

Registry Agreement Amendment Process

Summary and Analysis of Comments

Issue

ICANN has consulted with registries and other interested stakeholders and proposes a hybrid amendment process allowing future amendments to registry agreements when supported by both ICANN and affected registries (by simple majority and representing two-thirds of the fees paid to ICANN). An exemption process will be available. The proposed process is intended to allow for the protection of registrants while respecting unique business models and ensuring compliance with local laws.

These comments predate the consultations and development of the hybrid model.

Summary of Comments

Internet Committee of International Trademark Association (INTA)

- “ICANN should have the ability to unilaterally amend a uniform registry agreement with respect to provisions that allow ICANN to ensure security and stability, while providing registry operators predictable and stable agreements based on clear terms around such matters as notice, sanctions, cure periods and termination.”
- “...at least the following four provisions should be subject to unilateral amendment by ICANN at anytime in order to address potentially changing circumstances that jeopardize the stability and security of the DNS: (1) Right to Audit; (2) Private Registration and Registrar Data Escrow Requirements; (3) Operator Training and Testing Requirements; and (4) Data Retention Requirements.”
- If a registry operator does not agree, it may terminate the agreement and cease operations. If it fails to comply or terminate, ICANN may terminate the agreement.

Registrar Stakeholder Group (RrSG)

- “...the RrSG strongly opposes any version of unilateral contract amendment authority, including the amendment process proposed in the New gTLD Draft Applicant Guidebook Version 3.”
- No new amendment process should be implemented that relates to matters within the “picket fence” as existing mechanisms for amendment of these matters are already in place.
- The RrSG continues to evaluate alternative amendment processes for matters outside the picket fence but reaffirms its position that any unilateral amendment process is not acceptable.

Jonathon Nevett

- “There is no need for a new amendment process on top of the three that already exist— agreement between the registry and ICANN; Consensus Policies through community Policy Development Process; and Temporary Policies established unilaterally by a two-thirds vote of the ICANN Board.”

- “For issues outside of the picket fence and outside of the Consensus Policy or Temporary Policy procedures, there may be some benefit in a new amendment procedure to assist with scalability and consistency among registry agreements. Such a new procedure should not—in any way—grant ICANN the ability to unilaterally amend the registry agreement.”

Commercial and Business Users Constituency (BC)

- “As a matter of policy, the BC believes that businesses should not be subject to agreements where the other party has the unilateral right to amend such an agreement. ICANN’s proposal in which the ICANN Board could unilaterally impose a change to registry agreements notwithstanding the objections of a majority of registry operators, the BC, or any other ICANN organization is an anathema to ICANN’s bottom-up policy making roots.”
- However, the RysG’s proposal “is inconsistent with the efficient functioning and scalability of the New gTLD program. This issue requires a ‘balanced’ approach that satisfies both parties.
- The following areas should be subject to amendment without the specific consent of every single registry operator (so long as there is consensus in the community): “security and stability issues, enforcement tools, registrant protections, and promoting a stable marketplace...”
- “Compliance staff must have the tools to enforce the registry agreements against ‘rogue’ or potential bad actor registries...but neither ICANN staff nor the Board should be able to amend registry agreements without community involvement and input from registry operators.”

Registries Stakeholder Group (RySG)

- Current Consensus Policy and Temporary policy mechanisms “provide necessary flexibility to make changes to fundamentally important areas, such as security and stability...”
- “There are a number of reasons why it is important that amendments not be voted up or down by a collection of registries, including (1) if the potential amendment concerned pricing, collective voting or veto could raise problematic antitrust issues, and (2) even as to other issues, the fate of an individual registry might be determined by a democratic vote of its competitors.”
- “The RySG is opposed to the possible model in that memorandum regarding utilization of a process similar to the RAA, as it believes that a ‘one size fits all’ approach will not appropriately serve registries with varying business models, such as sponsored registries that have certain restrictions. Furthermore, a ‘one size fits all’ approach is inconsistent with ICANN’s stated aim to encourage innovation, and any amendment process must provide the flexibility and accommodate the differences in the Registry Agreement that an innovative gTLD might require.”

Richard Tindall

- The current (com/net/org/biz/info, etc.) contracts have effective mechanisms for change on issues that are inside the picket fence, or covered by Consensus or Temporary policies. These mechanisms should be retained for new TLDs.
- Changes outside the picket fence cannot be handled through existing mechanisms and may “have a significant impact on ICANN, e.g., registry fees.”
- On balance, I prefer the mechanism proposed by the Registry Constituency at the Washington, DC, consultation in January this year. Namely, a good faith negotiation every three years to effect changes.

Analysis and Proposed Solution

ICANN appreciates the contractual uncertainty that registry operators would face when entering into a contract that may be changed without their consent as contemplated by version 3 of the draft registry agreement.

ICANN and members of the RySG and the broader community discussed a number of these issues at the consultation on the proposed registry agreement amendment process held in Marina del Rey on 13 April 2010. At the consultation, ICANN staff agreed to work toward a compromise position that would be acceptable to the relevant constituencies, and to form a working group to collaborate on appropriate language for the draft registry agreement.

After further consultation with the working group, ICANN has proposed a compromise provision. Pursuant to the new provision, ICANN will have no ability to unilaterally amend the registry agreement. Rather, after consultation with and vetting by a working group, ICANN may propose amendments to the Registry agreement that, if approved in the manner set forth below, would automatically amend all registry agreements that contain the new amendment provision. The working group is constituted from representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments.

For such amendments to be approved, the amendment must be approved by the Board of Directors of ICANN and a specified percentage of registry operators. To be approved by the registry operators, the amendment must receive the affirmative approval of (1) the registry operators whose fee payments to ICANN accounted for at least two-thirds of the total amount of fees paid to ICANN in the previous year by all effected registry operators, and (2) a majority of all effected registry operators. Following such approval, any registry operator that did not vote in favor of the proposed amendment could apply to ICANN for an exemption from compliance with the approved amendment. If ICANN were to deny the requested exemption, the requesting registry operator can appeal such denial pursuant to the arbitration provisions of the registry agreement.

This proposed framework would be unavailable for amendments concerning (1) changes to Specification 1 to the registry agreement, (2) the price charged by the registry operator to registrars for domain name registrations, (3) the definition of “registry services,” and (4) the length of the term of the registry agreement.

The complete text of the proposed amendment process is set forth below. This text has not been approved by the ICANN Board of Directors, is not an official position of ICANN and is provided for discussion purposes only:

7.6 Amendments and Waivers.

- (a) If ICANN determines that an amendment to this Agreement (including to the specifications referred to herein) and all other registry agreements between ICANN and the Applicable Registry Operators (the “Applicable Registry Agreements”) is desirable (each, a “Special Amendment”), ICANN may submit a Special Amendment for approval by the Applicable Registry Operators pursuant to the process set forth in this Section 7.6, provided that a Special Amendment is not a Restricted Amendment (as defined below). Prior to submitting a Special Amendment for such approval, ICANN shall first consult in good faith with the Working Group (as defined below) regarding the form and substance of a Special Amendment. The duration of such consultation shall be reasonably determined by ICANN based on the substance of the Special Amendment. Following such consultation, ICANN may propose the adoption of a Special Amendment by publicly posting such amendment on its website for no less than thirty (30) calendar days (the “Posting Period”) and notice of such amendment by ICANN to the Applicable Registry Operators in accordance with Section 7.8. ICANN will consider the public comments submitted on a Special Amendment during the Posting Period (including comments submitted by the Applicable Registry Operators).
- (b) If, within two (2) calendar years of the expiration of the Posting Period (the “Approval Period”), (i) the ICANN Board of Directors approves a Special Amendment (which may be in a form different than submitted for public comment) and (ii) such Special Amendment receives Registry Operator Approval (as defined below), such Special Amendment shall be deemed approved (an “Approved Amendment”) by the Applicable Registry Operators (the last date on which such approvals are obtained is herein referred to as the “Amendment Approval Date”) and shall be effective and deemed an amendment to this Agreement upon sixty (60) calendar days notice from ICANN to Registry Operator (the “Amendment Effective Date”). In the event that a Special Amendment is not approved by the ICANN Board of Directors or does not receive Registry Operator Approval within the Approval Period, the Special Amendment will have no effect. The procedure used by ICANN to obtain Registry Operator Approval shall be designed to document the written approval of the Applicable Registry Operators, which may be in electronic form.
- (c) During the thirty (30) calendar day period following the Amendment Approval Date, Registry Operator (so long as it did not vote in favor of the Approved Amendment) may apply in writing to ICANN for an exemption from the Approved Amendment (each such request submitted by Registry Operator hereunder, an “Exemption Request”). Each Exemption Request will set forth the basis for such request and provide detailed support for an exemption from the Approved Amendment. An

Exemption Request may also include a detailed description and support for any alternatives to, or a variation of, the Approved Amendment proposed by such Registry Operator. An Exemption Request may only be granted upon a clear and convincing showing by Registry Operator that compliance with the Approved Amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registry Operator. No Exemption Request will be granted if ICANN determines, in its reasonable discretion, that granting such Exemption Request would be materially harmful to registrants or result in the denial of a direct benefit to registrants. Within ninety (90) calendar days of ICANN's receipt of an Exemption Request, ICANN shall either approve (which approval may be conditioned or consist of alternatives to or a variation of the Approved Amendment) or deny the Exemption Request in writing, during which time the Approved Amendment will not amend this Agreement. If the Exemption Request is approved by ICANN, the Approved Amendment will not amend this Agreement. If such Exemption Request is denied by ICANN, the Approved Amendment will amend this Agreement as of the Amendment Effective Date (or, if such date has passed, such Approved Amendment shall be deemed effective immediately on the date of such denial); provided, that Registry Operator may, within thirty (30) calendar days following receipt of ICANN's determination, appeal ICANN's decision to deny the Exemption Request pursuant to the dispute resolution procedures set forth in Article 5. The Approved Amendment will be deemed not to have amended this Agreement during the pendency of the dispute resolution process. For avoidance of doubt, only Exemption Requests submitted by Registry Operator that are approved by ICANN pursuant to this Section 7.6(c) or through an arbitration decision pursuant to Article 5 shall exempt Registry Operator from any Approved Amendment, and no exemption request granted to any other Applicable Registry Operator (whether by ICANN or through arbitration) shall have any effect under this Agreement or exempt Registry Operator from any Approved Amendment.

- (d) Except as set forth this Section 7.6, no amendment, supplement or modification of this Agreement or any provision hereof shall be binding unless executed in writing by both parties, and nothing in this Section 7.6 shall restrict ICANN and Registry Operator from entering into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement shall be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof shall be deemed or shall constitute a waiver of any other provision hereof, nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided.
- (e) For purposes of this Agreement, the following terms shall have the following meanings:

- (i) *Applicable Registry Operators* means, collectively, the registry operators of the top-level domains party to a registry agreement that contains a provision similar to this Section 7.6, including Registry Operator.
- (ii) *Registry Operator Approval* means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained. For avoidance of doubt, with respect to clause (B), each Applicable Registry Operator shall have one vote for each top-level domain operated by such Registry Operator pursuant to an Applicable Registry Agreement.
- (iii) *Restricted Amendment* means the following: (i) an amendment of Specification 1, (ii) except to the extent addressed in Section 2.10 hereof, an amendment that specifies the price charged by Registry Operator to registrars for domain name registrations, (iii) an amendment to the definition of Registry Services as set forth in the first paragraph of Section 2 of Specification 6, or (iv) an amendment to the length of the Term.
- (iv) *Working group* means representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments to the Applicable Registry Agreements (excluding bilateral amendments pursuant to Section 7.6(d)).