

The New gTLD Applicant Group (NTAG) is a group of applicants operating under the umbrella of the Registries Stakeholder Group (RySG). NTAG is a diverse group of over 100 members accounting for over half of all new gTLD applications. More than 50% of our members applied for only one TLD, and collectively we have paid ICANN in excess of \$175 million in application fees.

These comments are in response to ICANN's recent proposal to change 32 provisions of the Registry Agreement that each applicant would enter into with ICANN when it is awarded a TLD. The Registry Agreement is contained in the Applicant Guidebook (AGB), our contract with ICANN, upon which we relied when applying for TLDs almost a year ago.

Under the terms of the AGB, ICANN was able to unilaterally make changes to the proposed Registry Agreement until applicants "completed and submitted" their applications. After that time, ICANN could still make changes, but if such changes would create "a material hardship" to applicants, ICANN was and is required to work with applicants to mitigate any negative consequences of the change. (See AGB Module 6, Section 14). Alternatively, ICANN could have waited until the final contracts were executed and used the agreed-upon amendment process to offer these changes.

While NTAG members are free to file their own comments as part of the process, NTAG members, as a group, have the following concerns related to three of the proposed 32 changes. We believe that unless at least these three provisions are changed, they would create a material hardship for applicants. We support the comments offered by the RySG and its detailed dissertation of the unfairness and unreasonableness of this proposed action.

1. ICANN Board's additional unilateral right to amend the Registry Agreement

Under ICANN's renewed proposal (the same proposal had been rejected by the community and withdrawn by ICANN years ago), the ICANN Board could change the Registry Agreement with a two-thirds vote of the ICANN Board – regardless of any registry support – if there exists "substantial and compelling" need as determined solely by the ICANN Board. The ICANN community already has two vehicles to amend the Registry Agreement without registry support: the PDP process, and a temporary Consensus Policy in cases of security and stability concerns.

The fact that ICANN staff unilaterally proposed 32 substantive changes to an agreement, one approved and relied on by applicants, without any discussion with applicants is the exact reason why this change is highly problematic. How many of ICANN's 32 proposed changes in this instance would fall into that over-

broad definition? Under this proposal, the ICANN Board could unilaterally increase registry fees and change other important safeguards in the agreement.

The amendment structure in the Registry Agreement 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.

2. ICANN's suggested requirement in Section 1 of Public Interest Commitments Specification to use only registrars that sign the 2013 RAA or any subsequent RAA

ICANN's proposed requirement that new gTLD registries may only provide their services through registrars that sign the 2013 Registrar Accreditation Agreement (RAA) "or any subsequent form of the Registrar Accreditation Agreement approved by the ICANN Board" also is highly problematic. ICANN restricts registries to provisioning domain name services only through ICANN accredited registrars. To limit the pool of registrars that can sell new gTLDs, but not limit the pool that could sell *existing* gTLDs, puts applicants at an unfair competitive disadvantage to incumbent registries.

As future registries, we support ICANN and the registrars' work in negotiating terms of a new RAA. However, the viability of our enterprises should not be put at risk as a stick to encourage registrars to sign the new agreement. We note that we have not seen the terms of this agreement and understand that the registrar negotiating committee hasn't yet ratified it.

Moreover, the reference to "any subsequent form" of the RAA must be deleted from the agreement. We should not have our registries' success contingent on future registrar agreements approved unilaterally by the ICANN Board without registrar support. As such, we support the detailed comments of the RySG and strongly request that ICANN remove this proposed change in its entirety.

3. ICANN's proposal to circumvent the PDP process as it relates to Whois recommendations by an expert panel

ICANN's proposed change to the Registry Agreement related to the Expert Working Group on gTLD Directory Services could have the effect of circumventing the multi-stakeholder model by requiring registries to adopt Board-approved changes to the Whois database that do not go through a formal bottom-up community review and approval process. The proposed change seems to have failed to reflect ICANN's intentions that the output of the Expert

Working Group on gTLD Directory Services “will feed into a Board-initiated GNSO policy development process.”<sup>1</sup>

While we support the use of expert panels, we do not support a top-down approach of having the ICANN Board make unilateral decisions that bind registries 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.

### Conclusion

In at least these three egregious examples, ICANN has inappropriately attempted to seize the unilateral right to take action in a top-down fashion. While the RySG, individual NTAG members, and others will challenge other parts of the ICANN proposal (including the yet undefined PIC Dispute Resolution Process), we decided, as a group of applicants, to point out the most egregious ones. These proposals risk the stable and secure operation of a TLD by introducing uncertainty and potential financial damage, as well as risk the effectiveness and value of the multi-stakeholder model that most of us -- including ICANN -- have fought, and will continue to fight, to preserve. The proposals are being sold as a part of a maturation process, but in reality, it appears this is nothing more than a power grab by ICANN staff. By ignoring the bottom-up multi-stakeholder model, ICANN loses credibility with these three changes in the eyes of the community and with new TLD applicants who have invested so heavily in this program and have expectations for the organization with which they are entrusting their ventures. As such, under the terms of the AGB, ICANN should remove at least these three highly problematic proposals.

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<sup>1</sup> 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>.