

## **GNSO gTLD Registries Stakeholder Group Statement**

### **Issue: Expert Recommended Improvements to ICANN's Accountability Structures**

Date: 16 November 2012

Issues Document: <http://www.icann.org/en/news/public-comment/asep-recommendations-26oct12-en.htm>

Thank for you the opportunity to comment on the "Expert Recommended Improvements to ICANN's Accountability Structures." This comment is submitted on behalf of the Registry Stakeholders Group of ICANN's Generic Names Supporting Organization ("RySG"). The RySG now comprises 14 members contracted with ICANN to operate gTLD registries and dozens of observer members, primarily consisting of applicants for new top-level domains. As contracted parties with ICANN for registry services, and soon-to-be contracted parties with ICANN, the RySG takes seriously the accountability mechanisms embodied in ICANN's Bylaws and Articles of Incorporation.

Our principal concern with the current draft is with the new standard of review for the Independent Review Process ("IRP"). Specifically, a new Section 4 provides:

The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision?; b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

We believe that the Board can violate its articles or bylaw while simultaneously acting conscientiously, without conflict of interest, and believing the action in question to be in the best interests of ICANN. In fact, if history is any guide, we believe that future Boards that will be bound by the revised IRP will act in good faith and with the best interests of ICANN in mind. Our concern, however, is with those rare cases when the Board may violate its articles or bylaws despite its best intentions. The IRP is intended to be a check on such actions, especially when they are based on mistakes, inaccurate advice of Staff or counsel, or some other accident of fact or fate that leads to a violation of the articles or bylaws.

We are aware that ICANN argued for a very similar standard of review in its IRP brief in the ICM matter. See, Section III (A) (2) of ICANN's IRP Brief, at pp. 44-55 (<http://www.icann.org/en/news/irp/icm-v-icann/icann-response-for-icm-memorial-on-merits-08may09-en.pdf>). We are fairly persuaded by the IRP panel's rejection of that view, where it wrote:

The IRP, to quote Dr. Twomey's testimony before Congress, is a process meant to establish a 'final method of accountability.' The notion now advanced on behalf of ICANN, that this Panel should afford the Board 'a deferential standard of review' and only 'question' the Board's actions

upon 'a showing of bad faith' is at odds with that purpose as well as with the plain meaning of 'independent review'."

See, IRP Decision in ICM v. ICANN, Paragraph 56 at pp. 32-

33, <http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf>).

We believe that this amendment to the Section 4 of the IRP frustrates the overall purpose of the IRP and runs counter to the intent of improving ICANN's accountability mechanisms. We strongly believe that the amendment to Section 4 should be deleted.

We also are concerned with the concept of standing panels for the IRP. A key component of the IRP is that the review is "independent." To keep this independence, we believe that service on an IRP tribunal should be open to all eligible panelists, not just those with previous experience with or knowledge of ICANN. Determining whether an organization has complied with its bylaws or articles of incorporation should not require historic knowledge of the organization itself, and we believe that any jurist generally qualified by the IRP provider should be more than capable of acting as a panelist for an IRP.

With regard to the Reconsideration Process, we believe additional clarification is required in three places.

First, as a letter like this one makes clear, participation by members of the ICANN community often takes place in constituencies. In the new Section 8 of the Reconsideration Policy, ICANN says that the Board Governance Committee will be empowered to summarily reject requests filed by persons who had "notice and opportunity" to participate in a relevant public comment period but failed to participate. We believe "participation" should be broadly defined to include participation in and through an ICANN constituency; otherwise, ICANN will be creating an incentive for individual members of constituencies to file multiple duplicative comments, simply to preserve their right for reconsideration should a Board decision turn in an unexpected direction.

Second, we note that submission of a Reconsideration Request will now take place through a web form, where submission will be governed by certain yet to be defined "terms and conditions." We believe that the Reconsideration Policy should be a stand-alone policy and that ICANN should delete the sentence in Section 6 that reads: "Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing." We also wish to ensure that nothing in the Reconsideration policy, including these additional terms and conditions, causes a petitioner to lose or waive any rights it might otherwise have, including the right to seek relief in a court of law.

Third, we wish to emphasize to the Board the importance of crisp timelines for reviews of reconsideration requests. This is particularly important where a reconsideration request may be used for the purpose of delaying the progress or implementation of some decision of the Board or staff.

Finally, the Registry Constituency notes that improved accountability should be one of ICANN's most important undertakings, and deserves thought and attention commensurate with its

importance. We appreciate the work of the Experts Committee, and view it as an important – but incomplete – response to the Accountability and Transparency Review Team’s Recommendations 23 and 25. In our view, the time constraints imposed on the experts’ work, the limited opportunity for the community to engage with the experts on this topic, and the development of proposed bylaws to implement the experts’ recommendations prior to community discussion of the report suggests that the work is being driven by a desire the “check off” this item, rather than a desire to “get it right.” We believe that the recommendations require further work and refinement to ensure that they will achieve the goal of providing real, practical, and accessible accountability. We encourage ICANN to solicit more public comment and engage with the community more deeply before it finalizes any changes to these accountability measures.

Thank you for the opportunity to comment on these proposals, and we welcome the opportunity to have further dialog with the Board and Staff on these issues.

This statement has the support of a [super]majority of the members of the Stakeholder Group.

Respectfully submitted,  
Keith Drazek  
Chair, Registries Stakeholder Group

### **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):** N/A

### **General RySG Information**

- Total # of eligible RySG Members<sup>1</sup>: 14
- Total # of RySG Members: 14
- Total # of Active RySG Members<sup>2</sup>: 14

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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 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\\_FIN\\_AL.pdf](http://www.gtldregistries.org/sites/gtldregistries.org/files/Charter_for_RySG_6_July_2011_FIN_AL.pdf)

- 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, Inc. (.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 this statement: Bret Fausett, [bret@internet.pro](mailto:bret@internet.pro)

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<sup>2</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.