Comments of the Registries Stakeholder Group

New gTLDs DAG4 – Module 5 and Base Agreement

July 21, 2010

The Registries Stakeholder Group of the GNSO (RySG) is pleased to provide these comments on Module 5 as well as the contract provisions in Version 4 of the Draft Applicant Guidebook for new Generic Top-level Domains (DAG4). There is consensus support from the RySG for the work-in-progress of this document as well as the nature of the substance of the material contained. The RySG will inform ICANN staff upon completion of its formal vote.

Note: Comments regarding other sections of the DAG4 will be submitted separately.

I.   **Module 5: Transition to Delegation (Sections 5.2.1 through 5.3 of DAG4)**
http://www.icann.org/en/topics/new-gtlds/draft-transition-redline-28may10-en.pdf
Sections 5.2.1 through 5.3 now contain a number of pre-launch tests and requirements that any registry operator must fulfill before the TLD can be added to the root and the registry may launch its gTLD. However, the RySG notes that these requirements and tests are:

- largely undocumented
- binding and material but not covered in the base agreement
- not referenced in the agreement
- possibly subject to unilateral change by ICANN without advance notice to registry operators.

Moreover, ICANN gives no timelines or guarantees as to how long its evaluations will take.

Without further clarity on these issues, registry operators will not have a predictable path to launch and cannot perform business planning, and operators may be materially impacted. These requirements need to be documented, and objective standards should be published. The documentation should include information about ICANN's obligations, such as the timelines under which it will respond.

The requirements include but are not limited to:
  A. new, unspecified load tests and unspecified "additional tests" (5.2.1)
  B. unspecified "provision of additional information and completion of additional technical steps required for delegation" (5.3)
  C. Under-specified or unclear requirements. For example, there are multiple issues associated with the DNSSEC requirements in 5.22 and 5.2.3. They include:
      o They would seem to require registry operators to roll over their keys for ICANN before launch. Was this intended?
      o The criteria for "demonstration" are unclear.

- The "secure communication channels with the IANA for trust anchor material exchange" currently consists of a Web form. (https://itar.iana.org/procedures/) Does "Inter-operation" mean that ICANN/IANA is planning a new, interactive system of some sort?

II. BASE AGREEMENT

Introduction

These comments focus specifically on the terms and conditions of the registry agreement that an applicant would be required to sign, and also the terms and conditions of the application itself.

For ease of reference, the versions of the registry agreements discussed will be as follows:

"05-07 Registry Agreement" will refer to the 2005-2007 form gTLD Registry Agreement, as was used by ICANN in comparing the v1 Registry Agreement in version 1 of the Draft Applicant Guidebook for New gTLDs

"v1 Registry Agreement" will refer to the draft Registry Agreement associated with version 1 of the Draft Applicant Guidebook for New gTLDs

"v2 Registry Agreement" will refer to the draft Registry Agreement associated with version 2 of the Draft Applicant Guidebook for New gTLDs

"v3 Registry Agreement" will refer to the draft Registry Agreement associated with version 3 of the Draft Applicant Guidebook for New gTLDs

"v4 Registry Agreement" will refer to the draft Registry Agreement associated with version 4 of the Draft Applicant Guidebook for New gTLDs

Our comments consist of an annotated copy of the relevant portions of the Module 5 draft registry agreement that appears in the Guidebook. The ICANN text appears in black, while the constituency comments appear in blue. Specific language additions appear in bolded blue text.

Summary

The RySG appreciates and acknowledges the significant changes that ICANN did make in the v4 Registry Agreement. However, the RySG believes that additional changes are still necessary to address the RySG's concerns.

REGISTRY AGREEMENT

This REGISTRY AGREEMENT (this "Agreement") is entered into as of _____ (the "Effective Date") between Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation ("ICANN"), and _____, a _____ ("Registry Operator").

ARTICLE 1.

DELEGATION AND OPERATION OF TOP–LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

1.3 Representations and Warranties.

(a) Registry Operator represents and warrants to ICANN as follows:

(iii) Each of Registry Operator and the other parties thereto has duly executed and delivered to ICANN an instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the "Continued Operations Instrument"), and such instrument is a binding obligation of the parties thereto, enforceable against the parties in accordance with its terms.

The RySG repeats the comments it made in v3 as they are still relevant. More specifically, it is not apparent what "and the other parties thereto" refers to, and it seems this must be a typographical error. The sentence should read: "**Registry Operator has duly executed and delivered to ICANN…"**

ARTICLE 2. COVENANTS OF REGISTRY OPERATOR

2.1 Approved Services; Additional Services. Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2 in the specification at [*see specification 6*] and such other Registry Services set forth on Exhibit A (collectively, the "Approved Services"). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a modification to an Approved Service (each, an "Additional Service"), Registry Operator shall submit requests for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time in accordance with the procedures set forth in Specification 1 (the "RSEP"). Registry Operator may offer Additional Services only with the written approval of ICANN. In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP, which amendment shall be in a form reasonably acceptable to the parties.

The RySG notes that the process for the adoption of consensus policies is not set forth in Specification . Rather than citing Specification1, we recommend changing the language in second sentence to the following: "**as such policy may in the future be modified in accordance the ICANN's Bylaws applicable to Consensus Policies...**"

2.2 Compliance with Consensus Policies and Temporary Policies. Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with ICANN's Bylaws, provided such future Consensus Polices and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth at [*see specification 1*]* ("Specification 1").

2.3 Data Escrow. Registry Operator shall comply with the registry data escrow procedures posted at [*see specification 2*]*.

2.4 Monthly Reporting. Within twenty (20) calendar days following the end of each calendar month, Registry Operator shall deliver to ICANN reports in the format posted in the specification at [*see specification 3*]*.

2.5 Publication of Registration Data. Registry Operator shall provide public access to registration data in accordance with the specification posted at [*see specification 4*]* ("Specification 4").

2.6 Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall reserve from initial (i.e. other than renewal) registration all character strings that appear on the Schedule of Reserved Names in the specification posted at [*see specification 5*]* ("Specification 5"). Registry Operator may establish policies concerning the reservation or blocking of additional character strings within the TLD at its discretion. If Registry Operator is the registrant for any domain names in the Registry TLD (other than the Second-Level Reservations for Registry Operations from Specification 5), such registrations must be through an ICANN accredited registrar. Any such registrations will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-Level Transaction Fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

2.7 Functional and Performance Specifications. Functional and Performance Specifications for operation of the TLD will be as set forth in the specification at [*see specification 6*]*. Registry Operator shall comply with such Functional and Performance Specifications and, for a period of at least one year, shall keep technical and operational records sufficient to evidence compliance with such specifications.

2.8 Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth in the specification at [*see specification 7*]* ("Specification 7"). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all determinations and decisions made by ICANN pursuant to Section 2 of Specification 7.

have no liability to either Registrar, Registrant or any other person for any action taken in accordance with the terms of any RPMs (including in particular the URS).

2. The language above requires Registry Operators to "comply with all determinations made by ICANN pursuant to Section 2 of Specification 7." The RySG notes that a strict reading of this language may imply that a Registry Operator may be in breach even if it is exercising its right to appeal or review decisions of the PDDRP or RRDRP panels. Therefore it should state: "**Subject to any right to appeal or review under the applicable policies, Registry Operator must comply with all determinations and decisions made by ICANN pursuant to Section 2 of Specification 7**."

3. Finally, Specification 7 allows ICANN to amend the RPMs at its discretion. It should be made clear that Specification 7 (and each of the RPMs contained therein) may only be modified through the consensus policy process as it falls within the "picket fence" under Section 1.2.5 of Specification 1.

2.9 Use of Registrars* (see note below).

(a) *Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator and its Affiliates (or any person or entity acting on their behalf) shall not act as a registrar, reseller or any other form of distributor with respect to the TLD or any other top-level domain. Registry Operator must provide non-discriminatory access to registry services to all ICANN accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD, provided that such agreement may set forth non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Such agreement may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN. This Section 2.9 shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar. [Registry Operator shall not engage or otherwise permit any registrar, reseller or any other form of distributor, or any of their Affiliates (or any person or entity acting on their behalf) to provide Registry Services for the TLD.]*

(b) *Registry Operator and its Affiliates shall not, directly or indirectly: (i) control any ICANN-accredited registrar or its Affiliates, (ii) control or acquire greater than 2% Beneficial Ownership of any class of securities of any ICANN-accredited registrar or its Affiliates, (iii) be controlled by, or be under common control with, any ICANN-accredited registrar or its Affiliates, or (iv) except as set forth below in this sub-clause (b), sell or otherwise transfer any interest in any security of Registry Operator or its Affiliates to any ICANN-accredited registrar or its Affiliates. Nothing withstanding sub-clause (b)(iv) above, Registry Operator may sell voting securities to any ICANN-accredited registrar or its Affiliates, provided that any such sale will not result in such registrar or its Affiliates owning greater than 2% of Registry Operator's outstanding voting securities.*

(c) *For the purposes of this Section 2.9: (i) "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly,*

of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise, and (iii) a person or entity that possesses "Beneficial Ownership" of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares (A) voting power which includes the power to vote, or to direct the voting of, such security; and/or (B) investment power which includes the power to dispose, or to direct the disposition of, such security.]

* Note: The text in this section is possible implementation language resulting from the resolutions of the ICANN Board (adopted at the ICANN Meeting in Nairobi) with respect to the separation of registry and registrar functions and ownership <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5>. During the recent Board Retreat in Dublin during May 2010, the board reviewed possible issues that might result from a strict interpretation of the Board's resolutions. It was the sense of the Board that: 1) the draft proposed stricter limitations on cross ownership represents a "default position" and they continue to encourage the GNSO to develop a stakeholder based policy on these issues; 2) a very strict interpretation of the resolutions might create unintended consequences; 3) staff should produce language in the agreement matching a "de minimus" acceptable approach (2% language) while remaining generally consistent with the resolutions; 4) the Board encourages community input and comment on the correct approach to these issues in the absence of GNSO policy; and 5) the Board will review this issue again if no GNSO policy results on these topics.

The RySG notes that the entirety of this section is under review by the VI WG and reserves the right to comment on this section during the applicable public comment periods on the work of the VI WG.

2.10 Pricing for Registry Services. Except as set forth in this Section 2.10, Registry Operator shall provide each ICANN accredited registrar that has executed Registry Operator's registry-registrar agreement advance notice of any price increase (including the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars) of no less than thirty (30) calendar days with respect to initial domain name registrations and one hundred eighty (180) calendar days with respect to renewal of domain name registrations, and shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Notwithstanding the foregoing, with respect to renewal of domain name registrations, Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to a price for which Registry Operator provided notice within that past twelve (12) months, and need not provide any notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. Registry Operator shall offer all domain registration renewals at the same price, unless the registrant agrees in its registration agreement with a registrar to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price to such registrant. Registry Operator shall provide public query-based DNS lookup service for the TLD at its sole expense.

1. Section 2.10 as currently drafted fails to take into account the market dynamics that exist between registries, registrars and registrants and how domain names are sold in the marketplace. Because registrars operate under a wide range of business models, the effective price paid by a registrant to a registrar for a domain name is a result of many factors of which the price charged by the registry is only one component. Discounts, rebates, refunds and other marketing funds paid to registrars with respect to the sale of a particular domain name are not always passed through to the registrant of such

domain name. The language contained in the parenthetical that would require 30 days notice in the case of new registrations and 180 days with respect to renewals for the "elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars" would unduly and unnecessarily restrict the ability of registries to engage in seasonal or short-term and targeted marketing programs and/or respond to changes in market conditions with the potential effect of actually reducing the ability of registries to compete on price.   The proposed language would not provide new registries with the flexibility in pricing and marketing needed to compete in what is likely to become a crowded marketplace. The 180 day notice requirement when applied to the elimination of refunds, rebates, discounts, product tying or other programs is likely to discourage the introduction of innovative products and services.

Similarly, the requirement that a Registry Operator offer all domain name registration renewals at the same price, unless, the registrant agrees in its registration agreement with a registrar to a higher price at the time of the initial registration also fails to take into account the realities of the marketplace and the true nature of the relationship between Registries, Registrars and Registrants.   Registrants enter agreements with Registrars, and the price they pay for a domain name is dependent upon a multitude of factors including term length, number of domains registered, and services purchased that are outside the control of the Registry. Registrars, not Registries, set the price charged and renewal terms to Registrants. Furthermore because of the many different registrar business models, the type of "conspicuous disclosure" of the renewal price contemplated by Section 2.10 is often not practical or realistic, particularly if the price is bundled with other services.

The proposed language would also effectively prohibit Registries from offering marketing programs, refunds, rebates, discounts, product tying or other programs directed at renewing registrants or in any way takes renewal registrations into account. The proposed language could also be deemed to limit the ability to up sell registrants or engage in marketing directed at particular markets.

The RySG recommends that (i) the notice period for the elimination of any refunds, rebates, discounts, product tying or other programs be the same 30 days for both new and renewals of domain registrations; (ii) that language be added to make it clear that nothing in this section prevents a registry from offering rebates, discounts, product tying or other programs of limited duration provided that the duration of such offering rebates, discounts, product tying or other programs is disclosed up front; and (iii) delete the second to last sentence of the section.

2. In addition, the RYSG repeats it comments from DAG3 which asked In the final sentence, what does "public query-based DNS lookup service" mean? Does that sentence mean that alternative models are not allowed, such as free registration with fees for resolution?

3. In light of the above, the RySG recommends that 2.10 be changed as follows:

2.10 Pricing for Registry Services. Except as set forth in this Section 2.10, Registry Operator shall provide each ICANN accredited registrar that has executed Registry Operator's registry-registrar agreement advance notice of (i) any price increase (including the elimination of any refunds, rebates,

~~discounts, product tying or other programs which had the effect of reducing the price charged to~~ ~~registrars)~~ of no less than thirty (30) calendar days with respect to initial domain name registrations and one hundred eighty (180) calendar days with respect to renewal of domain name registrations, and (ii) no less than thirty (30) calendar days of the elimination of any refunds, rebates, discounts, product tying or other programs which had the effect of reducing the price charged to registrars; provided that no such notice shall be required to be given with respect to any rebates, discounts, product tying or other programs of limited duration provided that the duration of such offering rebates, discounts, product tying or other programs is disclosed up front) and shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Notwithstanding the foregoing, with respect to renewal of domain name registrations, Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to a price for which Registry Operator provided notice within that past twelve (12) months, and need not provide any notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. ~~Registry Operator shall offer all domain registration renewals at the~~ ~~same price, unless the registrant agrees in its registration agreement with a registrar to a higher price at~~ ~~the time of the initial registration of the domain name following clear and conspicuous disclosure of such~~ ~~renewal price to such registrant.~~ The price charged by Registry Operator shall include ~~Registry Operator~~ ~~shall provide~~ public query-based DNS lookup service at the top-level ~~for the TLD at its sole expense~~.

2.11 Contractual and Operational Compliance Audits. ICANN may from time to time (not to exceed twice per calendar year) conduct contractual compliance audits to assess compliance by Registry Operator with its covenants contained in Section 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN shall give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN. As part of such audit and upon request by ICANN, Registry Operator shall timely provide all responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than three (3) business days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its covenants contained in Section 2 of this Agreement. Any such audit will be at ICANN's expense, unless such audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% to ICANN's detriment. In the latter event, Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with such audit, which reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit. Notwithstanding the foregoing, if Registry Operator is found not to be in compliance with its covenants contained in Section 2 of this Agreement in two consecutive audits conducted pursuant to this Section 2.11, ICANN may increase the number of such audits to one per calendar quarter.

The RySG accepts that ICANN has the right to conduct contractual and operation audits up to 2 times per year. However, ICANN should understand that these audits are disruptive to normal business operations and they should commit to conducting these audits in a manner that does not disrupt the normal operations of the registry.

The RySG also notes that 3 business days is way too short of a notice period in that key personnel for registries that must be present during these audits plan their schedules much further in advance than 3 business days. Perhaps at least 5 business may suffice to ensure that any key personnel are able to make themselves available to ICANN.

2.13 Emergency Transition. Registry Operator agrees that in the event that any of the registry functions set forth in Section 5 of Specification 6 fails for a period longer than the emergency threshold for such function set forth in Section 5 of Specification 6, ICANN may designate an emergency interim registry operator of the registry for the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process (available at _____) (as the same may be amended from time to time, the "Registry Transition Process") until such time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process, provided that Registry Operator pays all costs incurred (i) by ICANN as a result of the designation of the Emergency Operator and (ii) by the Emergency Operator in connection with the operation of the registry for the TLD. In the event ICANN designates an Emergency Operator pursuant to this Section 2.13 and the Registry Transition Process, Registry Operator shall provide ICANN or any such Emergency Operator with all data (including the data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such Emergency Operator. Registry Operator agrees that ICANN may make any changes it deems necessary to the IANA database for DNS and WHOIS records with respect to the TLD in the event that an Emergency Operator is designated pursuant to this Section 2.13. In addition, in the event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable.

1. <u>Comment on Intent.</u>

Taken together, 2.13 and 6.5 say that if a registry operator misses a single escrow deposit, or takes allowed maintenance periods for certain services, ICANN may remove the TLD from the registry Operator's control. We do not believe this was the intent, but these issues must be fixed so the contract is reasonable and not in conflict with itself.

2.13 says: "Emergency Transition. Registry Operator agrees that in the event that any of the registry functions set forth in Section 5 of Specification 6 fails for a period longer than the emergency threshold for such function set forth in Section 5 of Specification 6, ICANN may designate an emergency interim registry operator of the registry for the TLD…"

6.5 says that "Critical Function Emergency Thresholds" include:

Critical Function	Emergency Thresholds	
DNS (all servers)	4-hour continuous downtime	4-hour downtime / week
DNSSEC	4-hour continuous downtime	4-hour downtime / week
Data Escrow	Breach of the Registry Agreement caused by missing escrow deposits	

The above should be modified for the following reasons:
- DNSSEC: it is unknown what "DNSSEC" means here; the term must be defined. Note that registries are allowed SRS downtime, which means the ability for registrars (registrants) to update keys will occasionally and allowably be offline.
- Data escrow: currently the contract says that missing even one escrow deposit is an emergency and is cause to transition the registry. Such is not an emergency, especially since issues beyond the control of a registry operator (such as Internet transit issues and

-

2. <u>Comment on Costs.</u>

In addition, the RySG notes that the requirement that a Registry Operator pay ALL costs incurred is the equivalent of requiring the Registry Operator to write a blank check to ICANN and the designated Emergency Operator. There must be an element of reasonableness, a monetary cap, and an ability for the Registry Operator to review (and even audit) those expenses as well as an opportunity to dispute the fees.

2.14 *[Note: For Community-Based TLDs Only]* **Obligations of Registry Operator to TLD Community.** Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration policies, and shall enforce such registration policies. Registry Operator agrees to be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at [*insert applicable URL*] with respect to disputes arising pursuant to this Section 2.14.]

The RySG notes that the processes and procedures in the PDDRP have evolved much more in terms of due process than has the RRDRP. The RySG therefore recommends that each of the protections for registries in the PDDRP are also applied to registries under the RRDRP. These include protections relating to review and appealability of RRDRP decisions.

ARTICLE 3. COVENANTS OF ICANN

The RySG still notes that the covenants in Article 3 are still worded differently and in many cases less favorably to gTLD Registries than the language contained in the proposed ccTLD Fast Track Agreements. Can ICANN please explain why such different wording is warranted?

ARTICLE 4. TERM AND TERMINATION

4.3 Termination by ICANN.

(d) ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, (iii) a trustee,

receiver, liquidator or equivalent is appointed over Registry Operator or over any of its property, (iv) execution is levied upon any property of Registry Operator, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors, or (vi) Registry Operator liquidates, dissolves or otherwise discontinues its operations or the operation of the TLD.

The RySG appreciates the changes added in Section d, however recommends that the following language be added:

"With respect to proceedings described in this subparagraph (d) (i-v) that are involuntary proceedings commenced or instituted against Registry Operator, Registry Operator shall have the opportunity to contest such proceedings, and ICANN's right to terminate shall not take effect if such proceedings are dismissed within thirty (30) days following Registry Operator's receipt of notice of their institution."

(e) ICANN may, upon thirty (30) calendar days' notice to Registry Operator, terminate this Agreement pursuant to Section 2 of Specification 7.

The RySG understands why this section was added, but remains concerned that the language above would supersede the rights to review and/or appeal decisions under the PDDRP. Therefore the RySG requests that ICANN make it clear in the language that this termination would only apply after all reviews and appeals under the PDDRP and this agreement are exhausted.

4.4 Termination by Registry Operator.

(a) Registry Operator may terminate this Agreement upon notice to ICANN if, (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that ICANN is in fundamental and material breach of such covenants, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

The RySG repeats its comments from v3, as they are still relevant. More specifically, we would like a better understanding of what it would mean to terminate a contract with ICANN for ICANN's breach, considering that ICANN presently has the sole authority to grant gTLDs. Would the relevant registry get to keep the ability to continue operating the registry for that particular TLD? In any event, termination is not a sufficient remedy in the event of a breach by ICANN, as it provides a Registry Operator with no ability to recover any losses.

In addition, RySG believes that ICANN should have Service Level Agreements with the registries to provide for an additional meaningful remedy to a breach by ICANN. Monetary penalties and sanctions (which are not subject to the limitations of liability) along with a right to be awarded Specific Performance may be the only potential meaningful penalties as opposed to termination by the Registry Operator.

ARTICLE 5. DISPUTE RESOLUTION

5.2 Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration will be conducted in the English language in front of a single arbitrator (unless the parties agree in writing to a greater number of arbitrators) and will occur in Los Angeles County, California. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator determine that a hearing is necessary, the hearing shall be limited to one day. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in its awards. In any proceeding, ICANN may request the appointed arbitrator(s) award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations) in the event the arbitrator(s) determines that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 and Section 5.4 of this Agreement. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

The RySG continues to object to the language on the number of arbitrators insisted on by ICANN. Although ICANN added language to allow 3 arbitrators, it is ONLY if both parties agree. This is not acceptable because it gives ICANN the unilateral right to always insist on 1 arbitrator.

The RySG repeats the comments it made in v2 and v3:

> *"It is contrary to normal commercial dealings to allow a single ICC arbitrator to determine important disputes. Indeed, the philosophy of the ICC rules, and most other arbitral authorities, is clearly to the contrary. Among other things, use of a single arbitrator in all disputes would inject large uncertainty into the process of dispute resolution for ICANN as well as the registries. Judgments as to registry agreements should have the benefit of three learned individuals and should not risk the potential talent or bias of a single person chosen by none of the parties. Although ICANN's motive for moving to one arbitrator – speed and economy – is a laudable one, it is appropriate to remember the caution, "you get what you pay for." Fast and cheap is not a good trade off for fair and reasoned justice. At a minimum, the provision should be changed so that a normal, three person arbitral panel is used for important disputes, such as, for example, disputes regarding renewal or termination, or in which ICANN seeks punitive damages, or where claims exceed a certain dollar threshold (such as $1,000,000)."*

This is especially disturbing in light of the fact that ICANN continues to insist on punitive and exemplary damages. Given the seriousness of the remedies, the registry should have the right to sufficient safeguards, including the right to 3 arbitrators if it so elects.

ARTICLE 6. FEES

6.1 Registry-Level Fees. Registry Operator shall pay ICANN a Registry-Level Fee equal to (i) the Registry Fixed Fee of US$6,250 per calendar quarter and (ii) the Registry-Level Transaction Fee. The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25, provided, however that the Registry-Level Transaction Fee shall not apply until and unless more than 50,000 domain names are registered in the TLD and shall apply thereafter to each Transaction. Registry Operator shall pay the Registry-Level Fees on a quarterly basis comprised of four

equal payments by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN.

RySG repeats the comments it made to the v1, v2 and v3 Registry Agreements:

"The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share."

6.2 Cost Recovery for RSTEP. Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at http://www.icann.org/en/registries/rsep/. In the event that such requests are referred to RSTEP, Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within ten (10) business days of receipt of a copy of the RSTEP invoice from ICANN, unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

RySG repeats the comments it made to the v1, v2 and v3 Registry Agreements:

"Registry operators urge ICANN to reconsider this provision in light of the strongly negative affect it could have on innovation in the TLD space.

The RSEP process is a function of ICANN's primary role in "preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet." ICANN's mission and core values specifically obligate it to respect creativity and innovation, and to rely on market mechanisms to promote and sustain competition. The RSEP process supports ICANN's core functions, and should be treated as an integral part of ICANN's operations, and not as an adjunct, pay-as-you-go service. It imposes a fee on innovation, creates a free-rider problem, and to the extent that registries with limited resources (i.e., smaller, community based registries) are the source of innovation, it reduces the likelihood that the community will enjoy the benefit of such innovation.

In addition, this would make it less likely that registries would seek to introduce new registry services that benefit consumers but do not produce additional revenue to registries. A perfect example of this is the PIR request to introduce DNSSEC in .ORG. Moreover, by creating a user fee for the RSEP process, ICANN is eliminating any incentives it may have to use the RSEP process efficiently."

In addition to the above, the RySG notes that no changes have been made to the amount of the fees recommended for the RSEP panels. We believe the level of fees seems extremely high. What are the individual cost factors that make up this estimate. The RSEP process was implemented several years ago when there was no historical basis that could be used to develop a cost model. There are now a few actual RSEP cases that have been processed. The cost model should be re-evaluated and made more cost effective."

6.3 Variable Registry-Level Fee.

(a) If the ICANN accredited registrars (as a group) do not approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a Variable Registry-Level Fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year. The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars who are party to a Registry-Registrar Agreement with Registry Operator, provided that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator's ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

(b) The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US$0.25 per domain name registration (including renewals associated with transfers from one ICANN-accredited registrar to another) per year.

The RySG repeats the comments made to v2 and v3 as they are still relevant. More specifically, the RySG objects to the notion of registry operators being forced to act as guarantors for registrars, especially in light of ICANN's role in accrediting these registrars, including vetting and due-diligence regarding financial qualifications of such registrars. At this point in time, registries have no ability to select the registrars they do business with. If ICANN were to revisit the obligation of registries to use all registrars accredited by ICANN that elect to do business in a TLD, then we can revisit this obligation as it would allow the registries to perform due diligence. If ICANN accredits registrars who can't or won't pay, this should not become an obligation of registries. RySG repeats the comments it made regarding the v3 Registry Agreement, which suggests additional language:

*"the following language should be added to Section 6.4, "**Registry Operator shall only be required to remit to ICANN the fees described in this Section 6.4 that it actually receives from registrars after submitting invoices for such fees. Registry Operator shall not be deemed in any way to be a "guarantor" for registrars, and has no obligation to make affirmative collection efforts beyond those made in its sole discretion in the ordinary course of business. Registry Operator's failure to collect any such funds from registrars shall not be deemed a material breach of this Agreement."***

Finally, as more of the burden of payments to ICANN come from the registries, the registries believe that it should have a similar approval right to the ICANN budget as currently enjoyed by the registrars.

ARTICLE 7. MISCELLANEOUS

7.1 Indemnification of ICANN.

(a) Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including reasonable legal fees and expenses, arising out of or relating to intellectual property ownership rights with respect to the TLD, the delegation of the TLD to Registry Operator, Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services; provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This section will not apply to any request for attorneys' fees in connection with any litigation or arbitration between or among the parties. This section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.

The RySG repeats the concerns expressed in v3 of the Agreement as they are still relevant. Namely, that this indemnification obligation remains uncapped and overbroad. Not only has ICANN ignored the comments made by the RySG, it decided to go the opposite way and add additional overbroad categories of indemnities in favor of ICANN. Not only does ICANN now require the registries to indemnify for everything that arises out of the operation of the registry or the provision of services, it now requires registries to indemnify for everything "arising out of or relating to intellectual property ownership rights with respect to the TLD" and "the delegation of the TLD to Registry Operator."

This violates fundamental fairness, and the notion that indemnification is a risk-transfer mechanism to be used in allocating responsibility for a specific and identified risk of loss. In addition, most of the potential claims relating to or arising out of the delegation of the TLD relate to actions or omission by ICANN and not the Registry Operator. There is no reason for the Registry Operator to be indemnifying ICANN for actions or omissions beyond the control of ICANN. ICANN needs to stand behind its process for the delegation, including everything that is in Applicant Guidebook, dispute processes, etc. None of these were created by, or performed by, the Registry Operator. It is unconscionable to make the Registry Operator indemnify for these types of claims.

Therefore, the RYSG makes the following recommendations:

1. Eliminate the added language in DAG 4 regarding indemnifying for IP claims and claims arising from the delegation of the TLD;

(b) For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator's aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN's total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof that are engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator's liability under Section 7.1(a) pursuant to this Section 7.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN's reasonable satisfaction, such other registry operators' culpability for such actions or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 7.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence. [*Note: This Section 7.1(b) is inapplicable to intergovernmental organizations or governmental entities.*]

7.3 Defined Terms. For purposes of this Agreement, Security and Stability shall be defined as follows:

(a) For the purposes of this Agreement, an effect on "Security" shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

The RySG repeats its comments from v3 as they are still relevant. Namely, "Unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards" is too broad. That language potentially takes in a wide variety of small and large security incidents on the Internet, such as unauthorized access or data breaches on third-party networks, malware that has infected individual user systems, phishing on compromised Web sites, etc. The mere fact that services are operating on a domain name does not imply or require registry involvement. Registries do not have any technical ability to mitigate many of those kinds of problems. And most do not threaten the systematic security, stability and resiliency of a TLD or the DNS itself, and are therefore out of ICANN's mission scope.

We suggest the language be changed to read: "**Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.**"

In addition, the v3 (now v4) Registry Agreement language seems to come from the Registry Services Evaluation Policy (RSEP) definition of an "effect on security" that is found in all Registry Agreements. The RSEP discusses how new registry services should not negatively impact security, and that new registry services should be compliant with applicable relevant standards. That context is missing in the Guidebook. Without that context, the language has become more expansive and open to interpretation. Both ICANN and the RySG desire that registries function within applicable standards, and that current or future registry services not be the genesis of security problems.

(b) For purposes of this Agreement, an effect on "Stability" shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

The RySG believes this section is over-broad, and conflicts with Specification 6 section 1 ("Standards Compliance") , which refers only to IETF standards.

We also repeat our DAG3 comments:

This language is unacceptable: "authoritative and published by a well-established, recognized, and authoritative standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force". ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to more explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the Consensus Policy process instead.

Moreover, the v3 Registry Agreement definitions misunderstand IETF practices and definitions. The contract language must be revised to adhere to proper terminology. The inclusion of "Standards-Track" [sic] is inappropriate, since only some documents on the "standards track" are authoritative. IETF Internet specifications go through stages of development, testing, and acceptance. Within the Internet Standards process, these stages are called "maturity levels." These maturity levels include "Proposed Standard", "Draft Standard", and "Standard" Specifications.[1] Documents at lower maturity levels are not Internet Standards, do not enjoy enough development or vetting, and registries should not be required to follow them.

Contracted parties should not be required to adhere to IETF Best Practices or "best current practice RFCs". By definition, best practices are *not mandatory*, and the IETF chose to make them Best Practices for a reason. Nor are IETF BCPs considered technical standards. They tend to deal with processes and procedures rather than protocols -- they represent a consensus of a way to do something because it is recognized that a user experience can be enhanced when there is an agreed-upon way to complete a task. However, interoperability is not usually applicable. As long as the user experiences standards-compliant behavior, ICANN does not need to say more about how that behavior is achieved.

7.5 Change in Control; Assignment and Subcontracting. Neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. Notwithstanding the foregoing, ICANN may assign this Agreement in conjunction with a reorganization or re-incorporation of ICANN to another nonprofit corporation or similar entity organized for the same or substantially the same purposes. For purposes of this Section 7.5, a direct or indirect change of ownership or control of Registry Operator or any material subcontracting arrangement with respect to the operation of the registry for the TLD shall be deemed an assignment. ICANN shall be deemed to have reasonably withheld its consent to any such a direct or indirect change of ownership or control or subcontracting arrangement in the event that ICANN reasonably determines that the person or entity acquiring ownership or control of Registry Operator or entering into such subcontracting arrangement (or the ultimate parent entity of such acquiring or subcontracting entity) does not meet the ICANN-adopted registry operator criteria or qualifications then in effect. In addition, without limiting the foregoing, Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any material subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder. Without limiting the foregoing, Registry Operator must also provide no less than thirty (30) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of ownership or control of Registry Operator. Such change of ownership or control notification shall include a statement that affirms that the ultimate parent entity of the party acquiring such ownership or control meets the ICANN-adopted specification or policy on registry operator criteria then in effect, and affirms that Registry Operator is in compliance with its obligations under this Agreement. Within thirty (30) calendar days of such notification, ICANN may request additional information from Registry Operator establishing compliance with this Agreement, in which case Registry Operator must supply the requested information within fifteen (15) calendar days.

The RySG repeats comments made to v3 as they are still relevant. Namely,

a) In the second sentence, after "organized" insert the text, "**in the same legal jurisdiction in which ICANN is currently organized and**". This is in keeping with ICANN's recommendation 1.11.1, in its February 26, 2009 Implementation Plan for Improving Institutional Confidence, that ICANN retain its headquarters in the United

---

[1] http://www.ietf.org/about/standards-process.html and http://tools.ietf.org/html/rfc2026#section-4

States "to ensure certainty about ICANN's registry…agreements." This is also consistent with ICANN's promise in Section 8(b) of the Affirmation of Commitments that ICANN "remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community." RySG is concerned that ICANN's unwillingness to make the change it requested in its v2 Registry Agreement comments suggests a desire to evade these cited commitments by a re-organization.

b) The RySG remains concerned about the impact of this section on securities laws as possibly requiring notification prior to public disclosure. Accordingly, the RySG recommends saving language, potentially as follows: "**Under no circumstances shall Registry Operator be required to disclose any event to ICANN earlier than Registry Operator is required to publicly disclose such event under applicable securities laws.**"

In addition, we believe with the additional language inserted, this section has become impractical and not feasible for public companies. There are absolutely no timelines imposed on ICANN, nor are there any real objective standards, which leads to unpredictability and instability. We believe a discussion needs to be had with the legal working group on the Operational and legal aspects of the entire process. We do not disagree that it is appropriate for ICANN to have a consent right, but commercially it needs to be a more stream-lined predictable approach to enable businesses to get loans, approval from shareholders, etc. Most regulators do this within 30 or 60 days. ICANN should adhere to a strict timeline as well.

7.6 Amendments and Waivers.

(iii) "Restricted Amendment" means the following: (i) an amendment of Specification 1, (ii) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (iii) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2 of Specification 6, or (iv) an amendment to the length of the Term.

As stated in Brussels by the RySG during the public forum, the RySG is very happy with the changes that have been made this section and we appreciate all of the work done by ICANN staff in conjunction with the legal working group set up to discuss this issue. The only comments we have would be to add the notion of the determination of fees to pay to ICANN under the agreement as a "Restricted Amendment". We do not believe this is the appropriate process for the determination of how much a Registry Operator pays ICANN. If, however, this is left to the amendment process, then if a request were made by ICANN to change the fees, then the Registries should have an approval right on ICANN's overall budget. We cannot be subject to a possible amendment of fees, without having any right to get an accounting and approval right over where those fees are spent.

Comments on Specifications

SPECIFICATION 2: ESCROW

- **PART A – Technical Specifications**
  Care must be taken to properly define all terms. For example, "Registry Data", "Registry Database" and "Escrow Records" are never defined. "Deposits" is also not really defined, but is used throughout this Specification 2. In 1.2 reference is made to "full or incremental deposit", but these should follow the capitalized, defined terms.

- **PART A, 4.8 Detailed File Formats**: This is missing the transaction file format for incremental feeds.

- **PART A, 4.8.1 Domains.** #5 says "Registrar Handle for the initial sponsoring registrar". Infinitely reporting a domain's initial sponsoring registrar seems to serve no purpose, and is unduly burdensome.

- **Part B** now says: "Registry Operator will be provided with the right to designate a third-party auditor to audit Escrow Agent's compliance with the technical specifications and maintenance requirements of this Specification 2 no more than once per calendar year." ICANN should not prohibit Registry Operators from auditing their escrow providers more frequently. Registry Operators are basically held liable for the performance of escrow, and should have the right to look into problems responsibly. The base agreement allows ICANN to audit Registry Operators multiple times per year--ICANN should not prohibit similar diligence by Registry Operators.

- **PART B, #3: Ownership.** A limitation on the "ownership" right must be placed as follows: "for the limited purpose of maintaining operation of the registry." This limitation should apply both during and after the term of the Registry Agreement.

- **PART B, #5: Copies.** Should be amended to read: "… Registry Operator shall bear the expense of such duplication "if the escrow agreement so specifies".

- **PART B, #6: Release of Deposits.** Amend to read: "… or receives one of the following written notices by ICANN, along with evidence that ICANN has so notified Registry Operator in writing," stating that…'

SPECIFICATION 4: WHOIS

Specification 4 contains a new section (1.8) that is highly problematic. It presents technical, policy, privacy, security, and legal issues for the wider ICANN community. The DAG process is insufficient for understanding those issues and making informed, fact-based decisions about them. The RySG requests that 1.8 be deleted for the following reasons:

1. Policy: By making the service mandatory, ICANN would make gTLD policy unilaterally via the contract process. And it would circumvent a current GNSO policy-making effort. This WHOIS service is currently under review at the GNSO via its "Inventory of WHOIS Service Requirements" effort (http://gnso.icann.org/issues/whois/whois-service-requirements-draft-final-report-31may10-en.pdf) The technical experts who reviewed

the service via the GNSO process noted that it presented a variety of technical, privacy, and social issues that needed further examination.

2. Technical: it is unknown if such services can be provided within the contract's WHOIS SLAs. Such a service is not technically easy to provide. To our knowledge, a service of this nature has never been attempted on a large scale.   The requirement "without arbitrary limit" means the service must allow extremely large, broad searches, which could swamp or stall the service. They might also require cookie tracking, which is not even possible for port 43 queries.

3. Cost: the service will impose new, significant, and unknown costs on registry operators.

4. Legal: The service is not required to establish bad faith under the UDRP. Many adequate resources and tools exist to do that, and have been used successfully for the past ten years.

5. Technical: Specification 4 deals specifically with Port 43 and Web-based WHOIS. Those may be inappropriate mechanisms to perform such searches.

6. Privacy: the service presents some obvious issues that members of the wider ICANN and Internet community may be concerned about. The privacy issues should be examined carefully, and more attention should be brought to them than the DAG4 affords. The phrase "subject to applicable privacy policies" is confusing, and the RySG does not know what it might mean.

7. Security: The DAG process is insufficient to quantify the possible malicious uses of such a service. The issue deserves greater study.

8. Technical / Security: it is unknown what "control structure" may be sufficient "to reduce the malicious use of the searching capability itself." It is impossible for Registry Operators to build compliant control solutions since no one seems to have defined the problem.

9. Security: there are other, existing tools that provide cross-identification of domain names during professional investigations of malicious conduct.   The proposed WHOIS service is not yet justified on the basis of security because no one knows if the service's drawbacks outweigh the supposed security benefit.

10. Security: the SSAC has demonstrated that WHOIS is mined by spammers (See SAC023: http://www.icann.org/en/committees/security/sac023.pdf) The service above could make this even easier for spammers and other bad actors.

11. Legal and cost: The parenthetical comments in 1.8 DAG4 mis-understand existing contracts. Existing contracts say that such WHOIS access *may optionally* be provided by "a *participating registrar, at the registrar's expense"* [emphasis added] – not provided by the registry, or at the registry's expense, as DAG4 *requires.*

SPECIFICATION 6

6.2: Registry Services and Continuity

6.2   says that "Registry Operator shall have a contingency plan including the designation of a registry services continuity provider, and must inform ICANN of the designated provider."

As per the RySG's objection to DAG3: this requires that a registry operator designate a back-up or successor registry operator-- before even beginning operations. This may be an impossible obligation for some registries to meet. It is unclear whether another registry would even promise to serve as a continuity provider, nor is it clear that the successor registry continuity provider would be compensated. Finally, if a registry fails, a reason for such failure could be due to a failed business model of the original registry. In such an event, no one should be forced to continue to operate a failed registry.   Finally, requiring registries to back each other up in advance presents some business issues.

We note that registrars are not obligated to designate back-up or contingency successors. ICANN has a process for providing continuity when registrars fail, involving an EOI and bidding process.

The RySG believes the above sentence should be replaced with: *"Registry Operator shall have a business continuity plan."*

6.4 Performance Specifications

In general, Section 6.4 continues to contain a variety of critical problems, and we did not see that our DAG3 comments were worked into DAG4. Section 6.4's current contents are:
1) sometimes confusing,
2) discourage registry stability and security, and
3) depart from proven measurement and reporting practices that have served everyone well in the past. These departures from industry practice have been made without explanation. The RySG therefore requests that ICANN work on a thorough review of section 6.4. A (non-exhaustive) list of examples is provided below; see our DAG3 public comments for additional.

A general problem is that ICANN has created new SLA, measurement, and reporting regimes that do not always work well with the realities of registry operations. In the existing gTLD registry contracts, registries are allowed scheduled and unscheduled downtimes for their various services.   Scheduled downtime allowances encourage regular maintenance, which strengthens registry security and stability. The requirement to report unscheduled maintenance is an indicator of unexpected problems and therefore contributes to registry security and stability.
As we mentioned in DAG3, the new base agreement does not distinguish between scheduled and unscheduled downtimes, instead lumping them together. And the new agreement allows less total downtime than the existing contracts, which seems overly aggressive.   Further, there are no longer any allowances for extended annual downtimes. Those are sometimes needed to comply with new requirements (such as new RFCs), moves to new data centres, etc. Together, these changes may discourage registry security and stability, rather than encouraging them.

Below is a non-exhaustive list of examples of where Specification 6 is confusing, or technically problematic.

- **DNS name server availability** (page 54):
  With regard to "DNS name server availability" of "$\leq$ 432 min of downtime ($\approx$ 99%)": Does this imply that one server with more than 432 minutes of downtime violates the SLA? Or is a server considered unavailable for the month if it had greater than 432 minutes of downtime? Say that a TLD has 10 servers globally dispersed and each had non-overlapping 45 minutes of downtime over a calendar month. Therefore 9 were operational at any point in time. What is the final DNS service availability for the month?

  This may have an unintended consequence of favoring a 100 percent anycast solution, so that no single site is unavailable. Best practice currently is to have a combination of anycast and unicast for security and stability purposes, but this SLA may drive to all to anycast.

- **DNS, WHOIS, and SRS RTT** (pages 54-57):
  For these, is the registry expected to monitor RTT from the client? This would be confusing, costly, and an unnecessary departure from past proactive. Recommend that this be revised to measure from receipt and response of a query/transaction at the registry's gateway. If truly measured from the client, especially for EPP, the registry SLR is at risk from poorly connected registrars located in geographically regions distant from the registry. The registry has no ability to select registrars and therefore has no control over meeting this SLR. Why not just use the CNNP test for resolution services?

  The SLAs conflate port 43 and Web-based WHOIS SLAs. Port 43 and Web are two completely different services. RTT for Web WHOIS is not really applicable and should be deleted.

- **Measuring EPP parameters (page 57)**
  Probes should query domain names, *not* IP addresses. The requirement will not allow registry operator to move or upgrade data centers or migration to new IP ranges. Registries require registrars to connect using the EPP domain name. Some IP addresses will be inactive at any point in time, such as those for alternate data centers or disaster recovery sites. This comment may also apply to DNS and WHOIS.

- **"DNS Update Time" (page 56):** With respect to "all the name servers", this is likely to result in the unintended consequence: discouraging deployment of DNS servers in developing regions where bandwidth limitations may create update delays. The logical response would be for registry operators to avoid deploying services in certain regions of the world. in order to make sure all servers can be updated within the required time.
  Is DNSSEC data included in "DNS information"? Seems likely from the context. A delay in updating DNSSEC data may be more probable than other updates.