

Report of Public Comments

Title:	Proposed Final New gTLD Registry Agreement		
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Section I: General Overview and Next Steps			
Section II: Contributors			
<p><i>At the time this report was prepared, a total of thirty-eight (38) 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.</i></p>			
ORGANIZATIONS AND GROUPS:			
Name	Submitted by	Initials	
Verisign	Richard Goshorn & Patrick Kane	RG, PK	
Verisign	Chuck Gomes	CG	
Donuts Inc. (Donuts)	Jonathon Nevett	JN	
Bloomberg IP Holdings LLC (Bloomberg)	William Ried	WR	
Verisign	Chuck Gomes & Thomas Indelicarto	CG & TI	
Victorian Government Domain Provider, Melbourne VIC 3000, Australia (Victoria Government)	Cheryl Hardy, Manager eGovernment Research, Department of Business and Innovation	CH	
National Association Boards of Pharmacy (NABP)	Gertrude Levine	GL	
ARI Registry Services (ARI Registry)	Yasmin Omer	YO	
Richemont DNS Inc. (Richemont)	Richard Graham	RG	
Brights Consulting Inc. (Brights Consulting)			
Verisign	Jacquelyn Conrad	JC	
FairWinds Partners LLC et al. (FairWinds)	Elizabeth Sweezey	ES	

Partners et al.)		
Valideus Ltd. (Valideus)	Brian Beckham	BB
Google Inc. (Google)	Halimah DeLaine Prado	HDP
Dish DBS Corporation (DISH)	Deborah Lodge	DL
Yahoo!	J. Scott Evans	JSE
Istituto Salumi Italiani Tutelati (ISIT)	Vito Galluzzi	VG
Kuwait Finance House (KFH)	Majeed Behzadi	MB
Sony Corporation (Sony)		
China Unicom	Zhou Xiaomin	ZX
UniForum SA (UniForum)	Neil Duncan Dundas	NDD
City of Amsterdam	Egbert Wolf	EW
Intellectual Property Constituency (IPC)	Kiran Malancharuvil, MarkMonitor	KM
Business Constituency (BC)	Steve DelBianco	SD
Coalition for Online Accountability (COA)	Steven Metalitz	SM
W.W. Grainger, Inc. (Grainger)	Marc Trachtenberg	MT
Steptoe & Johnson LLP (Steptoe)	Brian Winterfeldt	BW
Allstate Fire and Casualty Company (Allstate)	Marc Trachtenberg	MT
NCSG	Avri Doria	AD
Saudi Telecom (STC)	Mohameed Abdullah Alsanad	MAA

INDIVIDUALS:

Name	Affiliation (if provided)	Initials
Dave Wrixon (D. Wrixon)	Structures Asset Management, Carillion	DW
Toren		
Jason Rawkins (J. Rawkins)		JR
Balasubramanian		
Rubens Kuhl (R. Kuhl)		RK

Section III: Summary of Comments and Analysis

General Disclaimer: This section is 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). Responses labeled "Analysis" are intended to provide a preliminary analysis and evaluation of the comments received.

A. GENERAL COMMENTS

Support for Registry Agreement

Donuts supports the newly published Registry Agreement. *Donuts (6 May 2013)*

While Google still has concerns about specific issues in the Registry Agreement, none of those issues should prevent the current contract from being approved and signed by willing applicants. The revised Registry Agreement corrects a number of long-standing flaws compared with the version contained within the Applicant Guidebook. Google recommends that ICANN allow Registry Operators to begin signing this agreement as soon as possible. *Google (20 May 2013)*

Analysis: *ICANN remains committed to entering into the contract phase of the New gTLD Program as soon as practicable.*

IDN Aliasing--Support

It is time for ICANN to protect existing registrants of IDN.com against confusion from transliterated IDN versions of existing gTLDs. There is audible confusion between extensions. Verisign promised with their application that these domains would effectively be bundled so that only the owner of the original dot com can register them. But there is no evidence that there is going to be any kind of contractual obligation to do so, or even an indication that there is not going to be a massive price differential between English and other versions of dot com. ICANN should be championing the much neglected domain registrants. *D. Wrixon (2 May 2013)*

IDN Aliasing--Opposition

No IDN aliasing should be done for IDNs, and there is no need for clarification from Verisign or PIR. There is no confusion and they should be given to new comers. Verisign and PIR have no legal obligation to give .IDNs to any existing hybrid domain owners. In fact, they must not alias any of those domains if they plan to meet the ICANN goal to reach end users. *Toren (18 May 2013)*

Analysis: *These comments are indicative of the debate regarding IDN aliasing. ICANN believes it would be difficult to fully assess, analyze and reach community consensus on this issue. As a result, this topic may be a matter for the GNSO policy development process in the future.*

Brand gTLDs

Brights supports creation of an alternative Registry Agreement that addresses issues for .brands since the Registry Agreement contains multiple items that are not fully applicable to TLDs intended to be operated in a "single registrant, single user" manner or more specifically what is called a .brand. ICANN should actively pursue the creation of an alternative Registry Agreement and if necessary coordinate these efforts and consult with the interested parties. *Brights Consulting (20 May 2013); FairWinds Partners et al. (20 May 2013)*

The revisions requested for "brand" gTLDs apply equally to all closed gTLDs--whether or not they are linked to specific brands. ICANN's rules do not recognize a "closed brand" category. DISH does not

believe ICANN should distinguish between closed TLDs and closed-brand TLDs or should create a sub-category for the latter. It does make sense for ICANN to make certain adjustments in the Draft Registry Agreement to distinguish between the “open” and “closed” registries. *DISH (20 May 2013)*

The fundamental points needed for brand owners in a second template draft of the Registry Agreement for .brands, or in provisions drafted into the existing Registry Agreement, are proposed in the FairWinds Partners et al. comments. *FairWinds Partners et al. (20 May 2013)*

Valideus supports the shared efforts of the Brand Registry Group (BRG) which is in formation and looks forward to further coordinated dialog with ICANN on a Registry Agreement more cognizant of the particular interests of .brand applicants. *Valideus (20 May 2013); Yahoo! (20 May 2013); China Unicom (29 May 2013); IPC (11 June 2013); Grainger (11 June 2013); Steptoe (11 June 2013); Allstate (11 June 2013)*

Google believes there is value in considering general situations where a standardized variation of the New gTLD Registry Agreement could be used for specific classes of Registry Operator, such as brands. This is already recognized in the inclusion of variant language for Intergovernmental Organizations and government entities. This approach would prevent ICANN from having to negotiate the same set of terms for those Registry Operators repeatedly, creating operational efficiencies and freeing up resources to focus on any situations in which unique exceptions to the base agreement may be warranted. In general, Google is supportive of the suggestions made in the comments submitted to ICANN by FairWinds Partners on behalf of a number of brand applicants. These suggestions may serve as a useful basis for specific contractual variants for brands. *Google (20 May 2013)*

The need for a separate .brand registry agreement is highlighted in several areas, such as Geographic Names, Accredited Registrar Requirement and Transition Upon Termination. *IPC (11 June 2013)*

Analysis: *ICANN is currently considering alternative provisions for inclusion in the Registry Agreement for .brand and closed registries, and is working with members of the community to identify appropriate alternative provisions. Following this effort, alternative provisions may be included in the Registry Agreement.*

Geographical TLDs

Given the particular circumstances applicable to geographical TLDs, it is suggested that the Registry Agreement address these concerns or be flexible enough for the parties to negotiate provisions (or if need be exceptions to “default” provisions) which address these concerns. *UniForum (10 June 2013)*

Analysis: *Registry Operator may request revisions to the form Registry Agreement during the negotiation phase of the New gTLD Program.*

Timing

The new gTLD program has been delayed for far too long. ICANN has permitted delays in the gTLD

program to be caused, in part, by those who never supported the program in the first place and are using delay tactics as a strategy. *Donuts (6 May 2013)*

Analysis: *ICANN remains committed to entering into the contract phase of the New gTLD Program as soon as practicable.*

Process and Transparency

ICANN should explain how it determines which letters it makes public. ICANN should ensure that all comments about the Registry Agreement and new gTLD program are made public. Verisign (20 May 2013)

Analysis: *ICANN is committed to operating in an open and transparent manner. ICANN's public comment forum automatically posts all comments submitted. Additionally, ICANN routinely posts correspondence of general interest to the community. Any community members are invited to contact ICANN regarding any correspondence that should be posted.*

Risks of New gTLD Program--Generic Terms

ISIT agrees with concerns already expressed by other organizations about the risks posed to the European agro-industry by the new gTLD program. Reserving exclusive rights to private companies on certain generic terms, in the absence of an adequate regulation, could result in an improper use of those terms, contrary to the rules of European geographical indications. There is also a clear problem of private trademarks protection. ISIT hopes ICANN will do its best to protect the European agro-industry system, with particular reference to the Geographical Indications (Protected Designations of Origin and Protected Geographical Indication) and the interests of the numerous companies involved. ISIT (21 May 2013)

Analysis: *ICANN acknowledges this comment, which appears to be directed to concepts broader than the Registry Agreement.*

B. NEW gTLD AGREEMENT PROVISIONS

General

Drafting Improvements

Bloomberg requests that ICANN consider incorporating any or all of the handwritten, specific edits Bloomberg inserted in the redlined copy of the Registry Agreement attached to the Bloomberg comments, which are applicable to all applicants for brand gTLDs. A number of the Bloomberg edits are directed to drafting and would apply to base agreements for all gTLD applicants. Incorporating any or all of the Bloomberg handwritten edits would improve the draft and save time in the negotiation process with individual applicants. *Bloomberg (10 May 2013)*

Many of the terms in the Registry Agreement still do not meet commercially reasonable standards and need to be revised before the Registry Agreement can be executed. *Steptoe (11 June 2013)*

Analysis: *Successful applicants may request changes to the form Registry Agreement during the contracting phase of the New gTLD Program. In addition, ICANN will continue to consider comments made to the form Registry Agreement by the community until such time as the Registry Agreement is approved by the ICANN Board of Directors.*

Notice of Updates and Changes

In paragraph 2 on page 1, the language should be revised to read that ICANN reserves the right to make reasonable updates and changes to this proposed agreement during the course of the application process so long as it provides timely notice thereof to the Applicant. *KFH (21 May 2013)*

Article 1--Delegation and Operation of Top-Level Domain; Representation and Warranties

Closed Domains (Section 1.1)

The Registry Agreement should provide for automatic renewal for closed domains. *DISH (20 May 2013)*

Analysis: *Section 4.2 of the Registry Agreement sets forth the conditions to automatic renewal of the agreement.*

Scope (Section 1.3(a)(i))

The “made in writing” clause should be eliminated. It is standard in modern contracts to not limit the representations and warranties regarding the truthfulness and correctness of statements made during the negotiation of the Registry Agreement to statements “made in writing,” as negotiation statements are made by various means. Instead the final agreement should be fully inclusive of all promises, statements, and other agreements between parties that might have been made during the negotiation. *Steptoe (11 June 2013)*

Analysis: *The “made in writing” clause reflects a balancing of ICANN’s need to rely upon statements made by Registry Operators during the negotiation of the Registry Agreement, and a hesitancy of potential Registry Operators to acknowledge ICANN’s reliance on oral statements, which may be interpreted in varying manners. ICANN reserves the right to request that Registry Operators reduce oral statements into writing during the negotiation of the Registry Agreement.*

Letter of Credit (Section 1.3(a)(iii))

Comments text proposes revised language to enable flexibility to sign the Registry Agreement first with an equivalent authorization letter from the bank, and then after signing the Registry Agreement the official standby letter of credit would be provided. *China Unicom (29 May 2013)*

Analysis: *ICANN requires that the continuing operations instrument (for example, a letter of credit) be*

in place and operative at the execution of the Registry Agreement.

Article 2--Covenants of Registry Operator

Approved Services; Additional Services (Section 2.1)

Richemont would prefer that its reasonable changes to its business proposition not be subject to the RSEP process. The RSEP process should only be used where a proposed service touches upon what ICANN has deemed the five (5) critical registry functions. All other changes and/or additions should simply be subject to the prior consent of ICANN, which consent should not be unreasonably withheld or delayed. *Richemont (20 May 2013)*

Analysis: *The RSEP is the mechanism through which existing TLD Registry Operator's seek ICANN's consent to offer new or modified registry services. Registry Operators may offer Approved Services (as defined in the Registry Agreement), but must seek ICANN's consent to offer new services or material modifications to an Approved Service. If Registry Operator wishes to change an Approved Service, then Registry Operator is free to do so, if the change is immaterial in nature.*

Consensus Policies (Section 2.2)

The procedure for implementing new Consensus Policies is unclear. Richemont requires a right to wind down the registry should a change in Consensus Policy have a material impact upon its business. *Richemont (20 May 2013)*

For brand gTLDs, there should be an ability to wind down the registry (and such registry should not be available for use by anyone else for at least two application cycles or similar time frame) if an adopted Consensus Policy impacts our business. The process for involving registries in Consensus Policy development should be clearly defined with adequate reviews and appeals. *Richemont (20 May 2013)*

A Registry Operator of a closed domain should not have to comply with Consensus Policies or other Policies that could harm a brand or registrants of second level domains within a closed domain. *DISH (20 May 2013)*

Analysis: *ICANN's policy development process is set forth in the ICANN bylaws, and the Registry Agreement is not the proper instrument to modify policy development procedures. While noting that a Registry Operator's compliance with consensus policies is a fundamental part of the Registry Agreement (and all existing registry agreements), ICANN will consider community input and comments relating to .brand and closed gTLDs.*

Publication of Registration Data (Section 2.5)

This provision should be explicitly subject to all applicable data protection and regulations (e.g. EU data protection directive and U.S. safe harbor and state data protection laws). There should be such an exemption for at least any registration data that could be considered personally identifiable information or personal data, as this risks putting registries in breach of applicable law. *Richemont (20*

May 2013)

Analysis: *The latest version of the Registry Agreement (Section 7.13) provides that ICANN and the Working Group (as defined in the Registry Agreement) will mutually cooperate to develop an ICANN procedure for ICANN's review and consideration of alleged conflicts between applicable laws and provisions of the Registry Agreement. In the meantime, ICANN will review and consider alleged conflicts between applicable laws and the provisions of the registry in a manner similar to ICANN's Procedure For Handling WHOIS Conflicts with Privacy Law.*

Reserved Names (Section 2.6)

Closed domains should be allowed to use country code or country name designations as part of the second level domains. E.g., DISH or other brand owners may wish to designate the geographic location of an authorized dealer. *DISH (20 May 2013)*

Analysis: *The restrictions set forth in Section 2.6 and Specification 5 to the Registry Agreement relating to use of geographic names are the product of community-wide input (particularly the GAC).*

Protection of Legal Rights of Third Parties (Section 2.8)

Registry Operators of Closed Domains should not be required to maintain Sunrise, Claims and URS processes where the domain is intended to serve a specific brand or designation. In those circumstances, there is no likelihood of trademark infringement. The additional cost of maintaining those periods and processes is not warranted. *DISH (20 May 2013)*

Analysis: *All Registry Operators will be required to implement the required rights protection mechanisms.*

Use of Registrars (Section 2.9(a))

For brand gTLDs, Richemont would prefer to work with its own trusted registrars. The non-discriminatory requirement is less relevant in closed registries and it should be removed. At the very least it should be made clear that a .brand registry operator will not be penalized for utilizing a registrar of its choice for handling all second-level domain name registrations or that a .brand registry operator may only enter into Registry-Registrar Agreements with registrars of its choice. *Richemont (20 May 2013)*

Registry Operators should be allowed to designate registrars for their closed domains and to register second level domains themselves. *DISH (20 May 2013)*

Analysis: *This issue has been raised to ICANN by members of the community. ICANN has requested that these members explain why the existing exemption related to use of registrars set forth in the Code of Conduct is not sufficient to meet the needs of .brand and closed gTLDs. Under the Code of Conduct, a registry operator may request an exemption to the restrictions set forth in the Code of Conduct, if the registry operator demonstrates to ICANN's reasonable satisfaction that (i) all domain*

name registrations in the gTLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the gTLD to any third party that is not an affiliate of Registry Operator, and (iii) application of the Code of Conduct to the gTLD is not necessary to protect the public interest.

Registry-Registrar Agreement (RRA) Amendment (Section 2.9)

Verisign agrees that “immaterial” changes to the RRA should not be subject to ICANN’s approval, but ICANN’s revisions to this section are unclear and provide ICANN with too much discretion. All revisions require 15 calendar days’ notice, thereby creating an inability for the Registry Operator to move forward until ICANN has determined what category the change falls into. ICANN should include examples of changes that would fall into each of the three identified categories (“immaterial,” “potentially material,” or “material in nature”). No standard is provided as to how ICANN will make its determinations. The standards should be defined. There is also no clear timeframe by which the entire process, including consultations, must take place. *Verisign (20 May 2013)*

Analysis: *The revisions reflected in Section 2.9 of the revised Registry Agreement were based on discussions between ICANN and the Registry Stakeholders Group negotiating team. The previous version of the Registry Agreement provided that all revisions to the Registry Agreement be approved in advance by ICANN. Materiality standards are widely used and not defined in contracts. As set forth in the Registry Agreement, if ICANN determines that a change in material, it will follow its existing procedures regarding review and approval of changes to RRAs.*

Definition of Affiliate (Section 2.9 (c))

The current definition of “affiliate” in Section 2.9(c) is not broad enough to cover all forms of group structures. Therefore, see proposed amendment to this provision attached to comments. *J. Rawkins (21 May 2013)*

Analysis: *ICANN revised Section 2.9(c) to clarify the definition of “Affiliate.”*

Pricing (Section 2.10)

This section is not as relevant for brand gTLDs so the provision should be removed for them or made explicitly inapplicable to them. One approach would be to make Section 2.10 inapplicable to Registry Operators to whom an exemption to the Registry Operator Code of Conduct (Specification 9) has been granted. *Richemont (20 May 2013)*

Analysis: *The pricing provisions of Section 2.10 are relevant to all gTLDs, whether or not a Registry Operator receives an exemption from the Registry Code of Conduct.*

Contractual and Operational Compliance Audits (Section 2.11)

Audit rights should not extend beyond the actual entity providing the Registry Services, including where the entity is a subcontracted third party. Internal registration or security information should not be disseminated to third parties by ICANN. Richemont requires indemnification and/or additional

protections (e.g. injunctions) should there be a breach of this provision. As the purpose of the gTLD is outside that of the standard domain name business, Richemont should not be responsible for costs of any audit under Section 2.11(b). *Richemont (20 May 2013)*

Any audit of a Registry Operator that operates a closed domain should be limited to the specific registration and maintenance processes. ICANN should indemnify Registry Operators and affected entities in the event that any confidential information is compromised as a result of an audit or other breach by ICANN. *DISH (20 May 2013)*

Technical audits should be restricted to the relevant service provider(s). Registry operators should not be required to bear the cost of audits, even if certain registry functions have been outsourced to an ICANN-accredited registrar. *NABP (17 May 2013)*

Technical and financial audits should be restricted to the relevant service provider(s) or the Registry Operator, respectively, and not extend to corporate parent companies in cases where the Registry Operator is a subsidiary. Registry operators should not be required to bear the cost of audits, even if certain registry functions have been outsourced to an ICANN-accredited registrar. *FairWinds Partners et al. (20 May 2013)*

Analysis: *The audit provision of the Registry Agreement has been revised numerous times to address the concerns of Registry Operators. ICANN believes that the current provision appropriately balances ICANN's auditing needs with the Registry Operator's interests relating to scope, confidentiality, disruption, etc. The Registry Operator is ultimately responsible for the performance of the agreement, irrespective of whether the Registry Operator has retained a third-party service provider. ICANN also notes that any audit must be tailored to achieve the purpose of compliance, and as such cannot be a fishing expedition as to other unrelated information of a Registry Operator or its affiliates.*

Emergency Transition (Section 2.13)

Due to concern that any emergency transition operator will not necessarily operate the gTLDs in accordance with the mission and purpose of the gTLD (e.g. for prevention of counterfeiting), Richemont requires further protection should an emergency transition take place. *Richemont (20 May 2013)*

It is vital that the Registry Agreement make clear that any Emergency Back End Registry Operator (EBERO) which may provide services for a .brand gTLD will not gain trademark rights to the relevant trademark in so doing. The Registry Agreement should require that the EBERO disclaims any rights in the relevant trademark and that it agree in writing not to challenge registry operator's rights to the trademark as a condition for providing any services for a .brand. *Grainger (11 June 2013); Allstate (11 June 2013)*

The Emergency Back End Registry Operator should be required to maintain the registration

restrictions established by the Registry Operator during a period of emergency transition. *NABP (17 May 2013); FairWinds Partners et al. (20 May 2013)*

There should be a separate provision for transitions for closed gTLDs, in recognition of the goodwill and value of a trademark and other closed designations. If a situation warrants appointment of an Emergency Operator (EO), the EO should be required to maintain the status quo and to uphold the integrity and goodwill of the brand/designation until such time as the RO authorizes changes or a successor. The EO should not be allowed to register, renew, or delete any second level domain or other domain name during the emergency period without the approval of the Registry Operator or its designee. *DISH (20 May 2013)*

STC is concerned about having to bear the costs as provided for in this section. *STC (12 June 2013)*

Analysis: *The EBERO appointed by ICANN will have limited responsibilities and its services will be limited in scope. In general, an EBERO will be tasked with maintaining the operation of the critical registry functions. For example, an EBERO will not make initial registrations in the TLD, but may renew registrations and, in limited cases, delete registrations. In addition, an EBERO will not be tasked with implementing the policies applicable to the gTLD, or the gTLD's mission. An appointment of an EBERO is a short-term measure to protect operation of the gTLD, and not a long-term transition of the gTLD.*

Section 2.13 of the Registry Agreement does not contemplate the "transition" of the operations of the gTLD to an EBERO. Instead, the section provides for the temporary operation of the gTLD by an EBERO. The goal of emergency transition is to facilitate the continued operation of the gTLD during the limited period of time the Registry Operator is unable to do so.

ICANN also notes that Section 7.12 of the Registry Agreement was revised to provide that nothing in the Registry Agreement should be construed to affect any existing intellectual property rights of the Registry Operator.

Registry Code of Conduct (Section 2.14)

Registry Operators of closed registries should not be required to adhere to a general Code of Conduct, due to the differing circumstances between an open registry and a closed registry. ICANN should implement an expedited process for Registry Operators of closed gTLDs to seek and obtain exemptions from the Code of Conduct as warranted by such differing circumstances. *DISH (20 May 2013)*

Analysis: *The Code of Conduct, as set forth in the Registry Agreement, provides for an exemption mechanism. ICANN will consider community input as to any additional appropriate exemptions from the Code of Conduct. ICANN is developing a procedure for reviewing exemption requests.*

Cooperation with Economic Studies (Section 2.15)

Production of data should be subject to applicable laws. Given how many registries Richemont will be operating, complying with an undue amount of requests for data could be costly. Therefore, only

essential and generic information should be provided as part of this process. There are no limits on the amount, nature or burden of the data, and the amount of studies which can request data from a registry, and there is no mention of costs reimbursement. *Richemont (20 May 2013)*

Given the sensitivities under local law of certain kinds of bank information, in this provision ICANN should give a Registry Operator a prior opportunity at its discretion to opt out of any such disclosure process, even if it is anonymous. *KFH (21 May 2013)*

Analysis: *Under Section 2.15 of the Registry Agreement, the Registry Operator is only required to provide a “reasonable” level of cooperation in connection with “an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters.” In addition, the provision was revised in response to public comment to addresses confidentiality concerns. Should the provision of information pursuant to Section 2.15 conflict with applicable law, the parties may rely upon the provisions set forth in Section 7.13 of the Registry Agreement.*

Personal Data (Section 2.18)

This language will need to be updated to reflect the mandatory requirements of European data protection laws and, where applicable, reference to the U.S. safe harbor program. *Richemont (20 May 2013)*

It is standard for confidentiality obligations such as these to be subject to applicable law(s). *Steptoe (11 June 2013)*

Analysis: *The latest version of the Registry Agreement (Section 7.13) provides that ICANN and the Working Group (as defined in the Registry Agreement) will mutually cooperate to develop an ICANN procedure for ICANN’s review and consideration of alleged conflicts between applicable laws and provisions of the Registry Agreement. In the meantime, ICANN will review and consider alleged conflicts between applicable laws and the provisions of the registry in a manner similar to ICANN’s Procedure For Handling WHOIS Conflicts with Privacy Law.*

Article 3--Covenants of ICANN

Disaster Recovery Plan

ICANN should make and maintain, as well as comply with, an acceptable Disaster Recovery Plan/Business Contingency Plan for the Registry Operator. *Sony (24 May 2013)*

Analysis: *ICANN’s disaster recovery plans and business continuity plans are outside the scope of the Registry Agreement, and more appropriately addressed in ICANN’s operational reviews.*

Notice of Changes

It should be made ICANN’s duty that in the event ICANN makes changes to the procedures, rules or policies that the Registry Operator must comply with (Secs. 2.1, 2.2, 2.9(a), 2.13, 6.2, Exhibit A and

each Specification of this contract), ICANN must inform the Registry Operator beforehand (allowing proper time to deal with systematic details) and allow opportunity for the Registry Operator to discuss the applicable changes. *Sony (24 May 2013)*

Analysis: *ICANN will comply with the terms and condition of the Registry Agreement, including providing required notices. In addition, if future amendments to the Registry Agreement are made, ICANN will consider the impact of such amendments on Registry Operators, including whether transition periods are appropriate*

Intellectual Property Rights

It is understood that ICANN maintains a policy of protection for the rights of trademarks and so forth owned by the Registry Operator as well as rights under the Unfair Competition Prevention Act; however, ICANN should bear the responsibility of complying with such policy. *Sony (24 May 2013)*

Analysis: *Whether or not provided for specifically in the Registry Agreement, all parties to the Registry Agreement (including ICANN) must comply with applicable laws.*

Article 4--Term and Termination

Renewal and termination (Section 4.2(a)(i)-(ii))

The renewal and termination provisions could be much more clear and streamlined. E.g., the non-renewal provisions in Section 4.2(a) (i)-(ii) are redundant of the termination provisions in Section 4.3 and could be removed, and merely be revised to state that the Agreement shall renew unless the Agreement has been terminated pursuant to Section 4.3 and 4.4. If this change is made, see Steptoe comments for specific proposed revisions that should be made to Section 4.3 accordingly. *Steptoe (11 June 2013)*

Termination for breach of payment (Sections 4.2(a)(i), 4.3)

The right to terminate for any breach of any payment obligation is too strict. It is sufficient for non-payment to be included within a material or fundamental breach of the Registry Agreement and not a separate termination right (e.g. failure to make payment by one day is essentially a breach of the payment obligations but it is not sufficiently material to allow for termination of the Registry Agreement). *Richemont (20 May 2013)*

Details of alleged breach (Section 4.3)

To implement fairness among the parties, any notice of termination by ICANN should also include "with specificity the details" of the Registry Operator's alleged breach (see for comparison Section 4.4(a)). *KFH (21 May 2013)*

Fees (Section 4.3(b))

This last sentence should be amended by adding at the end of the sentence the phrase "so long as ICANN has not acted with gross negligence, fraud or willful misconduct." *KFH (21 May 2013)*

Termination for levy made against property (Section 4.3(d)(iv))

This wording needs clarification as levies are regularly made against properties and this does not fit within the standard “insolvency event” wording. *Richemont (20 May 2013)*

This provision should be revised to limit its scope to a narrow set of cases where termination is actually warranted. *Allstate (11 June 2013); Grainger (11 June 2013)*

Termination for breach of Specifications 7 & 11 (Section 4.3(e))

For brand gTLDs, the termination right for ICANN for any breach of the relevant specifications needs to be restricted to the extent that the obligations relating to RPMs (Spec. 7) and public interest commitments (Spec. 11) are not required for brand-related gTLDs. *Richemont (20 May 2013)*

Employment Law and Other Applicable Law (Section 4.3(f))

The termination provisions of Section 4.3(f) should be conditioned upon a statement such as that the termination of such officer or director is not otherwise prohibited by applicable law and that doing so would not subject Registry Operator to a potential wrongful termination claim or other claim(s) by such officer or director. *Steptoe (11 June 2013)*

Judicial Review (Section 4.3(f))

Any provisions within this entire section, related for example to conviction of any officer, board member, etc., should be effective only after a final, non-appealable determination of a court of competent jurisdiction. *KFH (21 May 2013)*

Termination by Registry Operator (Section 4.4)

With relevant amendment, termination by Registry Operator should include provisions similar in nature to those set forth in favor of ICANN in Articles 4.3(d), (f) and (g). *KFH (21 May 2013)*

The Registry Operator’s ability to terminate the Registry Agreement based on ICANN’s fundamental and material breaches should not be limited to those relating to Article 3. Rather, under standard contracting principles, Registry Operator should be able to terminate with 30-days’ notice based on ICANN’s fundamental and material breach of any part of the Registry Agreement. *Steptoe (11 June 2013)*

Analysis: *The termination provisions have evolved over time in response to considerable input from the community. ICANN does not anticipate making material revisions to the termination provisions of the Registry Agreement.*

Termination of .Brand Registry

The Registry Agreement must be revised to ensure that .brand registry winds down upon termination, whether that termination is initiated by ICANN or the registry operator and whether it is for cause or not, and is not reassigned. The risk of having ICANN reassign a .brand registry is too great to both the

registry operator and the general public as it is likely in many cases that consumer confusion would result from a reassignment to an unrelated party. Further, giving ICANN the ability to reassign a .brand places too much power in the hands of ICANN in future negotiations over Registry Agreement changes or consensus policy revisions. Changes need to be made throughout the Registry Agreement to address this concern. *Grainger (11 June 2013); Allstate (11 June 2013)*

Analysis: *This comment is under consideration by ICANN, and ICANN will work with the community to determine whether .brand specific provisions are appropriate.*

Transition Upon Termination (Section 4.5)

- ICANN should not have the right to transition any gTLD in circumstances where the registry has terminated the Registry Agreement as a result of a default of ICANN. *Richemont (20 May 2013)*
- To the extent that brand gTLDs are allowed to delegate names to affiliates, customers, licensees, advertisers, dealers, etc., then the provisions in Section 4.5 relating to “own exclusive use” should be broadened accordingly. *Richemont (20 May 2013)*
- Richemont may have broader reasons to object to a successor registry operator taking over the platform (e.g. the new operator may allow the gTLD to sell counterfeit products which would destroy the goodwill created by Richemont). Flexibility in the language is needed to accommodate all reasonable requests not to transition over to a new operator. *Richemont (20 May 2013)*
- ICANN’s obligation to take into account intellectual property rights on any transition may not be sufficient to protect either a brand gTLD or a Generic gTLD, especially where second-level domains have been provided to affiliates or others in the relevant industry. The preferred language should consider: a right for the registry operator to transfer the gTLD to a nominated third party (such as a trusted industry-led foundation); and a prohibition of transferring the gTLD where (i) the gTLD contains the registered trademark of the registry operator; or (ii) the registry operator was otherwise responsible for all the registrations in the gTLD. *Richemont (20 May 2013)*

The BC commends ICANN for its addition to Section 4.5 which states that ICANN will consider IP rights of the Registry Operator in determining whether to transition operation of the registry to a successor operator. This brings the Registry Agreement closer to meeting the BC’s position in this regard. BC notes with concern that ICANN still retains sole discretion for transferring control if the registry had allowed any non-affiliates to use domains it had registered, under Section 4.5(ii)(B). The BC maintains its objection to the phrase “or use” and recommends its deletion in order to accommodate use by entities that are not affiliates of the operator (such as subscribers and customers). *BC (11 June 2013)*

If Sections 4.2 and 4.3 are revised, Steptoe recommends for consistency purposes that Section 4.5 be revised to reflect that Sections 4.2, 4.3 and 4.4 are termination provisions and not expiration provisions. Also, Registry Operator should only have to provide data upon termination that is “reasonably required” for operation of the registry for the TLD “only to the extent” necessary to

maintain operations and registry functions. Other data may be confidential and not necessary to operate the registry upon termination. *Steptoe (11 June 2013)*

Registry Transition

Following Registry Transition, the secondary Registry Operator should be required to maintain registration restrictions to the extent that such restrictions exist to protect the public interest. *NABP (17 May 2013)*

A registry should not be transitioned upon termination of the Registry Agreement in cases where no domains have been sold, distributed or transferred to unaffiliated third parties, or where the gTLD corresponds to a trademark owned by the Registry Operator. *FairWinds Partners et al. (20 May 2013)*

Closed registries

The circumstances under which ICANN could terminate an agreement of a closed registry should be limited to cases of extreme breach or solely with the approval of the Registry Operator. ICANN should not be permitted to transition any TLD in a closed domain without consent of the Registry Operator. A third party should not be allowed to operate a TLD consisting of the Registry Operator's (or former Registry Operator's) trademark or brand, or other closed TLD. *DISH (20 May 2013)*

Analysis: *Further restrictions or qualifications to the transition of a .brand gTLD or termination due to ICANN's breach to a successor registry operator are under consideration by ICANN, and ICANN will work with the community to determine whether such specific provisions are appropriate. However, it is not appropriate for a Registry Operator to retain the sole discretion to assign the gTLD to a successor registry operator. If such an assignment is requested, it will be subject to the approval of ICANN pursuant to the existing provisions of the Registry Agreement. See also above analysis regarding the termination provisions.*

Article 5--Dispute Resolution

Mediation (Section 5.1)

- It is pointless for ICANN to insist that parties participate in a pre-arbitration process that will result in delays to resolution and additional costs and expense for both parties, especially when the process is poorly defined. *Verisign (20 May 2013)*
- Although ICANN added language requiring the mediator to consult with the parties regarding the rules and procedure for mediation, "consultation" is insufficient and the provision continues to create uncertainty and inconsistency in the process. *Verisign (20 May 2013)*
- There is no mechanism in the event the parties are unable to agree to a mediation provider entity and there is no timeframe for resolution. *Verisign (20 May 2013)*

Analysis: *ICANN believes mediation is a beneficial dispute resolution mechanism as it facilitates discussions and compromise between the parties. In addition, the provisions were drafted to provide flexibility to the parties and the mediator to craft proceedings best suited to reach an amicable*

resolution of a dispute.

Arbitration (Section 5.2)

- Punitive or exemplary damages should not be permitted. *Richemont (20 May 2013); STC (12 June 2013)*
- Arbitration should be subject to both the consent of the registry operator and ICANN. *Richemont (20 May 2013)*
- The location of the arbitration should be mutually agreed. *Richemont (20 May 2013)*

Prior to the start of any arbitration process, parties to the agreement should have an equal opportunity to opt out and proceed instead with litigation through the court system of an agreed jurisdiction. *KFH (21 May 2013)*

Limitation of Liability (Section 5.3)

Punitive or exemplary damages should not be permitted under any circumstances. *Richemont (20 May 2013)*

The possibility of punitive damages being awarded against a Registry Operator should be deleted or at least capped (as they have been with other TLDs such as .tel and .mobi). *DISH (20 May 2013)*

ICANN's last minute change carving out the Registry Operator's indemnification obligations from the liability cap creates a significant and unforeseen exposure for Registry Operators. Such a change would normally require substantive negotiations and discussions. ICANN should remove the carve-out and revert to the language agreed to by applicants in the June 4, 2012, version of the Applicant Guidebook. *Verisign (20 May 2013)*

Liability should not be excluded for fraud, confidentiality, data protection, death or personal injury caused by negligence (mandatory in many EU jurisdictions), intellectual property infringement and any other liability that cannot be excluded by applicable law. *Richemont (20 May 2013)*

It is a standard contracting principle that the limitations of liability should not apply to damages : (i) resulting from the gross negligence, intentional breach, bad faith or willful misconduct of a party or its personnel; (ii) stemming from personal injury, death, or property damage caused by a party or its personnel; (iii) arising from claims for which either party has agreed to indemnify the other party pursuant to the provisions of this agreement; or (iv) arising from any breach by a party of its confidentiality obligations. This language should be inserted into Section 5.3. *Steptoe (11 June 2013)*

It is not usual contracting practice to disclaim only warranties "with respect to the services rendered by itself, its servants or agents, or the results obtained from their work." It is thus recommended that this be revised to merely state that each party disclaims all other representations and warranties to protect both parties. *Steptoe (11 June 2013)*

Limitation on Liability--Registry Operator

The maximum aggregate monetary liability of the Registry Operator should be equal to that of ICANN. *NABP (17 May 2013); FairWinds Partners et al. (20 May 2013)*

Specific Performance (Section 5.4)

This provision is overly broad as it is understood that injunctive relief is usually limited to breach of the confidentiality provision or breach of performance obligations that are critical with respect to the services and products to be provided. This provision should be revised accordingly. Also, specific performance should be limited to non-performance by the other party. *Steptoe (11 June 2013)*

Analysis: ICANN appreciates these comments and has made revisions to the Registry Agreement over time 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 provision 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.

Article 6-Fees

Registry-Level Fees (Section 6.1(a))

Section 6.1(a) should be revised to provide that the Registry Operator's obligation to pay the Registry Level Fixed Fees begins 30 days from the date upon which the new gTLD is delegated in the DNS to the Registry Operator. This obligation must be aligned with the commencement of the Sunrise period following provision of 30 days' notice as mandated by ICANN. *ARI Registry (20 May 2013)*

- Insofar as the Section 6.1(a) revisions of the Agreement are intended to postpone the effectiveness of the Registry-Level Fixed Fees to a point in time where the Registry Operator is capable, not hindered by any ICANN restrictions or delays, of commencing its Sunrise, the revisions fail to recognize the restrictions of the Trademark Clearinghouse RPM requirements document. TLD Startup Information cannot be submitted prior to delegation of the TLD into the root zone. Therefore, the earliest possible time a Registry Operator can commence its Sunrise period is 30 days following delegation of its new gTLD. *ARI Registry (20 May 2013)*
- Registry Operators must not be obligated to pay Registry-Level Fixed Fees to ICANN when they are hindered, through no fault of their own, from generating revenue from the new gTLD. *ARI Registry (20 May 2013)*
- Further clarification is required regarding the timing of the Registry Operator's payment of the Registry-Level fees. Language should be added to clarify that ICANN will not invoice the Registry Operator for such fees until sometime following the end of the quarter in which the fees are incurred. *Verisign (20 May 2013)*
- The date that starts the 30-day clock ticking for the Registry Operator's payment of Registry-Level fees must be based on the date the invoice is received, not the date ICANN writes the invoice. *Verisign (20 May 2013)*

Clarification by ICANN on the operation of Section 6.1 and guidance from ICANN on the calculation of fees is requested based on an example set forth in the comments. *Balasubramanian GR (30 May 2013)*

Analysis: ICANN clarified Section 6.1 as it relates to the timing of invoices. The accrual of the obligation to pay the applicable quarterly fees is not tied to the commencement of the RPMs.

Pass-Through Fees (Section 6.4); Minimum Requirements for RPMs (Specification 7)

- The proposed language requires the Registry Operator to agree in advance to pay fees for RPMs pursuant to Specification 7, which has not been finalized. The RPMs must be made publicly available for comment. *Verisign (20 May 2013)*
- ICANN has maintained in this provision the ability to unilaterally revise the Trademark Clearinghouse Requirements (Specification 7) in “immaterial respects” from time to time. ICANN must define “immaterial” as such changes could require Registry Operators and Registrars to expend development time and cost to implement such changes, whether it be to format, naming convention, or technical specifications. The language also leaves open for ICANN to subject Registry Operators and Registrars to timelines that could place a party at risk for non-compliance. *Verisign (20 May 2013)*

Analysis: The RPMs were previously made available for public review, and ICANN has received comments from many within the community. ICANN intends to post the RPMs for public comment following additional input and interaction with the community. As discussed above, materiality standards are widely used and not defined in contracts.

Adjustments to Fees (Section 6.5)

This provision only allows for increases equal to CPI. It should allow for increases less than or equal to CPI. *UniForum (10 June 2013)*

Additional Fees on Late Payments (Section 6.6)

This provision should be deleted in its entirety, given certain applicable institutional restrictions. *KFH (21 May 2013)*

China Unicom could not agree with the preset rate; see text of comments for proposed revision. *China Unicom (29 May 2013)*

Analysis: ICANN appreciates these comments, but does not anticipate making revisions to Sections 6.5 or 6.6. Any material reduction in fees payable pursuant to the Registry Agreement would be the result of public discussion and likely be accomplished through the amendment mechanisms to the Registry Agreement.

Article 7 -Miscellaneous

Indemnification of ICANN (Section 7.1)

The provision is completely one-sided and should have reciprocity. *Richemont (20 May 2013); DISH (20 May 2013)*

Alternatively, the indemnification of ICANN by a Registry Operator should be limited to situations of intentional infliction of harm or gross negligence, and should be limited in amount. *DISH (20 May 2013)*

STC is concerned about the scope of this provision including Section 7.1(b). *STC (12 June 2013)*

Indemnification (Section 7.2)

This provision raises the concern that the indemnification provisions will not provide Registry Operators enough time to respond to indemnification notices. It is requested that all indemnification notices ensure that Registry Operator has sufficient time to investigate and respond to such claims. As with other provisions, ICANN's consent regarding a remedy affecting ICANN must not be unreasonably withheld. *Steptoe (11 June 2013)*

No Offset (Section 7.4)

China Unicom suggests that this term be waived. *China Unicom (29 May 2013)*

Analysis: Existing registry agreements do not provide for reciprocal indemnification, and ICANN does not anticipate providing reciprocal indemnification in the Registry Agreement. The indemnification provision in the Registry Agreement is consistent with existing provisions in registry agreements.

Change of Control; Assignment and Subcontracting (Section 7.5)

Certain changes will be highly confidential and 30 days' advance notice will not always be possible. In such circumstances, Richemont would prefer for consent to be obtained on the change of control and for there to be a right of termination for ICANN if the change of control was not "reasonable." *Richemont (20 May 2013)*

ICANN continues to fail to address Verisign concerns regarding this provision. ICANN's refusal to define review criteria for assignment and change of control gives ICANN the flexibility to make inconsistent, discriminatory and/or dilatory determinations. The language still allows ICANN to object based on undefined criteria, standard or process, which completely undermines the consent provision regarding subcontractors or assignment to compliant gTLD Registry Operators. There are no clear time limits for ICANN's decision to approve a subcontractor or assignment. ICANN must provide certainty to companies in this regard. ICANN also made a last minute change removing important protections restricting ICANN from assigning the Registry Agreement, broadening ICANN's right to assign the agreement to an entity that may not be appropriate and to an entity in an unknown jurisdiction. ICANN should revert back to the language in the Registry Agreement that was included in the June 4, 2012, version of the Applicant Guidebook as it pertains to this provision. *Verisign (20 May 2013)*

An exemption should be created so that no approval is needed from ICANN if the change in control or ownership is due to a reorganization of the Registry Operator's business. *DISH (20 May 2013)*

The current wording in Article 7.5(f)(iii) is not broad enough to cover all forms of group structures. Therefore, see proposed amendment to this provision attached to comments. *J. Rawkins (21 May 2013)*

Analysis: *The Registry Agreement has been substantially revised over time to address concerns relating to ICANN's consent over change of control transactions. As revised, ICANN cannot void such transactions (or prevent their occurrence), but may terminate the Registry Agreement in circumstances where ICANN withholds its consent to an assignment via change of control. The provision also does not require the Registry Operator to give ICANN advance notice of execution of a definitive agreement relating to such a change of control, which greatly reduces confidentiality concerns. ICANN notes that the latest revised version of the assignment provision provides that Registry Operator may assign the Registry Agreement without the consent of ICANN directly to a wholly-owned subsidiary of Registry Operator, or, if Registry Operator is a wholly-owned subsidiary, to its direct parent or to another wholly-owned subsidiary of its direct parent, upon such subsidiary's or parent's, as applicable, express assumption of the terms and conditions of the Registry Agreement.*

Further, the provision provides for the general parameters under which parties will seek consent to assignments, etc. A precise listing of each item or procedure that will be followed when analyzing requests is inappropriate as such listings and procedures are likely to evolve over time, as the marketplace develops and as ICANN and Registry Operators become accustomed to making and responding to such requests in a prudent manner.

Amendment and Waiver (Section 7.6) & Negotiation Process (Sec. 7.7)

Opposition. ICANN should not be allowed to usurp power unilaterally to amend registry agreements, determining registry/registrar rights and economics. *Verisign (1 May 2013)*

- The changes to Secs. 7.6 and 7.7 would give ICANN the right unilaterally to change the terms of the registry agreements, during the term of those agreements, without review by government authority and over the objection of registries. *Verisign (1 May 2013)*
- This is potentially not confined to registry operators of new gTLDs. ICANN will no doubt claim that this broad power, and specific uses of that power to change contracts, will become part of all registry agreements upon their renewal. *Verisign (1 May 2013)*
- The new terms would allow ICANN to determine issues reserved for consensus policies and allow ICANN to determine issues even more far-reaching than consensus policies are permitted to go. *Verisign (1 May 2013)*
- The new powers are subject to challenge under ICANN structured arbitration and an ICANN developed process, not in a court or under normal rules of arbitration. Secs. 7.6 and 7.7 are the antithesis of bottom-up policy development and ICANN's core values and should not

become part of Registry Agreements. ICANN should not have regulatory powers without accountability to an independent authority in a competent jurisdiction which can assess the validity of any such exercise of power against well understood criteria. Terms and conditions should be subject to judicial review as a facial challenge or as applied. *Verisign (1 May 2013)*

- At a minimum, Sections 7.6 and 7.7, if they survive and are recommended to the Board for approval, must contain a carve-out from the arbitration process to provide for judicial review of any action taken thereunder. ICANN's failure to permit judicial review will not insulate the exercise of its power under these sections from court actions that challenge the enforcement of any Registry Agreement unilateral changes. *Verisign (20 May 2013)*
- The Governmental Advisory Committee and Department of Commerce should rein in any such unprecedented expansion of ICANN's powers. *Verisign (1 May 2013)*
- The ICANN Board should vote "no" on Sections 7.6 and 7.7 and revert to the 2010 compromise language included in the final AGB. Verisign is fundamentally opposed to any extraordinary amendment process beyond the 2010 compromise language in the Applicant Guidebook which appropriately requires Registry Operator Approval for a Special Amendment. ICANN's newly proposed language unravels the 2010 compromise by granting ICANN a unilateral right to amend Registry Agreements. ICANN is refusing to act in a transparent manner; its action is not in good faith and is contrary to the multistakeholder process. ICANN is attempting to force through a new version of the Registry Agreement with last minute changes that a subset of anxious applicants could feel compelled to accept, further empowering ICANN to establish these last minute changes as the new baseline for all new gTLD registry operators. *Verisign (3 May 2013); NCSG (12 June 2013)*
- The "public interest" standard is illusory and meaningless in providing boundaries for the exercise of ICANN's proposed new unilateral powers. It is susceptible to misuse and abuse. There is no accountability mechanism in Section 7.6 for ICANN and no safeguards or opportunity for judicial review. Verisign petitions ICANN to withdraw Sections 7.6 and 7.7 and any version of the concept of unilateral amendment rights for ICANN--they are not in the public interest, not in the best interest of the community and not consistent with the letter and spirit of the multi-stakeholder model. *Verisign (16 May 2013)*

Mechanisms such as the Extraordinary Amendment process (Section 7.6 (e-h)) should be developed through the PDP rather than being introduced into an existing Agreement and posted for Public Comment. The Extraordinary Amendment process is both cumbersome and unlikely to be used; therefore, the added complexity in the contract is unnecessary. *Google (20 May 2013)*

There is no need for a separate process for amendment on top of the current PDP process. This section of the agreement creates a new, unnecessarily complex, convoluted and cumbersome process for amendment. The BC encourages ICANN to simplify the process by using existing procedures to solicit community input and involvement in the amendment of the new gTLD registry agreement. *BC (11 June 2013)*

Regarding the Negotiation Process (Sec. 7.7), arbitration is only applicable to a limited number of

clause amendments but would suggest that arbitrators would need profound knowledge of DNS as well as the economics of the industry in order to make a ruling. Also, “2.1” appears twice in Sec. 7.7(e)(ii). *UniForum (10 June 2013)*

Support. The positives in the new agreement outweigh the concerns about the new amendment process (which is far better than the version ICANN published earlier this year). *Donuts (6 May 2013)*

Revisions Required (Section 7.6)

IPC urges ICANN to revise Section 7.6; it is too complex and difficult to grasp. The circumstances defined in the current version of the Registry Agreement under which the ICANN Board could make changes to an Agreement without initiation of a PDP are too narrow. The criteria to be used by ICANN are inapposite. The standards and the automatic stay provision could undermine ICANN responsibility to act in the public interest and should be revised. *IPC (11 June 2013)*

Analysis: *ICANN appreciates these comments. Sections 7.6 and 7.7 of the Registry Agreement are the result of significant discussions and negotiations between ICANN and members of the community. In reaching the terms of these Sections, ICANN considered all public comments submitted on the amendment topic and believes that the revised Registry Agreement appropriately balances ICANN’s need for a mechanism to modify the Registry Agreement when appropriate and Registry Operators’ desire to have contractual certainty over the life of the agreement.*

Ownership Rights (Section 7.12)

Specific reference should be made to the fact that ICANN or any of its third party vendors must not seek to obtain any intellectual property rights over the terms to which the gTLD corresponds. Richemont also requires a mutual non-infringement warranty relating to the use by the other of any intellectual property rights supplied by a party under the Registry Agreement. *Richemont (20 May 2013)*

ICANN or third party vendors involved in operation of a gTLD should not seek or gain trademark or other intellectual property rights over the mark to which the gTLD refers. *FairWinds Partners et al. (20 May 2013)*

This section needs to explicitly acknowledge the .brand registry operator’s rights in the trademark(s) which comprise the .brand TLD string and ICANN needs to explicitly agree that it does not gain any rights in such trademark by delegating the TLD. This section should also have a clear non-challenge provision. *Grainger (11 June 2013); Allstate (11 June 2013)*

This provision should be revised to note that it does not affect any rights the Registry Operator or its affiliates may have in brands used as TLDs. *DISH (20 May 2013)*

Analysis: *Section 7.12 of the Registry Agreement was revised to provide for certain of the safeguards requested in previous comments. Specifically, Section 7.12 provides that nothing in the Registry*

Agreement shall be construed as affecting any existing intellectual property or ownership rights of Registry Operator. Although ICANN is willing to consider further revisions to this Section, ICANN cannot through the Registry Agreement extend protections against third parties, as the Registry Agreement is not binding on such parties.

Obligation to Publish a WHOIS that includes Personal Data (Section 7.13)

This obligation violates our national and European laws and it is hard to imagine a governmental organization signing a contract containing such an obligation. The WHOIS Conflicts with Privacy Law provision in Section 7.13 seems to suggest that there will be no room to negotiate on this issue in individual contract negotiations. The City of Amsterdam believes that use of that Section 7.13 provision at this point is entirely inappropriate. To avoid lengthy delays and complexity given that this issue affects many entities, it is recommended that ICANN arrange for an acceptable standard deviation on this point for EU based registries. The City of Amsterdam is willing to assist ICANN in that effort and notes that already two clear examples (.tel and .cat) can be pointed to in facilitating the drafting and reaching of agreement on an acceptable standard deviation for EU based registries. *City of Amsterdam (11 June 2013)*

Analysis: *Registry Operators may request revisions to the form Registry Agreement during the negotiation phase of the New gTLD Program.*

Confidentiality (Section 7.15)

This clause should be amended to take into account documents which the receiving party should reasonably have considered to be confidential by the nature of the information contained. *Victoria Government (17 May 2013)*

The added language falls far short of the necessary protections found in standard confidentiality clauses. *Verisign (20 May 2013)*

- The term for confidential treatment of information should be extended from two years to three years with a caveat that confidential information that is a trade secret under applicable law shall continue as long as the confidential information remains a trade secret under applicable law. *Verisign (20 May 2013)*
- The standard for disclosure, which includes the information being “useful,” is too low and should be removed. *Verisign (20 May 2013)*
- The provision allows disclosure to an overbroad group of recipients, such as “third parties.” *Verisign (20 May 2013)*
- A standard of care should be imposed to at least the degree of care the receiving party uses to prevent disclosure, publication or dissemination of its own confidential information, but in no event less than reasonable care. *Verisign (20 May 2013)*

Confidentiality provisions should be expanded, and should incorporate appropriate remedies in cases where breaches in confidentiality result in material harm to the Registry Operator. *FairWinds Partners et al. (20 May 2013)*

It is not standard to limit confidentiality obligations to only two years. Rather, they should be extended “so long as such information is treated as confidential by the disclosing party.” *Steptoe (11 June 2013)*

Confidentiality provisions should be expanded, and should incorporate appropriate remedies in cases where breaches in confidentiality result in material harm to the Registry Operator. *NAPB (17 May 2013)*

Analysis: *The confidentiality provision was drafted to ensure appropriate confidential protections for the parties. ICANN believes that, when read in its totality, the confidentiality provision appropriately protects confidential information of the parties, and provides clarity as to the information that will be considered “confidential” under the provision. For example, the references to “use” and “third party” (as noted in the comments) in Section 7.15(c) is qualified by the proviso that such third party (such as outside counsel, consultants, etc.) use must be limited to (i) use in connection with the performance of the activities under the Registry Agreement and (ii) third parties bound by confidentiality obligations at least as stringent as those set forth in the provision. ICANN revised the provision to include a three-year term (rather than two years).*

C. NEW gTLD AGREEMENT SPECIFICATIONS

Specification 2, Data Escrow Requirements

Notification of Deposits (Part A, Section 7)

The second paragraph of this provision limits the Registry Operator to the draft version available at execution of the Agreement and does not allow the Registry Operator to utilize a later draft version of the specification that is updated following execution of the Agreement. This is problematic for Registry Operators that manage the infrastructure for several TLDs which may launch at various times. Section 7 should be revised to allow, but not require, the Registry Operator to utilize any draft version that is updated following execution of the Agreement but prior to publication of a RFC. *ARI Registry (20 May 2013)*

Analysis: *ICANN agrees with the suggestion and will clarify in the specification that Registry Operators can use the current draft or a subsequent draft of the specification, but once the specification becomes an RFC, they will need to transition to the RFC version within 180 days.*

Release of Deposits (Part B, Section 6)

This language of this provision could result in the Registry Operator being in breach or otherwise penalized through no fault of its own, but due to the actions/inactions of the Escrow Agent. The language needs to distinguish between a failure of the Registry Operator and the failure of the Escrow Agent. *Verisign (20 May 2013)*

In some cases there should be validation of the escrow release trigger event. This is true for Secs. 6.1, 6.5, 6.6, 6.7, and 6.8. In these events, ICANN should provide supporting documentation to prove that the event has occurred. *UniForum (10 June 2013)*

Analysis: *Registry Operator is responsible for the performance of the escrow agreement by the escrow agent it contracts with to provide the escrow services. If the escrow agent does not provide ICANN required notices, such failure should not adversely affect ICANN's ability to receive deposits, and presumably Registry Operator would seek recourse against the escrow agent for any failure to comply with its obligations under the applicable escrow agreement. Escrow agreements may provide for dispute resolution mechanisms (such as directing that disputes between ICANN and Registry Operator under the escrow agreement be resolved pursuant to the dispute resolution provisions of the Registry Agreement) in the event that Registry Operator believes that ICANN was not entitled to a deposit that it received.*

Indemnity (Part B, Section 9)

Governmental entities are generally not able to agree to the inclusion of the indemnity provision as specified in Sec. 9. The alternative and preferred approach was recognized by ICANN in amendments to Article 7.1(a) of the Registry Agreement, which provides specific text for intergovernmental organizations or governmental entities. For consistency, the proposed indemnity clause in Data Escrow Requirements should be amended in the same way. *Victoria Government (17 May 2013)*

ICANN should be required to indemnify the Registry Operator from all claims, damages, liabilities, costs, and expenses unless incurred due to willful omission or breach of the Registry Agreement. *NABP (17 May 2013); FairWinds Partners et al. (20 May 2013)*

The words "absolutely and forever" should be deleted. Indemnity should be limited to a two-year period subsequent to the termination of the Escrow Agreement. *KFH (21 May 2013)*

STC is concerned about the scope of this provision. *STC (12 June 2013)*

Analysis: *Registry Operators may request modifications to their data escrow agreement, including the indemnification provisions imposed by a particular escrow agent. ICANN will modify the specification to delete the requirements related to indemnification between Registry Operator and the escrow agent. ICANN will not be a party to the escrow agreements and therefore will not have any indemnification obligations thereunder. The term "absolutely and forever" is consistent with existing TLD escrow agreements.*

Specification 3--Format and Content for Registry Operator Monthly Reporting

Registrar State Columns

The registrar state columns should be removed. The AROS solution should provide this information in a more relevant and TLD specific manner and should be used instead. To avoid unnecessary changes

to the format, it would be acceptable for Registry Operators to be allowed to simply put “0” in the “pre-ramp-up” and “ramp-up” columns. *ARI Registry (20 May 2013)*

Zone File Access Passwords Column

The “zfa-passwords” column should be removed from the report. If a Registry Operator opts to use the CZDA to deliver the zone file, there is currently no way to determine this value for the report. ICANN should obtain the relevant information from the CZDA. To avoid unnecessary changes in format, it would be acceptable for Registry Operators to put “0” in the “zfa-passwords” column. *ARI Registry (20 May 2013)*

Total Nameservers Column

The source data for this report column is ambiguous. Host objects are registered, and those host objects act as nameservers. ARI questions whether this column refers to the number of host objects under sponsorship, the number of host objects under sponsorship that are acting as nameservers or the number of nameserver associations from domains under sponsorship. ICANN should revise the description of the total nameservers column to clarify the intent of the report column. ICANN should note that host objects may be shared across several TLDs on a shared registry platform; depending on the requirements, attributing a host object to a TLD may not be possible and therefore the provisions added for the Registry Functions Activity Report may also apply. *ARI Registry (20 May 2013)*

Analysis: *Regarding the registrar state and ZFA password columns, the Registry Operator is responsible for the contents of the monthly reports, and ICANN simply publishes what the Registry Operator provides. The AROS and CZDA systems provide the data for the Registry Operator to fulfill its reporting requirements. ICANN will add clarification language regarding the nameservers column.*

Specification 4--Registration Data Publication Services

Registration Data Directory Services (Section 1)

This provision raises significant concern regarding both the ambiguity of the term “commercially reasonable” and its ignorance of established ICANN policy making processes. Requiring the implementation of a new standard no later than 135 days after being requested to do so by ICANN is unreasonable and does not fully take into account the potential magnitude of the implementation efforts and the differing development capacities of Registry Operators. This provision also is not consistent with the Roadmap to Implement SAC 051, and does not recognize the initiation of a GNSO PDP to implement a new standard. The provision should be revised to address ARI Registry’s concerns and to make the implementation timeframe consistent with other provisions having a 180 day period (e.g. Part A, Section 3.1) *ARI Registry (20 May 2013)*

The newly added Section 1.4 makes the positive change that registry operators may provide more registration data than the minimum required by the specification; however, it forbids registry operators from offering greater transparency and accountability through such additional data outputs unless ICANN approves it. This condition is unjustified. If there is a good reason for it, ICANN should

spell that out, and should make this condition subject to a requirement that ICANN not unreasonably withhold such approval. *COA (11 June 2013)*

The entirety of Section 1.10 has been deleted, thus eliminating any obligation by registry operators to implement any new or revised model for gTLD data directory services that may be adopted by the ICANN Board after public comment based on the recommendations of the Expert Working Group. It is discouraging that ICANN is retreating so rapidly and completely from its initial promotion of the Expert Working Group as the linchpin to resolving the persistent problems plaguing Whois. Deletion of Section 1.10 contrasts starkly with the addition of a new paragraph in Section 1 requiring each registry operator to implement a new IETF-developed standard supporting access to domain name registration data with no indication that any action at all by the ICANN Board or any public comment will be involved. Section 1.10 should be reinstated, especially if this new paragraph is retained. *COA (11 June 2013)*

In Section 1.11, COA suggests again that the provision be expanded to require registry operators to provide 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 (11 June 2013)*

Analysis: *The revisions to Specification 4 reflect numerous discussions with members of the community, and balance ICANN's desire for implementing enhancements to registration data publication services and the Registry Operator's need for contractual certainty and reasonable implementation timelines. The new language inserted requiring the implementation of the new standard is consistent with language in the .com registry agreement, which is the largest gTLD based on domain names under registration.*

Zone File Access (Section 2)

The addition of the text "optionally through the CZDA provider" throughout Section 2 in no way addresses the ambiguity regarding the obligations of the Registry Operator in relation to Zone File Access. While ARI Registry expects the nature of this obligation to include ensuring AXFR access to the CZDA's nominated servers once per day per zone, ARI Registry requests documentation of the interface between Registry Operators and the CZDA, which would be consistent with the level of detail provided in other Specifications of the Agreement. ARI Registry recommends use of proposed text in its comments to form the basis of ICANN's efforts to document this interface (see ARI Registry comments text). ARI Registry also requests documentation of the mechanism by which the CZDA provider informs Registry Operators to reject and/or revoke access of users that violate this mechanism and recommends use of proposed text in its comments to form the basis of ICANN's efforts to document this mechanism. *ARI Registry (20 May 2013)*

Both for brand gTLDs and Generic gTLDs, Richemont requires that the obligation for the provision of information for the relevant file is limited so as to exclude any proprietary information contained within it. *Richemont (20 May 2013)*

ICANN has yet to provide information regarding the CZDA Provider. *Verisign (20 May 2013)*

Analysis: *It should be noted that the information in the DNS is public by the nature of the service and therefore including proprietary information should be carefully considered. Regarding CZDAP, ICANN is launching the beta of the CZDAP and additional details will be available shortly.*

Exceptional Access to Thick Registration Data (Section 3.2)

The change from two business days to three calendar days is not comparable and should be increased to five calendar days. ICANN's revision from a business day requirement to a 365-day capability requirement could potentially pose additional unanticipated costs for some Registry Operators. *Verisign (20 May 2013)*

Analysis: *ICANN adjusted the requirement to "as soon as commercially reasonable, but in no event later than five calendar days."*

Specification 5--Schedule of Reserved Names

Reservations for Registry Operations

ICANN has not provided the rationale for removing the Tagged Domain Names which was put in place to minimize conflicts for future changes to the IDN tag (xn--). *Verisign (20 May 2013)*

Section 3 is entirely new and was added without consultation with the IPC. It raises concerns and requires clarification. *IPC (11 June 2013)*

- IPC recommends that all names activated pursuant to Sec. 3.2 and allocated pursuant to Sec. 3.3 be checked before activation or allocation against the TMCH database, with notification to the Registry Operator of any identical match to a trademark (or a corresponding label) in the TMCH. *IPC (11 June 2013)*
- If the Registry Operator proceeds with activation or allocation of such a name, the owner of the identical trademark should receive notice (regardless of any expiration of the 90-day mandatory notification period), and under appropriate circumstances should have the opportunity to challenge the activation or allocation. A specific dispute resolution procedure should be available. The IPC is prepared to propose such a procedure upon ICANN's request. *IPC (11 June 2013)*

ARI Registry recommends rejection of the proposed revisions to Section 3.2 of Specification 5. *ARI Registry (20 May 2013)*

Analysis: *Generally, the changes made to Specification 5 were intended to provide greater specificity and certainty relating to the reservation of domain names by the Registry Operator. ICANN notes that the provision prohibiting Reserved LDH labels (R-LDH labels) or "tagged domain names" as described in RFC 5890 was not deleted but only moved to Specification 6.*

Country and Territory Names, Other Reserved Names (Section 4, Section 5)

In Section 5, the new language states that upon 10 calendar days' notice ICANN can require the Registry Operator to withhold additional names from registration (Section 5). The provision does not address how a Registry Operator is expected to resolve a situation where ICANN adds domain names to a list of domain names that are already registered. The same issue could occur if the Country and Territory Name List is updated (Section 4). Failure to address this problem now will result in Registry Operators assuming that such existing and registered domain names are not subject to any claw-back should ICANN decide to expand the list of reserved names in the future. *Verisign (20 May 2013)*

Analysis: *As specified in the lead-in paragraph to this Specification, the requirement only relates to initial registrations.*

.BRAND/Closed, Single-Registrant and Geographical Names

ICANN should allow the release of reserved geographic names and two-character labels for use by the Registry Operator in conjunction with the promotion or operation of the registry. *NABP (17 May 2013); FairWinds Partners et al. (20 May 2013)*

Use of two-character labels and country codes or country names as second level domain names may be valuable as portals for brand gTLDs. ICANN and the GAC should develop a streamlined process whereby such names can be more easily released for usage. It would be highly inefficient for the registries to individually reach agreement with the governments and country-code managers. As such the GAC and ICANN prior consent requirements should be removed. *Richemont (20 May 2013)*

The BC reiterates its request for an exception that allows single-registrant TLDs to register domains for their markets and operations based in countries and territories, without the requirement to obtain express authorization from governments for each country and territory name. The BC also reiterates its request that, if an exception is not possible, ICANN should implement a centralized mechanism where single-registrant TLDs can request authorization from all governments in a consolidated request. *BC (11 June 2013)*

Analysis: *See above analysis related to Section 2.6.*

International Olympic Committee et al (Section 5)

If ICANN intends this provision to give ICANN the limited right to reserve additional names of the IOC, International Red Cross and Red Crescent movement only, then the language should expressly be limited to that effect. *IPC (11 June 2013)*

Analysis: *This Section will be clarified to make clear that this provision relates only to the IOC, International Red Cross and Red Crescent.*

Specification 6--Registry Interoperability and Continuity Specifications

Proposed Amendment (Section 1.2)

Language is suggested to be inserted after 5732: “(if not supporting domain attributes per RFC 5731)”. This amendment would make clear that while RFC 5731 supports both host objects and domain attributes, leaving its choice to the registry, ICANN is not requiring all gTLD registries to only use host objects (defined in RFC 5732), but keeping this technical choice up to the registry, provided registry documents this choice to ICANN prior to deployment as specified in the last sentence of Section 1.2. *R. Kuhl (10 June 2013)*

Analysis: ICANN agrees and will clarify Specification 6.

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

Unclear Which RPMs Apply

Should this not refer just to those RPMs “specified in this Specification” and those independently developed (and not refer to “ICANN mandated”)? Spec. 7 also refers to the URS but not the UDRP. Does that mean UDRP will not apply to new gTLDs? If it will then this should be specified, as referring to application of RPMs “specified in this Specification” would seem to indicate otherwise. *UniForum (10 June 2013)*

Analysis: The RPMs specified in Specification 7 must be applied by Registry Operators. Registry Operators may enact supplemental, non-contradictory RPMs in addition to the Specification 7 RPMs at their discretion. UDRP will apply with respect to all gTLDs between registrars and registrants.

RPMs: Sunrise and Reservation of Certain Geographic Names

There should be a provision made for a Registry Operator to reserve geographic names significant in the area (e.g. names of cities, government or municipal departments, etc.) prior to the Sunrise phase and to subsequently register them to the appropriate entity. It will not be feasible to allow these names to be registered to members of the public during the Sunrise phase. *UniForum (10 June 2013)*

Closed Domains

Registry Operators of closed domains should be exempt from the Sunrise, Claims and URS processes as there is little likelihood of trademark infringement in the closed domains. *DISH (20 May 2013)*

A Registry Operator should not be required to implement a Sunrise Period or Claims Service and pay associated fees in cases where registration restrictions prevent unaffiliated third parties from registering within the gTLD. *FairWinds Partners et al. (20 May 2013)*

Other Trademark (TM) Validation Services

Specification 7 is unclear on whether other TM validation services can be used; this should be clarified. UniForum will meet its obligations under the TMCH but also wishes to make use of an alternative, voluntary, mark validation service for the four geographic TLDs it has applied for. Clarity is also required as to whether such services can be used in addition to or as a voluntary alternative to

the TM Clearinghouse. *UniForum (10 June 2013)*

Precedence for Certain Trademarks

There is pressure for UniForum to give precedence to holders of African trademarks during the .africa gTLD's Sunrise phase in the case of a contention. It is not clear from Spec.7 whether UniForum will be able to do this. *UniForum (10 June 2013)*

Precedence and Conflicts Between Agreement and TMCH Requirements Document

Clause 2 regarding conflicts between the Agreement and the TM Clearinghouse Requirements document is light on details. This sentence is of little assistance as there is little for the TM Clearinghouse Requirements document to conflict with. UniForum suggests that governing principles be clearly stated in the Agreement, not the TM Clearinghouse Requirements document. *UniForum (10 June 2013)*

It is important to retain the principles underlying rights protection in the Registry Agreement, which is the document signed by the parties. Therefore, Spec. 7 should set out the principles governing RPMs for new gTLDs, while the requirements document should deal with the particulars of implementation and compliance with such RPMs. For example, if as implied in the TMCH document that the TMCH will be the only provider of validation services, then this point should be stated in the main agreement and not in the requirements document. If only certain classes of rights in a name will be recognized in the sunrise period, this should also be specified in the main agreement. *UniForum (10 June 2013)*

Registration of Domain Names by Holders of Non-Trademark Rights During Sunrise

It is unclear under Spec. 7 whether UniForum will be able to allow holders of non-trademark rights to register corresponding domain names during the Sunrise phase. Such rights would be registered company or trust (foundation) names. It is suggested that Spec. 7 set out the IP rights that will be recognized during the Sunrise phase. *UniForum (10 June 2013)*

Analysis: ICANN is currently reviewing and revising the RPMs, and will take these comments into consideration before finalizing a draft that will be posted for public comment. ICANN is committed to allowing Registry Operators flexibility in the implementation of the RPMs for their TLD, but must balance that flexibility against ensuring that the RPM's minimum requirements are effectuated.

Dispute Resolution Policy (DRP)

UniForum intends to introduce its own DRP for the four geographic gTLDs it has applied for which will differ from the URS and UDRP in that it will afford protection to a wider range of rights to a name and will also deal with offensive registrations and abusive practices. UniForum requires certainty as to which will prevail where there is overlap between the URS and UDRP and its proposed DRP so as to prevent "forum shopping." If a complainant is unsuccessful under the dotAfrica DRP, UniForum would like if possible to prevent a further action being brought under the UDRP and for the dotAfrica DRP to have sole jurisdiction if that is possible. The agreement should either specify how the different DRPs would operate, or have sufficient scope for the parties to negotiate these aspects during the

contracting phase. *UniForum (10 June 2013)*

Analysis: *The RPMs specified in Specification 7 must be applied by Registry Operators. Registry Operators may enact supplemental, non-contradictory RPMs in addition to the Specification 7 RPMs at their discretion.*

Specification 8--Continued Operations Instrument

Access to Funds (Spec. 8 & Section 4.5)

ICANN has failed to address Verisign's concerns over the breadth of ICANN's access to the Continued Operations Instrument (COI) funds. ICANN's reference in its Report on Public Comments to the remedy of a dispute resolution procedure for an abuse is unpersuasive given ICANN's insistence that it be entitled to a seemingly unconditional release of funds and its attempt to insulate itself from a Registry Operator's claim of breach. *Verisign (20 May 2013)*

- The language allowing ICANN to draw down on the COI in the event of an emergency transition termination/expiration of the Registry Agreement for any reason is too broad and should be narrowed (i.e., termination for any reason should not be justification to access COI funds if there not is an urgent need to transition registry services). *Verisign (20 May 2013)*
- There is still 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 period for the Registry Operator to object or dispute such notice. *Verisign (20 May 2013)*

"Best Efforts" Clause

Large multi-national corporations do not generally agree to "best efforts" clauses, but can agree to "commercially reasonable" efforts language. *Steptoe (11 June 2013)*

Analysis: *As previously indicated, ICANN intends to reserve use of the COI for the maintenance and operation of the TLD in cases where the Registry Operator has failed to provide critical registry functions. Section 4.5 of the Registry Agreement was revised in response to prior public comments. Given the importance of the COI to registrants in the TLD, ICANN believes a "best efforts" commitment is appropriate.*

Specification 9--Registry Operator Code of Conduct

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

ARI Registry recommends rejection of the proposed revisions to Section 1(b) of Specification 9. ARI Registry opposes the concept of a cap; it is arbitrary, limits flexibility and innovation, and does not recognize the diversity of new gTLD business models. *ARI Registry (20 May 2013)*

ARI Registry urges the following clarification for domain names registered in the Registry Operator's

own right that are reasonably necessary for the management, operations and purpose of the TLD:

- the Registry Operator must act as the Registered Name Holder as that term is defined in the then current ICANN RAA. *ARI Registry (20 May 2013)*
- the Registry Operator must activate these names and such activations will be considered Transactions for purpose of section 6.1 of the Agreement. *ARI Registry (20 May 2013)*
- the Registry Operator must either register such names through an ICANN accredited registrar or self-allocate such names and submit to and be responsible to ICANN for compliance with ICANN Consensus Policies and obligations in Secs. 3.7.7.1 through 3.7.7.12 of the then current RAA (or any other replacement clause setting out the terms of the registration between a registrar and a registered name holder). *ARI Registry (20 May 2013)*
- the Registry Operator may release these names for registration to another person or entity. *ARI Registry (20 May 2013)*

Analysis: ICANN considered these comments but believes it is preferable to maintain a limit on self-registered names. However, the registry will be able to register names through a registrar.

Rationale for Removal of Section 1(e)

ICANN's Summary of Changes does not explain the removal of Section 1(e) preventing Registry Operators from disclosing confidential registry data or information about its registry services or operations to any employee of any DNS service provider, except where equal access is provided. ICANN is asked to explain why this provision was removed. *Verisign (20 May 2013)*

Analysis: Section 1(e) was removed in response to comments that indicated that it was vague, impractical and did not serve the community interest to implement complicated and costly business processes, and it was unclear what information was to be subject to the requirement. In addition, these applicants advised that such a provision was impractical in the context of executives and board members of a company that operates both registry and registrar businesses.

Exemption to Registry Operator Code of Conduct (Section 6)

With regard to the operation of the brand gTLD exemption, it is unclear how ICANN will interpret the "transfer control or use" language which is critical to developing plans for using brand gTLD registries. The exemption must be broad enough to allow brand gTLDs to provide second-level domains to customers, affiliates, licensees, advertisers, dealers, etc. *Richemont (20 May 2013)*

ICANN still has not identified the process by which Applicants may seek to obtain a Code of Conduct exemption. *Verisign (20 May 2013)*

- ICANN's determination whether to grant an Applicant's request for a Code of Conduct Exemption should not be, as is set forth in this provision, "in ICANN's reasonable discretion." It should be pursuant to defined criteria that ensure exemptions are granted in a consistent and nondiscriminatory manner. *Verisign (20 May 2013)*
- It is unclear whether Registry Operators that have received an exemption to the Code of Conduct must use only ICANN-accredited registrars. *Verisign (20 May 2013)*

A clear, streamlined process should be established to grant exemptions to the Code of Conduct, provided that the Registry Operator does not sell, distribute, or transfer control of second-level domains to unaffiliated third parties. *FairWinds Partners et al. (20 May 2013)*

There is an apparent inconsistency between Sections 6(i) and 6(ii) of Specification 9. Therefore, see the proposed amended wording attached to comments. *J. Rawkins (21 May 2013)*

Analysis: *ICANN is developing a procedure for reviewing exemption requests.*

Specification 11--Public Interest Commitments

Registrar Accreditation Agreement (RAA) (Section 1)

A proposed change to Section 1 deletes the requirement that registry operators do business only with registrars that have signed up to the most recent version of the RAA, confining that rule only to the current situation involving the 2013 RAA. Either this reflects an unfounded belief that the 2013 RAA is the pinnacle of perfection for registrar accreditation, or it gives registries unjustified influence over future enhancements to the minimum standards registrars are required to meet. This change deprives ICANN of a powerful tool to encourage registrars to sign up to improved standards unless it can also persuade registries to narrow the spectrum of registrars with which they do business. The proposed deletion should not be made. *COA (11 June 2013)*

Analysis: *Following numerous discussions with members of the community, ICANN determined that implementation of ongoing requirement to conduct business with registrars that are party to the most recent form of RAA was both impractical and not fair to Registry Operators, as it would significantly impact their continued operations. ICANN views the existing requirement (i.e. implementation of the 2013 RAA) as a significant benefit to the community. When future forms of RAAs are developed, ICANN will work with the community to identify appropriate mechanisms to encourage registrars to transition to the latest form RAA, or utilize the amendment provisions of the 2013 RAA.*

Amendment or Withdrawal Process for PICs

Language added by many applicants giving the applicant sole discretion to modify or discontinue PICs for any substantial or compelling business need defeats the purpose of Spec. 11 which is meant to ensure that ICANN can enforce any relevant commitments made during the application process as part of the new Registry Agreement. BC recommends that ICANN develop a community participation process where registry operators may seek amendments or withdrawals to their PICs. The BC also encourages the GAC and ICANN to ensure that the community can hold registry operators to any relevant commitments that are important to protect consumer and business interests in these new gTLDs. *BC (11 June 2013)*

Analysis: *ICANN revised the PIC Specification in response to the GAC's Beijing Communiqué.*

PICs Dispute Resolution Procedure (DRP)

The PICs DRP continues to be poorly defined. Applicants who submit PIC specs should be permitted to define the third parties who would have standing to enforce the PIC spec against the applicant. In this way, the virtually unlimited pool of third parties who might challenge a PIC spec is limited to the community that the PIC spec is intended to address. *Verisign (20 May 2013)*

ICANN should not introduce a complex DRP for enforcement of PICs. ICANN can and should enforce PICs through its existing contract enforcement mechanisms. If needed to allow for such enforcement, it may be reasonable to work with the community to establish standardized commitments that ICANN is comfortable enforcing and that simultaneously serve to fulfill any requirements imposed in response to the GAC's recent advice on safeguards. *Google (20 May 2013)*

The proposed revision to Section 2 creates a potential ambiguity in relation to subsequent amendments to the PICDRP. The revised language could be construed as limiting ICANN's ability to implement material changes to the PICDRP. Such potential material changes to the PICDRP could be warranted and appropriately binding on Registry Operators if known at the time of execution of the Registry Agreement. *IPC (11 June 2013)*

Further amendments to Spec. 11 may be appropriate based upon any further refinement of the PICDRP. ICANN should also address the propriety of language included in some of the submitted PICs which purported to reserve to applicants the ability to discontinue compliance with the PICs at the applicants' sole discretion. *IPC (11 June 2013)*

Analysis: *ICANN has been in ongoing community discussions regarding the PICDRP and will provide additional details before the procedure is implemented.*

Generic gTLDs

Richemont would prefer that PICs are taken from a clear set of ICANN published statements with appropriate ICANN enforcement guidelines. Richemont does not wish to be challenged by third parties to the extent there is any ambiguity in respect of its PIC. *Richemont (20 May 2013)*

Brand gTLDs

For brand gTLDs, Richemont does not consider that Article 2, Section 2.16 or Specification 11 are required. *Richemont (20 May 2013)*

Analysis: *These provisions will apply to all new gTLD Registry Operators.*

Enforcement of Commitments

The plain language of the proposed changes continues to give ICANN enforcement rights, and, moreover, gives ICANN the right to impose any remedy against a Registry Operator (including termination). *Verisign (20 May 2013)*

Analysis: *It is envisioned that the PICDRP will be the primary enforcement mechanism for PICs. ICANN will implement the remedies recommended by the PICDRP panels, subject to the objection procedures provided in the PICDRP.*