs was to respond to a GAC request, we wonder whether it would be useful to consider allowing applicants to file PICs after GAC advice is given. This would be especially helpful in cases where GAC advice is given without any prior notification such as a GAC Early Warning. This might also allow more time for a more careful review of the PIC specification.

## B. Commitments, Business Plans and Statements of Intent

The RySG has some concerns with the new provision in Specification 11 stating that “Registry Operator will operate the registry for the TLD in compliance with all commitments, statements of intent and business plans stated in the following sections of Registry Operator’s application to ICANN for the TLD, which commitments, statements of intent and business plans are hereby incorporated by reference into this Agreement.” We believe that the Final Agreement, without these new amendments, already binds registries to all appropriate obligations. These include performance specifications, escrow requirements, service level, data access requirements, equal access requirements, code of conduct obligations, reserved names, registration policies, etc.

However, the addition of language on registries now forcing them to operate in compliance with all “commitments”, “statements of intent” and “statements of business plans” is overly broad and virtually unenforceable. It will also force ICANN to insert itself into the middle of how each and every new gTLD is run and open ICANN up to a plethora of comments and claims from the community each time members of the community do not believe that a registry is living up to its commitments or statements of intent.

We are also concerned that work is needed to understand how ICANN will handle the flood of change requests from 1400+ new registry operators every time a registry would like to change its commitments, statements of intent or business plans as a result of changing market conditions, decisions from TLD policy boards, etc. Registries will demand service levels from ICANN in responding to those change requests so as to not impact the operation and administration of the registries. The RySG does not believe ICANN is currently responsive enough to existing registry requests for changes, which often take months, if not years to make, and does not see any foreseeable way that ICANN will be able to evaluate hundreds of change requests per year. If one extrapolates the number of change requests to the application process to date, to the number of changes that will need to be made if these new requirements are put in place, does ICANN really believe it will have the resources to handle the changes?

## C. PICDRP

The RySG is also concerned about the insertion of an undefined new dispute resolution policy in which ICANN expects registries to agree to a possible termination remedy. The RySG believes that ICANN has not thought through the implications of having to enforce all of the new Public Interest Commitments (the “PICs”), We are also deeply concerned about the ability for the PIC Dispute Resolution Process (the “PICDRP”) to be abused by those filing frivolous claims, and by entrusting a registry’s entire business and operations to an unaccountable dispute resolution provider.

In fact, ICANN already has a number of dispute resolution processes including the existing Uniform Dispute Resolution Policy (UDRP), the added Uniform Rapid Suspension policy (URS) the Registration Restrictions Dispute Resolution Policy (RRDRP) and the Post-Delegation Dispute Resolution Policy (PDDRP). Each of these dispute resolution policies has taken literally years to devise to ensure the appropriate balance between the enforcement of obligations and the protection of registries from frivolous, costly and resource-intensive processes. Moreover, the policies have strived for an appropriateness of remedies (to fit the actual violations) as well as due process obligations.

In light of the above, the RySG is concerned that the addition of yet another dispute process at this point will undoubtedly either delay the new gTLD process or alternatively be rushed through in a manner that is not well-thought out, abusive to registries and have an adverse affect on the business and operations of the registries. The RySG thus recommends that these procedures not only be further developed through a bottom-up multi-stakeholder process, but also better understood before their implementation and subsequent acceptance by registries.

**IV. Implementation of ICANN’s expert working group on directory services (WHOIS) (Specification 4) without going through consensus policy process**

As part of ICANN’s proposed amendments to the Final Agreement, Specification 4, Section 1.10 contains a new provision requiring registries to implement any new or revised model for gTLD data directory services that is adopted by the ICANN Board of Directors unless a registry can demonstrate to ICANN’s satisfaction that such an implementation would be commercially unreasonable. It also states that the implementation of such recommendations may be superseded by Consensus Policies adopted by ICANN.

Although the RySG supports the creation of the Expert Working Group on gTLD Directory Services, it does so only in reliance of the announcement posted on ICANN’s website on December 13, 2012 in which ICANN’s CEO declared that the output of the working group will “feed into a Board-initiated GNSO policy development process to serve as a foundation for the GNSO’s creation of new consensus policy, and requisite contract changes as appropriate.”<sup>7</sup>

Despite the assurances that the output of the group would be subject to the consensus policy process in ICANN’s announcement in the creation of the group, the language in the New Agreement takes the role and mandate of this expert group an unacceptable, unpredictable and contradictory step further. Although ICANN concedes that it will subject the findings of the group to public comment, there is no requirement that the findings go through the consensus policy process before requiring that registries adopt whatever the ICANN Board unilaterally adopts regardless of the feasibility, costs, impact on privacy, etc.

The RySG does not accept this new addition to the Final Agreement in that this material addition provides yet another avenue for ICANN to circumvent the Consensus Policy process and the very nature of ICANN’s bottom-up multi-stakeholder process. It also amounts to a second set of provisions giving ICANN the unilateral right to amend the Registry Agreement. If there ever was a topic by which the whole ICANN community would agree falls within the mandate of the Consensus Policy process, it is WHOIS, a topic which has been discussed for well over a decade. In fact, the existing registry agreements (as well as the proposed Final Agreement) explicitly recognize this topic to be one expressly reserved for the Consensus Policy process.<sup>8</sup>

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<sup>7</sup> <http://www.icann.org/en/news/announcements/announcement-2-14dec12-en.htm>. This objective was repeated in ICANN’s announcement on February 14, 2013 when the expert group’s composition was announced. <http://www.icann.org/en/news/announcements/announcement-14feb13-en.htm>.

<sup>8</sup> See for example <http://www.icann.org/en/about/agreements/registries/verisign/registry-agmt-com-22sep10-en.htm>, Section 3.1(b)(iv)(D).

Although the Final Agreement does allow for a Consensus Policy to supersede an ICANN Board implementation of the expert working group, the newly proposed language shifts the burden from ICANN establishing, through the Consensus Policy process, the substantial and compelling need for the new policies, to the registries (and the ICANN community) to establish the rationale on why such changes should not be implemented **after those changes most likely will have already been required to be implemented by registries.**

Rather than relying on a community to decide through the bottom-up multi-stakeholder process what exactly should be implemented, ICANN, in a top-down fashion (using its own hand-selected experts), is forcing policy changes on registries unless these same registries are able to overcome a nearly impossible burden of establishing the need for a Consensus Policy on **why** those changes (which will have already been implemented) should not be implemented.

As a result, registries will have already been forced to spend the time, money and resources to implement a solution only for them to argue through the bottom-up multi-stakeholder process why they should not have implemented those changes in the first place. This is not only backwards; it is also an unacceptable mechanism for policy development in a mature bottom-up multi-stakeholder model. If policy changes are warranted, then they must go through the Consensus policy process to be implemented, and NOT the other way around. The RySG believes that further work is needed to develop this approach.

**V. Addition of language putting enforcement burden of Rights Protection Mechanism on the registries (as opposed to ICANN) – Specification 7, Section 1**

In the proposed revision to the Registry Agreement, ICANN has added language to Specification 7 not only requiring that the Registry Operator include all “ICANN mandated and independently developed RPMs in the registry-registrar agreement”, but also that it now “*require each registrar that is a party to such agreement to comply with the obligations assigned to registrars under all such RPMs*”.

The RySG seeks clarification from ICANN on what it believes are the ramifications of such additional language. Is ICANN now stating that it will hold each Registry Operator responsible (and ultimately liable) for the actions of the registrars? In other words, is ICANN attempting to shift the burden of enforcement of the RPMs to each individual registry as opposed to having a more efficient centralized unified contract compliance effort led by ICANN?

If the former is indeed the case, the RySG is concerned that requiring each of the registries to engage in a contract compliance function will greatly increase the costs of operating a TLD registry especially when such costs can easily be borne by ICANN on a centralized basis and subsumed into its existing compliance function. Moreover, reliance on each individual registry operator will be sure to lead to uneven enforcement which will ultimately have an adverse effect on competition within the new registry space. Only those with the resources to perform such enforcement functions will have the incentive and the ability to do so, while those smaller registries without such an incentive or ability may choose a less confrontational path.

Although ICANN may argue that just as it required registrars to police the activities of its resellers, registries should have to police the activities of its registrars; these two situations are not comparable. Unlike registrars which have the ultimate discretion to accredit and de-accredit their resellers for any reason (or no reason) at all, registries are forced to accept all registrars accredited by

ICANN that want to register names in the TLD. This is due to the fact that registries are obligated to treat all registrars equitably and to not discriminate in favor (or against) any registrar in the provision of registry services. The result of which is that registries must use registrars that a third party (ICANN) accredits, whether they would like to or not. Registries, unlike registrars with their resellers, in most cases are not able to pick and choose with whom they want to do business. In fact, that decision may in most cases be taken for them by ICANN.

Indeed, the very nature of non-discrimination requirements also subjects registries to added liability if they take action against one registrar for alleged breaches but do not take a uniform action against other registrars. Moreover, in the event that one registry operator takes action against a particular registrar for failure to implement an RPM to its satisfaction, but other registry operators do not take such action, that registry may face potential claims from the disciplined registrar that it was singled out for disparate treatment in violation of the registry's non-discrimination requirements.

Conversely, ICANN does not face this issue. If ICANN chooses to enforce certain obligations against the registrars, it is the only entity able to do so across all gTLDs uniformly. It is also the only entity in a position to require meaningful corrective action to ensure that such activity ceases with respect to all TLDs. Moreover, ICANN is adequately staffed and funded to take on this appropriate compliance function. With over \$350 million collected by ICANN in the new gTLD Application process, and a guaranteed \$25,000 minimum paid to ICANN per year per registry in addition to the variable fees collected from the registrars, ICANN should have the funds and the means to enforce registrar obligations with respect to the RPMs.

## **Conclusion**

In summary, the RySG believes that the latest proposed version of the Final Agreement contains so many serious and fundamental flaws that it should be withdrawn in its entirety. We oppose certain proposed amendments, and believe that other provisions need further thought and refinement. Finally, we are equally concerned about the timeline ICANN has imposed on the community's consideration of these proposals, and the mechanism by which ICANN proposes to adopt and implement the changes.

The issues at stake in the short and long term deserve sufficient time and consideration to ensure that new gTLDs are offered in a secure and stable manner and are successful in fostering innovation via sound business models that support the needs of all stakeholders in ways that have been developed via the bottom-up, multi-stakeholder process.

## **RySG Level of Support**

### **1. Level of Support of Active Members: [Supermajority]**

- 1.1. # of Members in Favor: 13
- 1.2. # of Members Opposed: 0
- 1.3. # of Members that Abstained: 0
- 1.4. # of Members that did not vote: 1

### **2. Minority Position(s): None.**

## General RySG Information

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

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<sup>9</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 Charter, Article II, RySG Membership, Sec. A). The RySG Charter can be found at [http://www.gtldregistries.org/sites/gtldregistries.org/files/Charter\\_for\\_RySG\\_6\\_July\\_2011\\_FINAL.pdf](http://www.gtldregistries.org/sites/gtldregistries.org/files/Charter_for_RySG_6_July_2011_FINAL.pdf).

<sup>10</sup> Per the RySG Charter, Article II, RySG Membership, Sec.D: Members shall be classified as “Active” or “Inactive”. An active member must meet eligibility requirements, must be current on dues, and must be a regular participant in RySG activities. 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 three consecutively scheduled RySG meetings or voting processes or both. An Inactive member shall continue to have membership rights and duties except being counted as present or absent in the determination of a quorum. An Inactive member immediately resumes Active status at any time by participating in a RySG meeting or by voting.