



**Comment on Proposed
Renewal of .TRAVEL
Sponsored TLD Registry
Agreement**

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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
3. is technically stable, secure and reliable.

Comment

This comment regards the “Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement” posted for public comment on May 12, 2015 (<https://www.icann.org/public-comments/travel-renewal-2015-05-12-en>). Insofar as the same issue arises in the “Proposed Renewal of .CAT Sponsored 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, our views and concerns are in regard to those gTLDs are identical.

The overview for each of these proposed registry renewal agreements contains a “Section I: Description, Explanation, and Purpose” which contains the following statement:

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](#).

We interpret the words “ICANN has proposed” to mean that ICANN staff members within the Global Domains Division (GDD) have proposed this approach. As a result, the proposed renewal registry agreement (RA) for .Travel and the other two referenced legacy gTLDs all contain a Section 2.8 (Protection of Legal Rights of Third Parties) that requires compliance with attached Specification 7. Specification 7 in turn requires compliance with the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Uniform Rapid Suspension (URS) system, both of which were developed as implementation measures for the general rights protection policy of the new gTLD program.

Concern About Top Down, Staff-Initiated Process Inconsistent with ICANN’s Bylaws

We wish to make clear at the outset that the BC’s concern is not in regard to the adoption of new gTLD rights protection mechanisms (RPMs) for legacy gTLDs. The BC has been a strong advocate for these RPMs as applied to new gTLD registries, and would support the GNSO taking up the question of and initiating a PDP regarding whether they should become consensus policies applicable to all legacy gTLDs.

Rather, our concern is that a unilateral decision by ICANN contractual staff within the GDD to take the new gTLD registry agreement as the starting point for renewal RAs for legacy gTLDs has the effect of transforming the PDDRP and the URS into de facto Consensus Policies without following the procedures laid out in ICANN's Bylaws for their creation. The fact that these RPMs are present in all three proposed renewal RAs referenced in this letter reinforces that conclusion. While consistency of registry agreements is a worthwhile goal, it should not trump consistency of action in accord with ICANN's Bylaws.

ICANN's current Consensus Policies are listed at <http://www.icann.org/en/resources/registrars/consensus---policies> . While the UDRP is a listed Consensus Policy, the PDDRP and the URS are not. We therefore question the authority for ICANN to seek to impose PDDRP and URS on legacy gTLDs through the contract renewal process.

Consideration within the Policy and Implementation Context

While it has not yet been posted for final comment or considered by the GNSO, on June 2nd the Final Report on Policy and Implementation (P&I) (<https://community.icann.org/display/PIWG/Final+Report+Redline+Version>) was forwarded to the GNSO Council. As this Report was developed "as a result of discussions stemming from implementation related issues of the new generic Top-Level Domain (gTLD) program" (p.3), and as "[t]he report and its recommendations have obtained the full consensus support of the Policy & Implementation Working Group" (p.6), it is particularly relevant to the subject of our letter.

The P&I Report defines a "GNSO Consensus Policy" (p.9) as "A Policy established (1) **pursuant to the procedure and required minimum elements set forth in ICANN's Bylaws**, and (2) covering those topics listed in Section 1.2 of the consensus policies and temporary policies specification of the 2013 RAA (see Annex I) or the relevant sections in the gTLD registry agreements (see Annex II). **GNSO Consensus Policies, adopted following the outlined procedures, are applicable and enforceable on contracted parties as of the implementation effective date.**" (Emphasis added)

The PDDRP and URS fit within the cited topics but have not been adopted pursuant to the outlined procedures for establishing Consensus Policies. Therefore, making them applicable and enforceable against legacy gTLDs is very questionable.

The P&I Report also contains a list of "Principles / Requirements that apply to Policy & Implementation" (p.13). The first two listed Principles are:

1. Policy development processes must function in a bottom-up manner. **The process must not be conducted in a top-down manner and then imposed on stakeholders**, although an exception may be made in emergency cases such as where there are risks to security and stability, as defined in ICANN's Security, Stability and Resiliency framework.

2. The development and implementation of policy must have a basis in and adhere to standards of fairness, notice, transparency, integrity, objectivity, predictability and due process consistent with ICANN's core values. (Emphasis added)

The adoption of the PDDRP and the URS as de facto consensus policy for legacy gTLDs has not proceeded in a bottom-up manner but has been imposed from the top down by GDD staff. There is no present emergency related to security and stability to justify such action. Further, the listed standards that are consistent with ICANN's core values have not been followed.

Finally, the "Principles / Requirements that apply primarily to Policy" (p. 14) states as its first Standard, "As outlined in the ICANN Bylaws, the GNSO is responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains. **As such, gTLD policy development should not take place outside of the GNSO.**" (Emphasis added) In the matter we are addressing in this letter, policy development has arguably taken place outside of the GNSO.

Incomplete Information and Analysis

Another troubling aspect of this staff decision is that it has been undertaken in the absence of a full evaluation of the issues related to the new gTLD RPMs. On May 1st the public comment period on "Draft Report: Rights Protection Mechanisms Review" (<https://www.icann.org/public-comments/rpm-review-2015-02-02-en>) closed, and on May 29th ICANN staff issued a "Report of Public Comments" (<https://www.icann.org/en/system/files/files/report-comments-rpm-review-29may15-en.pdf>) based upon community input.

As noted in the Background on the Draft Report, it "is intended to be available to inform the Issue Report requested by the GNSO as well as the independent review of Trademark Clearinghouse recommended by the GAC. In addition, this paper will serve as input to the Review Team on Competition, Consumer Trust, and Consumer Choice to be convened under Section 9.3 of the Affirmation of Commitments, charged with assessing the effectiveness of the safeguards developed for the New gTLD Program." None of these additional reviews have been completed.

In addition, and most relevant to the subject of Consensus Policies, ICANN staff developing the referenced Issues Report on new gTLD RPMs that was requested by the GNSO asked for a six-month extension in the delivery date of that report, from March to September 2015, in order to gather additional information and conclude several analytical studies. During its meeting of January 29, 2015 the GNSO Council granted that policy staff request as Item 3.1 on its Consent Agenda (see <http://gns0.icann.org/en/meetings/minutes-council-29jan15-en.htm>).

We find it troubling that ICANN contractual staff would seek to insert specific new gTLD program RPMs in legacy gTLD renewal RAs when ICANN policy staff have yet to define the issues they implicate, and the GNSO has yet to receive the Issues Report that may be the basis of one or more PDPs; including one addressing whether they should become Consensus Policies applicable to all gTLDs.

Impact on the Community

The staff decision is also contrary to the expectations of many members of the ICANN community. During the lengthy development of the RPMs many community members sought assurances that the RPMs would not be imposed on legacy gTLDs until their implementation was fully evaluated and a follow-up PDP was initiated. The GNSO's request for an Issues Report on the RPMs indicates that it has had a similar understanding.

The staff action of taking certain RPMs as a starting point for legacy gTLD renewal RAs is at odds with community expectations that the policy procedures set forth in the Bylaws would be followed. In addition, while registrants at new gTLDs had clear advance notice that they would be subject to the URS, registrants at legacy gTLDs have no such expectation and deserve to have such a decision made through the standard approach of a PDP resulting in the establishment of Consensus Policy.

Conclusion

For all of the reasons cited above, the BC believes it is inappropriate for GDD staff to take the new gTLD RA as the starting point for the renewal of legacy gTLDs. Therefore, section 2 of Specification 7 of the renewal RAs for .Travel and the other gTLDs noted in the introduction to this comment should be deleted.

The BC looks forward to receipt of the policy staff Issues Report on RPMs for new gTLDs this September. That Report can be the starting point for a process that considers their application to legacy gTLDs in a manner consistent with ICANN's Bylaws.

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These comments were drafted by Phil Corwin, Andy Abrams, Andrew Mack, and Jim Baskin.
It was approved in accordance with the BC charter.