

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: Philip S. Corwin, Founding Principal, Virtualaw LLC; in my capacity as Counsel to, and on behalf of, the Internet Commerce Association

Email: Contact Information Redacted

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

___ **Staff action/inaction**

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

The Internet Commerce Association (ICA) seeks reconsideration of Resolutions 2015.09.28.04 (Renewal of .Cat Registry Agreement), 2015.09.28.05 (Renewal of .Travel Registry Agreement) and 2015.09.28.06 (Renewal of .Pro Registry Agreement). These Resolutions were approved as part of the Consent Agenda at the Regular Meeting of the ICANN Board held on September 28, 2015.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

September 28, 2015

5. On what date did you become aware of the action or that action would not be taken?

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

September 28, 2015, upon publication of the Approved Board Resolutions.

6. Describe how you believe you are materially affected by the action or inaction:

ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

The ICA also participates actively in the GNSO's policymaking process for gTLDs as a member of the Business Constituency (BC) within the Commercial Stakeholder Group (CSG). As the asset value, marketability, and legal status of domains are substantially affected by ICANN Consensus Policies it is of critical importance to ICA members that ICANN Consensus Policies are developed in a manner that is fully consistent with ICANN's Bylaws and provides for full participation by all stakeholders, including ICA and its constituent members.

[While the views expressed in this request are solely those of the ICA, I presently serve as Interim Chair of the BC and have just been reelected to a two-year term on the policymaking GNSO Council.]

As stated in the ICA's comment on the "Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement", and restated in regard to the renewal registry Agreements for .Cat and .Pro:

The ICA is strongly opposed to the inclusion of new gTLD rights protection mechanisms (RPMs), particularly Uniform Rapid Suspension (URS), in this renewal agreement (RA) for a legacy gTLD. We believe that this attempt by ICANN contracting staff to create de facto Consensus Policy via individual registry contract, absent a relevant Policy Development Process (PDP), is a glaring example of the type of top down, unaccountable action that should be targeted by enhanced accountability measures accompanying the IANA transition proposal. Contracts with legacy gTLDs can contain and enforce Consensus Policy, but it is an impermissible violation of ICANN's Bylaws for contracts to attempt to create Consensus Policy.

... There can be no doubt that this is a staff attempt to create de facto Consensus Policy, as is clearly documented by the fact that the same objectionable provision appears in the proposed renewal RAs for .Cat and .Pro, both released for comment on May 28th. This evidences a deliberate and illegitimate attempt by contracting staff to create a series of precedents that would lead inevitably to the imposition of the URS on major legacy gTLDs such as .Org, .Net and .Com when they come up for renewal, despite the fact that the URS is not an ICANN Consensus Policy. Acting in a manner that is consistent with ICANN's Bylaws is far more important than consistency of RAs – if that latter principle had been paramount then there would be no RPMs at new gTLDs to begin with because they are inconsistent with the Consensus Policy in effect at legacy gTLDs.

The ICA's comment letters also noted relevant provisions of the Final Report on Policy and Implementation (P&I) (<https://community.icann.org/display/PIWG/Final+Report+Redline+Version>) and, in particular, the following Principle: "Policy development processes must function in a bottom--up manner. **The process must not be conducted in a top--down manner and then imposed on stakeholders**, although an exception may be made in emergency cases such as where there are risks to security and stability, as defined in ICANN's Security, Stability and Resiliency framework."

(Emphasis added). No such emergency existed in regard to the renewal of these three legacy Registry Agreements.

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

As also noted in ICA's comment letters, "This staff decision is all the more troubling because it was made in an irresponsibly uninformed manner without waiting for a full evaluation and identification of issues concerning the new gTLD RPMs. On May 1st the public comment period on "Draft Report: Rights Protection Mechanisms Review" (<https://www.icann.org/public-comments/rpm-review-2015-02-02-en>) closed, and on May 29th ICANN staff issued a "Report of Public Comments" (<https://www.icann.org/en/system/files/files/report-comments-rpm-review-29may15-en.pdf>) based upon community input. The Background on that Draft Report states that it "is intended to be available to inform the Issue Report requested by the GNSO as well as the independent review of Trademark Clearinghouse recommended by the GAC. In addition, this paper will serve as input to the Review Team on Competition, Consumer Trust, and Consumer Choice to be convened under Section 9.3 of the Affirmation of Commitments, charged with assessing the effectiveness of the safeguards developed for the New gTLD Program."

None of these additional reviews have been completed. Further, one of the major reasons that the GNSO requested the referenced Issue Report was so that GNSO's stakeholders could decide whether those RPMs should become Consensus Policy for all gTLDs."

We further note that ICANN staff has just issued, on October 9th, the "Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs". This report will be considered by the GNSO Council and the ICANN community at the upcoming ICANN 54 meeting in Dublin, Ireland and, following a public comment period scheduled to end on November 30th, will result in a Final Staff report being issued on or about December 10th.

That Final Report will probably provide the foundation for the initiation of one or more Policy Development Processes (PDP) addressing whether the new gTLD RPMs should be adjusted and, more relevant to this reconsideration request, whether they should be adopted as Consensus Policy and applied to legacy gTLDs and/or integrated with the UDRP. Indeed, the Preliminary Issue Report notes (at pp.22-23):

These [potential] issues would be specific topics to be addressed as part of their Charter by the PDP Working Group, in addition to the more general, overarching issues such as:

- **Whether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs, and the transitional issues that would have to be dealt with as a consequence.**

This passage of the Preliminary Issue Report constitutes further and new material evidence, provided directly by ICANN policy staff, that the question of whether the URS should become a Consensus Policy applicable to all gTLDs is an overarching policy matter, and that it is wholly inappropriate for GDD staff to seek imposition of it on legacy gTLDs as the starting point for registry renewal agreement negotiations because doing so creates de facto consensus policy via contract. It also identifies the presence of “transitional issues” that have in no way been considered in pressing for the inclusion of the URS in the three renewal agreements that are the focus of this reconsideration request.

Unless and until the URS is adopted as a Consensus Policy for all gTLDs, ICANN staff should not be initiating the registry agreement renewal process with any legacy gTLD by suggesting that new gTLD RPMs be the starting point for contract negotiation as, given the inequality in bargaining power, this can have the effect of making the URS a de facto Consensus Policy notwithstanding the fact that the regular order PDP outlined in and required by the Bylaws has not been followed. Such GDD staff actions make a mockery of and undermine the integrity of the GNSO’s upcoming PDP review of RPMs.

Global Domain Division (GDD) staff did just that in regard to all three of these Renewal Agreements. As we noted in our comment letters:

The rationale for this decision – *“With a view to increase the consistency of registry agreements across all gTLDs, ICANN has proposed that the renewal agreement be based on the approved new gTLD Registry Agreement as updated on 9 January 2014.”* – is flimsy and unconvincing. ICANN staff possesses no legitimate authority to create and impose what amounts to Consensus Policy. Proposing that the RA take the new gTLD RA as its starting point is tantamount to creating de facto Consensus Party given the overwhelming negotiating advantage that ICANN has in such a context.

Finally, the GDD’s tactics have an unfair impact on ICA members as both domain investors and as participants in ICANN’s policymaking process, and raises substantial legal issues in the event that any of their legacy gTLD domains affected by this matter become the subject of a URS action. As we stated, “Registrants at new gTLDs had clear notice that they would be subject to the new RPMs. Registrants at legacy gTLDs expect that they shall only be subject to Consensus Policy adopted in accordance with ICANN’s Bylaws. The proposed

RA is a complete betrayal of that legitimate expectation and is totally at odds with ICANN rhetoric in support of registrant rights. It is also likely to raise legality of enforceability issues if there is any attempt to enforce new gTLD RPMs against registrants at legacy gTLDs absent their adoption via Consensus Policy.”

In conclusion, as a participant in the bottom-up multistakeholder policymaking process the ICA , and the rights of our constituent members, are materially and adversely affected whenever ICANN staff seek to impose de facto Consensus Policy in a top-down manner that is inconsistent with the ICANN Bylaws, and that fails to take adequate consideration of majority public comment views and relevant facts and considerations in reaching its decisions – especially where the Board subsequently endorses such action by approving the underlying contractual agreement containing the staff-imposed, top-down de facto Consensus Policy.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

This consideration was also addressed in our comment letters, as follows:

“When the Applicant Guidebook for the new gTLD program was being drafted I was extensively engaged on ICA’s behalf in the vigorous community debate over its RPMs. Throughout their development by the IRT, STI-RT, and then the full community I repeatedly inquired of other stakeholders as well as ICANN senior staff whether adopting these RPMs as new gTLD program “implementation details” would in any way result in their automatic application to legacy gTLDs like .Com. I received repeated assurances that this would not occur – that the RPMs could be imposed on legacy gTLDs only after their impact and efficacy was fully assessed, and then only via a standard PDP to create new Consensus Policy in conformity with ICANN Bylaws.”

ICA members have been deprived of their legitimate expectation, based upon assurances of senior ICANN staff, that application of the URS to legacy gTLDs would only be imposed upon such registries as the outcome of a standard PDP in which they could fully participate. While the recently issued Preliminary issue report is the prelude to such a PDP, its result has been severely prejudiced by this GDD staff intervention.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies).

Please identify the policy(yes) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

The ICA understands that you are requesting "a detailed explanation of the material information not considered by the Board" and that "Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available."

The ICA further notes that the Board did consider the specific concerns raised in the public comments on these renewal agreements, including that "Some public comments expressed concern regarding ICANN's process to use the new gTLD registry agreement as the starting point for renewal RAs for legacy gTLDs. These commenters suggest that taking such a position has the effect of transforming the New gTLD Post-Delegation Dispute Resolution Procedures ... and the Uniform Rapid Suspension (URS) into de facto Consensus Policies without following the procedures laid out in ICANN's Bylaws for their creation.", as well as

that “most of the comments received expressed their objection to the inclusion of the URS to the proposed renewal of .CAT Registry Agreement, claiming that the URS can become a consensus policy only after a full policy development process (PDP) engaged in by the entire ICANN community of stakeholders. These commenters also suggested that imposing URS on a legacy gTLD via the contracting process is an unacceptable staff intervention into the policymaking process.”

We further note and appreciate the Board’s clear statement that “Although the URS was developed and refined through the process described here, including public review and discussion in the GNSO, it has not been adopted as a consensus policy and ICANN has no ability to make it mandatory for any TLDs other than new gTLD applicants who applied during the 2012 New gTLD round.

Accordingly, the Board's approval of the Renewal Registry Agreement is not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so. In the case of [these registries] inclusion of the URS was developed as part of the proposal in bilateral negotiations between the Registry Operator and ICANN.” (Emphasis added)

The ICA particularly appreciates the Board’s clear statement that “ICANN has no ability to make it [URS] mandatory for any TLDs other than new gTLD applicants” and that the Board’s decision “is not a move to make the URS mandatory for any legacy TLDs”.

The material information that we believe the Board has failed to consider is the actual record of exchanges – emails and other correspondence, as well as notes and minutes of meetings and discussions -- between GDD staff and officers and personnel of these three registries that would support the conclusion that “inclusion of the URS was developed as part of the proposal in bilateral negotiations between the Registry Operator and ICANN”. The rationale supporting the Board’s approval of all three of these renewal agreements does not state that it reviewed, or directed impartial non-GDD staff to review, any such documentary evidence in reaching its conclusion that inclusion of the URS was the result of even-handed “bilateral negotiations” rather than GDD staff insistence that the three registries accept it to achieve timely registry agreement renewal.

The Board has ready access to such material documentary information given its broad powers to oversee and investigate staff conduct. The ICA has no such ability.

While it is true that we could have sought disclosure of such material information under the [ICANN Documentary Information Disclosure Policy \(DIDP\)](#) it is unlikely that such disclosure would be timely or complete.

Under the DIDP, “If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request.” The comment period

on all three registry agreements was only 40 days. Given that, even if the ICA was able to develop and submit a comprehensive DIDP request quickly, there is no assurance that the requested disclosure would be made in manner timely enough to provide adequate review and analysis of any subsequently disclosed materials for the purpose of guiding the drafting of an ICA comment letter. Utilization of the DIDP in such comment period circumstances is not practical.

Further, even if a DIDP was responded to in a timely manner, there is no assurance that all of the relevant documents requested would be provided, given the multiple Defined Conditions for Nondisclosure that exist in the DIDP. And the necessary staff review of documents exchanged and developed in confidential contract negotiations again emphasizes that a DIDP request would not likely have provided the ICA with relevant documents in a timely manner given the short public comment window.

In addition, the Board has also failed to consider – because it did not exist at the time of the Board’s decision – the publication of the just-issued “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs” which specifically identifies the question of “[w]hether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs” as an “overarching” issue in an upcoming PDP, as well as the Report’s citation of “transitional issues that would have to be dealt with as a consequence” of such a policy decision.

GDD’s staff actions have had the effect, for the three registries we are now concerned with, of interfering with the standard policy development process in regard to an overarching RPM issue; as well as ignoring the consideration of important transitional issues, such as the fact that current registrants at these gTLDs have not entered into a registrant agreement that includes their consent to be bound by the URS and other new gTLD RPMs (contract terms in which registrants agree to abide by new Consensus Policies adopted in the future would not encompass these registry contracts).

In closing, the ICA wishes to express its appreciation for the Board statement that making the URS mandatory for any legacy gTLD would be “inappropriate.

Our concern is that the Board has not considered material information that is uniquely available to it, as well as key passages of the just-issued Preliminary Issue Report, that would inform it as to whether the inclusion of the URS in these three legacy gTLDs was truly the product of even-handed bilateral negotiations and voluntary registry action, rather than staff imposition of a de facto top-down Consensus Policy that was not the product of a PDP as required by the Bylaws; as well as the full extent of damage to the standard policymaking process encompassing RPMs when GDD staff make unilateral decisions that are beyond their proper role.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

In our comment letters on the three renewal registry agreements, the ICA's request was "**We strongly urge that Section 2 of Specification 7 of the Renewal Agreement (RA) for [these RAs], which contains the URS as well as the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) be deleted in its entirety. Failure to take that action, and the resulting approval of a .Travel RA that contains these RPMs, will constitute a gross and unacceptable violation of ICANN Bylaws.**"

The ICA is now requesting that the Board ask the staff of the GDD to disclose all of the unconsidered material information cited in our answer to question #8, and to review it to determine whether the inclusion of the URS in these three renewal registry agreements was truly the result of voluntary registry action in the context of even-handed bilateral negotiations. Following such review, the Board should publicly state its conclusions and disclose the material information supporting them.

Further, regardless of the result of the Board's review of such material information, we believe the Board should instruct GDD staff to refrain from proposing that the approved new gTLD Registry Agreement be used as the basis for legacy gTLD renewal agreements.

Such GDD staff restraint would reinforce the conclusion that a registry's acquiescence to inclusion of the URS in such an agreement was truly voluntary and the result of even-handed bilateral negotiations. It would also avoid any potential perception that facts are being deliberately created by ICANN staff to influence the outcome of the PDP(s) that will result from consideration of the just-issued Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs.

Finally, we are asking the Board to review and consider the above-cited provisions of the October 9th "Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs" that are relevant to this matter and to recognize the full extent of GDD staff's intrusion into the policymaking process by effectively seeking to predetermine the outcome of an overarching policy matter prior to the initiation and completion of a relevant PDP.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

The ICA believes it has the standing and right to file this request based upon our long-standing participation in ICANN's activities and policymaking process as a member of the BC.

The immediate and prospective material harm and adverse impact suffered by the ICA and our members in relation to the integrity and preservation of the Bylaws mandated policy development process is fully described in our answer to question 7.

While a specific financial value cannot be placed upon this harm, we believe that the multistakeholder policy development policy is priceless and worthy of preservation, and that any harm inflicted upon it is an affront to the global public interest. In addition, exposure to potential URS actions at legacy gTLDs raises legal and monetary risks for ICA members regardless of whether potential allegations of infringement are proved valid, especially as the imposition of RPMs by contract fails to address the transition issues noted in the Preliminary Issue report on RPMs. The relief requested by us in answer to question 9 would reverse or ameliorate the perceived harm and prevent or minimize its future recurrence.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

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Signature

Date 10/13/15