Comments of the Registries Stakeholder Group

New gTLDs DAG3 Modules 5-6

November 20, 2009

The Registries Stakeholder Group of the GNSO (RySG) is pleased to provide these comments on contract provisions and the Domain Application (Modules 5-6) in Version 3 of the Draft Applicant Guidebook for new Generic Top-level Domains (DAG3). The comments that follow represent a consensus position of the RySG as further detailed at the end of the document.
Note: Comments regarding Modules 1-4 will be submitted separately.

<u>Introduction</u>

These comments focus specifically on the terms and conditions of the registry agreement that an applicant would be required to sign, and also the terms and conditions of the application itself.

For ease of reference, the versions of the registry agreements discussed will be as follows:

"05-07 Registry Agreement" will refer to the 2005-2007 form gTLD Registry Agreement, as was used by ICANN in comparing the v1 Registry Agreement in version 1 of the Draft Applicant Guidebook for New gTLDs

"v1 Registry Agreement" will refer to the draft Registry Agreement associated with version 1 of the Draft Applicant Guidebook for New gTLDs

"v2 Registry Agreement" will refer to the draft Registry Agreement associated with version 2 of the Draft Applicant Guidebook for New gTLDs

"v3 Registry Agreement" will refer to the draft Registry Agreement associated with version 3 of the Draft Applicant Guidebook for New gTLDs

Our comments consist of an annotated copy of the relevant portions of the Module 5 draft registry agreement that appears in the Guidebook, followed by an annotated copy of the Module 6 draft application terms and conditions. The ICANN text appears in black, while the constituency comments appear in blue. Specific language additions appear in bolded blue text.

<u>Summary</u>

The RySG acknowledges the changes that ICANN did make in the v3 Registry Agreement. However, the RySG believes that significant changes are still necessary to address the RySG's concerns.

Most importantly, ICANN has continued to assert a *unilateral* right to change the terms and conditions of the registry agreement. This issue will be discussed more fully below, but the RySG is pleased that ICANN's Chairman of the Board recently acknowledged at the meeting in Seoul that this is an unreasonable position for ICANN to take.

In many instances, the RySG offers specific edits and language refinements, while in others areas the RySG has identified conceptual gaps that need to be narrowed. The RySG looks forward to working with ICANN to move toward a registry agreement that is more even-handed and mutually agreeable.

REGISTRY AGREEMENT

ARTICLE 1.

DELEGATION AND OPERATION
OF TOP–LEVEL DOMAIN; REPRESENTATIONS AND WARRANTIES

1.3 Representations and Warranties.

(a)   Registry Operator represents and warrants to ICANN as follows:

(iii) Each of Registry Operator and the other parties thereto has duly executed and delivered to ICANN an instrument that secures the funds required to perform registry functions for the TLD in the event of the termination or expiration of this Agreement (the "Continued Operations Instrument"), and such instrument is a binding obligation of the parties thereto, enforceable against the parties in accordance with its terms.

It is not apparent what "and the other parties thereto" refers to, and it seems this must be a typographical error. The sentence should read: "**Registry Operator has duly executed and delivered to ICANN…"** The RySG will comment more fully on the concept of a Continued Operations Instrument below.

ARTICLE 2.

COVENANTS OF REGISTRY OPERATOR

Registry Operator covenants and agrees with ICANN as follows:

2.1   Approved Services; Additional Services. Registry Operator shall be entitled to provide the Registry Services described in clauses (a) and (b) of the first paragraph of Section 2 in Specification 6 at [*see specification 6*]) and such other Registry Services set forth on Exhibit A (collectively, the "Approved Services"). If Registry Operator desires to provide any Registry Service that is not an Approved Service or is a modification to an Approved Service (each, an "Additional Service"), Registry Operator shall submit requests for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time (the "RSEP"). Registry Operator may offer Additional Services only with the written approval of ICANN. In its reasonable discretion, ICANN may require an amendment to this

Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP.

The following should be deleted: "at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time" and instead there should be a reference to the RSEP that is self-contained within the registry agreement as an exhibit. Further, the last sentence should be deleted for the same reason of providing contract certainty, "In its reasonable discretion, ICANN may require an amendment to this Agreement reflecting the provision of any Additional Service which is approved pursuant to the RSEP." The need for amendments is adequately addressed by the existing process.

       2.2   **Compliance with Consensus Policies and Temporary Policies.** Registry Operator shall comply with and implement all Consensus Policies and Temporary Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with ICANN's Bylaws, provided such future Consensus Polices and Temporary Policies are adopted in accordance with the procedure and relate to those topics and subject to those limitations set forth at [*see specification 1*]*.

RySG will comment below on Specification 1. Among other comments, care should be taken to ensure that the terms "Security and Stability" and "Registry Services" are used in their precise, capitalized, defined meanings, rather than lower-case.

       2.3   **Data Escrow.** Registry Operator shall comply with the registry data escrow procedures posted at [*see specification 2*]*.

RySG will comment below on Specification 2.

       2.4   **Monthly Reporting.** Within twenty (20) calendar days following the end of each calendar month, Registry Operator shall deliver to ICANN reports in the format posted at [*see specification 3*]*.

RySG will comment below on Specification 3.

       2.5   **Publication of Registration Data.** Registry Operator shall provide public access to registration data in accordance with the specification posted at [*see specification 4*]*.

RySG will comment below on Specification 4.

       2.6   **Reserved Names.** Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall reserve from initial (i.e. other than renewal) registration all character strings that appear on the Schedule of Reserved Names posted at [see specification 5]*. Registry Operator may establish policies concerning the reservation or blocking of additional character strings within the TLD at its discretion. If Registry Operator is the registrant for any domain names in the Registry TLD (other than the Second-Level Reservations for Registry Operations from Specification 5), such registrations must be through an ICANN accredited registrar. Any such registrations will be considered Transactions (as defined in Section 6.1) for purposes of calculating the Registry-Level Transaction Fee to be paid to ICANN by Registry Operator pursuant to Section 6.1.

RySG will comment below on Specification 5.

       2.7   **Functional and Performance Specifications.** Functional and Performance Specifications for operation of the TLD will be as set forth at [*see specification 6*]*. Registry

Operator shall comply with such Functional and Performance Specifications and, for a period of at least one year, shall keep technical and operational records sufficient to evidence compliance with such specifications.

RySG will comment below on Specification 6.

       2.8   **Protection of Legal Rights of Third Parties.** Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties, which shall at a minimum include those provisions set forth at [*see specification 7*]*. Any changes or modifications to such process and procedures following the Effective Date must be approved in advance by ICANN in writing.

RySG will comment below on Specification 7. RySG is unclear as to why ICANN would have an approval right for any changes or modifications, when it does not appear to have such a right initially when Registry Operator specifies the process and procedures it will use.

RySG also believes that the words "at a minimum" must be deleted in that it implies that registries must adopt additional protections above and beyond those specifically stated in Specification 7. This will inevitably lead to more complaints with ICANN or third parties in the event that one or more "rights owners" are dissatisfied with the rights protection mechanisms offered by a registry. We believe this provision should be replaced with the following:

> **"Protection of Legal Rights of Third Parties. Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth at [see specification 7]*."**

RySG will separately comment in the concurrent comment forum, "Proposed Rights Protection Mechanisms in New gTLDs." RySG remains concerned that the v3 Registry Agreement must not create rights that are inconsistent with existing law.

RySG repeats the comments it made to the v2 Registry Agreement, which was then numbered as Section 2.7,

"If additional tools are needed to address behavior that falls within the prescribed areas for which Consensus Policy may be developed, they can and should be developed as Consensus Policy. If tools to address behavior outside of the scope of Consensus Policy are desirable, those can be discussed and negotiated, but should not be confused with Consensus Policy."

       2.9   **Use of Registrars**. Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator must provide non-discriminatory access to registry services to all ICANN accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be

revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN.

[There are four options for community discussion and consideration with respect to registry/registrar separation:

        (a)   No cross-ownership restrictions except where there is market power and/or registry price caps (regulation needs, if any, left to regulating authorities)

        (b)   No cross-ownership restrictions for new registries, existing restrictions for existing registries.

        (c)   Limited lifting with enhanced structural separation:

        (i)   The registrar cannot sell names in the co-owned registry, or

        (ii)   The registrar can sell a very limited number of names in the co-owned registry.

        (d)   Complete restrictions:

        (i)   Registries cannot have ownership percentages in registrars, and vice versa.

        (ii)   Registrars prohibited from providing back-end services (this might be accompanied by reciprocal restrictions, i.e., that registries cannot provide back-end services for other registries and registries cannot own resellers).]

The RySG notes that ICANN identified "four options for community discussion and consideration" regarding registry/registrar separation in the v3 Registry Agreement. While the four options included a proposal for vertical integration espoused by a particular registrar, they did not include the RySG supermajority position or minority position on registry/registrar separation as set forth in the RySG's previous comments on the v2 Registry Agreement. The RySG is concerned that there is no apparent community support for the inclusion of the vertical integration options in the v3 Registry Agreement. The appearance of these options in the v3 Registry Agreement are similar to the inclusion in the v2 Registry Agreement of a single registrar's proposal to allow a vertically integrated registry/registrar to act as a registrar in its own TLD up to 100,000 registrations that likewise did not have broad community support. The process for addressing the proposed change in policy concerning registry/registrar separation remains as unclear going forward as it has been to date.

Members of the RySG have submitted numerous comments on this provision over the last several months and the RySG believes ICANN must consider those comments in addition to these.

    2.10   **Pricing for Registry Services.** Except as set forth in this Section 2.10, Registry Operator shall provide each ICANN accredited registrar that has executed Registry Operator's

registry-registrar agreement advance notice of any price increase [(net of refunds, rebates, discounts, product tying or other programs)] of no less than thirty (30) calendar days with respect to initial domain name registrations and one hundred eighty (180) calendar days with respect to renewal of domain name registrations, and shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Notwithstanding the foregoing, with respect to renewal of domain name registrations, Registry Operator need only provide thirty (30) calendar days notice of any price increase if the resulting price is less than or equal to a price for which Registry Operator provided notice within that past twelve (12) months, and need not provide any notice of any price increase for the imposition of the Variable Registry-Level Fee set forth in Section 6.3. [Registry Operator shall offer all domain registration renewals at the same price, unless the registrant agrees to a higher price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price by Registry Operator.] Registry Operator shall provide public query-based DNS lookup service for the TLD at its sole expense.

RySG requests clarification as to what "net of refunds, rebates, discounts…" means. RySG also requests clarification about the bracketed sentence regarding offering of all renewals at the same price, what "same price" means, and whether that pertains only to a Registry Operator who is selling directly to a registrant. The proposed language would appear to restrict a registry's ability to offer discounts on renewals to registrants who commit to a longer renewal term, such as five years. Further, a registry could disclose renewal pricing by, e.g., posting a pricing policy on its website. However, the registry does not have a direct relationship with the registrant, and should have no direct responsibility to disclose pricing to a registrant. Registry pricing and the fee a registrar charges are not the same. In the final sentence, what does "public query-based DNS lookup service" mean? Does that sentence mean that alternative models are not allowed, such as free registration with fees for resolution? Depending on the answers to the above questions, RySG reserves the right to provide additional comments on this section.

       2.11   **Contractual and Operational Compliance Audits.** ICANN may from time to time (not to exceed once per calendar quarter) conduct contractual compliance audits to assess compliance by Registry Operator with its covenants contained in Section 2 of this Agreement. Such audits shall be tailored to achieve the purpose of assessing compliance, and ICANN shall give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested by ICANN. As part of such audit and upon request by ICANN, Registry Operator shall timely provide all responsive documents, data and any other information necessary to demonstrate Registry Operator's compliance with this Agreement. Upon no less than five (5) calendar days notice (unless otherwise agreed to by Registry Operator), ICANN may, as part of any contractual compliance audit, conduct site visits during regular business hours to assess compliance by Registry Operator with its covenants contained in Section 2 of this Agreement. Any such audit will be at ICANN's expense, unless such audit is related to a discrepancy in the fees paid by Registry Operator hereunder in excess of 5% to ICANN's detriment. In the latter event, Registry Operator shall reimburse ICANN for all reasonable costs and expenses associated with such audit, which reimbursement will be paid together with the next Registry-Level Fee payment due following the date of transmittal of the cost statement for such audit.

In the first sentence, delete "quarter" and replace with "year." One audit per quarter is excessive and unduly burdensome. At a minimum, it should be clarified that there cannot be more than one audit per year covering the same ground. For example, if ICANN wants to separately audit finances and operations that is fine, but it should not do multiple operations audits in the same calendar year. Our discussions with ICANN staff seem to imply that this was the intent of the provision, but that must be clarified.

Site visits should require more than five calendar days notice. For example, under the five calendar day proposal, notice given the day before Thanksgiving could result in a site visit on the very next business day. Ten business days is more reasonable.

2.12 **Continued Operations Instrument.** Registry operator shall comply with the terms and conditions relating to the Continued Operations Instrument set forth at [*see specification 8*].

RySG will comment below on Specification 8.

2.13 *[Note: For Community-Based TLDs Only]* **Obligations of Registry Operator to TLD Community.** Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration policies, and shall enforce such registration policies. Registry Operator agrees to be bound by the Registry Restrictions Dispute Resolution Procedure as set forth at [*insert applicable URL*] with respect to disputes arising pursuant to this Section 2.13.]

With respect to the Registry Restrictions Dispute Resolution Procedure, RySG cautions that, as a matter of principle, any process which could result in penalties or termination of the Registry Agreement must be appealable to the ICANN Board and subject to judicial review. To do otherwise would violate ICANN's Bylaws, the Board of Director's fiduciary duty, and California Law.

ARTICLE 3.

COVENANTS OF ICANN

ICANN covenants and agrees with Registry Operator as follows:

3.1 **Open and Transparent.** Consistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner.

3.2 **Equitable Treatment.** ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause.

3.3 **TLD Nameservers.** ICANN will use commercially reasonable efforts to ensure that any changes to the TLD nameserver designations submitted to ICANN by Registry Operator (in a format and with required technical elements specified by ICANN at

http://www.iana.org/domains/root/ will be implemented by ICANN within seven (7) calendar days or as promptly as feasible following technical verifications. To the extent that ICANN is authorized to set policy with regard to an authoritative root server system, ICANN will ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD throughout the Term of this Agreement, unless earlier terminated pursuant to Section 4.3 or 4.4.

3.4   Root-zone Information Publication. ICANN's publication of root-zone contact information for the Registry TLD will include Registry Operator and its administrative and technical contacts. Any request to modify the contact information for the Registry Operator must be made in the format specified from time to time by ICANN at http://www.iana.org/domains/root/.

RySG notes that ICANN offered more commitments to the IDN ccTLDs in the Proposed Final Implementation Plan for IDN ccTLD Fast Track Process. See, e.g., page 42, wherein ICANN commits to "coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner" and to "maintain a stable, secure and authoritative publicly available database of relevant information" etc. ICANN must make these promises to gTLD registries as well.

ARTICLE 4.

TERM AND TERMINATION

4.1   Term. The term of this Agreement will be ten years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

4.2   Renewal. This Agreement will be renewed for successive periods of ten years upon the expiration of the initial Term set forth in Section 4.1 and each successive Term, unless:

(a)   Following notice by ICANN to Registry Operator of a fundamental and material breach of Registry Operator's covenants set forth in Article 2 or default of its payment obligations under Article 6 of this Agreement, which notice shall include with specificity the details of the alleged breach or default and such breach or default has not been cured within thirty (30) calendar days of such notice, (i) an arbitrator or court has finally determined that Registry Operator has been in fundamental and material breach of such covenant(s) or in default of its payment obligations, and (ii) Registry Operator has failed to comply with such determination and cure such breach or default within ten (10) calendar days or such other time period as may be determined by the arbitrator or court; or

(b)   During the then current Term, Registry Operator shall have been found by an arbitrator (pursuant to Section 5.2 of this Agreement) on at least three (3) separate occasions to have been in fundamental and material breach (whether or not cured) of Registry Operator's covenants set forth in Article 2 or default of its payment obligations under Article 6 of this Agreement.

RySG believes that 3 cured breaches over the span of 10 years should not necessarily result in non-renewal. That could be a breach only every 3 years, or it could be that breaches occurred during the very early portion of the contract term with exemplary performance for the 7 or 8 years thereafter. It is unclear what purpose an "automatic" three strikes rule serves.

(c)   Upon the occurrence of the events set forth in Section 4.2(a) or (b), the Agreement shall terminate at the expiration of the then current Term.

RySG remains concerned about the expanded number of offenses that could result in non-renewal, even offenses that seem relatively mundane. RySG repeats the comments it made with respect to the v2 Registry Agreement:

"Further, the v2 Registry Agreement, as compared to the 05-07 Registry Agreement, would have the effect of newly allowing non-renewal for uncured breach of many more categories, including: Data Escrow, Monthly Reporting, Publication of Registration Data, Protection of Legal Rights of 3rd Parties, Use of Registrars, and Contractual and Operational Compliance Audits. Per its comments in Article 2 above, RyC believes that changes need to be made to several of these provisions, such as removing the requirement for Protection of Legal Rights of 3rd Parties, and the draconian remedy of non-renewal (in addition to increased liability and litigation risks) underscores the importance of such removal. RyC submits that material breach determinations should be limited to those breaches that materially affect Security and Stability."

4.3   Termination by ICANN.

(a)   ICANN may terminate this Agreement if: (i) Registry Operator fails to cure any fundamental and material breach of Registry Operator's covenants set forth in Article 2 or default of its payment obligations set forth in Article 6 of this Agreement, each within thirty (30) calendar days after ICANN gives Registry Operator notice of such breach or default, which notice will include with specificity the details of the alleged breach or default, (ii) an arbitrator or court has finally determined that Registry Operator is in fundamental and material breach of such covenant(s) or in default of its payment obligations, and (iii) Registry Operator fails to comply with such determination and cure such breach or default within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

RySG does not believe that there should be different terminology used for "breach" or "default." These commonly mean the same thing, and care must be taken to ensure that there are no differing notice and cure provisions, or other obligations, owing to the different terminology used.

Similar to the expanded number of offenses that could result in non-renewal, RySG remains concerned that termination could result from offenses that do not impact Security and Stability, such as the relatively minor offense of filing monthly reports. RySG repeats the comments it made to the v2 Registry Agreement, which remain relevant,

"The v2 Registry Agreement, as compared to the 05-07 Registry Agreement, would have the effect of newly allowing termination for uncured breach of many more categories, including: Data Escrow, Monthly Reporting, Publication of Registration Data, Protection of Legal Rights of 3rd Parties, Use of Registrars, and Contractual and Operational Compliance Audits. … RyC believes that changes need to be made to several of these provisions, such as removing the requirement for Protection of Legal Rights of 3rd Parties, and the draconian remedy of termination (in addition to increased liability and litigation risks) underscores the importance of such removal. … RyC submits that material breach determinations should be limited to those breaches that materially affect Security and Stability."

(b)   ICANN may, upon notice to Registry Operator, terminate this Agreement, if Registry Operator fails to complete all testing and procedures necessary for delegation of the TLD into the root zone within 12 months of the Effective Date. Registry Operator may request an extension for up to additional 12 months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD. Any fees paid by Registry Operator to ICANN prior to such termination date shall be retained by ICANN in full.

There must be an objective standard for "testing and procedures necessary for delegation of the TLD into the root zone" so that registries don't invest time and money to then have the agreement terminated because of a subjective determination that "testing and procedures" were not met. Rather than termination simply on notice, there should be a standard cure period allowed.

(c)   ICANN may, upon notice to Registry Operator, terminate this agreement if Registry Operator fails to cure a breach of Registry Operator's obligations set forth in Section 2.12 of this Agreement within thirty (30) calendar days of delivery of notice of such breach by ICANN, or if the Continued Operations Instrument is not in effect for greater than sixty (60) consecutive calendar days at any time following the Effective Date.

This provision should also require a "material" breach and be subject to the protections of section 4.3(a) including "final" determinations by a court or arbitrator. RySG will comment further below with respect to continuity.

4.4   Termination by Registry Operator.

(a)   Registry Operator may terminate this Agreement upon notice to ICANN if, (i) ICANN fails to cure any fundamental and material breach of ICANN's covenants set forth in Article 3, within thirty (30) calendar days after Registry Operator gives ICANN notice of such breach, which notice will include with specificity the details of the alleged breach, (ii) an arbitrator or court has finally determined that ICANN is in fundamental and material breach, and (iii) ICANN fails to comply with such determination and cure such breach within ten (10) calendar days or such other time period as may be determined by the arbitrator or court.

RySG would like a better understanding of what it would mean to terminate a contract with ICANN for ICANN's breach, considering that ICANN presently has the sole authority to grant gTLDs. Would the relevant registry get to keep the ability to continue operating the registry for that particular TLD? In any event, termination is not a sufficient remedy in the event of a breach by ICANN, as it provides a Registry Operator with no ability to recover any losses.

RySG believes that ICANN should have Service Level Agreements with the registries to provide for an additional meaningful remedy to a breach by ICANN. Monetary penalties and sanctions (which are not subject to the limitations of liability) may be the only potential meaningful penalties as opposed to termination by the Registry Operator.

(b)   Registry Operator may terminate this Agreement upon notice to ICANN if, (i) within the notice period provided for in Section 7.2(d), Registry Operator provides ICANN notice of its objection to a proposed material amendment of this Agreement pursuant to Article 7,

which notice will include with specificity the details of such objection, and (ii) such amendment thereafter becomes effective in the form objected to by Registry Operator; provided, however, that Registry Operator may only terminate this Agreement pursuant to this Section 4.4(b) if the required notice of termination has been provided to ICANN within thirty (30) calendar days following the effective date of such amendment; provided, further, that the termination of this Agreement pursuant to this Section 4.4(b) shall be effective on the date that is the one hundred twenty (120) calendar day following the date upon which Registry Operator delivered the notice of termination to ICANN.

RySG will comment further on Section 7. RySG notes that the ability to terminate the contract if it objects to a unilateral amendment by ICANN is illusory, as it would require abandonment of the investment in the registry. This is much different than a consumer contract, such as changing the terms and conditions of a consumer credit card, with potentially millions of dollars invested in running a registry. A registry could not simply terminate and choose another ICANN if it was unhappy with the amended terms and conditions. Absent a viable alternative to ICANN, as recognized by the ICANN Chairman of the Board, ICANN must eliminate its unilateral right to amend the Registry Agreement. Once that occurs, this provision will not be necessary.

4.5 **Transition of Registry upon Termination of Agreement.** Upon expiration of the Term and any termination of this Agreement, Registry Operator shall agree to provide ICANN or any successor registry authority that may be designated by ICANN for the TLD with all data (including that data escrowed in accordance with Section 2.3) regarding operations of the registry for the TLD necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry authority. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry authority in its sole discretion and in conformance with the ICANN gTLD Registry Continuity Plan, dated April 25, 2009, as the same may be amended from time to time. In addition, ICANN or its designee shall retain and may enforce its rights under the Continued Operations Instrument and Alternative Instrument, as applicable, regardless of the reason for termination or expiration of this Agreement.

In the first sentence, after "this Agreement", insert "**as provided in Section 4.3**" This edit is necessary to ensure that the transition assistance is to be provided upon proper termination, having followed the appropriate termination procedures. In the second sentence, before "consultation" insert "**proper termination and**", and delete, ", as the same may be amended from time to time." RySG understands that the referenced Registry Continuity Plan is still not finalized, and therefore should only be included when it is complete. There should not be an ability to unilaterally amend this continuity plan. RySG also notes that the continuity plan does not have any obligations for any registry operator, but is primarily geared towards ICANN's responsibilities. RySG is unclear of how the continuity plan applies in this context.

ARTICLE 5.

DISPUTE RESOLUTION

5.1 **Cooperative Engagement.** Before either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.

5.2   Arbitration. Disputes arising under or in connection with this Agreement, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration will be conducted in the English language in front of a single arbitrator and will occur in Los Angeles County, California, USA. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator shall include in its awards. In any proceeding, ICANN may request the appointed arbitrator award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations) in the event the arbitrator determines that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 and Section 5.4 of this Agreement. In any litigation involving ICANN concerning this Agreement, jurisdiction and exclusive venue for such litigation will be in a court located in Los Angeles County, California, USA; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

RySG objects to the continuing insistence on only a single arbitrator, and repeats the comments made to the v2 Registry Agreement,

"It is contrary to normal commercial dealings to allow a single ICC arbitrator to determine important disputes. Indeed, the philosophy of the ICC rules, and most other arbitral authorities, is clearly to the contrary. Among other things, use of a single arbitrator in all disputes would inject large uncertainty into the process of dispute resolution for ICANN as well as the registries. Judgments as to registry agreements should have the benefit of three learned individuals and should not risk the potential talent or bias of a single person chosen by none of the parties. Although ICANN's motive for moving to one arbitrator – speed and economy – is a laudable one, it is appropriate to remember the caution, "you get what you pay for." Fast and cheap is not a good trade off for fair and reasoned justice. At a minimum, the provision should be changed so that a normal, three person arbitral panel is used for important disputes, such as, for example, disputes regarding renewal or termination, or in which ICANN seeks punitive damages, or where claims exceed a certain dollar threshold (such as $1,000,000)."

As to the right to grant punitive damages, RySG believes those extraordinary remedies should be reserved for truly important matters. For example, failure to file monthly reports, which is an Article 2 obligation, should not give rise to punitive damages, as other remedies are more than adequate to compensate for, and deter such conduct. Accordingly, RySG asserts that the following should be deleted, "Article 2, Article 6 and Section 5.4" and should be replaced by , "**Section 2.1, 2.2 and 6.1"** to reflect that punitive damages would be available with regard to temporary policies, consensus policies, registry services and fees.

5.3   Limitation of Liability. ICANN's aggregate monetary liability for violations of this Agreement will not exceed the amount of Registry-Level Fees paid by Registry Operator to ICANN within the preceding twelve-month period pursuant to this Agreement (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any). Registry Operator's aggregate monetary liability to ICANN for violations of this Agreement will be limited to the amount of fees paid to ICANN during the preceding twelve-month period (excluding the Variable Registry-Level Fee set forth in Section 6.3, if any), and punitive and exemplary damages, if any, awarded in accordance with Section 5.2. In no event shall either party be liable for special, punitive, exemplary or consequential damages arising out of or in connection with this Agreement or the

performance or nonperformance of obligations undertaken in this Agreement, except as provided in Section 5.2.

RySG restates its v2 Registry Agreement comments, which remain relevant, *"Because of the broad indemnification obligations proposed by the v2 Registry Agreement, such obligation must be capped under the Limitation of Liability. Thus, in the second sentence, insert the following text after "Agreement" and before "will": "*, ***and its aggregate indemnity obligations,***". The Guidebook analysis suggests that ICANN intended the indemnity to be subject to the cap, so this language will merely clarify that objective. (See, Guidebook, p. 138, "…ICANN revised to allow ICANN to recover in an indemnification proceeding an amount equal to fees paid in the last 12 months…")*

RySG believes that the disclaimer of warranties it previously proposed is reasonable, as these warranties may otherwise be implied by law, and they are routinely disclaimed. Thus, after the last sentence in Section 5.3, insert: *"***EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, REGISTRY OPERATOR DOES NOT MAKE ANY WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES RENDERED BY ITSELF, ITS SERVANTS, OR ITS AGENTS OR THE RESULTS OBTAINED FROM THEIR WORK, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE.***"*

ARTICLE 6.

FEES

6.1   Registry-Level Fees. Registry Operator shall pay ICANN a Registry-Level Fee equal to (i) the Registry Fixed Fee of US$6,250 per calendar quarter and (ii) the Registry-Level Transaction Fee. The Registry-Level Transaction Fee will be equal to the number of annual increments of an initial or renewal domain name registration (at one or more levels, and including renewals associated with transfers from one ICANN-accredited registrar to another, each a "Transaction"), during the applicable calendar quarter multiplied by US$0.25, provided, however that the Registry-Level Transaction Fee shall not apply until and unless more than 50,000 domain names are registered in the TLD and shall apply thereafter to each Transaction. Registry Operator shall pay the Registry-Level Fees on a quarterly basis comprised of four equal payments by the 20th day following the end of each calendar quarter (i.e., on April 20, July 20, October 20 and January 20 for the calendar quarters ending March 31, June 30, September 30 and December 31) of the year to an account designated by ICANN.

RySG repeats the comments it made to the v1 Registry Agreement and the v2 Registry Agreement:

"The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share."

6.2   Cost Recovery for RSTEP. Requests by Registry Operator for the approval of Additional Services pursuant to Section 2.1 may be referred by ICANN to the Registry Services Technical Evaluation Panel ("RSTEP") pursuant to that process at http://www.icann.org/en/registries/rsep/. In the event that such requests are referred to RSTEP,

Registry Operator shall remit to ICANN the invoiced cost of the RSTEP review within ten (10) business days of receipt of a copy of the RSTEP invoice from ICANN, unless ICANN determines, in its sole and absolute discretion, to pay all or any portion of the invoiced cost of such RSTEP review.

RySG repeats the comments it made to the v1 Registry Agreement and the v2 Registry Agreement:

"Registry operators urge ICANN to reconsider this provision in light of the strongly negative affect it could have on innovation in the TLD space.

The RSEP process is a function of ICANN's primary role in "preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet." ICANN's mission and core values specifically obligate it to respect creativity and innovation, and to rely on market mechanisms to promote and sustain competition. The RSEP process supports ICANN's core functions, and should be treated as an integral part of ICANN's operations, and not as an adjunct, pay-as-you-go service. It imposes a fee on innovation, creates a free-rider problem, and to the extent that registries with limited resources (i.e., smaller, community based registries) are the source of innovation, it reduces the likelihood that the community will enjoy the benefit of such innovation.

In addition, this would make it less likely that registries would seek to introduce new registry services that benefit consumers but do not produce additional revenue to registries. A perfect example of this is the PIR request to introduce DNSSEC in .ORG. Moreover, by creating a user fee for the RSEP process, ICANN is eliminating any incentives it may have to use the RSEP process efficiently."

6.3 Variable Registry-Level Fee.

(a) If the ICANN accredited registrars (as a group) do not approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for any ICANN fiscal year, upon delivery of notice from ICANN, Registry Operator shall pay to ICANN a Variable Registry-Level Fee, which shall be paid on a fiscal quarter basis, and shall accrue as of the beginning of the first fiscal quarter of such ICANN fiscal year. The fee will be calculated and invoiced by ICANN on a quarterly basis, and shall be paid by Registry Operator within sixty (60) calendar days with respect to the first quarter of such ICANN fiscal year and within twenty (20) calendar days with respect to each remaining quarter of such ICANN fiscal year, of receipt of the invoiced amount by ICANN. The Registry Operator may invoice and collect the Variable Registry-Level Fees from the registrars who are party to a Registry-Registrar Agreement with Registry Operator, provided that the fees shall be invoiced to all ICANN accredited registrars if invoiced to any. The Variable Registry-Level Fee, if collectible by ICANN, shall be an obligation of Registry Operator and shall be due and payable as provided in this Section 6.3 irrespective of Registry Operator's ability to seek and obtain reimbursement of such fee from registrars. In the event ICANN later collects variable accreditation fees for which Registry Operator has paid ICANN a Variable Registry-Level Fee, ICANN shall reimburse the Registry Operator an appropriate amount of the Variable Registry-Level Fee, as reasonably determined by ICANN. If the ICANN accredited registrars (as a group) do approve pursuant to the terms of their registrar accreditation agreements with ICANN the variable accreditation fees established by the ICANN Board of Directors for a fiscal year, ICANN shall not be entitled to a Variable-Level Fee hereunder for

such fiscal year, irrespective of whether the ICANN accredited registrars comply with their payment obligations to ICANN during such fiscal year.

In its "**Summary of Changes to Base Agreement for New gTLDs**

(v.3 against v.2)", ICANN explains that, "The proposed changes are: …

- to clarify that the fee is payable irrespective of the Registry Operator's ability to recoup the fees from registrars (Note: Registry Operator will have flexibility in negotiating its registry-registrar agreements to ensure collection of such fees if necessary); …

- to place a cap on the "per-registrar" component of the fee to give Registry Operators greater assurances with respect to the level of fees that will be charged;"

However, RySG does not see the cap on the per-registrar component that was supposedly added.

RySG objects to the notion of registry operators being forced to act as guarantors for registrars, especially in light of ICANN's role in accrediting these registrars, including vetting and due-diligence regarding financial qualifications of such registrars. At this point in time, registries have no ability to select the registrars they do business with. If ICANN were to revisit the obligation of registries to use all registrars accredited by ICANN that elect to do business in a TLD, then we can revisit this obligation as it would allow the registries to perform due diligence. If ICANN accredits registrars who can't or won't pay, this should not become an obligation of registries. RySG repeats the comments it made regarding the v2 Registry Agreement, which suggests additional language:

*"the following language should be added to Section 6.4, "**Registry Operator shall only be required to remit to ICANN the fees described in this Section 6.4 that it actually receives from registrars after submitting invoices for such fees. Registry Operator shall not be deemed in any way to be a "guarantor" for registrars, and has no obligation to make affirmative collection efforts beyond those made in its sole discretion in the ordinary course of business. Registry Operator's failure to collect any such funds from registrars shall not be deemed a material breach of this Agreement."***

Finally, as more of the burden of payments to ICANN come from the registries, the registries believe that it should have a similar approval right to the ICANN budget as currently enjoyed by the registrars.

> (b)   The amount of the Variable Registry-Level Fee will be specified for each registrar, and may include both a per-registrar component and a transactional component. The per-registrar component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year. The transactional component of the Variable Registry-Level Fee shall be specified by ICANN in accordance with the budget adopted by the ICANN Board of Directors for each ICANN fiscal year but shall not exceed US$0.25 per domain name registration (including renewals associated with transfers from one ICANN-accredited registrar to another) per year.

As noted above, there must be a cap on the "per-registrar" component of the fee.

> **6.4**   **Adjustments to Fees**. Notwithstanding any of the fee limitations set forth in this Article 6, commencing upon the expiration of the first year of this Agreement, and upon the

expiration of each year thereafter during the Term, the then current fees set forth in Section 6.1 and Section 6.3 may be increased, at ICANN's discretion, by a percentage equal to the percentage increase, if any, in (i) the Consumer Price Index for All Urban Consumers, U.S. City Average (1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, or any successor index (the "CPI") for the month which is one (1) month prior to the commencement of the applicable year, over (ii) the CPI published for the month which is one (1) month prior to the commencement of the immediately prior year. In the event of any such increase, ICANN shall provide notice to Registry Operator specifying the amount of such increase. Any fee increase under this Section 6.4 shall be effective as of the first day of the year in which the above calculation is made.

If such fees are subject to increase based upon the CPI, they should also decrease if the CPI goes down.

ARTICLE 7.

AMENDMENTS

7.1   Amendment of Terms and Specifications. During the term of this Agreement, Article 2 (including the specifications incorporated into this Agreement pursuant to Article 2), Article 6 and Article 8 may be amended by ICANN in accordance with changing standards, policies and requirements pursuant to the process set forth in this Article 7; provided, however, that (i) ICANN may not utilize this Article 7 to increase the amount of fees payable hereunder unless ICANN demonstrates a financial need for any such increase, (ii) no amendment shall be applied retrospectively, and (iii) ICANN may not utilize this Article 7 to amend Section 2.1, Section 2.2 or the process set forth at [*see specification 1*] for adoption and implementation of new or modified Consensus Policies or Temporary Policies.

RySG has repeatedly and strenuously objected to the concept of ICANN's unilateral ability to amend the terms and conditions of the Registry Agreement. RySG believes this is unreasonable, an abuse of power, and puts at risk the contracting scheme that has served the community well in providing certainty, but also allowing flexibility to amend within the bounds of the consensus policy process. ICANN's Chairman of the Board, Peter Dengate Thrush, agreed with RySG's position on this matter by reviewing this provision during the Seoul constituency day lunch session with the registries and proclaiming he would never advise a client to agree to this. RySG looks forward to working with ICANN staff on this issue, but emphasizes that the draft Registry Agreement must excise any provisions that unilaterally allow for amendment of contract terms, and return instead to the paradigm of requiring mutual consent as is customary for amendments. The v3 Registry Agreement does not provide adequate protection – rather, the whole concept of unilateral amendments must be removed.

For completeness, RySG repeats the earlier arguments it has made against this concept:

> *"RyC strongly objects to the proposed paradigm whereby ICANN could make unilateral changes to Registry Agreements at any time. The ability of one party to make changes to a contract is contrary to fundamental contract principles: there must be a meeting of the minds, and there must be certainty as to duties and obligations. RyC does not regard the proposed "safeguards" as a suitable check on this abuse of power. ICANN wants to be able to implement changes quickly without having to individually re-negotiate each registry agreement. While it may*

"want" this flexibility as a matter of administrative convenience, it must remember that there are two parties to each contract – ICANN must not use its position to "force feed" contract changes, particularly when it already has the Consensus Policy mechanism by which to enact critically important changes.

<u>Unilateral Change of Registry Agreement Terms and Conditions Prevents Certainty In Contracting and Operations</u>. First, it would make it more difficult for applicants to attract capital and measure the commensurate amount of capital required to sustain operations; it would also make it more difficult for existing Registry Operators to prioritize necessary investment for continued operations against what may be an unnecessary operational change for specific purpose TLDs. Financial markets abhor uncertainty. Operations people do too. It is hard to do modeling and planning with a moving target, and unilaterally changeable contract terms are the antithesis of certainty.

Second, the current Consensus Policy mechanism is sufficient for critical changes and ensures that any implementation is appropriately balanced across multiple constituencies and stakeholder groups. RyC understands that the world is dynamic and that it is impossible to foresee and plan for all eventualities. Consensus Policies allow adjustment for change, while at the same time limiting the changing duties and obligations to things that really matter (and that are within the scope of ICANN's mandate): issues affecting Security and Stability. Truly important and time sensitive issues can be addressed extremely quickly via Temporary Policies, and those can become permanent changes through Consensus Policies. It may help for ICANN to explain the specific things it needs to amend outside the current Consensus Policy scheme, as it has offered no compelling justification to date.

Third, the proposed safeguards in the v2 Registry Agreement fall short of providing a sufficient check on ICANN's abuse of power in making unilateral changes. For example, a change to pricing and economics could put registries in a problematic alliance under antitrust laws if they collectively rejected a change, so the registries would be left with no recourse. Moreover, even if more than 50% of registries reject a change, the ICANN Board could still override any such veto. Thus, ICANN would effectively have the last word on whether a unilateral ICANN change to a contract was acceptable, and no check and balance really exists.

<u>Unilateral Change of Terms and Conditions by One Party is an Unsuitable Approach for Private Contracting</u>. ICANN is not a regulator. It is a private, non-profit corporation. However, even regulated utilities possess more protections than ICANN is proposing. The proposed v2 Registry Agreement would allow unilateral changes with only limited public notice posting, but no requirements of fact finding, public hearings, neutral appeals or due process. There is a well-established method for making changes to private contracts – they may be amended at any time by mutual consent of the parties. This mutuality preserves the meeting of the minds necessary to form the basis of a sound contract. Unilateral changes to a contract by one private party could even result in the contract being declared an unenforceable contract of adhesion. RyC believes ICANN's proposed ability to make unilateral changes goes well beyond its mandate and is an unfair abuse of power.

Although the v2 Registry Agreement made some changes from v1 (such as requiring a more than 50% veto rather than 2/3), RyC's comments to the v1 Registry Agreement remain relevant:

"This is completely unnecessary, and an extraordinary act of over-reaching on ICANN's part. ICANN has described this provision as providing necessary flexibility, but has not identified any situation in which the absence of this right has hindered ICANN's ability to perform its mission. But the fact is that ICANN already possesses authority to impose new obligations on registry operators through the Consensus Policy provisions of the agreement, and has emergency authority to do so using the Temporary Policy provisions of the registry agreement. These provisions give ICANN the authority at all times to make changes necessary to preserve the stability and security of the Internet and the DNS. ICANN has not – because it cannot – point to any situation where it needed the kind of blank check it is requesting here. ICANN's expanded comments speak to the need to address market changes that would affect "the even playing field" for all registries. While we agree that ICANN is obligated to treat all registries in a non-discriminatory way, this suggests a far more affirmative role in regulating competition among contracted parties than is appropriate or necessary. This isn't about mission creep, it is about "mission leap." Further discussion follows Section 7.2 below.

Registries are also concerned that this provision introduces ambiguity with respect to the involvement of the ICANN Board in contract amendments. What would not be a "material change"? Are there any circumstances in which modifications, supplements, or updates would not be amendments? For example, could staff change Specification 1 without specific authority from the Board for a particular change?

Registry operators understand that the current approach to negotiating registry agreements is not likely to work in an environment where hundreds of new registries are added in quick succession. But giving ICANN unilateral authority of this sort is not a good answer. Rather, registries believe that we should focus now on crafting an agreement that is fair, gives ICANN the tools it needs to achieve its limited mission, and gives registries the stability and predictability they need to operate businesses. Provisions under which changes to the fee provisions of each registry's agreement should be negotiated on an individual basis, as appropriate.

RyC also restates its v1 Registry Agreement comments pertaining to Section 7.2:

"This provision is completely unacceptable, for the reasons articulated with respect to Section 7.1. ICANN may argue that the override rights protect registry operators from ICANN's over-reaching, but that is not the case.

First, there is no justification for shifting the burdens in the way this provision does. Currently, ICANN can force certain changes on stability and security grounds, but ICANN has to first make the case that Consensus Policy is needed. In addition, through the policy development process, registries may agree – but are not obligated - to abide by policies that extend into areas outside the picket fence, and registries have demonstrated their willingness to do so. Under the arrangement proposed by ICANN, however, ICANN can impose any changes it wants, and the

burden is on registries to block those that regulate activities outside the picket fence.

Second, even if such burden shifting could be supported, the requirement of a vote of two-thirds of the number of registries to overturn such changes is not an effective check in an environment involving hundreds, if not thousands, of TLDs employing many different business models. Registries already operate under widely varied business models and even now, with only a handful of non-cc registries, and it is easy to imagine changes that all registries are "subject to" but for which the cost impact varies tremendously from registry to registry. Registrant authentication obligations, for example, might impose relatively small costs on registries serving a pre-identified and pre-authenticated user base like, for example, .MUSEUM, but extraordinary costs on the larger commercial registries that would have to implement costly new procedures. There is no particular reason for registries that are only minimally impacted by a change to object to it, indeed, the incentive for such registries would be to preserve political capital by going along with a change. In addition, this provision requires a relatively high level of participation by all registries in the ICANN process by registry operators. Even today that is not always the case.
…

Registry operators do not believe there is any justification for giving ICANN unilateral authority to require registry operators to bear costs and adopt irrelevant business models."

      7.2   **Process for Changes.** The process for any amendment to this Agreement pursuant to Section 7.1 shall be as follows:

      (a)   Prior to formally proposing any amendment, ICANN will provide an opportunity of no less than thirty (30) calendar days for consultation with and consideration of input from all registry operators that would be subject to such amendment;

      (b)   Following such consultation and consideration, ICANN will publicly post on its website for no less than thirty (30) calendar days formal notice of any proposed amendment to this Agreement, including the text of the amendment (including any amendment to the specifications incorporated into this Agreement), during which Registry Operator may submit comments to the amendment;

      (c)   Following such public notice period and approval of the amendment by the ICANN Board of Directors, ICANN shall provide Registry Operator notice of the final terms of the amendment (including any amendment to the specifications incorporated into this Agreement) at least ninety (90) calendar days prior to the effectiveness thereof by the posting of a notice of effectiveness on ICANN's web site;

      (d)   From the date of such public notice of the approved amendment, Registry Operator shall have sixty (60) calendar days to provide notice to ICANN of its disapproval of such amendment;

      (e)   If, within such sixty (60) calendar day period, the registry operators of a majority of the top-level domains subject to the amendment (i.e. Registry Operator and any other registry operator party to a registry agreement with ICANN containing a provision similar to this

Article 7) provide notice to ICANN of their disapproval of the amendment, it shall be deemed disapproved by the affected registry operators; and

(f)   In the event that the amendment is disapproved by the affected registry operators pursuant to the process set forth in clause (e) above, the ICANN Board of Directors by a two-thirds vote shall have thirty (30) calendar days to override such disapproval if: (i) in the case of any amendment relating to the fees payable to ICANN hereunder, the amendment is justified by a financial need of ICANN and (ii) in the case of any other amendment, the amendment is justified by a substantial and compelling need related to the Security or Stability (as such terms are defined in Section 8.3) of the Internet or the Domain Name System, in which case, the proposed amendment shall be effective immediately upon expiration of such thirty (30) calendar day period. If the ICANN Board of Directors does not override such disapproval, the proposed amendment shall have no force or effect.

For the reasons set forth above, the proposed process for changes is inappropriate and unnecessary. Therefore, this entire section 7.2 should be deleted.

ARTICLE 8.

MISCELLANEOUS

8.1   Indemnification of ICANN.

(a)   Registry Operator shall indemnify and defend ICANN and its directors, officers, employees, and agents (collectively, "Indemnitees") from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services; provided that Registry Operator shall not be obligated to indemnify or defend any Indemnitee to the extent the claim, damage, liability, cost or expense arose due to a breach by ICANN of any obligation contained in this Agreement or any willful misconduct by ICANN. This section will not apply to any request for attorneys' fees in connection with any litigation or arbitration between or among the parties. This section shall not be deemed to require Registry Operator to reimburse or otherwise indemnify ICANN for costs associated with the negotiation or execution of this Agreement, or with monitoring or management of the parties' respective obligations hereunder. Further, this Section shall not apply to any request for attorney's fees in connection with any litigation or arbitration between or among the parties, which shall be governed by Article 5 or otherwise awarded by a court or arbitrator.

This indemnification obligation remains uncapped and overbroad. Being required to indemnify for all claims "arising out of or relating to Registry Operator's operation of the registry" or for "provision of Registry Services" means Registry Operators would need to indemnify for virtually everything regardless of whether the Registry Operator was at fault. This violates fundamental fairness, and the notion that indemnification is a risk-transfer mechanism to be used in allocating responsibility for a specific and identified risk of loss. It is important to remember that ICANN would still be covered by its usual contract remedies for damages that might result from a Registry Operator's breach of its performance obligations under the contract, even if the risks are not allocated in advance in the indemnification section. One of the primary factors in determining whether one party or the other should bear a particular risk is the ability of the party to control that risk. The overbroad clause as currently drafted would not cover a particular risk, but every third party claim.

A more reasonable approach would be to make the indemnification provision mutual, and to limit it to material breach of representations and warranties, and to gross negligence and willful misconduct. Thus, at a minimum, RySG suggests deleting, "Registry Operator's operation of the registry for the TLD or Registry Operator's provision of Registry Services" and replacing it with "**Registry Operator's material breach of any representation or warranty specifically identified as such in the Agreement, or the gross negligence or willful misconduct of Registry Operator, its employees, agents, or contractors in the performance of this Agreement.**"

Per its comments to Section 5.3 above, RySG has offered language that would clarify that the indemnity obligation is under the Limitation of Liability. A cap is especially necessary given the breadth of the indemnity required in the v3 Registry Agreement.

Finally, RySG requests to insert "**reasonable**" before "legal fees".

(b) For any claims by ICANN for indemnification whereby multiple registry operators (including Registry Operator) have engaged in the same actions or omissions that gave rise to the claim, Registry Operator's aggregate liability to indemnify ICANN with respect to such claim shall be limited to a percentage of ICANN's total claim, calculated by dividing the number of total domain names under registration with Registry Operator within the TLD (which names under registration shall be calculated consistently with Article 6 hereof for any applicable quarter) by the total number of domain names under registration within all top level domains for which the registry operators thereof that are engaging in the same acts or omissions giving rise to such claim. For the purposes of reducing Registry Operator's liability under Section 8.1(a) pursuant to this Section 8.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN's reasonable satisfaction, such other registry operators' culpability for such actions or omissions. For the avoidance of doubt, in the event that a registry operator is engaged in the same acts or omissions giving rise to the claims, but such registry operator(s) do not have the same or similar indemnification obligations to ICANN as set forth in Section 8.1(a) above, the number of domains under management by such registry operator(s) shall nonetheless be included in the calculation in the preceding sentence.

RySG advocates that the following sentence be deleted, "For the purposes of reducing Registry Operator's liability under Section 8.1(a) pursuant to this Section 8.1(b), Registry Operator shall have the burden of identifying the other registry operators that are engaged in the same actions or omissions that gave rise to the claim, and demonstrating, to ICANN's reasonable satisfaction, such other registry operators' culpability for such actions or omissions." There is no way the Registry Operator would know that information or have access to the information to make such a demonstration.

8.3 **Defined Terms.** For purposes of this Agreement, Security and Stability shall be defined as follows:

(c) For the purposes of this Agreement, an effect on "Security" shall mean (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the

unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

"Unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards" is too broad. That language potentially takes in a wide variety of small and large security incidents on the Internet, such as unauthorized access or data breaches on third-party networks, malware that has infected individual user systems, phishing on compromised Web sites, etc. The mere fact that services are operating on a domain name does not imply or require registry involvement. Registries do not have any technical ability to mitigate many of those kinds of problems. And most do not threaten the systematic security, stability and resiliency of a TLD or the DNS itself, and are therefore out of ICANN's mission scope.

We suggest the language be changed to read: "**Unauthorized disclosure, alteration, insertion or destruction of registry data, or the unauthorized access to or disclosure of registry information or resources on the Internet by registry systems operating in accordance with all applicable standards.**"

The v3 Registry Agreement language seems to come from the Registry Services Evaluation Policy (RSEP) definition of an "effect on security" that is found in all Registry Agreements. The RSEP discusses how new registry services should not negatively impact security, and that new registry services should be compliant with applicable relevant standards. That context is missing in the Guidebook. Without that context, the language has become more expansive and open to interpretation. Both ICANN and the RySG desire that registries function within applicable standards, and that current or future registry services not be the genesis of security problems.

(d)　　For purposes of this Agreement, an effect on "Stability" shall refer to (1) lack of compliance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice Requests for Comments ("RFCs") sponsored by the Internet Engineering Task Force; or (2) the creation of a condition that adversely affects the throughput, response time, consistency or coherence of responses to Internet servers or end systems operating in accordance with applicable relevant standards that are authoritative and published by a well-established and recognized Internet standards body, such as the relevant Standards-Track or Best Current Practice RFCs, and relying on Registry Operator's delegated information or provisioning of services.

This language is unacceptable: "authoritative and published by a well-established, recognized, and authoritative standards body." ICANN should not leave the language open-ended and make contracted parties subject to any and all standards bodies. ICANN needs to more explicitly enumerate the standards and name the authoritative body, which we believe is the IETF. Application of additional standards should be considered via the consensus policy process instead.

Moreover, the v3 Registry Agreement definitions misunderstand IETF practices and definitions. The contract language must be revised to adhere to proper terminology.

The inclusion of "Standards-Track" [sic] is inappropriate, since only some documents on the "standards track" are authoritative. IETF Internet specifications go through stages of development, testing, and acceptance. Within the Internet Standards process, these

stages are called "maturity levels." These maturity levels include "Proposed Standard", "Draft Standard", and "Standard" Specifications.[1] Documents at lower maturity levels are not Internet Standards, do not enjoy enough development or vetting, and registries should not be required to follow them.

Contracted parties should not be required to adhere to IETF Best Practices or "best current practice RFCs". By definition, best practices are not mandatory, and the IETF chose to make them Best Practices for a reason. Nor are IETF BCPs considered technical standards. They tend to deal with processes and procedures rather than protocols -- they represent a consensus of a way to do something because it is recognized that a user experience can be enhanced when there is an agreed-upon way to complete a task. However, interoperability is not usually applicable. As long as the user experiences standards-compliant behavior, ICANN does not need to say more about how that behavior is achieved.

8.5   Change in Control; Assignment and Subcontracting. Neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. Notwithstanding the foregoing, ICANN may assign this Agreement in conjunction with a reorganization or re-incorporation of ICANN to another nonprofit corporation or similar entity organized for the same or substantially the same purposes. Registry Operator must provide no less than thirty (30) calendar days advance notice to ICANN of any material subcontracting arrangements, and any agreement to subcontract portions of the operations of the TLD must mandate compliance with all covenants, obligations and agreements by Registry Operator hereunder. Registry Operator will provide no less than ten (10) calendar days advance notice to ICANN prior to the consummation of any transaction anticipated to result in a direct or indirect change of ownership or control of Registry Operator. Such change of ownership or control notification shall include a statement that affirms that the ultimate parent entity of the party acquiring such ownership or control meets the ICANN-adopted specification or policy on registry operator criteria then in effect, and affirms that Registry Operator is in compliance with its obligations under this Agreement. Within thirty (30) calendar days of such notification, ICANN may request additional information from Registry Operator establishing compliance with this Agreement, in which case Registry Operator must supply the requested information within fifteen (15) calendar days.

In the second sentence, after "organized" insert the text, "**in the same legal jurisdiction in which ICANN is currently organized and**". This is in keeping with ICANN's recommendation 1.11.1, in its February 26, 2009 Implementation Plan for Improving Institutional Confidence, that ICANN retain its headquarters in the United States "to ensure certainty about ICANN's registry…agreements." This is also consistent with ICANN's promise in Section 8(b) of the Affirmation of Commitments that ICANN "remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community." RySG is concerned that ICANN's unwillingness to make the change it requested in its v2 Registry Agreement comments suggests a desire to evade these cited commitments by a reorganization.

RySG remains concerned about the impact of this section on securities laws as possibly requiring notification prior to public disclosure. Accordingly, RySG recommends saving language, potentially as follows: "**Under no circumstances shall Registry Operator be**

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[1] http://www.ietf.org/about/standards-process.html and http://tools.ietf.org/html/rfc2026#section-4

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required to disclose any event to ICANN earlier than Registry Operator is required to publicly disclose such event under applicable securities laws."

       8.2   **Amendments and Waivers.** Except as set forth in Article 7, no amendment, supplement, or modification of this Agreement or any provision hereof will be binding unless executed in writing by both parties. Irrespective of the provisions of Article 7, ICANN and Registry Operator may at any time and from time to time enter into bilateral amendments and modifications to this Agreement negotiated solely between the two parties. No waiver of any provision of this Agreement will be binding unless evidenced by a writing signed by the party waiving compliance with such provision. No waiver of any of the provisions of this Agreement or failure to enforce any of the provisions hereof will be deemed or will constitute a waiver of any other provision hereof, nor will any such waiver constitute a continuing waiver unless otherwise expressly provided.

As discussed in Section 7 above, all references to the ability to make unilateral amendments should be stricken. Thus, delete, "Except as set forth in Article 7," and "Irrespective of the provisions of Article 7,".

       8.8   **General Notices.** Except for notices pursuant to Article 7, all notices to be given under or in relation to this Agreement will be given either (i) in writing at the address of the appropriate party as set forth below or (ii) via facsimile or electronic mail as provided below, unless that party has given a notice of change of postal or email address, or facsimile number, as provided in this agreement. All notices under Article 7 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail. Any change in the contact information for notice below will be given by the party within thirty (30) calendar days of such change. Notices, designations, determinations, and specifications made under this Agreement will be in the English language. Other than notices under Article 7, any notice required by this Agreement will be deemed to have been properly given (i) if in paper form, when delivered in person or via courier service with confirmation of receipt or (ii) if via facsimile or by electronic mail, upon confirmation of receipt by the recipient's facsimile machine or email server, provided, that such notice via facsimile or electronic mail shall be followed by a copy sent by regular postal mail service within two (2) business days. Any notice required by Article 7 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server. In the event other means of notice become practically achievable, such as notice via a secure website, the parties will work together to implement such notice means under this Agreement.

As discussed in Section 7 above, all references to the ability to make unilateral amendments should be stricken. Thus, delete "Except for notices pursuant to Article 7," and "All notices under Article 7 shall be given by both posting of the applicable information on ICANN's web site and transmission of such information to Registry Operator by electronic mail." and "Other than notices under Article 7," and "Any notice required by Article 7 will be deemed to have been given when electronically posted on ICANN's website and upon confirmation of receipt by the email server."

SPECIFICATION 1

RySG repeats the comments it made to the v2 Registry Agreement as follows:

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

All instances where "security and stability" and "registry services" are used should be capitalized and carefully reference where those terms are defined.

"Registry Agreement" and "registry agreement" references should be made consistent with the definition of the "Agreement" in the main body of the v2 Registry Agreement.

1.3.4   maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.

This subsection should end after "; and" with a new subsection 1.3.5 starting thereafter, "1.3.5 procedures to avoid…"

1.4 In addition to the other limitations on Consensus Policies, they shall not:

   1.4.1 prescribe or limit the price of registry services;

   1.4.2   modify the terms or conditions for the renewal or termination of the Registry Agreement;

   1.4.3 modify the limitations on Temporary Policies (defined below) or Consensus Policies;

   1.4.4 modify the provisions in the registry agreement regarding fees paid by Registry Operator to ICANN; or

   1.4.5 modify ICANN's obligations to ensure equitable treatment of registry operators and act in an open and transparent manner.

   Add additional subsections as follows:

   *"**1.4.6 modify the standards for consideration of proposed Registry Services, including the definitions of Security and Stability and the standards applied by ICANN;***

   ***1.4.7 modify ICANN's obligations to Registry Operator under Article 3 of the Agreement.**"*

2. Temporary Policies.

   2.1.2   If the period of time for which the Temporary Policy is adopted exceeds 90 days, the Board shall reaffirm its temporary adoption every 90 days for a total period not to exceed one year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one year period expires or, if during such one year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.

*In the second sentence, insert after "If" the following: "**the Board does not reaffirm a Temporary Policy, or**" and delete "and is not reaffirmed by the Board". The current language otherwise suggests that the Board could re-affirm a Temporary Policy and push it out beyond a year.*

SPECIFICATION 2
DATA ESCROW REQUIREMENTS
NOTE: THIS INTERIM DRAFT SPECIFICATION IS UNDER DEVELOPMENT BY ICANN AND REGISTRY TECHNICAL TEAMS.

As the v3 Registry Agreement states that "THIS INTERIM DRAFT SPECIFICATION IS UNDER DEVELOPMENT", RySG reserves the right to comment further when the draft is completed.

Registry Operator will engage an independent entity to act as data escrow agent ("*Escrow Agent*") for the provision of data escrow services related to the Registry Agreement. The following Technical Specifications set forth in Part A, and Legal Requirements set forth in Part B, will be included in any data escrow agreement between Registry Operator and the Escrow Agent, under which ICANN must be named a third-party beneficiary. In addition to the following requirements, the data escrow agreement may contain other provisions that are not contradictory or intended to subvert the required terms provided below.

RySG proposes deleting "related to" and replacing with "**as required by**". It is necessary to ensure that this does not preclude having an escrow agreement that is outside the registry agreement that would not be appropriate for ICANN to be named as a third party beneficiary.

PART A – TECHNICAL SPECIFICATIONS

1. **Deposits**. Deposits can be of two kinds: Full Deposits or Incremental Deposits.
    1.1 "**Full Deposit**" means the Registry Data that reflects the current and complete Registry Database and will consist of data that reflects the state of the registry as of 0000 UTC on each Sunday. Pending transactions at that time (i.e. transactions that have not been committed to the Registry Database) will not be reflected in the Full Deposit.

    RySG seeks clarification that this is not the same as "pending statuses" such as Pending Create, Pending Transfer or Pending Delete, since these should be included in the escrow deposits.

    1.2 "**Incremental Deposit**" means data that reflects all transactions involving the database that were not reflected in the last previous Full Deposit or Incremental Deposit, as the case may be. Each incremental file will contain all database transactions since the previous Deposit was completed as of 0000 UTC. Incremental deposits, where required, must include complete Escrow Records as specified below that were not included or changed since the most recent full or incremental deposit (i.e., newly added or modified names).

    Care must be taken to properly define all terms. For example, Registry Data, Registry Database and Escrow Records are never defined. "Deposits" is also not really defined, but is used throughout this Specification 2. In 1.2 reference is made to "full or incremental deposit", but these should use the capitalized defined terms.

3. Schedule for Deposits. Registry operators are obligated to submit a set of escrow files on a daily basis as follows:

    3.1 The other six days of the week, an Incremental Deposit must be submitted including objects that have been created, deleted or updated. Each of these files will be marked with the "inc" type.

A file format should be specific to show how adds/mods/dels should be represented. Is the timestamp for the transaction required?

4.8 **Detailed File Formats.**

    For each object the order in which its fields are presented indicates the order in which they are expected to be in the respective record. The first line of all files must contain the field names.

This is missing the transaction file format for incremental feeds.

4.8.1 **Domains.** Indicates a file type "DOMAIN"

        The following fields shall be stored in the DOMAIN file:

            (1) Domain Handle;
            (2) Domain Name;
            (3) Registrar Handle for the present sponsoring registrar;
            (4) Creation Date;
            (5) Registrar Handle for the initial sponsoring registrar;

Does this mean we have to track the initial registrar for the domain and track transfers to see who originally entered the name? Is this intended to show the previous registrar (for gaining/losing registrar data)? If so, should this also include transfer date? If not, what is the purpose of reporting initial registrar?

4.8.12 **Domain / Name server Associations.** Indicates a file type "DOMNS"

        The following fields shall be stored in the DOMNS file:

            (1) Domain Handle; and
            (2) Name server Handle.

The date the association was created should also be included.

PART B – LEGAL REQUIREMENTS

1.   **Escrow Agent**. Prior to entering into an escrow agreement, the Registry Operator must contact and inform ICANN as to the identity of the Escrow Agent, and provide ICANN with contact information and a copy of the relevant escrow agreement, and all amendment thereto. ICANN must be expressly designated a third-party beneficiary of such agreement.

      "amendment" should properly be "amendments"

3.   **Ownership**. Ownership of the Deposits during the effective term of the Registry Agreement shall remain with Registry Operator at all times. Thereafter, Registry Operator shall assign any such ownership rights (including intellectual property rights, as

the case may be) in such Deposits to ICANN. In the event that during the term of the Registry Agreement any Deposit is released from escrow to ICANN, any intellectual property rights held by Registry Operator in the Deposits will automatically be licensed on a non-exclusive, perpetual, irrevocable, royalty-free, paid-up basis to ICANN or to a party designated in writing by ICANN.

A limitation on the "ownership" right must be placed as follows: "for the limited purpose of maintaining operation of the registry." This limitation should apply both during and after the term of the Registry Agreement.

5.   **Copies**. Escrow Agent may be permitted to duplicate any Deposit, in order to comply with the terms and provisions of the escrow agreement, provided that Registry Operator shall bear the expense of such duplication.

After "duplication" insert "**if the escrow agreement so specifies**".

6.   **Release of Deposits**. Escrow Agent will deliver to ICANN or its designee, at the Registry Operator's expense, all Deposits in Escrow Agent's possession in the event that the Escrow Agent receives a request from Registry Operator to effect such delivery to ICANN, or receives one of the following written notices by ICANN stating that:

After "notices by ICANN" insert "**, along with evidence that ICANN has so notified Registry Operator in writing,**"

6.1 the Registry Agreement has expired without renewal, or been terminated; or

After "been" insert "**finally, validly and legally". After "terminated" insert "under Article 4 of the Registry Agreement and no injunction or similar order has been obtained from an arbitrator or court prohibiting ICANN from securing the data in escrow.**"

6.4 Registry Operator has: (i) ceased to conduct its business in the ordinary course; or (ii) filed for bankruptcy, become insolvent or anything analogous to any of the foregoing under the laws of any jurisdiction anywhere in the world; or

After "world" insert "**and in the case of either (i) or (ii) ICANN has provided adequate and official verification thereof**"

6.5 a competent court, arbitral, legislative, or government agency mandates the release of the Deposits to ICANN.
6.6 Unless Escrow Agent has previously released the Registry Operator's Deposits to ICANN or its designee, Escrow Agent will deliver all Deposits to ICANN upon termination of the Registry Agreement or the Escrow Agreement.

Delete 6.6, since it is covered under 6.1.

SPECIFICATION 3

FORMAT AND CONTENT FOR REGISTRY OPERATOR MONTHLY REPORTING

36	agp-exemption-requests	total number of AGP (add grace period) exemption requests
37	agp-exemptions-granted	total number of AGP (add grace period) exemption requests granted
38	agp-exempted-names	total number of names affected by granted AGP (add grace period) exemption requests

RySG notes that fields 36, 37 and 38 are provided at ICANN's request pursuant to the Add Grace Period (AGP) Limits Policy implementation notes, and not in accordance with the AGP Limits Policy.

SPECIFICATION 4

1. **WHOIS Service.** Until ICANN specifies a different format and protocol, Registry Operator will operate a registration data publication service available via both port 43 and a website at <whois.nic.(TLD)> in accordance with RFC 3912 providing free public query-based access to at least the following elements in the following format. ICANN reserves the right to specify alternative formats and protocols, including the Internet Registry Information Service ("IRIS" – RFC 3981 and related RFCs), and upon such specification, the Registry Operator will implement such alternative specification as soon as reasonably practicable.

This language requires significant alteration. ICANN should not carve out a contractual right to impose unknown and possibly arbitrary technical requirements on registries.

Movement to alternative formats and protocols is subject to consensus policy-making. This is consistent with Specification 1 of the v3 Registry Agreement, which states:

> "1.2 Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs. Consensus Policies shall relate to one or more of the following:
> …
>
> 1.2.2. functional and performance specifications for the provision of registry services;
> …
> 1.3. Such categories of issues referred to in Section 1.2 shall include, without limitation:
> …
> 1.3.4. maintenance of and access to accurate and up-to-date information concerning domain name registrations;"

GNSO efforts to examine WHOIS tools are already underway, and should continue.

As "**Section 2.2.2 is included for community discussion purposes**" RySG reserves the right to comment more fully until the proposal is more fully-baked.

[2.2.2. **Central Zone File Depository.** In the event that ICANN or its designee establishes a central zone file depository, Registry Operator will provide all zone file data to ICANN or to a third party operator of such depository designated by ICANN upon request by ICANN. Should such central zone file depository be established, ICANN may waive, at ICANN's sole discretion, compliance with Section 2.1 of this Specification 4. [**Note: This Section 2.2.2 is included for community discussion purposes as a result of prior community discussions regarding mitigation of malicious conduct. Under this provision, ICANN could take on the responsibility currently carried out by registry operators of vetting and monitoring access to zone file data by responsible parties for legitimate purposes.**]

There are legal, security, and procedural concerns with the centralized zone file access concept, and it is not known if it is a good solution to a real problem. The ICANN staff

has proposed this concept, but has not provided a clear statement defining the problem it is attempting to solve, has not provided details of how such a system might be set up and implemented, and has not explained or quantified the demand for such a service. The RySG would like to receive these. There should be discussion of what security and abuse risks may be involved.

The centralized service would essentially give ICANN an unprecedented ownership over registry data. ICANN staff would decide who gets access and under what terms, and would make all associated compliance decisions. The RySG has significant concerns about ICANN taking on this responsibility, which is currently carried out by registry operators.

Zone file access can contribute to abuse and malicious conduct. For example, spammers use zone files as seed lists for WHOIS mining, through which they collect contact e-mail addresses to spam (often advertising various frauds, phishing, malware, and so on).   Such practices helped fuel the use of proxy contact services, which have presented abuse issues of their own. The SSAC studied the issue in its paper "SAC 023: Is the WHOIS Service a Source for Email Addresses for Spammers?" [2] SSAC concluded that: "Registries and registrars that implement anti-abuse measures such as ratelimiting, CAPTCHA, non-publication of zone file data and similar measures can protect WHOIS data from automated collection."

It appears that in the ccTLDs, zone file access policy is the opposite of ICANN's. None of the ten largest ccTLDs offer zone file access, and most others apparently choose not to provide it either. ccTLD operators explicitly list abuse as a reason. When such clear disparity exists within the industry, the reasons behind it should be investigated.

We therefore wonder if bundling more zone files for access might exacerbate certain problems.

RySG also suggests consideration of the following with respect to centralized zone file access:

-    This does not help with time sensitive data since data is only updated daily – and not all registries will update on the same schedule. Therefore, it doesn't seem that this could help with phishing, etc.
-    Per ICANN staff at the Seoul meeting, even centralized zone file access would not eliminate the requirement for registries to continue providing zone file access.
-    Establishing a standard interface requirement could meet users' needs to automate access to any number of TLD zone files.
-    Someone could already perform a similar service. Why not let someone develop the service on their own if there is real market demand for it? This would also allow development of specific tools and services to meet the real need of zone file access users – filtering data, alerting, etc.
-    Section 2.1.5 says registries must comply with "Terms of Use" for zone data. Who and how are Terms of Use to be enforced with a centralized zone file access?
-    Registries should be allowed to innovate. How would this right be protected if all zone file access were centralized under a single provider selected by ICANN?

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[2] http://www.icann.org/en/committees/security/sac023.pdf

SPECIFICATION 5

SCHEDULE OF RESERVED NAMES AT THE SECOND LEVEL IN GTLD REGISTRIES

Except to the extent that ICANN otherwise expressly authorizes in writing, the Registry Operator shall reserve names formed with the following labels from initial (i.e. other than renewal) registration within the TLD:

5. **Country and Territory Names.** The country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations:

This requirement is not currently in registry agreements. It would help for ICANN to maintain the authoritative list (auditable for all updates), or provide the authoritative links to the official documents.

 5.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time;

Need to clarify how this would need to be implemented.

Example questions:
United Arab Emirates. Would the reserved name be UnitedArabEmirates? Would United-Arab-Emirates be allowed?

What about short form names with accent marks and special characters:
  Côte D'Ivoire
  Lao People's Democratic Republic
  Palestinian Territory, Occupied
  Holy See (Vatican City State)
  Virgin Islands, U.S.

Need to address rules for existing registrations when updates are made. Are they revoked? Grandfathered?

 5.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

Which column? Country – English (UN), Short Name, Formal Name? Need to be specific. See, for reference: http://unstats.un.org/unsd/geoinfo/ungegn%20tech%20ref%20manual_M87_combined.pdf

 5.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names.

Need specific reference.
http://unstats.un.org/unsd/geoinfo/9th-UNCSGN-Docs/E-CONF-98-89-Add1.pdf
Same questions about exactly which names must be reserved.

Finally, RySG recognizes that for certain TLDs the ability to use geographic names at the second level would be beneficial and non-objectionable. Accordingly, the RySG recommends that ICANN establish a process pursuant to which a TLD could register geographic names at the second level.

SPECIFICATION 6

REGISTRY INTEROPERABILITY, CONTINUITY, AND PERFORMANCE SPECIFICATIONS

1. **Standards Compliance**

Registry Operator shall implement and comply with relevant existing RFCs and those published in the future by the Internet Engineering Task Force (IETF) including all successor standards, modifications or additions thereto relating to (i) the DNS and name server operations including without limitation RFCs 1034, 1035, 1982, 2181, 2182, 2671, 3226, 3596, 3597, 3901, 4343, and 4472; and (ii) provisioning and management of domain names using the Extensible Provisioning Protocol (EPP) in conformance with RFCs 3735, 3915, 5730, 5731, 5732, 5733 and 5734.

Registry Operator shall implement Domain Name System Security Extensions ("DNSSEC"). During the Term, Registry Operator shall comply with RFCs 4033, 4034, 4035, 4509 and 4310 and their successors, and follow the best practices described in RFC 4641 and its successors. If Registry Operator implements Hashed Authenticated Denial of Existence for DNS Security Extensions, it shall comply with RFC 5155 and its successors. Registry Operator shall accept public-key material from child domain names in a secure manner according to industry best practices. Registry shall also publish in its website the practice and policy document (also known as the DNSSEC Policy Statement or DPS) describing key material storage, access and usage for its own keys and the registrants' trust anchor material.

The phrase "access and usage for its own keys and the registrants' trust anchor material" needs further discussion and technical comment by experts. Good operational security may require that the details of such practices not be published, since publication could facilitate a security breach. If it is ICANN's goal to let registrants know that registries maintain good practices in this area, then that goal should be more explicit or reflected better in the language.

If the Registry Operator offers Internationalized Domain Names ("IDNs"), it shall comply with RFCs 3490, 3491, and 3492 and their successors and the ICANN IDN Guidelines at <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>, as they may be amended, modified, or superseded from time to time. Registry Operator shall publish and keep updated its IDN Tables and IDN Registration Rules in the IANA Repository of IDN Practices as specified in the ICANN IDN Guidelines.

Registry Operator shall be able to accept IPv6 addresses as glue records in its Registry System and publish them in the DNS. Registry Operator shall offer public IPv6 transport for, at least, two of the Registry's name servers listed in the root zone with the corresponding IPv6 addresses registered with IANA. Registry Operator should follow "DNS IPv6 Transport Operational Guidelines" as described in BCP 91. Registry Operator shall offer public IPv6 transport for its Registration Data Publication Services as defined in Specification 4 of this Agreement; e.g. Whois (RFC 3912), Web based Whois, IRIS (RFC 3981 and related RFCs). Registry Operator shall offer public IPv6 transport for its Shared Registration System (SRS) to any Registrar, no later than six months after receiving the first request in writing from a TLD accredited Registrar willing to operate the SRS over IPv6.

2. **Registry Services and Continuity**

"Registry Services" are, for purposes of the Registry Agreement, defined as the following: (a) those services that are operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry DNS servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by this Agreement; (b) other products or services that the Registry Operator is required to provide because of the establishment of a Consensus Policy as defined in Specification 1; (c) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator; and (d) material changes to any Registry Service within the scope of (a), (b) or (c) above.

Registry Operator will conduct its operations using network and geographically diverse, redundant servers (including network-level redundancy, end-node level redundancy and the implementation of a load balancing scheme) to ensure continued operation in the case of technical failure (widespread or local), business insolvency or an extraordinary occurrence or circumstance beyond the control of the Registry Operator.

Registry Operator will use commercially reasonable efforts to restore the critical functions of the registry within 24 hours after the termination of an extraordinary event beyond the control of the Registry Operator and restore full system functionality within a maximum of 48 hours following such event, depending on the type of critical function involved. Outages due to such an event will not be considered a lack of service availability.

Registry Operator shall have a contingency plan including the designation of a registry services continuity provider, and must inform ICANN of the designated provider.

The RySG does not understand what is meant by a "Designation of a registry services continuity provider." In the event this is interpreted as an obligation for a registry to select a second registry to take over in the event of a registry failure, the RySG objects to this requirement as it is an impossible obligation to meet. The RySG does not understand how or why a registry should bear the burden of finding another registry to perform its functions in the event that it fails. It is unclear as to whether another registry would even have the desire to serve as a continuity provider, nor is it clear if the registry fails, whether the registry continuity provider would be compensated. Finally, if the registry fails, a reason for such failure could be due to a failed business model of the original registry. In such an event, no registry should be forced to continue to operate that registry.

The RySG believes the above sentence should be revised to state:

"Registry Operator shall have a business continuity plan."

In the case of an extraordinary event beyond the control of the Registry Operator where the Registry Operator cannot be contacted, Registry Operator consents that ICANN may contact the designated registry services continuity provider.

In light of the above comments, the RySG recommends the deletion of the above sentence.

Registry Operator shall conduct registry services continuity testing at least once per year.

For domain names which are either not registered by a registrant, or the registrant has not supplied valid records such as NS records for listing in the DNS zone file, or their status does not allow them to be published in the DNS, the use of DNS wildcard Resource Records as described in RFC 4592 or any other method or technology for synthesizing DNS Resources Records or using redirection within the DNS by the Registry is prohibited. When queried for such domain names the authoritative name servers must return a "Name Error" response (also known as NXDOMAIN), RCODE 3 as described in RFC 1035 and related RFCs. This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry Operator (or an affiliate engaged in providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.

The first clause regarding, "domain names which are either not registered by a registrant…" is not clear. Domain names which are not registered by a registrant are unregistered domain names, correct? Or is the intent to distinguish between domain names which are registered directly by a registrar and those that have a registrant that is not affiliated with the registrar?

Why not just say "**unregistered domain names and registered domain names that are not published in the TLD zone file…**"

Registry Operator shall provide on its website its accurate contact details including a valid email and mailing address as well as a primary contact for handling inquires related to malicious conduct in the TLD, and will provide ICANN with prompt notice of any changes to such contact details.

Do registrars have a similar requirement?

3. **Supported Initial and Renewal Registration Periods**

Initial registrations of registered names may be made in the registry in one (1) year increments for up to a maximum of ten (10) years.

Is the intention to preclude applicants from proposing short term registrations, such as monthly terms or any other unique model that may not exist today?

Renewal registrations of registered names may be made in one (1) year increments for up to a maximum of ten (10) years.

4. **Performance Specifications**

	Parameter	SLR (monthly basis)
DNS	DNS service availability	0 min downtime = 100% availability
	DNS name server availability	≤ 43 min of downtime (≈ 99.9%)
	TCP DNS resolution RTT	≤ 1500 ms, for at least 99% of the queries
	UDP DNS resolution RTT	≤ 400 ms, for at least 99% of the queries
	DNS update time	≤ 15 min, for at least 99% of the updates
RDPS	RDPS availability	≤ 43 min of downtime (≈ 99.9%)
	RDPS query RTT	≤ 1500 ms, for at least 99% of the queries
	RDPS update time	≤ 15 min, for at least 99% of the updates
EPP	EPP service availability	≤ 43 min of downtime (≈ 99.9%)
	EPP session-command RTT	≤ 3000 ms, for at least 99% of the commands
	EPP query-command RTT	≤ 1500 ms, for at least 99% of the commands
	EPP transform-command RTT	≤ 3000 ms, for at least 99% of the commands

With regard to "DNS name server availability" of "≤ 43 min of downtime (≈ 99.9%)":

Does this imply that 1 server with more than 43 minutes of downtime violates the SLR? Or is a server considered unavailable for the month if it had >43 minutes of downtime? Say that a TLD has 10 servers globally dispersed and each had non-overlapping 45 minutes of downtime over a calendar month. Therefore 9 were operational at any point in time. What is the final DNS service availability for the month?

This may have an unintended consequence of favoring a 100 percent anycast solution, so that no single site is unavailable. Best practice currently is to have a combination of anycast and unicast, but this SLR may drive to all anycast.

With regard to "DNS update time" and "RDPS update time" and other updates and commands in this table:

This metric is more stringent than most, if not all of the existing gTLDs. Why was the current 95% threshold raised to 99%? (same comment for the other rows about queries, updates and commands in this table). This has the impact of going from effectively 36 hours per month of slower performance than the metric stated to about 7 hours. Was this intentional or inadvertent? Expect this to be a significant cost driver for many registry operators that is 5 times more stringent than most gTLDs today.

Same thing for RDPS updates. Further, does this really not include maintenance windows?

With regard to "EPP service availability" of "≤ 43 min of downtime (≈ 99.9%)":

Is this planned maintenance and unplanned downtime? From the remainder of this section it appears that planned maintenance is included in the 43 minutes. This is more stringent than any gTLD today, and would be a significant operational cost.   This cost should be justified, or unreasonable costs will be passed on to registrants.

Most gTLDs have 4 hours of planned maintenance, plus periodic extended outages, or in the case of sponsored gTLDs, no requirement specified.

The most aggressive current SLAs do not include monthly planned maintenance in availability calculations, and have allowance for annual extended outages.

SLR. Service Level Requirement is the level of service expected for certain parameter being measured in a Server Level Agreement (SLA).

RTT. Round-Trip Time or **RTT** refers to the time measured from the sending of the first bit of the first packet of the sequence of packets needed to make a request until the reception of the last bit of the last packet of the sequence needed to receive the response. If the client does not receive the whole sequence of packets needed to consider the response as received, the time will be considered undefined.

For DNS, Whois and SRS, how is the registry expected to monitor RTT from the client? Recommend that this be revised to measure from receipt and response of a query/transaction at the registry's gateway. If truly measured from the client, especially for EPP, the registry SLR is at risk of poorly connected registrars from geographic regions distant from the registry. The registry has no ability to select registrars and therefore has no control over meeting this SLR.

Why not just use the CNNP test for resolution services?

IP address. Refers to IPv4 or IPv6 address without making any distinction between the two. When there is need to make a distinction, IPv4 or IPv6 is mentioned.

DNS. Refers to the Domain Name System as specified in RFCs 1034, 1035 and related RFCs.

DNS service availability. Refers to the ability of the group of listed-as-authoritative name servers of a particular domain name (e.g. a TLD), to answer DNS queries from an Internet user. For the service to be considered available at some point in time, at least, two of the name servers registered in the DNS must have defined results from "**DNS tests**" to each of their public-DNS registered "**IP addresses**" over both (UDP and TCP) transports. If 51% or more of the DNS testing probes see the service as unavailable over any of the transports (UDP or TCP) during a given time, the DNS service will be considered unavailable.

With respect to the last sentence, why was the CNNP requirement changed? This does not define who is performing the DNS tests, how often, etc.

DNS name server availability. Refers to the ability of a public-DNS registered "**IP address**" of a particular name server listed as authoritative for a domain name, to answer DNS queries from an Internet user. All the public DNS-registered "**IP address**" of all name servers of the domain name being monitored shall be tested individually. If 51% or more of the DNS testing probes get undefined results from "**DNS tests**" to a name server "**IP address**" over any of the transports (UDP or TCP) during a given time, the name server "**IP address**" will be considered unavailable.

UDP DNS resolution RTT. Refers to the **RTT** of the sequence of two packets, the UDP DNS query and the corresponding UDP DNS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

TCP DNS resolution RTT. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the DNS response for only one DNS query. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

DNS resolution RTT. Refers to either "**UDP DNS resolution RTT**" or "**TCP DNS resolution RTT**".

DNS update time. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, up until all the name servers of the parent domain name answer "**DNS queries**" with data consistent with the change made. This only applies for changes to DNS information.

DNS test. Means one non-recursive DNS query sent to a particular "**IP address**" (via UDP or TCP). If DNSSEC is offered in the queried DNS zone, for a query to be considered answered, the signatures must be positively verified against a corresponding DS record published in the parent zone or, if the parent is not signed, against a statically configured Trust Anchor. The query shall be about existing domain names. The answer to the query must contain the corresponding information from the Registry System, otherwise the query will be considered unanswered. If the answer to a query has the TC bit set, the query will be considered unanswered. A query with a "**DNS resolution RTT**" 5-times higher than the corresponding SLR, will be considered unanswered. The possible results to a DNS test are: a number in milliseconds corresponding to the "**DNS resolution RTT**" or, undefined/unanswered.

With respect to "If the answer to a query has the TC bit set, the query will be considered unanswered": As a matter of practice, resolution providers will want to truncate large UDP responses at a certain bit limit in order to avoid IP-level fragmentation. It might be more appropriate therefore to judge the response of the follow-on TCP request in the case of a truncated UDP response.

Measuring DNS parameters. Every minute, every DNS probe shall make an UDP and a TCP "**DNS test**" to each of the public-DNS registered "**IP addresses**" of the name servers of the domain named being monitored. If a "**DNS test**" gets unanswered, the tested IP will be considered as unavailable for the corresponding transport (UDP or TCP) from that probe until it is time to make a new test. The minimum number of active testing probes to consider a measurement valid is 20 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

With respect to "every DNS probe": Again, this will favor an all-BGP Anycast implementation to meet availability targets.

Placement of DNS probes. Probes for measuring DNS parameters shall be placed as near as possible to the DNS resolvers on the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

This seems problematic. What is the SLR determination for an authoritative server that is responding (available) to one probe that is in the same geographic region, but is not responding within the SLR for a probe in a distant geographic region?

RDPS. Registration Data Publication Services refers to the collective of WHOIS and Web based WHOIS services as defined in "SPECIFICATION 4" of this Agreement.

Similar comments for RDPS as DNS.

RDPS availability. Refers to the ability of all the RDPS services for the TLD, to respond to queries from an Internet user with appropriate data from the Registry System. For the RDPS to be considered available at some point in time, one IPv4 and one IPv6 address for each of the RDPS services must have defined results from "**RDPS tests**". If 51% or more of the RDPS testing probes see any of the RDPS services as unavailable during a given time, the RDPS will be considered unavailable.

WHOIS query RTT. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the WHOIS response. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

Web-based-WHOIS query RTT. Refers to the **RTT** of the sequence of packets from the start of the TCP connection to its end, including the reception of the HTTP response for only one HTTP request. If Registry Operator implements a multiple-step process to get to the information, only the last step shall be measured. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

RDPS query RTT. Refers to the collective of "**WHOIS query RTT**" and "**Web-based-WHOIS query RTT**".

RDPS update time. Refers to the time measured from the reception of an EPP confirmation to a transform command on a domain name, up until all the "**IP addresses**" of all the servers of all the RDPS services reflect the changes made.

RDPS test. Means one query sent to a particular "**IP address**" for one of the servers of one of the RDPS services. Queries shall be about existing objects in the Registry System and the responses must contain the corresponding information otherwise the query will be considered unanswered. Queries with an **RTT** 5-times higher than the corresponding SLR will be considered as unanswered. The possible results to an RDPS test are: a number in milliseconds corresponding to the **RTT** or undefined/unanswered.

Measuring RDPS parameters. Every minute, every RDPS probe shall randomly select one IPv4 and one IPv6 addresses from all the public-DNS registered "**IP addresses**" of the servers for each RDPS service of the TLD being monitored and make an "**RDPS test**" to each one. If an "**RDPS test**" gets unanswered, the corresponding RDPS service over IPv4 or IPv6, as the case may be, will be considered as unavailable from that probe until it is time to make a new test. The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

Why is 10 the minimum number of probes for RDPS, but 20 is used for DNS?

Placement of RDPS probes. Probes for measuring RDPS parameters shall be placed inside the networks with the most users across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

EPP. Refers to the Extensible Provisioning Protocol as specified in RFC 5730 and related RFCs.

EPP service availability. Refers to the ability of the TLD EPP servers as a group, to respond to commands from the Registry accredited Registrars, who already have credentials to the servers. The response shall include appropriate data from the Registry System. An EPP command with " **EPP command RTT**" 5-times higher than the corresponding SLR will be considered as unanswered. For the EPP service to be considered available at during a measurement period, at least, one IPv4 and one IPv6 (if EPP is offered over IPv6) address of the set of EPP servers must have defined results from "**EPP tests**". If 51% or more of the EPP testing probes see the EPP service as unavailable during a given time, the EPP service will be considered unavailable.

The defined results of 51% of 10 probes means that 4 could fail, therefore it would be possible that the service would be unreachable for 23 minutes during a 45 minute test (say from minute 6 through minute 29) and there would be no outage, correct? In other words, any unavailability period would be a minimum of 25 minutes.

EPP session-command RTT. Refers to the **RTT** of the sequence of packets that includes the sending of a session command plus the reception of the EPP response for only one EPP session command. For the login command it will include packets needed for starting the TCP session. For the logout command it will include packets needed for closing the TCP session. EPP session commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

EPP query-command RTT. Refers to the **RTT** of the sequence of packets that includes the sending of a query command plus the reception of the EPP response for only one EPP query command. It does not include packets needed for the start nor close of neither the EPP nor the TCP session. EPP query commands are those described in section 2.9.2 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

EPP transform-command RTT. Refers to the **RTT** of the sequence of packets that includes the sending of a transform command plus the reception of the EPP response for only one EPP transform command. It does not include packets needed for the start nor close of neither the EPP nor the TCP session. EPP transform commands are those described in section 2.9.3 of EPP RFC 5730. If the **RTT** is 5-times or more the corresponding SLR, the **RTT** will be considered undefined.

EPP command RTT. Refers to "**EPP session-command RTT**", "**EPP query-command RTT**" or "**EPP transform-command RTT**".

EPP test. Means one EPP command sent to a particular "**IP address**" for one of the EPP servers. Query and transform commands, with the exception of "create", shall be about existing objects in the Registry System. The response shall include appropriate data from the Registry System. The possible results to an EPP test are: a number in milliseconds corresponding to the "**EPP command RTT**" or undefined/unanswered.

Measuring EPP parameters. Every 5 minutes, every EPP probe shall randomly select one IPv4 and one IPv6 addresses from all the "**IP addresses**" of the EPP servers of the TLD being monitored and make an "**EPP tests**" to each one (IPv6 will be tested only if that transport is offered); every time it should randomly alternate between the 3 different types of commands and between the commands inside each type for testing. If an "**EPP test**" gets unanswered, the EPP service will be considered as unavailable from that probe until it is time to make a new test. The minimum number of active testing probes to consider a measurement valid is 10 at any given measurement period, otherwise the measurements will be discarded and will be considered inconclusive; during this situation no fault will be flagged against the SLRs.

Placement of EPP probes. Probes for measuring EPP parameters shall be placed inside or close to Registrars points of access to the Internet across the different geographic regions; care shall be taken not to deploy probes behind high propagation-delay links, such as satellite links.

Listing of probes. The current list of probes for DNS, RDPS and EPP can be consulted in <reference>. Registry Operator is responsible to take the necessary steps to ensure that the listed probes do not get their tests blocked by its network equipment. The list can be updated from time to time by ICANN provided it gives, at least, a 60-day notice to the Registry Operator before making the change. During that period the Registry Operator will have access to the readings for new probes, if any, without considering those measurements for SLA purposes.

Maintenance windows. Registry Operators is encouraged to do its maintenance windows for the different services at the times and dates of statistically lower traffic for each service. However, note that there is no provision for planned outages or similar; any downtime, be it for maintenance or due to system failures will be noted simply as downtime and counted for SLA purposes.

With respect to the first sentence, this will not necessarily work. Especially for SRS, if maintenance time is classified the same as unplanned outages, the operators will be encouraged to perform maintenance at the end of the last day of each month. By treating a maintenance window just like an unplanned outage, there is no incentive to schedule and announce maintenance in advance. The impact to registrars is very different between unplanned outages and planned maintenance during predictable maintenance windows.

With respect to the second sentence, this may encourage operators to minimize time-costly database integrity checks in favor of a faster recovery window.

In the "Maintenance Windows" section, ICANN staff has removed traditional provisions for planned outage allowances. This handicaps the ability of any registry operator to responsibly maintain its registry, and will endanger registry stability and security. ICANN staff should explain the reasoning and justification behind this surprising change. Planned maintenance periods are absolutely necessary to keep hardware, firmware, and registry software in good working condition, to promote new services, and to conform to changes in protocols and standards.

The bottom line in the v3 Registry Agreement is that a registry will violate its ICANN contract if EPP is unavailable for more than 43 minutes in any given month, for any reason whatsoever. Such limits are ignorant of the operational requirements of registries.

The contract should include SLA exemptions for maximum 8-hour/month scheduled maintenances as per recent contracts, such as the current .ORG, .BIZ, and .INFO contracts.

As a general matter, this performance specification 6 eliminates many of the protections for registries as to allowances for things beyond their control, allowances for planned outages and upgrades, and cure periods for failure. The standard of 100% availability for DNS service availability, for example, includes no discussion of what happens in the event that standard is missed. Would one minute of unavailability result in a material breach and termination of the contract? This standard requires further community discussion as to what is an appropriate standard for reliability and appropriate penalty for failure to perform. There should also be a discussion as to whether every TLD should be subject to the same standards.

SPECIFICATION 7

MINIMUM REQUIREMENTS FOR RIGHTS PROTECTION MECHANISMS

1. **Development of Rights Protection Mechanisms.** Registry Operator shall implement and adhere to any rights protection mechanisms ("RPMs") that may be mandated from time to time by ICANN. In addition to such RPMs, Registry Operator may develop and implement additional RPMs that discourage or prevent registration of domain names that violate or abuse another party's legal rights. Registry Operator will include all ICANN mandated and independently developed RPMs in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to register names in the TLD.

2. **Dispute Resolution Mechanisms.** Registry Operator will adopt and implement dispute resolution mechanisms under which third parties may challenge registration of domain names by other parties. Such dispute resolution mechanisms shall include participation in, and adherence to, the ICANN Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) approved and implemented by ICANN (posted at [url to be inserted when final procedure is adopted]), as revised from time to time, including implementation of any determinations or decisions by any Post-Delegation Dispute Resolution Provider.

RySG strongly objects to the scheme requiring registries to protect the legal rights of third parties, as registries are not in a position to do so, and it would place an undue burden on registries.

If registries voluntarily choose to do so in order to differentiate themselves on a competitive basis, then they should be required to live up to the promises they have voluntarily made.

It is entirely unreasonable to require registries to "implement and adhere to any rights protection mechanisms ("RPMs") that may be mandated from time to time by ICANN". This is akin to unilaterally amending terms and conditions of the contract, and would damage certainty and deter investment. Registries must not be required to "shoot at a moving target". The same is true of requiring adherence to a PDDRP which may be "revised from time to time."

As this entire scheme is still in the process of being developed, RySG reserves the right to comment further until the issue is more fully-baked.

SPECIFICATION 8

CONTINUED OPERATIONS INSTRUMENT

RySG reserves comment on this proposal until the details are more fully conceived. For example, section 4.5 of the Agreement, regarding transition of registry operations upon termination is still to be determined. This is a necessary pre-requisite to determining how large a deposit or standby letter of credit is required to ensure continued operation. Moreover, the triggers for tapping the Continued Operations Instrument need to be detailed with far greater specificity. RySG believes further discussion is necessary as to how standby letters of credit would work, and whether Dun & Bradstreet or other financial due diligence methods should be considered.

Top-Level Domain Application –
Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.

2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review and consider an application to establish one or more gTLDs is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

RySG repeats the comments it made in response to v2 of Module 6,

"RyC…believes the draft still leaves open the possibility of inequitable treatment by singling out particular applicants and/or particular applications within a new gTLD. If ICANN wishes to preserve its discretion not to go forward with a particular new gTLD or with new gTLDs altogether, that should be clarified.

RyC also repeats its v1 comments:

Section 3 also calls out ICANN's right to reject any application it is prohibited from considering under applicable law or policy. Registry operators do not question ICANN's obligation to do this, but in conjunction with the provisions discussed below, the reference to ICANN policy is a major concern. ICANN uses the word "policy" to justify

virtually all of its actions. For instance, in other settings ICANN has argued that it is obligated to follow GAC advice. Registry operators acknowledge that ICANN must consider and respond to GAC advice, but reject the notion that the Bylaws give the GAC a veto. This provision, however, insulates ICANN from liability for reading its "policies" any way it likes."

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.

RySG repeats its v1 and v2 comments:

"Applicants are required to acknowledge that the initial fee … is paid only "to obtain consideration" of an application. Applicants are not entitled to expect that the … fee will buy them even reasoned or fair consideration."

5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's consideration of the application, and any approval or rejection of the application; and/or (b) ICANN's reliance on information provided by applicant in the application.

RySG repeats its v1 and v2 comments:

"This provision requires an applicant to indemnify ICANN from claims in any way arising from its consideration, approval, or rejection of the application. Taken literally, this means that even if an applicant overcomes the barricades discussed above, it could be required to assume ICANN's liability for the complained of acts or omissions.

ICANN should have to stand on its own two feet and pay for claims relating to the new gTLD initiative itself, and the process of doling out new gTLDs."

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL

DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD.

RySG repeats its v1 and v2 comments:

"Applicants must agree to release ICANN from liability for any acts or omissions in any way connected with its consideration of the application, no matter how outrageous those acts or omissions may be. In fact, applicants must check their rights at the door, and promise that they will not challenge a final decision by ICANN for any reason. This provision goes so far as to prevent applicants who are harmed by ICANN's failure to comply with its bylaws to seek independent review. Finally, ICANN requires applicants to waive any equitable rights they may otherwise have with respect to a string that they have applied for but been denied. Thus, in the event of a dispute regarding ICANN's acts or omissions, ICANN would be insulated from liability for delegating the string to another party."

RySG has no comment as to the remainder of Module 6.

GNSO gTLD Registry Stakeholder Group Statement of Support with regard to These Comments

A majority of 9 RySG members supported this statement:

- ▪   Total # of eligible RySG Members[3]: 14
- ▪   Total # of RySG Members: 14
- ▪   Total # of Active RySG Members[4]: 14
- ▪   Minimum requirement for supermajority of Active Members: 10
- ▪   Minimum requirement for majority of Active Members: 8
- ▪   # of Members that participated in this process: 14
- ▪   Names of Members that participated in this process:

1. Afilias (.info)
2. DotAsia Organisation (.asia)
3. Dot Cooperation LLC (.coop)
4. Employ Media (.jobs)
5. Fundació puntCAT (.cat)
6. mTLD Top Level Domain (.mobi)
7. Museum Domain Management Association – MuseDoma (.museum)
8. NeuStar (.biz)
9. Public Interest Registry - PIR (.org)
10. RegistryPro (.pro)
11. Société Internationale de Télécommunication Aéronautiques – SITA (.aero)
12. Telnic, Limited (.tel)
13. Tralliance Corporation (.travel)
14. VeriSign (.com, .net & .name)

- ▪   Names & email addresses for points of contact:
    a. Chair: David Maher, dmaher@pir.org
    b. Alternate Chair: Jeff Neuman, Jeff.Neuman@Neustar.us
    c. Secretariat: Cherie Stubbs, ***Cherstubbs@aol.com***

Regarding the issue noted above, the level of support in the RySG for the Constituency statement is summarized below.

1. **Level of Support of Active Members**: Majority

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[3] All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the "effective date" set forth in the operator's or sponsor's agreement (Article III, Membership, ¶ 1). The RySG Articles of Operations can be found at http://www.gtldregistries.org/about_us/articles .

[4] Per the RySG Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as "Active" or "Inactive". A member shall be classified as "Active" unless it is classified as "Inactive" pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

      1.1. # of Members in Favor: 12

      1.2. # of Members Opposed: 0

      1.3. # of Members that Abstained: 0

      1.4. # of Eligible Members that did not vote: 2

2. **Minority Position**(s): Not applicable