



New gTLD Program Explanatory Memorandum

Process for Amendments to New gTLD Registry Agreements

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Background – New gTLD Program

Since ICANN was founded ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles, recognized by the United States and other governments, has been to promote competition in the domain-name marketplace while ensuring Internet security and stability. The expansion of the generic top-level domains (gTLDs) will allow for more innovation, choice and change to the Internet's addressing system, now represented by 21 gTLDs.

The decision to introduce new gTLDs followed a detailed and lengthy consultation process with all constituencies of the global Internet community represented by a wide variety of stakeholders – governments, individuals, civil society, business and intellectual property constituencies, and the technology community. Also contributing were ICANN's Governmental Advisory Committee (GAC), At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO), and Security and Stability Advisory Committee (SSAC). The consultation process resulted in a policy on the introduction of New gTLDs completed by the Generic Names Supporting Organization (GNSO) in 2007, and adopted by ICANN's Board in June, 2008.

This explanatory memorandum is part of a series of documents published by ICANN to assist the global Internet community in understanding the requirements and processes presented in the Applicant Guidebook, currently in draft form. Since late 2008, ICANN staff has been sharing the program development progress with the Internet community through a series of public comment fora on the applicant guidebook drafts and supporting documents. To date, there have been over 250 consultation days on critical program materials. The comments received continue to be carefully evaluated and used to further refine the program and inform development of the final version of the Applicant Guidebook.

For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Summary of Key Points in this Paper

- The process for future amendments to new gTLD registry agreements is one of the issues still under discussion.
- This paper outlines several possible amendment process models, including a model recently proposed by the GNSO's Registry Stakeholder Group.
- The RySG model is based on periodic good faith discussions, which would only result in binding amendments if each registry operator individually agreed. ICANN seeks comment on the RySG proposal and other possible models for amendments.

Introduction:

One of the remaining issues to be resolved in relation to the launch of new gTLDs is the content of the registry agreement that ICANN would enter with operators of new gTLDs.

In each of the three versions of the draft Applicant Guidebook published by ICANN, the draft registry agreement contained an amendment mechanism that would permit, through a defined process, the uniform amendment of the registry agreements for new gTLDs. ICANN proposed the amendment mechanism to be able to address unforeseen changes in the domain registration marketplace such as *gaming* tactics undertaken by a bad actor registry operator or just development of the marketplace in a way that worked to the disservice of registrants and users. The process will also serve to maintain an even playing field among registries. Without such a mechanism, any amendment to a registry agreement must be agreed to by the registry operator, even a bad actor registry operator. As a result, ICANN and the community would have limited, untimely ability to adapt the registry agreements to changes in the marketplace and limited remedies against such a registry operator (i.e., ICANN would rely exclusively on the consensus policy process, which covers only a limited set of topics).

The proposed mechanism was developed in anticipation of the changing gTLD landscape where a relatively few existing negotiated agreements will be joined by potentially hundreds, and eventually thousands of new gTLD registries. Such an expansion of the TLD space will present ICANN with a challenge and burden of administering hundreds or thousands of registry agreements. To facilitate this administrative task and ensure consistent treatment of registries, uniform agreements are highly desirable. It would be difficult for ICANN, without substantially increasing its human resources, to monitor several hundred agreements and ensure that all registry operators are treated in an equitable manner, with agreements containing varying terms and conditions.

For examples of potential amendments that might be considered someday, one can look to the recent set of amendments to the form of the Registrar Accreditation Agreement <http://www.icann.org/en/topics/raa/>. Those amendments largely consisted of topics that are not within the list of subjects on which ICANN is able to adopt new *consensus policies*. The following list represents an attempt to analogize between the amendments that were made to the RAA <http://www.icann.org/en/announcements/announcement-18jun08-en.htm> and possible future amendments to the form of the registry agreement that arguably could not be

effectively implemented through either consensus policies or bilateral negotiations with hundreds (or thousands) of registry operators:

1. Enforcement tools

- a. **Audits** – Future changes might require modifications to the frequency or location of audits.
- b. **Sanctions and Suspension** – New sanctions might be developed that better fit the behavior to be changed.
- c. **Group Liability** – Preventing *serial misconduct* by registries when another affiliated registry violates the agreement.
- d. **Registry Fees** – In the event of hyper-inflation, ICANN would have to try to negotiate several hundred fee changes.

2. Registrant protections

- a. **Private Registration and Registrar Data Escrow Requirements** – This problem, the RegisterFly issue, was not completely solved by the RAA negotiations. The escrow of data is still an evolving subject.
- b. **Contractual Relationships with Resellers** – Protecting registrants who are customers of resellers by obligating resellers to follow ICANN policies and requiring that they either escrow privacy/proxy customer data, or alternatively, give prominent notification that such data will not be escrowed. Bad behavior by resellers might be imputed to an affiliated registry.

3. Promoting a stable and competitive marketplace

- a. **Delegation by Purchase** – Requiring registries to notify ICANN upon a change of ownership and to re-certify the registry's compliance with the agreement.
- b. **Operator Skills Training and Testing** – In an environment with many new registries: providing for mandatory training of registry representatives to ensure better understanding of ICANN policies, agreement requirements, and technical obligations.

4. Agreement modernization

- a. **Notice Provisions** – might be updated with new technology.
- b. **Data Retention Requirements** – Clarifying data retention requirement to allow for more uniform practices.

The version of the draft registry agreement contained in the most recent draft Applicant Guidebook <http://icann.org/en/topics/new-gtlds/comments-3-en.htm> included a process where ICANN could propose amendments to certain sections of Articles 2 and Articles 6 and 8 of the registry agreement. That proposed mechanism / procedure included:

- Advanced noticed to gTLD registries with opportunity for discussion and refinement of proposed amendments
- Publication and public comment
- Analysis and modifications to amendments based on discussion and comment
- Board consideration and approval
- Opportunity for gTLD registry veto

Despite attempts to narrow the scope and strengthen the approval process, the amendment mechanism remains controversial and the subject of community debate.

In an effort to facilitate discussion and possible alternatives to the proposed amendment mechanism, ICANN has held discussions with potential new registry operators and other affected parties, including most recently during a public consultation on 7 January 2010 in Washington, D.C. At this latest meeting, several commentators expressed their continuing objections to the amendment process, generally arguing that a perceived unilateral amendment process was unfair to registry operators and was not necessary to facilitate changes to address security and stability concerns. Certain commentators proposed an alternative process through which registry operators would be obligated to consult in good faith with ICANN regarding proposed amendments, but each registry operator would only be subject to any such amendment if it individually agrees in writing.

Recently, ICANN received a written proposal from the Registries Stakeholder Group (RySG), which provides that the registry operator would be required to meet with ICANN every three years to discuss proposed amendments to the registry agreement (with certain limitations), and only amendments agreed to by the registry operator, on an individual basis, would bind that registry operator. While this proposal does require interaction and discussion between the parties, it does not provide for any type of uniform amendment process, even in cases where a substantial majority of the registry operators and the ICANN Board might agree that a change is necessary.

Registries Stakeholder Group Proposal

February 8, 2010

Draft Base Registry Agreement – Amendment provision

“Amendments and Waivers. No amendment, supplement, or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties. The parties agree to meet every three years, if requested, to discuss in good faith any amendments that may be reasonably necessary as a direct result of changes in external factors affecting the legal or technological context of the Agreement, including but not limited to laws, applicable technical innovations, or third party, judicial or governmental actions; provided, however, that neither party shall be required to negotiate or consider amendments relating to (i) Consensus Policies, Temporary Specifications or Policies or the limitations thereon, (ii) the price of domain name registrations, (iii) the definition of Registry Services, or (iv) the term length of the Agreement. Either party may request such a meeting by giving no less than thirty (30) days’ advance written notice to the other party, and such meetings may be in person or telephonic. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided.”

In advance of publication of the next draft of the applicant guidebook, ICANN seeks comments from the community on the process for amending the registry agreement for new gTLDs. Comments suggesting new proposals are welcome, and also commenters might consider the following possible models:

1. The RySG proposal for good faith negotiations; any amendments would only be effective if agreed to by each registry operator individually.
2. The amendment process outlined in v3 of the draft applicant guidebook; ICANN could propose uniform amendments, registries could veto and ICANN Board could override vetos.
3. A possible hybrid amendment process incorporating good faith negotiations; any amendments would be applied uniformly only if not vetoed by a majority of registries.
4. An amendment process similar to the process for amending the form of the Registrar Accreditation Agreement: upon renewal every registry agreement would be replaced by any new form of agreement approved by a supermajority of the GNSO Council and the ICANN Board.
5. Other models for uniform amendments proposed in the comment process or drawn from other analogous circumstances.