

RAA Critical Issues Analysis: CONSENSUS POLICY

This document provides the views of the Registrar Stakeholder Group Negotiating Team (the “Registrar NT”) on the status of negotiations related to Consensus Policy.

1. *Aligning the Definitions and Procedures Associated with Consensus Policy.* The “picket fence” is a fundamental protection for ICANN registries and registrars that agree to be bound by policies that may be developed in the future. The fundamental concept applies to both registries and registrars. The Registrar NT sought to align the articulation of Consensus Policy and the “picket fence” with the New gTLD Registry Agreement, and to align the relevant procedures by which Consensus Policy is adopted to the provisions of ICANN’s Bylaws. ICANN has rejected this approach, without explanation.
2. *Scope “Leap” that Effectively Eliminates the Picket Fence for Registrars.* ICANN’s language would significantly expand the scope of items falling within the picket fence to encompass registry or registrar services that do not affect the interoperability, security and/or stability of the Internet or the DNS. In addition, ICANN’s position explodes the picket fence to include *the RAA itself – and accordingly, every provision of that commercial agreement* – as an appropriate subject for non-negotiated regulation. This effectively eliminates the picket fence protections that have always been and continue to be the “basis of the bargain” between ICANN and the contracted parties.
3. *Use of Consensus Policy to Create Inequitable Regulation and/or to Regulate Content and Use.* The ICANN language would eliminate the prohibition against the use of Consensus Policy to engage in treatment that is not equitable and would reverse the prohibition against Consensus Policy about content and/or use – a prohibition that was mandated in the White Paper and has been in place since 1999.
4. Chart 1, below, shows the way in which the ICANN draft of 4 June 2012 would change the proposal submitted by the Registrar NT, and provides the Registrar NT comments on those changes.

ICANN Changes to Registrar NT Proposed Language on Consensus Policy	Registrar NT Comments
<p style="text-align: center;">CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION</p> <p>1. “Consensus Policies” are those policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this document. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with the process set forth therein.</p> <p>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 Registrars. Consensus Policies shall relate to one or more of the following:</p> <p>1.2.1. issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability, security and/or stability of the Internet, Registrar Services, Registry Services, or the Domain Name System (“DNS”);</p> <p>1.2.2. functional and performance specifications for the provision of Registrar Services;</p> <p>1.2.3. registrar policies reasonably necessary to implement Consensus Policies relating to a gTLD registry;</p> <p>1.2.4. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names, but including where such policies take into account use of the domain names);</p> <p>1.2.5. restrictions on cross-ownership of registry operators and registrars or Resellers and regulations and restrictions with respect to registrar and registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or Reseller are affiliated; or</p> <p>1.2.6. the forms of agreement to which a registrar is a party that relates to the provision of Registrar Services, including, without limitation, the Registrar Accreditation Agreement, or similar successor agreement.</p> <p>1.3 Such categories of issues referred to in Section 1.2 shall include, without limitation:</p> <p>1.3.1 principles for allocation of registered names in a TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);</p> <p>1.3.2. prohibitions on warehousing of or speculation in domain names by registries or registrars;</p> <p>1.3.3. reservation of registered names in a TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration);</p> <p>1.3.4. maintenance of and access to accurate and up-to-date information concerning domain name registrations; Registered Names and name servers, including (i) the type of data that must be accessible through an interactive web page and a port 43 Whois service, (ii) the development of a distributed capability that provides query-based Whois search functionality across all</p>	<p><i>ICANN’s language would significantly expand the scope of items falling within the picket fence to encompass registry or registrar services that do not affect the interoperability, security and/or stability of the Internet or the DNS</i></p> <p><i>ICANN changes would reverse the prohibition on content regulation mandated in the White Paper and in place since 1999.</i></p> <p><i>This provision guts all picket fence protections by making the RAA itself – and accordingly, every provision of that commercial agreement - an appropriate subject for non-negotiated regulation</i></p> <p><i>The application of Consensus Policy to these issues is addressed in the current RAA. By including</i></p>

<p>registrars, (iii) the development of a centralized Whois database for the purpose of providing comprehensive Registrar Whois search capability and (iv) limits on (A) the Personal Data concerning Registered Names that Registrar may make available to the public through a public-access Whois service and (B) the manner in which Registrar may make such data available;</p> <p>1.3.5. 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 domains among continuing registrars of the Registered Names sponsored in a TLD affected by such suspension or termination a registrar losing accreditation; and</p> <p>1.3.6. the transfer of registration data upon a change in registrar sponsoring one or more Registered Names.</p> <p>1.4 In addition to the other limitations on Consensus Policies, they shall not:</p> <p>1.4.1 prescribe or limit the price of Registrar Services 1.4.2 modify the terms or conditions for the renewal or termination of the Registrar Agreement Registrar Services;</p> <p>1.4.2 modify the limitations on Temporary Policies (defined below) or Consensus Policies;</p> <p>1.4.3. modify the provisions in the Registrar Accreditation Agreement regarding fees paid by Registrar to ICANN; or</p> <p>1.4.5. modify ICANN's obligations to ensure equitable treatment of Registrars and act exercise its responsibilities in an open and transparent manner.</p> <p>2. Temporary Policies. Registrar shall comply with and implement all specifications or policies established by the ICANN Board of Directors (the "Board") on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of Registrar Services, Registry Services or the DNS or the Internet ("Temporary Policies").</p> <p>2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws.</p> <p>2.1.1. ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.</p> <p>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</p>	<p><i>these here, ICANN is rejecting Registrar NT efforts to align the fundamental elements of Consensus Policy as applied to registries and registrars.</i></p> <p><i>As described above, ICANN's position explodes the picket fence to include every provision in the RAA. This effectively eliminates the picket fence protections that have always been and continue to be the "basis of the bargain" between ICANN and the contracted parties.</i></p> <p><i>ICANN proposes to permit the use of Consensus Policy to engage in treatment that is not equitable.</i></p>
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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, Registrar shall no longer be required to comply with or implement such Temporary Policy.

3. **Notice and Conflicts.** Registrar shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registrar Services and Consensus Policies or any Temporary Policy, the Consensus Policies or Temporary Policy shall control, but only with respect to subject matter in conflict.