Public Comments-Report Template (v1.2)

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Report of Public Comments

Title:	Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification
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Prepared By:	Daniel Halloran

Comment & Reply Period:	
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Staff Contact:	Daniel Halloran	Email:	daniel.halloran@icann.org

Section I: General Overview and Next Steps

On 5 February 2013 ICANN posted a proposed "Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification" <http://www.icann.org/en/news/announcements/announcement-3-05feb13-en.htm>. In that posting ICANN announced revisions to the agreement in response to developments since the last posting of the Applicant Guidebook in June 2012 and a general review of the contractual needs of the new gTLD program.

Since February 5, ICANN hosted two webinars (6 March 2013 and 26 March 2013) <http://newgtlds.icann.org/en/announcements-and-media/webinars>, held meetings with stakeholders, and initiated an official public comment period from 5 February 2013 to 20 March 2013 to provide the community opportunities to give feedback on revisions to this key agreement.

ICANN has carefully considered the comments on the revised agreement, and community discussion will continue at ICANN's Public Meetings in Beijing (7-11 April 2013). Please monitor the ICANN blog and new gTLDs microsite for further updates on next steps.

Section II: Contributors

At the time this report was prepared, a total of 55 community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

ORGANIZATIONS AND GROUPS:

Name	Submitted by	Initials
Nominet UK (Nominet)	Sarah Walden, Sr. Project Manager	SW
Pool.com	Richard Schreier, CEO	RS
Blacknight Solutions (Blacknight)	Michele Neylon	MN
Community TLD Applicant Group (CTAG)	Craig Schwartz	CS
Verisign	Keith Drazek	KD
TLDDOT GmbH (TLDDOT)	Dirk Krischenowski	DK
Accor	Nathalie Dreyfus	ND
Property Casualty Insurers Association of America (PCI)	David M. Golden	DMG
City of New York	Katherine Winningham	KW
Intellectual Property Constituency (IPC)	Brian J. Winterfeldt	BJW
Brand Registry Group--in formation (BRG)	Philip Sheppard	PS
U.S. Dept. of Commerce, NTIA (USG-NTIA)	Lawrence E. Strickling	LES
Registries Stakeholder Group (RySG)	Keith Drazek, Chair	KD-C
IBM Corporation	Leonora Hoicka, Lisa J. Ulrich	LH,LJU
Foundation for Network Initiatives (The Smart Internet)	Irina Danelia	ID
Valideus	Brian Beckham	BB
New gTLD Applicant Group (NTAG)	Krista Papac	KP
Coalition for Online Accountability (COA)	Steven J. Metalitz	SJM
FAITID	Maxim Alzoba	MA
Registrar Stakeholder Group (RrSG)	Michele Neylon, Secretary	MN-S
Key-Systems GmbH (Key-Systems)	Volker Greimann	VG
Google Inc. (Google)	Halimah DeLaine Prado	HDP
HBO Registry Services, Inc. (HBO Registry)	Judy McCool	JM
ARI Registry Services (ARI)	David Carrington,Yasmin Omer	DC, YO
Cronon AG (Cronon)	Dr. Michael Shohat	MS
Top Level Domain Holdings (TLD Holdings)	Antony Van Couvering	AVC
Steptoe & Johnson (Steptoe)	Brian J. Winterfeldt	BJW
E.I. DuPont de Nemours and Company (DuPont)	Karen Galbraith	KG
IEEE Global LLC (IEEE Global)	Prakash Bellur	PB

Copyright Alliance	Sandra Aistars	SA
fTLD Registry Services, LLC (fTLD Registry Services)	Craig Schwartz	CS
Citigroup Inc. (Citigroup)	Sara B. Blotner	SBB
Target Domain Holdings, Inc. (Target Domain Holdings)	Michael Kroll	MK
Web.com Group Inc. (Web.com)	Robert C. Wiegand	RCW
Business Constituency (BC)	Steve DelBianco	SD
Emirates Telecommunications Corporation (Etisalat)	Amy Repp	AR

INDIVIDUALS:

Name	**Affiliation (if provided)**	**Initials**
Alig Taweem (A. Taweem)		AT
Rockruler		
Jean-Sebastian Lascary (J. Lascary)		JL
Falko Neuhaus (F. Neuhaus)		FN
Bram van Es (B. van Es)		BV
Sammy Ashouri (S. Ashouri)		SA
D.F.		DF
David Cohen (D. Cohen)		DC
Tim Greer (T. Greer)		TG
Joyce Lin (J. Lin)		JL
John Berryhill (J. Berryhill)		JB
Toren Chikalut (T. Chikalut)		TC

Section III: Summary and Analysis of Comments

General Disclaimer: The summaries provided in this section are intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted). The analysis of staff set forth in this section is intended to provide an evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis. The analysis does not represent the position of the ICANN Board of Directors and is subject to change.

A. GENERAL PROCESS & TIMING

Support

COA commends ICANN for acknowledging that the current version of the new gTLD Registry Agreement requires certain updates and changes before it can be finalized for use by successful applicants. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

- This statement is equally applicable to other elements of the Applicant Guidebook (AGB). ICANN would be remiss in its public interest obligations if it did not modify other provisions of the AGB as needed to reflect changed circumstances, unforeseen developments, advice from the GAC and other inputs. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*
- ICANN is also following the proper procedure for making such modifications by providing an opportunity for public comment. COA urges ICANN to provide adequate time for community consideration and comment on these proposed changes and to prepare promptly a summary of these comments and an explanation of how they have or have not been taken into account. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

Timing Concerns

Pool.com applauds holding applicants "to their word" through translating their commitments in original submissions into legal obligations regarding registry operations, but raises two key concerns:

- PICs Comment Period Timing Issue--The comment period is open until 26 February 2013 (replies open until 20 March), but ICANN expects "near final" submission of PIC documents by 5 March, allowing very little time (5 business days) for submitted documents to reflect any changes that the public comment process may germinate. It is understood that Specification 11 may be changed at a later date subject to another 30 day public review. This process sets an applicant at a time disadvantage and inserts an excuse to delay the process where changes to the PIC requirements occur after the 5 March deadline. *Pool.com (19 Feb. 2013)*
- Competitive Disadvantage-- Incorporating PICs in Article 3 of Specification 11 allows competitive applications that did not include a PIC policy in their original application to add them after the fact. This is clearly a competitive disadvantage to those organizations that fully intended to implement and proposed policy to support certain public interest standards from the outset, and also conflicts with ICANN published change guidelines (3. Other Third Parties Affected, 4. Fairness to Applicants (competitor can easily and simply copy from publicly available competitive bid that originally included PICs), 6. Materiality). Questions 18c and 28 of the original submissions provided applicants with the opportunity to declare their PIC-related policies at the time of application. If they did not do so in the original submission, they should not be allowed to do so now when they have had the opportunity to reflect on what their competition has submitted. *Pool.com (19 Feb. 2013)*

Analysis: The schedule related to the PIC Specification was developed to allow for PIC Specifications to be submitted and published prior to the close of the objection period (13 March 2013). The schedule allows for public review of the PIC Specifications, including review by the GAC, as soon as possible in advance of the Beijing meeting (7-11 April 2013). This expedited timeline was required in order to ensure that ICANN is delivering the program within the timeframes previously identified.

Applicants will be held to the commitments made within their PIC Specifications. Any commitments set out in a PIC Specifications that result in a change to the application must be accompanied by a change request to change the corresponding portions of the application. Applicants will have the ability to request changes to their submitted PIC Specification via the change request process

The GAC's Toronto Communiqué provided advice to the Board of Directors of ICANN that "it is necessary for all of these statements of commitment and objectives to be transformed into binding contractual commitments, subject to compliance oversight by ICANN." In response to the GAC, the New gTLD Program Committee of the Board has approved a public comment period on a proposed Public Interest Commitments Specification as a mechanism to transform application statements into binding contractual commitments, as well as to give applicants the opportunity to voluntarily submit to heightened public interest commitments.

Opposition to General Process and Timing for Proposed Changes

ICANN's timing of the proposed Registry Agreement changes, after many years of multi-stakeholder input, must be rejected; this has the potential to disrupt expectations of new gTLD applicants and amounts to a top-down action by ICANN that undermines the bottom-up, multi-stakeholder model that ICANN has committed to uphold. ICANN's push for these expedited changes is inconsistent with its obligations under Section 9.1(d) of the Affirmation of Commitments. ICANN must revise the timeline for adoption of the changes to provide sufficient time for Verisign and the community to review and have meaningful input into each and every proposed change. *Verisign (21 Feb. 2013)*

- These changes are being posted for public comment via the shortest possible public comment period. There is no benefit to rushing important and material changes to the Registry Agreement to meet artificial deadlines. *Verisign (21 Feb. 2013)*
- ICANN is also requiring applicants to formally submit PICs, a brand-new concept, on 5 March, just a few days after the Registry Agreement comment period closes on 26 February and before the reply period closes on 20 March. The 5 March date is too soon after the close of the comment period because it requires applicants to perform a rushed analysis, potentially resulting in business harm. The 5 March date also falls well before the receipt of possible government objections and GAC advice, which Specification 11 seems designed, in part, to address. ICANN should at a minimum extend the 5 March deadline for parties to submit commitments to permit a reasonable amount of time after Specification 11 is finalized and after government objections and after GAC advice, if any, is received. *Verisign (21 Feb. 2013)*
- ICANN's Specification 11 should be rejected also because under the current timeline, applicants that wish to submit PICs will be forced to make such PICs before ICANN has disclosed the new dispute resolution procedure it contemplates creating for Specification 11 disputes. *Verisign (21 Feb. 2013)*
- Several of ICANN's proposed changes to the Registry Agreement will upset the reasonable expectations of applicants: E.g., ICANN's attempt to obtain a unilateral right to impose certain Registry Agreement amendments (section 7.6), previously opposed by the community and removed in Version 4 of the DAG; ICANN's seeking to broaden its assignment rights under Section 7.5 in a way already rejected through consensus by the community. *Verisign (21 Feb. 2013)*
- Some of ICANN's proposed terms and processes are yet to be defined and/or allow ICANN "leave" to make unilateral changes in the future. Undefined processes should not be left to

after-the-fact development just so ICANN can meet its artificial deadline of 23 April to "recommend" delegation. *Verisign (21 Feb. 2013); Verisign (21 Mar. 2013)*

The timing established by ICANN for submitting comments on the general notion of PICs and the associated dispute resolution process coupled with the "strong-armed" approach requiring applicants to submit PICs by 5 March is completely unreasonable. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

- The community has not had sufficient time to digest whether or not the PIC process laid out by ICANN is proper or even necessary. Applicants are feeling "blackmailed" into submitting additional commitments despite ICANN's statements that such filings are voluntary. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- The overall objection period (ends just 8 days after the period in which an organization has to file its PICs) means that the GAC or individual governments could submit objections after PICs are submitted. So applicants are expected to file their PICs before they even know formally whether the governments have a specific objection. Potential objectors will have to decide whether to file their objections based on PICs that were published for just one week and that can be amended post-deadline. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- Understanding that a primary reason for introducing PICs was to respond to a GAC request, RySG wonders whether it would be useful to consider allowing applicants to file PICs after GAC advice is given. This would be especially helpful in cases where GAC advice is given without any prior notification such as a GAC Early Warning, and might allow more time for careful review of the PIC Specification. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

The PICs and associated dispute resolution process require a more considered discussion than the present short and unexpected Public Comment period allows. *Valideus (26 Feb. 2013)*

- Applicants wishing to respond to the GAC Early Warnings or otherwise use the PIC (e.g. to respond to comments) are faced with an unreasonable dilemma--potentially be seen as unresponsive to raised concerns, or sign on to a completely unknown and untested mechanism with third party standing to lodge a complaint on unspecified grounds. *Valideus (26 Feb. 2013)*
- A procedural issue seems to have been overlooked--applicants are expected to submit PIC replies before the reply comment period on the proposed changes to the Registry Agreement expires. As such, applicants are requested to submit commitments on an agreement, the terms of which may change after the fact. While the PIC is intended to be a vehicle for applicants to address concerns raised by governments and the community, Valideus hopes that ICANN recognizes the predicaments this creates and urges a more considered approach. *Valideus (26 Feb. 2013)*

The timing of ICANN's proposal prevents applicants from making an informed decision about whether to participate in the PIC program (Spec. 11). ICANN set a 5 March 2013 deadline for opting in to the program. As a result, applicants must decide whether to participate weeks before ICANN's deadline for responding to public comments on the revised agreement and without knowing the parameters of the PIC dispute resolution process to which they will be subject. The deadline also falls well before many applicants will receive final GAC advice on their applications, thereby limiting applicants' ability to address GAC advice through the program. *Google (26 Feb. 2013)*

The timing of ICANN's proposals for significant, last-minute changes to the registry agreement is extremely troubling. RrSG is equally troubled by identical treatment by staff of the proposed updated RAA. Following more than a year of good faith negotiation on the part of registrars, staff inexplicably returned to the table with proposals that were previously rejected by agreement of both parties to the contract. It appears to be a bad-faith maneuver that has no place in our community and an abuse of the position of trust staff purports to hold. *RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013)*; *Cronon (26 Feb. 2013)*

RrSG notes that the new ICANN CEO is travelling the world with messages about the merits of the multi-stakeholder model, which RrSG supports. The proposed changes to the registry agreement, like the current draft of the RAA--and not insignificantly the manner in which they were introduced--are indicators either that the staff does not share the CEO's view or is operating in opposition to his vision. ICANN must be aligned internally with its own model before promoting it externally, and demanding a unilateral "kill switch" in commercial agreements does not advance this confidence. *RrSG (26 Feb. 2013)*

Positioning these top-down changes to the registry agreement as a step toward industry "maturity" insults ICANN's own credibility in and outside the community, particularly with those who have invested heavily in the program's and ICANN's continued success. *RrSG (26 Feb. 2013)*

Verisign has many serious concerns with ICANN's last-minute proposed changes to the June 2012 Registry Agreement, including the unilateral nature of many of the revisions. Under no circumstance should ICANN staff and the ICANN Board incorporate these proposed unilateral and unacceptable changes to the Registry Agreement. Verisign is concerned that ICANN is attempting to force through a new version of the Registry Agreement that a subset of anxious applicants could feel compelled to accept, thereby empowering ICANN to establish these last minute changes as the new baseline for all new gTLD registry operators. In many respects, the proposed revisions introduce more confusion than clarity. Verisign looks forward to working with ICANN and interested parties to move the process forward responsibly and thoughtfully in a way that ensures that any and all revisions and changes receive consideration and proper input from the stakeholders. *Verisign (21 Feb. 2013)*

The timing and content of the proposed changes, and the manner in which those changes are being considered, circumvent the ICANN policy development process, call into question ICANN's commitment to the multi-stakeholder process, and jeopardize the success of the new gTLD program

by failing to provide the kind of certainty that supports necessary investment in new businesses. *RySG (26 Feb. 2013)*; *Valideus (26 Feb. 2013)*; *NTAG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013); IEEE Global (19 Mar. 2013); Target Domain Holdings (20 Mar. 2013)*

While RySG commits to participate in an appropriate amendment process, RySG urges the Board to direct staff to move forward with the launch of new gTLDs using the 4 June 2012 "Final Agreement." The latest proposed version of the agreement contains so many serious and fundamental flaws that it should be withdrawn in its entirety. RySG opposes certain proposed amendments and believes that other provisions need further thought and refinement. RySG is equally concerned about the timeline that ICANN has imposed on the community's consideration of these proposals and the mechanism by which ICANN proposes to adopt and implement the changes. *RySG (26 Feb. 2013)*; *FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

Google believes that all of the proposed changes to the registry agreement should be withdrawn. *Google (26 Feb. 2013)*

- ICANN's 11th -hour changes to the registry agreement violate the spirit of ICANN's multi-stakeholder process and threaten to erode ICANN's credibility with applicants who are making good faith efforts to work in partnership with ICANN to ensure the success of the new gTLD program. The revised agreement is untimely in that it seeks to make substantial changes to the registry agreement that disrupt a balance calibrated through years of negotiation. *Google (26 Feb. 2013)*
- The revised agreement is unnecessary and unrealistic, as many of the proposed changes address issues that are already covered in the AGB and the existing registry agreement. *Google (26 Feb. 2013)*
- In order to maintain the momentum and credibility of the new gTLD program, Google strongly encourages ICANN to roll back the most recent changes to the registry agreement. While Google appreciates ICANN's efforts to avoid slippage of its timeline for delegating new gTLDs, the date on which ICANN recommends gTLDs for delegation effectively is meaningless if all or most applicants are unable to sign the registry agreement. *Google (26 Feb. 2013)*

Valideus urges ICANN to engage in good faith discussions about any proposed changes using a more appropriate and collaborative process, and to provide all affected parties with appropriate time for due consideration. The unexpected proposed new gTLD Registry Agreement should be withdrawn or at the very least given more time for discussion. *Valideus (26 Feb. 2013)*

- While there is already a mechanism in the new gTLD Registry Agreement to give effect to the required changes, this should not prejudice the ability of individual applicants to negotiate specific terms of the New gTLD Registry Agreement with ICANN. *Valideus (26 Feb. 2013)*
- The unexpected proposed changes to the New gTLD Registry Agreement seem to be at odds with the fundamental GNSO principle of introducing the new gTLDs in an orderly and predictable fashion, and the GNSO policy recommendation that "there must be a base

contract provided to applicants at the beginning of the application process." *Valideus (26 Feb. 2013)*

The AGB terms provide ICANN with the ability to change the proposed registry agreement until applicants completed and submitted their applications. Following submission, ICANN is duty-bound to work with applicants to mitigate "material hardships" or other negative consequences of such changes. Not only were the AGB terms violated, the RrSG is unaware of any attempt by ICANN to mitigate resulting hardships. Applicants, registries and registrars formulated plans on the basis of terms as presented--and relied upon--in the final AGB. Last-minute contractual demands by ICANN intentionally introduce instability into a critical phase of the program, when these businesses must focus heavily on preparation for delegation. *RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013)*

ARI rejects the content of the material changes to the Agreement and objects in the strongest possible terms to the timing and method by which ICANN has sought to enact such change. With the arguable exception of the optional elements of the Public Interest Specification, ARI is not convinced that there is any pressing need for these material changes. ICANN should: withdraw the proposed amendments; explain its rationale for any proposed changes so that where consensus dictates that change is fundamentally necessary, the community can work with ICANN to develop appropriate amendments; and confirm that this episode, of ICANN's making, will not further impact the repeatedly delayed timeline for delegation. *ARI (26 Feb. 2013)*

Comments and Analysis: The posting of a revised draft of the Registry Agreement for public comment demonstrates ICANN's commitment to a bottom-up, multi-stakeholder model, and provided stakeholders with six weeks (including the public comment and reply periods) to analyze, review and respond to the proposed changes. The intent of several of the revisions to the draft Registry Agreement described above was to further ICANN's ability to respond to changes and developments in a rapidly evolving DNS marketplace. ICANN views these changes as a step forward as the community and marketplace continue to mature and respond to the needs of registrants, the community and all stakeholders.

However, ICANN appreciates the comments submitted in response to the proposed changes, and has taken these comments under advisement, and has modified some of the proposed changes in response to the comments.

With respect to the PIC Specification, the schedule related to the PIC Specification was developed to allow for PIC Specifications to be submitted and posted prior to the close of the objection period on 13 March 2013. The schedule allows for public review of the PIC Specifications, including review by the GAC, as soon as possible in advance of the Beijing meeting (7-11 April 2013). This expedited timeline was required in order to ensure that ICANN is delivering the program within the timeframes previously identified. Applicants will have the ability to request changes to their submitted PIC Specification via the Change Request process. In addition, ICANN posted the Public Interest Commitments Dispute Resolution Procedure for public comment on 15 March 2013.

GAC Role

TLD Holdings hopes that the GAC lives up to its responsibilities to protect the public interest and to the principles for new gTLDs that it promulgated five years ago (2.5 and 2.13) and which it has stuck to ever since. If not, ICANN will have made a mockery of its founding principles. *TLD Holdings (26 Feb. 2013).*

Prioritization Draw--Competitive Disadvantage and Negotiation Likelihood

The new Prioritization Draw actively disadvantages those applicants who seek to negotiate the Agreement for any reason. ICANN has moved the goal posts. *ARI (26 Feb. 2013)*

- Given that it is an accepted truth that early delegation gives applicants critical first mover advantage, it is clear that applicants who seek to negotiate will be placed at a severe competitive disadvantage in terms of the delegation timetable. *ARI (26 Feb. 2013)*
- It can be assumed that a significant number of applicants (corporations, entrepreneurs, government or otherwise) will have risk policies in place that do not allow the execution of the Agreement in its current form. It is disturbing to have heard reports suggesting that ICANN has indicated applicants will have to simply make exceptions to such policies. ARI notes with similar concern the use of the term "contract acceptance" rather than "contract election" in recent correspondence. If correct, such would indicate a fundamental lack of understanding of corporate risk. Such an approach would prove impossible for a large number of applicants. *ARI (26 Feb. 2013)*
- ARI's own detailed analysis indicates that at least 25% of applicants will feel compelled to negotiate despite the potential to lose first mover advantage. Clearly a reconsideration of this approach is needed. *ARI (26 Feb. 2013)*
- The agreement contains a number of clauses likely to encourage applicants as advised by their lawyers to feel compelled from a risk perspective to enter into negotiations with ICANN (Jurisdiction, clause 5.2; Arbitration, clause 5.2; Liability, clause 5.3; Warranties, clause 7.14). *ARI (26 Feb. 2013)*

Analysis: The Applicant Guidebook (Section 5.1) states that "Applicants may request and negotiate terms by exception; however, this extends the time involved in executing the agreement. In the event that material changes to the agreement are requested, these must first be approved by the ICANN Board of Directors before execution of the agreement." ICANN will not delay signing contracts with applicants willing to accept the form registry agreement while other applicants attempt to negotiate exceptional terms, and this would have been the case whether or not ICANN had used a prioritization draw.

B. NEW gTLD AGREEMENT SPECIFICATIONS

Specification 4--For Registration Data Publication Services

Support

COA generally supports the proposed modifications to Spec. 4. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

- COA applauds the recognition that ICANN's Internic web page could serve as a portal for cross-registry Whois access, as recommended by the Whois Policy Review Team, and that therefore Whois data from the new registries should be supplied in a compatible format. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*
- COA agrees that ultimately new gTLD registries should be required to comply with the "next generation model" for gTLD directory services once that model is finally approved by the ICANN Board, but reserves judgment on the output of the newly established experts working group which is expected to form the basis of that new model. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*
- COA supports the new requirement for registries to provide links to the forthcoming ICANN page "containing Whois policy and education materials," but this provision should be expanded to cover links to any cross-registry registration data directory service operated by or on behalf of ICANN (such as the Internic service called for by the Whois Policy Review Team). *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

Opposition

Registry operators cannot responsibly agree to implement a service within a specific timeframe (the proposed 120 days in Section 1.10) without knowing the requirements for specification and implementation. The proposal is also problematic in requiring implementation of a service without regard to cost. The possible exception is problematic in providing a criterion ("commercially unreasonable") that is not objective, and in shifting the burden of proving commercial unreasonableness to the registry operator. *Verisign (21 Feb. 2013)*

RySG does not accept this new material addition to the final Registry Agreement in it provides yet another avenue for ICANN to circumvent the Consensus Policy process and the very nature of ICANN's bottom-up multi-stakeholder process. The newly proposed language shifts the burden to the registries and to the ICANN community to establish the rationale on why such changes should not be implemented after those changes most likely will have already been required to be implemented by registries. It amounts to a second set of provisions giving ICANN the unilateral right to amend the Registry Agreement. All in the community can agree that WHOIS falls within the mandate of the Consensus Policy process. The existing registry agreements as well as the proposed June 2012 Final Agreement explicitly recognize this topic to be one expressly reserved for the Consensus Policy process. If policy changes are warranted, they must go through the Consensus Policy process, not the other way around. Further work is needed to develop this approach. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013); Steptoe (26 Feb. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)*

Unilateral amendments to the registry agreement should not be allowed that may impose additional

burdens on all registry operators. Although enhanced Whois is important to brand owners, it should not be exempt from the amendment process just like any other amendment to the registry agreement. This clause needs to be removed or revised so that it is not unilateral but something that both parties have agreed to and that has undergone the established amendment process. *Steptoe (26 Feb. 2013); DuPont (15 Mar. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)*

ICANN should exercise responsibility and good faith by reflecting contractually its apparent intention made in a 13 Dec. 2013 announcement by its CEO to subject the findings of the directory services Expert Group to a full PDP. *Valideus (26 Feb. 2013)*

NTAG encourages ICANN to clarify that the expert panel recommendations will feed into the bottom-up process on which the ICANN model relies by removing the proposed change. *NTAG (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

- The proposed change seems to have failed to reflect ICANN's intentions that the output of the Expert Working Group on gTLD Directory Services "will feed into a Board-initiated GNSO policy development process." *NTAG (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- While NTAG supports the use of expert panels, it does not support a top-down approach of having the ICANN Board make unilateral decisions that bind registries based on recommendations of such panels. If ICANN intends any recommendations to go through the GNSO policy development process, any output would be binding on registries and there is no need for the additional language. *NTAG (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

Analysis: ICANN appreciates the comments submitted in response to the proposed changes to the draft Registry Agreement relating to the expert working group on gTLD directory services and the amendment process, and has taken these comments under advisement. ICANN has withdrawn or modified certain of the proposed changes in response to the comments.

Nameserver Queries (Section 1.6.1)

The Whois requirements in Spec. 4 regarding queries for nameserver objects (Section 1.6.1) create ambiguity between matching domain objects and host objects. It is unnecessarily complicated, especially considering that greater than 99% of Whois queries are from those seeking information about domain objects, not host objects. ARI recommends that the query string described in Spec. 4, Sec. 1.6.1 of the draft agreement should be updated to require a keyword for the search of host objects. ARI provides suggested text in its comments. *ARI (26 Feb. 2013)*

Analysis: ICANN has modified Specification 4 in response to this comment.

Whois Common Interface (Section 1.8)
The location of the specification for the WHOIS common interface, to Verisign's knowledge, has yet to be provided (Section 1.8). There is no clarification as to what ICANN considers the primary website for the TLD. The information regarding the CZDA Provider has yet to be provided (Section 2.1.1). *Verisign (21 Feb. 2013)*

Analysis: ICANN is currently working on updating the Internic Whois common interface. The specification will be revised to clarify that the "primary website for the TLD" is the website that Registry Operator provides to ICANN for publishing on the ICANN website. ICANN is also working on CZDA Provider processes. Additional public consultation is anticipated.

Zone File Access (Section 2.1.4)
ARI requests that the option for registries to send their zone files in DNS AXFR format be reflected in Spec. 4, Section 2.1.4 of the new gTLD agreement. *ARI (26 Feb. 2013)*

Analysis: ICANN expects to modify Specification 4 in response to this comment.

Specification 5--Schedule of Reserved Names at the Second Level in gTLD Registries

Detailed List
Spec. 5 of the draft agreement is inconsistent in the level of detail provided regarding names that are to be reserved at the second level. ARI recommends that the list of names that are to be reserved at the second level in accordance with Spec. 5 be compiled by ICANN and form part of the new gTLD Agreement or alternatively there should be an easily accessible website to locate this information. This list should include any relevant general label rules on how spaces between names or small words (such as "the") are to be treated. ARI believes that the inclusion of this list is consistent with ICANN's previous practice of attaching schedules of reserved names to registry agreements. *ARI (26 Feb. 2013)*

Analysis: The reference to the ISO list is based on advice from ICANN's Governmental Advisory Committee. Attaching a static list of each name referenced in the ISO list is not practical because the list may be modified in the future. ICANN would be willing to consult with registries individually or collectively on the compilation and updating of reserved names lists based on the standards.

.BRAND/Closed, Single-Registrant and Geographical Names
A more streamlined approval process or exception for .BRAND and/or closed registries is required with respect to reserved names at the second level which are country and territory names. Current restrictions in the second-level reserved names list make such use an unduly burdensome task for closed .BRAND TLDs where any confusion with relevant governments among Internet users is unlikely (e.g. Canada.Brand, Japan.Brand). *Steptoe (26 Feb. 2013); DuPont (15 Mar. 2013); Citigroup (20 Mar.*

2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)

The BC reiterates its request in May 2011 Public Comments for an exception that allows single-registrant TLDs to register domains for their markets and operations based in countries and territories (e.g. Canada.canon; Haiti.redcross, etc.). If not an exception for single-registrant TLDs, ICANN should propose a centralized mechanism where single-registrant TLDs can request authorization for all governments in a consolidated request. BC also repeats its 2011 proposed definition for "Single Registrant TLD." *BC (20 Mar. 2013)*

Analysis: Geographic names have long been protected by ICANN in new gTLDs, and this is supported by advice from the GAC. ICANN would encourage registry operators to discuss these issues with other interested stakeholders, including the GAC.

Specification 7--Minimum Requirements for Rights Protection Mechanisms (RPMs)

RPMs Enforcement (Section 1)

RySG seeks clarification on the ramifications of ICANN's addition of language requiring the Registry Operator to both include all mandated and independently developed RPMs in the registry-registrar agreement and "to require each registrar that is a party to such agreement to comply with the obligations assigned to registrars under all such RPMs." *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

- Is ICANN now stating that it will hold each Registry Operator responsible and ultimately liable for the actions of the registrars--i.e. shifting the burden of enforcement of the RPMs to each individual registry as opposed to having a more efficient centralized unified contract compliance effort led by ICANN? *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- Enforcement by registries would raise their costs and lead to uneven results based on the differing resources of specific registries (e.g., large v. small) which will adversely affect competition. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- This is not comparable to ICANN's imposition of policing responsibility on registrars for the activities of their resellers. Registries have non-discrimination obligations with respect to registrars and cannot pick and choose with whom they do business; they must use registrars that a third party (ICANN) accredits. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- ICANN is the only entity able to enforce obligations of registrars uniformly across all gTLDs, and is adequately staffed and funded (given the $350M new gTLD application fees and various other fees collected on an ongoing basis) to take on this compliance function. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

Analysis: ICANN is posting the description of the rights protection mechanisms referenced in Specification 7 for public review and input. ICANN's Registrar Accreditation Agreement does not directly address registrar responsibilities with regards to registry start-up processes such as sunrise or trademark claims, and therefore it is necessary for any registrar responsibilities in relation to those processes to be imposed via the registry-registrar agreements applicable to newly launched registries. As it is the primary responsibility of the registry operator to implement the rights protection mechanisms and the registry operator will have considerable flexibility in the manner in which it implements such requirements, ICANN believes that it is appropriate for registry operators to require its registrars to cooperate with the obligations assigned or undertaken by registry operators in connection with such rights protection mechanisms.

Specification 9--Registry Operator Code of Conduct

Delegation of Nameservers to Names for Promotional Purposes

- While new gTLD registry operators will desire to delegate certain domain names for the purpose of promoting them for registration by eligible third parties (e.g. banana.fruit), a current literal reading of the Registry Code of Conduct suggests that doing so would violate section 1(b) of that Code. ARI does not believe it violates the spirit of the Code. *ARI (26 Feb. 2013)*
- Alternatively, ARI contends that simply assigning nameservers to a domain name for the purpose of hosting content that promotes the domain name does not breach the Registry Code of Conduct. ARI requests that ICANN clarify the manner in which section 1(b) of the Registry Code of Conduct will be interpreted with respect to: (1) the registry operator's delegation of domain names for promotional purposes; and (2) the assignment of nameservers to a domain name by the registry operator for the purpose of hosting content that promotes the registration of the domain name. In considering this request, ICANN should avoid any clarification that hinders the registry operator's ability to successfully promote domain names in a competitive market. *ARI (26 Feb. 2013)*

Analysis: This comment raises an interesting question that merits further community discussion. One negative implication might be that allowing registry operators an unlimited right to register and use names for promoting their registration by third-parties would lead to registry operators attempting to monetize traffic to such promotionally registered names, which would undercut the purpose of the Code of Conduct provision as indicated in the comment by reducing registry operators' incentive to allow third-parties to register such names.

Article 6--Exemption to Registry Operator Code of Conduct

Most registry operators may wish to allow customers or other contracted third parties to control aspects of the websites within their TLDs -- i.e., "use" the domain names, even if the registry operator

is the registrant. The clause "control or use" should be stricken from subsection (ii) of Article 6 as the registry operator would still have ultimate control over the relevant domain even if third parties can dictate the content at the websites at such domains and can ensure compliance with the stated purpose for the TLD. *Steptoe (26 Feb. 2013); DuPont (15 Mar. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)*

Analysis: If third parties are given access to use of domain names, whether by traditional registrations or by leasing/licensing arrangements, the same protection of registrant or quasi-registrant concerns apply. It is unclear as to what is meant by "control aspects of the websites within their TLDs. . ."

Names Reasonably Necessary for Management, Operations and Purpose of the TLD

ARI requests clarification regarding Spec. 9 on the mechanism by which a registry operator may register domain names in its own right in accordance with section 1(b) of the Registry Code of Conduct. *ARI (26 Feb. 2013)*

Analysis: Registry Operator is generally required to register names in its own right (if permitted by the Code of Conduct) through an ICANN accredited registrar; provided, that Registry Operator need not use a registrar if it registers names in its own name in order to withhold such names from delegation or use in accordance with Section 2.6 of the registry agreement.

Specification 11--Public Interest Commitments

Support

The NTIA of the U.S. Department of Commerce strongly supports the inclusion of the PICs Spec. and commends ICANN for so directly responding to the concerns expressed by the GAC, including the U.S., regarding the need for new gTLD applicants' commitments to be binding and enforceable. *USG-NTIA (26 Feb. 2013)*

- Inclusion of the PICs Spec. provides new gTLD applicants the ability to clarify that they will in fact be accountable in the agreement for all the commitments made in their applications and to make additional commitments to respond to issues that may have surfaced since applications were made public. *USG-NTIA (26 Feb. 2013)*
- NTIA urges all applicants to take advantage of this opportunity to address the concerns expressed by the GAC in its Toronto Communique, the individual early warnings issued by GAC members, and the ICANN public comment process on new gTLDs, as appropriate. *USG-NTIA (26 Feb. 2013)*
- NTIA refers applicants to the principles the U.S. issued as part of its early warning submission, the views expressed by the National Association of Secretaries of State, and the proposals for enhanced safeguards for strings related to the creative sector. With regard to these enhanced safeguards, NTIA urges applicants to consider ensuring that WHOIS data is verified, authentic and publicly accessible. *USG-NTIA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

- Applicants should also consider providing an enforceable guaranty that the domain name will only be used for licensed and legitimate activities as such a commitment will aid in combatting online illegal activities. These new tools may help in the fight against online counterfeiting and piracy. NTIA is particularly interested in seeing applicants commit to these or similar safeguards. *USG-NTIA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*
- NTIA is still evaluating the other updates and changes provided for in this revised new gTLD Registry Agreement and the U.S. will continue to work within the GAC to develop GAC advice related to new gTLDs. *USG-NTIA (26 Feb. 2013)*

CTAG has reviewed the PIC Spec. concept and supports inclusion of contractual provisions intended to protect consumers and rights holders (e.g., registration restrictions, enhanced security measures to mitigate the potential for malicious activities, and RPMs). CTAG supports the GAC request in its Toronto Communique for transforming statements and commitments in individual gTLD applications into binding contractual commitments, subject to compliance oversight by ICANN. *CTAG (21 Feb. 2013); TLDDOT (24 Feb. 2013); fTLD Registry Services (20 Mar. 2013)*

PCI supports amending ICANN's gTLD Registry Agreement to make PICs in both the gTLD application and in the registry agreement itself, legally binding upon gTLD applicants. Adding a PIC Specification to the gTLD Registry Agreement is critical to the success of new gTLDs. The gTLD Application does not contain any binding commitment by applicants to follow through with the public interest and RPMs that they describe in their applications. Common sense dictates that all commitments made in gTLD applications should legally bind successful applicants. PCI commends ICANN for discovering the error and taking action to correct it. *PCI (25 Feb. 2013)*

fTLD Registry Services believes the PIC could be an effective tool to protect consumers but that in its current form the PIC would not provide its intended benefits. The PICs submitted by applicants for financially-oriented gTLDs are on the whole inadequate to produce real and enduring results for the financial services community and consumers. Further, the ICANN amendment process for PICs creates a moving target for the GAC and dispute resolution service providers who are basing their decisions on information at a specific point in time. This information could be modified in the future and materially impact the operations of a gTLD registry and its targeted community. *fTLD Registry Services (20 Mar. 2013)*

<u>Additional PICs (Paragraph 3)</u>

As proposed in para. 3 of Spec. 11, registries should be enabled to enhance the commitments made in their applications through additional "public interest commitments" that would be incorporated in the registry agreement. This will be particularly useful in cases in which the commitments contained in the applications are worded very generally and need to be made more specific in order to clarify what it is the applicant is committing to do. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

<u>Opposition</u>

- The PIC process is completely undefined and the 5 March requirement to inform ICANN of PIC

Specifications, before possible GAC objections and GAC advice may be received, appears to undermine the purpose of the PIC process. *Verisign (21 Feb. 2013)*

- The PIC specification would expose registry operators to multiple, unspecified parties for breach with unlimited exposure. The dispute resolution process is completely undefined. It is unreasonable for ICANN to expect any new gTLD applicant or registry operator to accept such undefined terms. *Verisign (21 Feb. 2013)*
- Enforcement of the PIC specification includes unknown potential remedies and no dispute mechanism for registry operators. ICANN has enforcement rights and can impose any remedy against a registry operator (including termination) with no apparent cure period (section 4.3) and has the ability to seek punitive or exemplary damages or operational sanctions. *Verisign (21 Feb. 2013)*
- It is unclear whether failure of an applicant to sign up for a PIC specification will in any way disadvantage the applicant in the review and approval process. *Verisign (21 Feb. 2013)*
- Verisign continues to view the PIC Spec. and the recently released PICDRP with concern. If the PIC Spec. proposal was restricted to cases where GAC Early Warnings were given and where GAC Advice will be given in the near future, and if the proposal was fully vetted via the bottom-up multi-stakeholder process, then the PIC proposal or some variation of it would have had a much stronger chance of success. ICANN and the ICANN Board must correct the many problems with the proposal, especially the lack of specificity around important details in the PIC, Spec. 11. *Verisign (21 Mar. 2013)*

The PIC program in Spec. 11 adds unnecessary complication and ambiguity while unreasonably asking applicants to make a commitment to the program before understanding how it will work. A simpler solution is to clarify that applicants can amend their applications to make any public interest commitments through the application change request process. *Google (26 Feb. 2013)*

In principle the PIC has its attraction as a way for applicants to assuage GAC concerns, and we commend ICANN for its attempt to reconcile competing needs. On closer inspection, the PIC proposal is practically flawed. Any efficacy withers when one considers that the GAC has not explicitly stated that its concerns will be satisfied by the contents of a PIC. Timing issues for submitting PICs also pose difficulties. *ARI (26 Feb. 2013)*

Analysis: As noted above and in the original announcement <http://www.icann.org/en/news/public-comment/base-agreement-05feb13-en.htm>, the PIC Specification was developed in response to advice from ICANN's Governmental Advisory Committee that "it is necessary for all of these statements of commitment and objectives to be transformed into binding contractual commitments, subject to compliance oversight by ICANN." The timing of the PIC Specification proposal allows for public review of the PIC Specifications, including review by the GAC, as soon as possible in advance of the Beijing meeting (7-11 April 2013). This expedited timeline was required in order to ensure that ICANN is delivering the program within the timeframes previously identified. Applicants will have the ability to request changes to their submitted PIC Specification via the Change Request process.

PICs Process Clarification

Nominet (applicant for .Wales and .Cymru) would like to confirm its understanding of the Public Interest Commitments (PICs) process in Specification 11 of the draft Registry Agreement (dated 5 February 2013), and specifically that the inclusion of PICs by an applicant is voluntary. Is it ICANN's intention that this will be the sole opportunity for PICs to be submitted, or is it expected that PICs may be adopted at a later stage (e.g., as part of the contract negotiation phase of the delegation process) in response to comments and objections made prior to delegation? *Nominet (18 Feb. 2013)*

Analysis: Section 1 of Specification 11 is intended to apply to all registry operators. Sections 2 and 3 of Specification 11 are optional, provided that if a registry operator elects to include any such commitments, then registry operator will be obligated to meet such commitments. PICs may be included in the registry agreement at a later stage prior to registry agreement execution.

PICs Dispute Resolution Procedure (DRP)

COA supports in principle the proposal that binding commitments in new gTLD applications would be enforceable, not only by ICANN, but also via a dispute resolution process that can be triggered by third parties. This process exists in name only. COA looks forward to participating in the development of this DRP to ensure that it provides an effective, efficient and fair means of holding new gTLD registries accountable for the representations they have made to the community. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

ICANN should publish its draft PICs dispute resolution mechanism at the earliest possible date and invite public comments, since this mechanism will become a critical protection for both consumers and businesses that conduct Internet transactions. *PCI (25 Feb. 2013)*

RySG is concerned about a new undefined PIC dispute resolution procedure policy in which ICANN expects registries to agree to a possible termination remedy. Addition of yet another dispute process at this point will undoubtedly either delay the new gTLD process or be rushed through in a manner not well-thought out and abusive to registries with adverse effects on their business and operations. RySG recommends that these procedures not only be further developed through a bottom-up multi-stakeholder process, but also be better understood before their implementation and subsequent acceptance by registries. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); ARI (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

It is not appropriate to cast the PIC dispute resolution procedure (DRP) wide open to any third party. If and when a PDP on a PIC and PICDRP emerge, ICANN should commit to a mechanism that strongly avoids the potential for abuse by the filing of frivolous claims. Discussion of a range of remedies including new harm-data-driven RPMs to respond to abuses should be on the table if and when such discussions emerge. *Valideus (26 Feb. 2013)*

FAITID cannot agree with Spec. 11, paras. 2 and 3, because FAITID cannot sign an agreement without knowing its rights and obligations under the PIC DRP and risks or penalties occurring in case of breach of this policy. *FAITID (26 Feb. 2013)*

Analysis: ICANN posted the Public Interest Commitments Dispute Resolution Procedure for public comment on 15 March 2013. Please refer to the posting at <http://www.icann.org/en/news/announcements/announcement-3-15mar13-en.htm> for additional details and in order to view and submit comments.

Support for 2013 Registrar Accreditation Agreement (RAA) Requirement

COA strongly supports para. 1 of proposed Spec. 11 requiring new gTLD registries to use only those registrars that sign up to the new version of the RAA once that is finalized. COA has long called for acceptance of an improved RAA to be the prerequisite for any registrar to enter the new gTLD market. COA sounds a note of caution with respect to timing, since the new RAA version does not yet exist. COA views the first paragraph of Spec. 11 as a commitment to the community that no Registry Agreement will be executed until a new version of the RAA is in place. If the first new gTLD Registry Agreement is ready for signature before the ICANN Board has given final approval to the revised RAA, the community is now on notice that the former will have to wait until the latter is ready. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013); BC (20 Mar. 2013)*

Opposition to 2013 Registrar Accreditation Agreement (RAA) Requirement

The proposed language would force registry operators to enforce an agreement that is not yet publicly available and for which ICANN has not completed negotiations. Requiring a registry operator to limit distribution of its channel to registrars that have executed a yet to be finalized agreement could have the effect of disadvantaging those registry operators whose TLDs will be delegated into the zone first. The provision is also inconsistent and does not track with several sections in the Registry Agreement (e.g., Spec. 9, Section 6, exemption for the Registry Operator Code of Conduct, and Section 2.9, Registrars). *Verisign (21 Feb. 2013)*

Until negotiations conclude and the RySG is able to assess the impact that the new RAA will have on registrars, it is unfair to force registries to choose only registrars that have signed the new agreement. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); ARI (26 Feb. 2013); TLD Holdings (26 Feb. 2013); IEEE Global (19 Mar. 2013); Target Domain Holdings (20 Mar. 2013)*

Section 1 undermines the new gTLD program objectives; registrars operating under the terms of the existing RAA and who have not signed the new RAA can still sell names in existing TLDs, which are likely to continue to account for most of their revenues. This would create incentives to focus on existing TLDs with some registrars potentially electing to remain under the old agreement and forgo selling new gTLDs entirely, thus undermining consumer choice and competition. *RySG (26 Feb. 2013);*

FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)

To limit the pool of registrars that can sell new gTLDs, but not limit the pool that could sell existing gTLDs, puts applicants at an unfair competitive disadvantage to incumbent registries. While NTAG supports ICANN and the registrars' work in negotiating terms of a new RAA, the viability of future registries' enterprises should not be put at risk as a stick to encourage registrars to sign the new agreement. NTAG has not seen the terms of this agreement and understands that the registrar negotiating committee has not yet ratified it. *NTAG (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

RrSG opposes this provision; it is an affront to all ICANN-accredited registrars. It unfairly implies that registrars operating under the 2009 agreement cannot be trusted to provide new gTLD registrations to their customers. Registrars also object to such an overreach of ICANN's authority particularly before the terms of the new RAA have been decided. The limitation is contrary to ICANN's goals for the new gTLD program, which registrars are positioned to help ICANN to advance. Creating "classes" of accreditation would create a non-level playing field and be anticompetitive. The 2013 RAA signatories would gain unfair advantage over competitors and applicants would be at a competitive disadvantage to existing registries which would enjoy unencumbered distribution through all registrars. There should and must be only one meaning for "ICANN-accredited." *RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); Cronon (26 Feb. 2013)*

Key-Systems calls upon ICANN to remove this insulting provision and come up with a better proposal regarding how to incentivize registrars to adopt a new agreement sooner rather than later that does not create an arbitrary hurdle to offering a wide range of consumer choice and competition. *Key-Systems (26 Feb. 2013)*

ICANN should explain the rationale for the section 1 criterion regarding ICANN accredited registrars and the Registrar Accreditation Agreement; this section specifies a version of the RAA that currently does not exist. Does this mean that ICANN is trying to drive a "wedge" between registrars and new TLD applicants, or does it mean that ICANN does not trust those registrars who are on the 2009 RAA? The RAA negotiations are ongoing and any agreement that comes out of the negotiations should be agreed to on its own merits without this form of external pressure. Or is it ICANN's intention to use any delay with the RAA as an excuse for delaying the launch of new TLDs? *Blacknight (19 Feb. 2013)*

Spec. 11 is not the appropriate vehicle to test ICANN's desire to compel registrar uptake of the 2013 RAA. While Valideus supports such uptake in principle, Valideus suggests an approach whereby registrars are positively encouraged to use the 2013 RAA, rather than forcing through this preference, understandable as it may be, through new registries. *Valideus (26 Feb. 2013)*

The Smart Internet recommends that ICANN withdraw or revise the requirement in Spec. 11, section 1 requiring registry operators to employ services exclusively from ICANN accredited registrars who are expected to execute an RAA currently under negotiation. *The Smart Internet (26 Feb. 2013)*

- The proposed requirement would unequivocally have an adverse effect on a potential distribution channel and would also pose a significant risk to the successful launch of a TLD and the associated project in question. *The Smart Internet (26 Feb. 2013)*
- Timing is an issue- -the new RAA has not been finalized, so for an applicant with an early drawing number, the plausibility of a situation with a TLD having already been delegated into the root and the RAA still not approved is perilously high. *The Smart Internet (26 Feb. 2013)*
- The other issue concerns a registrar's readiness to execute a new RAA. The Smart Internet's IDN TLD initiative focuses primarily on the Russian market. Out of a few hundred ICANN-accredited registrars, only three are based in Russia and operate in the domestic market. Hence, access to the distribution channel proves to be increasingly obstructed by the binding requirement to registrars to have signed the new agreement by the time the TLD is launched. *The Smart Internet (26 Feb. 2013)*
- These concerns are not unique and might be common for numerous IDN applications. Therefore, ICANN's generous and laudable move to grant priority to IDNs is at risk of being seriously compromised and ultimately blocked should the Spec. 11 requirement in question eventually retain its effect. *The Smart Internet (26 Feb. 2013)*

FAITID disagrees with Spec. 11, para. 1; it will cause great material damage and is contrary to the financial model in which participation of all registrars is calculated and not only those who signed a not yet existent RAA. All business plans of all applicants of the new gTLD program and financial models were calculated with the idea of non-restricted access of registrars to the new gTLD registries. Specification 11, para. 1 makes all business plans of all applicants irrelevant. Asking all applicants to change all their models at once is dangerous and irrational (after one year of silence). *FAITID (26 Feb. 2013)*

The Section 1 parenthetical must be deleted--it would allow the ICANN Board to dictate, with no input from registrars or the community, subsequent terms of the RAA. As long as the ICANN Board approves a new RAA in whatever form it chooses, new gTLD registries must exclude registrars that do not sign the agreement from selling domain names. Consumers would be harmed by not being able to use their registrar of choice and possibly having to transfer existing names away from their registrars. *RySG (26 Feb. 2013); NTAG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

The reference to "any subsequent form" of the RAA must be deleted from the agreement. Registries' success should not be contingent on future registrar agreements approved unilaterally by the ICANN Board without registrar support. NTAG supports the detailed comments of the RySG and strongly requests that ICANN remove this proposed change in its entirety. *NTAG (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

The reference to "any subsequent form" of the RAA has no place in the registry agreement. A future form approved by the ICANN Board but unacceptable to registrars could jeopardize not only the

economic viability of registrars and new gTLD registries, but could destabilize the DNS. *RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013)*

Analysis: ICANN is committed to implementing the numerous beneficial provisions that are anticipated to be included in the 2013 RAA, and thus it is of fundamental importance that registrants of new gTLDs benefit from these provisions. The comments raise important questions about the concept of requiring registries to work exclusively with registrars accredited under subsequent forms of the agreement, and ICANN has made changes to the agreement text on this issue. In addition, ICANN is working with the registrar community to implement a phased transition to the obligations of the 2013 RAA. That transition will apply to registrars but will not affect registry operator's obligation to only utilize registrars that are signatories to the 2013 RAA.

Commitments, Statements of Intent, and Business Plans

COA supports in principle para. 2 of Spec. 11 but as presented it could provide incentives that are perverse and exactly the opposite of what they should be. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

- Nothing in the proposal requires applicants to agree to live up to any of the "commitments, statements of intent, and business plans" on the basis of which they have been awarded the gTLD in question. Instead of inviting applicants to "opt in'' to binding promises to do what they said in their applications they would do, ICANN should allow applicants to publicly "opt out" of commitments they no longer believe they can keep. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*
- The presumption should be that everything in the application (including any ICANN-approved modifications thereto) can be relied upon by the community and can be enforced by ICANN as the community's representative, unless specifically stated otherwise. COA urges applicants to use this opportunity to spell out that they intend for the commitments made in their applications to be binding ones, and believes that responsible applicants will do so. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*
- Moving to an opt-out approach would help vindicate the reliance interest--i.e., some consideration should be given to the interests of other sectors of the multi-stakeholder ICANN community that cannot wield the virtual veto power ICANN has accorded to a consensus of governments, but that may have relied in good faith on statements in the publicly accessible portion of the applications to refrain from opposition to specific applications. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

The ALAC's first concern is that it is left up to the individual applicants to identify which, if any, elements of their application will be nominated as Public Interest Commitments. Given that it is the application that is the basis on which judgments are made on whether to accept an application, and whether objections should be made to an application, ICANN must be given power to ensure that if an application has public interest components in it, the applicant submits a PICS that includes all of those public interest components. *ALAC (25 Mar. 2013)*.

Analysis: ICANN believes that the PIC Specification proposal provides a adequate balance between the benefits of allowing registry operators to adapt their business plans in response to changing conditions and requiring registry operators to meet important commitments that were material to the process that led to the delegation of the TLD. Requiring that applicants instead "opt-out" of being bound to particular plans set forth in their applications would have been more burdensome and confusing because all registries by default would have had to implement not just all the obligations of their registry agreement but also every word in their applications for all time unless they were expressly excluded. Tens or hundreds of thousands of pages of supporting application materials would effectively have to be "attached" to all of the registry agreements since they would all be binding by default. The Applicant Guidebook and the PIC Specification proposal together clearly set forth the set of obligations that will bind registry operators, and therefore no third parties should have any "reliance interest" or other expectation that registries will be required to do anything beyond that which is required in the registry agreement including the PIC Specification.

ICANN Enforcement of Commitments

The BC supports Sections 2 and 3 of Spec. 11 as a way for applicants to list commitments and statements of intent that would become part of the Registry Agreement and thereby enforceable by ICANN. BC is concerned that a small minority of applicants have thus far elected to insert relevant commitments into Spec. 11. The BC encourages applicants, the GAC, and ICANN to examine all GAC early warnings and objections to ensure that ICANN can enforce any relevant commitments as part of new registry agreements. *BC (20 Mar. 2013)*

The addition of language in Spec. 11 forcing registries to operate in compliance with all "commitments," "statements of intent," and "statements of business plans" is overbroad and virtually unenforceable. It will force ICANN to insert itself into how each and every new gTLD is run and open ICANN up to a plethora of comments and claims from the community each time members of the community do not believe that a registry is living up to its commitments or statements of intent. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

- The final June 2012 Registry Agreement, without these new amendments, already binds registries to all appropriate obligations, including performance specifications, escrow requirements, service level, data access requirements, equal access requirements, code of conduct obligations, reserved names, registration policies, etc. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- Work is needed to understand how ICANN will handle the flood of change requests from the 1400+ new registry operators every time a registry would like to change its commitments, statements of intent or business plans as a result of changing market conditions, changes from TLD policy boards, etc. Registries will demand service levels from ICANN in responding to those change requests so as not to impact the operation and administration of the registries. RySG does not believe ICANN is currently responsive enough to existing registry requests for

changes which often take months if not years to make, and does not see any foreseeable way that ICANN will be able to evaluate hundreds of change requests per year. *RySG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

It is not appropriate to seek to hold applicants to statements made about business plans in their applications; not only is this is overly broad, but applicants may not have been able to share the full range of business possibilities in their public applications. *Valideus (26 Feb. 2013)*

If ICANN wishes to involve its compliance function with a range of potential commitments, then any PIC-type mechanism should follow a formal PDP for application to all registries, not just new gTLD registries. *Valideus (26 Feb. 2013)*

Google agrees that applicants should be bound to the material representations in their applications; however, it is neither necessary nor sensible for ICANN to use an ambiguously-worded, last-minute change as the basis for enforcement (section 2.17 and Spec. 11). The AGB and registry agreement already appropriately bind applicants to material statements made in their applications (Section 1.3(a) of the registry agreement, Module 6 and Module 2 of the AGB). *Google (26 Feb. 2013)*

Analysis: While the scope of the potential PICs is broad, the decision whether to elect to make such additional commitments rests entirely with the registry operator. Current provisions are not sufficient to bind applicants to all of the statements and plans set forth in the applications. Section 1.3(a) of the registry agreement is a representation that the statements made in the application were true at the time made and remain true as of the date of the signing of the registry agreement. It is not an ongoing covenant to comply with commitments made in the application with respect to the operation of the registry. Module 2 and Module 6 of the Applicant Guidebook apply to the application process, but are not contractual terms set forth in the Registry Agreement. Requests to amend the agreement to make additional commitments can be handled through the usual contracting channels but a baseline of commitments should be in the agreement on the day it is signed.

Material Changes & Gaming Concerns

ICANN must ensure that the PIC Specs. are not used to materially change applications. *CTAG (21 Feb. 2013); TLDDOT (24 Feb. 2013); fTLD Registry Services (20 Mar. 2013)*

- PIC Specs. should elaborate on and correspond to existing commitments applicants made in their applications. ICANN's FAQ includes that commitments do not need to be limited to statements in the application, raising CTAG's concern that in some cases, applicants could attempt to use the PIC Spec. to amend their applications to more closely correspond to existing community applicants' responses to Question #20. CTAG asks ICANN to carefully compare each PIC Spec. with its associated application prior to posting to ensure that any material changes are identified and handled as an application change request. *CTAG (21 Feb.*

2013); TLDDOT (24 Feb. 2013); fTLD Registry Services (20 Mar. 2013)

- Further, ICANN should reserve the right to identify any provision in a PIC Spec. as a material change requiring an application change request based on feedback obtained during public review. *CTAG (21 Feb. 2013); TLDDOT (24 Feb. 2013); fTLD Registry Services (20 Mar. 2013)*
- Given that some applicants may elect to negotiate their Registry Agreement with ICANN, should the PIC Spec. concept be accepted by the community and implemented, the application change request process must be followed for any future amendment to a given PIC Spec. *CTAG (21 Feb. 2013); fTLD Registry Services (20 Mar. 2013)*
- The timing of the PIC Spec., if not handled as described by CTAG, is troubling for many community applicants with regard to the publication of Question #20 and the filing of community-based objections. *CTAG (21 Feb. 2013)*; *TLDDOT (24 Feb. 2013); fTLD Registry Services (20 Mar. 2013)*
- The right for an applicant to amend its PIC Spec. makes it a moving target for applicants, the GAC and the International Chamber of Commerce reviewing panelists: how can the GAC and the ICC panelists factor a PIC Spec. into their considerations if the PIC Spec. can change over time or might be removed by ICANN if the applicant's change request was denied? *CTAG (21 Feb. 2013); fTLD Registry Services (20 Mar. 2013)*
- CTAG encourages ICANN to not only foster responsible commitments to the public interest but to recognize those who are already leaders in making those commitments. *CTAG (21 Feb. 2013); TLDDOT (24 Feb. 2013); fTLD Registry Services (20 Mar. 2013)*
- Classifying a PIC as a Change Request is the right way for ICANN to go now. This Change Request process is also likely to mitigate the risk of liability for compensation ICANN faces when it causes material hardship to applicants by the PIC Spec. *TLDDOT (24 Feb. 2013)*

The proposed PIC model can be of value for standard applications which received a governmental Early Warning and are not in a contention set. But for applications in contention, the PIC proposal is highly questionable, opens up multiple gaming scenarios and raises more questions than could be answered at this stage of the ICANN application process. PICs will be used to make promotional efforts in favor of a single application in a contention set, to gain additional supporters or to discredit competitors. PICs will be used to gain unfair advantages over other applicants by asking governments to withdraw Early Warnings or to avoid a GAC Advice. The Objection Process as well as the Community Priority Evaluation will be negatively affected by parties using PICs that positively affect their chances of winning while harming others. These scenarios are not theoretical predictions, but will become reality if no bounds are installed. *TLDDOT (24 Feb. 2013)*

<u>Analysis</u>: Applicants will be held to the commitments made within their PIC Specifications. Applicants are encouraged to carefully consider the commitments set out in the PIC Specifications for internal consistency as well as consistency with the commitments within their applications. Any commitments set out in a PIC Specifications that result in a change to the application must be accompanied by a change request to change the corresponding portions of the application.

IDN Aliasing--Support

Registries should be required to discuss their IDN Aliasing plans as part of their PICs as soon as possible. These domains can only exist as aliases of existing IDN dot coms as to prevent user confusion. The existing registrants have these rights. Verisign should be restricted in their fees to the reasonable cost of providing the service that they provide; they are not selling any intellectual property as that is already legitimately owned by the existing registrants. ICANN has a duty to ensure that existing registrants are contractually protected. *A. Taweem (22 Feb. 2013)*

IDN aliasing is a very important topic for the non-ASCII internet. Registries' aliasing plans should be reflected in their PICs so that Internet users in non-English scripts are aware of possible changes that will affect their experience on the Internet. *Rockruler (23 Feb. 2013); S. Ashouri (26 Feb. 2013);*

All applicants of strings which are internationalized versions of existing gTLDs should be required to divulge their aliasing plans or lack thereof as well as their plans to handle existing second level IDNs, where applicable, as part of their PICs. No delegated new gTLD should cause user confusion. There are serious concerns that applied-for strings which are internationalized versions of existing gTLDs may cause such confusion if identical second level domains are controlled by a different entity in each namespace. *J. Lascary (23 Feb. 2013); B. van Es (25 Feb. 2013); T. Greer (26 Feb. 2013)*

The IDN gTLD applications by Verisign and PIR should be treated as a special case within the new gTLDs because these are not completely new but are transliterations of the existing gTLDs .com, .net, and .org. IDNs already exist at the second level for these extensions, and this could be a cause for confusion by internet users if these do not resolve to the same destinations as their IDN.IDN equivalents. To prevent such confusion, Verisign and PIR should be contractually bound to allocate usage rights for IDN.IDN versions to the second level registrants of the equivalent IDN.com/.net/.org with some sort of "grandfathering" mechanism. Verisign has proposed this but did not mention it in its applications. *F. Neuhaus (25 Feb. 2013)*

Despite public claims by Verisign that their plans for second level IDN registration would not cause user confusion, these plans have not been officially included in their new gTLD applications. As a result, there is no guarantee that these plans will be implemented by the registry. Further, the ICANN community has not had the opportunity to comment on the said plans. This lack of clear second level registration policy is also an issue in the case of PIR's IDN applications and any other string application which is a translation or transliteration of another TLD, such as site and ((site)), online and ((online)), etc. *D.F. (26 Feb. 2013); D. Cohen (26 Feb. 2013)*

IDN Aliasing--Opposition

No aliasing should be done for IDNs, and there is no need for clarification from Verisign or PIR. There is no confusion and delegations to new owners should be done. Verisign and PIR can feel very safe to open the new IDN era, and give it to new applicants. In fact they must not alias any of those domains if they plan to meet the ICANN goal to reach end users. They have no legal obligation to give it to any

existing hybrid domain owners. The alleged confusion is only in the mind of hybrid IDN domain owners who are looking out for their own interest and trying to mislead the public. They have no legal rights or standing for IDN.IDN in Arabic, Hebrew, Chinese, Korean or Russian, whether it be in .COM, .NET, or .ORG transliterations. *T. Chikalut (20 Mar. 2013)*

Analysis: Applicants are free to address IDN-related technical issues in their PIC Specs. Also, all applicant plans to offer IDNs are being carefully vetted through the technical and registry services evaluation panels in the new gTLD application process. All new gTLD registry operators will be obligated to comply with the relevant technical requirements and specifications as set forth in the registry agreement.

Closed Generic gTLDs

ICANN should rule that: (1) exemption under Spec. 9 cannot be requested for Closed Generic gTLD applications such as HOTEL, HOTELS, HOTEIS, HOTELES; and (2) that PICs must be commitments in the interest of the public only and shall not include any commitment in the interest of the applicant. *Accor (25 Feb. 2013)*

- An application seeking exclusive access to a common generic string that relates to a particular industry or market would not be consistent with the protection of the public interest and in fact would be highly detrimental to it. Any application so granted would preclude all other players in this industry or market to compete on an equal basis with the applicant, thereby limiting consumer choice across the Internet. *Accor (25 Feb. 2013)*
- Further, Spec. 11 may lead certain Closed Generic gTLD Applicants to rely on it to impose certain restricted registration rules which they will present to be in the public interest. In the case of a common generic string relating to a particular industry or market, any such restricted registration rules will have anticompetitive consequences and limit consumer choice. *Accor (25 Feb. 2013)*
- Applications such as HOTELS from Booking.com B.V. and HOTEL, HOTELES and HOTEIS from Despegar Online SRL are typical cases of Closed Generic gTLD Applications which may be eligible to the exemption under Spec. 9 and may attempt to impose restricted registration rules under Spec. 11. ICANN should resolve the ambiguity surrounding these applications and rule that such Closed Generic gTLD applications do not comply with the limited scope of the exception in Spec. 9 (the provision was drafted in the first place specifically in order to create dot-brands, however at the time no distinction between generic/commonly used words and brands was made by ICANN). *Accor (25 Feb. 2013)*

Comment and Response: ICANN posted a separate public comment period concerning the topic of "Closed Generic" gTLD Applications on 5 February 2013; see <http://www.icann.org/en/news/announcements/announcement-2-05feb13-en.htm>. Any action taken on that issue will take into account the issues addressed by these comments, including the interplay between Specifications 9 (Code of Conduct) and 11 (PIC).

C. DRAFT NEW gTLD REGISTRY AGREEMENT

Dialog about the 2012 Draft Registry Agreement--Clarifications & Revisions

There is an important dialog to be had between ICANN and applicants regarding certain provisions of the 2012 registry agreement. The agreement exposes registries to more liability than is reasonable and could use clarification and cleanup in key areas. Google would appreciate ICANN's prompt focus on these and other concerns raised during this comment period so that applicants are in a position to move swiftly when the new gTLDs are delegated. In addition, to the extent ICANN believes any changes to the agreement are necessary, they should be included as part of this dialogue rather than imposed on applicants with no explanation or opportunity for discussion. *Google (26 Feb. 2013)*

- E.g., there are a number of places in the agreement where links to the relevant policies or portions of the AGB have not been inserted, including Section 2.13 of the agreement which asks registries to submit to a Registry Transition Process without defining the process. *Google (26 Feb. 2013)*
- Numerous provisions in the agreement do not apply to closed TLDs, including the non-discrimination provisions in Section 2.9(a), Section 2.10 on domain pricing, Section 2.14 addressing the Registry Operator Code of Conduct, and various sections of the specifications. *Google (26 Feb. 2013)*

Comments and Analysis: The submission of a revised draft of the Registry Agreement for public comment demonstrates ICANN's commitment to a bottom-up, multi-stakeholder model, and provided stakeholders with six weeks to analyze, review and respond to the changes. ICANN has engaged in discussions with the community on these issues during these six weeks, including through webinars and participation in RySG and NTAG teleconferences. Community discussion on these issues will continue at the ICANN meetings in Beijing. The registry agreement should not unnecessarily expose registry operators to liability, but it must apportion liability appropriately between ICANN as a non-profit coordinator and registry operators who have requested the delegation of new gTLDs and who will operate them in ways that might create liability.

First time corporate applicants are concerned not only with the most recent proposed revisions to the Registry Agreement, but with the way many of the terms in the Registry Agreement are currently drafted. Many of those terms do not meet commercially reasonable standards and need to be revised before the agreement can be executed. Specifically, provisions requiring revision include:
--the audit clause is vague and requires revision (Article 2.11);
--the emergency transition provision is vague as to the responsibilities of the emergency operator and should be revised, and the "registry transition process" is not clearly set forth and needs to be clarified (Article 2.13);
--the cooperation with economic studies clause is overly vague and burdensome and needs to be revised (Article 2.15);
--the transition upon termination clause needs to be revised so that: the exemption from transition includes closed registries whose TLDs consist of their trademark and that own all registrations within

the TLD even if some are leased to non-affiliated contracted parties; and all .BRAND gTLDs will not be transitioned to any other registry operators, and ICANN should not have discretion to transition any gTLD based on its own breach of the registry agreement (Article 4.5);
--registry operators should have the opportunity to choose how they desire to resolve disputes with ICANN, not just binding arbitration, and the time limit and page limits on arbitration procedures should be removed; if the arbitration requirement is not removed then the clause should be revised as specified in the Steptoe comments (Article 5.2);
-- revisions are required--it is commercially standard that liability limits in an agreement are reciprocal, the registry operator should not be liable for punitive or exemplary damages, and certain exceptions to liability limits which are standard in corporate agreements should be included (Article 5.3);
--revisions are required--it is standard in corporate agreements that any indemnification provision is reciprocal and that such provisions apply for actions during the life of the agreement (Article 7.1);
--the change in control, assignment, and subcontracting provision should be revised so that registry operators are not prevented from transferring or assigning the agreement where there is a change of control to an affiliated company, parent, or subsidiary; and the provision should state clearly the standards that would allow ICANN to withhold its consent to a transfer as well as include provisions regarding individual personal information from parent or affiliated companies (i.e., not required or kept strictly confidential), and specify the "registry transition process" here and in Article 2.13 where it first appears (Article 7.5) ;
--the definition of applicable law is under inclusive for international corporate applicants, and it is critical that a more inclusive definition of "Applicable Laws" be added as a separate provision in Article 2 and 7, and that compliance with all Article 2 and 7 provisions be subject to Applicable Law--see standard definition of Applicable Law provided in Steptoe comments (Article 7.14)
Steptoe (26 Feb. 2013); DuPont (15 Mar. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)

ICANN should take the steps necessary to revise the draft Registry Agreement and ameliorate the significant issues identified in the Steptoe comments for the benefit of all applicants. This will reduce the need for applicants to engage in the extended negotiation of the Registry Agreement which would ultimately delay the implementation of many TLDs. *Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)*

Analysis: ICANN appreciates these comments and has made revisions to the registry agreement where appropriate in order to address several of these concerns. Many of the provisions referenced in the comments have been revised in the past in order to reflect previous public comments. To the extent the latest set of amendments does not fully address the interests of any particular applicant or groups of applicants they are free to seek to negotiate with ICANN regarding the specific terms and conditions of their Registry Agreements.

Domain and Designation (Section 1.1)
Typo regarding the term of the agreement: the agreement should be effective until the earlier of the

expiration of the Term "or" (not "and") the termination of the agreement. *Verisign (21 Feb. 2013)*

Analysis: The draft Registry Agreement will be revised in response to this comment.

Reserved Names (Section 2.6)

The language regarding a registry operator's ability to reserve and register names is inconsistent. The language in the second sentence should carry in full to the last sentence in the section. *Verisign (21 Feb. 2013)*

Analysis: ICANN does not view the language referenced by the comment as inconsistent, as the proviso in the last sentence of Section 2.6 clarifies that in the event a registry operator reserves names via registration of such names, such registration will not result in the payment of fees to ICANN. ICANN will consider any proposed text submitted if it might help to make the provision clearer to all parties.

Registrars (Section 2.9(b))

The inserted language "or legal process" is vague and does not give the Registry Operator time for objection; it should be revised to say "pursuant to a legal proceeding, provided ICANN provides the Registry Operator with applicable notice and opportunity to object." *Verisign (21 Feb. 2013)*

FAITID opposes Article 2.9 (b) regarding ICANN having the right to refer a contract, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, transaction or other arrangement might raise competition issues. ICANN is not an authorized body which may characterize the actions of an entity (organization) as a breach of antitrust laws. *FAITID (26 Feb. 2013)*

Analysis: The draft Registry Agreement will be revised in response to the comment regarding a timeline for objection. As for the comment relating to competition laws, ICANN is not seeking to characterize any action as a breach of competition laws. ICANN simply reserves the right to refer any arrangement to the attention of competent authorities in case the arrangement might raise competition issues.

Audits and Economic Studies (Sections 2.11, 2.15)

Under the laws and regulations of the United Arab Emirates (UAE), Etisalat is unable to release any confidential information and cannot provide ICANN with access to personal data. Etisalat therefore strongly supports recommendations that audits be restricted to the Registry Service Provider (in this case, CentralNIC). Etisalat also refers to Section 7.14 of the Registry Agreement. *Etisalat (21 Mar. 2013)*

Analysis: ICANN has revised the draft Registry Agreement to include confidentiality requirements related to information exchanged in connection with ICANN's auditing rights and other Registry

Operator obligations under the registry agreement. Any other possible issues relating to consistency with local laws can be addressed through the agreement negotiation process. The obligations set forth in the base agreement apply directly to the party entering the agreement, referred to as the "Registry Operator", and only indirectly to the so-called registry service provider.

Renewal (Section 4.2(a)(ii))

This provision introduces language into the summary of changes that is not included in the redlined Registry Agreement--i.e., a "court finding" that a registry operator is in breach of the Registry Agreement is added to the list of items that would prevent renewal of the Registry Agreement. This language should be removed given the serious implications of the change to expand ICANN's ability to prevent renewal and the confusion it introduces into the dispute resolution process. The revision is overbroad and is not even limited to a court of competent jurisdiction or a valid, final non-appealable court. *Verisign (21 Feb. 2013)*

Analysis: The change was made to clarify that breaches found by a court would also be factored into renewals. ICANN has revised the draft Registry Agreement to reference a court of competent jurisdiction, consistent with other sections of the Registry Agreement.

Change of Control --Closed .BRAND Registry (Sections 4.3, 4.5, 7.11)

IBM is concerned about the ability of ICANN to continue operation of a .BRAND registry under section 4.5 following termination of a registry agreement, and the potential detrimental effect on the trademark that is the subject of the .BRAND string (IBM's response is focused on sections 4.3, 4.5 and 7.11 of the Agreement) *IBM (26 Feb. 2013)*

- It is important for trademark owners to strictly control and closely monitor use of their trademarks. If a .BRAND registry is re-purposed to operate in a manner inconsistent with the purpose originally envisioned by the trademark owner/registry applicant, or even if it is operated by a different source than the trademark owner, the public could easily become confused about the true ownership of the trademark in the .BRAND string. In the worst case scenario, permitting a .BRAND registry to be operated by a third party who is not subject to the control of the trademark owner could damage the trademark owner's reputation and lead to loss of rights in the trademark. *IBM (26 Feb. 2013)*
- To avoid that problem, IBM proposes that the provision regarding the change in control of a TLD following termination of the Agreement be modified to accommodate the unique situation of a closed .BRAND registry. In the event that the Agreement with the operator of a closed .BRAND registry is terminated, it should be an option that the TLD can be decommissioned, with a short wind down period if required to maintain the stability of the DNS. Due to the limited number or scope of domain name registrants, decommissioning a closed .BRAND registry will not be disruptive to the general public. *IBM (26 Feb. 2013)*
- IBM has only considered the option of decommissioning a registry following termination of the Registry Agreement in the context of a closed .BRAND where the potential damage to the trademark owner far outweighs any possible disruption to the public. Trademark owners of open .BRAND registries could face similar issues, and it may be appropriate to invite further

debate. *IBM (26 Feb. 2013)*

Transition of Registry (Section 4.5)

To accommodate use by entities that are not Affiliates of the operator (such as subscribers and customers) the BC recommends striking "or use" from Section 4.5 of the Registry Agreement. *BC (20 Mar. 2013)*

Analysis: The draft Registry Agreement already includes a provision restricting the transitioning of single-registrant/single-user TLDs. If a registry operator allows third parties to register domains (or license the use of domains) in a TLD then the possibility arises that those third-party non-affiliated registrants or licensees could be harmed if the registry ceases to function. However, ICANN has added a provision to the draft Registry Agreement that provides that, while ICANN will retain sole discretion in such cases, any intellectual property rights held by the registry operator will be taken into account in determining if the TLD should be transitioned.

Continued Operations Instrument (Section 4.5 & Spec. 9)

ICANN has failed to clarify and narrow its right to an unconditional release of funds maintained pursuant to a Continued Operations Instrument (COI). The language allowing ICANN's draw-down on the COI in event of emergency transition or termination/expiration of the Registry Agreement for any reason is too broad. There is no mechanism permitted in the COI for "checks and balances" on ICANN's right to access funds. At a minimum there must be an obligation on ICANN to provide the registry operator notice of its intent to withdraw funds and a commercially reasonable process for the registry operator to object or dispute such notice. *Verisign (21 Feb. 2013)*

Analysis: The provisions related to the Continued Operations Instrument are intended to be broadly defined to permit ICANN to access the funds needed to transition the TLD to an emergency registry operator in the instance where the registry operator fails to provide the required and specified critical functions. These broad terms are in the interests of registrants and necessary to protect registrants in a TLD where the registry operator fails to provide the required critical functions. If ICANN were to breach the agreement by abusing the right to the COI funds then the registry operator could pursue a remedy through the agreement's dispute resolution provisions.

Mediation (Section 5.1)

The proposal's creation of a brand-new pre-arbitration requirement will result in lost time to resolution and add cost and expense for both parties. *Verisign (21 Feb. 2013)*

The mediation process is poorly defined: rules and procedure are determined by the mediator, which is extremely unusual and creates uncertainty and inconsistency. *Verisign (21 Feb. 2013)*

- There is no mechanism in the event that the parties are unable to agree to a mediation provider entity, and there is no timeframe for resolution. *Verisign (21 Feb. 2013)*

- The mediator is not required to have technical knowledge, only general knowledge of contract law. *Verisign (21 Feb. 2013)*
- The provision is vague as to whether parties may obtain relief from a court to remedy irreparable harm from a breach without going through the tedious and lengthy mediation/ arbitration process. *Verisign (21 Feb. 2013)*

Public mediation rules must be created and everyone should have the right to study these rules before signing the agreement. It is also important that attorneys performing the role of a mediator have a license to practice as an advocate in both jurisdictions of the parties. *FAITID (26 Feb. 2013)*

Analysis: ICANN has made certain revisions to further define the mediation process in response to these comments. ICANN proposed a mediation precursor based on its belief that it is more likely to result in pre-arbitration resolution than the previous cooperative engagement obligations. Mediation is intended to be a flexible process to facilitate the resolution of disputes. As the process is non-binding and either party can escalate disputes to arbitration, there would appear to be no pressing need for further defined rules and procedures, which may not be appropriate to every conflict that arises on the Registry Agreements. Requiring a mediator licensed to practice law in multiple unrelated jurisdictions is too limiting and not likely practical in the majority of cases.

Arbitration (Section 5.2)

ARI opposes the requirement of California as the sole venue for non-intergovernmental organizations or governmental entities particularly since more than half of the applications are from non-U.S. applicants. ARI proposes that the current wording be widened to apply to all Registry Operators with the addition of Singapore as an optional location, thereby offering U.S., Europe and Asia as options. ARI proposes Singapore given its respected reputation as a seat of arbitration and practically owing to the soon to be constituted ICANN Singapore office. *ARI (26 Feb. 2013)*

Etisalat believes it should have a degree of choice in deciding jurisdiction and prefers a neutral competent jurisdiction (i.e. England and Wales). *Etisalat (21 Mar. 2013)*

Analysis: These comments and the choice of venue provision are under consideration by ICANN.

Liability (Section 5.3)

ARI proposes the removal of the arbitrator's power to award punitive or exemplary damages. Section 5.3 provides for punitive and exemplary damages if so awarded by an arbitrator and such amount is uncapped. Such a clause will inevitably trigger risk policy breaches across a wide range of applicants, both U.S. and non-U.S. based. *ARI (26 Feb. 2013)*

- ARI sees no reason why Registry Operators should be the subject of a punitive damages award. The nuclear option which allows ICANN to terminate and remove a TLD from a breaching Registry Operator serves as an eminently adequate deterrent. *ARI (26 Feb. 2013)*

- ARI notes that the .post registry agreement had no such power, and amounts were capped in the .mobi and .tel TLDs. *ARI (26 Feb. 2013)*

Analysis: Consistent with existing TLD registry agreements, punitive and exemplary damages are difficult to obtain (available only in case of repeated and willful breaches), and a request for punitive damages would trigger additional procedural safeguards. The possibility of such an award serves as a deterrent and provides an important tool for ICANN's compliance efforts.

Exceptions or carve outs should apply such as for claims associated with breach of confidentiality, fraud, gross negligence, or willful misconduct, any indemnity obligations, or real or personal property damage. Steptoe (26 Feb. 2013)

Comment and Analysis: ICANN's existing registry agreements contain a provision substantially similar to Section 5.3 of the draft Registry Agreement. The commentor notes that, in its view, the limitation on liability in Section 5.3 is applicable to Registry Operator's obligations under Section 7.1 (indemnification), which is not the intent of the provision and is inconsistent with the operation of the provision under ICANN's existing registry agreements. In order to avoid any confusion on this point, the draft Registry Agreement has been revised to clarify that Registry Operator's indemnification obligations are not subject to the limitation set forth in Section 5.3.

Cost Recovery for RSTEP, Adjustments to Fees, Late Fees (Sections 6.2, 6.4, 6.5)

The 10-day payment window in Section 6.2 is not appropriate for large, multinational corporations for whom the purchase/sale of domain names is not an integral part of the business. ICANN's insistence on using U.S. business days does not reflect the multinational nature of the applicant base or ICANN's own international ambitions. Etisalat requests that all invoice payment terms and notification of fee changes (section 6.4) be set at 30 calendar days or similar (at least for .BRAND applicants), and that late payment penalty fees not be charged until 45 days post-due. *Etisalat (21 Mar. 2013)*

Analysis: Reference to business days in the draft Registry Agreement will be replaced and adjusted to reflect calendar days. ICANN will consider the request to extend the deadline for payment of RSTEP cost recovery fees, but that might have an effect of the timing of the registry services evaluation process and therefore that will have to be analyzed carefully.

Indemnity (Clause 7.1)

ARI proposes that Clause 7.1 be deleted. ARI sees no reason why ICANN cannot seek to recover loss by traditional redress via the courts. Anything further, as the current draft most certainly is, is untenable. In the alternative, in the face of expected intransigence in this regard, ARI proposes that the indemnity be limited per the suggested text provided in ARI's comments. *ARI (26 Feb. 2013)*

Analysis. As anticipated in this comment, ICANN is unwilling to change its view on the need for an indemnification provision in the agreement. ICANN's Board of Directors is on record with a resolution

stating that: "The indemnification right should remain." <http://www.icann.org/en/groups/board/documents/resolutions-25sep10-en.htm#2.10> ICANN disagrees that the current provision is untenable; in fact it is consistent with the terms and conditions of current effective registry agreements. The provision apportions liability appropriately between ICANN as a non-profit coordinator and registry operators who have requested the delegation of new gTLDs and who will operate them in ways that might create liability.

Change in Control (Sec. 7.5)

- COA supports the proposed changes that would improve ICANN's ability to conduct a thorough but expeditious investigation of the proposed successor registry operator, including necessary background checks. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*
- While COA agrees that transfer of a given registry to an entity that already (and in a compliant manner) operates a different gTLD registry poses fewer risks, COA disagrees that such a transaction should automatically be approved unless ICANN formally objects within 10 calendar days. For a variety of reasons and factors, registry operations are not always fungible. Thus, clause (ii) of the proposed last sentence to section 7.5 should be revised to allow for a reasonable, if more limited, review before such a transfer is approved. *COA (26 Feb. 2013); Copyright Alliance (19 Mar. 2013)*

Change of Control (Assignment & Subcontracting (Section 7.5)

- The proposed language still allowing ICANN a right to object based on undefined criteria, standards or process completely undermines the provision regarding ICANN consent to subcontractors or assignment to compliant gTLD registry operators. *Verisign (21 Feb. 2013)*
- The criteria for approval of subcontractors or assignees that are not gTLD Registry Operators are not defined. The criteria ICANN will use to evaluate an assignment or subcontract must be clearly set forth (based off of the application process) and indiscriminately applied. The criteria must not be a moving target that ICANN can change from time to time. Information collected by ICANN as part of the review process must have set parameters and be consistently applied, and be maintained as confidential as appropriate, consistent with the standard applied during the application process. *Verisign (21 Feb. 2013)*
- There are no clear time limits for ICANN's decision to approve a subcontractor or assignment (e.g., 60 calendar days of receipt of "all requested" information). *Verisign (21 Feb. 2013)*
- ICANN removed important protections restricting ICANN's ability to assign the Registry Agreement, a last-minute change that broadens ICANN's right to assign the agreement to an entity that may not be appropriate for running/monitoring registries and to an entity in an unknown jurisdiction. *Verisign (21 Feb. 2013)*

Analysis. ICANN believes that the revised provision appropriately balances the interest of both ICANN and the registry operator. ICANN must have the flexibility to review assignment and change in control arrangements on a case by case basis, and listing specific standards is not required and likely will not appropriately address all potential variations of change in control arrangements. In addition, ICANN

needs the flexibility to assign the agreement in connection with a reorganization of ICANN.

The new language also provides registry operators a streamlined process for obtaining consent if the transfer is to another registry operator. However, ICANN does retain the ability to review any change in control in order to ensure registrant protection. The timeline for a decision by ICANN also applies to assignment, along with change of control and subcontracting. However, ICANN will review the provision to ascertain whether additional clarity is appropriate. In addition, ICANN will modify the draft Registry Agreement to provide that (i) ICANN's assignment of the agreement is subject to the assignee's assumption of the terms and conditions of the Registry Agreement, and (ii) registry operator may, under similar conditions, assign the agreement to a wholly-owned subsidiary.

Amendments and Waivers (Section 7.6)

The proposal for ICANN to exercise a unilateral right to amend the Registry Agreement is a concept that was already considered and rejected by the community; its reintroduction now could be considered an act of bad faith by the ICANN staff. The proposal gives ICANN overly-broad rights and is based on vague and undefined standards. The consensus-based PDP is the appropriate vehicle to accomplish changes to the Registry Agreement. *Verisign (21 Feb. 2013)*

Based on the comments submitted, it is clear that there is no support for ICANN's proposed "unilateral right to amend" which was previously rejected in a multi-stakeholder process in 2010. ICANN's proposal has created a credibility gap that now threatens its legitimacy. This proposal should be rejected entirely. *Verisign (21 Mar. 2013).*

Valideus rejects the proposal for the ICANN Board to exercise a unilateral right to amend the new gTLD Registry Agreement; this offends even the most basic notion of contract parity and on its present terms is inexcusable. ICANN already has the tools required to effect any necessary changes (i.e. Special Amendments or Temporary Policies). Valideus hopes that ICANN can appreciate that applicants who are considering using their new gTLDs to house their critical business infrastructure cannot hand over unrestricted control to ICANN to change the terms of their contract without appropriate justification. *Valideus (26 Feb. 2013)*

The City of New York's primary concern with ICANN's proposed unilateral change to the June 2012 Registry Agreement relates to Section 7.6(c) of the February 5, 2013, proposal. This provision substantially alters the nature of the registry agreement and the expectation of applicants who relied on the June 2012 registry agreement in applying for new gTLDs. The terms of the registry agreement were part of a detailed analysis and review of the City of New York's ability to participate in the new gTLD program. It was the City of New York's expectation in applying for the .nyc gTLD that it would be accorded at least the level of protection from unilateral changes to its contractual obligations that was present and detailed in the June 2012 registry agreement. The City of New York did not anticipate that it would be subject to unilateral changes in its obligation without the process detailed in section 7 of the June 2012 agreement. *City of New York (25 Feb. 2013)*

While Google understands ICANN's need for flexibility, applicants are making significant investments in the new gTLD program and could be profoundly impacted by unilateral changes to the agreement by ICANN. Google's calculation for participating in the new gTLD program was based on the assumption that we would be afforded the checks and balances contained in the 2012 agreement which provides an agreed-upon process for changing the agreement. *Google (26 Feb. 2013)*

The BC continues to hold to the principles it stated in April 2010 in its Public Comments regarding the process for amendments to the new gTLD Registry Agreement, and therefore has concerns with the amendment process as proposed in Section 7.6(c). Also, many of the new gTLD registries in sensitive or regulated industries will be operating with registrant restrictions designed to avoid or satisfy objections from governments and regulators. ICANN should not be empowered to unilaterally amend all registry agreements if that would interfere with some registries' prior obligations to enforce registrant restrictions and policies. *BC (20 Mar. 2013)*

Article 7.6 (c) is contrary to the norms of the applicant's jurisdiction legislation and will cause material hardship to FAITID which contradicts AGB, Section 14 in Module 6. Changes made by ICANN only a few months before the scheduled launch of the first new TLDs will force us to increase FAITID's resources and expenses. Contractual negotiations would be irrelevant due to the right of ICANN to re-draft all contracts unilaterally in one moment. *FAITID (26 Feb. 2013)*

On 5 February 2013, nearly 5 years after originally proposed, and 3 years after a bottom-up compromise position was agreed to by the community, without notice, consultation or justification, ICANN re-introduced the notion of granting ICANN a unilateral right to amend the gTLD Registry Agreement. This proposal remains as unacceptable today as it was in 2008, and is an unreasonable abuse of power which puts at risk the contracting scheme that has served the community well, particularly in terms of providing legal security and certainty while providing a certain flexibility to amend registry agreements within the bounds of the consensus policy process. *RySG (26 Feb. 2013); NTAG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); J. Lin (28 Feb. 2013); (ARI (26 Feb. 2013); TLD Holdings (26 Feb. 2013); Steptoe (26 Feb. 2013); DuPont (15 Mar. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); IEEE Global (19 Mar. 2013); Target Domain Holdings (20 Mar. 2013); Etisalat (21 Mar. 2013)*

- In the event of any emergencies or threats to security and stability, ICANN already does have the right to propose Temporary Policies by a supermajority of the Board if such measures are necessary to maintain the security or stability of Registry Services. Temporary Policies can at a later stage become permanent changes through Consensus Policies. *RySG (26 Feb. 2013); NTAG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); ARI (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- The proposed amendments would make it difficult for registry operators to attract capital and to plan for their capital requirements. *RySG (26 Feb. 2013); NTAG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); ARI (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

- The current Consensus Policy mechanism is sufficient for critical changes and ensures that any implementation is appropriately balanced across multiple constituencies and stakeholder groups. The 4 June 2012 Final Agreement gives ICANN authority to make amendments supported by a specific percentage of the registry operators effective across the entire group. *RySG (26 Feb. 2013); NTAG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); ARI (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*
- To ensure the stability, predictability and reliability of the DNS, ICANN must respect the longstanding arrangement that legitimizes its status with contracted parties. Failure to proceed in good faith to implement fully informed decisions of the past undermines the private-public partnership and ultimately the multi-stakeholder model. *RySG (26 Feb. 2013); NTAG (26 Feb. 2013); FAITID (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); ARI (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

The fact that ICANN staff unilaterally proposed 32 substantive changes to an agreement, one approved and relied on by applicants, without any discussion with applicants, is the exact reason why this change is highly problematic. The amendment structure in the Registry Agreement was discussed at length and reflects a highly negotiated compromise, and already includes the ability for ICANN to change the agreement. It should not be tampered with at this late date. As such, NTAG supports the detailed comments of the RySG and firmly requests that ICANN remove this proposed language. *NTAG (26 Feb. 2013); RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013); TLD Holdings (26 Feb. 2013)*

RrSG opposes ICANN's proposed right to unilaterally amend the agreement. There is no justification to reintroduce this proposal in either the registry agreement or the registrar agreement.
The Board and the community's existing avenues for addressing "substantial and compelling" needs are fully adequate. *RrSG (26 Feb. 2013); Key-Systems (26 Feb. 2013)*

While Section 7.6 has been characterized as providing ICANN with a unilateral power of amendment, it is additionally worth noting that the definition of Restricted Amendments does not include amendments to Section 7.6 itself. Hence, anyone concerned that the proposed amendment would essentially provide ICANN with a unilateral power of amendment subject to a supermajority Board vote should also take into consideration that there need only ever be a single such vote to amend the amendment power itself to any future criteria on which 2/3 of the Board agree. In other words, if you do not like giving 2/3 of the Board the power to unilaterally amend the contract, you will like it even less after 2/3 of the Board makes it a simple majority thenceforth. *J. Berryhill (28 Feb. 2013)*

Analysis. ICANN has made considerable revisions to the proposed amendment provision in response to these comments and community discussions. ICANN recognizes the need to maintain the centrality of the consensus-based policy development process, and the need to carefully restrict the applicability of the amendment provision.

Section 7.11--Ownership Rights

Section 7.11 needs to be revised to reflect that the registry agreement does not affect trademark and brand owners' pre-existing property interests, such as an exception covering those strings for which a registry operator had previously obtained trademark or other intellectual property rights in the applied-for term. *Steptoe (26 Feb. 2013); DuPont (15 Mar. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)*

Analysis. It is not the intent of the provision to limit or otherwise adversely modify any intellectual property rights of the registry operator. In order to provide further clarity on this point, ICANN has revised the draft Registry Agreement to clarify that the Registry Agreement does not either grant or take away any intellectual property rights.

Warranties (Section 7.14(e))

ARI proposes the removal of clause 7.14(e). ARI does not understand the legal basis or motivation for Section 7.14(e) or what further protection it offers to ICANN. Upon further consideration, a more worrying application might be postulated: ICANN could launch litigation over any breach or misrepresentation and in doing so circumvent the controls put in place to deal with conflict contained within the remainder of clause 7.14. When one considers the hurdle that this clause will pose for intergovernmental organizations or governmental entities, weighed against the fact that it adds no further redress for ICANN over and above that already contained in the Agreement, ARI suggests that it is eminently logical and reasonable that such be removed, which would cause no detriment to ICANN. *ARI (26 Feb. 2013)*

Analysis. This clause applies in the limited case of Registry Operators that are intergovernmental organizations or governmental entities. The provision is knowledge-qualified and intended to ensure that such a registry operator does not enter into a registry agreement with the knowledge that it will not have to comply with certain aspects of the agreement because of existing conflicting laws that the entity itself may have adopted.

Brand Registries

ICANN should create a second template Registry Agreement specifically for Brand Registries. BRG would be pleased to engage in discussions with ICANN on the aspects of the proposed Registry Agreement that are unsuitable for Brand Registries and on the detail required to create a Brand Registry Agreement template. *BRG (26 Feb. 2013); HBO Registry (26 Feb. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)*

- The proposed Registry Agreement model is unfit for around 637 or 33% of the applications received, as these applications are for future top-level domain registry operators: who are owners of a company or brand that forms their applied-for TLD; whose TLD represents an identical pre-existing registered trademark; whose TLDs are in furtherance of their pre-TLD operations business interests; whose main business area is outside the domain name industry; and whose TLD will be single entity, single user, and who do not intend to sell second-level domain names to the general public. *BRG (26 Feb. 2013); HBO Registry (26 Feb. 2013);*

Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)

- Brand registries have different needs regarding specific aspects, such as: compliance audits and economic studies conducted by ICANN on registry operators, and related confidentiality issues; transition of the TLD upon termination; arbitration; limitation of liability; indemnification; change of control; amendment procedure; applicable laws; registrant protection measures such as letter of credit, Trademark Clearinghouse, URS, Sunrise, IP Claims and UDR; use of registrars; PICs. *BRG (26 Feb. 2013); HBO Registry (26 Feb. 2013); Citigroup (20 Mar. 2013); Web.com (20 Mar. 2013); Etisalat (21 Mar. 2013)*
- ICANN should allow a "fast track" or exemption procedure for .BRAND applicants and TLDs. *Etisalat (21 Mar. 2013)*

Valideus encourages ICANN to recognize the need for a specific set of amendments to the new gTLD Registry Agreement to reflect the nature of brand applicants, and to begin discussions on this matter in earnest. *Valideus (26 Feb. 2013); HBO Registry (26 Feb. 2013)*

Analysis. ICANN has made certain changes to the registry agreement in order to address the issues raised in this set of comments. All registry operators share similar interests in provisions relating to confidentiality, arbitration, indemnification, etc., and ICANN has attempted through numerous rounds of public comments on the registry agreement to craft a set of terms that should be widely applicable to almost all classes of registry operators. It remains to be demonstrated that beyond IGOs and governments that there are any identifiable classes of registry operators that can both be reliably identified and who would have a compelling need for alternate provisions in their agreements, but ICANN is prepared to listen to any requests to negotiate from the form agreement raised by any applicant or groups of applicants.

D. OTHER ISSUES

String Similarity--User Confusion

ICANN and the concerned applicants have not addressed that unless objections are filed or a dispute resolution process is started against an applied-for string, the string will only be screened for visual similarity. This may not be sufficient to alleviate user confusion for strings whose target markets are non-English-speaking. *D.F. (26 Feb. 2013); D. Cohen (26 Feb. 2013)*

Analysis. The standards and procedures for addressing the issue of string confusion in the new gTLD application process were developed through years of community discussions and numerous successive drafts of the Applicant Guidebook. The issue of visual versus other types of similarity was the topic of extensive discussion and analysis as documented in the supporting documents relating to the development of the drafts of the guidebook; please refer to the historical documents posted at <http://newgtlds.icann.org/en/about/historical-documentation>.

Rights Protection Mechanisms (RPMs)

PICs are closely tied to trademark protections for second level domain registrations within the new gTLDs. ICANN's trademark RPMs remain weak; the current Registry Agreement spends less than one page (out of 61 pages) on trademark protection. PCI again urges ICANN to beef up its trademark RPMs. At this time, the Limited Preventive Registration (LPR) mechanism is the best alternative under consideration at ICANN and PCI urges ICANN to adopt it as a step toward effective trademark protection. *PCI (25 Feb. 2013)*

Analysis. Although the agreement itself only references RPMs on one page, the RPMs themselves and the contracts and processes implementing those RPMs are considerably more voluminous. In addition, ICANN is concurrently posting for public comment the description of the RPMs referenced in Specification 7.

Requests for Extension of Time to File Public Comments

IPC requests a 21-day extension of time to file public comments on the revised new gTLD Registry Agreement including the additional PICs specification. Absent any new information regarding implementation of the Trademark Clearinghouse or Uniform Rapid Suspension System, IPC requires additional time to consider the PICs Spec.-- particularly how applicant representations made regarding enhanced intellectual property RPMs (if made binding) will integrate with any forthcoming amendments to the existing mandatory mechanisms in the Guidebook. In considering this request for an extension, ICANN may also wish to consider extension of the 5 March 2013 PIC Spec. deadline to correspond with the current reply comment deadline of 20 March 2013 and allow for full consideration of stakeholder public comments. *IPC (25 Feb. 2013)*

ICANN has proposed a range of substantive changes to the New gTLD Registry Agreement apparently without regard for basic due process or ample opportunity for due consideration. For this reason, Valideus supports IPC's request for an extension of time to consider the proposed changes. *Valideus (26 Feb. 2013)*

BRG requests a delay of 30 days ending 31 March 2013 to the deadline for this comment period. *BRG (26 Feb. 2013)*

Analysis. ICANN allowed for six weeks of comment and reply comments on the proposed revisions to the registry agreement, including the PIC Spec. ICANN was not in a position to extend the schedule in order to ensure that ICANN could deliver the new gTLD program within the timeframes previously identified.

<END>