

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: gTLD Registries Stakeholder Group (RySG)

Address: % Morris, Manning & Martin, LLP
1401 Eye Street, NW Suite 600
Washington, DC 20005

Email: Contact Information Redacted

Phone Number (optional):

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

ICANN sent legal notices to a large majority of RySG members informing of a new consensus policy, "RDDS CL&D Policy, including implementation of RDAP" (<https://www.icann.org/resources/pages/rdds-labeling-policy-2016-07-26-en>)

This policy implementation improperly conflates the Consistent Labeling and Display (CL&D) Policy with ICANN's request for registry operators to implement a new standard for registration data display. In addition, ICANN's request to implement the new standard includes a requirement to adopt a staff-developed operational profile and an additional requirement that registry operators update their reporting to ICANN; neither of these requirements are permitted by ICANN's agreements with affected registry operators. We therefore seek the following relief:

- All references to the implementation of the Registration Data Access Protocol (RDAP) be removed from the CL&D Policy; and
- The requirements for registry operators to adopt ICANN's operational profile and update their reporting be removed from ICANN's request for implementation of RDAP.

4. Date of action/inaction:

July 26, 2016

5. On what date did you become aware of the action or that action would not be taken?

July 26, 2016

6. Describe how you believe you are materially affected by the action or inaction:

Applicable registry agreements require that the RDAP deployment be commercially feasible. The 2012 new gTLD Registry Agreement specifies that implementation of the protocol now known as RDAP be commercially feasible before it's required. The RySG can't even respond as to whether it's feasible or not since no reasoning to that regard was provided in the notice to implement such services

Furthermore, some of our members are on record stating that since the RDAP profile replicates the known deficiencies of WHOIS – which is currently being studied by a PDP WG – so it's not commercially feasible to deploy it to mimic a flawed system.

The introduction of RDAP represents an additive requirement for Registries to operate a new (additive) service. As there are no provisions for the sunset of the legacy Whois service, it's unclear how this additional requirement can be considered commercially feasible.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

To be determined based on ongoing consultation with the Registrar Stakeholder Group (RrSG).

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

A. ICANN staff improperly expanded the scope of the Thick Whois Policy to include a requirement for Registry Operators to implement RDAP.

B. ICANN Staff ignored objections to their proposed operational profile for RDAP, and are now attempting to impose the adoption of the profile on registry operators despite any contractual basis for doing so. Both Board-approved policy and agreements never referenced a gTLD Profile for RDAP.

1. ICANN’s ability to request Registry Operators to implement RDAP is based on specific contractual language. For example, the form agreement for the 2012 round includes the following language in section 1 of Specification 4:

“Registry Operator shall implement a new standard supporting access to domain name registration data (SAC 051) no later than one hundred thirty-five (135) days after it is requested by ICANN if: 1) the IETF produces a standard (i.e., it is published, at least, as a Proposed Standard RFC as specified in RFC 2026); and 2) its implementation is commercially reasonable in the context of the overall operation of the registry.”

Notably, this contractual requirement refers only to IETF-developed standards and does not provide that ICANN staff may develop further requirements independent of the IETF process.

2. On numerous occasions, including some documented sessions at ICANN meetings¹, Registries alerted ICANN that since ICANN hasn't passed the RDAP gTLD Profile thru a standard development process in the IETF, such profile wouldn't be enforceable through the adherence to technical standards clause of the Registry Agreements or to the requirements under section 1 of Specification 4. Instead of engaging in proper standards-making process, or including the RDAP gTLD Profile in the ongoing Registry Agreement amendment negotiations, ICANN staff proceeded to "backdoor" these requirements through an unrelated policy implementation to achieve its goals.
 3. In addition to the public forums at ICANN meetings, the RySG provided feedback to ICANN via the formal comment period for the CL&D policy and the RDAP profile. The Consistent Labeling and Display comments can be found at <https://forum.icann.org/lists/comments-rdds-output-03dec15/> with the RySG comments posted on 9 February 2016. The RDAP profile comments can be found at <https://forum.icann.org/lists/comments-rdap-profile-03dec15/> with the RySG comments posted on 14 March 2016. These and other comments from the community were not taken into account in their entirety by ICANN staff.
- C. Registry Agreements require that RDAP deployment to be commercially feasible. 2012-round Registry Agreements specify that implementation of the protocol now known as RDAP be commercially feasible before it's required. The RySG can't even respond as to whether it's feasible or not since no reasoning to that regard was provided in the legal notice to implement such services. Furthermore, some of our members are on record stating that since the RDAP profile replicates the known deficiencies of WHOIS – which are currently being studied by a PDP WG – it is not commercially feasible to deploy it to mimic a flawed system. Significantly, SAC-051 (see <https://www.icann.org/en/system/files/files/sac-051-en.pdf>) and its roadmap to implementation (see <https://www.icann.org/en/groups/ssac/documents/sac-051-roadmap-04jun12-en.pdf>) mentioned other possible criteria.
- D. Consensus calls in IRT were dubious.

¹ See, e.g., <https://meetings.icann.org/en/marrakech55/schedule/mon-rdap-implementation/transcript-rdap-implementation-07mar16-en.pdf> pages 8-11 for one of such occasion

E. RDAP Allowance was only specified in Specification _ (Registration Data Directory Services), not in Specification 10 (Reporting) RDAP Profile

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

1. For RDAP deployment to be taken out of the CL&D implementation notice (specifically remove section 12 from the CL&D, being given instead its own implementation notice);
2. For the RDAP implementation notice to carry consistent reasoning as to why RDAP implementation could be said to be commercially reasonable at that point, if ICANN so believes, or the RDAP implementation to be postponed if deemed to not be commercially reasonable;
3. For the RDAP reference profile to be recognized as one of the possible ways to achieve compliance with the Registry Agreement, not the only method, until such a time that the reference profile is either incorporated into the Registry Agreement or becomes a technical standard.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

This issue affects the majority of the RySG membership, as well as non-RySG members that also are contracted gTLD Registries and will suffer the same harm. We believe that any ICANN reversal or replacement actions should apply equally to all affected gTLD Registries, not only to RySG members.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Signature

Date