



Comment on Proposed Renewal of .MUSEUM Sponsored Registry Agreement

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**Business Constituency Submission
GNSO//CSG//BC**

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business;
2. Is competitive in the supply of registry and registrar and related services; and
3. Is technically stable, secure and reliable.

Comment on Proposed Renewal of .MUSEUM Registry Sponsored Agreement

This comment regards the “Proposed Renewal of .MUSEUM Sponsored Registry Agreement” posted for comment on 24-Aug-2017 (<https://www.icann.org/public-comments/museum-renewal-2017-08-24-en>).

The BC describes three concerns in this comment document:

Global Domain Division (GDD) has proposed a renewed Registry Agreement (RyA) that is inconsistent with the concept of “community” applied to other gTLDs;
has engaged in a process that fails to observe the very safeguards it has stated must be followed for the expansion of classes of eligible registrants for a community gTLD; and
continues to undermine the GNSO’s authority to recommend the substance of Consensus Policy.

Concern Regarding Substantive Community Registration Policies for .MUSEUM

Appendix S in the current .MUSEUM RyA is carried over to the proposed renewal in the form of Specification 12 (Community Registration Policies) with slight modifications. As such, upon Board approval the .MUSEUM proposed renewal registry agreement will be re-categorized as a "Community TLD" instead of a "Sponsored TLD".

Eligibility requirements have been expanded such that registrations will be granted to museums, professional associations of museums, individuals with an interest or a link with museum profession and/or activity, or **bona fide museum users**. The provisions regarding (i) delegated authority; (ii) selection of registrars; (iii) existing sponsor services; and (iv) community related registrations have been deleted. The provision regarding the Charter Eligibility Dispute Resolution Policy has also deleted. Disputes are to be resolved under the Eligibility Restrictions Dispute Resolution Policy or the Compliance Reconsideration Dispute Resolution Policy. (Emphasis added)

“Bona fide museum users” provision arguably turns this Sponsored TLD into an open TLD. Anyone can register a .museum domain name since there is no requirement for registrants to document that they actually “use” any museums and there would not be any practical means of verification.

Even if .MUSEUM were arguably a Community TLD, these RyA renewal negotiations stand in stark contrast to the very tight controls and tests used to judge Community TLD applicants in the new gTLD program. ICANN applied a rigorous evaluation process that resulted in most community applicants failing to qualify, and therefore required to compete in an auction against contending applicants.

We cannot imagine that any new gTLD application which proposed a restriction to “bona fide users” of the TLD string term would have passed muster if challenged as Community Applicant. So GDD appears to be creating a major discrepancy: the very tight definition of community TLD used in application evaluations, versus the very loose one accepted here in a RyA renewal.

A cursory review of Module 4 of the new gTLD Applicant Guidebook (AG)¹, containing “String Contention Procedures”, supports this view. In this regard we note that the “Attachment to Module 2”² of the AG makes clear that this contention set procedure sets the relevant standards for judging the bona fide nature of a gTLD claiming to represent a community, stating at #20 in regard to an applicant’s claim of “Community-based Designation”:

“Responses are not scored in the Initial Evaluation. Responses may be scored in a community priority evaluation, if applicable. Criteria and scoring methodology for the community priority evaluation are described in Module 4 of the Applicant Guidebook”.

Section 4.2.3 of Module 4³ of the AG, relating to Community Priority Evaluation (CPE) Criteria, sets forth the standards and key definitions for discerning the difference between bona fide communities from suspect ones. A key definition is that of “Community”:

Notably, as “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.

We must observe that there is no evidence of any awareness and mutual recognition among the members of a purported community of “bona fide museum users”. Nor is there evidence that the community existed prior to September 2007, or that it can be expected to have a future existence.

That definition of “community” is a critical component of Criterion #1 of the CPE, Community Establishment, which in turn is measured by Delineation and Extension. In this regard, Module 4 states:

- “Delineation” relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.
- “Extension” relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.

Even if it is asserted that there is some self-aware and self-recognized group of museum users justifying the existence of such a “community” – an assertion we contest – it seems clear that the definition of its membership is unclear, dispersed, or unbound. As for its extension, its numbers and geographic reach likely encompass millions of people across the globe. The breadth of the proposed “extension” is at odds with any recognizable bounds of a community, leading to the conclusion that accepting bona fide museum users as .Museum registrants converts this sponsored gTLD into an open registration gTLD.

¹ <https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

² <https://newgtlds.icann.org/en/applicants/agb/evaluation-questions-criteria-04jun12-en.pdf>

³ <https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

A new gTLD application must score at least 14 out of 16 points to prevail in a community priority evaluation. The .Museum gTLD community definition proposed in its RyA renewal would likely fail CPE if it were a new gTLD applicant. Guidebook Module 4 states that “a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.” But in this instance we believe the proposed definition of the community is far too broad to be valid under any reasonable analysis.

Therefore, we believe that the proposed RyA should delete “bona fide museum users” from the list of eligible registrants; and that the term “individuals with an interest or a link with museum profession and/or activity” should likewise be tightened to require that the “interest” be one that is demonstrated or documented.

Concern Regarding the Process for Expanding Eligible .Museum Registrants

GDD has proposed in this renewal RyA to convert .Museum from a Sponsored to a Community gTLD and significantly expand the range of its potential registrants. Just as the proposed delineation of eligible registrants is inconsistent with the definition of “community” adopted for CPE purposes in the new gTLD program, the process being followed for that expansion of eligible registrants is inconsistent with that imposed on bona fide community gTLDs.

This process contrasts sharply with the scrutiny that GDD is presently applying to a proposal by fTLD (.bank, .insurance) to make a minor modification of its registration policies. Namely, fTLD wants to add “Bank holding or parent companies that are supervised by a relevant government regulatory” authority to the eligibility list of other regulated financial institutions.⁴ ICANN recently denied the request, stating it will not approve requests to amend community restrictions in Specification 12 of the New gTLD Registry Agreement, absent a community process to consider such requests, including having the registry operator consult with the relevant TLD community and collecting documentation of support from key participants in that community.

That response raises a troubling inconsistency: Why is .Museum permitted to expand its eligible registrants when other bona fide community gTLDs are told that such requests must await final development of a process for considering them? And why is fTLD told that the full process for a Community gTLD Change request must be followed before its rather narrow objective can be considered, while .MUSEUM is allowed to transition to “Community” status (arguably a transition to a fully open registry) without any evidence of a preceding community review? Of course, such a review could not presently be conducted as ICANN has yet to approve a Community gTLD Change Request process.

(Please note that the BC has no position on .fTLD’s request; we are citing it solely as an example of inconsistent GDD positions on necessary procedures.)

⁴ For background we refer to a presentation made by Craig Schwartz to GNSO Council on 20-Sep-2017. Also see ICANN’s [letter](#) to Mr. Schwartz on the same subject -- <https://www.icann.org/en/system/files/correspondence/weinstein-to-schwartz-22sep17-en.pdf>.

Imposing Rights Protection Mechanisms that are not GNSO Consensus Policy

GDD has proposed renewal of the .MUSEUM Sponsored Registry Agreement that incorporate elements of the base new gTLD registry agreement. The multi-stakeholder community has not, however, fully deliberated on whether these elements should become Consensus Policy required of legacy sTLDs like .MUSEUM. This is at least the 5th instance in which the GDD has proposed such an amendment to a legacy TLD registry agreement.⁵ The BC sustains its procedural objection to these proposals, through which GDD staff unilaterally establishes a new *status quo* for registry agreements. By substituting its judgment instead of GNSO policy development, GDD exceeds its powers and overrides safeguards intended to preserve transparency and inclusion with the multi-stakeholder community.

The amendments in question require the .MUSEUM sTLD to *inter alia* adopt new rights protection mechanisms (RPMs) from the new gTLD Registry Agreement, specifically the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and the Uniform Rapid Suspension (URS) dispute resolution procedure.⁶ The GNSO has initiated a Policy Development Process (PDP) to review all RPMs at all gTLDs, and the working group Charter specifically tasks it with recommending whether any of the new gTLD program RPMs should become Consensus Policy and thereby applicable to legacy gTLDs. The working group tasked with evaluating these new RPMs does not expect to complete the task until sometime in 2018.⁷ We wish to make clear at the outset that the BC's concern is not in regard to the adoption of new gTLD rights protection mechanisms (RPMs) for legacy gTLDs.

The BC has been a strong advocate for these RPMs as applied to new gTLD registries and this PDP continues to consider fundamental questions about how the new RPMs should function and how they could evolve in the future.⁸

The GNSO may ultimately articulate a Consensus Policy that calls for different measures for legacy gTLDs than are now being used with the new gTLDs. If the GDD persists in forcing registries to adopt these pre-Consensus Policy RPMs, it may widely implement procedures that do not align with the GNSO's ultimate conclusions. Further, as ICANN policy staff has recognized, application of the RPMs to legacy gTLDs raises certain transition issues that are not addressed by implementation via contract. Finally, in the absence of such RPMs being Consensus Policy, registrants may have legal grounds to question their imposition. GDD personnel continue to set substantive policy for gTLDs by adopting elements of the new gTLD registry agreement into amended and renewed RAs for legacy gTLDs.

⁵ See "Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement" (<https://www.icann.org/public-comments/travel-renewal-2015-05-12-en>) posted May 2015, "Proposed Renewal of .CAT TLD Registry Agreement" (<https://www.icann.org/public-comments/cat-renewal-2015-05-28-en>). Also see "Proposed Renewal of .PRO Unsponsored Registry Agreement" (<https://www.icann.org/public-comments/pro-renewal-2015-05-28-en>), posted for public comment May 2015. Also see Proposed Renewal of .MOBI Sponsored TLD Registry Agreement" (http://www.bizconst.org/assets/docs/positions-statements/2017/2017_02February_01%20BC%20Comment%20on%20MOBI%20RyA%20.pdf) posted Feb 2017.

⁶ See ICANN, Specification 7 to the .MUSEUM Registry Agreement, available at <https://www.icann.org/sites/default/files/tlds/museum/museum-proposed-renewal-redline-24aug17-en.pdf>

⁷ See ICANN, RPM Review PDP Work Plan, available at <https://community.icann.org/display/RARPMRIAGPWG/Work+Plan> (updated July 12, 2016).

⁸ See ICANN, RPM Review PDP Charter, available at <https://community.icann.org/display/RARPMRIAGPWG/WG+Charter> (adopted March 9, 2016).

Moreover, the ICANN Bylaws reserve the power to set gTLD policy to the GNSO. The new RPMs have not, in their current form, received the uniform support from GNSO constituents and have not met the procedure set forth in the Bylaws to become Consensus Policies. While greater consistency between registry agreements is a worthwhile goal, and convenient for ICANN in terms of contractual compliance, it cannot supersede consistency of action in accord with ICANN's Bylaws.

By circumventing ICANN Bylaws, GDD personnel are also undermining the fundamental principles of transparency and inclusion that are core tenets of ICANN's mission. GDD personnel are effectuating policy through bilateral negotiations with registry operators, which are only subject to the larger community's review by way of these proposed amendments and public comments.

The BC notes that in earlier proposed registry agreement amendments and renewals, the GDD stated:

With a view to increase the consistency of registry agreements across all gTLDs,
ICANN has proposed that the renewal agreement be based on the approved new
gTLD Registry Agreement as updated on 9 January 2014.⁹ (Emphasis added).

A lack of transparency underscores why these policy decisions must be made through the open and inclusive procedures required of the GNSO. The proposed renewal RyA for .Museum grants its registry operator substantial concessions by allowing it to essentially convert the gTLD to one with arguably fully open registrant eligibility criteria, yet the negotiations that led to this concession by ICANN and the registry operator's agreement to adopt the above referenced RPMs was completely opaque.. Businesses have a duty to their shareholders or investors to maximize return, which is exactly why ICANN should avoid the perception that GDD staff has used beneficial concessions to leverage acquiescence on unrelated RyA provisions. That is especially true given the statement made by GDD head Akram Atallah during the November 8, 2016 Public Forum in Hyderabad, where he conceded, "The registries come and ask for something and we tell them please adopt the new gTLD contract".¹⁰

That statement makes clear that GDD's negotiating posture in RyA renewals is to condition the granting of benefits to the registry operator upon acceptance of provisions that are not Consensus Policy and yet have substantial policy implications.

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

⁹ See ICANN, Proposed Renewal of .CAT TLD Registry Agreement," available at <https://www.icann.org/public-comments/cat-renewal-2015-05-28-en> (May 28, 2015).

¹⁰ <http://www.internetcommerce.org/ica-on-the-record-at-icann-57-hyderabad/>

Conclusion

In regard to the proposed conversion of .Museum from a Sponsored to a Community gTLD and the considerable expansion of its eligible registrants, the proposed renewal RyA is inconsistent with the established definition of “community” for gTLD purposes , and the process followed in developing it is at odds with the consultative process that ICANN has directed bona fide community gTLDs to follow when proposing expansion of eligible registrants. Further, the action taken could be at odds with any changes regarding community gTLDs that is recommended by the working group reviewing Substantive Procedures for the next round of gTLDs.

Imposing RPMs that are under consideration by the RPM Review WG (which is charged by its Charter if they should become Consensus Policy applicable to legacy gTLDs), shows ICANN’s disregard for ICANN’s multi-stakeholder model. The decision by GDD staff to use the base new gTLD RyA for the renewal of legacy gTLDs is beyond its power and substitutes staff decisions for bottom-up policy development required by the ICANN Bylaws. GDD cannot create *de facto* Consensus Policies through RyA renewal negotiations.

Nor can GDD use the RyA renewal negotiation process to circumvent boundaries defining “community” for gTLD purposes. Likewise, GDD cannot tell one community gTLD what safeguards must be followed if they wish to expand classes of eligible registrants, while requiring no similar safeguards for changes made through opaque renewal negotiations.

Overall, GDD needs to respect the community-based policymaking process, and be consistent with existing policy decisions and approval procedures. The rulebook cannot be discarded when GDD goes behind closed doors with a registry that needs to renew its registry agreement.

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This comment was drafted by Phil Corwin and Steve DelBianco.

It was approved in accord with the BC Charter.