



6 September 2017

RE: Response to the ICANN organization's approval of Registry-Registrar Agreement Amendment without Registrar Stakeholder Group involvement

Graeme Bunton
Chair, Registrar Stakeholder Group
Via Email

Dear Graeme Bunton,

Thank you for your submission regarding the ICANN organization's handling of a registry operator's request for approval to amend the Registry-Registrar Agreement for two generic top-level domains (gTLDs); .MOSCOW and .xn--80adxhks. I've researched this issue and worked with the Global Domains Division to provide you with this response.

Your submission states that the ICANN organization (all subsequent uses of "ICANN" refer to the ICANN organization) missed its review deadline of a Registry-Registrar Agreement amendment, submitted by the Foundation for Assistance for Internet Technologies and Infrastructure Development (FAITID), the Registry Operator for the two gTLDs listed above. The missed deadline led to the approval of changes without input from the Registrar Stakeholder Group. After researching and discussing the incident described in your submission with the Global Domains Division, ICANN apologizes for the missed deadline and mistakes it made in its handling of FAITID's request to amend its Registry-Registrar Agreement. Further, we acknowledge and appreciate the risks that these types of mistakes can create for registrars. ICANN is accountable for the work it delivers, to meeting its obligations, and to continuous improvement. As a result of your complaint, ICANN has identified two areas for improvement – 1) Clear communications with the registry operator, and 2) Process enhancements.

ICANN, inclusive of the Complaints Office, is obligated and committed to providing the utmost transparency. I disclose that in my previous role as ICANN's Director, Registry Services & Engagement, I was involved in various internal and external discussions regarding this issue. My previous involvement in these discussions does not make me an authority on the matter. I have thoroughly researched the issue and available information in order to provide a comprehensive, transparent, and unbiased response.

General Background:

ICANN accredits registries and registrars to provide certain domain name registration services relating to gTLDs. ICANN's authority is purely contractual, and limited to registry agreements, registrar agreements, and the ICANN community developed policies. The agreements between ICANN, registries, and registrars outline certain responsibilities for each. ICANN is responsible for overseeing and enforcing these contracts.

Additionally, the registries have agreements with each accredited registrar they do business with. These agreements are known as Registry-Registrar Agreements. The registry agreement generally requires registries to include certain provisions in their Registry-Registrar Agreement. ICANN does not

have an approval role for Registry-Registrar Agreements, except when the registry is amending its Registry-Registrar Agreement, as described in more detail below.

Relevant Contractual Provisions and/or Requirements:

As you know, there is a registry agreement between ICANN and FAITID for each of the two gTLDs.

.MOSCOW: <https://www.icann.org/resources/agreement/moscow-2013-12-19-en>

.xn--80adxhks: <https://www.icann.org/resources/agreement/xn--80adxhks-2013-12-19-en>

Section 2.9 of each contract defines the requirements for a registry operator to amend its Registry-Registrar Agreement, references the ICANN Procedure for Consideration of Proposed Amendments to gTLD Registry-Registrar Agreements (“the Procedure”)¹, and provides a link to it. See: <https://www.icann.org/en/system/files/files/rra-amendment-procedure-25aug11-en.pdf>. The combination of section 2.9 and the Procedure outline the following sequence of events:

- ⦿ The registry operator needs ICANN's approval to bind registrars to material or potentially material changes to its Registry-Registrar Agreement.
- ⦿ The registry operator must provide ICANN and its contracted registrars a 15 calendar-day written notice of any revisions to its Registry-Registrar Agreement in order for the revision(s) to be effective.
- ⦿ ICANN has 15-days to determine if the proposed changes are material, potentially material, or immaterial in nature, and to inform the registry operator of its determination.
- ⦿ If the changes are determined to be immaterial, or ICANN fails to notify the registry operator of the determination within 15-days, the proposed changes may be considered "approved" and the registry operator can implement the changes with its contracted registrars.
- ⦿ If the changes are determined to be either material or potentially material, ICANN shares the proposed changes with the Registrar Stakeholder Group for review and feedback.
- ⦿ If the Registrar Stakeholder Group has concerns, ICANN should facilitate a dialogue between the stakeholder group and the registry to work towards mutual agreement.
- ⦿ Some changes may require approval by the ICANN Board.

Summary of Research Findings:

FAITID's initial submission was sent in March 2016 and indicated they were updating registration policies. FAITID's submission wasn't clear that it intended to amend its Registry-Registrar Agreements. After multiple discussions between FAITID and ICANN, it was clarified that FAITID wanted to amend its Registry-Registrar Agreements thereby requiring ICANN's approval under 2.9 of the registry agreements. FAITID was then requested to resubmit a complete request to amend its Registry-Registrar Agreements.

Several months later, FAITID submitted a clearly documented Registry-Registrar Agreement amendment request and received timely notification from ICANN that its changes were material. At that time, ICANN also notified FAITID that certain provisions they are required to have in their Registry-Registrar Agreement were missing and requested they either a) provide the location of the missing provisions or b) add them and resubmit updated documents. ICANN sent several follow-up requests for the missing information, each time reminding FAITID that the previously submitted changes were

¹ To view the full text of Section 2.9 in effect at the time of this transaction and the Procedure, see Exhibit 1 of this document.

deemed material. During this time, FAITID notified ICANN that it expected the 15-day clock would re-start when they resubmitted updated documents. ICANN did not dispute the registries expectation.

On 22 September 2016, FAITID submitted an additional document incorporating the missing provisions. On 10 October 2016 – 18-days later, ICANN notified FAITID that its changes were material and subject to section 2.9 of the contract, and to the Procedure. FAITID notified ICANN that it had missed its 15-day deadline, and therefore it believed the changes were deemed approved. ICANN and FAITID had several discussions in an attempt to resolve the situation differently, however could not reach agreement. In May 2017, ICANN notified the Registrar Stakeholder Group that “due to an internal processing delay the deadline for the review had passed and the amendment was deemed approved by default prior to its review by the Registrar Stakeholder Group.”

ICANN’s Response and Next Steps:

Based on the review and research conducted, the primary causes of this issue were a.) Unclear communication between ICANN and the registry, and b.) Lack of processing requirements for incomplete requests. ICANN regrets its mistakes but is committed to fixing them.

To date, when a ‘complete’ Registry-Registrar Agreement amendment request is received, ICANN makes a materiality determination and, where applicable, processes the request using the Procedure. For ‘incomplete’ requests that are submitted, ICANN has an informal conversation with the registry to collect the missing information rather than a structured time-bound conversation that is typical with ‘complete’ requests. In the case of the FAITID request, the lack of formal process for handling an incomplete request and the unclear communication from ICANN led to a missed deadline and the loss of opportunity for the Registrar Stakeholder Group to review and comment.

ICANN believes the changes outlined below will help address the primary causes of this issue and offer better predictability for the parties.

1. The Registry-Registrar Agreement amendment process will be updated to:
 - a. Differentiate between a complete request and an incomplete request.
 - b. Define a process for how incomplete requests are handled.
 - c. Establish an internal service-level-target to determine if the request is complete or incomplete.
 - i. Complete requests will continue to receive a materiality determination within the remaining 15-day period.
 - ii. Incomplete requests will be returned to the registry operator with an explanatory message advising: that the request is incomplete, what is missing, them to resubmit when it is complete, that the 15-day clock for materiality will begin once a complete request is resubmitted.
 - d. Review and update communication templates, where appropriate, to ensure timelines, deliverables and expectations are clearly articulated.
 - e. Update all internal process and procedure documentation.
2. ICANN will develop and publish a How-to-Guide, or other supplementary material, for this process on icann.org. It will detail the process steps, workflow, and timelines, and what is expected of the registry.
3. ICANN will evaluate additional controls for avoiding missed deadlines, including but not limited to increased system automation.

4. The Registry and Registrar Services & Engagement teams will work with their respective Stakeholder Groups to gather feedback regarding the current operational process. The purpose of this dialogue is to identify what is/isn't working and to brainstorm areas where operational changes could benefit these transactions.
5. Considering the Procedure was developed several years ago and prior to finalizing the language of the registry agreement –ICANN, registries and registrars should discuss the compatibility of section 2.9 and the Procedure. Should they agree that changes are warranted, they will need to identify the appropriate mechanism for making changes. The Registry and Registrar Services & Engagement teams will coordinate discussions with their respective Stakeholder Groups.

Many of the communication and process changes described above have been implemented or are in the process of being implemented, but ICANN plans to complete all process and communications changes no later than the ICANN60 meeting in Abu Dhabi, United Arab Emirates. Items 3 and 4 listed above will be initiated at or before ICANN60.

Thank you again for your submission regarding ICANN's handling of the Registry-Registrar Agreement amendment for the .MOSCOW and .xn--80adxhks gTLDs. In your submission, you asked ICANN to explain the steps it will take to prevent this from happening again, ensure that there is no single point of failure for the materiality review, to share changes with the Registrar Stakeholder Group and the ICANN community, and to publish ICANN's guidelines for what constitutes materiality in a Registry-Registrar Agreement amendment.

I believe this letter addresses your request except for materiality guidelines. With respect to what ICANN considers material when reviewing proposed Registry-Registrar Agreement changes – ICANN applies the commonly understood meaning of materiality which is to consider whether the change(s) is relevant, meaningful, and/or significant enough to be of interest to either the parties to the contract, to parties that are affected by the contract, or both.

ICANN appreciates you taking the time to bring this information to our attention and takes responsibility for the mistakes it made in handling this request. We are committed to always working to increase our effectiveness and to provide additional transparency and accountability, all in service of ICANN's mission. As described above, we are making changes to communicate more effectively and to enhance our processes. Your willingness to submit this information helps us to achieve these commitments.

I appreciate your continued participation in ICANN, your contributions to helping us work towards being our very best, and the opportunity to provide you with this information.

Kind regards,

Krista Papac
Complaints Officer

Exhibit 1

This exhibit contains the full text, as it appeared in the registry's agreements at the time of this transaction, of Section 2.9 of the Registry Agreement, and the linked ICANN Procedure for Consideration of Proposed Amendments to gTLD Registry-Registrar Agreements.

Section 2.9 of the FAITID Registry Agreements reads:

2.9 Registrars.

(a) All domain name registrations in the TLD must be registered 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. Subject to the requirements of Specification 11, Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD (the "Registry-Registrar Agreement"). Registry Operator may amend the Registry-Registrar Agreement from time to time; provided, however, that any material revisions thereto must be approved by ICANN before any such revisions become effective and binding on any registrar. Registry Operator will provide ICANN and all registrars authorized to register names in the TLD at least fifteen (15) calendar days written notice of any revisions to the Registry-Registrar Agreement before any such revisions become effective and binding on any registrar. During such period, ICANN will determine whether such proposed revisions are immaterial, potentially material or material in nature. If ICANN has not provided Registry Operator with notice of its determination within such fifteen (15) calendar-day period, ICANN shall be deemed to have determined that such proposed revisions are immaterial in nature. If ICANN determines, or is deemed to have determined under this Section 2.9(a), that such revisions are immaterial, then Registry Operator may adopt and implement such revisions. If ICANN determines such revisions are either material or potentially material, ICANN will thereafter follow its procedure regarding review and approval of changes to Registry-Registrar Agreements at <http://www.icann.org/en/resources/registries/rra-amendment-procedure>, and such revisions may not be adopted and implemented until approved by ICANN.

(b) If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such affiliation, reseller relationship or subcontract, as applicable, including, if requested by ICANN, copies of any contract relating thereto; provided, that ICANN will treat such contract or related documents that are appropriately marked as confidential (as required by Section 7.15) as Confidential Information of Registry Operator in accordance with Section 7.15 (except that ICANN may disclose such contract and related documents to relevant competition authorities). ICANN reserves the right, but not the obligation, to refer any such contract, related documents, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, related

documents, transaction or other arrangement might raise significant competition issues under applicable law. If feasible and appropriate under the circumstances, ICANN will give Registry Operator advance notice prior to making any such referral to a competition authority.

(c) For the purposes of this Agreement: (i) “Affiliate” means a person or entity that, directly or indirectly, through one or more intermediaries, or in combination with one or more other persons or entities, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

ICANN Procedure for Consideration of Proposed Amendments to gTLD Registry-Registrar Agreements found at <https://www.icann.org/resources/pages/rra-amendment-procedure-2015-04-06-en> reads:

ICANN has developed the following process for consideration of proposed amendments to gTLD Registry-Registrar Agreements (RRAs) where the registry is required to obtain ICANN approval of such amendments. This process is designed to ensure registrar input (and public input where appropriate) before ICANN approves changes to an RRA. Procedure for Consideration of Proposed RRA Amendments:

1. The registry requesting amendment to its RRA must provide ICANN with a copy of its proposed RRA that indicates all changes in redline and a cover note. The registry-provided cover note should describe the purpose of the proposed changes.
2. ICANN will forward the redlined version of the proposed RRA and cover note to the Registrar Stakeholder Group for review while ICANN undertakes an internal review of the proposed changes. The length of the registrars’ review period may vary depending on the complexity of the proposed changes or other circumstances, but will ordinarily not be longer than twenty-one (21) days. ICANN will ordinarily publish the proposal and cover note on its website.
3. At the close of the registrar review period, if there are any concerns expressed, ICANN will consult with the registry and with the Registrar Stakeholder Group to attempt to resolve any such concerns.
4. If the consultations result in changes to the proposal, ICANN will submit the revised document to the Registrar Stakeholder Group and open an additional review period, which will normally not exceed fifteen (15) days. Upon conclusion of any second review period, ICANN will attempt to resolve any remaining issues through consultation with the registrars and the registry.
5. Following the above review and consultation process, ICANN will approve or reject the proposed changes. Some changes may require approval by ICANN’s Board of Directors e.g., in cases where there might be a substantial effect on third parties or on the security and stability of the DNS.