

Bruce,

Thank you for your inquiry concerning the Policies for Contractual Conditions PDP ("PDP-Feb06") Task Force Chair's request for clarification on the effect of GNSO policy recommendations on ICANN's existing registry agreements.

Specifically, Task Force Chair Maureen Cubberley asked: "Given the existence of ICANN by-law annex A Clause 13, would Council please confirm to the Task Force that should the Task Force's recommendations lead to Consensus Policy (as described in Clause 13) that differs from contract wording, then all current gTLDs contracts would indeed be changed retroactively as a result? If not, the Task Force is looking for guidance on how to proceed." <<http://www.gnso.icann.org/correspondence/cubberley-to-tonkin-25aug06.pdf>>

Unfortunately, without knowing what the consensus policy or policies might emerge from the current PDP, any answer to this question would be speculative and cannot be answered definitively. 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.

Since there has been no uniform language on consensus policies included in each ICANN registry agreement, this has been the subject of bilateral negotiations between ICANN and each registry operator and sponsor. ICANN's GTLD registry and registrar agreements provide that under certain circumstances policies that are recommended by the GNSO and adopted by the Board can create new binding obligations on registries and registrars. All of ICANN's current GTLD agreements include limitations on the topics that may be the subject of such binding new obligations, and the procedures that must be followed in order to create them. For example, Section 3.1(b) of the .JOBS Registry Agreement (as an example of the framework for ICANN's recent registry agreements) <<http://www.icann.org/tlds/agreements/jobs/jobs-agreement.htm#3.1>> provides as follows:

[3.1](b) Consensus Policies.

(i) At all times during the term of this Agreement and subject to the terms hereof, Registry Operator will fully comply with and implement all Consensus 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 and as set forth below.

(ii) "Consensus Policies" are those specifications or policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 3.1(b)(iv) below. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time

in accordance with ICANN's Bylaws, and any Consensus Policy that is adopted through such a revised process and covering those topics listed in Section 3.1(b)(iv) below shall be considered a Consensus Policy for purposes of this Agreement.

(iii) For all purposes under this Agreement, the policies identified at <http://www.icann.org/general/consensus-policies.htm> shall be treated in the same manner and have the same effect as "Consensus Policies."

(iv) Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders. Consensus Policies shall relate to one or more of the following: (1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, Security and/or Stability of the Internet or DNS; (2) functional and performance specifications for the provision of Registry Services (as defined in Section 3.1(d)(iii) below); (3) Security and Stability of the registry database for the TLD; (4) registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars; or (5) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names). Such categories of issues referred to in the preceding sentence shall include, without limitation:

(A) principles for allocation of registered names in the TLD (e.g., first-come, first-served, timely renewal, holding period after expiration);

(B) prohibitions on warehousing of or speculation in domain names by registries or registrars;

(C) reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (a) avoidance of confusion among or misleading of users, (b) intellectual property, or (c) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration);

(D) maintenance of and access to accurate and up-to-date information concerning domain name registrations;

(E) procedures to avoid disruptions of domain name registration 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; and

(F) resolution of disputes regarding whether particular parties may register or maintain registration of particular domain names.

(v) Registry Operator shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Specifications or Policies in which to comply with such policy or specification, taking into account any urgency involved.

The .JOBS registry operator (Employ Media) therefore has agreed in advance to follow any ICANN "Consensus Polices", which are defined as polices that are developed pursuant to the procedure set forth in the ICANN Bylaws and which relate to the categories of issues specified in the agreement, e.g. prohibitions on speculation in domain names by registries, maintenance of and access to "WHOIS" data, resolution of disputes regarding registrations, etc. The .JOBS registry operator accordingly would not be obligated to comply with any ICANN policy that is not developed according to the policy-development procedure specified in the Bylaws or that does not relate to one of the limited topics (the so-called "picket fence") for Consensus Policies.

Other ICANN registry agreements and the Registrar Accreditation Agreements contain similar language on the applicability of Consensus Policies. For example, the Registrar Accreditation Agreement and the current .BIZ (2001), .COM (2001), .INFO (2001), .NAME (2001), .ORG (2002), and .PRO (2002) registry agreements <<http://www.icann.org/registries/agreements.htm>> all specify that any Consensus Policy must be supported by a written report with certain minimum required elements and must be recommended by at least a two-thirds vote of the supporting organization's Council (see, e.g. .BIZ section 4.3.1 <<http://www.icann.org/tlds/agreements/unsponsored/registry-agmt-11may01.htm#4.3.1>>).

The stated intent of PDP-Feb06 is to make policy recommendations on a series of subjects for which ICANN does not currently have uniform policy: the terms for renewal of registry agreements, the extent of limitations on consensus policies in registry agreements, whether or not there should be price controls in registry agreements, the level of ICANN fees in registry agreements, limitations on registry uses of data on DNS resolutions that their servers process, and whether or not ICANN should mandate particular levels of capital investment by registries. Such recommendations 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. If there is anything that my staff or I can do to further support this policy development process, please do not hesitate to ask.

I hope Task Force and Council members find this helpful. Please let me know if you have any questions or comments to this response.

Best regards,
John O. Jeffrey
General Counsel
ICANN