

TITLE: Proposed Amendment to .XXX Registry Agreement to Transition to New Fee Structure and to Adopt Additional Safeguards

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Public Comment Proceeding

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Section I: General Overview and Next Steps

Updated as of 20 January 2017

An error in the Staff Report of Public Comment Proceeding published on 23 December 2016, and in the announcement published on 12 October 2016 has been identified. The error was not present in the proposed amendment to the .XXX Registry Agreement which the community commented on. The error has been corrected in both publications to align with the text in the proposed amendment to the .XXX Registry Agreement.

General Overview

ICANN posted for public comment the proposed amendment to the .XXX Registry Agreement to, among other things, transition to a new fee structure for fees payable to ICANN and adopt additional safeguards and compliance audit requirements.

From 12 October 2016 through 1 December 2016, ICANN posted the proposed amendment to the .XXX Registry Agreement for public comment. At the time this report was drafted, eight comments were posted to the forum.

Next steps

ICANN will consider these comments as it determines whether or not to approve the amendment to the .XXX Registry Agreement.

Section II: Contributors

At the time this report was prepared, a total of eight (8) 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
Intellectual Property Constituency	Gregory Shatan	IPC
Internet Commerce Association	Phil Corwin	ICA
Business Constituency	Steve DelBianco	BC
ICM Registry	Sheri Falco	ICM
Non Commercial Stakeholders Group	Edward Morris	NCSG
NCSG Policy Committee	Marilia Maciel	NCSG PC

Individuals:

Name	Affiliation (if provided)	Initials
Paul Muchene	NA	PM
Josh Brown	NA	JB

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. ICANN 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 has received eight comments from the community on the proposed amendment to the .XXX 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) in legacy TLDs
- Transition to a new fee schedule
- The International Foundation for Online Responsibility (IFFOR)
- Negotiation process for the proposed amendment to the .XXX Registry Agreement and contract negotiations in general
- Recommendations to provisions of the .XXX Registry Agreement where no amendment has been proposed
- Other Comments

Comments on inclusion of new gTLD Rights Protection Mechanisms (RPMs) in legacy TLDs

While the IPC applauds the voluntary adoption of rights protection mechanisms in the .XXX Registry Agreement other commenters such as: ICA, PM, BC and NCSG expressed concern over the addition of new gTLD RPMs, including Uniform Rapid Suspension (URS), into legacy TLD registry agreements, via contract amendment, on the grounds that these RPMs are not Consensus Policy.

- “The IPC applauds ICM Registry LLC (ICM) and other Registry Operators that choose to implement rights protection mechanisms (RPMs) contained in the base New gTLD Registry Agreement. 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 and suspension mechanisms, implementing blocking prior to registration, and creating new dispute procedures. In addition, it would be useful to implement the URS in a restricted TLD like .XXX where a rapid suspension mechanism could be helpful in stopping reputational or similar harm, and where a brand owner may not wish to defensively register the domain in its own name”.....“We support ICM’s decision to include both the “standard” PICs and other safeguards appearing in proposed Appendix 9”. (IPC)
- “..it is highly questionable if the Uniform Rapid Suspension system (URS) should be implemented for the .XXX TLD because URS was specifically targeted towards new gTLDs of which .XXX is not.” (PM)
- “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)
- “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. Although the BC has been a strong advocate for the new RPMs as applied to new gTLD registries, 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)
- “We believe that the process of policy made by contract subverts the bottom-up consensus policy processes laid out in ICANN’s Bylaws and sets a dangerous precedent that imperils the role of the ICANN community, and by extension that of non-commercial users, in policy development. It also has the effect of discouraging volunteers from continuing their involvement in the ICANN community. After all, if staff is to establish policy by a contract that is not supported by the proper community based policy development processes (PDP) then why volunteer to participate in said processes?”... “NCSG has raised concerns to ICANN and especially the Global Domains Division (GDD) that not a single cent has been spent to educate Registrants regarding their rights and defenses under the URS. Is it even fair to have a dispute mechanism that Registrants cannot navigate and have never heard of?” (NCSG)

Some commenters suggested changes for the inclusion of RPMs for the .XXX Registry Agreement:

- “An appropriate alternative to the approach ICANN staff is taking would be for IFFOR to use its own processes to develop and recommend RPMs that ICANN and ICM prefer to incorporate into its Registry

Agreement Amendment. Alternatively, ICANN staff and board could wait for the GNSO to advance consensus policy, which the board could adopt and then would be binding upon ICM and all registries. Interestingly, if either of these outcomes occurred, ICM would not necessarily be entitled to any sort of reduction in its fees paid to ICANN.” (BC)

Comments on transition to a new fee schedule

Although none of the commenters objected to the updated fee schedule, some expressed concern regarding the justification for inclusion of additional new gTLD safeguards with the updated fee schedule.

- “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 registry fee reduction of 87.5%, providing a powerful incentive for ICM to agree to other modifications proposed by GDD.” (BC)
- “ICA has no objection the phased registry fee reduction contained in the revised RA. However, the net annual benefit of \$281,500 to be realized by ICM registry brings into question whether its agreement to other GDD-proffered provisions of the RA was truly “voluntary”, given the large financial benefit to it and the ability of GDD staff to deny a final agreement unless their initial negotiating position was agreed to by ICM.”....“GDD should properly have approved the phased fee reduction without pressing for additional unrelated concessions by ICM as conditions for approval.” (ICA)

Comments on the International Foundation for Online Responsibility (IFFOR)

As for the negotiation process, both ICA and BC expressed concern over the lack of clarity on whether IFFOR had reviewed and approved the proposed amendment and IFFOR’s role in contract negotiations between ICANN and ICM.

- “No further action should be taken by ICANN in regard to the proposed RA for this sponsored TLD until there is clear evidence that IFFOR, the policy- setting entity for .XXX, has reviewed and approved it.” (ICA)
- “The BC also has grave concerns about ICANN’s lack of regard for the Sponsoring Organization Agreement (SOA) entered into by ICM and IFFOR. This agreement explicitly indicates that ICM has delegated all policy-making decisions to IFFOR.”....“This SOA effectively creates a separate multi-stakeholder organization (IFFOR). This arrangement does not contemplate a scenario where ICANN and ICM work together to develop and impose non-consensus policy on the XXX registry.”.... “Trademark protections, including URS, are clearly within the remit of IFFOR, and the fact that the notice provides no indication of IFFOR’s consent to the change raises a concern for the BC.” (BC)

ICM responded to these comments by explaining that ICM has not delegated all policy-making decisions and authority to IFFOR and that ICM has the ability to develop policies for .XXX TLD.

- “ICM Registry seeks to remind the ICANN community, as well as ICANN’s board and staff, of ICM Registry’s policy-making authority for the .XXX sTLD. Some of the comments submitted in response to the proposed Amendment incorrectly assert that ICM Registry has delegated all policy-making decisions and authority to its sponsoring organization, the International Foundation for Online Responsibility (IFFOR). These same comments claim that IFFOR is the policy making body for the .XXX

sTLD with respect to all .XXX policies except for consensus-based GNSO policy. They go on to assert that trademark protections, including the URS, are clearly within the IFFOR remit. However, as evidenced in the express terms of the .XXX Agreement, this is inaccurate.” (ICM)

- “ICM Registry has the authority to develop the policies, terms and procedures proposed in the .XXX Agreement Amendment No. 4 and to negotiate directly with ICANN just like other sTLD registry operators have had the ability to develop policies, terms and procedures for delineated areas of their sTLDs and to negotiate their new terms and agreements with ICANN.” (ICM)

Comments on negotiation process for the proposed amendment to the .XXX Registry Agreement and contract negotiations in general

The IPC suggested that the negotiations for amendments to registry agreements should be more transparent and accountable:

- “The amendments to the .XXX Registry Agreement were carried out in a bilateral fashion in which there was little transparency or accountability. Many IPC stakeholders could be affected by the terms of the .XXX Registry Agreement, either directly or indirectly, and yet no opportunity was provided to observe or provide input directly or indirectly during the course of these negotiations.” (IPC)

On transparency, the IPC also questioned:

1. How and why the novel “registry-level fee adjustment” was developed.
2. Why neither the proposed amendment to the .XXX Registry Agreement nor the agreement as presently amended contains the base template PIC mandating that the registry operator use only ICANN accredited registrars that are party to the 2013 Registrar-Accreditation Agreement (RAA).
3. Whether possible coexistence between the Rapid Evaluation Service Policy (RES) and the URS within the .XXX TLD was ever addressed during negotiations with ICANN.

Several commenters raised their concern over what they viewed as ICANN’s effectuating policy through bilateral contract negotiations:

- “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 .XXX 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)
- “Regardless of whether ICM eagerly embraced URS or initially resisted it, Mr. Atallah was quite clear in his response that, in each and every negotiation in which a registry “asks for something”, GDD staff tells them “Please adopt the new gTLD contract” as its initial bargaining position – even though that contract contains multiple provisions which remain “implementation details” and have not been adopted as “Consensus Policy” through proper GNSO procedures and Board adoption.” (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)

Some commenters suggested changes for future contract negotiations:

- “The IPC encourages ICANN staff and the ICANN community to continue considering how other stakeholder groups can have both a view and a voice during negotiations, rather than being limited to ex post facto public comment periods that offer little opportunity for any practical impact.” (IPC)
- “The BC 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)

Recommendations to provisions of the .XXX Registry Agreement where no amendment has been proposed

PM suggested an additional change to the .XXX Registry Agreement that was not included in the amendment:

- “....section 3.1 (c) (ii) on personal data should be amended to include protection from data theft a problem that is increasing in severity.”so that it read as “*Registry Operator shall take reasonable steps to protect Personal Data from loss, theft, misuse, unauthorised disclosure, alteration or destruction....*” (PM)

Additionally, PM also stated that the provision in Section 1.a of Appendix 9 of the proposed amendment regarding registrars’ monitoring abuses conducted by registered domain name holders would be difficult to achieve and sought clarity from ICM on whether ICM has any assurances that registrars will abide by these terms.

Other Comments

Two comments added to the forum following the closure of the public comment period did not express any views on the proposed amendment for the .XXX Registry Agreement. While one of the comments is seeking for clarity for prices of .XXX domain names, the other commenter brings clarity to the comment added by NCSG.

- “I am operator of few adult sites and interesting to know: is price of xxx tld will go down or not? Just at a current time price of XXX tld is overpriced so much.” (JB)
- “I write on behalf of the NCSG Policy Committee in order to express our endorsement to the comment presented by Edward Morris on December 1st. We would like to clarify however that we do not fully

endorse the comment put forth by the Business Constituency (to which Mr. Morris makes reference), but only the specific common points that were raised by Mr. Morris on his comment. If this endorsement from the NCSG PC to Mr. Morris' comment could be captured in the staff report, that would be very much appreciated.” (NCSG PC)

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 appreciates all of the comments and suggestions submitted to the public forum for the proposed amendment to the .XXX Registry Agreement and also the concerns expressed over the negotiation process between ICANN and ICM.

Comments on the inclusion of new gTLD Rights Protection Mechanisms (RPMs) in legacy TLDs

ICANN acknowledges the comments submitted for the proposed amendment to the .XXX Registry Agreement and notes that the proposed amendment for the .XXX Registry Agreement is the result of bilateral negotiations between ICANN and ICM. Some of the provisions in the proposed amendment to the .XXX Registry Agreement are similar to the changes that were made to several “legacy” gTLDs, namely the .JOBS, .TRAVEL, .CAT and .PRO Registry Agreements, which were renewed utilizing the base new gTLD Registry Agreement and as a result of bilateral negotiations between ICANN and the applicable Registry Operator.

With respect to legacy TLDs’ adopting the Uniform Rapid Suspension (URS) in their renewal Agreements as well as the inclusion of the URS and safeguards in the proposed amendment to the .XXX Registry Agreement, some commenters suggested the URS may only be added to non-new gTLD agreements only after a full policy development process (PDP) and that including the URS in incumbent gTLD agreements via a bilateral contract renewal or amendment process is unacceptable staff intervention into the policymaking process. Conversely, a different commenter expressed support for the inclusion of the URS through the proposed amendment to the .XXX Registry Agreement.

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 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 staff has no ability to make it mandatory for any TLDs other than those subject to the base new gTLD Registry Agreement. Accordingly, ICANN staff has not moved to make the URS mandatory for any legacy TLD. In the case of the proposed amendment to .XXX Registry Agreement, as well as legacy TLD Registry Agreement renewals (namely, .JOBS, .TRAVEL, .CAT and .PRO), inclusion of the URS was agreed to via bilateral negotiations between the applicable Registry Operator and ICANN. With respect to the .XXX amendment, coexistence between the Rapid Evaluation Service Policy (RES) and the URS within the .XXX TLD was not discussed during the bilateral negotiations. Additionally, there is nothing restricting Registry Operators from imposing additional rights protection mechanisms, such as the URS, in other ways, such as through the RSEP process.

Finally, a question was posed by the IPC inquiring as to “Why neither the proposed amendment to the .XXX Registry Agreement nor the agreement as presently amended contains the base template PIC mandating that the registry operator use only ICANN accredited registrars that are party to the 2013 Registrar-Accreditation Agreement (RAA)”. The Public Interest Commitments, or PICs, included in the proposed amendment contain terms agreed to bilaterally between ICANN and the registry operator. Inclusion of the 2013 RAA requirement could certainly be included in future negotiations with the registry operator.

Comments on transition to a new fee schedule

In February 2016 and pursuant to Section 4.3 of the .XXX Registry Agreement, ICM requested to engage in good faith negotiations regarding possible changes to the terms of the .XXX Registry Agreement, including to Section 7.2 regarding fees and payments to ICANN. ICM’s request was that ICANN amend the .XXX Registry Agreement to lower the per transaction registry fee from \$2.00 per transaction to the per transaction fee contained in the new gTLD Registry Agreement.

As part of the review process, ICANN conducted a review of contractual compliance under the .XXX Registry Agreement and found ICM to be in substantial compliance with its contractual requirements. Additionally, ICANN reviewed the most recent IFFOR audit report of ICM’s Compliance Reporting System (CRS) and found that the system is fully functional and compliant for its intended purposes. ICM conveyed its belief that IFFOR’s Audit Report and trend analysis demonstrated effectiveness regarding mitigating abuse on the .XXX gTLD. ICM explained that the data shows that the system has been enhanced beyond its original capabilities and has now demonstrated high levels of utility for its operation and ease of use, which is evidenced by a pattern of decline in cases.

During the course of discussions, ICM informed ICANN that ICM would agree to add both additional safeguards contained in the form new gTLD Registry Agreement, and a phased implementation of a reduction of fees based on ICM’s compliance with the terms of the .XXX Registry Agreement.

Following negotiations, ICANN and ICM agreed to submit the proposed amendment to the .XXX Registry Agreement, which includes the following:

- An increase in the quarterly fee payable to ICANN from \$2,500 to \$6,250, except that, until the first adjustment to the per transaction fee is effective, the total registry-level fees will not **be less than US\$90,000 per rolling twelve month period** (as currently provided in the .XXX Registry Agreement).
- A staged reduction in the per transaction registration fee from \$2.00 to \$0.25 over a period of several years if ICM passes a compliance audit tied to each stage of the fee reduction.
- The inclusion of certain rights protections mechanism set forth in the new gTLD Registry Agreement.
- The inclusion of contractual and operational compliance audits rights consistent with those contained in the new gTLD Registry Agreement.
- The inclusion of the additional public interest commitments that are contained in ICM’s Registry Agreements for its new gTLDs referenced in Section III of this proceeding.

Comments on the International Foundation for Online Responsibility (IFFOR)

ICANN appreciates the questions about whether IFFOR has reviewed and approved the proposed amendment to .XXX Registry Agreement. The amendment to the .XXX Registry Agreement was the result of bilateral negotiations between ICANN and ICM. While IFFOR has an important role with respect to .XXX, the .XXX Registry Agreement does not include a provision requiring participation or approval by IFFOR of amendments to the Registry Agreement.

Negotiation process for the proposed amendment to the .XXX Registry Agreement and contract negotiations in general

ICANN acknowledges the comments expressing concern over amendment negotiations taking place in a non-transparent environment. It should be noted that all Registry Operators have the ability to negotiate the terms of their Registry Agreement in a bilateral manner, which inherently means discussions are between the two contracted parties – ICANN and the applicable Registry Operator. The proposed amendment to the .XXX Registry Agreement is the result of the bilateral negotiation process. Similarly, newly contracting gTLD registry operators and renewals for legacy gTLD Registry Agreement renewals (namely, .JOBS, .TRAVEL, .CAT and .PRO) avail themselves of the same bilateral process. In all instances, once the bilateral process concludes, ICANN invites the community, through the public comment process, to comment on the negotiated proposals for a minimum of 40 days in order to for the collect valuable community input before proceeding.

With respect to the comment that transitional issues need to be considered, the amendment to the .XXX Registry Agreement contemplates that the new Appendix 8 and Appendix 9 will not become effective until 30 days following the first Registry Level Transaction Fee Adjustment Approval Date, which gives ICM time to transition to the new policies. It will be ICM's obligation to comply with these requirements, just as it is their obligation to comply with its other obligations under the .XXX Registry Agreement.

Recommendations to provisions of the .XXX Registry Agreement where no amendment has been proposed

ICANN appreciates the recommendations regarding provisions of the .XXX Registry Agreement where no amendment has been proposed. ICANN will consider this feedback.

Next Steps: The amendment will be considered for approval taking into account the public comments.