



**Comment on Proposed  
Amendment to .XXX Registry  
Agreement to Transition to  
New Fee Structure and to  
Adopt Additional Safeguards**

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**Business Constituency Submission**

**GNSO//CSG//BC**

## Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business;
2. Is competitive in the supply of registry and registrar and related services; and
3. Is technically stable, secure and reliable.

### Comment on Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards

This comment regards the “Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards” posted for public comment on October 12, 2016 (<https://www.icann.org/public-comments/xxx-amendment-2016-10-12-en>).

The ICANN Global Domains Division (GDD) has proposed amendments to the .XXX Registry Agreement that incorporate elements of the base new gTLD registry agreement. The multi-stakeholder community has not, however, had an opportunity to fully deliberate on whether these elements should be required of the legacy gTLDs like the .XXX TLD. This is the fourth instance in which the GDD has proposed such an amendment to a legacy gTLD registry agreement.<sup>1</sup> The BC sustains its procedural objection to these proposals, through which GDD staff unilaterally seeks to establish a new *status quo* for registry agreements. By substituting its judgment for established policy, we respectfully believe that staff exceeds its powers and overrides safeguards intended to preserve transparency and inclusion within the multi-stakeholder community.

The amendments in question require the .XXX TLD to *inter alia* adopt new rights protection mechanisms (RPMs) from the new gTLD Registry Agreement, specifically the PPDRP and the URS.<sup>2</sup> The GNSO only recently initiated a Policy Development Process (PDP) to review all RPMs at all gTLDs, and the working group Charter specifically tasks it with recommending whether any of the new gTLD program RPMs should become Consensus Policy and thereby applicable to legacy gTLDs. The working group tasked with evaluating these new RPMs does not expect to complete the task until late 2017.<sup>3</sup> Although the BC has been a strong advocate for the new RPMs as applied to new gTLD registries, this PDP continues to

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<sup>1</sup> See e.g. “Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement” (<https://www.icann.org/public-comments/travel-renewal-2015-05-12-en>) posted on May 12, 2015, “Proposed Renewal of .CAT TLD Registry Agreement” (<https://www.icann.org/public-comments/cat-renewal-2015-05-28-en>) and the “Proposed Renewal of .PRO Un-sponsored Registry Agreement” (<https://www.icann.org/public-comments/pro-renewal-2015-05-28-en>), both posted for public comment on May 28, 2015.

<sup>2</sup> See ICANN, Amendment No. 4 to the .XXX Registry Agreement, at Section 1(c) and Appendix 8, available at <https://www.icann.org/sites/default/files/tlds/xxx/xxx-amend-4-12oct16-en.pdf> (October 12, 2016).

<sup>3</sup> See ICANN, RPM Review PDP Work Plan, available at <https://community.icann.org/display/RARPMRIAGPWG/Work+Plan> (updated July 12, 2016).

consider fundamental questions about how the new RPMs should function and how they could evolve in the future.<sup>4</sup>

The GNSO may ultimately articulate a Consensus Policy that calls for different measures for legacy gTLDs than are now being used with the new gTLDs. If the GDD persists in forcing registries to adopt these pre-Consensus Policy RPMs, it may widely implement procedures that do not align with the GNSO's ultimate conclusions. Further, as ICANN policy staff has recognized, application of the RPMs to legacy gTLDs raises certain transition issues that are not addressed by implementation via contract. Finally, in the absence of such RPMs being Consensus Policy, registrants may have legal grounds to question their imposition.

GDD personnel continue to set substantive policy for gTLDs by adopting elements of the new gTLD registry agreement into amended and renewed RAs for legacy gTLDs. This pattern is particularly clear in the context of proposed amendments to the .XXX RA, which trigger implementation of the new gTLD RPMs in .XXX "within 30 days following the first Registry Level Transaction Fee Adjustment Approval Date." That approval date, and effectively the implementation of these new gTLD RPMs within the .XXX TLD, is further conditioned upon the "sole discretion" of ICANN that "no unresolved compliance issues" remain after "a contractual compliance audit" tied to *inter alia* child protection obligations of the registry.<sup>5</sup>

While this is a worthy goal, the BC believes it is important that any significant fee reduction process be data driven, with clear measurable criteria that promotes internet security and a healthy domain name ecosystem. The development of such criteria should be done in a transparent manner, and may involve ICANN CTO/IS-SSR staff, and security and domain name analytics experts.<sup>6</sup> We also note that the revised RA would eventually result in a registry fee reduction of 87.5%, providing a powerful incentive for ICM to agree to other modifications proposed by GDD.

Moreover, the ICANN Bylaws reserve the power to set gTLD policy to the GNSO. The new RPMs have not, in their current form, received the uniform support from GNSO constituents and, as discussed above, have not undergone the procedure set forth in the Bylaws to become Consensus Policies. While greater consistency as between registry agreements is a worthwhile goal, and convenient for ICANN in terms of contractual compliance, it cannot supersede consistency of action in accord with ICANN's Bylaws.

By circumventing ICANN Bylaws, GDD personnel are undermining the fundamental principles of transparency and inclusion that are core tenets of ICANN's mission. GDD personnel are effectuating policy through bilateral negotiations with registry operators, which are only subject to the larger community's review by way of these proposed amendments and public comments. The limitations of this comment procedure are only underscored by apparent efforts by the GDD to conceal its conduct,

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<sup>4</sup> See ICANN, RPM Review PDP Charter, available at <https://community.icann.org/display/RARPMRIAGPWG/WG+Charter> (adopted March 9, 2016).

<sup>5</sup> See ICANN, Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards, available at <https://www.icann.org/public-comments/xxx-amendment-2016-10-12-en> (October 12, 2016).

<sup>6</sup> See Business Constituency Comment on Proposed Amendments to Base New gTLD Registry Agreement, available at [http://www.bizconst.org/assets/docs/positions-statements/2016/2016\\_07july\\_20%20bc%20comment%20on%20proposed%20gTld%20base%20registry%20agreement%20final.pdf](http://www.bizconst.org/assets/docs/positions-statements/2016/2016_07july_20%20bc%20comment%20on%20proposed%20gTld%20base%20registry%20agreement%20final.pdf) (July 20, 2016)

after previous criticism from BC. The BC notes that in earlier proposed registry agreement amendments and renewals, the GDD 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.<sup>7</sup> (emphasis added).

The above language clearly stated that ICANN had proposed the change and why. The instant proposal cryptically states instead:

ICM requested to engage in good faith negotiations regarding possible changes to the terms of the Agreement ... [where] ICM informed ICANN that ICM would agree to add . . . additional safeguards contained in the new gTLD Registry Agreement.<sup>8</sup>

This statement provides no insight on the process and rationale that led to this conclusion, but merely states the outcome. A lack of transparency underscores why these policy decisions must be made through the open and inclusive procedures required of the GNSO.

The BC also has grave concerns about ICANN's lack of regard for the Sponsoring Organization Agreement (SOA) entered into by ICM and IFFOR.<sup>9</sup> This agreement explicitly indicates that ICM has delegated all policy-making decisions to IFFOR. The preamble of the agreement states:

WHEREAS, IFFOR is organized and shall operate to (i) promote adoption and use of the .xxx sponsored top level domain in accordance with the .xxx Charter, (ii) foster communication between the Sponsored Community and other Internet stakeholders, (iii) protect free expression rights as defined in the United Nations Declaration of Human Rights, and (iv) promote the development and adoption of responsible business practices designed to combat child pornography, facilitate user choice and parental control regarding access to online adult entertainment, and protect the privacy, security, and consumer rights of consenting adult consumers of online adult entertainment goods and services (the "Policy Goals");

WHEREAS, ICM wishes to delegate to IFFOR, and IFFOR wishes to accept responsibility for developing policies, practices and procedures designed to serve the Sponsored Community and in furtherance of the Policy Goals ("IFFOR Policy");

Moreover, section II of the agreement makes it evident that IFFOR is *the* policy making body for the .xxx sTLD, except for consensus-based GNSO policy that is approved by the ICANN Board. This SOA effectively creates a separate multi-stakeholder organization (IFFOR). This arrangement does not contemplate a scenario where ICANN and ICM work together to develop and impose non-consensus policy on the XXX registry. Yet, ICANN and ICM have worked together to do exactly that. In this regard,

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<sup>7</sup> See ICANN, Proposed Renewal of .CAT TLD Registry Agreement," available at <https://www.icann.org/public-comments/cat-renewal-2015-05-28-en> (May 28, 2015).

<sup>8</sup> See ICANN, Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards, available at <https://www.icann.org/public-comments/xxx-amendment-2016-10-12-en> (October 12, 2016).

<sup>9</sup> <https://www.icann.org/en/system/files/files/iffor-sponsoring-organization-agreement-26jul10-en.pdf>

this situation is materially distinct from the past instances of ICANN working with a registry to incorporate non-consensus policy into the registry agreement.

Trademark protections, including URS, are clearly within the remit of IFFOR, and the fact that the notice provides no indication of IFFOR's consent to the change raises a concern for the BC.

An appropriate alternative to the approach ICANN staff is taking would be for IFFOR to use its own processes to develop and recommend RPMs that ICANN and ICM prefer to incorporate into its Registry Agreement Amendment. Alternatively, ICANN staff and board could wait for the GNSO to advance consensus policy, which the board could adopt and then would be binding upon ICM and all registries. Interestingly, if either of these outcomes occurred, ICM would not necessarily be entitled to any sort of reduction in its fees paid to ICANN.

Finally, the BC wants to make it clear that we oppose the renegotiation of material economic aspects of Registry and Registrar Agreements, while also trying to induce the registry or registrar to adopt non-consensus policy. The policies of ICANN are set by its stakeholders. The economics of contracts are ultimately decisions of the ICANN Board, even though stakeholder groups and constituencies have the opportunity to comment on such modifications. ICANN staff and the ICANN board should seek to bifurcate any such discussions about economic and policy matters during contract renegotiations, so as to preserve the integrity of the policy-making decisions of ICANN's SOs and ACs.

## **Conclusion**

ICANN's disregard for its own contractual obligations and that of its registries undermines the credibility of ICANN's multi-stakeholder model. At the same time, there is political pressure to move ICANN's functions to multilateral governmental appendages, such as the ITU. The decision by GDD staff to use the base new gTLD Registry Agreement as the starting point for the renewal of legacy gTLDs is beyond its power and substitutes staff decisions for bottom-up policy development required by the ICANN Bylaws. Therefore, the additional Section 3.1(i) and Appendix 8 of the renewal registry agreement for .XXX should be deleted.

The BC looks forward to the outcome of the ongoing GNSO RPM Review PDP. This PDP will determine, in a manner consistent with ICANN Bylaws, how new RPMs should be applied to legacy gTLDs.

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This comment was drafted by Andy Abrams, with editing by Beth Allegretti, Phil Corwin, and Jay Sudowski. It was approved in accord with the BC Charter.