

The Registrar Stakeholder Group (RrSG) submits the following comment regarding ICANN's recent proposal to change more than 30 provisions of the Registry Agreement new gTLD applicants would execute upon securing one or more new gTLDs.

The RrSG fully supports the comments submitted to date by the Registry Stakeholder Group (RySG) and New TLD Applicant Group (NTAG). Our detailed comment follows here:

Exclusive use of registrars under 2013 RAA

ICANN proposes that new gTLD registries be required to provision registrations only through registrars that have executed the yet-to-be-finalized 2013 Registrar Accreditation Agreement (RAA), "or any subsequent form of the [RAA] approved by the ICANN Board."

First, making such a proposal under the guise of "public interest" is an affront to all ICANN-accredited registrars, as it implies that provisioning new gTLDs through registrars operating under the 2009 RAA does not serve the public interest. Restricting commercial activity in such a way does not, in fact, serve the public interest by widening consumer choice and competition—the objective ICANN claims to pursue. This proposal ignores the contributions of registrars to the public interest and unfairly implies that registrars operating under the 2009 agreement cannot be trusted to provide new gTLD registrations to their customers.

Further, registrars vigorously object to such an over-reach of ICANN authority, particularly before the terms of the new RAA have yet to be decided. The RrSG has participated extensively and in good faith in development of the new gTLD program, and its members (and non-members) are positioned to help ICANN significantly advance its objectives. Sequestering the very channel by which Internet users will exclusively find new products and services is again in full contravention of this stated goal and, candidly, makes no sense. Creating "classes" of accreditation (2009 vs. 2013) also very much would create a non-level playing field, where 2013 RAA signatories would gain unfair advantage over competitors. Such a restriction would put applicants at a competitive disadvantage to existing registries, which would enjoy unencumbered distribution through all registrars. There should and must be only one meaning for "ICANN-accredited."

Reference to "any subsequent form" of the RAA has no place in the registry agreement. A future form as approved by the ICANN Board, but is unacceptable to registrars, could jeopardize not only the economic viability of registrars and new gTLD registries, but could destabilize the DNS.

Unilateral changes of this nature put the health and competitive stance of registrars and new registries at risk, and cannot be accepted.

Authority to unilaterally amend

The RrSG opposes expansion of ICANN's proposed right to impose new obligations on contracted parties—registries and registrars—without those parties' consent. The RrSG similarly opposes a similar attempt to include this capability in the RAA—an attempt that was rejected in negotiations and agreed to by ICANN as inappropriate, but has inexplicably resurfaced.

The "picket fence" provision in registry and registrar agreements provides ICANN the privilege of imposing temporary and/or consensus policy on operators without negotiation or consent, so long as they address issues within this appropriately limited scope and includes the protections necessary to avoid overreaching by the ICANN Board. This provides reasonable methods to address matters of urgency while preserving predictability for registries, registrars and their customers. Introducing the ICANN Board's ability to make unilateral changes into the registry agreement and RAA creates a level of risk and uncertainty that commercial operators cannot accept—it would have a chilling effect on small (entrepreneurial) and large (public) investment, and the industry would suffer from the resulting lack of innovation and competition.

In the recent past, ICANN made a similar attempt at such a right, which was broadly rejected by the community. In fact, when finally reviewed by the ICANN Board, even the Board Chairman found it disagreeable, stating, "as a

lawyer, [I] would not advise anyone to sign” a contract with such a provision. The Board agreed.¹ There is no justification to reintroduce this proposal, in either the registry or registrar agreements.

The Board’s and community’s existing avenues for addressing “substantial and compelling” needs are fully adequate.

The amendment structure in these agreements was discussed at length and reflects a highly negotiated compromise, and already includes the ability for ICANN to change the agreement. It should not be tampered with at this late date. As such, we support the detailed comments of the RySG and firmly request that ICANN remove this proposed change from the registry agreement and the RAA.

The RrSG notes that the new ICANN CEO is traveling extensively throughout the world with messages about the merits of the multi-stakeholder model, which of course we support. However, the proposed changes to the registry agreement, like the current draft of the RAA—and, not insignificantly, the manner in which they were introduced—are indicators either that staff does not share the CEO’s view or is operating in opposition of his vision. ICANN must be aligned internally with its own model before promoting it externally, and demanding a unilateral “kill switch” in commercial agreements does not advance this confidence.

Proposal to circumvent the PDP process (relating to Whois expert panel recommendations)

Similar to the inappropriate extension of rights to unilaterally amend an agreement, ICANN’s proposed change to the registry agreement as it relates to the expert working group on gTLD Directory Services could in fact circumvent the multi-stakeholder model by requiring contracted parties to adopt Board-approved changes to the Whois database without community review and approval.

The proposed change fails to reflect the ICANN Board’s intentions that the output of the Expert Working Group on gTLD Directory Services “will feed into a Board-initiated GNSO policy development process.”²

The RrSG generally supports the use of expert panels but does not support a top-down approach of having the ICANN Board make unilateral decisions that bind parties based on recommendations of such panels. If ICANN intends any recommendations to go through the GNSO policy development process, any output would be binding on registries and there is no need for the additional language. We encourage ICANN to clarify that the expert panel recommendations will feed into the bottom-up process on which the ICANN model relies by removing the proposed change.

Timing of proposed changes

The timing of ICANN’s proposals is extremely troubling. Nearly a full year after gTLD applicants submitted applications and more than \$350 million in associated fees, the community is now faced with unjustified attempts at significant last-minute changes. This of course follows a lengthy period of unexplained delay by ICANN, including missing its own deadlines. The RrSG finds that it is tremendously unfair not only to applicants, but also to registrars, registrants, and others who stand to help ICANN reach the multi-stakeholder goals associated with the new gTLD program.

The RrSG is of course equally troubled by identical treatment by staff of the proposed updated RAA. After more than a year of good faith negotiation on the part of the registrars, and seemingly near agreement on a final form of the RAA, staff inexplicably returned to the table with proposals that were previously rejected by agreement of both parties to the contract. It appears to be a bad-faith maneuver that has no place in our community.

Staff seems to sense that after protracted periods of negotiation or policy development, contracted parties will become fatigued and accept anything they must to simply carry on with business, and therefore staff enjoys the latitude to make unreasonable demands. This is an abuse of the position of trust it purports to hold.

¹ See <http://sel.icann.org/node/6762> (Part 2, Page 20)

² See <http://www.icann.org/en/news/announcements/announcement-2-14dec12-en.htm> and <http://www.icann.org/en/news/announcements/announcement-14feb13-en.htm>.

Reliance

The RrSG observes that Applicant Guidebook (AGB) terms provide ICANN with the ability to change the proposed registry agreement until applicants completed and submitted their applications. Following submission, ICANN maintains its ability to make changes, but is duty-bound to work with applicants to mitigate “material hardships” or other negative consequences of such changes.³ Not only were the AGB terms violated, the RrSG is unaware of any attempt by ICANN to mitigate resulting hardships.

A key principle of success of the gTLD program is the safe, stable operation of registries and registrars. The public relies on this stability and, knowing this is the case, applicants, registries and registrars have formulated plans on the basis of terms as presented—and relied upon—in the final AGB. Last-minute contractual demands by ICANN intentionally introduce instability into a critical phase of the program, when these businesses must focus heavily on preparation for delegation.

Conclusion

In these three examples (and others undocumented in this comment), ICANN attempts to act in a top-down fashion. Such proposals are blatant affronts to the bottom-up, consensus-based, multi-stakeholder model that ICANN professes to employ. Positioning such changes as a step toward industry “maturity,” insults its own credibility in and outside the community, particularly with those who have invested so heavily in the program’s and ICANN’s continued success.

The RrSG strongly urges removal of **at least** these problematic proposals.

³ AGB Module 6, Section 14