

## ICANN Organization Report of Public Comment Proceeding Template (v4.0)

### Proposed Renewal of .MOBI Sponsored Registry Agreement

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Public Comment Proceeding	
Open Date:	23 December 2016
Close Date:	1 February 2017
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Important Information Links
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#### Section I: General Overview and Next Steps

##### General Overview

ICANN posted for public comment the proposed agreement for renewal of the 2005 Registry Agreement for .MOBI, which is set to expire on 31 March 2017. This proposal is the result of discussion and agreement between ICANN and Afilias Technologies Limited. The proposed renewal is based on the [approved new gTLD Registry Agreement as updated on 9 January 2014](#) with certain provisions from the [10 July 2005 Sponsored TLD Registry Agreement](#) being carried over to account for the specific nature of the .MOBI TLD. The proposed changes to the .MOBI Registry Agreement are similar to those made in several recently renewed "legacy" gTLDs, namely .JOBS, .TRAVEL, .CAT, .PRO, and .TEL., except that Appendix S is not carried over in the form of Specification 12 (Community Registration Policies). Therefore, the .MOBI proposed Registry Agreement is not categorized as a "Community TLD".

From 23 December 2016 through 1 February 2017, ICANN posted the proposed renewal of the .MOBI Registry Agreement for public comment. At the time this report was drafted, four comments were added to the forum.

##### Next steps

As a next step, ICANN Organization intends to consider the proposed renewal of the .MOBI Registry Agreement taking into account the comments added to the forum. Following the completion of the public comment process, the proposed renewal of the .MOBI Registry Agreement will be considered by ICANN's Board of Directors.

#### Section II: Contributors

*At the time this report was prepared, a total of four (4) 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.

Organizations and Groups:

Name	Submitted by	Initials
International Trademark Association	Lori Schulman	INTA
Business Constituency	Steve DelBianco	BC
Internet Commerce Association	Phil Corwin	ICA
Intellectual Property Constituency	Greg Shatan	IPC

### Section III: Summary of Comments

*General Disclaimer:* This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer 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).

ICANN Organization has received four comments from the community on the proposed renewal of the .MOBI Registry Agreement. Comments submitted generally fall into the following categories, each of which is explained in more detail below:

- Inclusion of new gTLD Rights Protection Mechanisms (RPMs) and safeguards in legacy gTLDs
- Transition to a new fee schedule
- Negotiation process for the proposed renewal of the .MOBI Registry Agreement and legacy gTLD Registry Agreement negotiations in general
- Other comments

#### Comments on inclusion of new gTLD Rights Protection Mechanisms (RPMs) and safeguards in legacy gTLDs

While the IPC and INTA applauds the voluntary adoption of rights protection mechanisms in the proposed .MOBI Registry Agreement, ICA and BC expressed concern over the addition of new gTLD RPMs, including Uniform Rapid Suspension (URS), into legacy gTLD Registry Agreements, via contract renewal, on the grounds that these RPMs are not Consensus Policy for legacy gTLDs.

- “While the URS and Spec. 11 PICs carry important substantive benefits in their own right they carry an additional benefit within the context of renewal of a legacy gTLD Registry Agreement namely, consistency. As ICANN has noted: ‘Transition to the new gTLD Registry Agreement will provide consistency across all registries leading to a more predictable environment for end-users...’ True to that sentiment, ICANN has bilaterally negotiated for transition to parts of the New RA, not only with .MOBI, but also with other legacy gTLDs like .CAT, .PRO, .TRAVEL, .XXX, and .TEL. While that transition will take some time to achieve as the legacy gTLD Registry Agreements cycle through their respective renewals, the march of progress from ICANN’s negotiations with those various legacy gTLD registry operators has been steady.” (INTA)
- “In light of the foregoing substantive and procedural benefits, it is difficult to imagine any objection to Afiliac and ICANN adopting certain relevant provisions from the New RA into the renewal of the .MOBI Registry Agreement. Yet some have objected to the proposed renewal on the grounds that Afiliac’

choice to adopt the URS, for example, somehow circumvents the ongoing Policy Development Process (PDP) to Review all Rights Protection Mechanisms (RPMs) in all gTLDs. It is difficult to understand this argument. Nobody disputes that Afilias and ICANN bilaterally negotiated the renewal of the .MOBI Registry Agreement, or that Afilias received at least some form of consideration (including but not limited to monetary consideration in the form of lower fees) in exchange for agreeing to adopt certain relevant provisions from the New RA. It is not clear what the ongoing PDP has to do with such bilateral negotiations. Any argument to the contrary confuses ‘ceilings’ and ‘floors’. Whatever comes out of the ongoing PDP may or may not move the RPM “floor” from its current level. But that has nothing to do with a registry bilaterally negotiating to go above the current RPM ‘floor’.” (INTA)

- “The IPC applauds Afilias (the .mobi Registry Operator) and other Registry Operators that choose to implement enhanced rights protection mechanisms for third party trademark owners, and to take on enhanced responsibilities for the Registry Operator to prevent use of registrations for abusive purposes, including but not limited to violations of intellectual property rights. These enhanced Rights Protection Mechanisms include, but are by no means limited to, those contained in the base New gTLD Registry Agreement, including the Uniform Rapid Suspension (URS) procedure. The IPC also encourages Registry Operators to voluntarily adopt industry best practices beyond the minimum rights protections required by ICANN, such as adding new restrictions against abusive registrations, additional suspension mechanisms, implementing blocking prior to registration, and creating new dispute procedures. Specification 7 of the proposed .mobi renewal Registry Agreement appears to fully accommodate the implementation of such voluntary best practices. (We are puzzled, however, by the provision in the Addendum to the proposed renewal agreement that wipes out the registry’s obligations under Section 1 of Specification 7 to ‘implement and adhere to’ URS and other RPMs, and limits the obligation to the Section 2 provision that the registry operator ‘comply’ with them).” (IPC)
- “The inclusion of both URS and the PICs in yet another gTLD registry agreement underscores the glaring omission of these minimum safeguards for right holders and the public from the registry agreements for the largest legacy gTLD registries, including the dominant competitors, .com and .net.” (IPC)
- “The 2016 launch of the PDP Review of All Rights Protection Mechanisms in All gTLDs, which is tasked with recommending whether new gTLD RPMs should become Consensus Policy for legacy gTLDs, makes it particularly inappropriate for GDD staff to continue seeking that de facto policy result in non-transparent, bilateral RA negotiations that contravene the policymaking process set forth in the Bylaws.” (ICA)
- “GDD staff should demonstrate their clear commitment to ICANN’s bottom-up policymaking process by ceasing and desisting from seeking top-down imposition of new gTLD RPMs in legacy gTLD RA negotiations until the RPM Review WG has completed its work reviewing those RPMs and its final recommendations – including whether those RPMs should become Consensus Policy -- have been acted upon by the GNSO Council and ICANN Board.” (ICA)
- “The ICANN Global Domains Division (GDD) has proposed renewal of the .MOBI Sponsored Registry Agreement that incorporate elements of the base new gTLD registry agreement. The multi-stakeholder community has not, however, had an opportunity to fully deliberate on whether these elements should be required of the legacy sTLDs like .MOBI. This is the 5th instance in which the GDD has proposed such an amendment to a legacy TLD registry agreement. The BC sustains its procedural objection to these proposals, through which GDD staff unilaterally seeks to establish a new status quo for registry agreements. By substituting its judgment for established policy, we respectfully believe that staff exceeds its powers and overrides safeguards intended to preserve transparency and inclusion within the multi-stakeholder community.” (BC)

- “The GNSO only recently initiated a Policy Development Process (PDP) to review all RPMs at all gTLDs , and the working group Charter specifically tasks it with recommending whether any of the new gTLD program RPMs should become Consensus Policy and thereby applicable to legacy gTLDs. The working group tasked with evaluating these new RPMs does not expect to complete the task until late 2017. We wish to make clear at the outset that the BC’s concern is not in regard to the adoption of new gTLD rights protection mechanisms (RPMs) for legacy gTLDs. The BC has been a strong advocate for these RPMs as applied to new gTLD registries and this PDP continues to consider fundamental questions about how the new RPMs should function and how they could evolve in the future.” (BC)
- “The ICANN Bylaws reserve the power to set gTLD policy to the GNSO. The new RPMs have not, in their current form, received the uniform support from GNSO constituents and, as discussed above, have not undergone the procedure set forth in the Bylaws to become Consensus Policies. While greater consistency as between registry agreements is a worthwhile goal, and convenient for ICANN in terms of contractual compliance, it cannot supersede consistency of action in accord with ICANN’s Bylaws.” (BC)

Additionally, one comment also urged ICANN Organization and Afiliias to review the language used in Section 1 of Specification 11 of the proposed .MOBI Registry Agreement to make sure it is future-proofed.

- “We are pleased to see that among the PICs that Afiliias will be taking on is commitment #1 involving the obligation only to accept registrations sponsored by accredited registrars that have signed up to the 2013 edition of the Registrar Accreditation Agreement. However, we urge the parties to review whether the specific language employed in Section 1 of Specification 11 is sufficiently future-proofed. It seems to lock the registry into accepting registrations only from registrar adhering to the RAA as approved by the Board in 2013, regardless of whether this version of the RAA is succeeded by a subsequent version, or even regardless of whether the 2013 RAA is amended in the future. IPC cherishes the hope that the 2013 RAA, which has many flaws and shortcomings, will be improved upon in the future; thus, it would be shortsighted to prohibit the .mobi registry operator from doing business with responsible registrars that contractually commit themselves to future improved RAA provisions, or to require the registry operator to seek a contractual modification in order to do so.” (IPC)

#### **Comments on transition to a new fee schedule**

Although none of the commenters objected to the updated fee schedule contained in the proposed .MOBI Registry Agreement, some expressed concern regarding what they viewed as a link between the updated fee structure and the inclusion of additional new gTLD safeguards. Other commenters asked for clarification on the language used at Section 6.1 of the proposed .MOBI Registry Agreement:

- “The BC believes it is important that any significant fee reduction process be data driven, with clear measurable criteria that promotes internet security and a healthy domain name ecosystem. The development of such criteria should be done in a transparent manner, and may involve ICANN CTO/IS-SSR staff, and security and domain name analytics experts. We also note that the revised RA would eventually result in a substantial registry fee reduction, providing a powerful incentive for Afiliias to agree to other modifications proposed by GDD.” (BC)
- “ICA has no objection [to] the registry fee reduction contained in the revised RA. However, the (difficult to determine) net annual financial benefit to be realized by registry operator Afiliias brings into question whether its agreement to other GDD-proffered provisions of the RA was truly ‘voluntary’, given this permanent fee reduction and the ability of GDD staff to deny a final agreement unless their initial negotiating position of new gTLD RPM acceptance was agreed to.” (ICA)

- “The redline version of the proposed new registry agreement shows no changes in the language of Section 6.1, “Registry-Level Fees”, making it impossible to fully evaluate the potential economic benefits of the new fee structure to the registry operator. We have located the original 2007 registry agreement but the complex variable fee provisions of its section 7.2(b) reveal that it not possible to gauge the full economic impact absent knowledge of the current average price of .mobi registrations. We believe that ICANN should have provided a complete redline of the fee section as well as a good faith calculation of its potential benefits to the registry operator for the sake of full transparency and community understanding.” (BC, ICA)

Both BC and ICA also mentioned that they are:

- “....not objecting to the adjustment of the fee schedule of any legacy gTLD to the now prevailing fee schedule established for new gTLDs. What we do object to is GDD staff using the economic leverage of substantial fee reductions to induce registry operators to accept non-economic provisions of the new gTLD RA that clearly have important policy implications. In addition, we believe this approach is unseemly, as from an accounting perspective there is absolutely no difference between granting fee concessions to a registry operator or writing an annual check to the operator in exchange for its acceptance of other RA changes.” (BC, ICA)

#### **Comments on the negotiation process for the proposed renewal of the .MOBI Registry Agreement and legacy gTLD registry agreement negotiations in general**

While one commenter expressed its support for the new gTLD Registry Agreement being the starting point for contract negotiations, two other commenters raised their concern for this approach claiming that ICANN Organization is effectuating policy through bilateral contract negotiations:

- “INTA agrees with ICANN that the New RA has important ‘technical and operational advantages’ and ‘benefits to registrants and the Internet community’ over earlier, outdated versions. As such, INTA supports bilateral negotiations between ICANN and legacy gTLD registries in order to transition (as much as is possible) to the New RA at renewal time.” (INTA)
- “The Global Domains Division of ICANN should encourage innovation by engaging with Registry Operators during the amendment process and affording them the opportunity to adopt practices that suit their circumstances. Furthermore, that process should also be more open and transparent, because it can have potentially wide-ranging consequences for the broader community.” (IPC)
- “Given the history of flimsy and self-serving justifications by GDD staff and the ICANN Board for similar actions taken in 2015, we are under no illusion that this comment letter will likely be successful in effecting removal of the URS and other new gTLD RA provisions from the revised .Mobi RA. Nonetheless, we strenuously object to this GDD action that intrudes upon and debases ICANN’s legitimate policymaking process, and urge the GDD and Board to reconsider their positions, and to ensure that GDD staff ceases and desists from taking similar action in the context of future RA renewals and revisions until the RPM Review WG renders the community’s judgment as to whether the URS and other new gTLD RPMs should become Consensus Policy and such recommendation is reviewed by GNSO Council and the ICANN Board.” (ICA)
- “The GDD’s position in RA negotiations is materially flawed in that it fails to consider and address important ‘transitional issues’, including the necessary legal steps to bind legacy gTLD registrants to use of the URS when it has not been adopted as a Consensus Policy through proper PDP methodologies.” (ICA)

- “GDD personnel are undermining the fundamental principles of transparency and inclusion that are core tenets of ICANN’s mission. GDD personnel are effectuating policy through bilateral negotiations with registry operators, which are only subject to the larger community’s review by way of these proposed amendments and public comments.” (BC)
- “A lack of transparency underscores why these policy decisions must be made through the open and inclusive procedures required of the GNSO” (BC, ICA)

One commenter suggested changes for future contract negotiations:

- “The BC again wants to make it clear that we oppose the renegotiation of material economic aspects of Registry and Registrar Agreements, while also trying to induce the registry or registrar to adopt non-consensus policy. The policies of ICANN are set by its stakeholders. The economics of contracts are ultimately decisions of the ICANN Board, even though stakeholder groups and constituencies have the opportunity to comment on such modifications. ICANN staff and the ICANN board should seek to bifurcate any such discussions about economic and policy matters during contract renegotiations, so as to preserve the integrity of the policy-making decisions of ICANN’s SOs and ACs.” (BC)

#### Other comments

- “GDD personnel continue to set substantive policy for gTLDs by adopting elements of the new gTLD registry agreement into amended and renewed RAs for legacy gTLDs. This pattern is particularly clear in the context of proposed amendments to the .MOBI RyA, which trigger implementation of the new gTLD RPMs in .MOBI ‘within 30 days following the first Registry Level Transaction Fee Adjustment Approval Date.’ That approval date, and effectively the implementation of these new gTLD RPMs within the .MOBI TLD, is further conditioned upon the ‘sole discretion’ of ICANN that ‘no unresolved compliance issues’ remain after ‘a contractual compliance audit’ tied to inter alia child protection obligations of the registry.” (BC)

#### Section IV: Analysis of Comments

*General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.*

ICANN Organization appreciates all the comments and suggestions submitted to the public forum for the proposed renewal of the .MOBI Registry Agreement and also the concerns expressed over the negotiation process between ICANN Organization and Afilias.

#### **Comments on the inclusion of new gTLD Rights Protection Mechanisms (RPMs) and safeguards in legacy gTLDs**

ICANN Organization acknowledges the comments submitted for the proposed renewal of the .MOBI Registry Agreement and notes that the proposed renewal of the .MOBI Registry Agreement is the result of bilateral negotiations between ICANN Organization and Afilias. The proposed changes to the .MOBI Registry Agreement are similar to the changes that were made to several “legacy” gTLDs, namely the .JOBS, .TRAVEL, .CAT, .PRO and .TEL Registry Agreements, which were also renewed utilizing the base new gTLD Registry Agreement.

With respect to legacy gTLDs’ adopting the Uniform Rapid Suspension (URS) in their renewal Registry

Agreements as well as the inclusion of the URS and safeguards in the proposed renewal of the .MOBI Registry Agreement, two commenters argued that the URS should only be added to legacy gTLD Registry Agreements only after a full Policy Development Process (PDP) and that including the URS in legacy gTLD Registry Agreements via a contract renewal or amendment process is an unacceptable ICANN Organization intervention into the policymaking process. Conversely, the other two commenters expressed support for the inclusion of the URS through the proposed renewal of the .MOBI Registry Agreement and, one commenter, disagreed with ICA's and BC's position that Afiliás's adoption of URS circumvents the ongoing PDP.

It should be noted that the URS was recommended by the Implementation Recommendation Team (IRT) as a mandatory RPM for all new gTLDs. In [the IRT Final Report](#), the IRT stated that "Therefore, the IRT recommends that ICANN Organization implement the URS, which would be mandatory for all new generic Top Level Domain (gTLDs), implemented through the new gTLD Registry Agreements, which would in turn bind registrars supplying new gTLDs to the marketplace."

Although the URS was developed through the process described above, including public review and discussion in the GNSO, it has not been adopted as a consensus policy and ICANN Organization has no ability to make it mandatory for any gTLDs other than those subject to the base new gTLD Registry Agreement. Accordingly, ICANN Organization has not moved to make the URS mandatory for any legacy gTLD. In the case of the proposed renewal of the .MOBI Registry Agreement, as well as other legacy gTLD Registry Agreement renewals (namely, .JOBS, .TRAVEL, .CAT, .PRO and .TEL), inclusion of the URS was agreed to via bilateral negotiations between the applicable Registry Operator and ICANN Organization. Additionally, there is nothing restricting Registry Operators from imposing additional rights protection mechanisms, such as the URS, in other ways, such as through the Registry Services Evaluation Policy (RSEP) process.

One commenter stated that it was puzzled by the deletion of the first sentence of Section 1 of Specification 7, and limits the obligation in Section 2 to "comply" with them. The reason for the deletion of the first sentence in Section 1 of Specification 7 is that it is not applicable because .MOBI is an existing TLD and the sentence, referred to by the commentor, is related to initial launch of the TLD. However, Section 2 of Specification 7 still mandates compliance with Post-Delegation Dispute Resolution Procedure (PDDRP) and URS. It should be noted that the requirements to comply with the PDDRP and the URS dispute resolution mechanisms (as they may be revised from time to time) are available in Section 2(a) and 2(b) of Specification 7.

One commenter also stated that "the inclusion of both URS and the PICs in another gTLD Registry Agreement underscores the glaring omission of these minimum safeguards for right holders and the public from the Registry Agreements for the largest legacy gTLD registries...". As stated above, the URS is mandatory for new gTLDs, however ICANN Organization has no ability to make it mandatory for legacy gTLDs. Inclusion of the URS in other "legacy" TLDs may be included upon agreement of both ICANN Organization and the Registry Operator or if adopted as Consensus Policy.

Finally, one commenter suggested that ICANN and Registry Operator should review the language used in Section 1 of Specification 11 of the proposed .MOBI Registry Agreement to make sure it is future-proofed. The language used in Section 1 of Specification 11 is the same language used in all other legacy gTLD Registry Agreements. If a new registrar accreditation agreement is developed in the future, ICANN will develop an approach at that time as to how it will be implemented.

#### **Comments on transition to a new fee schedule**

ICANN Organization appreciates the comments submitted with respect to the proposed updated fee schedule for the .MOBI Registry Agreement. While two commenters expressed concern regarding the perception of ICANN Organization using economic leverage to induce Registry Operators to include additional new gTLD

safeguards, it should be noted that the proposed updated fee schedule and all other proposed provisions are the result of discussions and agreement between ICANN Organization and Afiliis. As noted by the commenters, the proposed updated fee schedule is similar to the fee schedules for the previously renewed legacy gTLD Registry Agreements, namely .JOBS, .TRAVEL, .CAT, .PRO and .TEL. ICANN Organization evaluated the impact of the projected annual registry fees paid to ICANN and concluded that the result will have a minimal, negative fiscal impact. The effect of the fee change to ICANN's budget was considered as part of the process.

Additionally, two commenters stated that it was difficult to fully evaluate the potential economic benefits of the new fee structure to Afiliis because the posted redline did not show any changes to Section 6.1. ICANN Organization would like to clarify that a redline outlining the new fee structure proposed in the .MOBI Registry Agreement against the current .MOBI Registry Agreement was not provided due to the complexity of the comparison. The document structure of the two agreements is so different, a redline would be confusing and unintelligible, thereby hampering transparency of the changes. Therefore, ICANN Organization instead chose to publish both the current .MOBI Registry Agreement and the proposed renewal of .MOBI Registry Agreement on the "[Proposed Renewal of .MOBI Sponsored Registry Agreement](#)" public comment announcement page of icann.org so interested parties could more easily review the changes.

### **Comments on the negotiation process for the proposed renewal of the .MOBI Registry Agreement and legacy gTLD Registry Agreement negotiations in general**

ICANN Organization acknowledges the comments expressing concern over renewal negotiations taking place in a non-transparent manner and how the proposed renewal was arrive at. It should be noted that all Registry Operators have the ability to negotiate the terms of their Registry Agreement with ICANN Organization, which inherently means discussions are between the two contracted parties – ICANN Organization and the applicable Registry Operator. The proposed renewal of the .MOBI Registry Agreement is the result of this established process. Similarly, Registry Operators for both new gTLDs and legacy gTLDs may avail themselves of the process. The process itself is straightforward. ICANN Organization and the Registry Operator engage to discuss whether to renew the agreement in its current form or transition all or part of it to the New gTLD base Registry Agreement. Once the parties agree on the form of agreement, a draft renewal is produced by ICANN Organization for the review and comment of the Registry Operator. Once both parties agree on the terms of the proposed renewal Registry Agreement, ICANN Organization invites the community to comment on the agreement, through the public comment process, in order to collect valuable community input before proceeding.

### **Other comments and analysis**

As for the Registry Agreement negotiation process, one comment claimed that ICANN Organization is "setting substantive policy for gTLDs by adopting elements of the new gTLD Registry Agreement into amended and renewed RAs for legacy gTLDs", referring to the language used in the proposed agreement, where implementation of RPMs in .MOBI was required "within 30 days following the first Registry Level Transaction Fee Adjustment Approval Date" and that such implementation was "further conditioned upon the 'sole discretion' of ICANN that 'no unresolved compliance issues' remain after 'a contractual compliance audit' tied to inter alia child protection obligations of the registry". ICANN Organization would like to note that the proposed .MOBI Registry Agreement does not include such provision and that ICANN Organization believes that the commenter was actually referring to the previously posted public comment announcement for the "[Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards](#)" where such provision exists in the proposed amendment.

Additionally, ICANN Organization would like to note that community registration policies available in Appendix S of the current .MOBI Registry Agreement have not been carried over to the proposed renewal of the .MOBI Registry Agreement in the form of Specification 12 (Community Registration Policies). Therefore, the .MOBI

proposed renewal Registry Agreement will not be categorized as a "Community TLD". ICANN Organization highlighted this material change in the request for public comment, however no comments or objections were received on this topic.

**Next Steps:** Following the completion of the public comment process, the proposed renewal of the .MOBI Registry Agreement will be considered by ICANN's Board of Directors.