

**VIRTUALAW LLC**

**Philip S. Corwin, Founding Principal**  
**1155 F Street, NW Suite 1050**  
**Washington, DC 20004**  
**202-559-8597/Direct**  
**202-559-8750/Fax**  
**202-255-6172/Cell**  
**[pvc@vlaw-dc.com](mailto:pvc@vlaw-dc.com)**

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By E-Mail to [comments-xxx-amendment-12oct16@icann.org](mailto:comments-xxx-amendment-12oct16@icann.org)

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

Re: Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards

Dear ICANN:

I am writing on behalf of the members of the Internet Commerce Association (ICA). ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

This letter addresses the Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards that was [published](#) for public comment on October 12, 2016.

## **Executive Summary**

- ICA has no objection the phased registry fee reduction contained in the revised RA.
- However, the net annual benefit of \$281,500 to be realized by ICM registry brings into question whether its agreement to other GDD-proffered provisions of the RA was truly “voluntary”, given the large financial benefit to it and the ability of GDD staff to deny a final agreement unless their initial negotiating position was agreed to by ICM.
- The 2016 launch of the PDP Review of All Rights Protection Mechanisms in All gTLDs, which is tasked with recommending whether new gTLD RPMs should become Consensus Policy for legacy gTLDs, makes it particularly inappropriate for GDD staff to continue seeking that de facto policy result in non-transparent, bilateral RA negotiations that contravene the policymaking process set forth in the Bylaws..
- No further action should be taken by ICANN in regard to the proposed RA for this sponsored TLD until there is clear evidence that IFFOR, the policy-setting entity for .XXX, has reviewed and approved it.
- GDD staff should demonstrate their clear commitment to ICANN’s bottom-up policymaking process by ceasing and desisting from seeking top-down imposition of new gTLD RPMs in legacy gTLD RA negotiations until the RPM Review WG has completed its work reviewing those RPMs and its final recommendations – including whether those RPMs should become Consensus Policy -- have been acted upon by the GNSO Council and ICANN Board.

## **Reduction of Per Transaction Registry Fee**

ICA has no objection to the principal material benefit provided by the revised RA to ICM Registry, the registry operator for .XXX, which is a phased reduction of its per transaction registry fee from the current level of \$2.00 to the standard registry fee of \$0.25 by mid-2018. The initial high level fee was based upon ICANN concerns that this adult content sponsored TLD (sTLD) could result in substantial litigation and related expenses for ICANN. Those concerns have not been realized, and there no longer seems to be any substantive reason to continue charging eight times the standard registry fee to the operator of .XXX. GDD should properly have approved the phased fee reduction without pressing for additional unrelated concessions by ICM as conditions for approval.

This 87.5 reduction will, based upon a published [report](#) that .XXX currently holds 170,000 domains, will be worth \$297,500 in annual reductions at that level of sTLD domain registrations, bringing the annual fees paid by ICM to ICANN down from \$340,000 to \$42,500. As the revised RA also contains an increase in the quarterly fee payable to ICANN from \$2,500 to \$6,500, the total net annual benefit at current registration levels will be reduced to \$281,500.

The very substantial financial benefit to be reaped by ICM Registry – aggregating to an additional \$2.815 million in retained revenue over the decade following full implementation – illustrate precisely why the concept of “voluntary” agreement by a registry seeking beneficial changes in its RA in closed door, non-transparent negotiations with GDD staff is a false but convenient fiction. In this instant case we have two negotiating parties. ICM Registry, presented with the opportunity for retaining substantial additional domain revenues, and already subject to Uniform Rapid Suspension (URS) and other new gTLD rights protection mechanisms (RPMs) at its .adult, .porn and .sex new gTLDs, cannot be expected to take the integrity of maintaining bottom-up, multistakeholder policy development into account and elevate it over its own financial interest. And GDD staff has already illustrated their willful blindness to the policy implications of pressing legacy gTLDs to adopt new gTLD (RPMs).

**Thus, two parties with no central role in ICANN’s policy development process are effectively permitted to collude in closed door negotiations on a decision with broad policy implications. With each legacy TLD revision in which GDD staff succeeds in imposing new gTLD provisions that are not yet ICANN Consensus Policy they create de facto consensus policy, one negotiation at a time. This is wrong and it should stop.**

### **De Facto Consensus Policy Through Non-Transparent Contract Negotiations**

The underlying policy issue created by GDD pursuit of the imposition of new gTLD RPMs on legacy gTLDs through contract negotiations was raised to a high profile within the ICANN community in 2015 when the revised RAs for .travel, .cat and .pro were challenged by multiple segments of the ICANN Community.

ICA’s [comment letter](#) of June 21, 2015 stated in part:

*The ICA is strongly opposed to the inclusion of new gTLD rights protection mechanisms (RPMs), particularly Uniform Rapid Suspension (URS), in this renewal agreement (RA) for a legacy gTLD. We believe that this attempt by ICANN contracting staff to create de facto Consensus Policy via individual registry contract, absent a relevant Policy Development Process (PDP), is a glaring example of the type of top down, unaccountable action that should be targeted by enhanced accountability measures accompanying the IANA transition proposal. Contracts with legacy gTLDs can contain and enforce Consensus Policy, but it is an impermissible violation of ICANN’s Bylaws for contracts to attempt to create Consensus Policy.... The potential addition of these RPMs to legacy gTLDs through this inappropriate avenue will have a substantial and deleterious effect on ICANN’s policymaking process going forward, will create a new and dangerous precedent whereby de facto Consensus Policy can be created by contractual fiat in violation of ICANN Bylaws, and will substantially and adversely affect third parties around the world consisting of the existing registrants of more than one hundred million legacy gTLD domains.*

In addition to ICA, that general line of reasoning was [echoed](#) by the Electronic Frontier Foundation, IP Justice, and ICANN’s Business Constituency (BC) and Non-Commercial

Stakeholders Group (NCSG).

On July 31, 2015 GDD staff [published](#) its Report of Public Comments regarding the Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement. In defense of the inclusion of the URS in the proposed .Travel Registry Agreement and other RAs, the report stated:

*Although the URS was developed and refined through the process described here, including public review and discussion in the GNSO, it has not been adopted as a consensus policy and ICANN staff has no ability to make it mandatory for any TLDs other than those subject to the new gTLD registry agreement. **Accordingly, ICANN staff has not moved to make the URS mandatory for any legacy TLDs, and it would be inappropriate for staff to do so. In the case of .TRAVEL and other legacy TLD registry agreement renewals (.JOBS) and proposed renewals for .CAT and .PRO registry agreements, inclusion of the URS was developed as part of the proposal in bilateral negotiations between the registry operator and ICANN.** (Emphasis added)*

This self-serving justification takes the position that GDD's opening position in these negotiations is not an attempt to make any particular revision "mandatory", and that a registry's agreement to a GDD request is entirely "voluntary" within the context of balanced, bilateral negotiations. It is true that under ICANN's new standard registry agreement any registry operator has a presumptive right of renewal of its RA – but only of the exact same RA, with no material changes in its terms and conditions. But all three of the registries accepting URS in their 2015 renegotiations sought and received material beneficial changes in their RAs that GDD staff had the exclusive power to approve, and to condition upon the acceptance of other unrelated revisions.

To the collective dismay of ICA and other parties that objected to the 2015 actions, ICANN's Board chose to back GDD staff rather than defend the community-based policymaking process. On February 3, 2016, in response to "Reconsideration Requests 15-19 (the ICANN Business Constituency & the ICANN Noncommercial Stakeholder Group (NCSG)) and 15-20 (The Internet Commerce Association)", ICANN's Board adopted the Board Governance Committee's denial of the two referenced Requests.

That [action](#) was based upon the flimsy rationale that—

*The inclusion of the new gTLD RPMs in the Renewed Registry Agreements is part of the package of agreed-upon terms resulting from the bilateral negotiations between ICANN and each registry operator, and not, as Requesters claim, a "unilateral decision by ICANN contractual staff." The Requesters present no evidence to the contrary – i.e., that applying the new gTLD RPMs to the Renewed Registry Agreements was based on a unilateral decision by ICANN staff. The Requesters suggest that the Board should have reviewed all of ICANN staff's communications with the .CAT, .TRAVEL, and .PRO registry operators in order to confirm that the negotiations were in fact bilateral. Such contention, however, does not support reconsideration.*

The Board's decision was based upon the false premise that the negotiations between a registry operator requesting material and beneficial alterations in its RA can be bilateral and balanced when GDD staff have placed requested changes on the table at the start of negotiations and have the unrestricted power to deny the requested RA changes unless

their requests are acceded to. The Board also failed to review the full record of communications between the negotiating parties to judge whether the final draft agreement was coerced by GDD staff.

The myth of “voluntary” acquiescence to GDD negotiating demands is even more stark in the present case, in which ICM stands to benefit in the amount of almost \$300k per annum simply by acquiescing to them. The disparity in bargaining power is even more pronounced in the instant case, in which ICM has sought and will receive substantial continuing monetary benefits. The interest of the ICANN community in maintaining a transparent and bottom-up policy development process was not represented by either party to this negotiation.

### **GDD Continues to press for RPM Adoption as a Condition of Negotiation Agreement**

Notwithstanding the lack of full transparency in the current comment request, there is little doubt that inclusion of the URS was done at the behest of the GDD in its negotiations with ICM.

In the three RAs at issue in 2015, the request for public comment clearly stated:

*With a view to increase the consistency of registry agreements across all gTLDs, ICANN has proposed that the renewal agreement be based on the approved new gTLD Registry Agreement as updated on 9 January 2014.*

In the current instance the history of how agreement to the URS came about is vague, with the request for comment stating only:

*During the course of discussions, ICM informed ICANN that ICM would agree to add both additional safeguards contained in the form new gTLD Registry Agreement, and a phased implementation of a reduction of fees based on ICM's compliance with the terms of the .XXX Registry Agreement.*

The mystery of whether URS inclusion in the revised .XXX RA was sought by GDD was cleared up at the Public Forum held at ICANN 57 in Hyderabad, India on November 8, 2016. During the Forum I made a statement (included in the Appendix at the end of this letter) regarding the proposed revisions.

In response, GDD head Akram Atallah stated:

***SO BASICALLY THE NEGOTIATIONS ARE -- THE REGISTRIES COME AND ASK FOR SOMETHING AND WE TELL THEM PLEASE ADOPT THE NEW gTLD CONTRACT. AND IF THEY PUSH BACK ON IT AND THEY SAY THEY DON'T WANT SOMETHING, WE CAN FORCE THEM TO TAKE IT. (Emphasis added)***

In Mr. Atallah's defense, the raw transcript may be mistaken and the word he used in the second sentence may have been “can't”. If that was his assertion, we must question its real world accuracy based upon the feedback we have received from contracted parties regarding the tough negotiating position that ICANN's GDD and Legal staff take in such

RA revision discussions.

**Yet, regardless of whether ICM eagerly embraced URS or initially resisted it, Mr. Atallah was quite clear in his response that, in each and every negotiation in which a registry “asks for something”, GDD staff tells them “Please adopt the new gTLD contract” as its initial bargaining position – even though that contract contains multiple provisions which remain “implementation details” and have not been adopted as “Consensus Policy” through proper GNSO procedures and Board adoption.**

### **Launch of the PDP Review of All Rights Protection Mechanisms in All gTLDs**

From a policy development perspective, the principal difference between last year’s actions and the instant case is the intervening creation of the PDP Review of All Rights Protection Mechanisms in All gTLDs. The Working Group’s (WG) [Charter](#) was approved by the GNSO Council on March 15, 2016.

That Charter’s “List of Potential Issues for Consideration in This PDP” includes this overarching one:

***Should any of the New gTLD Program RPMs (such as the URS), like the UDRP, be Consensus Policies applicable to all gTLDs, and if so what are the transitional issues that would have to be dealt with as a consequence?***

The actions of GDD staff in proposing adoption of new gTLD registry provisions by incumbent gTLDs severely prejudices the work of the PDP by creating de facto policy decisions in advance of its preliminary report and recommendations. Further, the GDD’s position in RA negotiations is materially flawed in that it fails to consider and address important “transitional issues”, including the necessary legal steps to bind legacy gTLD registrants to use of the URS when it has not been adopted as a Consensus Policy through proper PDP methodologies.

I spoke to this matter in my Public Forum Statement at ICANN 57, stating:

*SO I'LL END WITH THIS QUESTION: I DON'T KNOW WHAT THE RPM WORKING GROUP IS GOING TO RECOMMEND ON URS BECOMING CONSENSUS POLICY. MY OWN MIND IS COMPLETELY OPEN ON THIS POINT DEPENDING ON WHAT OUR WORK FINDS AND WHAT CHANGES MIGHT BE MADE IN IT.*

*BUT IF WE WERE TO RECOMMEND THAT URS SHOULD NOT BE CONSENSUS POLICY ... WOULD GDD STAFF CONTINUE THIS PRACTICE IN NEGOTIATIONS? IF THE ANSWER IS NO, THEN I MAINTAIN IT'S INAPPROPRIATE FOR THEM TO DO IT NOW. AND IF THE ANSWER IS THAT THEY'RE GOING TO KEEP DOING IT EVEN IF WE COME OUT AGAINST IT BEING CONSENSUS POLICY, THEN DOESN'T THAT RENDER THAT PART OF OUR CHARTER WORK A SOMEWHAT IRRELEVANT EXERCISE IN FUTILITY?*

In response, Mr. Atallah stated:

*IF THE POLICY COMES BACK AND SAYS THAT THE URS IS NOT SOMETHING THAT WE WANT TO HAVE AS A POLICY, OF COURSE, WE WOULD SUPPORT*

*THAT.*

Although the response is a tad ambiguous, read in its best light it indicates that GDD staff might cease their practice of suggesting adoption of new gTLD RPMs by legacy TLDs in RA renewal or revision negotiations if the WG recommends against their adoption as Consensus Policy.

**If that is a correct reading of GDD's position, then the proper action for it to take going forward is to cease and desist from urging legacy gTLDs to adopt those RPMs in RA negotiations while the RPM Review WG is active, because a recommendation of the WG that the RPMs not become Consensus Policy would merely be an extension of the status quo. If it is an incorrect reading, then the PDP deliberations of the WG on this central question are indeed an irrelevant exercise in futility and make a mockery of ICANN's purported commitment to a bottom-up policymaking process.**

For the record, ICA has taken no position on whether URS or any other relevant new gTLD RPM should become ICANN Consensus Policy applicable to .Com and other legacy gTLDs. Our position on that matter shall be based upon the PDP's review and findings regarding the actual implementation of the URS, and particularly whether it is being uniformly administered as a narrow supplement to the UDRP in which bad faith registration and use are demonstrated by clear and convincing evidence. Our position will also be dependent on whether any alterations of the URS are recommended – and, in particular, whether a domain transfer option is recommended with its potential to turn the URS into a rapid and inexpensive means of hijacking valuable legacy domains.

(For the record, while I am one of three Co-Chairs of the RPM Review WG, that position gives me a co-equal voice solely on administrative matters, and no authority whatsoever to steer that very large WG to any particular policy recommendation.)

### **Lack of IFFOR Review and Approval of the Revised RA**

The revised RA on which we are commenting also raises unique issues insofar as .XXX is a sponsored TLD for which a governing, policy-setting organization was required due to the controversial nature of the adult content hosted at .XXX domains.

That organization, the International Foundation for Online Responsibility ([IFFOR](#)) is, according to its own [description](#), constituted as follows:

*IFFOR comprises a Board, Policy Council and staff which work together in developing and approving IFFOR's work.*

*The Board comprises three members, on two-year terms, one of whom is chosen by ICM Registry.*

*The Policy Council comprises nine members, representing four stakeholder groups. Five members represent the sponsored community for dot-xxx domains, and then there is one representative for each of the other groups that represent: free expression; child advocacy; privacy and security. The ninth member is chosen by*

*ICM Registry.*

*The staff comprises an Executive Director and Manager of Public of Participation, and an Ombudsman.*

Most important for the present circumstance, IFFOR develops policies that apply to all owners of .XXX domain names, and its [Baseline Policies](#) contain a provision that is directly relevant to the same trademark protection concerns that underlie the URS:

***G. Prohibition on Abusive Registrations***

***No registrant may register an abusive string in the sTLD including, without limitation, strings that infringe the intellectual property rights of a third party, including common law trademark rights; strings that are obvious variants of well-known trademarks not belonging to the registrant; first and last names of an individual other than the individual or his/her agent or names that suggest the presence of child abuse images. (Emphasis added)***

IFFOR is referenced in the request for public comment in the following way:

*Additionally, ICANN reviewed the most recent IFFOR audit report of the Registry Operator's CRS and found that the system is not only fully functional, but exceptionally functional and compliant for its intended purposes. ICM conveyed its belief that IFFOR's Audit Report and trend analysis demonstrate effectiveness regarding mitigating abuse on the .XXX gTLD and further maintained that the .XXX gTLD no longer carries risk, for either ICANN or the Internet stakeholders initially concerned with the launch of .XXX. ICM explained that the data shows that the system has been enhanced beyond its original capabilities and has now demonstrated high levels of utility for its operation and ease of use, which is evidenced by a pattern of decline in cases.*

However, there is no further indication that IFFOR had any role in reviewing and approving the proposed RA, despite the presence of RPM provisions that relate to trademark protection and therefore are clearly within IFFOR's existing Policy remit. Additionally, the fact that IFFOR's Audit Report found that .XXX no longer carries risk for ICANN (a conclusion that ICANN implicitly accepted given its agreement to reduce registry fees by 87.5%), as well as that IFFOR's existing anti-infringement policy is effectively preventing significant infringement, plus the fact that .XXX are restricted solely to members of the Sponsored Community, calls into question why the URS was even introduced into the RA negotiations -- save for GDD's preexisting decision to seek its imposition in each and every RA renegotiation.

Given the lack of any clear evidence that the revised RA has been reviewed or approved for IFFOR, final action by ICANN should be deferred until that process occurs.

**Conclusion**



Unfortunately, while we have no objection to granting ICM the .XXX registry fee reduction it has justifiably sought, we must object to the proposed RA's approval given GDD's imposition of extraneous new gTLD RA provisions into a legacy TLD agreement, and the consequent de facto creation of policy in regard to matters that are presently under consideration by a GNSO-chartered PDP.

**Given the history of flimsy and self-serving justifications by GDD staff and the ICANN Board for similar actions taken in 2015, we are under no illusion that this comment letter will likely be successful in effecting removal of the URS and other new gTLD RA provisions from the revised .XXX RA. Nonetheless, we strenuously object to this GDD action that intrudes upon and debases ICANN's legitimate policymaking process, and urge the GDD and Board to reconsider their positions, and to ensure that GDD staff ceases and desists from taking similar action in the context of future RA renewals and revisions until the RPM Review WG renders the community's judgment as to whether the URS and other new gTLD RPMs should become Consensus Policy and such recommendation is reviewed by HNSO Council and the ICANN Board.**

We appreciate the opportunity to provide these comments on the proposed revision of the .XXX RA. We hope they are helpful to the further consideration of this matter by ICANN and its community.

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association

**Appendix – Transcript of Public Comments of Philip S. Corwin at ICANN 57 Public Forum, Hyderabad, India, November 8, 2016** (raw transcript edited for accuracy)

>>PHILIP CORWIN: GOOD MORNING. PHILIP CORWIN. I WEAR MANY HATS IN THE ICANN WORLD ONE OF THEM AS A COUNCILLOR FOR THE BUSINESS CONSTITUENCY ON THE GNSO COUNCIL. ANOTHER IS CO-CHAIR OF TWO WORKING GROUPS INCLUDING ONE REVIEWING ALL RPMs AT ALL GTLDS. BUT THE HAT I'M WEARING FOR THIS STATEMENT IS THAT OF COUNSEL TO THE INTERNET COMMERCE ASSOCIATION.

YOU ALL RECALL THAT LAST YEAR GLOBAL DOMAINS DIVISION STAFF NEGOTIATED .CAT, PRO AND TRAVEL, REGISTRY AGREEMENT RENEWALS ALL OF WHICH INCLUDED SO-CALLED VOLUNTARY ADOPTION OF UNIFORM RAPID SUSPENSION. ICA PROTESTED THAT AS DID MANY OTHERS SAYING THAT IT WAS MAKING POLICY THROUGH CONTRACT NEGOTIATIONS. WE FILED A RECONSIDERATION REQUEST AS DID THE BC AND THE NCSG JOINTLY. AND THAT HASN'T HAPPENED VERY OFTEN. AND I WANT TO NOTE HERE THAT MY BC COLLEAGUES FAVOR ADOPTION OF URS AS CONSENSUS POLICY BUT TOOK A VERY PRINCIPLED STAND AGAINST GETTING TO THAT RESULT THROUGH THIS MANNER.

BUT GDD AND THE BOARD IN THAT PROCESS SAID THAT, OF COURSE, IT WOULD BE WRONG TO FORCE URS ON REGISTRY OPERATORS THROUGH NEGOTIATIONS BUT THAT THESE RESULTS WERE VOLUNTARY AND, THEREFORE, OKAY.

NOW, ON OCTOBER 12th, ICANN PUBLISHED FOR PUBLIC COMMENT A RENEWAL AGREEMENT FOR .XXX IN WHICH THEY TOO AGREE TO URS FOR A 87% REDUCTION IN THEIR REGISTRY FEES. ONE HAS TO WONDER WHAT A REGISTRY OPERATOR WOULDN'T AGREE TO IN EXCHANGE FOR THAT TYPE OF REDUCTION.

SO I'LL END WITH THIS QUESTION: I DON'T KNOW WHAT THE RPM WORKING GROUP IS GOING TO RECOMMEND ON URS BECOMING CONSENSUS POLICY. MY OWN MIND IS COMPLETELY OPEN ON THIS POINT DEPENDING ON WHAT OUR WORK FINDS AND WHAT CHANGES MIGHT BE MADE IN IT.

BUT IF WE WERE TO RECOMMEND THAT URS SHOULD NOT BE CONSENSUS POLICY -- [TIMER SOUNDS.] CAN I JUST FINISH THIS? -- WOULD GDD STAFF CONTINUE THIS PRACTICE IN NEGOTIATIONS? IF THE ANSWER IS NO, THEN I MAINTAIN IT'S INAPPROPRIATE FOR THEM TO DO IT NOW. AND IF THE ANSWER IS THAT THEY'RE GOING TO KEEP DOING IT EVEN IF WE COME OUT AGAINST IT BEING CONSENSUS POLICY, THEN DOESN'T THAT RENDER THAT PART OF OUR CHARTER WORK A SOMEWHAT IRRELEVANT EXERCISE IN FUTILITY? THANK YOU VERY MUCH.

>>AKINORI MAEMURA: THANK YOU VERY MUCH. [APPLAUSE] ANYONE TAKES? NO?

>>CHERINE CHALABY: AKRAM, DO YOU WANT TO MAKE A COMMENT ON THAT, PLEASE?

**>>AKRAM ATALLAH: SURE, THANK YOU. SO BASICALLY THE NEGOTIATIONS ARE -- THE REGISTRIES COME AND ASK FOR SOMETHING AND WE TELL THEM PLEASE ADOPT THE NEW gTLD CONTRACT. AND IF THEY PUSH BACK ON IT AND THEY SAY THEY DON'T WANT SOMETHING, WE CAN FORCE THEM TO TAKE IT. IT'S A NEGOTIATION BETWEEN TWO PARTIES, AND I THINK IT'S WITHIN THE REMIT OF THE CORPORATION TO NEGOTIATE ITS CONTRACTS. IF THE POLICY COMES BACK AND SAYS THAT THE URS IS NOT SOMETHING THAT WE WANT TO HAVE AS A POLICY, OF COURSE, WE WOULD SUPPORT THAT. THANK YOU.**

>>PHILIP CORWIN: I APPRECIATE THE LAST PART OF YOUR STATEMENT, AKRAM. THANK YOU VERY MUCH.

**(Emphasis added)**

