POLICIES FOR CONTRACTUAL CONDITIONS

ICANN STAFF DISCUSSION POINTS

1 Introduction

1.1 This document provides staff commentary on potential implementation of the recommendations contained in the Task Force Report on Policies for Contractual Conditions – Existing Registries ("PDP Feb 06"), available at <http://gnso.icann.org/issues/gtld-policies/pdp-report-feb06-tfr-20Apr07.htm>. As discussed at the 24 May 2007 meeting of the GNSO Council <http://gnso.icann.org/meetings/minutes-gnso-24may07.shtml>, this document comments on the implementation issues arising from the recommendations in the report.

1.2 This policy development process arose out of various responses to one version of a proposed registry agreement for the .COM top-level domain. As described in the Issues Report for this PDP <http://gnso.icann.org/issues/gtld-policies/issues-report-02feb06.pdf>, staff had concerns about a PDP aimed at one particular agreement. The report included the General Counsel's opinion that "the dot COM proposed agreement in relation to the various views that have been expressed by the constituencies is not properly within the scope of the ICANN policy process and within the scope of the GNSO."

1.3   At its meeting on 6 February 2006, members of the GNSO Council clarified that the intention of the request for the issues report was to seek an issues report on the topic of the broader policy issues related to the contractual conditions of gTLD agreements, which were identified from the various views expressed by the GNSO constituencies on the proposed .COM agreement.

Also at its meeting on 6 February 2006, the GNSO Council, by a super-majority vote, decided to initiate a PDP ("PDP Feb 06") on specific areas of contractual conditions for existing gTLDs <http://gnso.icann.org/meetings/minutes-gnso-06feb06.shtml>.

1.4 On 27 September 2006, ICANN's General Counsel responded to an inquiry from the Chair of the GNSO Council regarding the effect of GNSO policy recommendations on ICANN's existing registry agreements. This communication stated that: "It is possible for the GNSO to recommend, and the Board to approve, consensus policy that would change all existing gTLD registry contracts, but that is dependent on both the policy and the impacted contracts, which have some variations between registries." This memo also noted that the policy recommendations arising out of PDP Feb 06 "could be useful in negotiating future agreements and might impact amendments to existing agreements, even where consensus policy might limit the impact of such advice or policy on current agreements." <http://gnso.icann.org/correspondence/jeffrey-to-tonkin-27sep06.pdf>.

1.5 The following sections discuss implementation recommendations for each of the individual recommendations. In responding to the recommendations, it is necessary for the staff to consider whether the recommendation falls within the ICANN mission, the scope of the GNSO, and the scope of the policy development process. Further, if the intention of the policy recommendations is to impose new requirements on existing gTLDs, the recommendations must fall within the topics delineated in the current agreements.

1.6 Staff's understanding is that this set of recommendations is intended to guide ICANN's actions in the relevant areas, and is not intended to directly impose new requirements on contracted parties.

2 Policy Recommendations

The table below sets out the majority supported recommendations and maps those recommendations to the Terms of Reference.

	Majority Supported Recommendations
Rec. 1A.1	There should be a policy guiding registry agreement renewal.
Rec. 1A.2	The initial term of Registry agreements should be for a commercially reasonable length.
Rec. 1C	There was majority support for the concept of a re-bid of registry contracts but there are differing opinions as to the conditions under which re-bids would occur.
Rec. 2A	The present limitations to Consensus Policies are appropriate and should continue.
Rec. 2B	Certain policy making responsibility should be delegated to the sponsored gTLD operators.
Rec. 4A	In order to improve ICANN accountability and effective business planning by registries, ICANN staff should immediately implement a system that avoids individual negotiations of ICANN fees and provides consistency unless there is an established justification for disparate treatment.
Rec. 4B	The ICANN Board should establish a Task Force or Advisory Committee to examine budgeting issues, including the manner and allocation of revenue collection, budget oversight and budget approval processes. This group should solicit and review public comments on the issues.
Rec. 5	In order to determine whether there is a need for a new consensus policy on the collection and use of registry data, including traffic data, for purposes other than which is was collected, there is first a need for a properly targeted study by an independent third party on the data collected and the uses to which it is put.
	The study should provide appropriate safeguards to protect any data provided for the purposes of the study, and the confidentiality of which registry, or other group, provides the data. The findings of the study should be published and available for public review. A Statement of Work should be developed by the GNSO Council, with appropriate public review, to cover an analysis of the concerns for data collection and use, the practice involved in collection and use of data - including traffic data, and the availability, when appropriate, for non-discriminatory access to that data.
	It is recommended that a current processes document be developed, describing the current registry practices for the collection of data and the uses of that data, for example, but not limited

	to, operating the registry; preparing marketing materials to promote registration of domain names; gathering of 'null' returns, ensuring the integrity of the Registry, or the DNS. This report should be available to the group doing the external study and should be made available to the public for comment. After examining the results of the independent study and public discussions recommended above, the GNSO Council should examine the findings and determine what, if any, further policy process is required.
Rec. 6A	There should not be a policy guiding investments in development and infrastructure.
Rec. 6B	ICANN should establish baseline requirements for the security and stability of registries and anything above that would be negotiated on a case-by-case basis, if necessary. Baseline requirements should be recommended to the Board by the Security and Stability Advisory Committee (SSAC) after consultation with the gTLD registry operators. In determining those recommendations, the SSAC should solicit and consider public comments.

2.1   There should be a policy guiding registry agreement renewal. *(Rec. 1A.1)*

2.1.1 Staff will document current registry agreement renewal guidelines, and establish a draft procedure and timeline, collaborating with the GNSO and incorporating public comment. The procedure developed by staff could be superseded by a policy developed through the consensus process in a subsequent PDP.

2.1.2 Renewal agreements would incorporate the other recommendations listed below.

2.2   The initial term of Registry agreements should be for a commercially reasonable length. *(Rec. 1A.2)*

2.2.1 Currently, the terms of gTLD registry agreements range from 5 to 10 years in length. No current policy specifies what the exact duration of any registry agreement should be, and therefore the terms have been the subject of negotiation between ICANN and the registry operators and sponsors.

2.2.2 Staff will implement this recommendation by using expert economic analysis to determine what is reasonable for the industry (benchmarked against similarly-situated industries), and then applying this to all gTLD registries under contract.

2.2.3 This recommendation refers only to the "initial term" of a registry agreement. Staff's implementation would modify the recommendation to apply to "the terms of registry agreements" rather than the "initial term," so that the renewal terms of registry agreements would also be included.

2.3 There was majority support for the concept of a re-bid of registry contracts but there are differing opinions as to the conditions under which re-bids would occur. *(Rec. 1C)*

2.3.1 Staff will examine the existing agreements, conditions for termination and nonrenewal of agreements, and experiences to date in order to determine whether the conditions under which re-bids would occur are appropriate for new registry agreements.

2.3.2 ICANN will continue to use re-bids in cases where a registry agreement is terminated or expires without renewal.

2.4 The present limitations to Consensus Policies are appropriate and should continue. *(Rec. 2A)*

2.4.1 As described in previous communications with the GNSO <http://gnso.icann.org/correspondence/jeffrey-to-tonkin-27sep06.pdf>, the limitations and applicability of consensus policies currently vary among the registry and sponsorship agreements.

2.4.2 Assuming that the Task Force is recommending that there be no changes to the provisions regarding consensus policies in the existing

gTLD registry agreements, there would be no implementation impact resulting from this recommendation.

2.4.3 Staff also notes that, in accordance with ICANN's mission and core values, any consensus policies needed to preserve the stability and security of the DNS should remain applicable to all registries under contract.

2.5   Certain policy making responsibility should be delegated to the sponsored gTLD operators. *(Rec. 2B)*

2.5.1 The current form of agreement for sponsored top-level domains includes provisions delegating certain policy making responsibilities to the Sponsor (see for example http://www.icann.org/tlds/agreements/asia/appendix-s-06dec06.htm#2). This recommendation appears to confirm the existing practice.

2.5.2 In the absence of further guidance on the types of policy making responsibility which should be delegated to sponsors, staff interprets this recommendation to mean that the current provisions on delegated authority should be retained. As such, there is no implementation impact resulting from this recommendation.

2.6   In order to improve ICANN accountability and effective business planning by registries, ICANN staff should immediately implement a system that avoids individual negotiations of ICANN fees and provides consistency unless there is an established justification for disparate treatment. *(Rec. 4A)*

2.6.1 There is no current policy establishing the level or type of registry fees to be paid to ICANN; therefore, staff negotiates these fees with the registries individually. Analysis has demonstrated that recent contractual negotiations have resulted in registry fees that are consistent across

various registry business models in proportion to registration revenue. In formalizing a consistent model for registry fees, staff would take into account both current practices and the existing fee structure for each registry.

2.6.2. Staff will continue to work with the above approach as part of the new gTLD process in order to ensure consistency in fee arrangements across registries unless there is an established justification, and avoid individual negotiations of ICANN fees wherever possible.[1]

2.6.3 Staff notes that a new "policy" or approach to ICANN fees would apply going forward, and would not alter fee arrangements which have already been negotiated with the individual registries. The new practice could also be implemented in the base contract coming out of the new gTLD process, and apply to new registries going forward.

2.7 The ICANN Board should establish a Task Force or Advisory Committee to examine budgeting issues, including the manner and allocation of revenue collection, budget oversight and budget approval processes. This group should solicit and review public comments on the issues. *(Rec. 4B)*

2.7.1 This recommendation will be forwarded to the ICANN Board of Directors for consideration upon approval of this proposed policy.

2.7.2 The Board and Finance Committee frequently discuss and address the issues involved with the ICANN revenue model, the budgeting formulation and approval processes, and public consultation model.

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[1] Staff could approach this by adopting a fee structure based on a set proportion of revenues, with established minimums and maximums. Staff also assumes that there will continue to be a number of different business models within the gTLD space, necessitating some flexibility for staff to negotiate appropriate fee arrangements on a case by case basis. Proposed fee models varying from the standard would be posted for public comment and submitted to the ICANN Board for approval.

Therefore, the Board is particularly well situated to consider and address these issues.

2.8 **In order to determine whether there is a need for a new consensus policy on the collection and use of registry data, including traffic data, for purposes other than which is was collected, there is first a need for a properly targeted study by an independent third party on the data collected and the uses to which it is put. The study should provide appropriate safeguards to protect any data provided for the purposes of the study, and the confidentiality of which registry, or other group, provides the data. The findings of the study should be published and available for public review. A Statement of Work should be developed by the GNSO Council, with appropriate public review, to cover an analysis of the concerns for data collection and use, the practice involved in collection and use of data - including traffic data, and the availability, when appropriate, for non-discriminatory access to that data. It is recommended that a current processes document be developed, describing the current registry practices for the collection of data and the uses of that data, for example, but not limited to, operating the registry; preparing marketing materials to promote registration of domain names; gathering of 'null' returns, ensuring the integrity of the Registry, or the DNS. This report should be available to the group doing the external study and should be made available to the public for comment. After examining the results of the independent study and public discussions recommended above, the GNSO Council should examine the findings and determine what, if any, further policy process is required.**

2.8.1 This recommendation proposes a third-party study on various types of registry data, based on a Statement of Work developed by the GNSO Council.

2.8.2 Staff support is available should the Task Force desire assistance from staff in preparing for and carrying out this study, including writing a draft statement of work and securing expert assistance in executing the study. Staff notes that the recommendation includes references to various types of registry data, and suggests that the purpose for the study and questions to be answered be clearly established in order to inform and focus any further discussions in regard to "registry data."

2.9   There should not be a policy guiding investments in development and infrastructure. *(Rec. 6A)*

2.9.1 The existing gTLD registry agreements do not require registry operators or sponsors to invest specific amounts in development and infrastructure. Each registry agreement contains minimum functional and performance specifications which must be met.

2.9.2 The minimum functional and performance specifications are intended to encourage investment in development and infrastructure improvements. In practice, many registries invest in development and infrastructure improvement as part of an ongoing commitment to stability and security, to ensure that they continue to meet minimum functional and performance specifications.

2.10   ICANN should establish baseline requirements for the security and stability of registries and anything above that would be negotiated on a case-by-case basis, if necessary. Baseline requirements should be recommended to the Board by the Security and Stability Advisory Committee (SSAC) after consultation with the gTLD registry

operators. In determining those recommendations, the SSAC should solicit and consider public comments. *(Rec. 6B)*

2.10.1 Various contractual requirements in the current gTLD registry agreements exist for the purpose of maintaining the security and stability of the DNS, including functional and performance specifications, data escrow requirements, and obligations to comply with consensus policies and temporary specifications or policies adopted as necessary.

2.10.2 The ICANN Board and staff continue to consult with SSAC on all matters relating to the security and integrity of the Internet's naming and address allocation systems. Staff will request that the SSAC and the gTLD registries review and consider baseline requirements for security and stability in accordance with this recommendation.

2.10.3 ICANN is currently engaged in a registry failover project to promote the stability of the DNS and protect registrants in the event of registry failure. Staff is also developing, in collaboration with existing registries and the SSAC, a "best practices" document with baseline requirements. Two initial reports from this project have been issued this year (see http://www.icann.org/announcements/announcement-05mar07.htm; http://www.icann.org/announcements/announcement-4-01jun07.htm). SSAC provided comments to these reports and will continue to be consulted in the development of comprehensive registry failover plans. This policy recommendation will be included in consultations with the SSAC.

3 Additional Notes

3.1 The Task Force's report includes a constructive set of recommendations regarding difficult and controversial issues. Staff can act in accordance with

these recommendations without requiring their adoption as formal policy recommendations, and will do so at the direction of the Council.

3.2 Specific staff actions discussed above include:

- Documenting current registry agreement renewal guidelines.

- Establishing a draft procedure and timeline for registry agreement renewal.

- Using economic analysis to determine a commercially reasonable length for registry agreements.

- Examining the existing agreements, conditions for termination and nonrenewal of agreements, and experiences to date in order to determine whether the conditions under which re-bids would occur are appropriate for new registry agreements.

- Continuing to refine the current approach to ICANN fees paid by registries.

- Forwarding a request to the Board of Directors regarding examination of budgeting issues.

- Assisting as needed with a targeted study on the collection and use of registry data.

- Forwarding a request to the Security and Stability Advisory Committee regarding baseline requirements for the security and stability of registries.