

Board-Approved Amendment Process: Purpose and Discussion

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In the New gTLD Registry Agreement and the Registrar Accreditation Agreement negotiations, ICANN has proposed the incorporation of a Board-approved amendment clause. The proposal has caused a lot of backlash within the community. While some of the backlash is caused by a misunderstanding of the required process that must occur prior to the Board approving an amendment over the objection of the contracted party/parties at issue, the bigger concern raised is that ICANN has no justifiable need to put this type of power within the Board. It is important to recall that ICANN has presented the amendment language as a proposal, a starting point for the conversation.¹

The Board-approved amendment process is drafted to address a key concern of ICANN in this changing marketplace – what if the gTLD registration market develops in a way that is anti-consumer, yet very favorable to the existing registries or registrars. In this situation, it would be against the business interests of the incumbent registries or registrars to adopt a change – even when the broader community supports the change. Particularly in light of the “perpetual” renewal terms that are already in place within the proposed agreements, this limited power of the Board is the only way to introduce this type of change over the life of the agreements.

Changing Marketplace Reduces Predictability

ICANN is reviewing how it can assure that its contracts are stable and predictable, and yet flexible enough to address changes in the marketplace. Great change has already occurred: since 1998, we have seen the registrar marketplace grow from one to over 1000 accredited registrars, yet many terms of the RAA are still based on terms negotiated in 2001 when there were just a few registrars in the market. Now we are on the cusp of the anticipated introduction of over 1000 new gTLDs, and with the re-introduction of vertical integration of registry operators and registrars that will each hold agreements with some form of “perpetual” renewal ability, no one can know what this marketplace will look like in a few years.

Both the 2013 RAA and the New gTLD Registry Agreement are expected to include provisions through which ICANN and the contracted parties can bilaterally agree to uniform amendments to the base agreements. In order to effectuate these amendments, at least 50% of Registry Operators would have to vote in favor, and on the Registrar side, an even higher percentage is proposed. However, within both the registries and registrars, we can expect great diversity in the business models, which could lead to diverging interests among those groups that in and of itself can serve as a barrier to meeting these voting thresholds. For example, registrars with business models based on reseller channels could have needs and interests counter to small registrars, which are again different from large direct-selling registrars. Among the anticipated new Registry Operators, applicants are already starting to self-identify in smaller interest groups, such

¹ A perceived loophole within the proposed language has already been identified – that the Board could use the Board-approved amendment process to change the Board threshold needed to enact an amendment in this way. This loophole was not intended, and language can be added that would prohibit modification to the Board’s supermajority requirement.

as “brand” operators as opposed to the “generic” operators, IDN operators, and others. This raises the potential that a proposed amendment could have the support of a large number of registries or registrars, but could be defeated by the smallest of a margin. The impact of registry and registrar integration on business interests and voting is not yet fully understood. The lack of predictability does not pose an issue for ICANN only, but for all of the registries and registrars in anticipating how amendments to the agreements may be considered and approved.

Potential Areas of Usage

As new gTLDs move forward, we can conceive that new market conditions could arise that require attention in order to sustain the responsible and mature marketplace into which the gTLD registries and registrars are evolving. The broad changes and innovation could bring forward areas of abuse or negatively associated conduct that are avoided in other sectors by regulation that does not exist for the DNS. Swift action to address that conduct through contractual amendment could have the dual benefit of remedying conduct and reducing the need for external regulation from varying jurisdictions. For example, an imbalance of the contracted parties could arise through gross consolidation in the marketplace, which might warrant the introduction of new terms to counterbalance behavior. We could see contracted parties acting in a way that causes an artificial scarcity of domain names. We could see the rise of “rogue” registries that could be reigned in – for the benefit of other registries and registrars and the public interest – through the introduction of new contractual terms that curb behavior. We could see registries and registrars offering complementary services in ways that could negatively impact competition in the registration of domain names (such as tying agreements), which could be alleviated through amendments to the agreement. Similarly, there could be other broad-reaching consumer protections that are seen as necessary to address at a large scale through an amendment to the agreements. In each case, it could be against the business interests of the incumbents to adopt reasonable amendments to the agreements.

In each case, the registries or registrars would be given the first opportunity to weigh in on the value of taking affirmative action to remedy this behavior. But in the event that it is not in the business interests of the contracted parties (by a narrow or wide margin) to take action to remedy these business practices that are inconsistent with the public interest, that is where the Board-approved amendment process is anticipated to be used. The types of market developments described above are they types of issues that are anticipated to fall into the “substantial and compelling need” limitation on the Board-approved amendment process. Community support would be a key component for any change initiated through this process.

Interaction with the Policy Development Process

The existence of the Board-approved amendment process in no way supplants the operation of a properly-initiated policy development process (PDP). PDP recommendations can always address the obligations in the amendment, if the topic of the amendment is one that falls within the scope of allowable Consensus Policy.

The Board-approved amendment process is also separate from the Board’s ability to create policy on a temporary basis where the Board “determines that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the operational stability of Registrar Services, Registry Services, the DNS, or the Internet.” That emergency provision – which has not been used to date – allows for immediate incorporation of a narrowly tailored policy, and for the reference of that temporary policy to the GNSO for further review. Where the temporary policies are immediately in force for 90-day terms, the Board-approved amendment process has a substantial amount of process built in on the front side: community consultation, review by registrars, further Board review, a supermajority Board vote and then a 90-day timeframe for implementation. The processes serve two separate and distinct purposes.

Within the proposed RAA, ICANN has clarified that the Board-approved amendment process could be deferred in favor of an active PDP on the same topic. This would allow for the community work on an issue to proceed prior to the Board taking any action on an amendment. However it is conceivable that a PDP does not result in recommendations that address the issue at hand, and further action by the Board may be deemed necessary. Imagine if the issue of removing registry-registrar separation arose after 1,000 registry agreements were in force. The economic studies demonstrated that vertical integration was likely to have positive competitive effects and efficiencies. A PDP was initiated within the GNSO, where a range of options for vertical integration was presented, but no single solution had the level of support to be the prevailing policy recommendation. That is a potential area where the Board may deem it necessary to invoke the Board-approved amendment process. Similarly, if a PDP fails to result in recommendations to address a security or stability related issue that is seen as essential to address for the public interest, that is another area where the Board-approved amendment process may need to be invoked.

Explanation of the Board-approved Amendment Process in Operation

The following table describes in summary form the process for amending the Registrar Accreditation Agreement (RAA) or the New gTLD Registry Agreement using the Board-approved amendment process. It is important to note that this process is entirely separate from the Consensus Policy and Temporary Policy development process conducted in accordance with ICANN’s bylaws and described in proposed Specification 1 to the RAA or the Registry Agreement. The policy development processes could also result in changes to the agreements but only to the extent that those changes fall within the specific categories of matters specifically allocated to the policy development process. Pursuant to the proposed amendment provision, ICANN may propose amendments to any provision of the agreements through the below described process (subject to the limitations specified in the provision).

Step	Action
1.	ICANN determines that an amendment to the agreement is desirable.
2.	ICANN consults with a working group (consisting of representatives of registries or registrars and any other members of the community that ICANN appoints) regarding the proposed amendment.
3.	Following such consultation, ICANN publicly posts the proposed amendment for a 30 day comment period and formally notifies registries or registrars of the proposed

	amendment
4.	Following public comment, the ICANN Board approves the amendment (which may be altered based on public comment).
5.	ICANN submits the proposed amendment to registries or registrars for approval based upon the thresholds set forth in the contract.
Alternative 1 – Registries or Registrars Approve Amendment	
6.	Registrars approve the proposed amendment.
7.	ICANN sends notice to all registries or registrars that the proposed amendment has been approved and the amendment becomes binding on all registries or registrars going forward on the 60 th day following that notice, subject to the exemption process – See Steps 13 - 18.
Alternative 2 – Registries or Registrars Do Not Approve Amendment	
8.	Registries or Registrars do not approve the proposed amendment.
9.	The proposed amendment goes back before the ICANN Board for further consideration.
10.	If the ICANN Board determines that the proposed amendment is not justified by substantial and compelling need, the proposed amendment is abandoned.
11.	If the ICANN Board determines that the proposed amendment is justified by substantial and compelling need, the proposed amendment is put to another vote of the ICANN Board.
12.	If the ICANN Board re-approves the proposed amendment with a two-thirds vote, ICANN will send a notice to registries or registrars and the proposed amendment becomes binding on all registrars going forward on the date that is 90 days following that notice, subject to the exemption process – See Steps 13-18.
The Exemption Process	
13.	Registry or Registrar may request an exemption from the amendment during the 30 days following notice from ICANN that the amendment was approved.
14.	Each exemption request must set out the basis for such request and may provide suggested alternatives to the amendment that Registrar would be willing to accept.
15.	An exemption request will only be approved by ICANN if Registry or Registrar can make a clear and convincing showing that compliance with the amendment conflicts with applicable laws or would have a material adverse effect on the long-term financial condition or results of operations of Registrar.
16.	ICANN will have 90 days to review the exemption request during which time the amendment will not take effect with respect to the Registry or Registrar seeking an exemption.
17.	If ICANN approves the exemption request, the amendment will not amend the agreement (but ICANN may impose alternatives or variations to the amendment that would amend the agreement).
18.	If ICANN does not approve the exemption request, the amendment will become binding on Registry or Registrar going forward.
Arbitration	
19.	If a Registry or Registrar disputes that ICANN has adopted the amendment pursuant to the requirements of the provision (such as ICANN cannot demonstrate a substantial and compelling need), Registry or Registrar may always submit such dispute to arbitration under the RAA.

Other Examples of Substantial and Compelling Need

Determinations of “substantial and compelling need” will be made by the Board on a case-by-case basis, but always with a focus on the public interest. Some examples of potential areas of substantial and compelling need include, among other things, amendments required to (i) eliminate or mitigate a threat to the Security and Stability of the DNS or the Internet, (ii) eliminate malicious conduct in the provision of Registry or Registrar Services, (iii) address inequities among all ICANN-accredited registrars or Registry Operators, (iv) protect registrants from harmful activities in the DNS, and (v) adopt necessary technical protocols or specifications that are not anticipated within the agreements.

If such an amendment is brought and is supported by the community, it is more than likely that registries or registrars will also be in support of an amendment, and the Board-approval process will never have to be initiated. However, the potential for change in the registry-registrar marketplace could bring with it a situation where the Board and the community support an amendment that is in the public interest and of substantial and compelling need, yet is resisted by incumbent contracted parties. It is in this limited scenario where the Board-approval process is anticipated to be invoked.