

New gTLD Draft Applicant Guidebook: Analysis of Public Comment

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I. INTRODUCTION AND EXECUTIVE SUMMARY

Background

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market. In addition, the Joint Project Agreement that ICANN has with the U.S. Department of Commerce says: "ICANN shall maintain and build on processes to ensure that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs."

The policy making process in the ICANN model is driven by people from around the world. Those discussions have involved representatives of governments, individuals, civil society, the technology community, business, and trademark lawyers. The consensus they came to, through discussions at the Generic Names Supporting Organization (GNSO), one of the many groups that coordinate global policy in ICANN, was that new gTLDs were needed and could be introduced.

The current new gTLDs project has been in the study and planning stages for more than 3 years. See <http://gnso.icann.org/issues/new-gtlds/>. Its origin goes back even further – to the first two rounds of top-level domain applications held in 2000 and 2003. Those rounds were used to shape the current process.

In June 2008 the ICANN Board adopted the GNSO policy to introduce new gTLDs and directed staff to continue to further develop and complete a detailed implementation plan, continue communication with the community on the work, and provide the Board with a final version of the implementation proposals for the Board and community to approve before the new gTLD introduction process is launched.

In October 2008, a Draft Applicant Guidebook, with six explanatory memoranda was released and a consultation period of 76 days was held on the first draft. In addition to the comment period, there have been face to face consultations held at ICANN meetings and special consultations. Over 300 comments were received via the written public comment process and hundreds more via face to face discussion at ICANN meetings and other events.

Overview of the Analysis

ICANN conducts numerous public comment periods. They can be found here: <http://www.icann.org/en/public-comment/>.

In 2008 more than 50 comment periods were held. This process shapes policy direction and effects change to important technical, contract, and policy implementation documents. While ICANN relies heavily on this process, many have suggested that it is often difficult to understand how comments have shaped outcomes and if not, why not.

For the first comment period, ICANN has introduced a detailed analysis of comments received so far. The comments were divided into thirteen major categories and then subdivided into sub-categories. An analysis was written to address issues raised in the categories and sub-categories. The analysis identifies commenters and provides a summary of issues with which commenters are associated, and then provides an explanation of the proposed position regarding the issues raised. Therefore, each category is divided into the following sections:

- A summary of the key points made in that category,
- A summary of the analysis where a synopsis of comments and sources is listed,
- A listing of the issues raised by that set of comments,
- An analysis balancing the issues raised by the comments,
- A proposed position that is reflected in the Applicant Guidebook for additional discussion.

Issues Requiring More Discussion to Address Concerns

The following overarching issues need more examination and discussion before they can be changed in a future draft Guidebook. They remain unchanged in this version of the Guidebook. This does NOT imply that the concerns expressed have not been understood or are being disregarded; it only indicates that these matters require more substantive discussion before changes to the Guidebook can be made.

Those issues are:

a. Security and Stability

Scaling

While there is always opportunity for more study, the concern regarding security abuses scaling with more TLDs is ultimately better dealt with through pragmatic implementation approaches than a set of predictions around which many would disagree.

Many clearly feel more work is needed on implementation of registrant protection and end user confusion, and these questions need to be raised again. Are there implementable and practical mechanisms to avoid the need for purely defensive registrations at the second level? Is there such a need in an expanded name space? Can registry or registrar mechanisms be put in place to make new gTLDs desirable from both a confusion avoidance and protection viewpoint? ICANN staff will be actively soliciting feedback on these topics over the next 60 days, and share with the community options for improvements in these areas in the next several months.

In addition, given that the near coincident changes planned for introduction into the root zone - IPv6 records, DNSSEC, IDNs, and new TLDs – have not been analyzed for their combined impact on root zone operations, the ICANN Board has requested the Security and Stability Advisory Committee and Root Server System Advisory Committee to jointly conduct a study analyzing the impact to security and stability within the DNS root server system of these proposed implementations. The study will address the capacity of the root server system to cope with a stressing range of technical challenges and operational demands that might emerge as part of the implementation of proposed changes.

b. Malicious Conduct

Abuse

Several commenters expressed concern that expanding the number of TLDs would also expand malicious behavior on the Internet.

One approach to addressing this would be to conduct a study (really a forecast) of expected behaviors with an expanded TLD name space.

Many clearly feel more work is needed on implementation of registrant protection and end user confusion, and these questions need to be raised again. Is there such a need in an expanded name space? Can registry or registrar mechanisms be put in place to make new gTLDs desirable from both a confusion avoidance and protection viewpoint? ICANN staff will be actively soliciting feedback on these topics over the next 60 days, and will share with the community options for improvements in these areas in the next several months.

c. Trademark Protection

Many comments noted that an issue of concern was trademark protection and particularly protection from what they saw as frivolous and expensive defensive registrations at the second level, both at the registry start-up time and on an ongoing basis. Are there implementable, practical mechanisms to avoid the need for purely defensive registrations at the second level?

ICANN intends to conduct a series of discussions with all relevant parties relating to proposed enhanced protections for trademark holders. ICANN is also in discussions with several Intellectual Property organizations around the world to coordinate setting up several conferences to propose some additional solutions to these issues.

If additional trademark protection mechanisms are agreed upon and included in the new gTLD implementation, the aim would be to reduce costs to trademark holders, and increase and build more confidence in protection measures.

d. Demand/Economic Analysis

Many comments indicated that ICANN should commission an economic analysis of the effect of increasing the number of gTLDs before proceeding. ICANN will release a study on the dynamics of the domain system in broad as well as a study specifically related to the impact of increase in gTLDs in the near future. ICANN will post that study for public comment and discussion prior to the next iteration of the Draft Applicant Guidebook.

Major Changes in the Draft Applicant Guidebook

This draft of the Guidebook has changed in many ways that clarify language and expand on concepts. These changes are outlined in the Analysis and reflected in the red-lined revised version of the Guidebook posted with the Analysis. In addition, the major areas of change are outlined below.

a. Compliance

ICANN will revise the audit rights provision in the agreement included as part of the updated Applicant Guidebook to more closely align with the provisions in the current Registry Agreement, which cover compliance with the fee arrangements, monthly reporting specifications and technical and functional specifications. The scope of ICANN's audit rights will be clarified and limited to cover only the covenants of Registry Operator.

For Registry Operators who are repeatedly problematic, ICANN can bring action in front of an arbitrator and request the award of punitive damages. In addition, ICANN will clarify in the proposed Registry Agreement that ICANN may request that an arbitrator sanction the Registry Operator for noncompliance issues, including operational sanctions such as an order temporarily restricting a registry operator's right to sell new registrations if appropriate.

b. Registry/Registrar Separation

The revised Guidebook includes a limited lifting of restrictions on registry-registrar cross-ownership that could include the following:

- Maintain separation between the registry and registrar functions (with separate data escrow and customer interface);
- Registries continue to use only ICANN-accredited registrars;
- Registries should not discriminate among registrars;
- With a limited exception, a registrar should not sell domain services of an affiliated registry (this limit may be up to a threshold of 100,000 domain names, although the registrar may continue to manage its existing base once the threshold is met)
- Reasonable notice should be provided before any pricing changes are made on domain renewals.

This model would support small, targeted registries (including community-based applicants or single-entity TLDs), and recognizes that limited cross-ownership may provide economic benefit and competitive benefit in the domain name market.

c. Financial Considerations

Annual Registry Fee

It is proposed to reduce the gTLD annual registry fee base amount (not minimum) to \$25,000 per year (\$6,250 per quarter). For registries with 50,000 or fewer second-level registrations, no further fee would be charged. For registries with more than 50,000 registrations, the registry would pay \$0.25 per transaction-year. This approach better accommodates a diversity of registry models, registries in start-up phase, and smaller community registries, while ensuring reasonably expected future costs can be covered by the fees. Volume registries will pay total fees in line with current ICANN registry contracts. The proposed gTLD Evaluation Fee remains \$185,000. No additional cost estimates or policy decisions indicate that the fee should be altered. However, the cost estimates will continue to be evaluated as the launch date approaches. If any significant cost estimates are altered due to more information becoming available, then the fee could be adjusted accordingly.

d. Geographical Names

The Draft Applicant Guidebook is amended to make it easier to identify the different elements of geographic names.

It has also been amended to reflect that a country or territory name in any language will require evidence of support, or non-objection from the relevant government or public authority.

The definition of meaningful representation is also amended to take out the reference to official languages.

The requirements of the letter of support will be augmented. In addition to demonstrating an understanding of the string being requested and what it will be used for, the letter should also reflect that the string is being sought through the gTLD process and the applicant is willing to accept the conditions under which the string will be available, i.e. sign a contract with ICANN, abide by consensus policies, pay fees etc.

ICANN intends to hold further consultations with the Governmental Advisory Committee, ccNSO and others to discuss these issues.

e. Last Resort Contention Resolutions: Auctions

Auctions are intended to be the mechanism of last resort for contention resolution.

Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds for projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure. Other uses include outreach and education and DNS stability/security projects.

f. General Communications and Timeline

The proposed timeline that estimated the launch of the application round in September 2009 is under reconsideration. It will depend on the resolution of the overarching issues raised by the community in response to the initial draft Applicant Guidebook. There will be a third draft version of the Guidebook. It is unlikely that the application round will open before December 2009.

It is very important to take the time to resolve the overarching issues raised as a result of the publication of the first draft Guidebook. DNS stability, user protection and trademark rights must not be undermined by the introduction of new TLDs. It is equally important to continue to refine other community issues within the process and complete as much implementation work as possible so that when the overarching issues are resolved the new gTLD process will be robust and timely and effectively be able to commence. In that regard, the community will see several activities going forward while the overarching issues are addressed. For example, ICANN will continue to work on locating panels that will evaluate aspects of the applications. A communications program that will focus on communicating existing proposals for the application process as well as informing the community about changes will commence immediately.

II. GENERAL COMMUNICATIONS AND TIMELINE

Summary of Key Points

- There was strong commentary from a variety of sources concerned that the timeline for the launch is too aggressive considering there are overarching questions remaining.
- A third draft version of the Applicant Guidebook will be necessary to provide sufficient time to address a set of overarching concerns raised in the public commentary.
- Other program elements are being pursued so that when the remaining questions are resolved, a robust, effective, timely process will be in place ready to launch.
- A comprehensive communication plan is being implemented presently.

Summary of Input

Program language

The new gTLD process should be addressed in other languages and the consultation period of 45 days is too short. *A. Al-Zoman, SaudiNIC (2 Dec. 2008); J. Shea, APTLD (15 Dec. 2008).*

Language Barrier: the whole process (including consultations, documentations, forms, communications, people involved) is done in English. Non English speaking communities would be put in behind because of this. *A. Al-Zoman, SaudiNIC (2 Dec. 2008).*

Timelines - four months communications period; launch; next round announcement

Demand Media supports the introduction of new gTLDs, the timely review of public comments, prompt issue of the final version, and swift progress to the bid submission stage. Recommends that the four month global communication phase begin with the publication of the revised Applicant Guidebook in February 2009. *Demand Media (17 Dec. 2008).*

The four-month awareness campaign for new gTLDs should be brought in earlier so application process can begin earlier. *Cairo Public Forum (6 Nov 2008).* Move Guidebook awareness campaign forward to January 2009. *Cairo Public Forum (6 Nov 2008).* The Global Awareness campaign should begin after the New Year in January 2009 to avoid needlessly holding up applicants that are prepared and ready to submit their applications on the given day in Q2 2009, as anticipated in the timeline. *R. Andruff (20 Nov. 2008).*

We urge the ICANN Board to not delay new gTLD application process in order to make changes to the Guidebook. *Cairo Public Forum (6 Nov 2008).*

The provision stating that ICANN will begin the next application round within one year of the close of the application submission period for this round is too vague and conditional in light of the GNSO Implementation Guideline recommendation. The intent was that at the beginning of the first round there would be a definite announcement of the start of the second round. *C. Gomes (18 Nov. 2008).*

Global awareness, further consultation and information availability

ICANN should organize regional and sub-regional workshops to raise the awareness of the gTLD launch. *F. Purcell, Ministry of Communications and Information Technology* (6 Nov. 2008)

Publication of a revised, more detailed schedule of events/milestones prior to application opening: with only seven or eight months to go before application opens, certainty over the pre-launch timetable would be to the advantage of many. A timeline that is regularly updated showing all the steps in the process such as when the second Draft Applicant Guidebook is due, when comment periods open and close, what events the ICANN team have planned, key events in the Communication Campaign, would be useful. *S. Metalitz (IPC, COA)*.

ICANN should commit to use best efforts to raise awareness of and support solutions to the acceptance issues created by use of outdated length parameters or other erroneous formatting criteria. *RyC*.

There should be significant time between application rounds. *INTERNET COMMERCE COALITION* (15 Dec. 2008)

Issues

The community feedback in relation to the New gTLD Program communications and timeline can be categorized in 3 different levels: (1) Program language; (2) Timelines, including: four months communications period; launch; next round announcement; and (3) Global awareness, further consultation and information availability.

Program Language

Why is the New gTLD Program mainly in English? Why is ICANN not making the New gTLD program available in other languages giving an unfair advantage to English speaking applicants?

Why is the Public comment period only 45 days?

Timelines - Four Months Communications Period; Launch; Next Round Announcement

Why does ICANN not start the 4 months communications period now to prevent further delays in the timeline?

Can ICANN announce the exact date the next round of applications will start?

Global Awareness, Further Consultation and Information Availability

What will ICANN do to increase awareness from a global perspective?

Can ICANN provide a detailed timeline from now to launch, including all additional public comment periods?

Proposed Position (for this version of the Guidebook)

Program Language

ICANN has considered the development of a multilingual Program, nevertheless, it has reached a conclusion that the first application round should be in English due to the cost and time it would take to develop a truly multilingual Program. ICANN is making informational materials available in the 6 United Nations Languages (in alignment with Policy implementation guideline O). A multilingual Program is under consideration for future rounds.

Timelines - Four Months Communications Period; Launch; Next Round

The four months window between the publication of the final applicant guidebook and beginning of the application round is reflected in the GNSO in the implementation guideline E:

“The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.”

The terminology “4 months communications campaign” has generated some misunderstandings and led to erroneous conclusions the 4 months are the only outreach activity ICANN plans on doing. ICANN communications campaign has been going on since the Policy approval with the intent to increase awareness about the New gTLD Program around the world.

The 4 months between final applicant guidebook and application round proposed by ICANN are specific activities being developed with the intent to explain in details the application process around the world. ICANN believes this step important considering the evolving process and changes of the applicant guidebook from now to final version.

The proposed timeline is under reconsideration and will depend on the resolution of the overarching issues raised by the community in response to the proposed draft applicant guidebook. ICANN staff is committed to a timely resolution of these overarching issues through further evaluation and consultations with the community and experts.

It is very important to take the time appropriate to resolve the overarching issues raised as a result of the publication of the first draft Guidebook. DNS stability, user protection and property rights cannot be deleterious way by the introduction of new TLDs. In order to do that, it is certain that ICANN will publish a third draft version of the Applicant Guidebook. That is because there will be substantial change between the second and third version of the Guidebook and that change should be made available for public comment. The requirement for a third version of the Guidebook means that the first applications cannot be taken until December 2009 at the earliest.

It is equally important to press other issues through to resolution and complete implementation work in these areas so that when the overarching issues are resolved, the new gTLD process will be robust, timely and effective. In that regard, the community will see several activities going forward while the overarching issues are addressed. For example, ICANN will continue to work to locate panels that will evaluate aspects of the applications. The time required to locate adequate resources for these tasks is uncertain.

ICANN intends to announce the timeline for the second New gTLD applicant round when the final applicant guidebook is published. At this point, ICANN cannot make a precise calculation when the second round can begin without first finalizing the retention of the panels, finalizing several of the processing steps and analyzing different potential issues regarding pending application.

Global Awareness, Further Consultation and Information Availability

ICANN is updating the calendar of global consultations and outreach activities for 2009. These activities include, for example, events specially developed for the ICANN Meetings, additional consultations with ICANN supporting organizations, participation in events with the Intellectual Property and business leaders, governments, technical community, registries and registrars, and consumer organizations.

ICANN also plans to improve the quality and availability of online information through the ICANN website.

Analysis

Program Language

ICANN received few comments regarding the fact that the new gTLD Program is mainly in English, although some informational materials have been available in 6 UN languages. The issue comes mainly from regions that are non-English speaking and the overall concern is that English speaking applicants have an unfair advantage.

The Public Comment period is only 45 days and this is not enough time for the global audiences to prepare a response.

Timelines - Four Months Communications Period; Launch; Next Round

ICANN has received comments urging the launch not to be delayed and suggesting shortening the 4 months communications campaign or starting it earlier in order to expedite the launch.

There was also strong commentary from a variety of sources voicing concern that the timeline for the launch is too aggressive considering there are many unanswered questions ICANN still needs to address and the global current economic crisis.

A few indicated that ICANN needs to announce a precise date for the second round when the information about the first round is available.

Global Awareness, Further Consultation and Information Availability

ICANN has been conducting and participating in a series of outreach and consultation activities with the community. Some of the activities to date include the Public Forum during the ICANN Cairo meeting, clarification and update meetings with the GNSO, ccNSO, GAC, RYC, and Registrars. ICANN will continue to consult with the Community to address the few overarching issues. A schedule of events will be made available to the community via ICANN website in March.

III. APPLICATION PROCESS

A. APPLICATION PROCESS: GENERAL REQUIREMENTS

Summary of Key Points

- The Guidebook will be updated to clearly indicate which parts of the application submissions will be held confidential. Essentially, answers to all financial questions and a portion of the security plan will not be published.
- The “stated purpose” of the TLD in the application will not be used directly in the evaluation but that information might be useful in resolving formal objections to applied-for strings.
- The documentation requirement for “good standing” will be made more flexible if possible to accommodate different cultures, regions, and business models.
- A limitation on communications between applicants and evaluators is intended to balance the need for the evaluators receiving complete information against the need for a finite, timely process.

Summary of Input

The proposed new gTLD process forces ICANN to be a regulatory body for the TLD allocations. Hacker suggests that proposed strings be meaningful with regards to purpose. Under Hacker’s proposal, applicants would describe the purpose for the proposed gTLD and justify why the submitted TLD name is necessary in the first place. ICANN should require proposed TLDs to include a well-defined organizational definition. *Hacker* (14 Dec. 2008).

A financial sector gTLD should be implemented from a top down approach to ensure that no unsponsored gTLDs are issued, and that if issued, such gTLDs are managed within an industry and regulatory framework. *FDIC* (15 Dec. 2008).

Given the large amount of sensitive information collected in the application, this needs to be clearly defined. We recommend that ICANN only list the party placing the application and the gTLD that the party is applying for. *DHK* (15 Dec. 2008).

The full and complete application should be posted (subject to the confidentiality protections of Module 6). *Bank of America* (15 Dec. 2008); *FairWinds* (15 Dec. 2008).

What constitutes “proof of good standing,” and how will start-up businesses satisfy this requirement? What happens if governments do not issue such certificates?” *C. Gomes* (18 Nov. 2008).

Why must evaluation requests be made solely through TAS? Why would only one exchange of information be permitted, and why would evaluators not be obliged to request further information or evidence if it is needed? *C. Gomes* (18 Nov. 2008).

Issues

Several comments had to do with providing justification for a TLD application. Should ICANN act as a "regulatory body for the TLD allocations" (taking the organizational structure and purpose into account in deciding which TLDs should be allocated)?

Question 1: Should ICANN take the purpose of the TLD into account when conducting the evaluation of an application?

There were a number of comments asking ICANN to disclose what sections of information would remain confidential and what would be publicly available.

Question 2: When should ICANN differentiate between confidential and public information in the AG?

Question 3: "What constitutes "proof of good standing," and how will start-up businesses satisfy this requirement? What happens if governments do not issue such certificates?" – C. Gomes

Question 4: Why is only one exchange of information allowed during each of Initial Evaluation and Extended Evaluation?

Proposed Position (for this version of the Guidebook)

Question 1: As indicated in the Analysis, ICANN has a technical mandate, not a mandate to act as a reviewer of business plans (i.e., a venture capitalist). As such, ICANN should continue to concentrate its evaluation process on the technical, operational, and financial capabilities of applicants. The stated purpose of the TLD may be taken into account as evidence in support of other areas. A TLD whose registrants are the sausage makers of Europe does not require the same infrastructure as a TLD whose registrants are the sausage eaters of Europe. Also, the purpose may become important if an applied-for string is a trademark that is also a generic word, because the purpose of the TLD may play a role in determining the outcome of an infringement of rights objection. The stated purpose will then also be used in later right ownership disputes, if they occur.

Question 2: The criteria questions in the Draft Applicant Guidebook will be clearly marked as public or confidential for the revised Draft Applicant Guidebook.

Question 3: Recognizing that practices in different regions vary and the requirement for a process that must accommodate governments, start-ups, and well-established entities, the current Guidebook attempts to be flexible regarding the requirements for good standing. ICANN is receiving seeking further guidance from KPMG, a big four accounting firm, on how to provide appropriate flexibility in defining "proof of good standing." Provided ICANN agrees with their analysis, these further details should be included.

Question 4: Based on the Analysis, the limit of one communication for Initial Evaluation and, if necessary, one communication in Extended Evaluation, should be maintained. ICANN has determined it is the proper balancing act in preventing a prolonged review process, while allowing for certain clarifications. It is believed that the questions and criteria are sufficiently straightforward so that a competent application will require no extra communications. The allowance for one communication during Initial Evaluation and one during Extended Evaluation

is meant to balance providing for complete communications and providing a certain end date to the evaluation. In addition, the communication will continue to be made through TAS only. This will provide a standard methodology that will help organize the tasks of evaluators, as well as ensure all communications and actions are captured in an historical record.

Analysis

Question 1 above asks that as ICANN acts as an evaluator of business and marketing plans, whether ICANN should place a value on the intended offerings of an applicant. ICANN has thus far refrained from focusing on these elements and instead has focused on ensuring that applicants are technically, operationally, and financially capable of running a registry. This focus is for the purpose of “preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet,” which is an element of ICANN’s Core Values. (<http://www.icann.org/en/general/bylaws.htm#I>). The stated purpose of the registry can become important for other reasons during the evaluation process. This might be the case in dispute resolution procedure where the proposed purpose of a TLD can be used to help determine if an applied-for name is a community label or might abuse a registered trademark.

ICANN primarily intends to focus on technical, operational, and financial capabilities. Additionally, the GNSO, in recommendations in its Final Report (<http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>), emphasizes the technical and financial capabilities of the applicants, not the intended purpose of the string.

In regards to Question 2, the majority of the application information will be made public. The financial section and one question of the technical section will remain confidential. This will be clearly marked in the evaluation questions and criteria.

The final two questions pertain to both TAS and the evaluation period. For Question 3, the definition of “proof of good standing” should be expanded. How a newly formed entity would be able to provide this information can be discussed (i.e. proof of good standing for the individual entities that make up the new entity). The current definition was derived through discussion with outside consultants, Deloitte and Gilbert & Tobin, as part of a broader scope of work. Work will continue to determine if the current wording can be improved, taking into account the public comments. The test of good standing generally requires some form of official documentation but must make allowances for both start-up entities and well-established firms and take into account variance across different cultures and regions.

Regarding Question 4, the reasoning for only one communication is to meet the objective of establishing an efficient and predictable review process. The ideal situation is that the applicant criteria are absolutely predictable and every applicant is aware of their requirements. The reality is that because ICANN anticipates receiving applications with varying attributes, the criteria cannot be designed in absolute terms. As a result, ICANN chose to avoid creating an ongoing Q&A session where evaluators “coach” an applicant into completing an application correctly. The one communication is a compromise that reduces the bottlenecking issue that would likely exist if an ongoing dialogue was allowed to occur, but does allow for some level of rectification. The requirement to have all communications made strictly through TAS is to ensure that every action and communication is captured in an historical record.

B. APPLICATION PROCESS: LIMITED APPLICATION PERIOD

Summary of Key Points

- Limiting the application round is an effective way to reduce the risk of over-burdening the evaluation process but leads to issues of fairness and potential gaming.
- Therefore, it is not planned to limit applications in the first round.
- Application windows designed to reduce risk of over-burdening the evaluation process raise the same issues but evaluation windows could be used in the event that many times the anticipated number of applications are received.

Summary of Input

Some of the public comments suggested that ICANN follow a limited or phased implementation approach to the new gTLD program. For example, for the first round of the new gTLD process, one commenter suggested that ICANN impose a limit on both the number of applications it will accept and the number of new gTLDs that it will approve (e.g., no more than 100 applications evaluated on a first-come, first-served basis). *Go Daddy* (15 Dec. 2008). Another commenter suggested that ICANN start with processing 50 sponsored or community-based TLDs. *MARQUES* (15 Dec. 2008). Multiple application windows within each TLD round were also proposed as a way of providing a stable timeline and to avoid a “Big Bang effect” leading to resource bottlenecks and delays and uncertainties regarding future rounds. *W. Staub, CORE* (26 Nov. 2008).

Many other commenters suggested that ICANN phase the start of the program, including limiting the initial application period to certain types of applications (e.g., community-based, sponsored, IDN ccTLDs) and assessing some preliminary results before moving forward with a broad launch of the gTLD program.

See, e.g. Open community-based gTLDs first to speed process *PuntoGal* (13 Dec. 2008). Only community-based gTLDs with registrant verification mechanisms should be allowed before better rights protection mechanisms are developed for unrestricted gTLDs. *Rodenbaugh* (16 Dec. 2008). Prioritization system should be announced for orderly review of gTLD applications; it is more important that the application and approval process for new gTLDs be done right than be done fast. *ICA* (16 Dec. 2008) Consider scaling back to only those IDN or geographic-based gTLDs supported by a significant community demand. *U.S. COC* (15 Dec. 2008); *CSC* (15 Dec. 2008) Do a phased rollout of sponsored gTLDs and IDNs first; need to develop more safeguards before broader rollout. *ITT* (15 Dec. 2008) Reconsider and delay program pending more global demand studies, and/or scale back the launch to only “sponsored” community TLDs that have broad support from the affected community. *News Corporation* (16 Dec. 2008); Allowing a round of IDN ccTLDs first would remove bulk of current calls for expansion and allow new gTLD processes to be more thoughtfully developed. *MarkMonitor* (15 Dec. 2008); *P. Tattersfield* (15 Dec. 2008).

While studying economic justification and risks for broader gTLD program, ICANN may proceed with safe, orderly phased rollout of “fast track” country code IDNs and community/sponsored domain names provided that appropriate safeguards are in place. *AT&T* (15 Dec. 2008); *USTA* (15 Dec. 2008); *NAM* (15 Dec. 2008). Expansion of the domain name space should be limited to market differentiated, sponsored (“community-based”) gTLDs. *INTA* (15 Dec. 2008). ICANN

should first focus on IDN TLDs with documented demand from users that employ non-ASCII scripts. If after the IDN TLD launch ICANN can show a strong need for more gTLDs only then should it consider them. *Time Warner* (15 Dec. 2008). Supports fast track ccTLD IDNs introduction but in general while IDNs are promising they need more study before their deployment. *INTERNET COMMERCE COALITION* (15 Dec. 2008)

Issues

The comments suggesting that ICANN first conduct a phased or limited application period for the gTLD program raise the following key questions:

1. Is there a way to fairly limit the application round and thus limit the number of new gTLDs added to the root?
2. Is there a way to divide the rounds into different windows to increase efficiency in evaluating the applications?

Proposed Position (for this version of the Guidebook)

The commenters' suggestions that ICANN conduct phased or limited application periods relates to both the issue of DNS stability – i.e., whether the DNS will scale to handle all of the new gTLDs, how many applications can be processed competently and quickly, and also the issue of fairness, in allowing a certain group to precede all others.

As stated in the DNS Stability section of this summary and analysis, the ICANN Board has requested that SSAC and RSSAC jointly conduct a study that takes into account the combined impact on the DNS of new TLDs (country code and generic), IDNs, IPv6 records, and DNSSEC. The final resolution of the key questions above regarding phased or limited application periods will be informed by the outcome of that study.

The other concern mentioned in comments related to ICANN's ability to process applications in a consistent and efficient manner. ICANN is undertaking preparations for operational readiness as the opening of the application round approaches. Best efforts will be made to ensure that sufficient resources are allocated to the program that anticipates processing several hundred applications but is modeled in a way to scale upwards quickly if necessary.

While limiting the number of applications was carefully considered as an effective way to "guarantee" program robustness, issues of fairness will inevitably arise if a first round is limited to a certain group; whatever group is given preference will enjoy a first-movers advantage. In addition, preference to a certain group may lead to "gaming" activity as applicants attempt to qualify under whatever limiting factors ICANN attempts to introduce.

In summary, there does not appear to be a way to fairly limit rounds and the efficiency gains from a smaller application pool are not a significant enough advantage to alter this position. Pending the outcome of the DNS study, at this time no change is being recommended that would establish a limited application period; the round will not be limited and any and all qualified applications would be accepted.

Analysis

Regarding question 1, ICANN concluded that there does not appear to be a way to fairly limit the number of applications in a round. A first-come, first-served process would encourage the development of automated computer scripts to apply as soon as the application period opens, rewarding those who enter the most applications or those that could write the best script. ICANN concluded that it was preferable to refrain from establishing limits that would encourage such behavior and instead consider any qualified application.

As some of the comments suggested, there are ways to limit an application round – e.g., by brand owners, IDNs, geographical names, non-controversial names, sponsored or community-based names, among others; however, limiting the round in any significant way inevitably raises issues of fairness. Whatever group is allowed to apply first will naturally have an advantage. In addition, limiting rounds to certain groups also creates potential “gaming” incentives and concerns – *i.e.*, applicants taking all steps within their power to qualify under whatever methodology is established. A number of parties isolated IDNs as a candidate for an early application round. However, the same fairness issues exist, as well as the potential for ASCII squatting (registering an IDN TLD in an early round and then attempting to claim the ASCII equivalent in a later round).

Given the difficulty in introducing limited rounds because of fairness issues and the threat of “gaming,” it makes it very difficult to justify limited rounds because of efficiency gains in evaluations.

Regarding question 2, setting up multiple application windows in a single round might create a first-movers advantage similar to what would exist in a limited application round. For the same reasons indicated for not limiting the round, application windows would not be suitable for considering different “types” of applications first or considering applications on a first come, first served basis. ICANN will take measures to allocate adequate resources to handle evaluations in a predictable and efficient manner. However, setting up “evaluation windows” might be a suitable way to address a situation where, say, ten times the number of applications anticipated are received. The evaluations might be broken into sets that are selected by lot. If there are contending applications, then all contenders would be grouped into the same set.

Background Resources: Two previous limited new gTLD rounds have been conducted (2000 - <http://www.icann.org/en/tlds/app-index.htm> and 2003 <http://www.icann.org/en/tlds/stld-apps-19mar04/>) which were used as a “proof of concept.” These rounds lead to the successful addition of 13 new gTLDs into the root. Based on the success of the two “proof of concept” rounds, the GNSO developed the new gTLD Policy Development Plan (<http://gns0.icann.org/issues/new-gtlds/new-gtld-pdp-28mar06.pdf>) and eventually the GNSO Final Report on new gTLDs (Part A: <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> and Part B: <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-part-b-01aug07.htm>).

A cautious, limited expansion of the DNS was warranted to better understand the impact of additions to the root zone. Towards this purpose, an ICANN staff paper on root zone impact of new TLDs was published for public comment in February, 2008 (see <http://icann.org/topics/dns-stability-draft-paper-06feb08.pdf>). The paper came to the conclusion that “there is not currently any evidence to support establishing a limit to how many TLDs can be inserted in the root based on technical stability concerns.” As noted above, ICANN has requested additional study of not only the impact on the DNS of new gTLDs, but also IPv6 records, DNSSEC, IDNs, and new ccTLDs. Further detail can be found in the DNS Stability – Security and Stability paper.

IV. FINANCIAL CONSIDERATIONS

Summary of Key Points

- Significant, thoughtful comment was received regarding the Applicant Guidebook and accompanying explanatory memorandum on Financial Considerations: including proposals of alternative models.
- Annual registry fees are reduced to a \$25,000 base in the revised version of the Applicant Guidebook. The calculation of the variable fee component was simplified to 25 cents a registration.
- Recalculation of processing costs resulted in no change to the \$185,000 processing fee. However, a refund mechanism is clearly defined for applicants that voluntarily exit the process.
- Handling surplus funds, if they occur, is discussed.

Summary of Input

Cost Recovery Basis-Application Evaluation Fee. Considering the fact that the new gTLD process is supposed to be implemented on a cost recovery basis, why is it that an applicant that applies for more than one string is required to pay the same evaluation fee for each application? Otherwise, this will result in applicants for multiple gTLDs subsidizing other applicants' fees. *C. Gomes* (18 Nov. 2008).

Application Evaluation Fee-Impact on Developing Nations. Paying \$185,000 as an application evaluation fee may not be possible for a very large number of businesses and communities living in under-developed and developing countries. ICANN may divide the evaluation fee criteria on the basis of developed, under-developed and developing countries especially in context with a community-based gTLD. This would not only encourage more participation for new gTLDs but will also improve the end-user confidence in ICANN's regarding promoting internet resources. *N. ul Haq, Pakistan Telecommunication Authority* (14 Dec. 2008).

Brand Owner Costs-Defensive Registrations. USTA is concerned about the costs associated with the new gTLD process. They are concerned that brand owners will be forced to defensively register to protect their brands. *USTA* (15 Dec. 2008).

More Transparency Needed. Thank you for explaining the principles and high level estimation approaches that you have used to arrive at the proposed fees. It provided a good high level overview. However, in the name of transparency, I believe the internet community needs more explanation and greater visibility into the actual cost estimations and assumptions behind the application and recurring fees. This is especially important since cost recovery is the principle governing the fees. *A. Martin* (16 Dec. 2008).

Bundled Services Included in Fee Calculation. In determining the 5%, ICANN proposes to include all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration. This expansive definition goes well beyond any contractual terms with existing registries, and would create an unequal playing field among registry operators. *CentralNIC* (13 Dec. 2008)

Refund Details. Details on refunds are missing from the Applicant Guidebook, and if the community has to wait until the Final version of the Guidebook, it may be too late to comment. *K. Koubaa, Arab World Internet Institute* (8 Nov. 2008).

Fee Level; Deterrence Factor. The RFP presents a reasonably well-detailed case justifying the \$185k Evaluation Fee. We agree that the process is unique and unprecedented, with considerable scope for unexpected costs. In our experience there will almost certainly be unanticipated complexities, therefore, we think it is prudent to have a fee that is high enough to cover these costs. On the balance we think \$185k is an acceptable, one-time fee for serious applicants. We recommend that refunds only be provided in rare cases and that the amount of refund be determined on a case by case basis. *Demand Media* (17 Dec. 2008).

To deter frivolous applications, the gTLD evaluation fee should be higher for non-community-based applications (e.g., \$500,000; do not allow payment by credit card); excess fees can be used to reduce the dispute resolution fee; need to clarify fees relating to dispute resolution and keep low the barriers for filing objections. *Bank of America* (15 Dec. 2008). *SIFMA* (12 Dec. 2008). *G. Kirikos* (24 Nov. 2008).

Fee Structure Transparency. ICANN must articulate a clear rationale for the proposed fee structure as well as a transparent mechanism, that includes community agreement, for the disposition of excess revenues, should there be any, given ICANN's status as a non-profit entity. *U.S. DOC-NTIA* (18 Dec. 2008); *CentralNIC* (13 Dec. 2008). *A. Martin* (16 Dec. 2008); *eCOM-LAC* (8 Dec. 2008); *C. Gomes* (18 Nov. 2008); *SIDN* (10 Dec. 2008) ("cost recovery" goal is not supported by high fees charged which create entry barriers and limit innovation). *J. Neuman* (26 Nov. 2008) (fee/cost recovery issues require explanation). *V. Bertola* (19 Nov. 2008). *D. Younger* (5 Dec. 2008) (cost recovery policy if used needs to be applied uniformly and subject to community consensus; ICANN overfocuses on commercial and its own revenue streams and has not addressed fee and cost concerns of needy and noncommercial applicants or needs of developing world). *Hacker* (14 Dec. 2008) (suggests changes to fee structure). *MARQUES* (15 Dec. 2008). *FairWinds* (15 Dec. 2008); *ANA* (15 Dec. 2008) (how do the fees affect existing gTLD fee structures).

Issues

There are many comments regarding financial considerations for the new gTLDs. Many comments expressed concerns about the size of the fees, while others expressed satisfaction with the underlying support and methodology for the calculation of the \$185,000 evaluation fee. (Note: all \$ amounts are expressed in US Dollars throughout this document.) Many comments expressed concern with the amount, the structure, and the lack of clear support for the annual registry fee. The comments can be grouped into the following issue areas:

- 1) Fees may be too high. Many comments suggested that both the \$185k Evaluation Fee and the annual registry fee are too high for various reasons such as:
 - Applicants have financial hardships and can't afford the fees (e.g., some in developing nations),
 - Applicant's have a business model that is not aligned with paying such fees. (e.g., community based, not-for-profit, down-stream revenue)
 - Applicant's have applications which are believed to cost less to process than other applications (e.g., applicants who apply for more than one string).
 - Cost estimates are too high.

- Program development costs should not be included especially if already covered in budgets from prior years.
 - Some comments expressed concern with the uncertainty of the amount or even the uncertainty of the possibility of further fees such as registry services review, dispute resolution, and comparative evaluation fees or thought the costs should be included in the \$185k Evaluation Fee.
- 2) Need more support for the fees. Although many comments supported the \$185k evaluation fee amount and the methodology used to determine the evaluation fee, some requested more information on the details of the evaluation fee development. The annual registry fee development was frequently mentioned as not being well supported in the documents provided.
 - 3) Annual registry fee structure is problematic as described. Many comments focused on the challenges of a “% of revenue” structure for the annual registry fee and reiterated that the minimum registry fee level was problematic as well. Others commented that the structure as proposed would be a challenge to registries in the start-up phase, or community registries.
 - 4) Clarify refunds. Many comments expressed the need to know the amounts and methodology of refunds available to applicants. This information was not covered in the initial cost considerations paper.
 - 5) Clarify how surplus funds will be handled. Several comments requested more clarity on how surplus funds, if any, will be handled.

Analysis

1) Fees may be too high.

As described in the cost consideration paper <http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf>, the determination of the new gTLD evaluation fee is based upon the following principles:

- The new gTLD implementation should be fully self-funding (costs should not exceed fees; existing ICANN activities regarding technical coordination of names, numbers and other identifiers should not cross-subsidize this new program).
- The new gTLD policy requires a detailed and thorough implementation process to achieve its goals; this process is inherently costly.
- Since this is a new program, it is difficult to predict costs or volumes with certainty. A detailed costing process has been employed, and costs are in line with historical precedent.
- If all cost-related estimates are accurate, there will be no net increase to ICANN’s funds as a result of evaluating new gTLD applications; fees will just equal costs. After some time, there will be a careful assessment on whether the actual costs exceeded the estimates (shortfall) or whether the costs were less than estimated (surplus). If there is a surplus, the excess funds will not be used for ICANN’s general operations, but rather will be handled in accordance with community consultations.
- In addition to the one time evaluation fee, other fees will be paid directly to providers based upon the requirements of certain applications for technical issues or disputes.

- For those new gTLD applicants that are delegated a registry, annual fees will be assessed in accordance with contract terms and the overall ICANN budget process.

Although the evaluation fee, at \$185k, may be burdensome for certain organizations that are considering applying for a new gTLD, the evaluation fee was developed based upon a policy of revenue-cost neutrality, conservatism, and a detailed cost estimating exercise. The impact on a specific applicant or a class of applicant, by policy, is not a factor in the development of the evaluation fee. When specifying the fee, it was also understood that new registries would require additional investment of, at a minimum, \$500k in addition to the application fee to begin registry operations so that, by some measure, the fees are not an unreasonable fraction of the entire investment. It is also anticipated that with time, greater efficiency and greater certainty, evaluation fees would likely be reduced over time. It may make sense for entities to wait until subsequent TLD rounds to make an application.

Some applications may have lower processing costs than others; they may not require extended review; they may not require technical or other reviews, and they may not require much staff or consultant time to answer questions and process the evaluations. Some, such as organizations with multiple strings, may not need discrete applicant evaluations repetitively for each string. Despite all of the possible reasons a particular application may cost less than another application to evaluate, it is difficult, if not impossible, to determine which applications will require more or less resources. Applications fees are set based upon the estimated average cost of all applications based upon principles of fairness and conservatism. Singling out certain applications or types of applications as lower cost than others is contradictory to the principles of fairness and conservatism.

The GNSO policy recommendations allow for different pricing for different applications. Although the evaluation fee is proposed to be \$185k in all cases, individual applicants may pay different amounts due to refunds and due to other fees. Applicants that choose to withdraw an application can pay significantly less. If an application requires dispute resolution or extra technical evaluation, the application may pay significantly more.

ICANN is a not for profit organization and is dedicated to deliver its services as efficiently as possible. ICANN is not established to grow revenue. The \$185k evaluation fee is based upon the estimated costs associated with the new gTLD program. ICANN will continue to evaluate the cost estimates. If further research or adjustments to the evaluation process or cost estimating methodology changes the costs estimated to evaluate the applications, suggested changes to the pricing will be proposed.

If the actual costs for evaluating the applications end up being less than the \$185k Evaluation fee, then the surplus funds will not be used as part of ICANN's general funds. Instead these funds will be distributed in accordance with consultation from the ICANN community.

2) Need more support for the fees.

As described in the cost consideration paper, the \$185k evaluation fee was based on detailed analyses of specific tasks and steps needed to be performed during the evaluation. These costs will be described in additional detail in the next version of the cost considerations paper. Key questions that will be addressed include:

- What are the activities that need to be performed for each phase of the application evaluation?
- How are historical costs factored into the development costs?

- What is the impact of the assumptions used for the number of applications?

3) Annual registry fee structure is problematic as described.

The initial draft of the Applicant Guidebook posted on 24 October 2008 proposed that annual registry fees for new gTLDs would be the greater of \$75k or a percentage (suggested 5%) of the registry transaction revenue. These initial fees were based upon the general terms and practices with the existing ICANN contracted gTLD registries. Although the annual registry fees are not to be based upon the direct costs to support the new gTLD program or the costs to support gTLD registries in general, the \$75k fee roughly reflects the costs of a half to three quarters full time equivalent staff member or contractor.

The percentage of revenue structure suggested in the first draft of the guidebook was developed to reflect the impact of a registry on ICANN's operations. Thus a registry with large revenue streams could require more of ICANN's resources for support, and a registry with more revenue could more ably support ICANN's operations than a registry with less revenue. The five per cent number was selected based upon the range of fees paid by current gTLD registries.

Going back to ICANN's multi-year financial review in ICANN's Delhi meeting, it has been anticipated that ICANN's future fee structure will create a financial surplus when the new gTLDs are operational. Thus, it was forecasted that fees for existing registries/registrars and new registries/registrars could be reduced in future budget cycles to reduce or eliminate excess surplus. As documented in the Delhi meeting, future financial years were assumed to have fee reductions, but the specific source of that reduction was not determined (registrar, registry, other).

Many of the comments indicated that the size of the proposed new gTLD annual registry fees would, in effect, prevent diverse business models for new gTLDs, and effectively raise the question should some of the future fee reductions be recognized in the start-up phase of these new registries.

Many comments raised concerns with the percentage of revenue structure including:

- How does one determine revenue? Is it the revenue of the subsidiary running the gTLD? Is it the revenue of the entire organization? How does one adjust if unrelated business revenue is included? How does it adjust for premiums charged for other services?
- How does one verify the revenue numbers? How would audit features/rights be established?
- How does one capture revenue from auctions?

Other revenue structures were considered such as that considered in the chart below:

Fee Structure – Alternatives for Registry Fees

Structure	Description	Advantages	Disadvantages
Flat Fee	One set amount	Simple	High volume (high costs) not captured
Tiered	Stepped fees for levels of transaction	Fairly simple	Unfair within a tier
Percentage	% of registry's revenue, net income, or other measure	Successful registries pay fair share	Revenue difficult to measure
Transactions	Fees charged for each domain contracted (transaction year)	Familiar. Similar to registrar and most registry contracts	Reporting complexity. Fluctuations not predictable.
Hybrid	Transaction fees with a minimum "floor" fee.	Could accommodate traditional and new model registries	
Age	Tiered pricing based upon years established	Allows startups to get established.	Contrary to ICANN's cost basis pricing. Is age fair measure of success
Type of gTLD	Tiered pricing based upon community or open TLD	Reflects historical trends and alliances	Fairness

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Based on comments received, the criteria used to evaluate a proposed fee structure should better fit with start-up and community registry needs, encourage diversity of registries, be simpler to determine than a revenue-oriented approach, yet maintain consistency with ICANN's current agreements in terms of overall fee structures. Given that future fee reductions have been forecast by ICANN, one consideration now should be to reduce new gTLD registry fees, while assuring, in general, costs associated with them can be covered.

4) Clarify refunds, amounts and methodology.

The first draft of the new gTLD applicant guidebook, posted on 24 October 2008, mentioned that refunds of a portion of the \$185k evaluation fee could be refunded in certain situations depending on the point in the process at which the withdrawal of an application is made. The draft also mentioned that details would be provided when the application process is launched.

Details of the refund amount and timing are to be posted as part of the next draft of the applicant guidebook. In general, the refunds are roughly based on the principle that all anticipated costs are on expended on an application that is withdrawn before final processing is completed. It is also designed to encourage unsuccessful or problematic applications to be withdrawn. The refunds allow an applicant to withdraw an application any time prior to completion of the evaluation. The amount of the refund will vary depending upon the stage at which the application has been evaluated.

5) Clarity on how surplus funds, if any, will be handled.

In order to comply with the principle of being fully self-funding and avoid cross-subsidy of the new gTLD program by existing ICANN registry or registrar fees, the fees for evaluation are to be segregated and to be used for the new gTLD program only. They are not for general purpose ICANN uses. This requires two important finance actions to ensure compliance with the

revenue-cost neutrality principles as well as adherence to ICANN's principles of accountability and transparency:

- 1) Report on cost accounting. There must be careful cost reporting performed that captures all relevant costs for the new gTLD program. As described in the cost evaluation paper, the \$185k evaluation fee was developed based upon new gTLD development costs initially estimated at \$12.8 million (and assumed to be amortized over the first several hundred applications) plus fixed and variable application evaluation costs, initially estimated at \$100k per application. Each of these costs and the underlying details of the costs are to be captured and presented in an easily understood and reviewable manner.

At some point in the future, currently thought to be in two to three years, the costs will be collected and the new gTLD application round will be deemed closed. The total costs expended will be subtracted from the total of all fees including application and evaluation fees collected by ICANN, less any refunds paid out. This net amount, if positive, will be the new gTLD application round surplus. If negative, the net amount will be the new gTLD application round deficit. If there is a deficit, future rounds will pay a portion of the fee.

- 2) Dispose of surplus. If the net amount from the new gTLD application round is a surplus, the funds will not be contributed to the general ICANN funds. Instead they will be disposed of in a manner consistent with the community's feedback and the policy recommendations. ICANN's multi-stakeholder model for decision making will be employed to ensure that all decisions regarding the underlying guiding principles, amounts, recipients, timing, and manner of disposition of surplus funds, if any, will be handled in accordance with the communities' wishes. Since the amount of any possible surplus is difficult to forecast (other than the current financial forecast of zero), it is hard to determine in advance how such a surplus should be used. Undoubtedly, this would depend in part on the magnitude of any surplus.

Proposed Position (for this version of the Guidebook)

1) Fees may be too high.

Retain gTLD Evaluation Fee of \$185k.

The proposed gTLD Evaluation Fee remains \$185k. No additional cost estimates or policy decisions indicate that the fee should be altered. However, the cost estimates will continue to be evaluated as the launch date approaches. If any significant cost estimates are altered due to more information becoming available, then the fee could be adjusted accordingly.

No discounts will be made available in this round of the new gTLDs as there is concern with gaming and possible added complexity in the first round. Discounts may be considered in future gTLD rounds.

Reduce gTLD annual registry fee.

Reduce gTLD annual registry fee to base amount (not minimum) to \$25,000 per year (\$6,250 per quarter). For registries with 50,000 or fewer second-level registrations, no further fee would be charged. For registries with more than 50,000 registrations, the registry would pay \$0.25 per transaction-year. This approach better accommodates a diversity of registry models, registries

in start-up phase, and smaller community registries, while ensuring reasonably expected future costs can be covered by the fees. Volume registries will pay total fees in line with current ICANN registry contracts.

No direct support for applicants.

As noted in the cost considerations paper (<http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf>) ICANN will not directly subsidize the application processing fee or other fees in the first round. ICANN will endeavor to help applicants with need to identify organizations that may be willing to sponsor or grant funds to such an applicant. A subsidy in the first round would add another layer of complexity along with other first round uncertainties. Additionally, there are potential abuses associated with subsidies that must be anticipated and protected against. These will be explored in preparation for the second round.

2) Need more support for the fees.

As described in the cost consideration paper (<http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf>), the \$185k evaluation fee was based upon detailed analyses of specific tasks and steps needed to be performed during the evaluation. These costs will be described in more details in the next version of the cost considerations paper. Key questions that will be addressed include:

- What are the activities that need to be performed for each phase of the application evaluation?
- How are historical costs factored into the development costs?
- What is the impact of the assumptions used for the number of applications?

3) Annual registry fee structure is problematic as described.

The fee in the revised version of the Applicant guidebook is reduced and more direct. If the transactions are less than 50,000, the annual registry fee is proposed to be structured as

- a flat annual fee of \$25,000 (billed at \$6,250 per quarter),

If the transactions are more than 50,000, the annual registry fee is proposed to be structured as

- a flat annual fee of \$25,000 (billed at \$6,250 per quarter, plus
- \$0.25 per transaction-year.

4) Clarify refunds, amounts and methodology.

Depending upon the stage of the application's evaluation processing, refunds for 20%, 35% or 70% of the evaluation fee will be available. Refunds will be made available to applicants whose applications do not proceed through the entire evaluation process. The amount of the refund will be generally based on an amount of the estimated evaluation costs not expected to be spent on the particular application. Any applicant can apply for a refund by submitting a request for a refund along with a request to stop processing the application. Any application that has not been successful is eligible for a 20% refund. The following table summarizes each of the refunds available.

#	Description of Refunds Available to Applicants	Percentage of Evaluation Fee	Amount of Refund	Considerations
1	After public posting of strings	70%	\$130K	Applicants who perceive themselves to face considerable contention or dispute can withdraw at this point. Collect some fee from all applicants to avoid frivolous applications, and cover possible future risks of all applications.
2	After initial evaluation	35%	\$65k	Applicant has failed initial evaluation or has the same considerations as above, and recognizing some significant amount of costs have already been expended.
3	After any later phase of evaluation	20%	\$37k	Applicants who fail extended evaluation or lose may exit at this point without having spent the entire processing fee.

5) Clarity on how surplus funds, if any, will be handled.

1) Report on cost accounting: When the new gTLD round is deemed as closed, as well as periodically throughout the first-round process, all costs will be captured and reported on in a detailed and readily accessible manner. The total costs will be compared to the total fees collected, less any refunds and a report of the deficit or surplus will be posted. The report will be available for the community and will be reviewed by an independent accounting firm. (While most costs will be apparent at the “end” of the round, the full realization of risk costs may take up to three years. An estimated final cost will accompany each report.)

2) Use of surplus, if any: A process will be developed and implemented to engage the community in the disposition of the surplus, if any. This will include likely recipients of the funds as well as clarity on the principles (e.g., application of funds against future rounds), amounts, timing, and manner of disposition of the surplus funds, if any.

Appendix: Additional Comments on Financial Considerations

High Cost of Fees

Impact on non-profit groups, smaller entities, developing nations. They are also concerned that the proposed (US) \$75,000 registry annual fee is too high for a not-for-profit community registry: “Our proposal would be that community TLDs pay a small percentage of their annual surplus/profit to ICANN – up to a maximum ceiling of (US) \$10,000 per year. Should a community TLD be taken up in large volumes (on a par with strings such as BIZ) then there may be a case for a revision of the annual fee beyond the (US) \$10,000. *dotSCO* (15 Dec. 2008); *dotCYM* (15 Dec. 2008) (fees too high for community bids and fail to address possible bilingual

requirements). *PuntoGal* (13 Dec. 2008). *J. Evans* (12 Dec. 2008). *NIC Mexico* (9 Dec. 2008). *NCUC* (15 Dec. 2008) (fees too high). *M. O'Connor* (14 Dec. 2008) *Lovells* (15 Dec. 2008).

ICANN should look at impact of high fees and other financial requirements on cities. *Connecting.nyc* (15 Dec. 2008). ICANN should consider charging lower fees for smaller registries. *Anonymous*.

Should the fee requirements apply to all types of entities (for-profit and non-profit)? *Y.E. Shazly* (2 Dec. 2008).

There should be reduced fees for non-profits and associations. An association or non-profit prevailing on an objection should be reimbursed its objection costs and attorneys' fees. *ASAE* (10 Dec. 2008) ICANN should clarify whether there is an application fee waiver for humanitarian corporations. *R. Romano* (7 Dec. 2008); *N. ul Haq* (14 Dec. 2008) (adjust fees downward for developing world).

Uses of Fee Money; Flexibility. The new gTLD fees are too high (e.g. annual and application), and ICANN must state how it intends to use the annual fees to protect the stability of the Internet. *RC* (15 Dec. 2008). *MarkMonitor* (15 Dec. 15 2008) (fees are high, should be adjusted for particular circumstances). *Smartcall* (4 Dec. 2008) (allow some flexibility in operation of the application fee to allow entities more opportunity to obtain gTLD). *Arab Team* (15 Dec. 2008). *Lovells* (15 Dec. 2008).

Cost Recovery Justification Needed. Considering the fact that the new gTLD process is supposed to be implemented on a cost recovery basis, why is it that an applicant that applies for more than one string is required to pay the same evaluation fee for each application? It is clear that evaluation of the string itself is going to result in some costs but presumably most of the rest of the application would be identical and require no additional costs at all. It certainly seems reasonable that all applicants pay a proportional share of general evaluation costs to the extent that their applications are mostly unique and it is understandable that it might be impractical to have a different application fee for every applicant, but it would be relatively easy to determine portions of the application fee that could be deducted in cases where no new evaluation activity would be required. Otherwise, this will result in applicants for multiple gTLDs subsidizing other applicants' fees. *C. Gomes* (18 Nov. 2008).

Microsoft (Guidebook comments, 15 Dec. 2008) (ICANN should not seek to recover from applicant fees funds to cover new gTLD program developments costs (reported \$12.8 MM); an escrow system should be used for \$60K of the application fee and drawn against, with potential for some refunds; in general excess funds should be refunded to applicants).

Application Evaluation Fee-Annual Fee Impact. On Application fees, "the proposed ICANN fees serve as a significant deterrent to corporations considering whether to apply for a new TLD for their brand. Specifically, the recurring annual fee (the greater of \$75,000, or 5% of the registry transaction revenue) is high, in the light of the probability that corporate owned TLDs may not have large numbers of second level registrations, thereby causing the per domain fee to be significantly higher than currently charged by ICANN." *MarkMonitor* (15 Dec. 2008).

Application Evaluation Fee-Economic Impact. Paying \$185,000 as an application evaluation fee may not be possible for a very large number of businesses and communities living in under-developed and developing countries. ICANN may divide the evaluation fee criteria on the basis of developed, under-developed and developing countries especially in context with a

community-based gTLD. This would not only encourage more participation for new gTLDs but will also improve the end-user confidence in ICANN's regarding promoting internet resources. *N. ul Haq, Pakistan Telecommunication Authority* (14 Dec. 2008).

ICANN should announce in advance if any adult extensions will be permitted, without requiring applicant to pay \$185,000 to find out. *WMI* (13 Dec. 2008). Why not define a fee based on an envelope of domain names which makes it possible for smaller gTLDs to stay in good shape and offer stable and functional services? *ISOC*.

A project to serve a mono-lingual demographic is inherently cheaper under ICANN's draft rules, than a project to serve a multi-lingual demographic. Registry applicants should be permitted to apply for transliterations in IDNs without additional costs. *E. Brunner-Williams. ANA* (15 Dec. 2008) (how do the fees affect existing gTLD fee structures). ICANN should clarify if there is only one \$100 registration fee for each application. *INTA* (15 Dec. 2008). *Grainger* (15 Dec. 2008) (the workings of the \$100 fee for accessing the application system must be clarified).

Fee Impact on Community-Based Applicants. There are concerns that \$185,000 for the application fee is too high for community/city TLD applicants. Closer to (US) \$50,000 would be welcome. *dotSCO* (15 Dec. 2008). See also *NIC Mexico* (9 Dec. 2008). *NCUC* (15 Dec. 2008). *dotCYM* (15 Dec. 2008). *Lovells* (15 Dec. 2008). *Anonymous*.

They are also concerned that the proposed (US) \$75,000 registry annual fee is too high for a not-for-profit community registry.

Our proposal would be that community TLDs pay a small percentage of their annual surplus/profit to ICANN – up to a maximum ceiling of (US) \$10,000 per year. Should a community TLD be taken up in large volumes (on a par with strings such as BIZ) then there may be a case for a revision of the annual fee beyond the (US) \$10,000. *dotSCO* (15 Dec. 2008).

Comment: community-based cityTLDs should pay application fees not more that \$ 50,000 and not more than \$ 10,000 minimum annual fees. *dotberlin* (4 Dec. 2008).

We recognize that the application process to ICANN should be cost based, and that registrars should be contributing annually to ICANN's ongoing costs. However, the purpose of opening up the GTLD space should be to encourage a range of new TLDs that meet a range of community as well as corporate requirements. The initial application fee of \$185,000 plus the annual fee of \$75,000 may be far too high for legitimate, smaller communities (or communities of interest) who would otherwise benefit from their own TLD. ICANN should give consideration on how those community interests could be addressed, either through a discount of those fees or a special grants program for such communities. *ISOC-AU*.

Excessive Fee Impact-Proposed String: Fee Imposition Requiring Applicants to pay an \$185,000 fee for multiple transliterations of a proposed string is unconscionable. Allowing a second entity to secure the rights to a transliteration of a string is contrary to the confusingly similar aspect of the Guidebook. Allowing applicants to have the ASCII string and IDN translations would permit applicants to offer users a full package of services, and promote the stability of the internet. *R. Andruff*.

The \$185,000 application fee should permit application for more than one string (up to five in order of preference). In the alternative, if 1 string is limited per application, then unsuccessful

applicants should be given the option of participating in the second round without submitting a new application fee. *Smartcall* (4 Dec. 2008).

ICANN may consider allowing applicants to apply for up to x (x being a reasonable number like 5 for example) gTLD strings with one application with a mandate to reduce it to one after string contention check. ICANN may charge a "change fee". ICANN may charge "change fee" if such action leads to extra work for ICANN and to discourage frivolous changes. *I. Vachovsky* (16 Nov. 2008).

Multiple fees should not be charged for applications that are basically for one string (e.g. Milano and Milan; fee should not be more than \$50K) *.koln* (15 Dec. 2008).

Brand Owner Costs-Defensive Registrations. USTA is concerned about the costs associated with the new gTLD process. They are concerned that brand owners will be forced to defensively register to protect their brands. *USTA* (15 Dec. 2008). Corporations are concerned about the high application fee of \$185,000 and the \$75,000 annual fee, when they are registered names purely for brand protection purposes-there is also a high cost for those wanting to apply for their brand in multiple languages or for multiple brands in the same industry sector (e.g. brands of cars). *Melbourne IT* (15 Dec. 2008). The \$75,000 annual fee is too high for most brand owners to consider defensive registrations of TLDs, but possible for a large trade union and its membership. *E. Brunner-Williams*.

Closed gTLDs-Lower Fees/Economies of Scale. Reduce the annual fee for a "closed" gTLD for when a trademarked name has been approved, but not yet requested to be in the DNS - e.g. small holding fee \$5000 per year - allow a lower application fee for a "closed" gTLD where the applicant has a trademark on the gTLD string, as costs for reviewing and risk is likely lower. Recommend \$90,000 for "closed" gTLDs - offer a variable annual fee based on the number of approved applicants. E.g. \$75,000 per year if less than 100 new gTLDs, \$50,000 per year (100-200), \$40,000 (200-500), \$30,000 (greater than 500). This is because ICANN will obtain economies of scale with more gTLDs, and the costs of managing compliance for "closed" gTLDs will be lower (as there are no third party registrations at the second level). For "closed" gTLDs - for applicants that apply for multiple names that are trademarks for the same legal entity (e.g. product names), provide a 10% discount on application and annual fees for each additional name, up to a maximum of 50% of all fees. This can be justified as ICANN staff can have a single interface with the applicant for multiple names, and the cost of reviewing multiple applications will be lower as most of the content of each application will be the same except for the string being applied for. - allow a discount for multiple applications for names that have the same meaning in different languages (e.g. travel in Arabic or Chinese). *Melbourne IT* (15 Dec. 2008).

Single enterprise gTLDs. ICANN should adopt a tiered structure for the application, registry and annual fees, and discount fees equitably for single enterprise gTLDs ("seTLD"). Some of the fees have not been justified and seem excessive. Fees should be steeply discounted for multiple applications filed by the same seTLD application; the annual "tax" fee has not been justified and should be heavily discounted for seTLDs due to their narrow use of the registry compared with open, unrestricted gTLD registries (e.g., the .museum registries fee levels seem appropriate). *Client B* (15 Dec. 2008).

The \$185,000 application fee outlined in the Applicant Guidebook is too high. Particularly with regard to transliteration i.e. paying the same fee over again for an approved TLD in a different language. (RA)

The \$75,000 annual registry fee outlined in the Applicant Guidebook is too high (MF, DK, R1, SR, RA, AP, MB, JB, AM, IA, TH)

The \$75,000 annual registry fee: It may have the effect of restricting applicants (MF, DK, R1, SR, AP, IA)

The \$75,000 annual registry fee: the costs will be passed onto consumers (RA, AM, TH)

The \$75,000 annual registry fee: does not account for smaller communities (SR, JB)

If a new registry makes under \$1million it should be waived the annual fees (MF)

Allow non-profits to pay a percentage of the annual registry fee for the first two years of running a new gTLD (TH)
(See *Cairo Participation Key*)

Need Support for Evaluation Fee

Evaluation Fee Does Not Ensure Fair Consideration. Applicants are required to acknowledge that the initial fee of \$185,000 is paid only "to obtain consideration" of an application. Applicants are not entitled to expect that the \$185,000 fee will buy them even reasoned or fair consideration. *RyC* (6 Dec. 2008).

Transparency: Estimated First Round Applications. ICANN should provide more transparency in how it arrived at the cost estimates and fees in the new gTLD process, as well as its estimates for number of expected applications in the first round. He also recommends that ICANN be consistent in its terminology on "phases", "steps," and "tasks". *A. Martin* (16 Dec. 2008). Thank you for explaining the principles and high level estimation approaches that you have used to arrive at the proposed fees. It provided a good high level overview. However, in the name of transparency, I believe the internet community *needs more explanation and greater visibility into the actual cost estimations and assumptions* behind the *application and recurring fees*. This is especially important since cost recovery is the principle governing the fees and fairness and transparency seem to be higher priorities than cost-minimization. *A. Martin* (16 Dec. 2008).

Fees need to be reflective of ICANN's true costs. *NeuStar* (15 Dec. 2008).

Expected quantity of applications: Because your cost model depends significantly on this number, can you describe in detail your data points and sources for your 500 applications estimation, especially the "report from a consulting economist" There is some inconsistency and I am slightly confused with your use of the terminology of "phases," "steps," and "tasks." (See Pg 8, "Expected value is determined by estimating the likelihood that each of the 75 steps will actually be executed for the pool of applications, then multiplying that likelihood times the cost."). This leads me to the question: at which of these levels (either phases, steps, or tasks) do you assume and assign probabilities that the application would pass through. For example, did you assume 80% of applications would pass through the Initial Evaluation step, or did you get more granular and assign probabilities at the task level where appropriate? Can you provide the internet community with the full list of tasks, as well as your assumptions with regard to what probabilities you assigned to each task, which you consider predictable? How are efficiencies factored into the accounting of individual tasks or steps? Presumably certain steps would not take the fully estimated time if repeated for all 500 applicants or done in batches? Please

explain. At what points in the application process (and which individual tasks) are you using consultants whose hourly rates are presumably more expensive than those of internal staff? *A. Martin* (16 Dec. 2008).

Cost Basis for Single Company gTLD Registry. This reasoning does not apply to company registries without registrar model, the Charles River Model I, as the TLD operator can define the cost of a registration to be zero, rendering percentages ineffective. However, it also seems inappropriate to have higher charges for large number of second level entries as they will not cause additional work for ICANN. To prevent applicants that wish to copy the .com model from applying for this category, restrictions must be defined. Category C domains have to be registered for free and services associated with C domains may not generate revenue for anyone except the operator. I would like to reiterate our offer of support in working on this important question by whatever means you consider helpful. We can think of no more important part of the guidebook to get correct than this, as without the .org revenue, or the NANPA revenue, the unrestricted "stars" of the 2000 new gTLD round would be economic failures, *M. Faure, CORE*.

Cost Basis-Evaluation Fee: The fees associated with the proposed TLD submission process seem to be the least coherent portion, yet this proposal section has the most justification. The initial submission fee of \$185,000 is one example of the incoherency. The fee is intended to go toward ICANN's operational costs. However, the proposal does not identify which operational costs are currently covered. Are salaries, services, and base overhead currently not being funded? *Hacker* (14 Dec. 2008).

ICANN should provide more details on the costs and fees associated with each type of Extended Application described in 2.2. *NICMexico* (9 Dec. 2008).

ICANN needs to be more specific regarding its fee structure. *BITS*.

Need Support for Annual Registry Fee

Equitable Issues. Why should the new gTLDs pay \$75,000 during their start up periods when the following existing TLDs all pay \$10,000 or less -- .cat, .jobs, .coop. aero, .museum, and .travel? *CentralNIC* (13 Dec. 2008). What is the basis for the fee of the greater of 5% of transaction revenue or \$75,000? Please provide more explanation and detail regarding the principle of having this fee be the same across all new TLDs. Is this to cover only variable costs? How many TLD are assumed to be designated (how many applications make it through the entire process? What type of services are you assuming you will provide? Do you assume you will provide the same level of service that will require same amount of staff labor or technical investment for each type of TLD? Won't some, for example corporate trademark TLDs used for internal purposes, require significantly less work on the part of ICANN? *A. Martin* (16 Dec. 2008). The annual fee is too high (should not be more than \$25K). *.koln* (15 Dec. 2008).

Cost Recovery Analysis. ICANN states that the application fees are calculated on cost recovery only. The 500 applications that ICANN itself estimates to be submitted in the first round, at \$185k per application, will mean a \$ 95M revenue for ICANN. This roughly equals 1000-1500 man years of work (or 300 to 500 man years when consultants are used). First of all, it seems unrealistic to assume that all preparatory work done so far, together with the manpower necessary to evaluate the five hundred applications will take 100 persons ten years, so the goal of "cost recovery only" does not seem to be supported by fees charged. *SIDN* (10

Dec. 2008). *Microsoft* (Guidebook comments, 15 Dec. 2008) (ICANN has not justified the annual \$75K registry “tax” fee).

Fee Structure – Annual Registry Fee

Unequal Impact. In determining the 5%, ICANN proposes to include “all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration.” This expansive definition goes well beyond any contractual terms with existing registries, and would create an unequal playing field among registry operators. *CentralNIC* (13 Dec. 2008).

ICANN should consider charging lower fees for smaller registries, and should consider a maximum fee in the event that the variable component results in an unexpected windfall to ICANN. In any event, the Guidebook should be revised to clarify that the 5% threshold does not apply to non-domain related registration services or revenue. *MarkMonitor* (15 Dec. 2008).

Clarifications Needed-Cost Recovery and Revenue. Section 6.1 states that the average price of registrations “include all bundled products or services that may be offered by Registry Operator and include or are offered in conjunction with a domain name registration”. 1. Please explain exactly what was meant by ICANN in this statement. 2. Please explain how this relates to ICANN collecting fees from registries as a “cost recovery” mechanism which was cited as the purpose of collecting fees. 3. Please explain how this relates to ICANN as a non-profit organization as opposed to a for-profit revenue sharing arrangement. 4. Please explain why ICANN is not protected with a minimum as it relates to cost recovery. In other words, in most for-profit commercial arrangements, there is EITHER a minimum OR a rev share but not both. It appears that ICANN wants to have “it’s cake and eat it too.” 5. How does this comport with the GAO study on ICANN several years back which talked about ICANN's cost recovery mechanism as opposed to taxation on income? *eECOM-LAC*.

The GNSO policy on new gTLDs recommends that ICANN take a consistent approach to registry fees, but in no way mandates that ICANN impose a one-size-fits-all model. Registry operators strongly reject this model. The proposed mechanism seems to abandon any cost-recovery obligations and, in the end, amounts to a revenue share. *RyC* (6 Dec. 2008).

In addition, ICANN has also not shown why it deserves five percent of any fees generated by services that may be completely unrelated to the domain name registration other than perhaps that they are offered as part of a package. *Neustar* (15 Dec. 2008).

Registry Pricing. Pricing is not a stability or security issue and thus not within the bounds of the picket fence. It is a matter on which each registry is free to agree via contract, but it is not an appropriate matter for Consensus Policy. To the extent registry fees depend upon pricing by registries, there is no justification for calculating such prices on the basis of all bundled products or services. *RyC* (6 Dec. 2008).

Fees, as Proposed, are Reasonable

On the Application fee, Demand Media finds it to be an acceptable, one-time fee for serious applicants. They note that ICANN should spend surplus fees in a way that promotes and assists new gTLDs and reductions in fees for new gTLDs. The RFP presents a reasonably well-detailed case justifying the \$185k Evaluation Fee. We agree that the process is unique and unprecedented, with considerable scope for unexpected costs. In our experience there will

almost certainly be unanticipated complexities, therefore, we think it is prudent to have a fee that is high enough to cover these costs. On the balance we think \$185k is an acceptable, one-time fee for serious applicants. *Demand Media* (17 Dec. 2008).

Clarify Refunds—Amounts and Methodology

Refund Details Needed. Confirming and publishing a complete table of fees including details of refunds as soon as possible *IPC, COA*. Will a refund will be granted if ICANN determines that an applied for string is too similar to a Reserved TLD String [or an existing TLD]. In addition, she asks if it is possible to get a pre-application determination from ICANN on whether a proposed string would be too similar to a Reserved TLD string. *F. Hammersley* (24 Nov. 2008).

Details on refunds are missing from the Applicant Guidebook, and if the community has to wait until the Final version of the Guidebook, it may be too late to comment. *K. Koubaa, Arab World Internet Institute* (8 Nov. 2008).

The statement that refunds may be available to applicants who withdraw at certain stages of the process is too vague. A specific refund policy with guidelines that applicants can be aware of up front would be a very good idea. *C. Gomes* (18 Nov. 2008). ICANN should provide specifics of the refund policy in the next round of RFPs. *CentralNIC* (13 Nov. 2008).

Competing Applications; Withdrawals. If multiple applicants apply for the same gTLD .example, obviously only one applicant can be awarded with the gTLD. Will the other applicants receive a refund or a partial refund or be able to use the application fee to apply for an alternate or different gTLD? *B. Gilbert*.

It is desirable for all parties that an application facing opposition or contention can be withdrawn as gracefully as possible. To achieve this, applicants must be able to apply in a context where the possibility of withdrawal is a reasonable option. They must also be able to withdraw without losing face and without a substantial monetary loss. Negotiations between contenders should be encouraged, and their outcome should not be affected by the financial burden of a failed application. Finally, ICANN should facilitate withdrawal before any money has been spent on evaluation or objections. Full proposal made. *W. Staub, CORE*.

Refund Policy and Speculative Filings. We understand the motivation for those who want the RFP to provide an explicit promise of partial refund, or some form of graceful withdrawal period. In practice, however, any commitment by ICANN of this nature will cause ICANN to be inundated with a very large number of speculative proposals. We recommend that refunds only be provided in rare cases and that the amount of refund be determined on a case by case basis. *Demand Media* (15 Dec. 2008). The Guidebook states that, "ICANN reserves the right to reject any application that ICANN is prohibited from considering for a gTLD under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant." CADNA believes that the application fee itself, if nonrefundable, can deter attempts to register frivolous TLDs. *CADNA* (15 Dec. 2008).

Under 1.5.5, refunds should not be available. Applications for a new gTLD are a serious matter, and shouldn't be a game of trial and error, with refunds if unsuccessful. Section 3's refund policy is very unclear, and in particular seems to leave the door open for full refunds in all cases of refusal. It must be made clear that full refunds should not be the norm by tweaking the language. *G. Kirikos* (24 Nov. 2008).

Clarity on how surplus funds, if any, will be handled.

Articulate a clear rationale for the proposed fee structure as well as a transparent mechanism, that includes community agreement, for the disposition of excess revenues, should there be any, given ICANN's status as a non-profit entity. *US DOC-NTIA* (18 Dec. 2008). Is that already decided that ICANN is going to spend it or can it eventually be used to reduce registration fees for detailed deregistrants in general? *G. Kirikos* (24 Nov. 2008).

Evaluation Process – Financial considerations

Under 1.2.3 (5), Demand Media asks for clarification on funding of on-going operations in the event of registry failure. *Demand Media* (17 Dec. 2008).

Other Fees

Please specify if there are any additional costs after passing initial evaluation and clearing all objections (if any), prior to the TLD been added to the root zone. *NIC Mexico* (9 Dec. 2008).

RSTEP Review Fee. What is the basis for a \$50,000 RSTEP review fee? What criteria will be applied to determine whether an applicant will be required to pay additional fees and when will these fees need to be paid? An excessive fee for new registry services will discourage innovation and competition in providing services for registrants, users and the community as a whole. *C. Gomes* (18 Nov. 2008).

The RSEP process supports ICANN's core functions, and should be treated as an integral part of ICANN's operations, and not as an adjunct, pay-as-you-go service. It imposes a fee on innovation, creates a free-rider problem, and to the extent that registries with limited resources (i.e., smaller, community based registries) are the source of innovation, it reduces the likelihood that the community will enjoy the benefit of such innovation. Why do the Registry Operators have to pay for the RSTEP process under the new agreement? *RyC* (6 Dec. 2008).

Will an extended review by the RSTEP entail an additional fee? Is it possible that the RSTEP might not be able to respond in a timely manner? If so, how would applications be prioritized and how would communications with affected applicants occur? *C. Gomes* (18 Nov. 2008).

Extended Evaluations. Why are requests for extended evaluations only allowed in four circumstances? What if ICANN gave applicants the option of extended evaluations in other areas at their expense? *C. Gomes* (18 Nov. 2008).

The objection filing fee. I find it morally wrong to even suggest an objection filing fee. I am of course talking about the rights of those that haven't got the money. Are ICANN telling them that they don't have any rights. Remember that they didn't ask for there rights to be violated. If anything. This fee should be funded by the evaluation fee. If you do not take this into account. Then I'm afraid that you are going see a lot of, later one, lawsuits. *A. Rosenkrans Birkedal* (10 Nov. 2008). Per the draft, in situations where an objector files a protest, both the objector and the applicant must pay a fee to cover the costs of resolution (i.e. "Objection Filing Fees"). Once ICANN resolves the objection, ICANN will refund the fees of the successful party paid. We suggest ICANN clarify how it will handle the requirements for filing fees in situations wherein it consolidates two or more objections. It is not clear if each objector must pay a full fee or if ICANN will divide the Objection Filing Fee equally between the each "consolidated" objector. *BITS*. Requiring the applicant to pay a fee every time a response is filed seems excessive and also could be administratively challenging in terms of paying and collecting fees. Will dispute fees be reduced when objections are consolidated? *C. Gomes* (18 Nov. 2008).

The total sum of the fees should cover all forms of the conflict resolution. Individuals wishing to voice opposition to a TLD should not be required to submit any fees. What is the fee for extended review? (If it's not decided yet, why not, and when will that be decided)? *Anonymous*. ICANN should consider small economies when the dispute fees are finalized. *F. Purcell* (6 Nov. 2008).

Processing of Fees

We do not believe a six figure Evaluation Fee should be payable by credit card. A serious applicant will have the funds on hand to make this payment. *Smartcall* (4 Dec 2008). It is ridiculous that ICANN would even consider payments by credit cards to be acceptable, given the ability of people to do chargebacks months after a transaction. Only irrevocable forms of payments should be allowed, namely wire transfers. *G. Kirikos* (24

V. DNS SECURITY AND STABILITY

Summary of Key Points

- Consideration of issues where the introduction of new TLDs might affect DNS stability and security should continue to be studied.
- This is especially true given the near coincident introduction of new gTLDs, IDNs, DNSSEC and IPv6.
- Strongly associated with these issues to be studied are security-oriented concerns that the introduction of new TLDs will lead to increased instances of malicious behavior.

Summary of Input

Public comments emphasized that ICANN must ensure that introducing a potentially large number of new gTLDs, including internationalized TLDs, will not jeopardize domain name system (DNS) stability and security. They urged that ICANN must assess threats to the DNS from the new gTLD rollout, and also must consider the potential in the future for events such as destabilizing registry failures. Some commenters suggested that ICANN conduct research on DNS stability issues before start of the first gTLD application round. A number of commenters urged ICANN not to move forward with the new gTLD program because of threats to DNS stability and security, and warned that the new program will create a new wave of malicious activity, including spam and phishing.

See U.S. DOC-NTIA (18 Dec. 2008) (ICANN must ensure that introducing a potentially large number of new gTLDs, including internationalized TLDs, will not jeopardize DNS stability and security). ITT (15 Dec. 2008). G. Kirikos (24 Nov. 2008). Bank of America (15 Dec. 2008). P. Tattersfield (15 Dec. 2008). SIIA (15 Dec. 2008). FairWinds (15 Dec. 2008). AT&T (15 Dec. 2008) (ICANN must assess threats to the DNS from new gTLD rollout and, at a later stage, how it will deal with registry failures). SIDN (10 Dec. 2008) (do research on stability issues before start of first application round). R. Fernandez (16 Dec. 2008) (ICANN should reject agreement; it removes all certainty and assurance for registrants). WMI (13 Dec. 2008). NAM (15 Dec. 2008). SIFMA (12 Dec. 2008). Contessa (11 Dec. 2008). Microsoft (Guidebook comments 15 Dec. 2008) (opposes new gTLD introduction, likely to threaten DNS security and stability). Arab Team (15 Dec. 2008) (not enough focus on stability and impact on other countries and communities). L. Parsons (29 Oct. 2009) (opposes because will increase phishing and confusion); R. Robertson (4 Dec. 2008); D. Buzzard (31 Oct. 2008).

Issues

The comments addressing DNS stability break down into two main questions:

Scaling: What are the technical scaling issues associated with new TLDs?

- How can ICANN demonstrate confidence that the name system (root servers, resolvers) will scale to handle new TLDs?
- How large can the root zone be?

Security Impact: Will security-oriented abuses of the DNS systematically increase with an increased number of TLDs and a new set of registry participants?

- With evident problems in misuses of the existing DNS (squatting, pharming, phishing, malware), will increasing the number of TLDs significantly increase these misuses?
- Has adequate thought been given to the requirements and behavior for new TLD operators?

Proposed Position & Analysis (for this version of the Guidebook)

Scaling

Proposed Position: The ICANN Board has requested the SSAC and RSSAC to jointly conduct a study analyzing the combined impact to security and stability within the DNS root server system of the proposed implementation of new TLDs (both country code and generic), IDNs, IPv6 records in the root zone, and DNSSEC. The analysis is expected to address the implications of initial implementation of these changes occurring during a short time period. ICANN must ensure that potential changes in the technical management of the root zone and scope of activity at the TLD level within the DNS will not pose significant risks to the security and stability of the system. The study is also expected to address the capacity of the root server system to address a stressing range of technical challenges and operational demands that might emerge as part of the implementation of proposed changes.

Analysis: The public comments' concern about the impact of new gTLDs on the root zone and whether this issue has been studied adequately has been raised against the backdrop of other recent and planned changes to the DNS, all in roughly the same time frame, including: the recent addition (in December 2007) of IPv6 records for authoritative root servers to the root zone, and the planned addition of DNSSEC, IDNs, and new country code TLDs. While a [new gTLD issues paper](#) discussed scaling the root zone, to provide adequate confidence in the technical support for scalability, the simultaneous impact of all of these changes should be considered.

Background resources: In addition to the [new gTLD issues paper](#), the following provides background on ICANN's efforts to understand the potential security and stability impacts of these changes individually:

The RSSAC and SSAC jointly issued an analysis of adding IPv6 records for the authoritative root servers in 2007 (see <http://www.icann.org/committees/security/sac018.pdf> and IANA's report at <http://www.iana.org/reports/2008/root-aaaa-announcement.html>). The addition of IDNs to the root has been the subject of significant advance planning, and an extended real-world testbed (see for example SSAC's report at <http://www.icann.org/committees/security/sac020.pdf>, and IANA's report at <http://www.iana.org/reports/2007/testetal-report-01aug2007.html>). DNSSEC has benefited from extensive root zone test bed experience and been extensively analyzed though not specifically for the all the events proposed to occur in the root zone (see for example <http://www.net.informatik.tu-muenchen.de/~anja/feldmann/papers/dnssec05.pdf>, and the RSTEP report on PIR's DNSSEC implementation at <http://www.icann.org/registries/rsep/rstep-report-pir-dnssec-04jun08.pdf>). Finally, an ICANN staff paper on root zone impact of new TLDs was published for public comment in February, 2008 (see <http://icann.org/topics/dns-stability-draft-paper-06feb08.pdf>).

Security Impact

Proposed Position: Further comments on the issue of security impact are expected. Many public commenters clearly feel more work is needed on security and particular issues relating to it, including implementation of registrant protection and avoiding end user confusion. These questions should be explored further. For example, are there implementable, practical mechanisms to avoid the need for purely defensive registrations? Can registry or registrar mechanisms be put in place to make new gTLDs desirable from both a confusion and protection viewpoint? While there is always opportunity for more study, the concern regarding security abuses scaling with more TLDs is ultimately better dealt with through pragmatic implementation approaches than a set of predictions around which many would disagree in any event. ICANN staff will be actively soliciting feedback on these topics over the next 60 days, and share with the community options for improvements in these areas in the next several months.

ICANN staff believes that the concerns about security impact are being reasonably assessed in the currently proposed study and are consistent with GNSO policy recommendations and principles and also with ICANN's mission to ensure DNS stability and security. That study will solicit the opinion of the broad DNS technical community. Wide consideration has been taken of a broad range of issues, including: intentional and unintentional confusion at the TLD level; balancing introduction of new business models with compliance mechanisms and assurances of ongoing business stability of new registries; and the intent to create choice and competition. The new gTLD policy development process is focusing on how policies could be implemented that would minimize confusion to end-users, and costly defense to brand holders.

Analysis: The public comments have shown that there are a variety of security-oriented concerns that could be associated with new TLDs. These include:

- Potential confusion of new TLDs with existing, or other new TLDs, either in Latin script or in IDNs. This has been a major focus of the policy development behind both new TLDs in general, and IDNs specifically. Many elements of the implementation plan are designed to specifically address this issue. For example, there are two “stops” in application evaluation process to test that applied for string might result in user confusion due to their similarity with existing or other applied-for strings. There is also a stop to test whether an applied for string might infringe on a trademarked label or inappropriately appropriate a community label. New TLDs for communities, brand holders, industry associations, online communities and unique applications will all be evaluated within an environment intended to be more structured, more predictable, and more protected than today's second-level registrations.
- Possible misbehavior of new registries— through inexperience or other causes. The guidebook criteria for new registry operators are intended to address some of this concern. New registries are asked to complete sections on business and technical capabilities, and there is a particular focus placed on the ongoing continuity of the registry (both in terms of ongoing operations, and in the worst case, continuing to run for a period when business models fail).
- Confusion at the second level. That is, expanding the number of TLDs will expand the number of locales at which abusers of the system could register second-level names intended to dupe end-users. For entities facing both direct cost and possible indirect cost in loss of confidence in a name or brand, this is a pressing matter. Some have studied the costs of brand protection at the second-level. While there is not complete agreement

on the data, the general point is unarguable. There is a substantial amount of resource spent by brand holders and others defending look-alike second level names. While there are no studies to show this would expand with an expanded namespace, it is an important concern.

There have been suggestions that new TLDs would actually aid brand identity, for example see [this article proposing new thinking for global branding on the Internet](#). Many Internet users already pay close attention to the TLD, and look first to it – not the second level name – as the indicator of site validity. A user in France might well first look at .fr sites for those providing most local and linguistic relevance. In a world where there are many generic TLDs, the carefully-protected and rationally-considered TLD suffix could become more relevant than the second-level name for users, leading to less confusion, and ultimately less need for defensive second-level registration.

VI. STRING REQUIREMENTS

A. STRING REQUIREMENTS: IDN AND TECHNICAL

Summary of Key Points

- The three-character requirement will be the subject of additional community discussion and consultation to determine if a consistent exception can be made for ideographic or other script sets.
- The new IDN specification is not sufficiently mature to adopt the suggestion made by the Unicode Technical Committee (UTC) but progress on the protocol will be monitored with an eye toward updating string requirements in the near term
- The Guidebook asks that applicants take reasonable steps to identify string compatibility issues, not guarantee that all applications are compatible with the applied-for string.

Summary of Input

String compliance with IDNA technical protocols. The reference to the existing IDNA standard (RFC 3490) should be altered to refer to the new IDNA technical standard, on the presumption that the current standard will be superseded. Language should also be more emphatic that the list of restrictions in the guide is not complete. *UTC* (14 Nov. 2008). Add additional language regarding in-progress IDNA protocol revisions to make it clear that the protocol revision is expected to succeed, but the text is still subject to change. *UTC* (14 Nov. 2008)

Directionality of characters in string. “Must consist entirely of characters with the same directional property” is wrong and should be struck. Valid IDNs according to the in-development revised IDNA protocol would be limited by this restriction. *UTC* (14 Nov. 2008)

Prohibiting mixing characters from different scripts. The language that requires strings be limited to a single script is overly narrow, and does not address scripts deemed “Common” and “Inherited”, which are given to characters that are used within multiple scripts, such as numerals. *UTC* (14 Nov. 2008)

Documenting properties of the string. The language on specifying the language used by the label should be altered to reference BCP 47 rather than ISO 639-1. *UTC* (14 Nov. 2008). The language on specifying the script used by the label should be altered to bring the section “in line with the use of script in 2.1.1.3.2 String Requirements”. *UTC* (14 Nov. 2008). The language on specifying the discrete Unicode code points in the application should be more explicit on the notation used. It should be U+ notation, “for example, for the label “öbb”, the list would be: “U+00F6 U+0062 U+0062”. *UTC* (14 Nov. 2008) The reason for the requirement that the proposed TLD’s pronunciation be supplied is unclear. Very few registrants will be able to supply the pronunciations correctly using the International Phonetic Alphabet, and there are likely to be multiple pronunciations depending on the part of the world. *UTC* (14 Nov. 2008) The requirement to provide an IDN table may mean provide a reference to a table, rather than provide the complete table. The format required of the table is not clear. *UTC* (14 Nov. 2008)

Avoiding string compatibility issues. With respect to making “reasonable efforts” to ensure there are no rendering and operational issues with the selected string, it is not clear what reasonable

efforts are, and it sounds like “this is asking the applicant to change all the program applications that use the domain name, which is clearly impossible.” *UTC* (14 Nov. 2008)

Eligible string preclusions. The requirement for a minimum of three characters does not work for scripts where one character can represent an entity. *W. Tan* (8 Dec. 2008); IDN variant implementation needed for Chinese, Japanese and Korean TLDs. *J. Seng* (8 Dec. 2008). It is not clear why hexadecimal representations of numerals are prohibited. *A. Baumgart* (5 Dec. 2008) Inquiry relating to whether there is a prohibition on new TLDs that commence with the characters of a ccTLD (i.e. .FR blocking .FRANCHISE). *J.C. Vignes*.

Issues

The issues raised in these sections can be narrowed down to:

Regarding the technical requirements for TLD strings, there are questions on unclear language, or suggestions on improvements to the language, with a view to improving the clarity of the document.

Can changes to restrictions be made in order to better match equivalent standards documents?

Can changes be made to reflect the suitability of certain restrictions or obligations?

Proposed Position (for this version of the Guidebook)

String compliance with IDNA technical protocols: ICANN staff will continue to monitor the dynamics of the IDNabis working group, and will continue to consult on the latest status and the viability of the proposed new standard, and identify the likelihood it will be resolved prior to the launch of the first round. If this is still a reasonable prospect then the proposed change of language is appropriate.

Directionality of characters in string. The current language should be retained; however, the comments provided will be re-evaluated should the IDNabis standard be used as the reference standard.

Prohibiting mixing characters from different scripts. The current language is required as ICANN policy is to allow certain exemptions where scripts can be mixed.

Documenting properties of the string. Limit the technical details in the Guidebook on how script and language properties are formally provided, as they are operational details that are better in the scope of IANA Root Zone operational procedures, which are outside the scope of this document. Explain that these are informative properties, not evaluative, and make the phonetic description optional.

Avoiding string compatibility issues. Make the language clearer that “reasonable efforts” means that the applicant make a good faith effort to ensure that common applications do not have unexpected problems caused by the domain.

Eligible string preclusions. Number of characters in a string:

In the initial release of the Applicant gTLD Guidebook ICANN suggested that gTLD strings need to be minimum three (3) characters long.

In return comments have been received representing the fact that for example there are single and two character combinations in the ideographic writing systems that represents the name of cities, concepts and otherwise generic terms. This concern is understandable and additional information is being made available to inform community feedback on the topic. ICANN will also conduct additional consultations on this topic in order to reach a resolution before the launch of the new gTLD round.

In preparation of the initial suggestion of a minimum of 3-chars, ICANN took into consideration various analysis, including the work done by the Reserved Names Working Group:

- Single and two-character U-labels on the top level and second level of a domain name should not be restricted in general. At the top level, requested strings should be analyzed on a case by case basis in the new gTLD process depending on the script and language used in order to determine whether the string should be available for allocation in the DNS. This is notwithstanding the rule that the ISO-3166 list will continue to be reserved and as such all two character ASCII strings (i.e., LDH-labels) will remain reserved at the top level and second level of a domain name, although registries may propose release of two character strings at the second level provided that measures to avoid confusion with any corresponding country codes are implemented. Single and two character labels at the second level should be available for registration, provided they are consistent with the IDN Guidelines. (<http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm>)

At the same time, considerations need to be made to ensure that also confusion (and not just clashes) with the ISO-3166 list and associated IANA function for allocation of ccTLDs is not jeopardized. Confusability with existing ccTLDs and any future ccTLDs allocated through the IANA function by use of the ISO3166 list was viewed as increasing if strings with less than three character combinations are allowed. Further, avoiding such confusability is not planned for in the gTLD applicant Guidebook and needs to be if the 3-char suggestion is to be changed.

Additional considerations have to do with the concept of character and how to count characters on a global scale. Since the concept of a 'character' can remain hard to define, ICANN decided to go with the definition described at: <http://www.icann.org/en/topics/idn/idn-glossary.htm#C>. As is illustrated there, this creates some complications when moving to Internationalized TLDs due to the reason that in some writing systems, such as the ideograph system, a character can represent an entire concept or word. Specifically, it has not been possible to find a way of counting characters across all languages and scripts that creates an identical concept of numbers, this includes an incapability of counting the characters represented in the U-label, the Unicode code points, or other ways. The only way one can count characters in a unique way for IDNs is by counting the characters in an A-label and the shortest string available as an A-label is seven (7) characters long. It also does not appear that it is the length of the A-label that concerns the community members, although it is the length of the A-label that creates problems for the usability of domain names under such TLDs in various applications software. As such ICANN has determined to count the number of characters in strings that are applied for by counting their immediate code points as identified by Unicode.

While some specific examples of what appears to be reasonable (less than 3-char) strings can be made, for example in the ideographic writing system, it is not straightforward to

define (based on all received feedback so far) a globally implementable rule or set of rules that will identify when a string with less than 3 characters should be allowed. One could imagine that such strings could be allowed by a script by script basis, but a closer look at Unicode, which is the classification of scripts that ICANN is using, shows that there even is an inconsistency within a script as to when less than 3-chars appears to be reasonable. As such, at that time of writing ICANN did not find it possible to select for example some characters from the ideograph system over other writing systems with good reason. And simply going through all (approximately 100.000) characters in Unicode today also did not seem to be a scalable practice.

ICANN will conduct additional consultations as to what categorizes a good set of rules and requirements for when a string of less than 3-characters should be allowed, if such change should be made in the implementation of this program. Simply stating that it should be analyzed on a case by case basis does not provide ICANN with sufficient details of how or based on what such decision should be made. It further does not give enough indication to a potential applicant as to whether their string will pass such case-by-case analysis or not.

Analysis

String compliance with IDNA technical protocols. The comments from UTC suggest that the references to RFC 3490 (the current IDNA standard published in 2003) be replaced in favor of references to the in-progress IDNA standard. The emphasis should be shifted to the revised IDNA standard being at the final stages of standardization and being the more appropriate document to refer to. Whether this is appropriate really comes down to the probability of whether the IDNA standard will be revised by the time the next round opens. The prospect of this varies from month-to-month. The current standard was included in the document as it is a stable reference, and for most cases they will be equally compatible between the current standard, and the new standard.

Directionality of characters in string. The proposed new language improves the section to better match the intent of the restriction, but is predicated on the new IDNA standard revision being adopted. As per the previous section, RFC 3490 is being retained as the reference for the moment, however this may evolve in the future and the restrictions modified accordingly.

Prohibiting mixing characters from different scripts. The proposed new language would prohibit some classes of mixing characters for which exceptions have been made. These are description in Section 3 of the existing IDN guidelines available at <http://www.icann.org/en/topics/idn/idn-guidelines-26apr07.pdf>

Documenting properties of the string. Most of the comments provided by UTC in this section revolve around an enhanced description of the IANA Change Request Template that is employed today, which reads:

- IDN Specific Information
- 10. English translation of string...: test
- 11a. Language of Label (ISO 639-1)...: ru
- 11b. Language of Label (English)....: Russian
- 12a. Script of Label (ISO 15924)....: Cyril
- 12b. Script of Label (English).....: Cyrillic

13. Unicode code points.....: U+0438 U+0441 U+043F U+044B U+0442 U+0430
U+043D U+0438 U+0435

This section has several purposes:

First, in order to assist in day-to-day handling of delegated top-level domains by ICANN's IANA function, a methodology of generating an English-based reference was devised that can be used as an alternative to either the "A-label" and "U-label" notations for the purposes of dealing with IANA. For example, the IANA code for .испытание is "test:ru-Cyrl". This code indicates the domain means "test", written in "Russian", expressed used "Cyrillic". This code is broken into <meaning>:<bcp47tag>, whereby the meaning is the English meaning (or a similar reference) of the string; and the BCP 47 tag is a reference to an IANA registry of scripts and languages. The BCP 47 registry in turn is based upon two different standards, one for scripts (ISO 15294) and one for languages (ISO 639-1).

Second, in Part 13 the Unicode code points are requested as a simple cross-check. The elements could be automatically derived from the U-label or A-label itself, but because the meaning of the label may not be immediately evident, this provides a cross-check such that IANA can automatically detect transcription errors of the other labels.

Finally, there may be public interest reasons for IANA to classify the strings based upon their script and language properties, for example, an ability to review the root zone database for all of the strings that mean "test", or all the strings that are written in Russian.

Accordingly, the requirements are *informative* as opposed to *evaluative*. When stored in the IANA root zone database, they are considered meta-data that is additional to the central data for a top-level domain, but plays no direct role in processing or evaluation. An additional requirement was suggested by the applicant guidebook for the label, which is to provide a description on pronunciation. This would possibly aid IANA staff in understanding what a label was that a person while performing customer service tasks such as answering enquiries. It was not considered to be a property that is assessed as part of the qualification criteria.

With respect to providing IDN tables, it is the intent of ICANN to obtain the entire IDN table, not just a reference to it; because the goal is for it to be lodged in the IANA Repository of IDN Practices. It is a fair point that the formatting expectation be explained; however it is not clear whether this should be explicit in the document or merely by reference. IANA's website has submission guidelines already, although it is likely to change in the short-to-medium future to a more useful format (specifically, XML rather than HTML formatting). This timing of that is independent of the new TLD programs.

Avoiding string compatibility issues. ICANN staff did not have a strong vision of what specific actions would be considered "reasonable" when developing this requirement, as the provision is designed to detect any problems that can't be fully predicted or articulated in advance. The idea was to have language that could be pointed to in the event there are labels that were an egregious abuse (for example, the triggered properties that could be knowingly used for phishing attacks). It was not envisaged that applicants would need to undertake their domain would work in every browser, rather to make some effort in good faith to ensure there are no reasonably discoverable issues in popular software.

Eligible string preclusions. The restriction on 1- and 2- character top-level domains stems from the current split in ASCII top-level domains. There, two-letter top-level domains are restricted solely for ISO 3166-1 country codes (either current or future). Single letter domains, both in the

top-level and in the second-level within gTLDs, were reserved against possible registration in the early 1990s for possible future expansion purposes.

The guidebook states that for new gTLDs “applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate”. Concern has arisen from communities that use ideographs to express their language that single characters can often denote whole words, and therefore concepts need to be expressed in less than three characters to be practical.

The hexadecimal restriction is designed because most Internet software does not distinguish between IP addresses and domain names. Instead, in most software a generic “Internet address” field is provided which can accept either, and the software must analyze and decide whether it is an IP address or domain name. Hexadecimal is a legitimate method of representing IP addresses, and a domain name that matches a possible IP address would cause confusion and unexpected results.

Example: Using hexadecimal in an application:

```
$ ping 0xd04dbc67
PING 0xd04dbc67 (208.77.188.103) 56(84) bytes of data.
64 bytes from 208.77.188.103: icmp_seq=1 ttl=59 time=1.70 ms
```

B. STRING REQUIREMENTS: RESERVED NAMES

Summary of Key Points

- For the next version of the Applicant Guidebook, no changes will be made to the Reserved Names list, but this position might change after additional consultation.
- Requests by certain rights holders that the reserved names list be augmented to include famous trademarks will also be discussed in additional consultations.

Summary of Input

Technical/Infrastructure Names. Create a mechanism that provides for the expansion of the gTLD reserved names list, as appropriate, technical or infrastructure-related names. *U.S. DOC* (18 Dec. 2008). Add the following names to the Reserved Names list: ARPA, IN-ADDR, IP6, and RIR. Develop a process for releasing reserved domains to the appropriate entity. Develop a process for adding or removing names from the Reserved Names list.” IANA-related infrastructure names should be protected at all levels; the reserved names list has omitted significant Internet infrastructure names. *ARIN* (8 Dec. 2008). ICANN should specify criteria for the reserved names list, with transparent justification for each name on list; develop challenge and removal procedures; and clarify if they are reserved in ASCII but not IDN equivalents. *Rodenbaugh* (16 Dec. 2008) (these issues are of special concern to globally famous trademark owners to whom ICANN does not extend Reserved Names protection). ICANN should add other terms commonly found in Internet URLs (e.g. HTTP and HTTPS) to the Reserved Names list. *INTA* (15 Dec. 2008).

Government and NGO Names. On 2.1.1.2, ICANN should not reserve its own names without offering the same opportunity to governments and non-governmental organizations. *NYC* (13

Dec. 2008); AT&T (15 Dec. 2008) (consider the reserved names list concept for country and geographic names).

Trademarks. See citations in Trademark Protection section, under "Top Level Reserved Names List".

Reinstate Protection. "Reinstate the existing protection for Reserved Names." ARIN (8 Dec. 2008).

Issues

There was little direct feedback about the Reserved Names list itself, as presented in Draft Applicant Guidebook, with the exception of a comment from ARIN, which proposed the addition of ARPA, IN-ADDR, IP6, and RIR to the list. Feedback focused on the lack of any provisions for trademark owners. Comments from groups/companies such as Nike, ISOC, and the Internet Commerce Coalition requested the inclusion of trademark names on the Reserved Names list since ICANN was choosing to protect its own interests.

- 1) What type of categories should the Reserved Names list include?
- 2) Should the 2nd level Reserved Names schedule in the base agreement be reinstated to what is generally reflected in current agreements?

Analysis

The top-level Reserved Names list, which will prevent applicants from applying for certain names, was created for the new gTLD program based largely on the existing 2nd level Reserved Names schedule. This decision was reached as a result of the work conducted by the Reserved Names Working Group (final report available here: <http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm>), which recommended that existing names on the second or perhaps even third level Reserved Names schedules should be included on the top level list. However, they suggested that additional work should be performed to provide justification for the names or categories of names included on the list. In carrying over the 2nd and 3rd level Reserved Names schedule to the top level, ICANN has decided upon a conservative approach as it is far more difficult to recover a TLD than it is to block a TLD from being registered in the first place.

ICANN has identified three options:

Option 1: Reduce list to technical and structural terms and have ICANN and its supporting organizations use the standard objection procedures used by others to protect their names, in order to show that there is no preferential treatment.

Option 2: Include technical, structural, and ICANN related names, which would leave the list as it is presented in the Draft AG. Potential additions include the suggestions from ARIN.

Option 3: Include all elements of option 2, but also provide a provision for other entities, like trademark owners and geographical names holders.

Option 1 presents arguably the most defensible position to the general Internet community (i.e. limit the RN list to names that require technical or structural protection). ICANN would demonstrate that it is not placing its interests above other organizations. However, this position is subject to objection from the SOs, ACs, and other entities supporting ICANN. They will likely

contend that not reserving names like RIR, IETF, or GNSO could lead to security concerns via phishing and spoofing if one of these names was obtained by a malicious operator. In addition, if one of the ICANN related entities wished to protect their name against an applicant (for IETF or AFRINIC for instance), they would have to use the very same objection mechanisms that ICANN designed. This has the potential to open up questions of impartiality.

Option 2 presents the status quo (relative to the Draft AG), and thus the most conservative option, since there was only limited feedback on this topic. The external objections to this option will likely be similar to what was received in public comments for the Draft AG. The perceived message being conveyed is that ICANN is protecting its own interests without taking trademark owners and other entities into account. However, as mentioned above, it is far easier to prevent a name from being registered by placing it on a RN list than to recover that name from a registry operator.

Option 3 is dependent upon a solution being developed for rights holders, like trademark owners. ICANN is undertaking significant consultation on this subject to determine what methods of protection will be extended for the protection of rights holders. Please see the separate paper that discusses Brand Protection for further information on this topic.

Regarding the second issue posed above, the principal concern is that existing infrastructure and software is designed to accommodate the existing names on the 2nd level schedule. While exact details were slim on what types of technical complications may arise from having something like lacnic.newgtld registered, presumably this may affect registrar software and search/filter functions. However, these issues can likely be addressed by software modifications.

Proposed Position (for this version of the Guidebook)

Issue 1: The recommendation for the revised Applicant Guidebook is Option 2 (the status quo), as the consultative work with the community regarding trademark owners still needs to be undertaken. In addition, going forward, further work should be initiated to determine under what conditions ICANN-related entities should have continued inclusion on the list.

Issue 2: Unless a more compelling technical argument can be produced, the schedule currently included in the base agreement should be left unchanged.

VII. GEOGRAPHICAL NAMES

Summary of Key Points

- The implementation model seeks to achieve the objective of the GNSO to protect against abuse of community labels, and anticipate criticism of governments and possible objections to geographic names,
- The applicant guidebook is amended to:
 - make it easier to identify the different elements of geographic names,
 - reflect that a country or territory name in any language, will require evidence of support,
 - augment the requirements of the letter of support.
- No additional protections for city and abbreviated names were added to the revised Guidebook as those terms are many in number and often have generic connotations.

Summary of Input

The ccNSO states that the Applicant Guidebook lumps together country names, territory names, and other geographical names like sub-national names and city names. *ccNSO* (14 Dec. 2008). The ccNSO suggests a definition for how to distinguish ccTLDs and gTLDs and notes “Until the introduction of IDNs, the number of characters in the TLD is how we have been able to visually separate the two categories. So how do we identify what is a ccTLD in the post- IDN world where we can no longer use that visual mechanism?” *ccNSO* (14 Dec. 2008). The ccNSO believes the current language preempts the ccTLD IDN PDP, by opening up for country names and abbreviations in Latin scripts and in non-Latin scripts that are not yet official languages of the country, to be entered as gTLDs while the ccTLD policies have yet to be developed. *ccNSO* (14 Dec. 2008).

The Applicant Guidebook does not establish a process to authenticate, or for a panel to consider challenges to, governmental statements of support or non-objection that may be presented by applicants. The ISO3166-2 standard is not comprehensive. *NYC* (13 Dec. 2008)

On 2.1.1.4.1, [of the applicant guidebook] the ISO 3166-2 standard is mostly inapplicable to new gTLDs. *NYC* (13 Dec. 2008) The reference to “city name” is too restrictive and should be expanded to include “city name or abbreviation”. *NYC* (13 Dec. 2008). The capital city requirement from the Explanatory Memorandum of 22 October 2008 is not included in the draft Applicant Guidebook. *NYC* (13 Dec. 2008)

The four enumerated grounds for objection do not provide sufficient grounds to safeguard the interests of national, local, and municipal governments in the preservation of geographic terms that apply to them. Suggested costs for dispute resolution will be too onerous for governments. The contention process for geographic names should be specified. Any application for a geographic term should be considered community-based. The right of governments to object should be explicitly stated. *NYC* (13 Dec. 2008). The Geographic Names Panel decision should be posted and communicated to the relevant GAC representative and relevant sub-national government entity. IDN applicants should be required to indicate whether the proposed string corresponds to a geographic term. *NYC* (13 Dec. 2008)

The objection procedure for governments is not clearly defined. It is not clear whether a geographic objection would constitute a “morality and public order objection.” Any fees associated with a government objection should be minimized. *NYC* (13 Dec. 2008)

This comment is on geographic names (particularly state names). Craig writes that he is considering applying for a string that is a State Name, has made inquiries with the relevant state government, and believes it almost impossible to get a letter of approval or non-objection. Craig says that the users and businesses in the state he has contacted have expressed support, and he wonders whether the benefit of the people who live in the state is considered (by ICANN). *D. Craig* (17 Nov. 2008).

Craig also argues that states have State.gov, and can restrict the registration policies in the .GOV space (he also writes that .GOV should be open to other governments to use). He wonders if he can make a case that a string corresponding to a state name, that case & the benefit to the local population should be considered in the evaluation. *D. Craig* (17 Nov. 2008)

The current language in 2.1.1.1 “co-mingles immediate and important issues like gTLD applications for strings that look like country codes, and non-immediate and possibly non-important issues potentially posed by gTLD applications for well-known terms referring to place names which pre-exist all present governments.” *E. Brunner-Williams* (6 Dec. 2008)

The restriction on sub-national or continent names should be removed, section 2.1.1.4 [of the applicant guidebook] should be moved to a secondary materials reference, and ICANN should test for collision with a ccTLD Fast Track string. *E. Brunner-Williams* (6 Dec. 2008)

Demys is requesting clarification in the geographical names process on whether a string is a sub-national place name, on the basis that there appears to be ambiguity. This is important for common abbreviations of sub-national place names. *Demys* (14 Dec. 2008). An example presented is .lancs, a term not found in ISO 3166-2. This is a common abbreviation for Lancashire, and on a less rigid test might be held to “represent” Lancashire. Demys asks how this will be handled in practice. *Demys* (14 Dec. 2008)

Demys also notes that the test of “meaningful representation” applied to country and territory names is not applied to IS3166-2 sub-national place names. *Demys* (14 Dec. 2008). It says in the Draft Module 2 2.1.1.4.1 that in order to apply for city TLD, “documents of support or non-objection from the relevant government(s)” are required and they “should include a signed letter of support or non-objection from the Minister with the portfolio responsible for a domain name administration, ICT, foreign affairs or the Office of the Prime Minister or President of the relevant jurisdiction.” *Interlink*.

If Interlink were to apply for dotTOKYO, do we need the documents from both Ministry of Internal Affairs and Communications and Tokyo Metropolitan Government? Or do we just need Ministry of Internal Affairs and Communications to support our application? *Interlink*.

ICANN should revise this Module to minimize disputes with governments on geographic and country names. *F. Purcell, Ministry of Communications, Information and Technology* (6 Nov. 2008)

This includes a representation of the country or territory name in any of the six official United Nations languages (French, Spanish, Chinese, Arabic, Russian and English) and any of the country or territory's local languages. *Unicode Technical Committee (UTC)* (13 Nov. 2008). It is

quite common for a country or territory to have more than one language, so that needs to be accounted for. *UTC* (13 Nov. 2008).

Applications for any string that represents a subnational place name, such as a county, province, or state. These could be, for example, as listed in the ISO 3166-2 standard. *UTC* (13 Nov. 2008). The ISO 3166-2 standard is not complete, and is not freely available. Including the comma may imply to the reader that it is required, that the sentence is to be read as: "Applications for any string that represents a subnational place name (such as a county, province, or state) listed in the ISO 3166-2 standard." *UTC* (13 Nov. 2008).

Applications for a city name, where the applicant clearly intends to use the gTLD to leverage from the city name. *UTC* (13 Nov. 2008). City names are very ambiguous - look at the number of "Paris" cities that exist. If Paris, Texas gets there first, what happens? Should there be some qualification necessary to disambiguate city names instead? *UTC* (13 Nov. 2008)

We strongly urge ICANN to adhere to GAC principles in general and in particular the following: (a) New gTLDs should respect the sensitivity regarding terms with national, cultural, geographic and religious significance. (b) ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities. *APTLD* (15 Dec. 2008)

A 'geographical term' is terribly broad and thereby offers protection even beyond what I believe the GAC requested. *C. Gomes* (18 Nov. 2008). The GNSO recommended that a dispute process be used and that governments and GAC should have standing to file a dispute. The guidebook indicates that ICANN will ensure that appropriate consideration will be given to government interests. This is contrary to the GNSO recommendation. *C. Gomes* (18 Nov. 2008).

Applicants for a Geo -TLD need to represent on which legal framework their application is based and that the use of the proposed string is not in violation of the legal framework in the country in which the applicant is incorporated. The applicant also needs to represent if and how the relevant government/s and/or public authority/ies have to respond to requests of ICANN on support or non-objection. Additionally, the fees are too high for many cities and countries who may have very small user bases. *dotberlin* (4 Dec. 2008); *J. Evans* (12 Dec. 2008); *Plaid Cymru* (15 Dec. 2008); *PuntoGal* (13 Dec. 2008).

dotSCO raises issues with the geographic considerations in the Guidebook. They note that SCO is not a three-letter code in ISO 3166-2 nor does it clash with a country name on the ISO 3166-1 list. "The difficulty for us, and indeed all other applicants, is that the criteria of a string which could 'represent a sub-national place name' in ISO 3166-2 could potentially catch any string that anyone could think of." *dotSCO* (15 Dec. 2008).

Giving governments control over ccTLD space may stifle competition. *Cairo Public Forum* (6 Nov 08).

Government support concern: ICANN should reverse its adoption of the GAC position on prior approval for any geo-gTLD and revert to the GNSO position providing standard objection rights to governmental entities. Any suggestion that governments have any ability to object to second level geo-domains on any grounds outside the scope of the UDRP should be rejected outright. *ICA* (16 Dec. 2008). Some country names have well-used and general meanings in the English language. Requiring TLDs that are country names to have government support or non-objection

makes it unlikely that certain communities will be able to secure logical TLDs (e.g. china, turkey). Some territory names are geographic indicators for specific products (e.g. champagne), but the government support/non-objection requirement makes it unlikely that producers of such products can secure those corresponding TLDs. Having multiple applicants for the same city name TLD resolve the contention themselves is odd; there are numerous potential applicants for city name TLDs. *INTA* (15 Dec. 2008).

Issues

Process

Can the presentation of geographic names in the guidebook be improved to distinguish between the differing elements, i.e. Country or territory names, sub-national, city names?

- Will there be a process to deal with possible string collisions for strings sought under the IDN ccTLD Fast-Track and new gTLD processes?
- What is the objection procedure, i.e. would an objection regarding a geographic name be considered under 'morality and public order'?
- How does an applicant know what level of government support is required for a geographic name.
- Should the decisions of the Geographic Names Panel be posted and communicated to the relevant GAC and sub-national entity?

Country and territory names

- Will allowing country and territory names in the new gTLD process create confusion between what is a ccTLD and a gTLD?
- Should the number of languages representing a country or territory name be expanded to include all languages.

Sub-national names

- Can there be a clear comprehensive list, for defining sub-national names, such as the ISO 3166-2 list?
- Will the meaningful representation test be applied to sub-national names?
- How will common abbreviations for sub-national names be handled?
- How will abbreviations be considered in the context of geographic names?

City names

- Is the issue of city names ambiguous, where they are shared by multiple cities or may be a generic term?
- Should the city name definition be expanded to include abbreviations?

Government interests

- Is the consideration of government interests, as currently written in the guidebook, contrary to the GNSO recommendation?
- Are the interests of national, local and municipal governments adequately protected through the objection process?

Analysis

Process

Can the presentation of geographic names in the guidebook be improved to distinguish between the differing elements of country and territory names, sub-national names, and city names?

- Yes. The applicant guidebook will be amended to make it easier to identify the different elements of geographic names.

Will there be a process to deal with possible string collisions for strings sought under the IDN ccTLD Fast-Track and new gTLD processes?

- An application for a geographic place name, as described in the applicant guidebook, requires the evidence of support, or non-objection from the relevant government or public authority. There can only be collisions in circumstances where this documentation is provided for applications for a string in both the gTLD and ccTLD fast track process. Secondly, if the evaluation of an application for either an IDN ccTLD or gTLD string is complete before a contending application is lodged, the successfully evaluated TLD will not be removed from the root zone.

What is the objection procedure, i.e. would an objection regarding a geographic name be considered under 'morality and public order'?

- The GNSO policy recommendations intend that government interests in geographic names be protected under community based interests. These protections are described in the guidebook and in answers to other questions below.

How does an applicant know what level of government support is required for a geographic name.

- Discussions among GAC members revealed that there is no one standard that applies across the countries of the world about which level of government support will be required for country, territory, place or city names. It will be the applicant's responsibility to identify which level of government support is required.

Should the decisions of the Geographic Names Panel be posted and communicated to the relevant GAC and sub-national entity?

- The results of the evaluation will be publicly posted on ICANN's website at the conclusion of the Initial Evaluation and will also be available to applicants.

Country and territory names

Will allowing country and territory names in the new gTLD process create confusion between what is a ccTLD and a gTLD?

- The solution offered by the ccNSO to not allow country and territory names in the gTLD process until the outcome of the ccPDP, will mean that country or territory names in ASCII at the top level would not be available before August 2011. In considering the comments received on the issue of country and territory names in the gTLD space, the definition of meaningful representation will be expanded to include a representation of a country or territory name in any language to address the ccNSO's concern that "almost all non-Latin and Latin scripts can be entered as a gTLD without any restriction except that the country in question can object." This amendment, combined with the requirement that the relevant government or public authority provide support or non-objection for an application for a country or territory name, ensures that a government is aware of the application.

Further, to overcome concerns that governments have varying degrees of understanding of ICANN and TLDs, the requirements of the letter of support will be augmented. In addition to demonstrating an understanding of the string being requested and what it will be used for, the letter should also reflect that the string is being sought through the gTLD

process and the applicant is willing to accept the conditions under which the string will be available, i.e. sign a contract with ICANN, abide by consensus policies, pay fees etc.

ICANN has received considerable exposure through the World Summit for the Information Society process, and the more recent annual Internet Governance Forum events. This, combined with the work of the GAC, has resulted in governments having a better understanding of ICANN and the domain name system. Through the communication plan for the implementation of new gTLDs, communication will be targeted at governments to ensure that they are informed about the various elements of the program, and its potential application to governments.

Should the number of languages representing a county or territory name be expanded?

- During the meeting between the ccNSO and the GAC in Cairo, members of the ccNSO raised concerns that country names were not protected in all languages, and this has been reiterated in their comments as well as being raised by the UTC. The Guidebook will be changed to provide protection for country and territory names in all languages. Therefore the guidebook will now reflect that applications for any string that is a meaningful representation of a country or territory name listed in the ISO 3166-1 standard, including a representation of the country or territory name in any language, must be accompanied by documents of support or non-objection from the relevant government or public authority.

Sub-national names

Can there be a clear comprehensive list, for defining sub-national names, such as the “ISO 3166-2 Codes for the representation of names of countries and their subdivisions—Part 2: Country subdivision code” for defining sub-national names?

- In the Explanatory Memorandum for Geographic Names, “place names are considered those that represent a sub-national identifier such as counties, states, regions or provinces”. During discussions with the GAC on the issue of place names, the GAC suggested the ISO 3166-2 list as a possible reference list for identifying sub-national names. The City of New York, Law Department, recommended that the guidebook adopt an additional standard, the United Nations Code for Trade and Transport Locations <http://www.unece.org/cefact/locode/service/location.htm> This list is derived from the ISO 3166-1 and 3166-2 codes, however, as the purpose of the list is to identify trade and transport locations, it goes beyond the scope of geographic names as outlined in the draft applicant guidebook and may lead to confusion among applicants.

It is difficult to develop a list that covers all sub-national names world wide; however, the 3166-2 list is considered the most applicable for the introduction of new gTLDs. The list is intended to be used in conjunction with the ISO 3166-1 list, which was selected by Jon Postel as the basis for ccTLDs, in the knowledge that ISO has a procedure for determining which entities should be and should not be on that list. The ISO 3166-2 list provides an independent and dynamic list of names which is consistent with previous ICANN processes. This list, combined with the applicant’s responsibility to identify if a string represents a place name, and that any application may be subject to objections under GNSO Recommendation 20, under which applications may be rejected based on objections showing substantial opposition from the targeted community, is felt to provide reasonable protection for local and national governments.

Will the meaningful representation test be applied to sub-national names?

- It is not the intention to apply the meaningful representation test regarding sub-national names. Similar to city names, the volume of names will make with this difficult to police. It is considered that the objection process provides an appropriate avenue for recourse.

How will common abbreviations for sub-national names be handled?

- It is difficult to define what is meant by a common abbreviation, and therefore there will be no restrictions imposed on such names as part of the process. It is considered that the objection process provides an appropriate avenue for recourse.

How will abbreviations be considered in the context of geographic names?

- Currently, the definition of meaningful representation of a country or territory name includes a short-form designation of the name of the Territory. This could include three letter country codes such as .AUS for Australia and .AUT for Austria. With regard to sub-national names, and city names, the meaningful representation definition does not apply. However, as any string may be the subject of objection, it is the responsibility of the applicant to research possible meanings for a string, and acquire any support they believe necessary to successfully acquire the string, or at least minimize the likelihood of objection. This is consistent with the approach for community applications.

City names

Should the city name definition be expanded to include abbreviations? Is the issue of city names ambiguous?

- As stated in the Explanatory Memorandum on Geographic Name Applications, city names offer challenges because a city name can be a generic term, and in many cases no city name is unique. Given the infinite number of city names world wide, and duplication, identifying and determining if a name is an abbreviation of a city name would be very difficult. Evidence of support or non-objection will be required for capital cities of the countries or territories on the ISO 3166-1 list, and for city names where an applicant declares that it intends to use the TLD for purposes associated with a city name. It is considered that the objection process provides an appropriate avenue of recourse, for strings that may be considered an abbreviation of a city name.

Government interests

Is the consideration of government interests, as currently written in the guidebook, contrary to the GNSO recommendation? Are the interests of national, local and municipal governments adequately protected through the objection process?

- The GNSO recommendations were intended to provide for protection of government interests in geographical and other community labels through recommendation 20 of the Final Report on New gTLDs: "An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted." The implementation model of this recommendation has provided for protection of these interests through the objection and dispute resolution policy. The GAC raised concerns that this mechanism was inadequate, as many governments were not aware of the ICANN process and would therefore be unlikely to object in a timely manner, if at all. In order to achieve the objective of the GNSO to protect against abuse of community labels, and anticipate criticism of governments and possible objections to geographic names, the evaluation process was designed to require evidence of community support (i.e., government approval or non-objection) at the time of application. The amended process as outlined in the Draft Applicant Guidebook requires the application for certain

geographic labels to provide evidence of support or non-objection from the relevant government or public authority. This demonstration of community support, that may be required during the dispute resolution process is now simply required at the application stage.

Proposed Position (for this version of the Guidebook)

The applicant guidebook is reorganized to make it easier to identify the different elements of geographic names.

The draft applicant guidebook is to be amended to reflect that a country or territory name in any language will require evidence of support, or non-objection from the relevant government or public authority:

“applications for any string that is a meaningful representation of a country or territory name listed in the ISO 3166-1 standard, including a representation of the country or territory name in any language.”

The definition of meaningful representation is also amended to take out the reference to official languages:

A string is meaningful if, in any language, it is a) the name of the Territory; or b) a part of the name of the Territory that denotes the Territory in any language; or c) a short-form designation of the name of the Territory.

The requirements of the letter of support will be augmented. In addition to demonstrating an understanding of the string being requested and what it will be used for, the letter should also reflect that the string is being sought through the gTLD process and the applicant is willing to accept the conditions under which the string will be available, i.e. sign a contract with ICANN, abide by consensus policies, pay fees etc.

It is intended to offer to hold consultations with the GAC, ccNSO and others to discuss these issues.

VIII. APPLICANT EVALUATION

Summary of Key Points

- Several specific questions are answered on various aspects of the evaluation.
- The role of public comment in the process is discussed and there is updated information in the revised Guidebook describing this.
- ICANN continues independent evaluations of the scoring methodology. There are updates in the revised Guidebook to improve objectivity and repeatability; there will be more changes.

Summary of Input

This section organizes the summary of responses about Applicant Evaluation into the following categories: *Applicant Information, Scoring, Miscellaneous, and Community-Based*.

Applicant Information

Submission of Updated Information. Applicants should be permitted to supplement incomplete sections. *MarkMonitor* (Module 1, 15 Dec. 2008). *Bank of America* (15 Dec. 2008) (there should be opportunities to amend substantially complete applications).

Subsidiaries/Affiliates. Under Applicant Review, existing entities should be permitted to set up newly formed subsidiaries or affiliates to serve as the registry. *MarkMonitor* (Module 1, 15 Dec. 2008).

Financial Statements Criteria. The requirement for “audited” financial statements in Section 1.2.3 should be reworded to allow applicants to submit the latest “available” audited financials, due to the delays typically associated with obtaining audited statements, and to submit unaudited financials for the latest period. *MarkMonitor* (Module 1, 15 Dec. 2008). ICANN should clarify how newly-formed applicant entities may comply with the financial statement requirements. *INTA* (15 Dec. 2008); *Microsoft* at 9 (Guidebook comments, 15 Dec. 2008).

Good Standing. The required documents under 1.2.3 for “proof of good standing” are insufficient...Given ICANN's history in certifying registrars that later proved themselves to be shams, higher standards are demanded in order to protect the public. Financial statements of newly formed special-purpose companies will be insufficient to detect iffy applications. *G. Kirikos* (24 Nov. 2008).

There should be a clearer definition of the term “good standing” under 1.2.3. ICANN should explicitly describe how it would vet the government authority, notary public or legal practitioner attesting to the good standing to assure its legitimacy and to assure its veracity. ICANN should identify the types of documents it would accept to validate an applicant’s good standing. *BITS* (15 Dec. 2008).

Public Comments. If an evaluator uses public comment as part of the evaluation under 1.1.3 then the evaluator must validate the accuracy of the submitted comment. *Demand Media* at 2 (Module 1, 17 Dec. 2008). ICANN should make available on its website all public comments submitted, provide Evaluators with all public comments, not just summaries generated by ICANN; and include in the next draft Guidebook examples of the type of matters for which the

public comment process is intended. *Microsoft* (Guidebook comments, 15 Dec. 2008). *INTA* (15 Dec. 2008). Clarifications needed regarding role of public comments. *BITS* at 4-5 (15 Dec. 2008). *MarkMonitor* (15 Dec. 2008). *Bank of America* at 5-6 (15 Dec. 2008) (oppositions should be considered only if made by a person with standing; should not subject applications to informal blogging, informal comments). *SIIA* (15 Dec. 2008). *CADNA* (15 Dec. 2008). *IPC* (15 Dec. 2008). *ANA* (15 Dec. 2008)

Scoring

“Rights” and Other Clarifications Needed. The questions and criteria on legal rights characterize “rights” broadly. There should be more clarification on the type of rights that must be protected at start-up to score “1”. Question 50 in Evaluation refers to an “attached table of numbers” but the table is omitted. Also, there are discrepancies in scoring in the Attachment of Module 2. *Demand Media* (Module 2, 17 Dec. 2008). Were the criteria and scoring sections on Section 3, Scoring, page A-25, Questions 57 & 58 intentionally left blank? If not, what are the criteria and what are the scoring guidelines? *C. Gomes* (Module 2, 13 Dec. 2008).

Abusive Registrations. Increase the criteria for earning a minimum acceptable score on proposed policies to minimize abusive registrations. *NetChoice* (Module 2, 15 Dec. 2008).

Protection Mechanisms. The scoring system for question 31, page A-11 of Attachment to Module 2 should not turn on the detail provided, but on the characteristics of the mechanisms themselves. Applicants should be evaluated based on criteria such as the likely effectiveness of the mechanisms in preventing abusive registrations; the costs imposed on right holders who make use of such mechanisms, including the costs of assembling and documenting claims; and whether applicants are cooperating with other applicants in implementing common mechanisms, or at least common features, such as a single repository of claims information to which right holders can refer in lodging claims with multiple new gTLDs. *eBay*.

Expand Scale. Scoring ICANN should use a larger scale (e.g. a 10-point scale) for scoring evaluation criteria, as the current 0-1-2 scale does not provide enough latitude. *Microsoft* at 9 (Guidebook comments, 15 Dec. 2008). *INTA* (15 Dec. 2008) (use 0-5 or 0-10 at a minimum).

Communication Limitation. (1) The meaning of “one communication round per application” should be clarified. (2) The interface may increase the likelihood of questions, “so it will put a higher burden on the evaluation teams to precisely word their questions and provide as much guidance as possible with regard to the type information needed.” *C. Gomes* (Module 2, 13 Dec. 2008). Evaluators should not be subject to a limit of one request for further information from an applicant. *INTA* (15 Dec. 2008).

Extended Evaluation Panel Choice. If an applicant fails the initial evaluation and applies for extended evaluation, it should have the choice of engaging the same panel that conducted the initial evaluation or a different panel. This affords the applicant a fair evaluation process, if the applicant thinks that the panel is prejudiced. *J. Seng* (8 Dec. 2008).

Proposed Rights Protection Mechanisms-Transparency. ICANN should provide for greater transparency and stakeholder inquiry of an applicant’s proposed mechanism to minimize abusive registrations and other activities that affect the legal rights of others. Stakeholders should be invited to query the applicant about specifics and contingencies regarding their plan for rights protection. ICANN must require applicants to provide substantive responses to these

queries, and to publish questions and responses for public review. *NetChoice* (Module 2, 15 Dec. 2008).

Diverse Business Models; Small Community Participation. When considering an application for a new TLD, purely objective criteria such as a requirement for a certain amount of cash on hand will not provide for the flexibility to consider different business models. ICANN should make the proper adjustments to the RFP in order to actually allow diverse business models and small, but valuable and representative communities, to participate. The process should allow small communities to not only participate in the process with an application, but also have a well balanced and sustainable business without excessive or unjustified burdens. *NIC Mexico* (9 Dec. 2008).

Registry Failure: Continuity; Documentary Evidence. Under 1.2.3.5, the “documentary evidence of ability to fund ongoing basic registry operations for then-existing registrants for a period of three to five years in the event of registry failure” is obviously insufficient, as the number of “then-existing registrants” is ZERO! Reference needs to be made to the projected number of registrants within the applications, and furthermore funds need to be held in escrow by a recognized third party, or some other form of security bond should be in place. Under 1.2.3.5 the bond or escrow of funds to “fund ongoing basic registry operations” is far too small a bond given the negative externalities that can be created by a malevolent Registry Operator. The bond or level of insurance needs to be much higher, perhaps in the order of USD \$10 million. The “documentation of outside funding commitments” also needs to be strengthened beyond simply “documentation” -- security bonds or insurance are stronger than simply words that can be altered. ICANN has no real means to assess the creditworthiness of these outside sources of funding, nor means of enforcing their financial commitments. Given ICANN's poor history in policing Registry Operators (e.g. VeriSign's SiteFinder) and registrars (too many to list!), it's clear that these extra safeguards from insurance companies are essential. *G. Kirikos* (24 Nov. 2008).

ICANN should clarify how an applicant can provide documentary evidence of its ability to fund ongoing registry operations “for then existing registrants” at a time when many applicants won't yet have any registrants. *Microsoft* (Guidebook Comments, 15 Dec. 2008). *Demand Media* (Module 1, 17 Dec. 2008) (1.2.3 (5) should be clarified regarding the funding of on-going operations in the event of registry failure). Registry failure provisions including a deposit to cover transition costs should be included. *INTA* at 4 (15 Dec. 2008). Requirement of having 3-5 years of registry's operational costs is onerous; should consider alternatives such as a pooled registry continuity plan or arrangements between registries to take over in the event of a registry's failure. *Van Couvering* (15 Dec. 2008).

Miscellaneous

RFCs 3730 and 3734 appear to have been updated by 4930-4934. *Demand Media* (Module 2, 17 Dec. 2008).

Confidentiality. ICANN should clarify which portions of the application are to be confidential, and should further specify its methods for maintaining the confidentiality of this information. *Rodenbaugh* at 4 (16 Dec. 2008). *R. Fassett* (5 Dec. 2008) (financial confidentiality concerns). *G. Kirikos* (24 Nov. 2008) (financial questions should not be kept confidential; criminal and background checks should be authorized). ICANN should clarify exactly what information will be placed in public posting; because a great deal of sensitive information will be collected in the application, ICANN should only list the party applying and the gTLD being applied for. Postings

should not be made public until the end of the application window. *DHK* (15 Dec. 2008). *C. Gomes* (18 Nov. 2008) (concern expressed about no assurances by ICANN on keeping data confidential).

DNSSEC. ICANN should require the use of DNSSEC for any proposed new gTLD that is devoted to high trust applications (including but not limited to financial services). This should be a mandatory feature to protect consumers in such environments. *eBay* (15 Dec. 2008). *BITS* at 5 (15 Dec. 2008). To improve security, DNSSEC should be considered. The contract should require the new domain to adopt best available security measures such as DNSSEC, a robust Whois and the current Add Grace Period Limits Policy. *Bank of America* (15 Dec. 2008).

ICANN needs to provide more information about how it will select and monitor outside service providers who will be serving as evaluators. *BITS* (15 Dec. 2008) *INTA* (15 Dec. 2008) (the Guidebook should be amended to provide information about the selection process and criteria for evaluators); *G. Kirikos* (24 Nov. 2008). *SIFMA* (12 Dec. 2008). *IPC* (15 Dec. 2008).

Conflicts Policy. Module 2 should include a conflicts of interest policy for evaluators/examiners. ICANN should publish the names of the examiners and give applicants an opportunity to object. The language should also be narrowed to allow certain contacts with ICANN which are unrelated to the application. *Microsoft* (Guidebook comments, 15 Dec. 2008). The conflicts policy should also ensure that no party involved with consideration of an application has a conflict regarding prior or current work with the applicant or a party that might be adverse to the application. *INTA* (15 Dec. 2008).

Financial Crimes, Fraud, Breach of Fiduciary Duty Questions. The application form should contain questions intended to ascertain if the applicant or any of its officers, directors or managers has been convicted of financial related crimes, fraud, breach of fiduciary duty, or has been disciplined by any government for such offenses. *Microsoft* (Guidebook comments, 15 Dec. 2008). *G. Kirikos* (24 Nov. 2008) (financial requirements must create big barriers to malevolent entities securing a gTLD). The background of applicants, their principals, and their senior officers should be subject to review, perhaps through the use of a form similar to the Sponsoring Organization's Fitness Disclosure. *BITS*.

Suggestions on Scoring and Evaluation Criteria. The Guidebook should specify (and rate) at least the following: General registration policies, and special ones, if any (types of registrations or registrants, if distinction is made); Specific mechanisms for the TLD launch (sunrise, special allocation mechanisms; land rush, etc); Compliance/enforcement procedures, if any, and dispute resolution procedures; Special services (not necessarily in the New Registry Services meaning) offered and/or planned. *A. Abril i Abril* (Module 2, 15 Dec. 2008).

Community-Based

Closed Branded gTLD. Based on the criteria for "community-based gTLD." A "branded" gTLD for which the brand owner is the applicant, that brand owner will operate for its own benefit, and for which the brand owner will restrict the population (which could range from merely the applicant itself to its divisions and personnel to its manufacturing and distribution channels) would be considered a "community-based gTLD." If ICANN does not intend to allow the "community-based gTLD" designation to apply to corporate, branded gTLDs, it should so state and provide a detailed explanation as to why not. In some instances, such as branded gTLD, it is conceivable that the applicant may be the only established institution representing the community and the requirements for written endorsement of the application should reflect that

possibility. *Microsoft* (Guidebook comments, 15 Dec. 2008). Operators of closed, branded gTLDs should have the flexibility to decide to stop operating the gTLD if they so choose. In such circumstance, it would be inappropriate for a third party with no rights in the brand to operate the gTLD. *Microsoft* (Guidebook comments, 15 Dec. 2008)

Financial Services gTLDs. The “written endorsement” requirement for community-based gTLDs is insufficient, because ICANN cannot consider one institution representative enough of a community. The threshold for a community-based gTLD should be significantly higher. A select group of industry associations (or regulatory agencies) should act as a consortium designated as the “community” to make decisions regarding the approval of any gTLDs whose names suggest they offer financial services or to endorse any applicants of such gTLDs. *BITS* (15 Dec. 2008). New gTLDs could create new rounds of financial fraud and increased costs to financial sector at a time of economic distress. There should be a separate and distinct application process for financial sector gTLDs: (1) top-down approach to ensure that no unsponsored gTLDs are issued and if issued that such gTLDs are managed within an industry and regulatory framework, with no “open” applications and explicit financial industry and regulatory endorsement; (2) subject financial sector gTLDs to community-established governance rules, including laws and regulations established by financial sector regulators. Applicants must show their ability to comply; (3) the objection process for financial sector gTLDs should allow objection on grounds of insufficient governance and include a process for financial regulatory objection; (4) allow financial gTLD ownership to be revocable or transferable at any time in future when the represented community or regulatory body determines and shows that the sponsored gTLD has not satisfied its governance requirements. *FDIC* (15 Dec. 2008). Financial sector does not yet have clear consensus on having a financial services sector gTLD. Fundamental concerns are raised regarding how to ensure only legitimate entities would be granted a financial sector gTLD. ICANN should have application controls and a “community” consortium approach for financial gTLDs. *ABA* (15 Dec. 2008). *Bank of America* (15 Dec. 2008) (further analysis and consensus needed before having financial sector gTLDs)

ISSUES, ANALYSIS AND PROPOSED POSITIONS

Applicant Information

Issues

Submission of Updated Information: Should applicant be permitted to supplement incomplete sections?

Subsidiaries/Affiliates. Should applicants be permitted to set up newly formed subsidiaries or affiliates to serve as the registry?

Analysis

Submission of Updated Information: ICANN recognizes that situations change and applicants may need to supplement sections of their application throughout the process, however, ICANN also needs to protect against the possibility of applicants changing their applications for competitive advantage. Material changes in the application information must be reported immediately. A material change after the evaluation would render that evaluation inaccurate.

Therefore, changes to applications are generally not permitted after the evaluation has started, i.e., at the close of the application period.

Subsidiaries/Affiliates: It is not an objective of ICANN to prohibit the formation of new subsidiaries or affiliates by an applicant to serve as the Registry Operator. However, the formation of new entities to resolve string contention, say by agreement between contending parties, is a material change to the application information that must be reported.

Proposed Position (for this version of the Guidebook)

Submission of Updated Information: Applicants will be able to revise and supplement their application until the time when the application period is closed and submissions must be final. After this time, the Guidebook includes a requirement that an applicant notify ICANN in the event of any material changes to the application submitted.

Subsidiaries/Affiliates: It is acceptable for existing entities to set up newly formed subsidiaries or affiliates to serve as the registry. If new entities are formed after the evaluation performed (in order to resolve contention) the evaluation will be performed again, possibly incurring additional fees and possibly in the next round.

Financial Criteria

Issues

Should 1.2.3 be reworded to allow the submission of the latest “available” audited financial statements?

Can ICANN clarify how newly formed applicants should comply with the financial statement requirement?

Analysis

ICANN’s requirements are suitably met in allowing applicants to submit the latest available audited financial statements, provided they are within a date of 12 months of the application and accompanied by interim statements. ICANN intends to update the Applicant Guidebook in line with the comments received to permit applicants to submit the latest available audited financial statements.

Newly formed entities should be permitted to submit pro forma financial statements with supporting data.

Proposed Position (for this version of the Guidebook)

Section 1.2.3 will be revised to allow applicants to submit the latest “available” audited financials and to submit unaudited financials for the latest interim period.

For newly formed applicants, a pro forma balance sheet will be acceptable.

Evidence of Good Standing

Issues

Are the documentation requirements for proving “good standing” under 1.2.3 sufficient to detect sham applications?

Will ICANN clarify: the definition of “good standing,” the validity requirements for governments providing assurances of good standing, and the types of documentation necessary to establish good standing?

Analysis & Proposed Position (for this version of the Guidebook)

The good standing requirement is to independently demonstrate existence and organization of the entity. ICANN must separately evaluate the completeness and accuracy of information submitted in the application in order to approve an application and the possible entry into a registry agreement for a TLD. ICANN is continuing to investigate common practices in the various regions in order to provide further guidance to applicants on this requirement.

The requirement should be flexible to accommodate different systems as well as newly formed and well-established companies. A good standing certificate or the equivalent under local law will be acceptable to reflect the existence of the entity. ICANN recognizes that jurisdictions will vary in custom and the application requirement is intended to be flexible. ICANN will accept submissions with supporting documents or information as to the relevance under local law.

Use of Public Comment

Issue

Should evaluators validate the accuracy of a public comment?

Analysis and Proposed Position (for this version of the Guidebook)

Evaluators will be provided with public comment for use and reference in their evaluation. As part of the procedures for evaluators, they will be asked to apply appropriate judgment and verify comments if necessary.

The Guidebook and other documentation to the evaluators will reflect the ability to perform due diligence in regard to the public comments as required by the circumstances of that particular evaluation.

Scoring

Issues

Can ICANN clarify the type of rights that must be protected at start-up to score “1”?

Can ICANN attach the table of numbers omitted from Question 50 in Evaluation?

Will ICANN resolve the discrepancies in scoring in the Attachment of Module 2?

What are the criteria and what are the scoring guidelines for Section 3, Scoring, page A-25, Questions 57 & 58?

Will ICANN increase the criteria for earning a minimum acceptable score on proposed policies?

Will the scoring system for question 31, page A-11 of Attachment to Module 2 should turn on the amount of detail provided, or on the characteristics of the mechanisms themselves?

Will ICANN use a larger scale (e.g. a 10-point scale) for scoring evaluation criteria?

Analysis and Proposed Position (for this version of the Guidebook)

As part of the updates to the Applicant Guidebook, ICANN is revising the Attachment to Module 2. All questions require a passing score of at least "1". A series of additional consultations and discussion is being undertaken in order to determine what specific rights protection mechanisms might be included as a requirement in the evaluation. The table of numbers omitted from Question 50 can be included. Questions 57 and 58 are not scored individually but the answers to those questions will be used in combination with answers to other questions in order to score the criteria. For example, the soundness of the financial plan will be evaluated based upon answers to questions about expected revenue, the uncertainty in the projections and how to address major risks in the projections. This methodology is described in the preamble to the evaluation. There will be changes in the formatting of the questions and criteria to make this clear.

ICANN does not intend to adopt a larger scale for scoring evaluation criteria, but is reviewing areas where scoring can be improved to remove subjectivity and provide greater granularity for the applicants. Revisions to the scoring criteria will be posted in the revised version of the Guidebook and ICANN is undertaking independent evaluations of the scoring methodology to verify the scoring model or change it.

ICANN is reviewing the Applicant Evaluation Criteria and Scoring with the suggestions made by Mark Monitor, Chuck Gomes, CADNA, Microsoft, among others, and will be testing modifications to the evaluation criteria and scoring.

Evaluators

Issues

Will ICANN clarify the meaning of "one communication round per application"?

Will the evaluation team word their questions precisely to provide as much guidance as possible with regard to the type information needed?

Will an applicant be allowed the choice of engaging the same panel that conducted the initial evaluation or a different panel after it fails the initial evaluation and applies for extended evaluation?

Will ICANN allow stakeholders to query the applicants about specifics and contingencies regarding their plan for rights protection?

Will ICANN provide flexible criteria when considering an application for a new TLD?

Analysis and Proposed Position (for this version of the Guidebook)

The revised Guidebook gives some more detail on the exchanges between applicants and evaluators. Essentially, evaluators will ask one series of questions in an evaluation round if the information provided is not sufficiently clear to pass the application. Through a standard channel, evaluators will ask applicants specific questions to obtain the necessary information.

Stakeholders can comment through the public comment process and those comments will be made available to the evaluators. To have stakeholders actively involved in the evaluation through questioning would tend to slow the process and increase costs and decrease objectivity in a way that is unpredictable to applicants.

Whether or not the same panel hears extended evaluation is not definitely determined. Final decisions will be based upon the proposals and rules received from evaluation panel providers. Additional public comment is welcome on this issue.

The criteria are intended to be flexible in order to accommodate different business models as is described in the preamble to the evaluation criteria and scoring section of the Guidebook.

Ongoing Registry Operations

Issues

Can 1.2.3 (5) be clarified as regards the funding of on-going operations in the event of registry failure?

Will 1.2.3.5, be edited to require further information, such as the projected number of registrants, and to require funds to be held in escrow by a recognized third party, or some other form of security bond?

Will the bond or level of insurance be increased, perhaps to as much as USD \$10 million?

Will ICANN strengthen the “documentation of outside funding commitments” requirement?

Can ICANN clarify how an applicant provides documentary evidence of its ability to fund ongoing registry operations “for then existing registrants” at a time when many applicants won’t yet have any registrants?

Analysis and Proposed Position (for this version of the Guidebook)

ICANN has made clarification to several areas of the questions and scoring criteria. Also, independent evaluations of the scoring criteria are being performed with an eye toward making additional changes that will improve objectivity.

As suggested by Demand Media, Microsoft, INTA and others, ICANN will continue to clarify the evaluation questions on registry failure and continuity, provide additional information on the bond or level of insurance, and on how an applicant provides documentary evidence of its ability to fund ongoing registry operations.

Miscellaneous

Issues

RFCs 3730 and 3734 appear to have been updated by 4930-4934.

Will ICANN reevaluate the “written endorsement” requirement for community-based gTLDs?

Will ICANN provide guidelines for determining which portions of the application are to be confidential, and what methods are used to maintain the confidentiality of this information?

Should DNSSEC be required for any proposed new gTLD that is devoted to high trust applications?

Will ICANN revise the application to require background checks and/or disclosures of past fraud by an applicant, its officers, directors and managers?

Will ICANN provide more information about how it will select and monitor outside service providers who will be serving as evaluators?

Should ICANN develop a conflicts of interest policy for evaluators and allow applicants to view the names of and object to evaluators based on such conflicts?

Will ICANN edit the guidebook to provide more clarity on the issues of general and special registration policies, specific mechanisms for the TLD launch, Compliance/enforcement procedures, dispute resolution procedures; and special services offered and/or planned?

Analysis

These are all good questions and comments that ICANN takes very seriously. ICANN will be confirming updates to RFCs and making the appropriate changes. ICANN will be offering some additional clarity with regard to confidentiality and the application process in general. ICANN believes in encouraging Registry Operators to use the most advanced technologies available to ensure the security of its information as it is fundamental to the security of the Internet. ICANN must also, however, balance these requirements with the constraints applicable to small Registry Operators who do not have and may not expect to have a large user base to justify the cost of certain measures. For these smaller Registry Operators, the requirement to implement these state of the art security measures, DNSSEC for example, could be too financially burdensome as a mandatory requirement. This requirement may change as DNSSEC becomes widely adopted.

Proposed Position (for this version of the Guidebook)

RFCs 3730 through 3734 have been replaced with the most current RFCs 4930-4934 in the next version of the Guidebook.

ICANN will clarify which sections are designated confidential.

ICANN will continue to encourage Registry Operators to implement DNSSEC but for the time being such implementation will remain optional.

Background checks for applicants are a good suggestion, and there are rules for how and when this might be done in each jurisdiction. The evaluators will be provided with a variety of tools to use to verify information in their evaluations.

ICANN will publish information on the selection of evaluators as well as a RFP for such evaluators. The process for selecting evaluators will be open and transparent.

ICANN intends to add granularity in the evaluation questions and scoring, in line with comments and inputs received.

Community-Based

Issues

Has ICANN decided not to allow the “community based” designation to apply to corporate brand owners? Please explain.

Will ICANN consider allowing a [“closed”] branded TLD to cease operations of its TLD without requiring it to turn the operations over to a third party?

Will ICANN consider increasing the number of representative institutions necessary to satisfy the “written endorsement” requirement?

Analysis

Summary of key points:

The concerns/questions regarding an applicant's freedom to select the type of application and the possibility of multiple representative institutions for a community are already covered in the current approach and no changes of the Applicant Guidebook are foreseen in these respects.

Community based/Brand Owners: It is wholly up to the applicant to select the type of application to file. ICANN will not verify nor change the type as such. Whether the application, if declared as community-based, will prevail in Comparative Evaluation for a contention situation is dependent on how well the application scores against the criteria, as detailed in the Applicant Guidebook. No change of the applicant's freedom to select the type of application to file is foreseen for the next version of the Applicant Guidebook.

Multiple representative institutions: If the community has a structure with multiple institutions that are representative of different parts of the community, it is wholly appropriate to take endorsement, or lack thereof, from all these institutions into account. Such endorsement is assessed only in a case when the application is in a contention situation that is resolved by Comparative Evaluation. As further detailed in Module 4 and the explanatory memorandum on string contention handling, the evaluation of the Endorsement criterion in such a case is already foreseen to take into account both endorsement and opposition from constituent parts of the

community and can thus address a situation where there are multiple representative institutions. No change of that aspect is foreseen for the next version of the Applicant Guidebook.

Proposed Position (for this version of the Guidebook)

Community based/Brand Owners: It is the applicant's choice to designate the application as community-based or open. There is no prohibition currently and none is envisaged for the next version of the Applicant Guidebook. The same criteria will be applied to all applicants in cases where there is a community-based objection and in cases of comparative evaluation.

Multiple representative institutions: The endorsement criterion applies to a case when a contention situation is resolved by Comparative Evaluation, where the endorsement will be taken into account as appropriate for the community addressed.

IX. TRADEMARK PROTECTION

Summary of Key Points

- Comments state that the introduction of new TLDs will increase burdens on rights holders by multiplying opportunities for malicious behavior at top and second levels of the DNS.
- ICANN will continue consultations over the next few months to promote a universal understanding of issues across the rights-holder community and derive potential solutions to possible deleterious effects of the introduction of new TLDs.

Summary of Input

A substantial number of public comments asserted that the new gTLD program will create an array of trademark law protection concerns which must be addressed through further trademark protection measures. This section organizes the summary of responses about Trademark Protection into the following categories: *In General, Process and Procedure/Defensive Registrations; Objections; and Rights Protection Mechanisms.*

In General

Costs and Burdens on Trademark Rights Holders. Numerous comments raised concerns that the new gTLD program would potentially impose new burdens and costs on rights holders in well-known brands and trademarks. For example, the International Olympic Committee (IOC) asserted that ICANN's guidelines should explicitly acknowledge the IOC's preeminent IP rights in the Olympic trademarks and raised concerns about: what preventative measures can ICANN take to block or screen out unauthorized applicants for Olympic trademarks; what steps can be taken to ensure that the IOC does not have to expend funds chasing down unauthorized uses of Olympic trademarks? *IOC* (5 Dec. 2008). Others said that allowing registries to sell domains of famous trademarks and keep the profits from the sale is a basic flaw in ICANN policies, which undermines ICANN credibility and the entire domain system. *WMI* (13 Dec. 2008).

Monopoly Concerns. Commenters also raised concerns about the potential for the new gTLD program to destroy the DNS's level playing field by leading to the creation of single entity super brands and monopolistic generic TLDs and urged that more consideration is needed about how to guard against the creation of monopoly positions. E.g., *P. Tattersfield* (15 Dec. 2008)(generic gTLDs risk creation of monopoly positions that would not be permitted under equivalent trademark law; while on the surface a competitive, market-driven approach for generic gTLDs may be well-supported, in practice there may be significant concern about the specific entities that actually run them—e.g., “.search” run by run by Afilias or VeriSign as opposed to “.search” run by Microsoft); *ANA* at 4 (15 Dec. 2008) (new generic TLD policies and standing must be carefully reviewed). *NCUC* at 4 (15 Dec. 2008) (the proposal perpetuates a presumption that trademarks and domain names are identical rights and raises significant anticompetitive issues regarding generic names). Commenters also warned that the new program is likely to confuse rather than benefit consumers. E.g., *U.S. COC* at 3 (15 Dec. 2008); *Arab Team* at 3 (15 Dec. 2008) (users will lose faith in a system with many variations of TLDs existing for a single label). Particular industry segments are concerned about the rights to certain generic TLDs and urged that no action be taken on them pending further work and consideration about issues raised. For example, the ABA requests that no “.bank” gTLD be granted until such time as the ABA has secured a sponsor or community base. *ABA* at 1-4 (15 Dec. 2008. See also *BITS* at 2-3, 5 (15 Dec. 2008); *Bank of America* at 8 (15 Dec. 2008).

Single Enterprise/Corporate TLDs. A number of commenters said that further work and consideration is required regarding the issue of single enterprise or corporate TLDs.

For example, eBay stated that the draft guidebook may need adjustment to accommodate the possibility to new TLDs operated by individual corporations for their own use, whether strictly internal or consumer-facing. It said ICANN should clarify whether such applications would be labeled as “open” or as “community,” and urged that in appropriate circumstances a registry should be allowed to enter into an exclusive arrangement with a registrar to handle all registrations in a gTLD. *eBay* at 6 (15 Dec. 2008).

Microsoft asserted that if ICANN does not intend to allow the community based gTLD designation to apply to corporate, branded gTLDs, than ICANN should explain a rationale for not doing so. In some cases the applicant may be the only established institution representing the community and the written endorsement requirement should reflect that possibility. Operators of closed, branded gTLDs should have the flexibility to decide to shutter the gTLD; and set out that it would be inappropriate for a third party with no rights in the brand to operate the gTLD. *Microsoft* at 9-10 (Guidebook comments, 15 Dec. 2008). *See also INTA* at 7-8 (15 Dec.2008).

GT at 3-4 (15 Dec. 2008) (ICANN should amend the Guidebook to allow a “DNS wildcarding” exception for single enterprise TLD registries).

Potential negative impacts on the perception of DNS root due to single registrant TLDs were also raised. *W. Staub-CORE* (15 Dec. 2008) (single registrant TLDs will create a rush of brands to the top level; there should not be brand-based TLDs where the only conceivable use is reserved to the brand holder itself). Some commenters wanted further practical guidance about single enterprise/corporate TLDs. *E.g.*, is the application open to public or just to those who will be the registrar business? Can any company apply directly to ICANN for a new gTLD for its own business purposes and not resell second level domains? For example, can Nike apply for a .nike gTLD and operate it exclusively for themselves? And technically, will the Internet users be able to just type <http://nike> (without any second level domain name) to go their website? *J. Lam, Email Support*.

Process and Procedure; Defensive Registrations

Numerous comments asserted that ICANN must improve the process and procedures for trademark protection if the new gTLD program is launched. For example one commenter highlighted these concerns with the new gTLD program: (1) little to no protection for global trademark holders; (2) excessive administrative costs for applicants; (3) virtual total control by ICANN with no accountability; (4) exposure to increased fraud and legal liabilities for trademark owners; and (5) easy access and control for unscrupulous entities to core Internet infrastructure components and ultimately threatens Internet commerce around the globe. *R. Raines-Chevron Corporation* (4 Dec. 2008).

Many commenters emphasized that the new gTLD program will impose on them the necessity of expending resources to submit multiple defensive registrations to protect their trademarks, an especially negative cost impact given the global economic recession. *Internet Commerce Coalition* at 2 (15 Dec. 2008) (the new TLD program will greatly increase costs of protecting trademarks and brands). *Citrix* at 1 (15 Dec. 2008) (threatens brand integrity and is too costly). *INTA* at 2 (15 Dec. 2008) (costs imposed on trademark owners and businesses by the new GTLD program raise special concern in current global economic downturn). *E. Brunner-*

Williams (the \$75,000 annual fee is too high for most trademark owners to consider defensive registrations of TLDs, but possible for a large trade union and its membership).

USTA asserted that there is no substantiated need for new gTLDs, and is also concerned with trademark abuse in new gTLDs, the obligation on brand owners to defend their trademarks in new gTLDs, and the costs associated with the new gTLD process. They are concerned that brand owners will be forced to defensively register to protect their brands. *USTA* (15 Dec. 2008). *USCIB* at 2 (16 Dec. 2008) (having low-cost ways to protect trademarks at the pre- and post-allocation stages is a key concern). *Hearst Corporation* (15 Dec. 2008) (no commercial value in expanding gTLDs, and will require costly defensive actions by trademark owners). See also *Time Warner* (15 Dec. 2008) (launch of a very large number of new gTLDs poses huge exploitation risks and costs to major trademark owners). *Lego* (4 Dec. 2008) (will impose major costs; outsourcing technical administration to an ISP would lessen burden for trademark owners). *GE van Staden* (12 Dec. 2008); *GE Bandon* (11 Dec. 2008). *Adobe* at 1 (12 Dec. 2008) *Bank of America* at 2 (15 Dec. 2008). *Melbourne IT* at 1 (15 Dec. 2008). *Cyveillance* (15 Dec. 2008).

Commenters cited the need for additional, cost-effective trademark protection measures. Illustrative examples include the following:

Block Registration for Brand Holders. Procedures should be implemented whereby (analogous to the community trademark or PCT patent in which several countries are designated with a single registration): (a) holders of existing domain names or trademarks could register any number of TLDs with a single registration, with a reduced cost to allow such a block registration to be financially feasible; (b) mechanisms to avoid abusive registrations and to verify actual use/right of alleged right holders; (c) an existing registration of all domain names/extensions would effectively block new domain names/extensions that are confusingly similar to existing domains by means of notification to the existing domain name holder allowing it a right of first refusal during a certain period (as opposed to a single sunrise period) - only if it does not act on this right would the domain name become freely available; (d) Joint action - in order to protect their rights, domain name and trademark holders could file a single action or single submission for dispute resolution involving any number of TLD extensions that infringe prior rights, instead of having to file separate actions in each case. *Busse* (13 Dec. 2008).

Many other commenters raised concerns about the increased need for defensive registrations, and some emphasized giving trademark owners the right to block or park TLDs containing their trademarks and to purchase such TLDs at a low cost with no obligation to implement infrastructure to support it. *See, e.g., Lego* (4 Dec. 2008); *Visa* (13 Dec. 2008) (brand owners should be able to register their trademark extension to protect it but should not have to actively use it or fulfill back-end requirements).

Top Level Reserved Names List. ICANN should create a list of top-level reserved names based on clearly defined, objective criteria and a clear process requiring all new string applicants to refer to and honor this list to minimize disputes between new registry applicants and global trademark holders. A dispute procedure should be provided with registry applicants to bear the cost. If the holder of the registered name prevails, the name should be removed to a "White List" of names that are unavailable for registration. ICANN should consider this list concept for country and geographic names. ICANN should revise dispute process at the second level to mandate a standard sunrise process and incorporate the global brand reserve list for second level domains also. *AT&T* at 4-5 (15 Dec. 2008). *See also G. Kirokos* (24 Nov. 2008); *NAM* (15 Dec. 2008) (supports "reserved list" to protect brand owners, just as ICANN created a list of

reserved ICANN-related names to protect its own interests); *NYC* at 6 (13 Dec. 2008) (governments or non-governmental organizations should have same rights as ICANN to reserve their own names). IANA-related infrastructure names should be protected at all levels; the reserved names list has omitted significant Internet infrastructure names. *ARIN* (8 Dec. 2008). ICANN should create a reserved list based on objective criteria for trademark owners at the registry level and applicant requests for a domain name on the reserved list should be resolved in an expedited administrative proceeding. *Internet Commerce Coalition* at 6 (15 Dec. 2008). See also *INTA* at 4-5 (15 Dec. 2008); *Pattishall* at 2 (15 Dec. 2008) (consider reserved names list and/or sunrise); *Nike* (2 Dec. 2008); *CADNA* at 4-5 (15 Dec. 2008) (reserved names list); *FairWinds* at 2-3 (15 Dec. 2008); *L. Cordell* (15 Dec. 2008); *USTA* at 7-8 (15 Dec. 2008); *Lovells* at 3-4 (15 Dec. 2008) (reserved names system); *ITT* at 4 (15 Dec. 2008); *Visa* (13 Dec. 2008); *News Corporation* (15 Dec. 2008) (the reserved names list should be broadened to include well known trademarks).

Some public comments cautioned against ICANN establishing protection mechanisms for trademark owners beyond existing law. *E.g.*, *ICA* at 2, 10-12 (16 Dec. 2008) (protections for rights holders should be limited to enforcement under existing law, not based on creation of broader rights by ICANN fiat; a reserve list of trademark names should not be created because it would provide rights protections beyond the geographic and relevant marketplace limitations of trademark law; new rights or procedures should not supplant the UDRP; all second level registrations should be required to be subject to the UDRP). See also, *C. Christopher* (16 Dec. 2008) (lack of support by trademark owners for TLD expansion is self serving, especially by those who benefit from error traffic monetization and from not having a neutral network.; allowing trademark owners to remove themselves from .com and obtaining their own .brand may reduce trademark problems—consumers will no longer look to .com for individual trademarks).

WHOIS Commitment. New gTLDs will, like nearly all of the new gTLDs previously launched under the auspices of ICANN, operate as thick Registries. Accordingly, they should commit to making a full set of Whois data publicly available on each registration in the new gTLDs, so that copyright and trademark owners (as well as law enforcement, consumers, and members of the public) will have ready access to this information. *IPC* at 6 (15 Dec. 2008).

For the post-launch stage, new gTLDs should take on the same WHOIS publication obligations as those in previous rounds: nearly all new gTLDs have adopted a “thick” registry model in which extensive registrant contact information is collected and retained at the registry level. TLD applicants must specify how they will ensure that data collected by registrars and stored in the registry is accurate and up to date, and this information should be publicly evaluated. *eBay* at 5 (15 Dec. 2008).

ICANN should evaluate applicants’ commitment to maintaining and enforcing WHOIS requirements, and should encourage applicants to maintain centralized or “thick” WHOIS databases and adopt additional WHOIS requirements. *CSC* at 4 (15 Dec. 2008). *Time Warner* at 6 -7 (15 Dec. 2008) (new gTLD registries should be required to maintain “thick” registries and make full registrant contact data publicly accessible; applicants must have policies to ensure accuracy of WHOIS data and how they will enforce this requirement with registrars and resellers, and there should be a tie-in to ICANN’s WDRPS to shut down domains where WHOIS reports go unanswered and uncured for more than 15 business days). *AT&T* at 5 (15 Dec. 2008) (require applicants to maintain thick WHOIS data, inquire about proxy registrations and access to actual registrant data, standardize procedures in any new registry agreement; this is key to law enforcement and consumer safeguards). *U.S. COC* at 8 (15 Dec. 2008). *NAM* (15

Dec. 2008) (applicants must commit to open and accurate WHOIS system; proxy and private registrations should be discouraged if not prohibited). *Internet Commerce Coalition* at 7 (15 Dec. 2008) (require applicants to commit to open and transparent WHOIS database). See also *Visa* (13 Dec. 2008); *COA* at 2, 9-10 (15 Dec. 2008); *FairWinds* at 4 (15 Dec. 2008). *MarkMonitor* at 3 (15 Dec. 2008); *Lovells* at 4 (15 Dec. 2008); *IPC* at 6 (15 Dec. 2008); *Grainger* at 4 (15 Dec. 2008). *AIPLA* at 2 (15 Dec. 2008) (ensure enforcement of WHOIS data accuracy and establish policy regarding proxy or private registrations). *MARQUES* at 5 (15 Dec. 2008) (registry operators should be required to offer a privacy service but must provide for service to third parties and rights owners that need access to the registrant; registrars should not be allowed to offer Whois privacy protection services in the new gTLDs). See also *ITT* at 2-3 (15 Dec. 2008); *Bank of America* at 9 (15 Dec. 2008); *IACC* at 3 (10 Dec. 2008) (ICANN still needs to resolve outstanding Whois issues with existing gTLDs and should not exponentially magnify those problems by launching new gTLDs).

IP Registry/Other Mechanisms. ICANN must do more to provide scalable, cost-effective and efficient rights protection mechanisms to minimize the ICANN-imposed burden of having to secure defensive registrations and combat cybersquatting in as many as 500 new gTLDs. Possible steps include: (1) creating a “reserved list” to which rights owners could apply to have their marks excluded from second level; (2) developing 2-4 standardized Rights Protection Mechanisms (RPMs) that applicants could select from; (3) facilitate creation of a central repository for legal rights documentation on which rights holders may rely in pre-launch RPMs and requiring successful applicants to utilize the repository in their RPMs; (4) creating an online, cross-TLD interface through which rights holders can designate gTLDs they wish to participate in and gTLD operators may access the requisite data for participating rights holders. ICANN must discourage new gTLD registries from using RPMs as revenue-generating opportunities. *Microsoft* at 3 (Guidebook comments, 15 Dec. 2008). See also *ANA* at 3 (15 Dec. 2008); *Ameriprise* at 2 (15 Dec. 2008). *U.S. COC* at 7 (15 Dec. 2008) (ICANN should create a low cost or no-cost IP registry applicable to gTLD applicants and second level domains; it would be used to screen out infringing applications so that trademark owners do not have to defensively register marks in each new gTLD). *MarkMonitor* (15 Dec. 2008) (trademark owners in registry could get notice of infringing applications allowing them to apply for the gTLD). *K. Abbot* (8 Dec. 2008) *MARQUES* at 4 (15 Dec. 2008) (supports IP registry database concept). See also *Melbourne IT* at 3 (15 Dec. 2008); *Visa* (13 Dec. 2008); *SIFMA* at 4 (12 Dec. 2008).

Rights Holder Verification Process. ICANN should consider an alternative to a central IP registry database to facilitate sunrise registrations in new TLDs designed through a consensus process according to the following principles: real-time verification from authoritative sources; time stamp on all verified data; operation by a trusted third party on behalf of global Internet community; all communities to have a voice in developing technical and policy considerations; ICANN should not duplicate a sub-set of non-authoritative trademark data when other more authoritative sources exist. *M. Palage* (15 Dec. 2008).

Second-level concerns. ICANN should (1) require all new TLDs to implement a standard and effective pre-launch rights protection mechanism that would allow trademark owners to block their marks from being registered at second-level; (2) prevent use of “premium pricing” schemes for second-level domain names corresponding to or related to a well known trademark; and (3) require new TLDs to limit fees, if any, in any pre-launch rights protection mechanism to actual cost recovery. *News Corporation* at 3 (16 Dec. 2008). *SIIA* at 5 (15 Dec. 2008) (pre-launch framework to prevent abusive registrations lacking in Guidebook—this issue cannot be left to whims of TLD applicants). Applicants should be evaluated based on criteria such as the likely effectiveness of mechanisms for preventing abusive second-level registrations; costs imposed

on rights holders who make use of such mechanisms, including claims; whether applicants are cooperating with other applicants in implementing common mechanisms or features. Premium pricing of second-level domains should be prohibited. *eBay* at 4-5 (15 Dec. 2008). *IPC* at 5-6 (15 Dec. 2008) (ICANN must do much more to ensure effectiveness of pre-launch mechanisms). *MARQUES* at 4 (15 Dec. 2008) (detailed pre-launch rights protection mechanisms required). ICANN should incent TLD applicants to adopt ways beyond the UDRP compliance to deal promptly and effectively with abusive registration of second-level domains. *eBay* at 6 (15 Dec. 2008). For second-level registrations ICANN should mandate a notice/takedown procedure if the domain name is used in an infringing manner to a name on the IP Registry or require WHOIS verification and prohibit proxy or anonymous registrations for registrants intending to register a domain name conflicting with a name on the IP registry. *USTA* at 9 (15 Dec. 2008). See also *MARQUES* at 5 (15 Dec. 2008) (study notice/takedown experience to improve expedited suspension at registry level of domain names that facilitate sale of counterfeit goods and other infringement).

ICANN should: evaluate new gTLD applications not only on the level of detail used to describe their preventive mechanisms but also on how effective they are likely to be; require new gTLD operators to prevent registrations at the second level of any mark appearing on the gTLD reserved names list; require new gTLD operators to participate in a common repository for documentation of trademark claims that rights holders can invoke in any pre-launch mechanism for particular TLDs; provide a single portal through which rights holders can participate in any pre-launch mechanism provided by participating new gTLD registries and provide strong incentives in the evaluation process for new gTLD operators to participate in the common portal; provide strong incentives for new gTLD operators to limit fees in any pre-launch mechanism to actual cost recovery and to offload costs to ICANN-provided facilities such as the suggested common repository and single portal. *Time Warner* at 6 (15 Dec. 2008). ICANN should establish a baseline processes to ensure that IP rights holders can easily protect their trademarks and brands both prior and subsequent to launch of new gTLDs. *Internet Commerce Coalition* at 6-7 (15 Dec. 2008). *INTA* at 15-16 (15 Dec. 2008) (e.g., reserved trademark list, develop a few basic rights protection mechanisms that applicants could choose; database of cleared rights). See also *COA* at 2, 8-9 (15 Dec. 2008).

Objections

Burden on Rights Holders. The IACC strenuously objects to the proposed Applicant Guidebook insofar as (i) it imposes 100% of the financial burden of objecting to any application made for a new gTLD upon the existing rights owner (except, ironically, for ICANN itself); and (ii) it imposes no requirement beyond adoption of a UDRP based dispute resolution model with respect to second level domain names. *IACC* (10 Dec. 2008). A less costly and more efficient IP protection solution should be considered to shift the burden to bad faith infringers including due diligence by ICANN regarding serial domain name abusers. *Visa* (13 Dec. 2008).

The ICANN plan reliance on the Legal Rights Objection procedure to filter out applicants seeking to establish new gTLDs that are identical or confusingly similar to preexisting trademarks and service marks (1) unfairly shifts the entire burden and of cost and risk onto trademark owners to identify and challenge applications; (2) is too uncertain and too limited to serve as an adequate protection against abusive applications. *Time Warner* at 2 (15 Dec. 2008). See also *SIFMA* at 5 (12 Dec. 2008); *IACC* at 1-3 (10 Dec. 2008) (suggests additional IP protection measures, including bad faith fines). ICANN should filter out the strongest global marks at an earlier stage, either through expanding the “reserved names” list of character strings that are barred from recognition as new gTLDs or through an adaptation of the non-

objection procedure contemplated for geographic names.—*i.e.*, require that any application be accompanied by a statement of non-objection from the owner of the mark. Also, applications should be disclosed as they are received, not when the application window closes, so that mark owners have the option of filing their own competing application rather than only having the option of invoking the objection procedure. ICANN should also take into account the record of past abusive conduct by the applicant in the existing and new TLD space, and build the expanded reserved names list into the string confusion algorithm to be used to guide determinations on string contention. *Time Warner* at 3 -4 (15 Dec. 2008). A pattern of abusive DNS behavior should be grounds for ineligibility to apply, not just a factor in adjudicating an LRO. *Bank of America* at 11 (15 Dec. 2008). The application procedure should include diligence for past domain name abuse and certainly this should be a factor if raised in any objection. *Nike* (2 Dec. 2008); *Microsoft* (Guidebook comments, 15 Dec. 2008) (application form should have questions about financial crimes, fraud, etc.).

Precedential value of successful objections. Famous trademarks should be added to the reserved name list. However, failing this, successful objections should have precedential value so trademark owners don't have to keep objecting. *Nike* (2 Dec. 2008). *MARQUES* (15 Dec. 2008).

Rights Protection Mechanisms

Current Mechanisms Not Sufficient for New TLDs. The current trademark protection sunrise period system used for TLDs to date will not work economically or practically for new TLDs. The suggestion of an ICANN-supported database of trademarked items for purpose of pre-registering IP rights to protect them within proposed new gTLDs is encouraging. The UDRP is unlikely to be an effective remedy in the context of a very large number of new TLDs. *Net Names* at 1 (16 Dec. 2008). See also *Bank of America* at 2-3 (15 Dec. 2008); *Grainger* at 3 (15 Dec. 2008); *MarkMonitor* at 2 (15 Dec. 2008); *NCTA* at 2-3 (15 Dec. 2008); *USTA* at 8-9 (15 Dec. 2008); *CSC* at 3-4 (15 Dec. 2008); *U.S. COC* at 2-3 (15 Dec. 2008); *Ameriprise* at 2 (15 Dec. 2008). *News Corporation* at 3 (16 Dec. 2008) (with new gTLD program UDRP as tool for second level protection could be undermined completely). *Rodenbaugh* at 1-2 (16 Dec. 2008) (ICANN should study the costs of the new program for trademark owners and other rights holders; the new gTLD program will make abuses dramatically worse if stronger protection mechanisms are not developed to address abusive registrations). *eBay* at 1 (15 Dec. 2008) (existing defense mechanisms almost certainly not feasible once new gTLD process occurs). Most major corporations prefer that the new gTLD program launch be delayed until basic safeguards are adopted to protect against trademark abuse (74% of domain names containing a trademark were registered by 3rd parties and not the brand owner) *CSC* at 3 (15 Dec. 2008). *MarkMonitor* at 2 (15 Dec. 2008) (new tools against brand abuse needed that shift costs away from brand owners). See also *RILA* at 2 (15 Dec. 2008). ICANN should establish clear conflict avoidance procedures designed to avoid granting applications that infringe on global trademark holders; the new gTLD program does not afford comprehensive protections to globally recognized brands. *AT&T* at 1 (15 Dec. 2008); *NAM* at 3-4 (15 Dec. 2008) (UDRP will be impractical and too costly for new gTLD program).

Single mode of protection. ICANN should address why there is not a universal Rights Protection Mechanism (“RPM”) that all new gTLDs must follow. *Anonymous Email* (26 Nov. 2008). Presently, it is not proposed that there should be one single model of protection for the assignment of domains within a new gTLD, *i.e.* whether there should be a sunrise period or some other procedure, and the precise terms of any such sunrise. Consequently, with the anticipated launch of numerous gTLDs a trademark owner seeking to protect its key trademarks

will have to familiarize themselves with the particular model chosen for each one, and ensure that they comply. This will inevitably be more time-consuming, and consequently costly, than having one prescribed model. *BBC* (15 Dec. 2008); *MARQUES* (15 Dec. 2008); *Rodenbaugh* (16 Dec. 2008) (supports one-time standardized sunrise validations process for interested rights holders, but more and stronger mechanisms needed to protect rights both before and after infringements).

Explicit Minimum Standards. The draft Guidebook must state for applicants the nature of IP rights that it must consider and minimum standards applicants must have in place for developing a mechanism to protect the rights of others—e.g., the consequences if an assertion of rights is sustained, the consequences if the assertion is rejected, and the minimum standards of authentication to be applied. By making minimum standards known in advance, vendors can self-identify as possessing a solution they believe will fulfill ICANN’s minimum substantive requirements whether or not the procedural mechanism is a “sunrise” or a “stop” or some other form. Brand owners can determine the estimated cost of advanced registration and/or opposition and make strategic decisions regarding both. *GT* at 1-2 (15 Dec. 2008).

Best Practices. New gTLD applicants should be required to adopt strong best practices to protect IP rights; if the method chosen is sunrise period, trademark owners should be charged only a reasonable minimum fee to register their protected names at the second level on the new gTLD. *ICA* at 11 (16 Dec. 2008).

New Registry Agreement--Obligation to Protect. Section 2.7 of the proposed new registry agreement adopts a new, ongoing obligation to “protect the legal rights of third parties,” which goes beyond the current commitment to take specified and agreed-upon steps to protect such rights. It creates potential liability for infringement that is neither practical nor consistent with established law. *RyC* (6 Dec. 2008).

Abusive Registrations/Transparency. There should be greater transparency and stakeholder inquiry of an applicant’s proposed mechanism to minimize abusive registrations and other activities that affect the legal rights of others. The criteria should be increased for earning a minimum acceptable score on proposed policies to minimize abusive registrations. *NetChoice* (15 Dec. 2008).

Issues

In General

What preventative measures can be taken ICANN take to block or screen out unauthorized applicants for trademarks (e.g., Olympics)?

Why are Registries allowed to maintain registrations of famous trademarks and keep the profits?

How will ICANN handle industry-specific generic TLDs (e.g., “.bank” and request for delay until such time as banking industry has consensus and sponsorship is secured)?

How will ICANN handle single enterprise and “corporate” TLDs? E.g., could corporations have a formal relationship with an exclusive registrant?

Process and Procedure; Defensive Registrations

Will ICANN increase the protection for trademark rights holders?

Will ICANN consider allowing trademark holders to apply for multiple TLDs on one application?

Will ICANN consider a low-cost alternative for trademark rights holders to reserve certain TLDs?

Is the application process open to the public or only potential Registry Operators?

Can a company apply for a TLD for internal use only (i.e., not sell second-level domains)?

Will ICANN require new Registries to commit to making a full set of Whois data publicly available so that trademark rights holders (and others—consumers, law enforcement, etc.) can have access to them?

Is ICANN considering any ways to lower the cost of defensive registrations for trademark rights holders?

Will ICANN consider a policy where trademark owners are allowed to apply for TLDs with no obligation to support it?

Objections

Why is the financial burden of the objection process borne by existing rights holders?

Will successful objections have precedential value?

Does past abuse factor into the decision in the objection process?

Rights Protection Mechanisms

Why isn't there a universal rights protection mechanism that all new gTLDs must follow?

With the expansion of the obligations regarding protection of the rights of third parties, do the Registry Operators face greater infringement liability exposure?

Will ICANN consider adding mechanisms that allow for greater transparency of an applicant's rights protection mechanism to minimize abusive registrations?

Proposed Position (for this version of the Guidebook)

The guidebook should have a notation added indicating that information has been received regarding additional requests for trademark protection, and that this is an issue which ICANN has determined requires additional consultation. ICANN intends to conduct a series of discussions with all relevant parties relating to propose enhanced protections for trademark name holders. ICANN is in discussions with WIPO to coordinate setting up some conferences to propose some additional solutions to these issues.

If additional trademark protection mechanisms are agreed upon and included in the next guidebook, this would likely result in a cost savings to trademark holders, and additional consideration should be given to these concerns raised as part of any proposal.

It is possible that in consideration of additional mechanisms for trademark rights holders there may be solutions that require changes to this section in the next version of the Guidebook.

Analysis

As with all situations, ICANN must balance the needs of individuals and individual constituencies with the needs of the community at-large. As it pertains to trademark protection, ICANN recognizes the trademark rights holders' concerns with protecting their brands and controlling costs associated with defensive registrations. ICANN believes in protecting brand owners' trademarks and preventing abusive registrations. To that end, ICANN is continuing to evaluate and update its brand protection strategy and will be setting out a process to receive further inputs regarding appropriate mechanisms to enhance those protections.

Process and Procedure; Defensive Registrations

ICANN understands that trademark protection is of serious concern to the trademark rights holders and is requesting additional input on mechanisms to better protect those rights holders. On the other side of this issue is the need to protect competing trademark rights holders who believe they too have a right in the proposed TLD. ICANN has set forth an enhanced obligation on Registry Operators to protect the rights of third parties within the objection processes and rights protection mechanisms, which should help protect trademark rights holders.

ICANN Staff is evaluating a number of options for further enhancing the mechanisms available within the processes for trademark rights holders; however, it must also take into account the interests of non-trademark holder applicants. A system must be put into place that balances the needs of trademark holders to protect their interests while still promoting an open marketplace for the rest of the community.

The proliferation of defensive registrations is a concern that should be addressed because it is not beneficial to either the trademark rights holders or the Registry Operators.

Objections

These questions bring to light important issues that need to be clarified. In the past, the reserved name list was not as successful as had been hoped in protecting trademark rights holders, and was not uniformly available.

The objection process as drafted requires the objector to bear the costs of the process to prevent frivolous objections and the exposure of TLD applicants to excessive costs. There are many factors that contribute to the resolution of the objection process and the factors utilized should include past abuse.

Rights Protection Mechanisms

ICANN's position has been to develop and implement effective and efficient rights protection mechanisms. ICANN Staff sought and considered information from a variety of sources relating to the implementation plan, including setting out the paper promulgated by the IP Constituency (a copy of which can be found at: <http://www.ipconstituency.org/PDFs/A%20Perfect%20Sunrise.PDF>) which indicated that no single rights protection mechanism was superior to another and that any number of methods could be equally successful.

All Registry Operators are required to post their rights protection mechanisms to allow applicants a window into the decision making process. It may be necessary to adopt formal steps to address issues of particular concerns to the community.

X. OBJECTION & DISPUTE RESOLUTION PROCESSES

Summary of Key Points

- Several specific questions regarding dispute resolution procedures are answered; new detailed procedures are introduced in the Draft Applicant Guidebook, version 2.
- Specific questions regarding aspects of community-based, legal rights and morality and public order objections are answered. Standards to be employed by morality and public order dispute resolution panels are introduced in the Draft Applicant Guidebook, version 2. There are other Guidebook clarifications.
- Dispute resolution fees models are discussed; the “loser pays” model remains as the preferred model.
- Whether there should be appeals and other post-decision activities are balanced. The current model of no appeals remains but post-delegation objections can be raised in certain areas, with mechanisms under construction, and the model of an Independent Objector is introduced.

Summary of Input

This section organizes the summary of responses into the following categories: *Appeals and Post-Decision*, *Community-Based Objections*, *Existing Rights*, *Fees*, *Morality and Public Order*, and *Procedures*.

Appeals and Post-Decision

ICANN Authority. Under what circumstances will ICANN allow an application to go forward notwithstanding a successful objection (e.g., decision by DRP in favor of objector)? *K. Rosette* (Module 3, 26 Nov. 2008). *Microsoft* at 5 (Guidebook comments, 15 Dec. 2008) (ICANN must clarify meaning and consideration of panel decisions—i.e., would an application proceed notwithstanding a DRSP in favor of an objector?). See also *IPC* at 4 (15 Dec. 2008); *NCUC* (15 Dec. 2008) (need to clarify ICANN discretion to approve or deny).

Appeals to Dispute Resolution Mechanisms: IP rights holders should have legal recourse and the right to appeal an adverse ruling on an objection. *Internet Commerce Coalition* at 4 (15 Dec. 2008). The Guidelines should allow for a procedure to appeal a clearly erroneous DRSP decision. *MarkMonitor* (Module 3, 15 Dec. 2008). Panel decisions should not be subject to further review by ICANN, but rather to an appeal process by a third party dispute resolution provider and/or a court. *Rodenbaugh* at 5 (16 Dec. 2008). See also *U.S. COC* at 9 (15 Dec. 2008); *ANA* at 4 (15 Dec. 2008); *AIPLA* at 2 (15 Dec. 2008). Several ccTLD operators including Nominet, the operators of .uk, have a reasonably priced appeals process with a three person Appeals Panel. There are well-documented inconsistencies in UDRP decisions which an appeals process would help to even out. *MARQUES* would like a credibly valid appeals process included in LRO. *MARQUES* at 3 (15 Dec. 2008). No appeal opportunity is in clear conflict with common legal practice for organizations serving the public such as ICANN. *SIDN* at 4 (10 Dec. 2008).

Court Review. Will applicants whose strings are in contention and subject to determination by a single panelist have an opportunity for legal review comparable to the UDRP provision: "The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for

independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded.” (Section 4(k) of the UDRP) and if not, why not? *PIR* at 2-3 (15 Dec. 2008). There should not be a rule requiring a losing party in a formal legal rights objection to forfeit its rights to seek judicial redress—i.e., commenters object to the provision that in filing an application for a gTLD, an applicant agrees to accept the gTLD dispute resolution process, if that “acceptance” means that the applicant forfeits his right to protect his legal rights in the courts. *Bank of America* at 9 (15 Dec. 2008). See also *SIFMA* at 6 (12 Dec. 2008); *NCUC* at 5-6 (15 Dec. 2008); *Microsoft* at 4 (15 Dec. 2008). Page 3-1 in paragraph 3.1 says “an objector accepts the GTLD dispute resolution process by filing its objection.” Does that mean that the objector will be required to, in some way, agree not to challenge the outcome of the dispute resolution process such as in court? *COA GNSO New gTLD Question and Answer Open Teleconference*. The Draft Implementation Guidelines eliminate the right of applicants to challenge any ICANN decision or related dispute proceedings in a national court (unlike under the UDRP). So applicants would have no protection at all for their free expression rights and national courts would have no means of protecting their citizens from an abuse in an ICANN proceeding about a domain name. This point was also not in the GNSO's recommendations and is something that staff pulled out of a hat (as part of its bottom-up process) presumably in an attempt to protect itself from being sued. *R. Gross, IP Justice* at 2 (26 Nov. 2008). See also *G. Kirikos* at 10 (24 Nov. 2008) (accountability to courts); *IPC* at 3 (15 Dec. 2008); *Pattishall* at 3 (15 Dec. 2008) (review/appellate process necessary).

Effect of DRSP Decision. A decision from a DRSP should be final and binding on ICANN, rather than an “expert determination” to be considered by ICANN as a factor in the evaluation of a TLD application. *Visa* at 2 (13 Dec. 2008). See also, *U.S. COC* at 9 (15 Dec. 2008). Dispute resolution decisions should be binding and final on ICANN. *CSC* at 4-5 (15 Dec. 2008). Clarify impact of DRSP panel decision on ICANN and the LRO appeal standard. *Bank of America* at 5 (15 Dec. 2008). See also *Grainger* at 4 (15 Dec. 2008); *ITT* at 5 (15 Dec. 2008); *IPC* at 4 (15 Dec. 2008); *MARQUES* at 3 (15 Dec. 2008).

Post-delegation dispute resolution mechanisms: IP rights holders should be entitled to rely on representations in the application that are aimed at minimizing conflict between a new TLD and their IP rights and should have a means of redress available if those representations are violated. *Time Warner* at 5 (15 Dec. 2008); *INTA* at 16 (15 Dec. 2008) (supports development and publication of a post-delegation dispute resolution process as soon as possible); *IPC* at 6-7 (15 Dec. 2008); *MARQUES* at 4-5 (15 Dec. 2008); *SIIA* at 6 (15 Dec. 2008) (post-launch protections needed). ICANN should have a process for reviewing TLD allocations periodically regarding their use and adoption; violations of any approved proposal should also be addressed. *Hacker* at 3 (14 Dec. 2008). ICANN should create specific language for new gTLD registry agreements and consult with a DSRP for developing processes for post-delegation dispute resolution addressing post-launch infringement by a gTLD registry. *Microsoft* at 5-6 (Guidebook comments, 15 Dec. 2008); *COA* at 8 (15 Dec. 2008) (next draft Guidebook needs to address post-delegation obligations in detail).

Community-Based Objections

Community Definition and Standing. There is no working definition of “community”, so it is possible that the community of “Internet users” and the community of “dog owners”, the community of “blondes” and the community of “anything you can reasonably describe” would be a “defined community” according to ICANN, and as such will have standing if there is an “established institution” to lodge the objection. Also, NCUC believes that further details as to standing need to be disclosed as soon as possible, to enable a more fruitful public discussion to

take place. *NCUC* at 3, 5 (15 Dec. 2008). The concept of community is poorly defined; for example, it will be unfair for a community-based applicant to lose on the basis of substantial opposition by a member of the community if the applicant counters with a showing of substantial support. *Bank of America* at 11 (15 Dec. 2008). See also *CADNA* at 6 (15 Dec. 2008); *COA* at 3-4 (15 Dec. 2008); *ASAE* (10 Dec. 2008).

Linkage to Community. The objector should be required to satisfactorily prove that the string it is objecting to has an association to the community it represents. This does not have to be a strong association, but that it passes the "absurdness" test. *J. Seng* (8 Dec. 2008).

Community Objection Criteria. Regarding point 3.1.2.4 Community Objection, It is an established institution. We feel that this is too limited. What if it is a community of people objecting that don't make up an institution or religious belief. *C. Schuddebeurs; Email Support.* The difference between existing legal rights objections and community-based objections should be described in more detail. *E. Brunner Williams; GNSO New gTLD Question and Answer Open Teleconference.* How will community objection criteria be weighed given subjectivity concerns? *USCIB* at 2 (16 Dec. 2008); *COA* at 5 (15 Dec. 2008). Concerns about the LRO also apply to the community objection procedure. *MARQUES* at 6 (15 Dec. 2008).

Defenses. "Defenses – Satisfaction of the standing requirements for filing a Community Objection (refer to paragraph 3.1.2.4) by the applicant is a complete defense to an objection filed on community grounds." Keeping this clause would imply that a community-based TLD could be squatted by a single member of the community. For instance, that one pharmaceutical company could apply for .pharma and enjoy "complete defense" against objections from any competitor, industry association or consumer group. Or that one bank could apply for .bank and that no other bank, nor associations of banks nor even a banking regulator could successfully object. Or that one tennis club could apply for .tennis and prevail against objection from any federation. It is dangerous to award complete defenses against objections on any ground; some communities have more than one generally accepted representative institution and these do not always agree. *W. Staub-CORE* (11 Dec. 2008). *A. Abril i Abril* (Module 3, 15 Dec. 2008) (automatic defense may yield perverse results).

Existing Rights

Clarifications Re: Mark and Rights Holders. We request that there be clarification as to the definition of a "mark" relied-on by an objecting brand owner. We assume that this would include an unregistered mark? *BBC* (15 Dec. 2008). The Guidebook should provide more clarity on what constitutes a 'Rights Holder.' For example, with respect to trademark rights, the Guidebook should specifically address what types of trademark rights are eligible for disputes, such as whether common law rights, trademark applications, or trademark registrations and trade names qualify. *MarkMonitor* (Module 3, 15 Dec. 2008).

Ensure rights protection mechanisms are effective. ICANN must do more to ensure that these [rights protection] mechanisms are effective, accessible, low-cost and efficient for right holders to use. *IPC* at 5 (15 Dec. 2008); *Microsoft* at 3 (Guidebook comments, 15 Dec. 2008). Regarding point 3.4.4, Selection and Number of Panelists: There will only be one panelist in intellectual property rights proceedings. Is this sufficient? *C. Schuddebeurs; Email Support.*

Objection Standards. The 'legal rights' ground for objection cannot be clear cut. The law on trademarks, and intellectual property is not universally consistent. What amounts to 'standing legal rights' in one jurisdiction may very possibly not be recognized in other jurisdictions. *ISOC-*

AU. Regarding Point 3.1.1 Legal Rights Objections: What happens if two or more parties have equal legal rights? If someone files a TLD that is confusingly similar to someone else's registered mark an objection can be based on the Legal Rights objection. What happens if two or more parties have equal legal rights? What if the applicant owns a trade mark right as well as the objector? Regarding point 3.5.2.4: Knowledge should not be required for infringement or should this read as knowing or should know. *C. Schuddebeurs; Email Support*. How would something like .bank, where under US law you must be a bank to call yourself a bank, be objected against? Is the legal rights objection restricted to the string itself? *Bank of America-GNSO New gTLD Question and Answer Open Teleconference*.

Fees

Fee details. These need to be more detailed. Brand owners are already spending hundreds of thousands to protect their trademarks online and there continues to be rampant online abuse. Having a cost of \$70 - 122K to object to an application is unacceptable. *Nike* (2 Dec. 2008). See also *BITS* at 7 (15 Dec. 2008).

Economic and financial considerations. ICANN should consider small economies when the dispute fees are finalized. *F. Purcell* (Module 3, 6 Nov. 2008). Is it possible for there to be more than two parties in a given dispute? If so, will all parties be required to pay the full 'Dispute Resolution Adjudication Fee? *C. Gomes-Compiled Comments on the New gTLD Applicant Guidebook*. *MarkMonitor* (Module 3, 15 Dec. 2008) (fees are high and duplicative; one fee should be filed in the case of a rights holder's objection to multiple applications for the same TLD).

No separate objection fee should be levied. It is morally offensive to charge a fee for an objection and this should be covered by the evaluation fee. If ICANN does not take that into account, ICANN may receive law suits. *A. Rosenkrans Birkedal* (10 Nov. 2008).

Deterrence Factor of Fee. A fee for filing an objection helps to avoid false and bad-faith filings. An applicant whose proposal has passed initial evaluation and has all the required support from pertinent communities and/or governments shouldn't have to pay for filing a response to an objection, nor any other associated costs. The applicant should have the right to defend himself from allegations without being required to pay to a third party. *NIC Mexico* at 3 (9 Dec. 2008). In order to be taken seriously, an opposition must be considered only if made by a person with standing under section 3.1.2 who has gone to the expense of paying the necessary fees and who has raised a recognized ground for objection. Allowing any person to post a public objection makes a mockery of the standing requirements. If ICANN believes it has defined standing too narrowly, then ICANN should broaden its rule using explicit categories. If ICANN believes its own procedures for objection may forestall inquiry into relevant areas of concern, it should broaden the grounds of objection. If ICANN believes that persons with limited financial means will not be able to raise their legitimate concerns, ICANN should consider waiving or reducing the fee to file an objection upon an application showing good cause. *Bank of America* at 6 (15 Dec. 2008).

Fee levels. Why is the cost of opposing a proposed gTLD string so prohibitively expensive? Why is it so much more expensive than a UDRP, and when will an upper price point cap be announced? *Anonymous Email* (26 Nov. 2008). The proposed process for the "legal right" DRP appears to have a proposed cost two orders of magnitude less than the proposed cost for the proposed process for "community objections" DRP. The choice of proposed vendors may explain a difference in pricing, but if the underlying process is not two orders of magnitude

different in complexity, than the difference in cost has no justification other than the vendor choice. If the "legal right" DRP involves forming judgments on questions of "substantial" (opposition) and "likelihood" (detriment), how is two orders of magnitude of cost difference commercially reasonable for the cost of forming similar judgments for "community objections"? *E. Brunner-Williams* (25 Nov. 2008). Fees for LROs should be at the lower end of range stated in the Guidebook. DRSP rules must specify when and under what conditions fees may increase or be refunded. Parties should be allowed to set up accounts with the DRSPs for administrative ease of payment. *INTA* at 9 (15 Dec. 2008)

Prevailing Party Reimbursement. The prevailing party in a dispute resolution proceeding should be reimbursed for all costs and expenses. This will deter parties from maintaining otherwise questionable proceedings. *Visa* at 1 (13 Dec. 2008). Fees, including attorneys fees and litigation costs should be recovered by the prevailing party. *U.S. COC* at 9 (15 Dec. 2008). See also *Lego* at 1 (4 Dec. 2008); *MarkMonitor* at 3 (15 Dec. 2008); *Grainger* at 2 (15 Dec. 2008); *ITT* at 5 (15 Dec 2008).

Morality and Public Order

Legal Standards. [In relation to categories that are automatically banned] The ICANN paper [Oct 29, 2008] shockingly changes the AND to an OR in description of the US test: ICANN: "This limit should be construed as applying only to violent lawless action that is imminent or likely to result from the incitement." (p. 4 of 29 Oct. paper). So instead of this being a 2-part test as US law requires, ICANN will ban the speech if it meets either prong of the test - big difference and ICANN is not being honest about this legal standard (or is getting incompetent legal counsel). (Technically, it is a 3-part test in the US because the speaker must INTEND to produce the imminent lawless violence.) WHERE DID THE RESEARCH COME FROM THAT TOLD ICANN THE TEST INVOLVED AN "OR" RATHER THAN "AND" AS CLAIMED IN ICANN'S PAPER? *R. Gross, IP Justice* at 2 (26 Nov. 2008). See also *NCUC* (15 Dec. 2008); *ICA* at 2, 12-13 (16 Dec. 2008) (opposes law and public morality objections absent narrow and clearly articulated criteria).

Content Regulation. [In relation to categories that are automatically banned] It appears ICANN is attempting to regulate the content of websites, not URLs, since a domain name (2-6 letter string) cannot be child porn or sexual abuse of children. I'd like an answer from ICANN about how a URL can be child porn as a practical matter. *R. Gross, IP Justice* at 2 (26 Nov. 2008). *Y.E. Shazly* (Module 3, 2 Dec. 2008) (critique of ICANN moral and public order objection approach). *C. Preston* (Module 3, 12 Dec. 2008) (provides legal commentary supportive of ICANN morality and public order standards). ICANN should announce up-front if it will permit any "adult" extensions. *WMI* at 4 (14 Dec. 2008). The proposed standards open the door to unacceptable forms of content regulation by ICANN and provide the ability for a 'heckler's veto' over legitimate possible domains. ICANN needs to clarify the types of objective criteria and the nature of "independent judicial control" that will be used to determine the narrow exceptions that justify an interference with free expression. *NCUC* at 1-3 (15 Dec. 2008)

Standing. Who can bring a morality and public order objection? There is concern that attempts to make this anything other than a government (who has standing to object) will lead to arbitrary, subjective, and more widely conflicting standards. *R. Gross, IP Justice* at 3 (26 Nov. 2008). More details are needed regarding the Morality and Public Order Objection. *CADNA* at 5 (15 Dec. 2008). See also *Rodenbaugh* at 5 (16 Dec. 2008); *Pattishall* at 4 (15 Dec. 2008) (clarify standing); *NCUC* at 5 (15 Dec. 2008) (standing has yet to be determined). New TLDs should be restricted to protect the rights of those who would be offended or harmed by material

widely deemed offensive and not deserving of free speech protection, but the context must be balanced carefully. Any interested party should have the right to object on grounds of morality or public order. *INTA* at 11-12 (15 Dec. 2008)

Dispute Resolution. Module 3 of the Draft Applicant Guidebook states that objections based on morality and public order considerations will in principle be determined by the International Chamber of Commerce (ICC). As the ICC is an industry association for businesses, and as such represents and advocates on their behalf, we do not see the ICC as a particularly well-qualified arbiter of standards of morality and public order or as conducive to considering the interests of non-commercial parties in such a broad and values-based determination. *NCUC* at 3 (15 Dec. 2008). Uncertainty over whether the International Chamber of Commerce is the best place for dispute resolution on questions of morality and related issues. *A Muehlberg* (Cairo Meeting Public Forum, 6 Nov. 2008) See also Y. E. Shazly Cairo Meeting Public Forum, 6 Nov. 2008).

Issue Appropriate for Governments. ICANN should focus on coordinating technical functions related to the management of the DNS and not on matters more appropriately addressed by governments, such as adjudication of morality and public order and community objections in accordance with international human rights law. The proposed mechanisms to address these topics are inappropriate. *U.S. DOC-NTIA* at 2 (18 Dec. 2008). See also *APTLD* at 2-3 (15 Dec. 2008); *Arab Team* at 2 (15 Dec. 2008); *Demand Media* (Module 3, 15 Dec. 2008); *U.S. COC* at 5 (15 Dec. 2008) (ICANN should not assume powers and duties on issues best left to governments as recognized in WSIS Principle 49).

Procedures

Abuse of Objections Process. In order to avoid potential abuse by entities that use their financial prowess to thwart smaller deserving players, a limit should be placed on the number of disputes per application. *J. Seng* at 3 (8 Dec. 2008). ICANN should take the possible abuse of objections (submitting an objection at the latest possible moment and thus forcing maximum costs at a competitor) into account when determining the objection period. ICANN should set limits on the objection grounds and protect applicants against abuse of objections. A start-up applicant, having already invested significantly in preparing the application and paid fees risks being financially "brought to his knees" by numerous objections of which none might even prevail. *SIDN* at 2 (10 Dec. 2008). See also *DHK* at 2 (15 Dec. 2008).

Panel Qualifications. Panelists should have sufficient years of experience in dispute resolution. ICANN must make clear the scope of documents that can be required by the panel; discovery should be allowed. *INTA* at 10 (15 Dec. 2008). *MARQUES* at 3 (15 Dec. 2008) (fluency of at least one panelist in local language should be required and panel must have sufficient trademark qualifications). ICANN should state a conflicts of interest policy for all panelists. *Rodenbaugh* at 5 (16 Dec. 2008).

General Procedural Comments. What is the limit of the panelist's discretion, and can the list identified in the draft Applicant Guidebook be improved by panelists? The categories are general and could lead to wide interpretation by panelists. *Y.E. Shazly* (Module 3, 2 Dec. 2008). See also *AIPLA* at 1 (15 Dec. 2008) (experts on LRO cases should be subject to approval of both parties); *MARQUES* at 3 (15 Dec. 2008) (use a small number of experts to chair panels and appeals for a fixed term to promote consistent decision-making); *INTA* at 10 (15 Dec. 2008) (hearings should be allowed in exceptional cases and must be public; the standard of proof should be explained). Fees need to be predictable; the panel's apparently unrestricted ability to

appoint experts is inconsistent with predictability. *Time Warner* at 5 (15 Dec. 2008). See also *COA* at 6 (15 Dec. 2008); *Pattishall* at 3 (15 Dec. 2008). For transparency, panel decisions should be published. See *IPC* at 4 (15 Dec. 2008); *AIPLA* at 1 (15 Dec. 2008); *MARQUES* at 3 (15 Dec. 2008); *Bank of America* at 10 (15 Dec. 2008). WIPO acting as the dispute resolution provider is problematic because it will inevitably favor and prioritize applications by trademark owners. *NCUC* at 5 (15 Dec. 2008). WIPO should be the sole provider of LRO services for at least 5 years with annual reviews. *MARQUES* at 3 (15 Dec. 2008). Consistency and transparency are needed in the online dispute resolution (ODR) process; a gateway provided by ICANN could help with this; these proceedings should be public. *InternetBar* (Module 3, 15 Dec. 2008). There should be a single organization with which all objections are filed and that organization should determine which DSRPs should resolve them. *Pattishall* at 3 (15 Dec. 2008); *IPC* at 4, 8-9 (15 Dec. 2008) (consider common portal for objections to promote efficiency; consider including a challenge of last resort). The new gTLD program might benefit from having a free period of mediation after submission of a complaint. *MARQUES* at 3 (15 Dec. 2008). Objections and responses should be made public. *ITT* at 5 (15 Dec. 2008). See also *G. Kirikos* at 10 (24 Nov. 2008); *INTA* at 9-10 (15 Dec. 2008) (lengthen the word limit for objections and responses; allow reasonable extensions of time to file responses; supports fee for filing a response; default judgment); *COA* at 6 (15 Dec. 2008) (word limit should be relaxed for a community objection; ICANN should reconsider policy that objections are not published as received). An objection category should be added regarding applicants who have a history of domain name abuse. *RILA* at 3 (15 Dec. 2008).

Three-Member Panels. ICANN should permit three member panels. *Internet Commerce Coalition* at 4 (15 Dec. 2008). Instead of only a single panelist in LRO cases, as in the existing UDRP, ICANN should consider constituting a three-person panel at the request of parties. *eBay* at 4 (15 Dec. 2008). See also *Microsoft* at 4 (Guidebook comments, 15 Dec. 2008); *MARQUES* at 3 (15 Dec. 2008); *AIPLA* at 1 (15 Dec. 2008) (LRO procedure should allow a 3 member panel); *Lovells* at 5 (15 Dec. 2008); *Pattishall* at 3 (15 Dec. 2008). Why wouldn't objectors be allowed to request a 3-member panel if they are willing to pay the expense if they lose? *C. Gomes-Compiled Comments on the New gTLD Applicant Guidebook*.

Dispute Resolution Criteria. What are the specific criteria that will be used to decide who wins a dispute resolution matter? When will such criteria be published? *Anonymous Email* (26 Nov. 2008). The standard for string contention is confusing similarity in sight, sound or meaning. The "Defenses" section should be removed or clarified, and other objection procedures should be clarified (e.g., clarify how the community objection might be accommodated if in effect there are two or more valid community claims to same or similar strings). *Rodenbaugh* at 5 (16 Dec. 2008). Regarding Point 3.1.1 criteria for String Confusion Objection: In module 2 (2.1.1) it is explained that by string confusion in the Initial Evaluation phase performed by ICANN is meant: "String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion". Do the same criteria apply to the dispute resolution? *Schuddebeurs; Email Support*. Guidance needed for resolving disputes among associations and applicants (e.g., a local association and an international NGO competing for a gTLD). See also *ASAE* (Module 3, 10 Dec. 2008).

Details or Clarification of Objections Process. Objection process should be efficient and cost effective, and more details are needed; a cost of \$70-\$120K to object is unacceptable. *Nike* (2 Dec. 2008). Further clarification is needed regarding standing to object. *NCUC* at 5 (15 Dec.

2008); *NAM* at 7 (15 Dec. 2008) (objections and responses should be made public). When can exact dispute resolution process rules be completed and published? *Rodenbaugh*; *GNSO New gTLD Question and Answer Open Teleconference*. The Guidebook should be clarified to indicate when potential objectors should file objections to an application. *ASAE* (Module 3, 10 Dec. 2008). Will there be a challenge of last resort? *MARQUES* at 6 (15 Dec. 2008). More detail is needed on panel procedures—e.g., documents, ensuring limits on panels appointing experts to be paid for by one or more parties. *Microsoft* at 4 (15 Dec. 2008). See also *Grainger* at 2 (15 Dec. 2008); *IPC* at 4, 8 (15 Dec. 2008); *INTA* at 9-10 (15 Dec. 2008) (various aspects of objection procedures require clarification—e.g., filing deadlines, single complaints with multiple objections, resolution of inconsistent outcomes by DSRPs; cooling off period).

Consolidated Objections. There should be an ability to consolidate complaints against the same party. *Nike* (2 Dec. 2008). Consolidated objections with a single filing fee should be allowed in appropriate circumstances. *Time Warner* at 5 (15 Dec. 2008). See also *Visa* at 2 (13 Dec. 2008); *SIFMA* at 6 (12 Dec. 2008); *DHK* at 2 (15 Dec. 2008); (consolidation should be required); *MARQUES* at 3 (15 Dec. 2008); *IPC* at 4 (15 Dec. 2008); *CADNA* at 2 (15 Dec. 2008). More information is needed on costs of filing objections and ways to reduce costs through consolidated objections. *USCIB* at 2 (16 Dec. 2008). *eBay* at 3-4 (15 Dec. 2008) (clarifications needed regarding consolidated objection scenarios; to promote consistency and predictability, more guidance and examples needed in Guidebook on LRO case resolution). There should be efficient procedures regarding combining multiple objections; opportunities to amend procedurally noncompliant objections, ability to refuse consolidated objection proposals by the DRSP. *Microsoft* at 4 (Guidebook comments, 15 Dec. 2008). See also *C. Gomes* at 6 (17 Nov. 2008); *BITS* at 7 (15 Dec. 2008) (clarify fees for consolidated objections); *Pattishall* at 3 (15 Dec. 2008) (more detail needed on resolving objections based on multiple grounds).

Online Submissions. Is it possible for each applicant to provide copies of all submissions to the DRSP associated with objection proceedings via the electronic system? *C. Gomes-Compiled Comments on the New gTLD Applicant Guidebook*.

Government Concern. The dispute resolution process is not a cost effective way for governments to participate and they should have an earlier opportunity to participate and object; the right of governments to objection and the mechanisms for it should be expressly indicated with costs minimized. Governments should be explicitly recognized as having standing to file an objection. *NYC* (13 Dec. 2008). ICANN should be doing more to minimize disputes with national governments and to increase their understanding of the new gTLD process, especially smaller, developing nation governments. *F. Purcell* (Module 3, 6 Nov. 2008).

Details Needed on LRO Procedure. The Legal Rights Objection (LRO) procedure will generally be the sole means that a trademark owner has at its disposal within the ICANN process to prevent the recognition of a new gTLD that infringes, dilutes, or otherwise harms or weakens its mark, and/or that will threaten to cause confusion detrimental to the mark owner's customers and the public at large. While the LRO procedure is sketched out in the draft applicant guidebook, much more detail will be needed before it can be determined whether this is a sufficiently robust safeguard for preventing these harms. *IPC* at 3 (15 Dec. 2008). See also *AIPLA* (15 Dec. 2008); *SIIA* at 5 (15 Dec. 2008); *Time Warner* at 4-5 (15 Dec. 2008); *eBay* at 3-4 (15 Dec. 2008). Finalized procedures are needed for business certainty—e.g., ICANN has not yet completed agreements with Dispute Resolution Service Providers; it would help rights owners and applicants to know the likely application of factors in the LRO standard. *Microsoft* at 4-5 (Guidebook comments, 15 Dec. 2008).

ICANN Duties and Legal Reviews. ICANN must commit itself to follow the rules and procedures of the Guidebook once final; ICANN is acting in a quasi-governmental capacity and its Guidebook should be considered akin to an administrative rule. *Bank of America* at 12 (15 Dec. 2008). ICANN should state how ICANN will conduct legal reviews of applications, consider legal objections from third parties, and discharge its responsibility to ensure that the process of introducing new gTLDs respects all relevant national and international law, including property rights. *U.S. DOC-NTIA* at 2 (18 December 2008). The dispute resolution processes give ICANN too much authority. *Cyveillance* at 2 (15 Dec. 2008).

ISSUES, ANALYSIS AND PROPOSED POSITIONS

Appeals and Post-Decision

Issues

How might applications go forward notwithstanding a successful objection?

Will the panels' decisions be final and binding on ICANN?

The guidelines currently do not provide for appeals. Should there be such a provision and does a lack of one conflict with the public interest?

Does an acceptance of the gTLD dispute resolution process mean that the participating party has forfeited all right to judicial review?

Do applicants forfeit their rights to protect their legal rights in the court?

Analysis

The comments that have been summarized above reflect concerns about due process and the protection of substantive legal rights. ICANN takes these concerns very seriously and, with considerable participation from constituency groups, has sought to create an objection process that is fair and adequately protects the rights of all participants in the process.

One may distinguish three types of recourse or legal action in connection with new gTLD applications: (a) recourse against the expert determination that is rendered in the New gTLD Dispute Resolution Procedure (e.g., an "appeal" or some other action), (b) action in defense of one's legal rights before a court with jurisdiction, and (c) legal action against ICANN by an applicant.

(a) As stated in Section 3.4.5 of the draft Guidebook, the dispute resolution panel's decision will be an expert determination. The New gTLD Dispute Resolution Procedure (the "Procedure") currently does not provide for an appeal or other recourse against the expert determination that is rendered by the Panel. While an expert determination will not be legally binding, as part of the dispute resolution process ICANN will follow the advice of the panel.

(b) It is implicit in the Procedure that an objector does not waive its right to defend its legal rights (e.g., trademark) before a court of competent jurisdiction merely by filing an objection to an applied-for gTLD.

(c) The terms and conditions of the application for a new gTLD contain an express waiver by the applicant of recourse against ICANN relating to the application evaluation and approval process. This does not bar claims against ICANN that may not be related to the application process, nor does it bar claims by the applicant against any other party.

It does not seem that the absence of an appeals process within the process conflicts with ICANN's role in serving the public interest. There are various countervailing factors to consider in formulating the dispute resolution procedure. Adding a procedure for appeal would increase the cost and extend the duration of many – if not most – proceedings, thereby delaying the introduction of many new gTLDs. If on appeal, the determination is “reversed,” there would be an argument for extending the process even further, resulting in great uncertainty in the process.

The dispute resolution process is intended to provide economic incentives for parties to participate in the process and to resolve disputes in a timely and efficient manner.

Proposed Position (for this version of the Guidebook)

At this juncture, ICANN does not plan to introduce an appeals mechanism into the dispute resolution process that has been developed. ICANN has heard many comments about making sure the new gTLD program progresses as swiftly and efficiently as possible. A dispute process that does not include a separate appeals mechanism is intended to help minimize the delay of introduction of new gTLDs into the root zone.

Given the nature of the expert determination to be rendered at the completion of a dispute proceeding, an unsuccessful applicant cannot obtain judicial review of the rejection of its application.

An applicant is not prohibited, however, from pursuing its legal rights related to the application process in court against any party other than ICANN.

Community-Based Objections

Issues

Will the definition of “community” and the role of an established institution be clarified?

Does an objector have to demonstrate an association with a community related to the string to which it objects?

Does an applicant who is able to fulfill the standing requirements to object have an absolute defense and could this complete defense to a community objection provided for in paragraph 3.1.2.4 lead to squatting?

In addition to describing “existing legal rights objections” and “community based objections,” the Guidebook or supporting documentation could do a better job differentiating the role of each.

Analysis

The creation of community-based gTLDs offers great opportunities for diverse communities to learn about each other, meet, and communicate through the Internet. However, the rights, obligations and interests of many communities and their representative institutions may be at odds with the legal rights of trademark rights holders. The comments that ICANN has received thus reflect both the avid interest that communities have in obtaining gTLDs and concerns that some people and entities have about definitions and criteria.

The concept of community is not easy to define. That said, the “working definition” of community, and requirements for a community-based gTLD, and objections thereto, are summarized in the draft Applicant Guidebook, Section 1.2.2.1. The Guidebook also sets out the standing requirements for what group or entity may object to a community-based application. Those requirements make clear that the objector does have to demonstrate a relationship to a community to have standing. Further, the objector must be an established institution that has an ongoing relationship with the community. This requirement will help to insure that the objector has some legitimacy as a representative of the community. Such a standing requirement is intended to avoid a multitude of objections from individuals, many of whom represent only themselves and have no relationship to or real interest in the relevant community.

The complete defense to a community objection provided for in paragraph 3.5.4 should not, in itself, lead to squatting for one reason, among others, that a successful registry operator must also make the registry operational. Note the requirements for obtaining a community-based gTLD (summarized in the Draft Guidebook, Section 1.2.2.1) and the post-delegation obligations that the successful applicant will assume (*id.*, Section 1.2.2.2).

Regarding a comparison of legal rights and community objections, different criteria are at issue for each. While it is true that there might be a situation where a gTLD could provide an objector with both grounds, they are exclusive in that the legal rights criteria is focused on providing a forum in which trademark rights holders can object to a gTLD on the basis of an existing legal right to a trademark. The community objection, on the other hand, has no basis in trademark or other intellectual property law and, instead, focuses on rights of organized groups.

Proposed Position (for this version of the Guidebook)

An objector to a community-based gTLD must be an established institution with an ongoing relationship with a defined community that consists of a restricted population. See Draft Guidebook, Section 3.1.2.4. It will be made explicit in the revised Applicant Guidebook that the “defined community” is a community related to the string to which the objector objects.

Existing Rights

Issues

One common theme that has arisen in various public comments are the concerns voiced by trademark owners in terms of the efforts and costs that may need to be expended to protect their Intellectual Property. Another section of this paper specifically relates to trademark protection and will discuss these overarching concerns.

Do holders of all types of trademark rights – including common law trademarks, trademark applications, and trade names – qualify as “rights holders” and what if both the applicant and the objector are rights holders?

Are the current mechanisms of enforcement low-cost and efficient?

How/Who can object against a string, such as “.bank,” where under U.S. law, it is suggested, an entity must be a bank to use such designation?

How will the “legal rights” grounds for objection be dealt with when the law on trademarks and other intellectual property is not universally consistent?

Regarding Section 3.5.2.4, why isn’t there a knowledge standard required for infringement?

Is the legal rights objection restricted to the string itself?

Is only one panelist in intellectual property rights proceedings sufficient?

Analysis

ICANN appreciates the numerous comments it has received relating to trademark protection and is considering various options. As noted above, a separate section of this paper relates to trademark protection, which addresses the overarching concerns. The rest of this section will discuss the specific issues raised in the comments set forth in this paper.

The definition of mark was meant to allow objections on the basis of registered and unregistered marks. Further, the definition of “Rights Holder” was left broad to allow any person or entity that claims an existing legal right to object so as not to favor a registered mark over a mark that is not registered or to encourage sham filings to obtain registrations in jurisdictions which award them on a first to file basis.

ICANN has attempted to develop a process that is low-cost and efficient. Providing for an independent dispute resolution procedure is meant to achieve the goal of providing efficient and reasonably low cost ways in which rights holders can assert rights to an applied for string, and protect them on a global scale. ICANN is considering additional procedures, including some to apply post delegation; however, at this point allowing for global resolution in one forum in a relatively expeditious time frame goes a long way to providing effective, accessible, low cost and efficient ways for rights claims to be resolved. The UDRP proceedings will remain in effect, as well, for post delegation issues that arise in connection with second level domain disputes in the new gTLDs, and the specific laws of each jurisdiction still provide redress.

In terms of the issue raised regarding the potential gTLD .bank, it is not necessarily true that one must be a bank (i.e., a certain type of financial institution) in order to call oneself a “bank”. (Consider blood bank, food bank, sperm bank, etc.) If more than one entity applies for the gTLD .bank, all applicants for the gTLD would enter into the string contention process. Further, a .bank application may qualify as a community-based application and, in such a circumstance, gain consideration in cases of contention. If the eventual owner of the gTLD .bank uses the name or domain in a way that violates U.S. law, legal action could be taken against that owner in accordance with the law.

It is correct that there is no universal application of intellectual property law. Indeed, this fact has made it quite difficult to identify standards that would be viable on a global stage. Thus, the standards to be applied and balanced are from a number of jurisdictions that enforce intellectual property rights as well as from UDRP proceedings, the closest form of IP precedent available on an international basis. As none of the factors are absolute, knowledge is not a "requirement". However, sections 4 and 5 contemplate a knew-or-should-have-known standard.

ICANN did consider providing for three-member panels, but thought a one-member panel would be more cost efficient. Alternatively, ICANN is considering providing for three-member panels, but only to the extent that all parties agree.

Proposed Position (for this Version of the Guidebook)

ICANN will provide more clarity in the revised Draft Applicant Guidebook in terms of the types of mark an objector or rights holder must have to file a valid objection. ICANN will also make clear in the revised Draft Applicant Guidebook and Procedures that parties may elect a three member panel, but only if all parties in the proceeding agree.

Fees

Issues

Can the dispute resolution fees be more detailed and can the costs be curtailed or limited?

Can small economies be considered with dispute resolution fees are finalized?

Can the filing fee be funded by the evaluation fee?

Can standing requirements for filing an objection be broadened and allowances for fee waivers be made in lieu of permitting the posting of public objections by any person?

Will the prevailing party be reimbursed for costs and expenses?

If more than two parties participate in a dispute, do all parties pay the Dispute Resolution Adjudication fee?

Why is the proposed cost for the "community objections" DRP proposed process higher than the proposed cost for the "legal rights" DRP proposed process?

Analysis

Some concerns have been expressed over the estimated dispute resolution fees, particularly for those that are not fixed rate proceedings. The rules of procedure for these proceedings have been designed, in part, to minimize costs. The general rule ICANN is promulgating, that the losing party in the dispute resolution proceedings pays the full cost (i.e., panelists' fees and filing fees), will provide some protection against parties acting in bad faith.

The costs of a dispute resolution proceeding must be paid by the parties in that proceeding (with the prevailing party having its advance payments reimbursed). An applicant's successful

passage through the initial evaluation would not be a basis for waiving dispute resolution fees, as the costs of resolving a dispute arising from an objection must be paid.

The filing fee in dispute resolution proceedings should not be funded by the evaluation fee, as the two fees relate to different steps in the application process, one of which may not occur in some applications. If the evaluation fee were to cover filing fees in dispute resolution proceedings, it would have to be increased (since the evaluation fee is currently set on a cost-recovery basis). This would produce an excessive fee for applications to which no objection is filed. Further, the dispute resolution fee will not be paid to ICANN. Note also that the number of filing fees that must be paid by an individual applicant may vary, depending upon the number of objections that are filed against that applicant's gTLD.

The consolidation of objections should result in certain cost savings (and is therefore strongly encouraged by ICANN). It is intended that the applicant would pay a single filing fee when submitting its response to all of the consolidated objections. Parties would pay in advance the costs of only one proceeding, rather than multiple proceedings, and a single Panel would render one expert determination that is applicable to all of the consolidated objections. Consolidation, of course, is conditioned on the type of objection and the facts of each dispute. For example, legal rights objections depend largely on the rights of the objecting party and therefore it is less likely that cases could or would be consolidated. Morality and Public Order objections are intended typically to be about the applied for string and therefore, a better candidate for consolidation. Consolidation will be the decision of the dispute resolution service provider.

The costs of dispute resolution proceedings in connection with "community objections" are likely to be higher than the costs of "legal rights objections". The latter are unlikely to be as complex, and their duration can be predicted with some confidence. In contrast, proceedings that arise from "community objections" are likely to be more diverse in their nature and to involve more varied factual submissions. For this reason, variable fees based upon the time spent by the expert panelists are more appropriate for the "community objections" than fixed fees. Similar factors indicate that the costs of "morality and public order objections" are also likely to be higher than those of "legal rights objections". In addition, dispute resolution proceedings that involve three-member panels at an hourly rate will have higher costs than those involving a single panelist. If the hourly rate based dispute processes do not take as much time or are less complex than estimated, the amount of time spent by the dispute resolution panel would be less, and therefore the fees should be less than estimated as well.

Per Section 3.4.7 of the draft Applicant Guidebook, the process has been developed so that dispute resolution fees paid in advance by the prevailing party will be refunded to that party.

Simply submitting a public comment in objection to an applied for string will not be considered a formal objection.

Proposed Position (for this version of the Guidebook)

Each dispute resolution provider will establish its fees. ICANN does not plan to include dispute resolution filing fees as part of the application fee, nor does ICANN intend in this round to announce a maximum level for dispute resolution fees.

Morality and Public Order

Issues

As related to the standards: (i) Does the test for incitement conflict with the test under US law; and (ii) what type of domain name would qualify as “child pornography” leading to an automatic ban?

Can anyone other than a governmental entity bring a morality and public order objection?

Is this dispute resolution process the right mechanism for adjudicating issues of morality and public order and community objections with international human rights law?

Can the types of objective criteria and the nature of “independent judicial control” used to determine when in interference with free expression is justified be clarified?

Analysis

Issues of morality and public order with respect to rights of expression are inherently controversial. The accepted standards of morality and public order may vary widely in different societies and over time. As explained in the first Draft Applicant Guidebook (Section 3.5.3), ICANN is guided by two general principles in this area: (a) everyone has the right to freedom of expression, and (b) such freedom of expression may be subject to certain narrowly interpreted exceptions that are necessary to protect other important rights.

ICANN has conducted extensive research and consultations to develop standards under which the Morality and Public Order Objections should be reviewed. In addition to extensive research in every geographic region, ICANN conducted individual consultations with experts in the human rights arena, present and former judges of internationally recognized tribunals dealing in human rights and morality issues, as well as legal practitioners who regularly appear in such tribunals. In such consultations, the starting premise was always that found in the GNSO Principle G:

“The string evaluation process must not infringe the Applicant’s freedom of expression rights that are protected under internationally recognized principles of law” (emphasis added).

Internationally recognized principles of law, however, do include narrow restrictions. See, e.g., Articles 19(3) and 20 of the International Covenant on Civil and Political Rights, Article 10(2) of the European Convention on Human Rights and Article 13 of the American Convention on Human Rights. Thus, absolute freedom of expression is not protected under internationally recognized principles of law; there are permissible limits.

As the GNSO policy indicated, the standards that panels shall apply in dispute resolution proceedings should not necessarily be based upon U.S. law. The standards applied to morality and public order objections need to be as international in reach and applicability as possible, which ICANN has intended to identify now and in its Explanatory Memorandum on morality and public order objections, which can be found at: <http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>.

The rule that would bar incitement to violent lawless action in new gTLD strings is not necessarily the same as the rule under U.S. constitutional law. Dispute resolution panels can consider whether under internationally recognized standards of law a string is likely to produce

violent lawless action and, if so, whether such action would be immediate (along with other factors), but it may not be appropriate to require “immediate” violence to sustain an objection. The DRSP panel is not bound to follow U.S. law in deciding morality and public order objections.

The standard that would bar incitement to or promotion of certain forms of discrimination has been criticized as a potential “heckler’s veto” or the adoption of a “European Standard” for limiting free expression. Rules barring incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin exist in various forms in many countries around the world, not just in Europe. See *also* Article 20(2) of the International Covenant on Civil and Political Rights, which provides for analogous limits upon free expression.

It is important to stress that the requirement that new gTLD strings not be contrary to generally accepted legal norms relating to morality and public order concerns the string – *i.e.*, the letters to the right of the dot. This is not a regulation of the content of websites. It would be optimal if a mere gTLD string could not constitute incitement or promotion of child pornography or other sexual abuse of children. However, taking into account the fact that new gTLD strings may comprise up to 63 characters, one must anticipate that a string could well incite or promote child pornography.

Based on a few comments, there seems to be some confusion about the role of the dispute resolution service providers (DRSP). The DRSP itself does not decide the disputes; the DRSP administers the dispute resolution proceedings. That administration includes the selection and appointment of the panel (comprising one or three experts) that will issue an expert determination. The rules of procedure that ICANN plans to implement state that panelists deciding morality and public order objections should be eminent jurists of international reputation.

ICANN agrees that the standing and standards issues are worthy of further discussion. One comment asserts that the standards will be “arbitrary, subjective, and ... conflicting” if parties other than governments have standing to file morality and public order objections. ICANN is still working to develop a mechanism relating to the standing requirements for filing objections relating to Morality and Public Order. Concerns have been expressed about leaving this open to any person or entity, but concerns have also been expressed about limiting this to just one defined group of people, such as governments. Allowing anyone to object is consistent with the scope of potential harm, but may be an insufficient bar to frivolous objections. On the other hand, while groups such as governments may be well-suited to protecting morality and public order within their own country, they may be unwilling to participate in the process. The current thought, on which ICANN invites public comment, is to develop a mechanism by which those objecting on these grounds must show a legitimate interest and harm or potential harm by the proposed string.

It has been suggested that the “proposed mechanisms” for this adjudication are “inappropriate”, but no specific details or constructive criticism were provided. ICANN remains open to suggestions for improving its dispute resolution procedure for morality and public order objections and other objections.

Proposed Position (for this version of the Guidebook)

ICANN is recommending that the dispute resolution panel be provided the GNSO recommendation relating to Morality and Public Order (Recommendation No. 6), along with the categories of restriction described in ICANN’s Explanatory Memorandum dated 29 October

2008, as well as what will be set out in the Draft Applicant Guidebook, version 2. The categories include certain criteria contrary to principles of international law: (i) incitement to violent lawless action; (ii) incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin; (iii) incitement to or promotion of child pornography or other sexual abuse of children; and (iv) any other category that the panel determines would render a proposed TLD contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under principles of international law. With respect to standing, as noted above, ICANN is still working on standing requirements for filing an objection on these grounds.

Procedures

Issues and Analysis

There are naturally many questions about the details of the dispute resolution procedure. Some of these points will be clarified with the publication of the New gTLD Dispute Resolution Procedure (a detailed set of procedures governing the objection process, based upon the more general description in Module 3 of the Draft Application Guidebook, version 2). Meanwhile, ICANN wishes to answer as many of the specific questions that have been raised as possible:

Can a limit be placed on the number of objections allowed per application?

ICANN understands the concern. However, it seems appropriate not to place a limit in advance upon the number of objections allowed per application because there is no first come first serve requirement and placing a limit would prevent legitimate objectors from objecting.

Will ICANN take measures to protect applicants from objection abuse – like limiting the grounds for objection – in order to protect applicants from incurring potentially devastating costs in the process of responding to multiple objections?

The process has been designed to take these concerns into account. Both standing to object is limited as are the grounds for objecting, and certain standards for such objections are defined. Multiple objections on the same grounds can be consolidated, thereby reducing costs. In addition, the rule that the losing party pays the costs of the dispute resolution process (i.e., panelists' fees) should discourage frivolous objections.

Can the costs of objecting to multiple applications of the same TLD be consolidated?

This is not currently contemplated, but is something that will be considered in light of string contention and the dispute resolution provider rules.

What is the limit of the panelist's discretion, and can the list identified in the draft Applicant Guidebook be improved by panelists? The categories are general and could lead to wide interpretation by panelists.

Specific standards have been defined, within which panelists will exercise their discretion as independent experts.

Can complaints against the same party be consolidated?

Yes, provided that the objections are based upon the same grounds. Thus, two or more legal rights objections against the same applied-for gTLD can be consolidated, whereas a legal rights objection against a given gTLD cannot be consolidated with a community objection against the same gTLD. Consolidation will be at the discretion of the DRSPs.

Will ICANN provide more guidance on the objection process, specifically on timing, deadlines, and procedure?

Yes. ICANN will publish its New gTLD Dispute Resolution Procedure along with the Draft Applicant Guidebook, version 2, which identifies specific Procedures.

Will ICANN allow community based objections to be submitted to the International Chamber of Commerce?

Community-based objections shall indeed be submitted by the objector to the International Chamber of Commerce's International Centre for Expertise (ICC), which will administer the dispute resolution proceedings. The panel appointed by the ICC (and not the ICC itself) will issue the expert determination.

Can applicants provide copies of all submissions to the dispute resolution service provider associated with objection proceedings via the electronic system?

Yes. In fact, that is required.

Will ICANN permit legal rights objections to be adjudicated by three member panels, particularly if objectors are willing to pay the expense if they lose?

Yes, provided both parties agree.

What specific criteria are used to decide who wins a dispute resolution matter and when will such criteria be published?

Certain criteria – i.e., standards – have already been published. See draft Guidebook, § 3.5. The standards for deciding morality and public order objections will be published in the Draft Applicant Guidebook, version 2.

Can ICANN provide more detail about the existing legal rights procedure so that it can be determined whether this procedure is a sufficiently robust safeguard?

The publication of the New gTLD Dispute Resolution Procedure with the Draft Applicant Guidebook, version 2 will provide more detail.

What discretion does the ICANN Board have to reject an application that threatens the process, the stability of ICANN, or the interests of the Internet community, but that has otherwise cleared all steps in the process because no third party objected?

ICANN does have discretion to reject such applications. Other mechanisms that could help ensure that applications that may “threaten [] the process, the stability of ICANN, or the interests of the Internet community,” are also being carefully scrutinized and considered. Such a mechanism might include an independent third party or “Independent Objector” to ensure no obviously objectionable applications pass through

the process without objection. More information about ICANN's thinking about an 'Independent Objector' will be published with the Draft Applicant Guidebook, version 2.

Do the proposed standards for objection procedure open the door to unacceptable forms of content regulation or allow a 'heckler's veto' over legitimate possible domains?

No. Please see the "Morality and Public Order" Analysis.

Can ICANN provide more detail about who has standing to object?

The rules for standing for three of the four grounds for objections were provided in the draft Guidebook, Section 3.1.2. ICANN is still working on developing standing requirements for filing objections relating to Morality and Public Order. Concerns have been expressed about leaving this open to any person or entity, but concerns have also been expressed about limiting this to just one defined group, such as governments. The requirements will ensure that those objecting on the ground of morality and public order have and prove a legitimate interest and harm or potential harm resulting from the applied-for gTLD string.

How will ICANN conduct legal reviews of applications, consider legal objections from third parties, and discharge its responsibility to ensure that the process of introducing new gTLDs respects all relevant national and international law?

The dispute resolution process that is being developed by ICANN (Module 3) will perform exactly these tasks.

When can exact dispute resolution process rules be completed and published?

The current version of the Dispute Resolution Procedure will be published with the revised Draft Applicant Guidebook. These will be supplemented by the specific rules for the dispute resolution providers. The existing Rules of Expertise will apply for the disputes administered by the ICC. WIPO Rules for New gTLD Dispute Resolution Procedure will apply for disputes administered by the Arbitration and Mediation Center for the World Intellectual Property Organization. The ICDR Supplementary Procedures for ICANN's New gTLD Program will apply to the disputes administered by the International Centre for Dispute Resolution.

Does the same "confusion" principle set forth in Module 2 (regarding String Confusion Objection) apply to DRSP?

Yes; see Section 3.5.1 of the Applicant Guidebook.

Proposed Position (for this version of the Guidebook)

Many of the comments received about the procedures are well-taken and will be addressed in a more detailed procedures document that will be published with the Draft Applicant Guidebook, version 2.

XI. STRING CONTENTION

A. STRING CONTENTION: STRING SIMILARITY

Summary of Key Points

- The objection-based dispute resolution process tests for all types of string similarity that might result in user confusion, including visual, aural and meaning similarity. The revised version of the Applicant Guidebook will highlight this.
- The string similarity check in the Initial Evaluation will be done based on visual similarity in order to identify most cases of contention or user confusion early in the process.
- The role of the algorithm is primarily for filtering; it is intended to provide informational data to the panel of examiners and expedite their review.

Summary of Input

It should be made very clear to applicants up front that the definition of confusing similarity is not just visual. It could be easily concluded, because the algorithm only covers visual confusion, that that's all that matters, which is not the case with regard to GNSO recommendation 2. C. *Gomes*; *INTERNET COMMERCE COALITION* (15 Dec. 2008)

String confusion should apply to visual confusion only. Any broadening of the standard will limit competition. *Demand Media* (15 Dec. 2008); *Pattishall* (15 Dec. 2008)

In the standard for string confusion, how will the probability of confusion be determined? This should be clearly defined. C. *Gomes*(18 Nov. 2008)

The similarity review will be conducted by a panel of String Similarity Examiners. This examination will be informed by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs. The score will provide one objective measure for consideration by the panel. The algorithm uses proprietary software to perform a series of mathematical calculations to assess the visual similarity between strings based upon the following parameters. Issue--It is inappropriate for ICANN to use an algorithm which is not public, and not based on public data. C. *Gomes*(18 Nov. 2008)

The string similarity algorithm only accounts for visual similarity, and does not address aural or phonetic similarity. The phonetic sound or meaning should be incorporated in the string similarity algorithm. *INTERNET COMMERCE COALITION* (15 Dec. 2008).

Concerned that confusing similarity is only restricted to visual and not other forms of perception. G. *Kirikos-GNSO New gTLD Question and Answer Open Teleconference*.

The string review process is visually, but objections can be on other grounds - like meaning. A. *Kinderis-GNSO New gTLD Question and Answer Open Teleconference*.

The current approach taken where every string is seen as independent from any other may cause problems. It could create unnecessary fights and problems. It doesn't full account for the

realities of other scripts. (RA, WT) - See *Cairo Participation Key (Cairo public forum, 6 Nov. 2008)*.

Issues

Scope of similarity: How are all types of user confusion tested? How is the similarity test defined by standards that will be furnished to evaluators?

Role of algorithm: What is the role of the algorithm? Should an algorithm based on proprietary software be used and, if so, in what function and what kind of similarities should be covered?

Analysis

Scope of similarity:

For the introduction of new gTLDs, the Generic Names Supporting Organization (GNSO) has recommended that: Strings must not be confusingly similar to an existing top-level domain or a Reserved Name. (Recommendation 2, http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_ftn26)

The string contention lifecycle was developed to address this concern. There are two main components of string contention. The first involves identifying gTLD strings that are likely to deceive or cause user confusion in relation to existing TLDs or Reserved Names. In addition, proposed gTLDs in a given round must not be likely to deceive or cause user confusion in relation to each other.

The applicant Guidebook provides the standard to be used in the Objection process by dispute resolution providers to determine whether an applied-for string should be excluded or placed into a contention set based upon potential confusion: "String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion."

More specific standards were considered during the development of the Guidebook. It seemed that very specific standards would lead to gaming or manipulation or would leave holes for the introduction of strings that would result in user confusion.

The revised Guidebook indicates in several places that this examination is not limited to visual checks only but also includes aural and meaning similarity, for example, any similarity that will result in user confusion.

In addition to the process that tests for all types of confusion, the Guidebook also includes a preliminary test. The Initial Evaluation includes a first check of similarity to find cases of identical strings among applications and string sets with a strong visual similarity. This is intended to capture many sets of string contention or instances of user confusion early in the process. It is not intended to replace the basic objection and dispute resolution model described above, just augment it.

The standard for this initial test is: "String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the

average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.”

This is a standard first step in the application handling process. Given that similarities can be of other natures, these will be caught when objections regarding confusing similarities can be lodged based on a full range of similarities.

Role of algorithm:

The algorithm selected is a tool used by many trademark offices to provide evidence of identical strings and similarity cases worthy of closer scrutiny. It is developed to focus on visual similarity and there are no algorithms on the market that we know of that effectively extend to wider concepts of similarity. Its wide acceptance makes it an attractive product. Generally, ICANN would plan to make the code public. In this instance, its wide acceptance and evident effectiveness caused ICANN to accept, for now the fact that the software cannot be published. No other products, where publication of the code was acceptable, were found to be as economical, effective, reliable and repeatable as the currently selected algorithm. Developing new software is attended by substantial risk and cost.

The similarity check in the Initial Evaluation is a first check for obvious cases of similarity, based on visual similarity where the algorithm primarily has a filtering role, reducing the work load on the panel to focus on the most likely cases of similarity, while giving an indication of visual similarity for pairs of strings to scrutinize. The decision whether a string pair is confusingly similar or not is entirely with the panel.

The algorithm will allow the panel of examiners to swiftly sort through the $n(n-1)$ combinations of applications in order to identify candidates where confusion might arise. Every combination of string can be ranked ordered according to score, allowing the examiners to scan down and identify a family of combinations for closer examination.

Proposed Position (for this version of the Guidebook)

Scope of similarity:

The scope of the string confusion objection and dispute resolution process includes all types of confusion: visual, aural, meaning and so on. This check is implemented through the policy recommended objection and dispute resolution process. The revised Applicant Guidebook will include specific descriptions of these types of similarity.

The Initial Evaluation includes a first check that is based on visual similarity. The intention of this early check is to identify many instances of contention or user confusion as soon as possible in the process.

At this preliminary check, an algorithm will be employed to sort all combinations of strings and provide similarity scores to evaluators that can use the score along with other evidence of similarity.

In response to comments on the draft Applicant Guidebook, ICANN has clarified the standard for string similarity in Initial Evaluation as visual but that other forms of confusion are available in the Objection process, as recommended by the GNSO Council.

Role of algorithm:

The algorithm has primarily a filtering role, reducing the workload on the panel to focus on the most likely cases of similarity, while giving an indication of visual similarity for pairs of strings. The decision whether a string pair is confusingly similar or not is entirely with the panel.

B. STRING CONTENTION: COMMUNITY

Summary of Key Points

- Advance postings of proposed strings in order to identify possible string contention is a good idea but may lead to abuses.
- The distinction between open and community-based applications is intended to provide a preference for bona fide community-based applicants in cases of contention between identical (or very similar) TLD strings.
- Brand owners may apply as community-based applicants. Whether they are extended the preference depends on whether that application meets the comparative evaluation criteria.

Summary of Input

ICANN should post an open board for public comment on intended gTLD strings before the formal application process as a way of reducing string contention. *L. Ye (28 Oct. 2008)*

We encourage ICANN to remove the designation of open and community based from all gTLD applications. ICANN should allow all applicants to compete with each other on an equal basis through a comparative evaluation. *DHK (15 Dec. 2008)*.

On open vs. community-based TLD types, ICANN is commended “for defining a workable process for this complex issue of ‘community’.” *Demand Media (17 Dec. 2008)*.

Is the applicant's identification of its application as open or community-based dispositive? If not, under what circumstances will ICANN substantively examine that self-identification and change it? *K. Rosette (26 Nov 2008)*.

There is a need for clarifying the “Open” vs. “Community-based” question by publishing further examples of types of organizations that would fit in both categories – and then explaining the process of selection if there is string contention between Open and Community-based applicants. *IPC (15 Dec. 2008); COA (15 Dec. 2008)*.

Does ICANN consider a ‘brand’ application an ‘open’ gTLD or a ‘community based’ gTLD? *F. Hammersley (9 Dec. 2009)*.

There are many issues around community provisions that all Constituencies need to understand further. One issue for the IPC is whether a business application (e.g., an application to run a gTLD for the exclusive use of a single company) could ever be categorized as a Community-based application, and if so, under what circumstances? *IPC (15 Dec. 2008); COA (15 Dec. 2008)*.

Issues

Should ICANN post intended strings for public comment before the formal application period is launched or, alternatively, before it is closed?

Should the distinction between open and community-based applications be eliminated?

What is the (potential) relationship between a brand and a community-based TLD?

Analysis

The benefits of posting information about strings that are known beforehand to be contemplated for applications would be that the community be informed earlier with possibilities to discuss and provide feedback to the applicants at an earlier stage.

ICANN staff may have information about various gTLD projects and contemplated strings before the application period is launched, but it would be inappropriate for ICANN to announce such information for public comment. Early public information about strings could arguably facilitate voluntary agreements between contenders for the same string, but could equally well prompt others to apply for the same string, thereby exacerbating string contention rather than reducing it. This was discussed in depth during the policy development and the adopted policy clearly requires that proposed strings be kept confidential until the end of the application period. To announce proposed strings before the end of the application period would be at variance with the adopted policy.

To eliminate the distinction between open and community-based applications would certainly simplify the process. However, the distinction between open and community-based applications has been introduced to implement the approved policy and enable the required preference for community-based applications in contention situations, as the adopted policy requires. This is a core policy aspect that was discussed in depth during the policy development and clearly expressed in the finally adopted policy. The test of the application's worthiness of such preferential treatment is encapsulated in the Comparative Evaluation criteria and the threshold set for winning.

The distinction between open and community-based applications implements the approved policy, enabling the required preference for community-based applications in contention situations, as the adopted policy suggests. The test of the application's worthiness of such preferential treatment is encapsulated in the Comparative Evaluation criteria and the threshold set for winning. The policy reasons for creating a preference for community-based TLDs, as indicated in the record of the policy discussions, indicate that community-based TLDs enhance the name space and that true communities should be afforded some preferences and protections.

It is wholly up to the applicant potentially a brand owner, to select the type of application to file. ICANN will not verify nor change the type as such. Whether the application, if declared as community-based, will prevail in Comparative Evaluation for a contention situation is dependent on how well the application scores against the criteria, as detailed in the Applicant Guidebook.

Proposed position (for this version of the Guidebook)

Confidentiality about proposed strings will be kept until the end of the application period, after which all will be posted publicly.

To eliminate the distinction between open and community-based applications would be in conflict with the adopted policy and the distinction will remain for the next version of the Applicant Guidebook. The distinction provides a vehicle for extending a preference to a bona fide community-based TLD in cases of contention.

C. STRING CONTENTION: COMPARATIVE EVALUATION

Summary of Key Points

- The comparative evaluation criteria are altered to provide increased granularity in the scoring and an altered threshold for meeting the criteria in the revised version of the Applicant Guidebook.
- The only preference extended to community-based applicants is in cases of string contention. If the comparative evaluation criteria are not met, there is no other preference.

Summary of Input

Lower the required points to achieve community-based from 11 to 10 to bring the intent more in line with the purpose i.e. better balancing. *R. Fasset* *Employmedia.com* (5 Dec. 2008); *J. Seng* (8 Dec. 2008); *SIDN* (10 Dec. 2008); *CADNA* (15 Dec. 2008); *COA* (15 Dec. 2008).

Applying the most weight for nexus to trade names infers an assumption that the concern for implementation is the predictability of string contention for non-dictionary terms vs. dictionary terms. I think the reverse is true and that the intent of GNSO Implementation Guideline F (ii) - and the reason for its existence - is because the reverse is true. *R. Andruff* (20 Nov. 2008).

The Guidebook requires “an impossibly high threshold of proof - particularly when the review of an applicant’s nexus to a particular community is wholly subjective, i.e., subject to human fallibility.” A modification should be made to avoid auction, and factor in human error. *R. Andruff* (20 Nov. 2008).

Does the trade name of a community institution, as a gTLD string, offer the strongest connection ‘between proposed string and community’? *R. Fasset*, *Employmedia.com* (5 Dec. 2008).

Why does the first ‘Dedicated Registration’ policy get a higher score than the second? *C. Gomes* (18 Nov 2008).

The comparative evaluation procedures must not be used to capture generic words for the benefit of one group. Also, community scoring should be high (11 or above). *Demand Media* (15 Dec. 2008).

To what extent will “the good of the internet community” be taken into account in such a clash? Is it ICANN’s view that a Community-based application will always be better for the internet community? *S. Metalitz* (*IPC, COA*).

If a community-based application fails to emerge as a “clear winner” in a comparative evaluation, does any preference it would otherwise receive evaporate? *S. Metalitz* (*IPC, COA*).

What happens if a claim of support from the community is not substantiated? C. Gomes (18 Nov 2008)

Issues

How should the scoring and threshold for winning in a comparative evaluation be modified to ensure that proper preference is given to a bona fide community application?

To what extent will "the good of the internet community" be taken into account in cases of string contention? Does the community-based TLD always prevail?

What preferences are given to community-based applicants that do not meet the comparative evaluation criteria?

Must community support be substantiated?

Analysis

The threshold for winning is intentionally set with a view to prevent gaming attempts and identifying true Community applications. The risk for "false negatives" in the scoring can be moderated by a lowering of the threshold, but this has to be balanced against an increased risk for "false positives". In cases of generic words submitted as Community based strings, test runs by staff have also shown that the threshold is difficult to attain with the current scoring template and alternatives are being considered. There is merit in considering uniqueness in the nexus between string and community as a main factor for achieving a high score. To be an unambiguous identifier, the "ideal" string would have no other associations than to the community in question. This can arguably be achieved by using the community institution abbreviation as string, but there are other possibilities, for example by putting a prefix or suffix on a generic string to make it distinctly and uniquely associated with the relevant community (for example, prefixing "boy" to "scouts" for the community of boy scout organizations, or suffixing "growers" to "apple" for the associations of apple growers). Modification of the scoring template to reflect this approach is considered.

A higher granularity in the scoring template might provide for higher reliability in the scoring and reduce the impact of human judgment subjectivity. This is especially the case where the increase in granularity is attained by asking more detailed questions that are more objective. A higher granularity is considered, both by widening the scoring scale and de-aggregating some of the criteria (i.e., asking separate, more specific questions).

Registration policy is a criterion where a balance is needed between what is reasonably the most appropriate registration policy for a community and the risk for gaming of the process by an "open" application declaring itself as "community-based" to get an advantage in a contention situation. The approach taken is conservative in this respect, with the high score reserved for a registration policy only permitting members of the community to register. A widening has been considered, but it appears reasonable to maintain the chosen approach, while at the same time possibly de-aggregate this criterion in the scoring template in order to reduce the effect of missing out on one of the sub-criteria.

In accordance with the broad-based policy discussions, the category of community-based applications was introduced to implement a preference for community-based applications in contention situations. This preference is manifested in the process as an opportunity to win a

Comparative Evaluation for a contention situation. The test of the application's worthiness of such a preference is encapsulated in the Comparative Evaluation criteria and the threshold required for meeting the criteria, as detailed in the revised Applicant Guidebook. Both aspects are under review for the next version.

The only preference a community-based application will be given is the opportunity to win a Comparative Evaluation for a contention situation. If the application scores lower than the required threshold for winning, that opportunity is lost and there is no other preferential treatment to expect. In the eventuality that multiple community-based applications score above the required threshold in a Comparative Evaluation, they may all proceed to delegation if their strings are not identical or confusingly similar to each other. Otherwise, a further step is required to resolve the remaining contention among these applications.

Substantiated community support is a criterion that is scored for the application in a Comparative Evaluation. The absence of substantiated community support will lead to a lower score for the application in a Comparative Evaluation, reducing the application's likelihood of reaching an overall score above the required threshold for winning.

Proposed Position (for this version of the Guidebook)

The Comparative Evaluation scoring and threshold was reviewed and modified with increased granularity of the scoring template and an altered threshold for meeting the criteria in the revised version of the Applicant Guidebook.

D. STRING CONTENTION: COMMUNITY RESOLUTION ASPECTS

Summary of Key Points

- In cases where multiple community-based applications meet comparative evaluation criteria, the other, non-community based applications that are in direct contention with the former will no longer be considered.
- In cases where multiple community-based applications address the same community and meet comparative evaluation criteria, if one applications demonstrates considerably more community support, it will prevail.
- In cases where multiple community-based applications meet comparative evaluation criteria, but neither has demonstrated significantly more support than the other or they represent different communities, and they cannot settle the contention amongst them, an auction will be held between these applications.

Summary of Input

In the case of two community-based applicants of equal strength, rather than go to auction, neither should get the proposed TLD. Instead:

- Establish a parallel and similarly-limited period for negotiating the merging of proposals whenever there is more than one community-based application for the same community, also under the control of an ICANN-appointed mediator. If agreement is reached, the parties would have a further month to amend one of the applications, if needed, and

such reformed application would be put at the very end of the evaluation queue, not delaying the process for other applicants.

- In case more than one community-based TLD passes the Comparative Evaluation (scores 11 or 12), and both applications are deemed to represent or have the support of similar or even sizable parts of the intended community, ICANN should refrain from allocating such TLD in this round, and the parties (both community-based and eventual open applicants) should resubmit it at the next application window, if they wish so. *A. Abril i Abril* (15 Dec. 2008); *CORE Internet Council of Registrars*; *PIR*.

What is the reason for not allowing contending parties to combine to form a new application? *K. Rosette* (26 Nov. 2008)

ICANN should encourage joint ventures as a means of resolving string contention, as opposed to prohibiting them. *CentralNIC* (13 Dec. 2008); *Melbourne IT* (15 Dec. 2008). Why are joint ventures not allowed? *C. Gomes* (18 Nov. 2008). Joint ventures will help resolve string contention among competing applications. *Demand Media* (15 Dec. 2008).

In the 1st public draft GFA text, this set always goes to auction if two or more of community-based applications score 11 points or more in the comparative evaluation, and the relative evaluation fails to determine a "clear winner". Suppose that all three community-based applications each score 11 points in the comparative evaluation, and the evaluators are unable to arrive at a basis for awarding priority between them.

Therefore, Chrysler LLC, with a capitalization that may be negative today, but historically has had better access to capital than any Tribal Government ever, is allowed to bid as a brand manager (JEEP CHEROKEE) against three rather poor tribes and their respective community-based applicants. This is not the outcome we should be designing for. The process should always select a qualified community-based application, and unlike contention sets formed for generic strings, communities can not change their names to accommodate the uniqueness of labels requirement of the DNS, there is no 'commercially reasonable' private settlement possible for communities, unlike commercial plays for generic strings." *E. Brunner-Williams* (15 Nov 2008)

ICANN may consider allowing applicants to apply for up to x (x being a reasonable number like 5 for example) gTLD strings with one application with a mandate to reduce it to one after string contention check. ICANN may charge a "change fee". ICANN may charge "change fee" if such action leads to extra work for ICANN and to discourage frivolous changes. *I. Vachovsky* (15 Nov. 2008)

Should an applicant who invests in the process but loses a String Contention be afforded the opportunity of selecting (or proposing) another character string that is not part of a contention set? *S. Metalitz (IPC, COA)*. Why can't an applicant choose an alternate string to avoid contention? The parties should be given an opportunity to select an alternative string if they fall into a contention set for auction. If the parties cannot agree to select different strings, then an auction would be able to proceed. *Smartcall* (4 Dec. 2008).

There will be a high degree of cooperation to resolve contention if the efficient allocation mechanism of last resort is auctions (as applicants will have incentives to not go to auction). If the mechanism is chance, less cooperation will occur and gaming may result. *Demand Media* (17 Dec. 2008). In the case of contention and where more than one applicant meets the criteria for community-based, "I believe ICANN has administered all that they can fairly and objectively

for the applicants with the final resolution to be left to an auction.” *R. Fasset, Employmedia.com* (15 Dec. 2008)

The option to elect to comparative evaluation raises an additional cost for community-based applicants. *E. Brunner-Williams* (15 Nov. 2008).

Does the cooling off period count against any applicable time limits? Why wouldn't the time limits be automatically extended for the amount of time used in the cooling off period? *C. Gomes* (18 Nov. 2008).

Will the Evaluators take into consideration the purpose of an application? Is “Content Contention” of concern to ICANN? Would ICANN accept two applications with dissimilar character strings but identical purposes? *S. Metalitz (IPC, COA)*.

It would be helpful for the Applicant Guidebook to clearly denote that the only instance when an applicant will be evaluated against another applicant is when two or more applicants each achieve the number of points required to be community-based. *R. Fasset, Employmedia.com* (10 Dec. 2008)

Issue

How can a residual contention situation between multiple community-based applicants who meet the criteria in a Comparative Evaluation best be resolved, or possibly prevented?

Analysis

The case at issue here is when there are multiple community applications, for identical or confusingly similar strings, that score above the threshold for criteria in a Comparative Evaluation.

There is some merit in refusing to resolve such a contention, notably to avoid polarization of the community, but this would have to be weighed against the negative consequences for all applicants involved in the contention set - their applications would all be considered void and they would have to reapply in the next round, implying both substantial extra costs and severe delays.

It should further be made clear that any final resolution necessary will be made ONLY between the community applications that score above the threshold, and NOT involve other applications in the contention set. This was ambiguous in the first version and will be clarified in the next version.

The opportunity to resolve the contention situation on a voluntary basis is present before a Comparative Evaluation takes place. To add an opportunity for such a resolution thereafter would carry a risk of delay with arguably meager chance of success, as the voluntary path has already been tried and failed. It is a preferred option to further facilitate the original opportunity for voluntary resolution by allowing more flexibility for agreements between the contending applicants, while safeguarding expedience in the process. Agreements between contending parties may result in deep modifications of an application that would have to be reviewed thru all steps from Initial Evaluation onwards. Applicants can investigate what agreements can be permitted in order to facilitate voluntary resolution of contention without resulting in substantive changes of any application. This should be considered in order to reduce the number of

contention cases to address by other means, thereby also avoiding additional costs for applicants.

An opportunity for applicants to present alternative strings, or to select a new string, would facilitate contention resolution and this was an option considered in the policy discussion but it was thought it would overly complicate the process. The agreed approach in the implementation advice accompanying the policy recommendations was, in short, that there be only one string per application to prevent gaming aspects.

For the final resolution in a case with multiple community applications, there are essentially two options to consider, either assessment of which one has majority support from the community or an auction among the winners. The first option is only applicable if the contenders do address the same community, while the second is applicable to any situation. From that perspective, an auction is preferred since that solution provides clarity of process and better predictability.

The role of the purported “purpose” of the TLD application: similarity of purpose between two applications is not a contention situation as defined by the process, which only is concerned with the ability of the TLD strings to coexist in the DNS. Provisions to prevent “content contention” are not part of the adopted policy, nor contemplated in the implementation. “Similarity of purpose” is, in fact, another way of saying “competition” and it is ICANN’s recognized duty to promote competition.

Proposed Position (for this version of the Guidebook)

A comparative evaluation where multiple community applications feature identical or confusingly similar strings and score above the threshold for meeting the criteria will need to be resolved through an additional step. In cases where the applicants represent the same community, there will be a test to determine if one of the applicants represents a significantly greater portion of the community. In cases where this is not so, the applicants will be afforded an opportunity to settle the contention. During that time, the community invoked in the applications may choose to support one of the applicants over the other, with the result that one of the applicants would no longer meet the criteria and the other applicant would prevail. Absent a failure of all these methods, an auction will be held.

If more than one community-based application meet the criteria, none of the non-community-based (open) applications in direct contention with the former will prevail. This step should only address the particular contention situation among these community applications and not involve other applications in the contention set in question. This will be clarified in the revised version of the Applicant Guidebook.

E. STRING CONTENTION: LAST RESORT CONTENTION RESOLUTION--AUCTIONS

Summary of Key Points

- The revised Guidebook proposes that if comparative evaluation, agreement between parties or other methods do not resolve contention among applicants, that auctions will be used as a last resort contention resolution method.
- Several other methods of contention resolution were considered. Auction is an objective, legal, timely way to resolve contention, while other candidates proved not to be.

- Bona fide community-based applicants meeting the criteria will not face non-community based applicants in auction. In certain cases, if after other additional methods fail, community-based applicants might face each other in auction.
- Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure.

Summary of Input

Support or Non-Objection to Auctions

Demand Media strongly supports the use of auction to resolve contention for open TLDs. They note that there will be a high degree of cooperation to resolve contention if the efficient allocation mechanism of last resort is auctions (as applicants will have incentives to not go to auction). If the mechanism is chance, less cooperation will occur and gaming may result. Related to cooperation is the issue of self-resolution of string contention. Demand Media notes that joint ventures could be permitted if the joint venture proceeds with the original bidder except for the new ownership structure of the entity. *Demand Media* (15 Dec. 2008).

“As a related comment, I would like to add that the draft AGB is still unsure what to do in the case more than one applicant meets the criteria for community-based. In this scenario, I believe ICANN has administered all that they can fairly and objectively for the applicants with the final resolution to be left to an auction.” *R. Fasset (EmployMedia)* (15 Dec. 2008)

“Second, ICANN should encourage joint ventures as a means of resolving string contention, as opposed to prohibiting them. As long as the original applicant is part of the joint venture, the application shouldn’t change in substance sufficiently to prohibit an important means to resolve string contention. If ICANN really wants to use auctions as a contention resolution method of last resort, it should adopt a high refund policy, announce it soon, and permit joint ventures to be formed by two or more parties that are contending for the same or similar string.” *CentralNIC* (13 Dec. 2008). Several commenters also addressed the joint venture issue: E.g., noting that it is unclear why applicants may not resolve string contention situation through creating a joint venture to operate one string. *Rodenbaugh* (16 Dec. 2008). *Demand Media* (15 Dec. 2008). *K. Rosette* (26 Nov. 2008). *C. Gomes* (18 Nov. 2008). *Bank of America* (15 Dec. 2008).

4.3 Contention Resolution- “The Guidebook mentions an ‘efficient mechanism for contention resolution’ that has yet to be developed; the Guidebook only states a) that the first efficient means of resolution that will be employed is an attempt at a settlement between the two parties, and b) that auctions will be a last resort. ICANN should develop this mechanism that will come into play after attempts to settle a dispute between two competing applicants.” CADNA notes that the Guidebook needs further clarification regarding how funds resulting from auctions will be allocated. “There should be further clarification as to what would be deemed an appropriate allocation of these proceeds, the time frame for this decision and how this allocation would be determined through ‘community consultation.’” *CADNA* (15 Dec. 2008).

“The Guidebook mentions an ‘efficient mechanism for contention resolution’ that has yet to be developed; the Guidebook currently only states a) that the first efficient means of resolution that will be employed is an attempt at a settlement between the two parties, and b) that auctions will be a last resort. ICANN should develop this mechanism so that contention sets are not frequently pushed to auction.” *RILA* (15 Dec. 2008).

General Concerns: Support for Comparative Evaluation Over Auction; Other

Supports mandatory, rather than optional, comparative evaluation on string contention. *AIPLA* (15 Dec. 2008) The DAG indicates that “auctions are one means of last resort” to resolve string contention. However, *SIIA* notes that no other means are discussed. *SIIA* has serious reservations about auctions as a mechanism for awarding new gTLDs.” *SIIA* (15 Dec. 2008)

Instead of auction, “not allocating the TLD would be more efficient to all parties involved (when multiple applicants for the same community-based TLD pass the evaluation and are all of them representative of such community).” *A. Abril i Abril* (15 Dec. 2008).

“If no community-based applications are presented other enterprises competing for a gTLD could be determined either between the competing parties or through an auction process (the one with the most money offered wins). There is no guarantee that the most appropriate trademark owner would retain a gTLD containing their brand name.” *R. Raines* (4 Dec. 2008).

“The so-called “comparative evaluation” process should be completely re-thought, since in its present form it will be extremely difficult for even a strong community application to emerge as a “clear winner” and escape being funneled into an auction.” “COA participants share the strongly stated concerns of the IPC regarding the inappropriateness of resorting to auctions to award gTLDs in most cases, see <http://www.ipconstituency.org/PDFs/IPC%20comments%20on%20auctions%20paper%20090708.PDF>, and thus urge ICANN to re-think the “comparative evaluation” procedure. Especially when only one community-based application is involved, it should be designed mainly to weed out specious claims of community-based status, rather than to impose an unjustifiably high hurdle between an otherwise qualified community applicant (including those that have survived Community Objection procedures) and the goal of a gTLD delegation.” *COA* (15 Dec. 2008)

The next Guidebook should clearly describe the nature of the “efficient mechanism for contention resolution”; it is doubtful that auction is appropriate for resolution of any string contention). *Bank of America* (15 Dec. 2008). *SIFMA* (12 Dec. 2008). *SIDN* (10 Dec. 2008) (revenues to ICANN aspect is problematic).

Opposed to Auctions

On Module 4, George Kirikos asserts that auctions alone are insufficient mechanisms for allocating gTLDs, as they do not address the negative externalities imposed upon others.” “ICANN cannot be trusted to use the auction proceeds in a financially responsible manner, given what has been revealed in its IRS Form 990 disclosures, whereby ICANN's budget and staff compensation has been exploding to unreasonably high levels. Any proceeds should be used on a dollar-for-dollar basis to reduce ICANN fees for existing gTLD registrants, thereby refunding partially the externalities that ICANN is imposing upon society. Debacles like the ICANN Fellowship Project ...should not create new precedents for even grander debacles that ICANN and its insiders hope to fund through auction proceeds. Financial prudence in these tough economic times means not funding white elephants, but instead rebating the fees back to domain registrants.”“In the “Resolving String Contention”, bidders during any auction must place a bidding deposit of large enough size to ensure that no fraudulent bids take place (in which case the auctions would be replayed, but the deposit forfeited to the other bidders). It's unclear that the current mechanism adequately addresses this, given the short time frames discussed

(bank letters of credit or other instruments might be required before the auctions). We've seen spectrum auctions, for example, where bidders defaulted, e.g. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2207A1.pdf. G. Kirikos (24 Nov. 2008)

Section 4.3 of the DAG states that "auctions are one means of last resort" to resolve string contention, but no other means are discussed. IPC reiterates its strong concerns about auctions as a mechanism for awarding new gTLDs (see <http://www.ipconstituency.org/PDFs/IPC%20comments%20on%20auctions%20paper%20090708.PDF> and previous submissions cited there). [These comments were addressed in the Explanatory Memo on Auctions, except for detail on uses of funds and revised comparative evaluation criteria. IPC (15 Dec. 2008).

"Section 4.3 deals with an auction to resolve contention. Is this to maximize the revenue of ICANN? This seems to go against the foundational principles to promote competition in the domain-name marketplace while ensuring Internet security and stability. Surely the parties should firstly be given the option of accepting an alternative name? If this is not agreed then by all means, have an auction." *Smartcall* (4 Dec. 2008)

For brand protection in resolving string contention in the new gTLD process, auctions should be avoided and other mechanisms should be developed. If auctions are deemed necessary in some cases, escrow amounts should be required to deter fraud or defaulting bidders; analysis of auctions and resultant revenues to ICANN in relation to ICANN's status as a nonprofit should also be assessed. *NAM* (15 Dec. 2008).

Opposed to Auctions – Don't Use if Rights Holder has Objected

On Auctions, *MarkMonitor* recommends "Section 4.3- Auctions should not be adopted as a mechanism for string contention resolution if there has been an objection filed by a rights holder. This might occur if ICANN decides not to adopt the findings of the DRSP, and the rights holder has submitted an application for the string. To do so would enable ICANN to benefit from potentially infringing TLD applicants." *MarkMonitor* (15 Dec. 2008).

Opposed to Auctions – In Case of Community-Based Applicants

"In the 1st public draft GFA text, this set always goes to auction if two or more of community-based applications score 11 points or more in the comparative evaluation, and the relative evaluation fails to determine a "clear winner". Suppose that all three community-based applications each score 11 points in the comparative evaluation, and the evaluators are unable to arrive at a basis for awarding priority between them.

Therefore, Chrysler LLC, with a capitalization that may be negative today, but historically has had better access to capital than any Tribal Government ever, is allowed to bid as a brand manager (JEEP CHEROKEE) against three rather poor (and corrupt for two out of the three) Tribes and their respective community-based applicants. This is not the outcome we should be designing for." "The process should always select a qualified community-based application, and unlike contention sets formed for generic strings, communities can not change their names to accommodate the uniqueness of labels requirement of the DNS, there is no "commercially reasonable" private settlement possible for communities, unlike commercial plays for generic strings." "It should be very clear that paying a fee to obtain access to an evaluated outcome rather than a auction outcome is an additional barrier to community-based applications who may be in a contention set, and failure to pay this fee will, in the simple case of a community-based

applicant and a "open" application, resolve the outcome as an auction in which the bidders are comprised of one auction-preferred bidder, and one auction-adverse bidder, with the obvious general outcome." "Again, this is not the outcome we should be designing for. The evaluation fee should be paid by the party forcing the evaluation, which is the "open" application which intentionally formed a contention set by applying for a community identifier, and has not withdrawn its application upon notice that a community-based application for that community identifier has been filed. Where there are no applicants within a contention set predisposed to an auction outcome, the evaluation fee should be paid by ICANN, which at its sole discretion selected the rather expensive International Chamber of Commerce rather than any other means to evaluate community-based applications, and which has, so far, rejected any contention outcomes other than "last man standing." *E. Brunner-Williams* (15 Dec. 2008)

"If there is no "clear winner" from the Comparative Evaluation, the resolution process is to process into a not-yet-finalized Efficient Mechanism for Contention Resolution, which will probably be auctions. Auctions do not appear to be a realistic mechanism for resolving contention among community-based applicants. Because it seems likely that many community-based applicants, such as non-profit organizations, may not have resources sufficient to compete with the open applicant in the auction setting, auctions are likely to favor those with open applications instead of those with community-based applications. In addition, an auction would work to the detriment of a community-based applicant unfortunate enough to compete with another community-based applicant and an open applicant. If the two community-based applicants both qualify through the Comparative Evaluation procedure and neither represents "a much larger share of the relevant community," they might both lose out to a better funded open applicant. This result seems contrary to the general preference for community-based applicants." *INTA* (15 Dec. 2008); *Arab Team* (15 Dec. 2008) (do not use auctions for community-based string contention).

Issues

1. Whether to specify or more clearly explain that joint ventures are permitted under the current language of the Applicant Guidebook, as part of self-resolution of contention among competing applicants.
2. Whether to specify that ICANN staff is proposing that auctions be the last resort mechanism to resolve string contention.
3. Whether to add detail on potential uses of funds derived from auction.
4. Whether community-based applicants continue to auction in cases where comparative evaluation does not produce a clear winner.
5. Whether auctions should be used as a last resort contention mechanism in cases in which an objection has been filed against a proposed string.

Proposed Position (for this version of the Guidebook)

1. Whether to specify or more clearly explain that joint ventures are permitted under the current language of the Applicant Guidebook, as part of self-resolution of contention among competing applicants.

Joint ventures are expected as part of the application process and it is designed to accommodate applications by new entities. Agreements are expected as part of self-resolution of string contention but a new entity, resulting in a material change to the application information would require re-evaluation for satisfaction of the Operational/Technical/Financial criteria. This might require additional fees or potential

postponement of consideration to a subsequent round. Applicants are encouraged to resolve contention amongst them by arriving at accommodations that do not materially alter the application information of the surviving applicant in order to achieve a timely resolution and decision. ICANN will work with evaluation service providers as they are retained to determine if re-evaluation can occur in a timely way.

2. Whether to specify that ICANN staff is proposing that auctions be the last resort mechanism to resolve string contention.

Considerable analysis of this question is provided below. Module 4 has been revised to clearly describe auction as the last resort contention resolution mechanism, only after contending parties have had an opportunity to resolve the contention themselves, comparative evaluation does not resolve the contention, and all objection processes or comparative evaluation processes are complete. It is expected that resolution between the parties will present a more economical resolution method for applicants and that most contention will be resolved in this manner.

3. What are uses of funds derived from auction?

Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure. Other uses include outreach and education, and DNS stability/security projects. The revised Guidebook includes this added detail on the use of funds regarding the establishment of a foundation.

It is important to note again that it is thought that most cases of contention will be resolved by an agreement among the parties since that is a more economical solution to contention than auction. Therefore, few auctions are expected.

4. Whether community-based applicants continue to auction in cases where comparative evaluation does not produce a clear winner.

This situation is described more fully in a companion paper. Briefly:

- In cases where multiple community-based applications meet comparative evaluation criteria, the other, non-community based applications in direct contention with the former will no longer be considered.
- In cases where multiple community-based applications address the same community and meet comparative evaluation criteria, if one application demonstrates considerably more community support, it will prevail.
- In cases where multiple community-based applications meet comparative evaluation criteria, neither has demonstrated significantly more support than the other or they represent different communities, and they cannot settle the contention amongst them, an auction will be held between these applications.

Contending parties will be given an opportunity to resolve their differences, after which an auction will be conducted. An alternative was for both community-based applicants to come back at a later date (future round) after both have settled their differences but this seems to unnecessarily delay the delegation of a desired resource.

5. Whether auctions should be used as a last resort contention mechanism in cases in which an objection has been filed against a proposed string.

All objections will be resolved prior to resolution among contending applications. Presuming that the objection was not successful, and contention remains after the original objection was filed, then the contending applicants should proceed to resolution methods, including comparative evaluation, agreement among the parties, and auction.

Analysis

Background

Comparative evaluations were used in the 2001 proof-of-concept round and the 2003 sponsored TLD round. Comparative evaluation was also used in the .NET rebid process and transition of .ORG. It was widely noted in the community that ICANN did not have a good experience with comparative evaluation in the .NET rebid process.

The use of auctions in the new gTLD process has been discussed for many years. In 2004, ICANN received a paper on allocation of gTLDs via auction from the Organization for Economic Cooperation and Development (OECD) titled "Generic Top Level Domain Names: Market Development and Allocation Issues" (see <http://www.oecd.org/dataoecd/56/34/32996948.pdf>). This paper described allocation methods for gTLD strings, including auction and comparative evaluation. The OECD concluded: "On balance the economic arguments favour the use of auctions in some form, where scarcity exists, in relation to the goals set by ICANN for allocation procedures. They are particularly strong in relation to allocation decisions concerning to existing resources and where a 'tie-breaker' is needed during a comparative selection procedure for a new resource. In all cases, the best elements of comparative selection procedures could still be incorporated, at a prequalification stage for registries, using straightforward, transparent, and objective procedures that preserve the stability of the Internet" (pp. 51-52).¹

The paper acknowledged that comparative evaluation may have the advantage of providing equity for new gTLD applicants, and permits the inclusion of broader objectives in the new gTLD selection process. However, it also noted that comparative evaluation lacks transparency and relies on subjective judgment in the determination of a winner for a proposed gTLD string.

Auction of new gTLDs was discussed during the development of the GNSO Recommendations during a meeting in Marina del Rey, California in 2007, and referenced in the final recommendations approved by the GNSO. Implementation details, including potential use of auctions, were discussed with the GNSO and others during the ICANN meetings in Los Angeles, Delhi, Paris and Cairo.

The GNSO Recommendations approved by the ICANN Board in June 2008 state that new gTLDs must be introduced in an orderly, timely and predictable way. There must be a clear and pre-published application process using objective and measurable criteria. All applications must initially be assessed in rounds until the scale of demand is clear.

¹ Legal scholars familiar with ICANN and the DNS have also recommended auction as a means for distributing new gTLDs. See "An Economic Analysis of Domain Name Policy," *Hastings Communication and Entertainment Law Journal* (2003) (by Karl M. Manheim and Lawrence B. Solum) (<http://law.bepress.com/sandiegolwps/le/art1>).

The GNSO also recommended that if there is contention for strings, applicants may:

1. resolve contention between them within an established time-frame;
2. if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. **If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention** [emphasis added] and;
3. the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

In early 2008, ICANN retained PowerAuctions, LLC as an auction consultant, and published an Economic Case for Auctions in August 2008. The Economic Case paper became the basis for the auction model incorporated as Chapter 6 of the Resolving String Contention explanatory memorandum attached to the draft Applicant Guidebook.

Allocation Mechanisms Overview

The GNSO Recommendations anticipate that there will be cases where two or more identical or nearly identical strings will meet the qualifying criteria and successfully complete all evaluations. Applicants should first be provided an opportunity to resolve contention themselves. In cases where one or more contenders is community-based, comparative evaluation may be used. If comparative evaluation is not used or does not result in a clear winner, contention may be resolved by an “efficient mechanism.” Staff has proposed that this mechanism be auctions. There are essentially four ways to resolve contention:

- Comparative evaluation – subjective criteria are applied to each contender in order to determine the better or best applicant. This method, supported by the GNSO Council for community-based applicants, is problematic because devising measurable criteria is difficult and the process will lead to controversial results.
- Auction – In a pre-determined methodology, contending applicants submit monetary bids for the TLD. Generally, the highest bid wins. This method is objective. It is supported by the OECD (Organization for Economic Cooperation and Development, www.OECD.org) and other stakeholders including aspiring gTLD registries.²
- Random selection – A coin-flip or (in the case of several contenders) random drawing determines the winner. The method is objective but is problematic as law in certain jurisdictions provides a direct barrier to using a lottery or other form of selection by chance to determine the winner of a contested gTLD.

² The GNSO stated that in these cases “a process will be put in place to enable efficient resolution of contention.” In that report, the council indicated that they had considered auctions as discussed in policy discussions and implementation meetings with ICANN staff an auctions merited additional study.

- Best terms - The party agreeing to best contract terms would be the winner. Determination of what are best terms is problematic and will lead to gaming. For example, the choice could be made on a registry reliability or response time measure that won't necessarily serve registrants better but would result in a number of overreaching application promises.

1. Selection by Chance

Selection by chance includes the use of lotteries, "short straw", "coin flip" or random selection as a mechanism for allocating applications for new gTLDs. ICANN has received advice from outside counsel that lotteries (or other selection by chance methods) might be viewed as illegal in some jurisdictions, and such laws may provide a direct barrier to using lotteries or other chance mechanisms in order to determine the winner of a contested gTLD.

2. Comparative Evaluation

ICANN previously used comparative evaluation for the transition of .ORG from VeriSign to PIR, the .NET rebid process, and the 2000 and 2003 new gTLD rounds. Subjective aspects of comparative evaluation in the .NET rebid made selection of a winner in a close contest difficult and vulnerable to litigation. ICANN anticipates that comparative evaluation will be used to resolve contention among applicants when at least one applicant purports to represent a community or is seeking a community-based gTLD.

The disadvantages of comparative evaluations can be summarized as follows:

- It is difficult to establish clearly objective criteria that allow the evaluator to differentiate among competing applications that have already passed all evaluation criteria;
- comparative evaluations take relatively longer time periods than objective measures and cost more;
- Depending on how the comparative evaluation is structured, the process may favor well-connected applicants, and thus may not be any more protective of disadvantaged applicants than auctions;
- Comparative evaluation is difficult in cases where community-based applicants are up against open applicants over the same string.

3. Auctions

ICANN has received a number of inputs from the community on the potential use of auctions to resolve contention among competing new gTLD applications.

Auctions are an objective and transparent means to resolve string contention. Given that bids are observable and verifiable by a court or any third party, the final allocation is less likely to be legally contested relative to a comparative selection procedure. The key benefits of a well-designed auction mechanism include the following:

- Transparent and objective means for determining a winner
- Efficient allocation – puts gTLD strings in the hands of those who value them
- Efficient process – fully dynamic auction, concludes in one day to one week
- Revenue maximization (although this is not one of ICANN's goals in the new gTLD process)

Parties competing for the same or similar strings would be able to collaborate with each other once contention sets have been identified. This would permit applicants for the same or similar strings to work out contention amongst themselves between the time in which all applications are posted and the initial evaluation process closes, and this would be in line with the GNSO

Recommendations. This would be a more cost effective solution for most contending parties and it is anticipated most contention would be resolved prior to the auction occurring. ICANN's task is to make a final determination among the applications received. As an example, how best should ICANN resolve contention for .shop if VeriSign, NeuStar, Afilias, Nominet and NIC.MX all meet the base criteria? An auction mechanism would provide for a clear and objective means for resolving contention among multiple applicants. In another example, how should ICANN resolve contention for .car, .cars, .care, and .cares (if it is determined that .car, .care and .cars are in contention and .cares and .care are in contention with each other)?

4. Selection by Best Terms

ICANN could also determine to resolve contention by selecting the applications that present the "best terms". This would require ICANN to identify in advance "best terms." Determination of what are best terms is problematic and will lead to gaming. For example, the choice could be made on a registry reliability or response time measure that won't necessarily serve registrants better but would result in a number of overreaching application promises.

Uses of Funds

ICANN's plan is that fees and costs of the new gTLD program will offset, so any funds coming from a last resort contention resolution mechanism such as auctions would result in new revenue to ICANN. Therefore, consideration of a last resort contention mechanism should include the possible uses of funds. Clearly, any funds must be used in a manner that supports directly ICANN's Mission and Core Values.

Given that possible new revenue from contention resolution mechanisms could range from zero to potentially significant sums, it is challenging to identify specific uses with certainty. Proceeds from auctions will be returned to the community via a foundation that has a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community. One use of funds would be to sustain registry operations for a temporary period in the case of registry failure. Other uses include outreach and education, and DNS stability/security projects. Other possible uses could include reduction in application fees or grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, or other specific projects for the benefit of the Internet community in accordance with ICANN's security and stability mission.

XII. REGISTRY AGREEMENT

Summary of Key Points

- ICANN received dozens of thoughtful and constructive comments on the draft proposed Registry Agreement.
- There have been significant revisions to the proposed Registry Agreement in response to public commentary and discussions:
 - ICANN has modified the proposed process and included limitations on implementing global amendments to the form of the Registry Agreement.
 - ICANN has included covenants requiring equitable treatment among registry operators and open and transparent actions by ICANN.
 - The recurring registry fees to ICANN have been reduced to US\$25,000 per year, plus a flat \$0.25 per transaction for registries with over 50,000 names.

Summary of Input

This section organizes the summary of responses about the Registry Agreement into the following categories: *General Comments, Covenants of ICANN, Consensus Policies, Compliance, TLD Delegation, Term and Termination, Payment Concerns, Pass-Through of Registrar Fees, Price Controls, Amendment Process, Dispute Resolution and Damages, Indemnification, Warranties and Liability, and Changes of Control.*

General Comments

General Concerns Regarding Proposed New Form of Registry Agreement. The introduction of an entirely new “base agreement” in the draft appears to be based only on a desire to simplify the form of agreement. With a few exceptions, it certainly does not stem from the recommendations in “Term of Reference Four – Contractual Conditions: http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc35657640.” The resulting base agreement is so flawed in substantive provisions that consideration should be given to abandoning it in its entirety. At the very least, the Board should consider, as a possible starting point, the forms of registry management agreements in force for .ORG, .BIZ and .INFO. Among other sections that must be added: ICANN covenants, consensus policies, limits on ICANN authority to make changes; and certain fee provisions should be removed. *PIR* (15 Dec. 2008). ICANN must address other omissions and changes in the agreement - e.g., the TLD zone servers; the term of agreement; renewals; termination rights; dispute resolution; arbitration; liability; registry fees; RSTEP cost recovery; collection of registrar fees by registries; changes and modifications to the agreement; notice of changes; indemnification; and changes in control. *RyC* (6 Dec. 2008); *G. Kirikos* (24 Nov. 2008) (cites numerous deficiencies and need for revisions to the base agreement—e.g., renewal provisions, pricing, equal treatment trigger problem, fees, changes in registry control, rights protection mechanisms); *Demand Media* (Module 5, 15 Dec. 2008) (suggests numerous revisions – e.g., spell out rights protection mechanisms, indemnification, arbitration, community policies, audits); *A. Abril i Abril* (Module 5,

15 Dec. 2008) (certain omitted provisions should be added back into agreement — e.g., rights to data, traffic data, extent of delegated authority; clarification needed for public law corporations and community-based TLDs). Why does the currently proposed draft Registry Agreement deviate so much from existing Registry Agreements? It is very one-sided in favor of ICANN. Are there key areas in existing agreements that ICANN Staff think have been unsuccessful? If so, what are those and why are they thought to be unsuccessful? *C. Gomes* (18 Nov. 2008).

Need for a Balanced Agreement. Registries believe that we should focus now on crafting an agreement that is fair, gives ICANN the tools it needs to achieve its limited mission, and gives Registries the stability and predictability they need to operate businesses. Provisions under which changes to the fee provisions of each registry's agreement should be negotiated on an individual basis, as appropriate. *RyC* (6 Dec. 2008).

Impact on Existing TLDs. What will be the impact of the adoption of the new form of Registry Agreement on existing TLDs? *G. Kirikos* (24 Oct. 2008).

Compliance with Application; Changes. Do TLDs have to follow what was in the application? *J. Neuman, C. Greer; Notes from October 29 RyC Meeting.* ICANN should anticipate and accept that reasonable changes may occur during the course of what could be a lengthy review process. Registries also believe that the Registry Agreement should obligate operators to fulfill the commitments made in their applications, particularly with respect to community based applications, and note that this provision does not accomplish that goal. *RyC* (6 Dec. 2008). Can an applicant apply for a TLD and choose not to use it? Can applicants apply for a TLD to prevent others from using it? *F. Hammersley* (24 Nov. 2008; 6 Nov. 2008) (inquires about possible pre-application opinion on similarity to a reserved name; what is the position on gTLD "warehousing" to prevent others from using it).

Contract Execution. Section 4.4 – If an Applicant is in good faith negotiations with ICANN on the Registry Agreement, ICANN should not have the right to assign the contract to the runner-up applicant if the contract has not been signed within 90 days. *MarkMonitor* (Module 4, 15 Dec. 2008); *C. Gomes-GNSO New gTLD Question and Answer Open Teleconference.*

Covenants of ICANN

ICANN Accountability. More ICANN accountability is needed. The covenants section of the Registry Agreement needs clarification and adjustment to conform with established registry expectations, and the agreement also raises concern due to certain unilateral changes. ICANN needs to reconsider the significant changes it made to the "Covenants of ICANN" (article 3) provision. The proposed changes in this section eliminate ICANN's obligations to (a) operate in an open and transparent matter consistent with its expressed mission and core values, and (b) not apply its standards, policies, procedures or practices arbitrarily, unjustifiably or inequitably, and not single out particular Registries for disparate treatment unless justified by substantial and reasonable cause. As previously discussed, because Bylaws can be changed, Registry Operators feel very strongly that ICANN's accountability for compliance with the most basic obligations of fair dealing should be set out in the Registry Agreement. *RyC* (6 Dec. 2008). Why was the reference to the "equitable treatment" provisions in the old form of Registry Agreement (Sections 3.2(a) and (b)) removed from the list of issues which consensus policies could not modify? *M. Palage, J. Neuman; October 29, RyC Meeting.*

Zone Server and Nameserver Implementation Timeframe. Related to Section 3.1, the Registry Operators believe that ICANN should be willing to commit to a best efforts standard that targets implementation within 7 days for changes to the TLD zone server and nameserver. ICANN is obligated to ensure that the authoritative root points to the designated TLD zone servers to the extent ICANN has the authority to do so. This is a very limited obligation with respect to a matter of fundamental importance to Registries, and should remain in the Registry Agreement. *RyC (6 Dec. 2008).*

Consensus Policies

Limitations. Why was the definition of “Registry Services” removed from the Consensus Policy specification? *M. Palage, October 29, 2008, RyC Meeting.*

Scope of Consensus Policies. Registry operators cannot agree to expand the scope of Consensus Policies beyond the long-accepted picket fence, and believe that it is not in ICANN's long-term interests to do so. Because Bylaws can and do change, Registries feel that contractual protections for the picket fence are essential. *RyC (6 Dec. 2008).* Registry Agreement pricing is not a stability or security issue and thus not within the bounds of the picket fence. It is a matter on which each registry is free to agree via contract, but it is not an appropriate matter for Consensus Policy. *M. Palage, October 29, RyC Meeting.*

Compliance

Audit Rights. ICANN has the right to audit a registry's compliance with each and every aspect of the Registry Agreement. ICANN already has the right to audit compliance with the fee arrangements and with ICANN's technical and functional specifications. This provision could impose significant costs on Registry Operators (even if ICANN has to pay the actual auditor) that are not justified unless the audit is necessary to investigate a bona fide complaint about a material violation of the Registry Agreement. *RyC (6 Dec. 2008).*

Sanctions Program. ICANN should require re-evaluations in the event of blatant violations of the TLD's specified purpose that simplifies the deregistration process. *Hacker (14 Dec. 2008).* Is there a compliance and sanctions process for the companies who will run the new gTLDs? And if so, what is it? *Anonymous Email (26 Nov. 2008).* Where in the draft base agreement is implementation of GNSO recommendation 17 about a “clear compliance and sanctions process must be set out in the base contract that could lead to termination?” *C. Gomes (18 Nov. 2008).* ICANN should use graduated sanctions for registries and additional rights protection mechanisms should be encouraged beyond UDRP. *MarkMonitor (Module 5, 15 Dec. 2008).*

Community-Based TLDs. On contracts post-delegation, Demand Media would like to see ICANN include in community contracts a requirement that changes only be considered due to changes within the community itself. *Demand Media; http://forum.icann.org/lists/gtld-transition/pdfm3Q_H889SJ.pdf.* If a community application makes it through without contention, are they bound to the restrictions in application? *Demand Media-GNSO New gTLD Question and Answer Open Teleconference.*

Reporting Requirements. ICANN demands monthly reporting by the registry. It is unclear what the purpose of such reporting is and what the ground for such an obligation would be. ICANN

demands reporting on transfers. Again, it is unclear what the purpose of such reporting is and what the ground for such an obligation would be. *SIDN* (10 Dec. 2008).

Whois Obligations. Was it intended that all new TLDs have only the Whois obligations of their registries? If so, why? *S. Metalitz* (25 Nov. 2008). It is essential to combating online fraud that full Whois information be available at the Registry Operator level (Base agreement Section 2.4, specification 4). *Microsoft* (Guidebook comments, 15 Dec. 2008).

General; ICANN Enforcement Capacity. “Standards Compliance: Registry Operator shall implement and comply with all existing RFCs.” Does this include RFC 2549? *E. Brunner-Williams* (25 Nov. 2008). ICANN must demonstrate that ICANN has sufficient capacity to enforce contract compliance with an as-yet unknown number of new contracting parties, especially in light of outstanding questions regarding existing contracts (such as the proposed amendments to the Registrar Accreditation Agreements and problems with the Whois data accuracy reporting system). *U.S. DOC-NTIA* (18 Dec. 2008); *Lovells* (15 Dec. 2008); *News Corporation* (16 Dec. 2008) (ICANN also must dedicate resources to enforcement); *Grainger* (15 Dec. 2008) (policing new TLDs for compliance with intended use is ICANN’s responsibility). ICANN must foster consistency and empower its contracting parties with the clear right to suspend resolution to any abusively registered domain; this right is absent in the proposed new Registry Agreement. ICANN should consider a notice and takedown system for abusive registrations. *Rodenbaugh* (16 Dec. 2008); *ICA* (16 Dec. 2008) (strongly oppose cost-free takedown procedures for domains alleged to be established in bad faith for new and existing gTLDs; bad faith is already one of the key elements of the UDRP and should be one or three elements in a balanced proceeding, not the single determinative element; ICANN and registries should increase resources for taking down domains used for criminal activity).

TLD Delegation

Applicant Implementation. The contract should allow the applicant to choose its own timetable for entering into the root zone. To prevent complete preclusion of a string by an applicant, an applicant should be required to proceed to delegation and to register at least one second level domain with legitimate content within three years after award of a gTLD. *Bank of America* (15 Dec. 2008); *Visa* (13 Dec. 2008) (brand owners should be able to register their trademark extension to protect it but should not have to actively use it or fulfill back-end requirements). We recommend that the contract require the new domain to adopt the best available security measures, such as DNSSEC, a robust Whois (see section 2.1.3) and the current Add Grace Period Limits Policy which currently does not have even “temporary policy” status. *Bank of America* (15 Dec. 2008). Is there any idea what the time period will be for ICANN to determine that a registry’s initial start-up requirements are not satisfied such that the gTLD can be delegated into the root zone within the time frame specified in the Registry Agreement? Should this correspond to the time period by which the TLD has to become active? *C. Gomes-Compiled Comments on the new gTLD Applicant Guidebook*.

Term and Termination

Term of Agreement. Extending the term to ten years does not justify the many changes ICANN proposes to make in this agreement. In fact, the protections in place in the current agreements are far more important, and once in place, the term itself is less critical to Registry Operators. *RyC* (6 Dec. 2008).

Termination and Renewal. The current Registry Agreement places modest constraints on ICANN's rights to refuse to renew, which ICANN proposes to eliminate in the draft. The draft also eliminates existing provisions regarding the terms under which such renewals will take place. The current agreement assures ICANN that it can bring renewal agreements in line with contract changes that have been implemented during the term, but provide the degree of stability and predictability Registry Operators need to operate their businesses, both with respect to terms and pricing. Those protections should be maintained. *RyC* (6 Dec. 2008). The new draft extends ICANN's termination rights to any "fundamental and material breach" of the agreement, including any changed terms. *RyC* (6 Dec. 2008). Related to Section 4.4, the reference to "critical registry functions" should be defined in the same manner that this phrase is used in the proposed gTLD Registry Continuity Plan. *RyC* (6 Dec. 2008). Competitive bidding should be required for renewals of a gTLD Registry Agreement, rather than granting incumbents perpetual right to renew; this serves the interests of registrants and may lower domain prices and raise operating specifications. *U.S. DOC-NTIA* (18 Dec. 2008). If the Registry Operator operates a closed, branded gTLD or a gTLD with fewer than a set number of registrants, the Registry Operator should have the right to terminate the Agreement and cease operating the registry. *Microsoft* (Guidebook comments, 15 Dec. 2008). *Demand Media* (Module 5, 15 Dec. 2008) (registry should have right to terminate under certain conditions).

Payment Concerns, Pass-Through of Registrar Fees

Bilingual Fees. Regarding Section 6.1 of the New gTLD Draft Agreement, the fee structures do not make any provisions for bilingual Registry Operators, who may be required under equality legislation to make bilingual domain registrations available at no extra cost to the end user. We wish to suggest that Registry Operators who are legally required to operate bilingually should be dealt with on a different fee structure. *dotCYM* (15 Dec. 2008).

Registry Fee Collection. Registry operators have agreed in the past to collect fees, subject to a specific cap, from Registrars on behalf of ICANN. Registry operators cannot, however, agree to the changes proposed by ICANN, which remove all limitations on what ICANN may require Registries to collect. Also, regarding Section 6.4, this provision would appear to obligate Registries to pay registrar fees with no phase-in period to allow Registries to first collect the fees from Registrars. Registries should not have to compensate ICANN for fees due by Registrars unless they have had the opportunity first to collect those fees. *RyC* (6 Dec. 2008).

Price Controls

Maintain Price Controls. ICANN should clarify whether price controls that apply to domain names will be preserved; before any elimination of them ICANN must demonstrate the mechanisms to ensure that prices will be controlled by market forces. *News Corporation* (16 Dec. 2008); *K. Pilna* (16 Dec. 2008) (concern lack of price controls and preserving TLD neutrality); *eedlee* (Module 5, 12 Nov. 2008); *Swa Frantzen* (Module 5, 11 Nov. 2008); *A. Allemann* (Module 5, 12 Nov. 2008); *T. Smith* (Module 5, 8 Dec. 2008); *C. Christopher* (Module 5, 8 Dec. 2008); *P. Gusterson* (Module 5, 8 Dec. 2008); *D. Carter* (Module 5, 13 Nov. 2008) (why opening up old debate); *YouBeats* (Module 5, 12 Nov. 2008); *E. Rice* (Module 5, 13 Nov. 2008); *Searchen Networks* (Module 5, 14 Nov. 2008); *S. Morsa* (Module, 8 Dec. 2008); *B. Regan* (Module 5, 9 Dec. 2008); *G. Yandl* (Module 5, 15 Dec. 2008); *M. Menius* (16 Nov. 2008, 12 Dec. 2008, 15 Dec. 2008); *K. Pitts* (12 Nov. 2008); *C. Mendla* (13 Nov. 2008); *F. Schilling* (Module 5, 21 Nov. 2008); *K. Ohashi* (13 Nov. 2008); *K. Smith* (13 Nov. 2008); *Tom* (Module 5,

15 Nov. 2008, 13 Nov. 2008); *URL Names* (4 Dec. 2008); *C. Beach* (Module 5, 8 Dec. 2008); *J. Monasterio* (10 Dec. 2008); *M. Sumner* (Module 5, 13 Nov. 2008); *M. Castello* (13 Nov. 2008); *G. Boulter* (15 Nov. 2008); *R. Lafaye* (10 Dec. 2008); *A. Miller* (Module 5, 8 Dec. 2008); *J. Sprout* (11 Dec. 2008); *WMI* (14 Dec. 2008) (should not allow tiered pricing).

Impact on Innovation and Public Interest. Is it not in the ICANN charter to help support the growth and definition of the Internet for the public? The public does not need control but protection it seems from those that want to enslave it for profitable gain beyond what most can cope with. We need to help the newcomers as well as the founding members of the web to have as free and open a marketplace as can be made available. Allowing the introduction of open charging fees that could be anything the registrar deems appropriate is a recipe for disaster. As an example, .TV would have stood a much greater chance at succeeding if not for the incredibly high registration fees for their premium names. This was not good for the public, nor the domain owner. The public was denied a domain name that was stunted in its growth from the start. *M. Castello* (13 Nov. 2008).

Impact on Existing gTLDs. The new gTLD contracts must have hard caps in place to protect existing gTLD registrants. New gTLDs are NOT effective substitutes for existing gTLDs, and thus "competition" isn't going to keep VeriSign's pricing power in check. Even with a 10-year transition period, it would shock the conscience if VeriSign was permitted to arbitrarily and unilaterally raise the renewal price of .coms to millions or billions of dollars per year (say \$1 billion/yr for Google.com, \$10 million/yr for Hotels.com, \$50 million/yr for Cars.com, \$30 million/yr for Games.com, or whatever the market would bear), effectively re-auctioning the entire list of premium domain names to the highest bidder, removing the existing registrant and replacing things with .tv style pricing. Alternatively, all existing gTLD operators need to agree to language, before any new gTLDs are approved, that make explicit that the hard caps cannot be removed regardless of whatever happens in other gTLDs. *G. Kirikos* (24 Oct. 2008); *G. Kirikos* (4 Dec. 2008) (raises ICANN staff process concerns about changing price controls policy); *C. Christopher* (16 Dec. 2008) (equal cost registration and renewal for all registrants of retail TLDs to avoid extortion by registries, and ICANN must show its own financial accountability).

Lack of Price Controls. Maximum price caps or other terms benefiting consumers should be imposed in those cases where competitive bidding mechanisms will not adequately limit the ability of Registry Operators to exercise market power. *U.S. DOC-NTIA* (18 Dec. 2008); *ICA* (16 Dec. 2008) (draft contract for new registries lacks any pricing controls, and could lead to tiered pricing). Price caps should not be included in new gTLD agreements, but ICANN must be cautious about removing the caps in incumbent agreements given potential for tiered renewal pricing. *Go Daddy* (15 Dec. 2008); *D. Craig* (17 Nov. 2008) (new TLD purchaser should be able to set pricing, but there should be safeguards against monopolistic, unrestricted price increases); *I. Vachovsky* (15 Nov. 2008) (consider a model where gTLDs divided into two groups – (1) unregulated free market and competitive and (2) regulated monopolistic). To preclude abusive behavior, ICANN should have review mechanisms and then approve or disapprove any renewal price increases over a certain threshold. The potential exists for elimination of negotiated price caps in existing Registry Agreements, leading to differential pricing, as well as extortionate renewal pricing. *Rodenbaugh* (16 Dec. 2008). The base agreement represents a Trojan Horse that can be used by existing gTLD Registry Operators to engage in tiered pricing, due to the equal treatment clauses in existing contracts and the removal of price controls. It should take into account contingency that U.S. Dept. of Commerce will not renew the JPA. The base agreement tends to favor Registry Operators at the expense of registrants. There should not be bilateral, non-public agreement amendments by ICANN and

Registry Operators. *G. Kirikos* (24 Nov. 2008); *ICA* (16 Dec. 2008) (do not reopen tiered pricing through backdoor of new registry contracts).

Vertical Separation. Regarding vertical separation in registries under price caps, the Report is correct that relaxing the vertical separation requirement for registries operating under a price cap is undesirable, and will remain so for at least as long as those registries, particularly .com, account for such a disproportionate volume of current registrations. *Steve Metalitz (IPC)*. Open-access and price cap controls are essential complements to vertical ownership. *D. Maher* (forwarding J. Cave study). The new gTLD process must not be used to resurrect differential pricing by registries. ICANN should maintain vertical separation between registries and registrars and enforce equal access policies for registrars, with any exceptions to these policies strictly limited. ICANN should move slowly toward permitting integration of registry and registrar services, but should not use experimentation with single-organization and hybrid registries as a prelude to relaxing vertical separation and equal access requirements for a broader pool of gTLDs. *ICA* (16 Dec. 2008).

Objection to Registrar Price Disclosure; Notice of Increases. In a competitive market for registrar services, we do not understand ICANN's justification for requiring Registrars to disclose their price structure to registrants. The transparency of pricing for registry services provision is problematic; pricing policies are contracts between registries and registrars, not between registries and registrants. *RyC* (6 Dec. 2008). It is unclear why a registry has to publish prices on its website. *SIDN* (10 Dec. 2008). All Registries should be required to provide adequate notice before increasing renewal prices. *Network Solutions* (15 Dec. 2008).

Effect of Equitable Treatment Provision in Existing Registry Agreements. The following language—"ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause" - could lead to existing gTLD operators such as VeriSign petitioning to get the same treatment as new gTLDs in regards to not having a pricing cap. This could open up the door to variable pricing, whereby registrants of popular and/or high-earning domains would have to pay more for the same service, simply because they can afford it. *M. Sumner* (Module 5, 13 Nov. 2008). Before any new contract is approved with VeriSign in regard to .com and .net, unambiguous language must be specifically included in the contract that prohibits tiered-pricing on new registrations and renewals in the .com and .net namespace. Comment on the CRA Report is against existing gTLD registries being able to modify their agreements to remove price caps. *M. Menius* (16 Nov. 2008). Given the existing Registry Agreements state that ICANN cannot apply inequitable policies to registries, a logical conclusion must be that if the new gTLDs have no pricing controls, the existing registries will apply to have price controls removed also, and ICANN will be in no position to deny them. *C. Beach* (Module 5, 8 Dec. 2008). Will the issue of tiered pricing be revisited; what mechanisms are in place to prevent existing gTLDs from using the "equitable treatment" clause to have price controls removed? *G. Kirikos* (24 Nov. 2008). If price caps are not included for new gTLDs, then price caps must be removed from the .biz Registry Agreement. Any material changes for the newer, no-price capped TLDs regarding vertical separation and equal access in general must be applied to NeuStar – this is required under the .biz Registry Agreement and ICANN's Bylaws. Price caps are appropriate for larger TLDs that have a much higher percentage of the market and are not appropriate for gTLDs that do not have any real market power. *NeuStar* (15 Dec. 2008).

Amendment Process

Objection to unilateral amendment by ICANN; other changes. To remove the potential for unilateral amendments to the Registry Agreement by ICANN, ICANN should remove the Board's ability to override a GNSO's veto of agreement amendments. *NIC Mexico* (9 Dec. 2008); *Demand Media* (Module 5, 15 Dec. 2008) (remove ICANN ability to change contract); ICANN should not have ability to change contract terms unilaterally; *CentralNIC* at 2 (13 Dec. 2008); *dotSCO* (15 Dec. 2008) (ICANN should not have unilateral ability to alter contract); *Van Couvering* (15 Dec. 2008) (instead allow ICANN to make changes all at once, but changes have to approved by 2/3 of registries). This is completely unnecessary, and an extraordinary act of over-reaching on ICANN's part. ICANN has described this provision as providing necessary flexibility, but has not identified any situation in which the absence of this right has hindered ICANN's ability to perform its mission. But the fact is that ICANN already possesses authority to impose new obligations on Registry Operators through the Consensus Policy provisions of the agreement, and has emergency authority to do so using the Temporary Policy provisions of the Registry Agreement. These provisions give ICANN the authority at all times to make changes necessary to preserve the stability and security of the Internet and the DNS. ICANN has not – because it cannot – point to any situation where it needed the kind of blank check it is requesting here. *RyC* (6 Dec. 2008). These annexes should not be subject to unilateral change absent a stability or security consideration that supports creation of a Consensus Policy. *RyC* (6 Dec. 2008). *dotSCO* has reservations on the proposed provisions for “Universal Contract change,” and requests that ICANN respect the various legal systems that proposed Registries may be operating under. *dotSCO* (15 Dec. 2008).

Burden Shifting Concern. There is no justification for shifting the burdens in the way this provision does. Under the arrangement proposed by ICANN, however, ICANN can impose any changes it wants, and the burden is on Registries to block those that regulate activities outside the picket fence. Even if such burden shifting could be supported, the requirement of a vote of two-thirds of the number of Registries to overturn such changes is not an effective check in an environment involving hundreds, if not thousands, of TLDs employing many different business models. *RyC* (6 Dec. 2008).

GNSO Role. It is not clear what the ability of the GNSO Council to overturn a change by a two-thirds vote adds by way of protection for Registries. Rather, it problematically expands the mission of the GNSO Council, which currently consists of policy development only. *RyC* (6 Dec. 2008); *NeuStar* (15 Dec. 2008) (the GNSO Council should not be involved in any of the gTLD Registry Agreements except for the limited role already afforded to it as part of serving as managers of policy development per the Consensus Policy provisions of the agreements).

Clarifications and Modifications. What was the genesis of Article 7 of the new form of agreement, and how does ICANN expect to enforce these provisions? *J. Neuman; October 29, RyC Meeting.* What can ICANN change under Article 7 – Changes and Modifications? *Anonymous Email.* If Section 7 must stay in the Registry Agreement, then we request the following changes: (1) the term “Affected Registries” is unclear and should be defined; “Affected Registry Operator” should be defined as a “TLD operator that is materially impacted by such proposed change;” (2) ICANN should then provide notice to those TLD operators that ICANN has determined are the Affected Registry Operators who are entitled to vote; (3) ICANN should publish a list of those TLD operators that ICANN has determined are the Affected Registry Operators; (4) there should be a challenge process and dispute resolution process in the event that a party does not agree with ICANN's assessment of who constitutes an Affected Registry Operator; (5) the vote to disapprove the proposed changes to the Registry Agreement should be

51% of the Affected Registry Operators, not 2/3 vote; (6) in the event that the proposed change is disapproved by the Affected Registry Operators, the ICANN Board vote to override such disapproval shall be 2/3 vote of the ICANN Board. *Demand Media* (15 Dec. 2008). Section 2.7 of the proposed Registry Agreement should clarify that only changes that might decrease the effectiveness of Rights Protection Mechanisms are subject to prior ICANN approval. *Rodenbaugh* (16 Dec. 2008).

Uniform Standard Agreements. Uniform standard agreements that cannot be altered are essential. *WMI* (14 Dec. 2008); *SIFMA* (12 Dec. 2008). There should be one or at most two (one for open and another for community) standard contracts between ICANN and registry owners. The standard contract should not be subject to modification. The contract term must be finalized in the rule-making process and not left open for further negotiation or modification by the ICANN Board of Directors. *Bank of America* (15 Dec. 2008).

Dispute Resolution and Damages

Process Details. The existing Registry Agreement sets out a specific process whereby either party can invoke the other party's cooperative engagement obligation, and then sets out a series of steps for that process. While there are many ways this process could reasonably proceed, these changes remove all specificity – including most importantly, specificity about when the period starts. *RyC* (6 Dec. 2008).

Arbitration Requests. The Registry Operators object to mandating a single arbitrator. Moreover, we see no grounds for substituting a blanket right to seek extraordinary damages for the limited right set out in of the current Registry Agreement (Failure to Perform in Good Faith), which provides procedural and substantive safeguards to prevent abuse. *RyC* (6 Dec. 2008). Can ICANN seek punitive damages under the new agreement? *J. Neuman, October 29, RyC Meeting.*

Indemnification, Warranties and Liability

ICANN Liability. ICANN should be accountable and not have broad immunity. *RILA* (15 Dec. 2008); *G. Kirikos* (24 Nov. 2008); *SIFMA* (12 Dec. 2008); *CADNA* (15 Dec. 2008); *Bank of America* (15 Dec. 2008); *FairWinds* (15 Dec. 2008). Applicants must agree to release ICANN from liability for any acts or omissions in anyway connected with its consideration of the application, no matter how outrageous those acts or omissions may be. *RyC* (6 Dec. 2008).

Fee Liability Increase for Registries. The changes to Section 5.3 increase the liability for Registry Operators from “fees and sanctions owing” to fees paid during the preceding 12 months. ICANN's liability is not increased, however. *RyC* (6 Dec. 2008).

Indemnification. The indemnification provision (paragraph 5) is unfair – why should an applicant defend and indemnify ICANN if a disappointed objector or other applicant sues ICANN over the same string as that awarded to the applicant? ICANN is demanding sweeping indemnification rights without justification and without providing anything to Registries. There is no justification for such sweeping indemnification. *Bank of America* (15 Dec. 2008); *CentralNIC* (13 Dec. 2008); *RyC* (6 Dec. 2008). The covenant not to challenge and waiver in paragraph 6 are overly broad and unreasonable and should be revised in their entirety. *Microsoft* (Guidebook comments, 15 Dec. 2008).

Warranties. Registry operators do not agree with ICANN that the express waiver of warranties is unnecessary. *RyC* (6 Dec. 2008).

Changes of Control

Approval; Assignments. Does ICANN anticipate revising this provision to require a Registry Operator to obtain ICANN's prior written approval for a change of control? If not, why not? *K. Rosette* (26 Nov. 2008). Parties should have the ability to assign their rights in any application under commercially reasonable circumstances. ICANN should retain discretion to approve or reject any such assignment to prevent the development of a market for TLD applications and to ensure that any assignee meets all of the applicant criteria previously met by the assignor. *Rodenbaugh* (16 Dec. 2008).

Notice Requirement. To the extent notification of subcontracting arrangements is required, it should be limited to subcontracts that have a material impact on a registry's compliance with the Registry Agreement. Moreover, while there may be situations in which it is appropriate for ICANN to seek advance notice of changes in control that should be the exception rather than the rule. *RyC* (6 Dec. 2008).

ISSUES, ANALYSIS AND PROPOSED POSITIONS

General Comments

Issues

What were the main objectives in crafting the proposed new Registry Agreement?

Why did ICANN determine to change its form of gTLD Registry Agreement?

What will be the impact of the adoption of the new form of new Registry Agreement on existing TLDs?

Analysis

During the process of creating a new agreement framework for new TLDs, ICANN endeavored to craft a flexible yet robust agreement that provides sufficient protections and clarity for new TLDs. The proposed new form of agreement is intended to be simpler and streamlined where possible, focusing on technical requirements and security and stability issues. These changes were made after taking into consideration input from the GNSO in its recent policy development processes on new gTLDs and contractual conditions. Much of the prior details in the Registry Agreement and associated appendices have been replaced with relevant specifications and requirements, which will be maintained on ICANN's web site.

In drafting the proposed new form of Registry Agreement, ICANN started with a list of concepts the agreement must or should include. Where appropriate, language was drawn from existing Registry Agreements. As proposed, each of the new TLD agreements will have an initial ten-year term, with an expectation of renewal, in order to allow operators of the new registries some surety in the investments necessary to build a successful registry. ICANN has incorporated proposed mechanisms into the form of new Registry Agreement to allow ease of effecting

changes and modifications during the life of the Registry Agreement. These form changes were deemed appropriate and beneficial to both parties.

Proposed Position (for this version of the Guidebook)

The general comments on the new form of Registry Agreement raised a number of important issues that will be the subject of continuing community discussion. The revised version of the base Registry Agreement being posted with the second draft applicant guidebook incorporates a number of changes in response to further feedback, and discussion and thought on these comments will continue and changes will continue to be made in the proposed form of agreement.

Existing Registry Operators may approach ICANN to discuss adopting the new form of agreement, which would be the subject of bilateral discussions between the parties. ICANN will not require existing Registry Operators to implement the new form of agreement.

Application Process

Issues

To what extent will ICANN mandate applicants adhere to statements made in their applications?

Why is ICANN requiring an applicant to execute a Registry Agreement within 90 days following a contention resolution?

Analysis

With respect to “community-based” TLDs, ICANN recognized that it needed to protect the community identified in the application from fraudulent applicants (i.e., applicants who had stated one purpose in their application and then once the TLD was granted used the TLD for an entirely different purpose).

Following resolution of string contention proceedings, an applicant should be in a position to enter into a Registry Agreement with all due haste, and accordingly 90 days should be more than sufficient time for this to occur.

Proposed Position (for this version of the Guidebook)

Registry Operators will be required to comply with the terms of the Registry Agreement. Registry Operators will be required to warrant that all information provided and statements made in connection with the registry TLD application were true and correct. Also, community-based TLDs will be required to observe and implement measures set forth in their application relative to the defined community.

Per Section 4.3 of the proposed draft Registry Agreement, ICANN may terminate the Registry Agreement if the applicant does not complete all testing and procedures necessary for delegation of the TLD into the root zone within 12 months. Apart from requiring the Registry Operator to pass technical and operational checks sufficient to permit the TLD to be delegated in the rootzone, ICANN does not require a Registry Operator to utilize or operate a TLD in any specific manner.

Because the Registry Agreement will be signed by Registry Operators in a form that is substantially similar to the final proposed draft, 90 days should be enough time to resolve any minor points that may need to be negotiated by ICANN and the Registry Operator.

Covenants of ICANN

Issues

Will ICANN reconsider the removal of ICANN's covenants regarding operating in an open and transparent manner and equitable treatment among Registry Operators?

Why did ICANN remove the commitment to implement name server and TLD zone server changes within 7 days?

Why were ICANN's covenants removed from the list of provisions that could not be modified by Consensus Policies?

Analysis

ICANN understands that applicants and Registry Operators need to feel confident that ICANN will live up to its obligations, and such obligations should be confirmed in writing. ICANN's Bylaws already require ICANN to act transparently and non-discriminatorily, but as a result of community feedback these commitments will also continue to be restated in the Registry Agreements.

With regard to the commitment to implement nameserver and TLD zone server changes within 7 days: ICANN understands that timely implementation of changes is an important matter and is constantly looking for ways to improve its efficiency, however, ICANN also sees the need for some flexibility regarding this requirement because it does not always have control over the receipt of necessary information and cooperation from third parties. ICANN is presently engaged in discussions with existing and potential Registry Operators regarding a service level commitment by ICANN with respect to nameserver change requests. ICANN has stated its goal is to complete nameserver changes within 10 days.

Proposed Position (for this version of the Guidebook)

Consistent with ICANN's Bylaws, the covenants regarding operating in an open and transparent manner and equitable treatment will be reinstated.

For the reasons noted above, the commitment to *always* implement nameserver and TLD zone server changes within 7 calendar days of submission may not be sustainable as the gTLD name space rapidly expands. Apart from actions required by ICANN, ICANN must receive confirmation of certain changes from third parties, the timing of which may be outside of ICANN's control. Nevertheless, the revised draft Registry Agreement has been modified somewhat to continue to reference a goal of seven days for changes when possible.

With the reinstatement of the transparency and equitable treatment covenants, ICANN will include these covenants within the list of topics that may not be modified through the Consensus Policy process, consistent with other recent Registry Agreements.

Consensus Policies

Issues

Why was the definition of “Registry Services” removed from the list of items comprising the picket fence?

What will protect Registry Operators from expansion of the scope of Consensus Policies, particularly in relationship to the process set out in Article 7 of the proposed Registry Agreement by which the agreement and specifications can be modified, subject to certain requirements?

Analysis

In light of comments received, ICANN considers it is appropriate to incorporate a definition of “registry services” in the revised proposed Registry Agreement. This definition will be relative generally to compliance provisions in the agreement.

ICANN reviewed and considered the continuing relevance of each item included within the “picket fence,” which contains the topics excluded from the adoption of Consensus Policies. The definition of “registry services” was included within the list of topics excluded from Consensus Policies contained in Registry Agreements negotiated during 2005-2006, but not during 2001-2002. The genesis for the inclusion within the 2005-2006 Registry Agreements was the concern of Registry Operators regarding the process for the approval of new or modified registry services and the attendant definition of registry services. Subsequently, a Consensus Policy regarding the process for the approval of new registry services (including a definition of registry services) was adopted, rendering the earlier concern regarding changes to the contractual definition a non-issue.

It has historically been the position within Registry Agreements that pricing matters should not be a subject of Consensus Policies, and that is why pricing of registry services is an excluded topic from the topics on which Consensus Policies may be adopted.

Proposed Position (for this version of the Guidebook)

ICANN will include a definition of Registry Services in the specification incorporated into the proposed new form of agreement.

The specification on Consensus Policies retains the concept of the picket fence and exclusions from Consensus Policy adoption, and the scope of the fence is appropriately revised to remove items that are no longer relevant, similar to the revisions in 2005 of the list of Consensus Policies exclusions included in the 2001 form of agreement.

See also discussion regarding changes to the amendment process specified in Article 7 as it relates to the consensus policies provisions of the agreement.

Compliance

Issues

Why is the proposed expansion of ICANN's audit rights appropriate?

Will ICANN include a sanctions program as part of the Registry Agreement?

Are community-based TLDs going to be held to their stated purpose and operation for a defined community?

Why does ICANN requiring monthly reporting on items such as monthly transfers?

Was it intended that all new TLDs have only the Whois obligations of thin registries? If so, why?

Will ICANN be able to enforce compliance with the increased number of TLDs?

Analysis

Audit and compliance provisions are important components of a contractual relationship whereby accurate reporting is essential. With that in mind, ICANN has carefully considered the scope of its audit provisions and the affect they could have on the Registry Operators. ICANN has reviewed and reconsidered the audit provisions in light of public comments and determined that the scope was perceived by the community as broader than intended. The scope of ICANN's audit rights will accordingly be clarified and limited to some extent in the next version of the proposed agreement to cover only the covenants of Registry Operator (which are enumerated in Article 2 of the agreement).

With regard to the institution of a monetary sanctions program, ICANN looked to past agreements and its past course of dealing to evaluate the costs and benefits associated with the implementation of such a program. After careful consideration, ICANN's assessment is that, in the past, when a sanctions-like program was in place, there was little opportunity or need to utilize it and a reluctance to do so given the punitive nature. In addition, an ability by ICANN to unilaterally impose sanctions on a Registry Operator without the requirement of proceeding through arbitration was considered to raise due process concerns. The first draft proposed base agreement included a provision permitting the imposition of punitive or exemplary damages by arbitrators in cases of repeated willful breaches of the agreement, and the new draft includes a proposal that arbitrators be permitted to order operational sanctions such as temporarily restricting Registry Operator's right to sell new registrations.

The Registry Agreement requires compliance with all terms and conditions. ICANN employs appropriate tools and procedures to monitor compliance. ICANN has the ability to terminate the Registry Agreement for repeated and willful material breach. It is not ICANN's objective to *sanction* Registry Operators through fines or some other punitive means in the case of minor infractions and noncompliance issues. In ICANN's experience, "good citizen" Registry Operators are willing to work with ICANN in the event there is a disagreement over contractual requirements.

As part of the creation of new gTLDs, ICANN will continue to implement and enhance its contractual compliance oversight program <<http://www.icann.org/en/compliance/>>. The audit provisions of the proposed Registry Agreement were included specifically for this purpose. ICANN has already initiated the planning that will be necessary to ensure operational readiness in the new environment to be created by the addition of new gTLDs.

Proposed Position (for this version of the Guidebook)

ICANN will revise the audit rights provision in the agreement included as part of the updated Applicant Guidebook to more closely align with the provisions in the current Registry Agreement, which cover compliance with the fee arrangements, monthly reporting specifications and technical and functional specifications. The scope of ICANN's audit rights will be clarified and limited to cover only the covenants of Registry Operator (which are enumerated in Article 2 of the agreement).

For Registry Operators who are repeatedly problematic, ICANN can bring action in front of an arbitrator and request the award of punitive damages. In addition, ICANN will clarify in the proposed Registry Agreement that ICANN may request that an arbitrator sanction the Registry Operator for noncompliance issues, including operational sanctions such as an order temporarily restricting a Registry Operator's right to sell new registrations if appropriate.

Community-based TLDs will not be able to make changes to community-specific terms without support from the community. Any necessary material changes to the community-based TLD operator's agreement would only be approved following appropriate public notice and comment.

ICANN requires monthly reporting by all Registries operators for tracking purposes including expected database demands, fees compliance and policy compliance.

ICANN is only requiring the publication of "thin" Whois data due to the multitude of applicable laws (including data protection and privacy laws) in different jurisdictions. Registry operators would be free to collect and publish additional data in accordance with their individual business plans and agreements. ICANN is exploring a possible requirement that Registry Operators would have to collect additional data, which would not be required to be publicized, as an additional safeguard against loss of information in the event of registry or registrar failure.

As discussed above, ICANN plans to enhance and strengthen its contractual compliance program <<http://www.icann.org/en/compliance/>>. The audit provisions of the proposed Registry Agreement were included specifically for this purpose. ICANN has already initiated the planning that will be necessary to ensure operational readiness in the new environment to be created by the addition of new gTLDs.

TLD Delegation

Issues

What security resources will be required of TLD operators in order to safeguard DNS stability and security?

Will there be specific timing obligations related to delegation into the root-zone?

Analysis

The stability and security of the DNS is a primary focus of ICANN's mission. ICANN believes in encouraging Registry Operators to use the most advanced technologies available to ensure registry security is fundamental and appropriate. ICANN must also, however, balance these requirements with the constraints applicable to small Registry Operators who do not have and may not expect to have a large user base to justify the cost of certain measures. For these smaller Registry Operators, the requirement to implement these state of the art security

measures, DNSSEC for example, could be too financially burdensome and is therefore optional. Please refer, for example, to the evaluation questions and criteria (#46) for details regarding the treatment of applicants' plans to implement DNSSEC.

ICANN is and will remain committed to encouraging the use of adequate security measures. For the time being, the requirement to implement DNSSEC will remain optional for Registry Operators due to the expense and burden it would place on smaller Registry Operators. Likewise, ICANN is only requiring the publication of "thin" Whois data due to the multitude of data protection and privacy laws in different jurisdictions. Registry operators would be free to collect and publish additional data in accordance with their individual business plans and agreements. ICANN is exploring a possible requirement that Registry Operators would have to collect additional data, which would not be required to be publicized, as an additional safeguard against loss of information in the event of registry or registrar failure.

ICANN is requiring applicants to commit to go through the required steps for a TLD to be delegated into the root zone to attempt to deter "blocking" applicants, who have no intention of actually running a TLD, but would attempt to take the opportunity to do so from other applicants. The new gTLD application process and the proposed base Registry Agreement are being designed to assure that ICANN retains the ability to respond flexibly and resiliently to changing circumstances and marketplace evolution that could occur with the growth of the Internet and the expansion of the name space.

Proposed Position (for this version of the Guidebook)

For additional details on security requirements and evaluation, please refer to the evaluation questions and criteria section titled "Demonstration of Technical & Operational Capability."

Registry operators are required to complete technical and operational checks to allow the TLD to be delegated into the root zone within 12 months of execution of the Registry Agreement. There are no other staged requirements for TLD start-up.

Term and Termination

Issues

What is the justification for the changes to the term and termination provisions in the proposed Registry Agreement?

What protections does the proposed Registry Agreement offer against arbitrary decisions by ICANN not to renew a Registry Agreement?

How will "fundamental and material breach" and "critical registry operations" be interpreted for purposes of the termination provisions of the proposed Registry Agreement?

Will ICANN consider a competitive bidding process for TLD renewals?

Analysis

ICANN balanced considerations relative to the security of a longer term against ICANN's need to be able to act to terminate the agreement, or determine not to renew, in the case of repeated

bad actor Registry Operators. Accordingly, there is less rigidity relative to the right to renewal of the proposed Registry Agreement.

Providing a 10-year potential term of the agreement is beneficial to the Registry Operator by providing assurance on the issue of business continuity and supporting the basis for investment by the Registry Operator. However, by proposing a ten-year term, ICANN must have the flexibility to implement modifications to the agreement during the term. On balance, providing a longer term for the agreement with the flexibility to modify seemed likely to be more desirable to the community as opposed to short 3 or 5 year term agreements which do not include a flexible process for making amendments such as the equivalent of Article 7 in the proposed agreement.

Proposed Section 4.2 (Renewal) has been modified somewhat in response to comments and allows for automatic renewal so long as the registry hasn't been deemed in fundamental and material breach of the agreement during the initial term. Essentially, this means that so long as the Registry Agreement hasn't been terminated due to breach, or subject to an uncured breach at the time of proposed renewal, it will be renewed.

As part of the evaluation of applications, ICANN will be carefully selecting among applicants those that are best suited and most qualified to operate a TLD. Registry Operators should expect to invest significant time, effort and expense in building a robust business model to support registry operations and service the registrants within the TLD. Mandating a rebid process for a TLD upon renewal would de-incentivize Registry Operators from making this investment, and directly counter the philosophy relative to the selection of each TLD Registry Operator.

Proposed Position (for this version of the Guidebook)

The termination rights provision will be revised for clarification and specificity. The definition of "critical registry functions" does not appear to be necessary as this section is generally describing the transition obligations of the outgoing Registry Operator. The registry functions that are considered to be critical in the context of the Registry Continuity Plan do not necessarily correspond directly to the responsibilities of an outgoing Registry Operator protect registrants and registrars by cooperating in a smooth transition to a new operator.

The inclusion of termination rights for ICANN relative to fundamental and material breaches of the Registry Agreement is consistent with existing Registry Agreements and will also relate to "fundamental and material breach" of the agreement as the same may be modified during its term.

The comments concerning the idea of requiring the rebid of TLDs upon expiration of the initial term of a Registry Agreement raise profound economic questions that will be addressed separately from this legal analysis, and will continue to be the subject of community discussions.

Payment Concerns, Pass-Through of Registrar Fees

Issues

What adjustments can be made to the fee structure to accommodate Registry Operators who are required to make bilingual registrations at no extra charge?

Why was the cap on the registrar fee that could be collected from the Registries eliminated?

How will the timing on collection and payment by Registries of the Registrars' fee if the obligation is triggered operate?

Analysis

ICANN received a number of thoughtful comments on the proposed model for the calculation of fees to be paid by Registry Operators to ICANN. Please refer to the separate paper on financial considerations for a detailed discussion of the proposed fee model. One of the GNSO's implementation guidelines was that "ICANN should take a consistent approach to the establishment of registry fees." The model being proposed (in the separate paper on financial considerations) attempts to find a balance between fairness and consistency, but it would be difficult to find a consistent fee model that is well-matched to every jurisdiction where registries will operate and to every varied business model that registries will implement.

The provision allowing the pass-through of the registrar fees has been a component of existing Registry Agreements and this is not a conceptual change. ICANN must retain the flexibility to require registries to collect this fee from the registrars, however the fee is fully recoupable by the registry from registrars. Any such fees would be approved through the ordinary ICANN budget approval process, but otherwise there is no special phase-in period for collection and payment of these fees by registrars or registries; they would be collectible from registries (and through them from registrars) directly upon invoice as they are under current Registry Agreements and registry-registrar agreements.

Proposed Position (for this version of the Guidebook)

The proposed agreement is sufficiently flexible to allow Registry Operators to adapt their own fee structures regarding domain name registrations as necessary to comply with local law.

ICANN must retain some flexibility to adjust the fees that registries pass through to registrars in response to changes in the evolving marketplace. These fees, however, will be justified in ICANN's annual budget and will therefore be subject to public scrutiny and comment. In response to comments ICANN will cap the transactional component of the Variable Registry-Level Fee. Registries will have the flexibility to include a provision in the registry-registrar agreement that gives them assurance on the ability to collect the registrar fees on a timely basis.

Price Controls

Issues

Will ICANN reconsider inclusion of price controls in the Registry Agreement?

How will ICANN deal with price caps under vertical ownership?

Will the issue of tiered pricing with respect to new registrations and renewal registrations be revisited?

Has ICANN considered the affect that the absence of price controls will have on new Registry Operators as well as existing Registry Operators?

Why is ICANN requiring Registries to disclose their pricing and fee structure?

Analysis

One of ICANN's main goals of the proposed Registry Agreement is to provide enough flexibility for Registry Operators to implement a variety of business models. ICANN has commissioned studies on whether there should be price controls in new gTLDs, and also a study on the effects of vertical registry-registrar separation. Please refer to those separate detailed analyses for treatment of the concerns raised in this set of comments.

Proposed Position (for this version of the Guidebook)

In General. ICANN has commissioned a study on the economics of and relative need for price controls in new gTLDs, which will be posted as soon as available.

Vertical Separation. ICANN commissioned a comprehensive study on the effects of vertical separation, which has been posted at <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>.

Transparency of Pricing for Registry Services. ICANN has modified the proposed requirement in response to comments. Six months' notice of a registry price increase has been incorporated consistent with other recent Registry Agreements. Further, the functional and performance specification and now also section 2.9 of the Registry Agreement obligate Registry Operators to offer up to ten-year registrations.

Equitable Treatment. As it relates to an ability for Registry Operators under existing Registry Agreements to invoke the "equitable treatment" clause to require ICANN to agree to the removal of price controls under existing agreements, "equitable treatment" does not mean that every TLD will have the same agreement. Specifically, existing Registry Agreements are not alike in all respects and include distinctions to address differing business and market concerns. ICANN's current Registry Agreements differ from each other markedly in some aspects, for example some registries (unsponsored) operate under price caps, while other current Registry Agreements (sponsored) have no price controls. Please refer to the separate economic studies for further discussion and analysis of this issue.

Amendment Process

Issues

Why did ICANN decide to include the process set forth in Article 7 allowing ICANN to implement modifications to the Registry Agreement and specifications during the term of the agreement?

What modifications and changes to the Registry Agreement (and incorporated specifications) can ICANN implement under Article 7?

Why did ICANN propose to allow veto of a proposed agreement modification by the GNSO Council?

Analysis

The proposed process for amending the Registry Agreement is a deviation from the current form Registry Agreement, and ICANN has carefully considered all comments on the proposed contract change mechanism. The problem the Internet community faces as the population of TLDs increases is how to deal with the inevitable changes and advancements, either in technology or circumstance, that affect all or substantially all TLDs. For example, concerns relating to changes due to market growth or dominance, or the need to impose new requirements due to Internet security or stability concerns. With anticipated significant growth in the TLD space, the burden to negotiate individual changes is too great to bear, and not achievable from a practical standpoint. With that in mind, Article 7, allowing contract changes and modifications to be implemented across all new TLDs, was conceived to create a mechanism where changes affecting all or substantially all TLDs could be made efficiently but still provide procedural safeguards for affected Registry Operators to act to contravene proposed changes.

The Registrar Accreditation Agreement (the "RAA") includes an analogous procedure to modify the form of agreement across all registrars, but it requires a lengthy and cumbersome development, approval, and implementation process that can more than 5 years to complete. ICANN's experience with attempting to negotiate and implement changes to the RAA have demonstrated the need for a flexible and efficient process for public discussion and approval of beneficial changes to the form of ICANN's agreements. In order to retain authority to address any adverse effects or consequences of the introduction of a large number of new gTLDs, ICANN needs a mechanism allowing modification to the agreement.

Proposed Position (for this version of the Guidebook)

ICANN's proposal included in the October 2008 draft agreement provides that ICANN would first consult with Registry Operators and the public for at least 30 days on any proposed changes to the agreement. Any material changes to the Registry Agreement would continue to be subject to ICANN Board approval. ICANN would give Registry Operators notice 90 days before any changes would take effect. This flexibility is also intended to benefit the registry community. Specifically, Registry Operators who believe change or modification to the Registry Agreement is necessary or appropriate will be able to suggest such a change or modification for consideration in a public forum.

ICANN has incorporated proposed mechanisms into the form of new Registry Agreement to allow ease of effecting changes and modifications during the life of the Registry Agreement. The process proposed by ICANN allows for public notice, discussion and opposition by the registry community, and, as noted above, any material changes to the Registry Agreement and specifications would require ICANN Board review and approval.

Existing gTLD operators (who would not be subject to the provisions of Article 7) are subject to the terms of their agreements, which cannot be amended without negotiation and bilateral agreement with ICANN. ICANN understands the concerns the Registry community has with proposed Article 7 and believes that a compromise is possible. The February 2009 v2 revised version of the proposed Registry Agreement reflects a modified Article 7 incorporating changes to address community comments, including: 1) a new preliminary 30-day consultation period prior to posting a notice of any proposed change, 2) a new requirement that any proposed changes could be vetoed by a majority of affected registry operators (instead of providing that a two-thirds' vote of either the registries or the GNSO Council could veto any change), and 3) a

prohibition on using the amendment process to modify ICANN's covenants in the agreement or provisions on Consensus Policies.. Community discussions on how to reach a compromise model for approval of global amendments to the form of the Registry Agreement (or whether such an amendment process is necessary at all) will continue, and further changes to this provision in the agreement can be expected.

Dispute Resolution and Damages

Issues

Why was the specificity regarding (i) the procedure for cooperative engagement between senior management of the Registry Operator and ICANN and (ii) the arbitration process removed?

Why did ICANN eschew a panel of three arbitrators in favor of only one with respect to the arbitration of disputes under the Registry Agreement?

Can ICANN seek punitive damages under the proposed Registry Agreement?

Analysis

ICANN determined to revise the dispute resolution provisions contained in the proposed Registry Agreement in an attempt to simplify and streamline the agreement. With respect to the provisions mandating a process for cooperative engagement by senior management of both parties, ICANN did not believe incorporating a rigid process into the proposed Registry Agreement was necessary. In making this decision, ICANN considered the current course of dealing in communications with Registry Operators, pursuant to which points of contention are raised and typically resolved in such cooperative discussions which proceed in a fashion suitable to both parties. As relationships with Registry Operators have evolved, ICANN has not experienced difficulty in arranging management level discussions (akin to cooperative engagement) to resolve issues and or points of disagreement regarding Registry Agreement provisions.

ICANN simplified the arbitration provision in the proposed Registry Agreement, allowing the parties to rely on the rules of the ICC. ICANN's decision to mandate a single arbitrator as opposed to a panel was driven by an interest in keeping the process both efficient time wise (selecting a single arbitrator is generally quicker than selecting a panel) and also in cost (a single arbitrator's fees versus the fees for a panel of arbitrators). From a legal perspective, ICANN does not perceive a notable benefit from having three arbitrators render a decision as opposed to a single arbitrator. Conversely, having to select and appoint three agreed-upon arbitrators can increase the time involved before a matter can be substantively decided and also raises costs that are ultimately passed on to registrants.

ICANN may ask an arbitrator for an award of punitive damages against a Registry Operator in circumstances where the Registry Operator has been in repeated and willful fundamental and material breach of the agreement. This right to punitive damages will be in addition to ICANN's right to ask for specific performance, or sanctions (monetary or operational) against the Registry Operator.

Proposed Position (for this version of the Guidebook)

ICANN has removed the very specific contractual provisions as unnecessary, with the expectation that ICANN and Registry Operators will keep open communications to resolve disputes before escalating to formal action. In response to comments, the revised version of the agreement has been modified to make it clearer that either party may initiate good-faith communications concerning any dispute.

As discussed above, ICANN does not perceive a notable benefit from having three arbitrators render a decision as opposed to a single arbitrator, and therefore the concept of a single arbitrator remains in the dispute resolution article of the proposed Registry Agreement.

Under the parameters specified in the proposed agreement (repeated willful fundamental and material breach) ICANN can request an arbitrators to award punitive damages, or specific performance. ICANN will clarify in the revised proposed Registry Agreement that ICANN may request the arbitrator order sanctions against the Registry Operator, which could include monetary and/or operational sanctions.

Indemnification, Warranties and Liability

Issues

How does the provision regarding the limitation of liability of the parties to fees paid during the prior 12 months operate differ from existing agreements?

Why were the indemnification provisions in the proposed Registry Agreement revised from those included in existing Registry Agreements and what is the effect?

Why was the express waiver of warranties relating to services, including implied warranties of merchantability, non-infringement or fitness for a particular purpose removed?

What is the justification for the requirement applicants release ICANN from liability from any acts or omissions associated with its consideration of the application?

Analysis

In the process of preparing the proposed Registry Agreement, ICANN specifically focused on provisions that could be simplified to the benefit of both parties. In the provision relating to the limitation of the liability of the parties, ICANN revised to allow ICANN to recover in an indemnification proceeding an amount equal to fees paid in the past 12 months, together with exemplary or punitive damages imposed by an arbitrator. This can be compared to existing Registry Agreements that allow ICANN to recover an amount equal to fees and monetary sanctions (imposed as a result of breaches of the agreement) due and owing in the last 12 months.

Regarding the topics on which the proposed Registry Agreement requires the Registry Operator to indemnify ICANN, as compared to existing gTLD agreements, the provision does not include the several other grounds for which ICANN could claim indemnification, such as (a) ICANN's reliance, in connection with its decision to delegate the TLD to Registry Operator or to enter into the Registry Agreement, on information provided by Registry Operator in its application for the

TLD; (b) Registry Operator's establishment of the registry for the TLD; (c) collection or handling of Personal Data by Registry Operator; and (d) any dispute concerning registration of a domain name within the domain of the TLD for the registry.

The express waiver of warranties relating to services, including implied warranties of merchantability, non-infringement or fitness for a particular purpose was deleted as not applicable to the commitments under the Registry Agreement. There are no express warranties made by the Registry Operator, and implied warranties typically seen in agreements relating to the sale of goods are not applicable.

Regarding the application indemnification provision, ICANN anticipates that rejected or unsuccessful applicants might try to take legal action in an attempt to challenge the decision, and possibly delay the advancement of the new gTLD program. Accordingly, ICANN has carefully considered how to protect the new gTLD program from such challenges. The release from such potential claims was deemed appropriate in light of these considerations.

Proposed Position (for this version of the Guidebook)

As discussed above, the limitation on liability provisions are appropriate for the proposed Registry Agreement as they are consistent with the revised provisions relating to dispute resolution.

The indemnification provisions included in the proposed new form of agreement (as compared to existing gTLD agreements) have been narrowed to require the Registry Operator to indemnify ICANN only for losses and damages caused by the Registry Operator's operation of the TLD or the provision of registry services. As part of the revisions to the form of Registry Agreement, ICANN viewed it as appropriate to reduce ICANN's rights in this regard.

It was determined to be unnecessary to include an express waiver of warranties, implied or otherwise, in the proposed Registry Agreement. As discussed above, the express waiver of warranties relating to services, including implied warranties of merchantability, non-infringement or fitness for a particular purpose was deleted as not applicable to the commitments under the Registry Agreement.

Changes of Control

Issues

Is a Registry Operator required to obtain ICANN's prior approval in the context of a change in control transaction, such as a sale of the entity?

Should there be a materiality threshold requiring notice to ICANN of arrangements to subcontract registry operations?

Analysis

ICANN's prior approval to a change in control of a Registry Operator, such as the sale of all assets of or equity in the relevant entity, is not required. ICANN simply requires notice no less than 10 days prior to the anticipated event. Requiring ICANN pre-approval of any change of control of a contracting party could be burdensome. Similarly, with subcontracting

arrangements, ICANN simply requires notice and not pre-approval. Notice requirements with respect to such events are, at a minimum, typical in a business agreement.

Proposed Position (for this version of the Guidebook)

ICANN will retain the provision as included in the draft Applicant Guidebook. A materiality requirement has been added to the notice of subcontracting requirement.

XIII. REGISTRY/REGISTRAR SEPARATION

Summary of Key Points

- An independent report was commissioned to study registry-registrar separation requirements after considerable community inquiry about the issue.
- The report (by Charles River Associates) weighed the benefits and risks to lifting the restrictions, taking into account the current and proposed gTLD environment.
- The report proposed a limited lifting of the restrictions in a way that reduced risk so that the effects could be studied.
- Based on the report and a set of public consultations, a model for lifting the current restrictions in a limited way, is introduced in the revised Applicant Guidebook for discussion.

Summary of Input

Below is a summary of input addressing registry and registrar separation and ownership comments submitted in (1) the first comment period regarding the new GTLD Draft Applicant Guidebook consultation; and (2) the consultation addressing the Charles River Associates (CRA) report – Revisiting Vertical Separation of Registries and Registrars - which was commissioned by ICANN. ICANN staff prepared an earlier summary and analysis of the CRA comments which is posted at <http://forum.icann.org/lists/crai-report/msg00035.html>. ICANN also conducted two face-to-face consultations regarding the CRA Report in December 2008.

(1) Comments in the new gTLD Consultation

Maintain Separation. There should be separation between registries and registrars; registries must continue to sell registrations through registrars and should not discriminate among registrars; with limited exception a registrar should not sell domain services of an affiliated registry (exception should allow sales of an affiliated registry up to a certain threshold of names—i.e., 100,000); this exception eliminates need for a special single organization TLD exception; registries must provide reasonable notification period before making domain renewal price changes; ICANN should maintain existing market protections for registries with market power. *Network Solutions* (15 Dec. 2008). ICANN should move slowly toward permitting integration of registry and registrar services, but should not use experimentation with single-organization and hybrid registries as a prelude to relaxing vertical separation and equal access requirements for a broader pool of gTLDs. *ICA* (16 Dec. 2008).

Maintain Accredited Registrar Model. The Accredited Registrar model should be required regardless of how the vertical integration and separation issues are resolved. *RC* (15 Dec. 2008).

Equitable Considerations. It is unfair to allow registrars to own new registries but to not allow existing registries to own registrars. *NeuStar* (15 Dec. 2008); *J. Neuman* (26 Nov. 2008) (clarify registry-registrar issues).

Risks of Ownership Changes. To avoid risk of a speculative marketplace developing through “flipped” registries, ICANN should clarify policy regarding changes of ownership or control of a registry; there is no restriction on ability of an applicant to flip registry to a buyer unvetted by ICANN, even immediately after delegation. *IPC* (15 Dec. 2008); *G. Kirikos* (24 Nov. 2008); *K.*

Rosette (26 Nov. 2008) (clarify ICANN approval policy regarding registry control change); *R. Raines* (4 Dec. 2008) (change allowing cross ownership could be exploited and increase cyber crime); *CentralNIC* (13 Dec. 2008).

Allow Cross-Ownership. *Melbourne IT* (15 Dec. 2008) (supports allowing single organization operating a “closed” gTLD to operate both the registry and registrar functions subject to safeguards). *J. Cady* (3 Nov. 2008) (clarify separation and consider novel uses allowing one company to do both). *Demand Media* (15 Dec. 2008) (change policy for new registries, allow cross ownership and do not impose price controls).

(2) Comments in the CRA Report Consultation (meetings held in Washington, DC and Los Angeles on 11 & 19 Dec 2008, respectively)

The views expressed in the comments to the publication of the CRA report on registry-registrar separation can be categorized as follows:

Cross ownership:

- support for limited cross-ownership where a registry could own an accredited registrar but not service names in its own TLD, and a registrar could own a registry as long as it did not service names in the TLD that it owns;
- support for limited cross-ownership with a self-management threshold of varied size (from 20,000 to 100,000 names);
- support for cross-ownership without a threshold; and
- support for continued registry-registrar separation.

Use of accredited registrars:

- wide support for continuing use of accredited registrars; and
- some opinion that “private label” registries, need not use accredited registrars.

These viewpoints and suggestions are summarized in specific models discussed below:

One Cross-Ownership Model with Limited Self-registration

During the Consultation on Registry-Registrar Separation in Washington, DC on 11 December 2008, Jon Nevett of Network Solutions presented the following model based on adherence to the following safeguards:

- if there is cross-ownership, there should be separation between the registry and registrar functions;
- registries must continue to sell domain registrations through registrars;
- registries should not discriminate among registrars;
- with a limited exception, a registrar should not sell domain services of an affiliated registry;
- registries must provide a reasonable notification period before making any pricing changes on domain renewals; and
- ICANN should maintain existing market protections with regard to registries with market power.

The model generally agrees with the CRA recommendation that a registry and registrar may be corporate affiliates, but the registrar may not sell the domain name services of an affiliated company, so long as market protection mechanisms are in place and enforced.

The model would permit:

- a registry to sell domain name services through an affiliated ICANN accredited registrar until the registry meets a certain threshold of names, such as 100,000 names;
- once the threshold is met, the registrar would no longer be able to accept new registrations, but would be permitted to manage its existing base;
- the registrar would not be required to divest these names; and
- other market safeguards would remain in place.

One aspect is that the model would help a new registry reach a sustainable level of registrations to remain competitive in the market. This would allow small, community-based TLDs to be supported by an affiliated registrar with an understanding of the needs of the TLD. Under this model, ICANN would not need to adopt the CRA recommendation for single organization TLDs.

Other comments suggested variations of the first model.

Vittorio Bertola recommended that registries could self-manage up to 20,000 names, but between 20,000-100,000 names, registries must accept willing accredited registrars. He recommended full vertical separation for registries charging a fee and managing over 100,000 names.

Michael Palage also supported the suggestion that registries could provide registration services direct to registrants up to a certain threshold, such as 50,000 names.

During the DC consultation session on 11 December 2008, Carolyn Hoover of DotCoop noted that they could support the model of a 100,000 name cap at start-up for self-management through an affiliated registrar as a reasonable long-term approach for starting a registry. Carolyn noted that many of the problems they experienced would not have occurred if they had been able to continue to support the names managed by the affiliated registrar, rather than divesting them after six months from launch.

Eric Brunner-Williams of CORE supported the idea of the Nevett Model but thought the 100,000 name cap was too large. He thought the proper number was somewhere below 100,000 names. This would help support proposed TLDs aimed at small linguistic or cultural communities, allowing them to directly serve their community when there may be little interest from other registrars. His comments were made from the experience of .MUSEUM (which CORE serves as the backend Registry Operator). .MUSEUM proposed to self-manage a number of registrations without using ICANN accredited registrars. In the renewal of the 2007 .MUSEUM sTLD Agreement, MuseDoma was permitted to self-manage up to 4,000 names.

Amadeu Abril i Abril also supported the idea of registry self-management of names through an affiliated registrar, up to a cap, such as 10,000 names. He did not support single-organization TLDs.

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The concept of the Network Solutions Model was supported by Liana Ye, who suggested that ICANN “allow registrar[s] to operate both as registry and registrar to a certain point before they

have to separate into two entities to encourage start-up operation without price cap.” She also suggests that legal separation is important and there should be a requirement that at least 50% of the directors [for a registry or registrar] cannot be the same.

The threshold concept was supported by the gTLD Registry Constituency in its comments.

“It would be possible to come up with a numerical threshold of registrations below which relaxation of these requirements could apply, and above which the restrictions would apply. The RyC believes that further study should be conducted on what those thresholds should be and how these registries would transition to new restrictions [upon surpassing the threshold].”

Melbourne IT recommends that where a registry offers registrations to third parties, the registry should be allowed to operate its own registrar (up to a cap of 50,000 names in total), as well as allowing other ICANN accredited registrars to offer names on the same commercial terms. Upon reaching the cap, the registry would not be able to sell additional registrations (or registrations for other gTLDs). This would assist a small registry to get started, but ensure that if the registry was dealing with large numbers of registrants, the registrants have the option to choose registrars in a competitive market.

Unlike Network Solutions’ model, Melbourne IT supports a single-operator closed TLD operating both the registry and registrar functions. To avoid gaming, the operator would be limited to single organizations as the registrant for all second level domain names in the TLD and the registry prevented from licensing registrations to third parties.

A Second Model with Unlimited Self-registrations

Richard Tindal of Demand Media provided an alternate model for discussion, which supports the cross-ownership of gTLD registries and ICANN accredited-registrars. Demand Media supports the conclusion in the CRA Report that registries be able to sell directly to the public through an affiliated registrar. Demand Media supports legal but not ownership separation of registry and registrar functions. Unlike the Nevett model, the Demand Media model would not have a 100,000 name threshold.

Demand Media notes that registrars should be able to own a registry and sell through domain services of that registry but the registry should also be open to other willing registrars. “We believe the objective of enhanced competition in TLDs will be harmed if TLD operators are not allowed (under equal terms) to also promote their TLD at the retail level via an accredited registrar which is owned by the registry.”

Demand Media supports relaxation of price caps. “*For registries not operating under a binding price cap, the arguments in favor of vertical separation and equal access requirements are less clear cut. We would recommend that ICANN take steps towards relaxing one or both of these requirements. We agree.*”

Demand Media supports keeping market safeguards in place for registries with market power. This concept is supported by NeuStar. Comments from GoDaddy echoed the cross-ownership with no threshold approach. GoDaddy advocates the elimination of existing restrictions on registry-registrar cross-ownership as a way for ICANN to stimulate competition. This comment was also supported by Antony Van Couvering.

In response to earlier models (such as the Networks Solutions 100,000 name threshold or Melbourne IT 50,000 name threshold), GoDaddy notes that the limit “provides a warm fuzzy” but if cross-ownership works for the first 50,000 names, there is no sound reason to limit it there. The caps also impose on registrants who want additional domain names in a new name space (or other TLD) to then manage names between two different entities, or incur additional expense in getting their existing names transferred.

GoDaddy cites to existing examples of registry-registrar cross-ownership (Hostway & .PRO, the consortium of registrars that formed .INFO, VeriSign’s management of .TV, GoDaddy’s joint venture for .ME). “There are no such integration restrictions within several major ccTLD name spaces, yet it isn’t collapsing, there is robust competition, and the ccTLD space continues to grow.”

Of the two CRA models, GoDaddy recommends that the issue of single owner TLDs be referred back to the GNSO Council for vetting with the community and examination of the policy implications.

Cross-Ownership/Equitable Treatment

Jeff Neuman of NeuStar recommends that registries be able to operate an accredited registrar, as long as the registrar did not sell registrations of the TLD that owns it.

Neuman suggests that a registry should be able to have an ownership interest in a registrar as registrars can already have in a registry under the existing rules.

“NeuStar’s main point is that there needs to be a level competitive playing field and ICANN has not been able to achieve this to date. IF justification exists to allow registrars to directly or indirectly serve as registries, THEN steps needed to be taken to ensure that existing registries are not discriminated against. IF registrars are allowed to enter the registry market, then NeuStar agrees with the CRAI recommendation that a registry should not serve as a registrar in the TLD for which it serves as the registry. However, NeuStar is not certain that ICANN has established sufficient justification as to why a registrar should be allowed to enter the registry market. NeuStar also believes that ALL loopholes need to be closed to make sure that a registry does not resell the names as a reseller to circumvent the rules. IN other words, a registrar should not directly OR *indirectly* be allowed to sell names in a TLD for which it has a *direct or indirect* ownership in the registry.”

Amadeu Abril i Abril (CORE) notes that some registrars serve as backend Registry Operators today (like CORE) and they should be permitted to do so and operate a registry as long as they do not sell registrations in the TLD they are managing.

NeuStar also notes that price cap flexibility must be offered to existing registries if offered to new gTLDs (except for registries with market power).

Comments against lifting of registry-registrar separation requirement

Steve Metalitz (on behalf of Intellectual Property Constituency, IPC) noted that ICANN has not made clear why the CRA Report was requested. The IPC urges ICANN to provide its reasoning and assumptions underlying the request to CRA to conduct the report. The IPC also note that the comprehensive economic study has not been done and would be valuable for a number of

ICANN initiatives. The IPC is asking for a status update on that study.

The IPC notes that some registrars are large domain name holders. “Because several registrars own vast domain portfolios, the equal access and vertical separation requirements also have the positive effect of preventing particular *registrants* from having privileged access to domains in particular registries. Relaxing the [registry-registrar separation] requirements could inhibit competition in the market for domain names.”

The IPC agrees that relaxing of the vertical separation requirement for registries operating under price caps is undesirable and should remain in place for .com.

On single-owner TLDs, the IPC notes this is theoretically possible “but the devil is in the details.” The IPC does not understand why a gTLD operated as a money-making venture should be excluded from the single-owner model. Owners of a collective mark may want to register a gTLD and sell second-level registrations to members. The same may be true of trade associations or franchisors. “The Report’s description of the single-owner model should have made clear what gTLDs should not qualify for the single-owner model.”

The IPC calls the hybrid model proposed in the report deeply flawed and should not be given serious consideration. If not for vertical separation, ICANN may have to take on more monitoring and enforcing compliance. See <http://forum.icann.org/lists/crai-report/msg00013.html>.

Patrick Mevzek notes that he sees no reason to relax the current registry-registrar separation under the current market conditions. He notes that makes sense to let registries own registrars or the opposite as long as the registrar does not register domain names in the registry it owns or that owns it, provided there are proper safeguards in place. He suggests data should be publicly available to be able to see who owns these entities. “It is not a big problem already for registries, due to their current low numbers, but it is already a huge problem currently for registrars, as some studies have shown even basic data such as true postal address and phone numbers are not really available for all current registrars.”

He suggests performance criteria for new gTLDs should be established before any new gTLD is introduced. See <http://forum.icann.org/lists/crai-report/msg00019.html>.

David Maher submitted a comment on behalf of Public Interest Registry (“PIR”) noting that the CRA Report had four major shortcomings:

1. “PIR believes that the public interest in supporting competition does not favor a breakdown of the current separation of registry and registrar ownership. Even more so, the (limited) separation in the current rules, as reflected in the contracts so far, should be made symmetric [registrars should not be permitted to own registries].”
2. “PIR believes that the conclusions of the CRAI Report do not give ICANN a basis for an implicit policy to remove all cross ownership restrictions on new gTLDs. PIR further believes that any policy ultimately adopted should be applicable equally to registries and registrars and to existing and new gTLDs.”
3. The proposed experiments in the Report do take account of the risks of self-dealing by registrars that own registries.
4. The creation of the accredited registrar program has led to problems with monitoring compliance and ownership across 900+ registrars. “Blurring lines of registry/registrar

ownership would strengthen incentives for the economically strongest registrars to engage in the anti-competitive practices.”

PIR believes ICANN should adopt a general policy limiting or prohibiting cross ownership between registries and registrars. See <http://forum.icann.org/lists/crai-report/msg00020.html>.

David Maher also provided a study by Jonathan A.K. Cave titled “A name by any other rows: an economic consideration of vertical cross-ownership between registries and registrars” by Jonathan A.K. Cave of the University of Warwick. The paper is an analysis of the proposal to relax, eliminate or substantially modify cross-ownership of registries and registrars from an economic perspective. The paper sets forth arguments for the continuing necessity of vertical restrictions, and makes recommendations based on the current market.

Cave notes that vertical control can distort competition between registries, encourage registries to become integrated, and may lead to “capture” by market power in a concentrated layer. This may give integrated registrars unfair advantages in bargaining with other registries, and it may give advantages to commercial registries over non-commercial registries that do not own registrars. Cave states that open-access and price cap controls are essential complements to vertical ownership.

Among the open issues are:

- “The extent of real competition in the registrar market or in the registry market;
- The extent of any anti-competitive behavior in relation to prices, entry, name access and quality of service and the degree to which this is predatory or collusive;
- Whether competition is actually producing useful efficiencies (lower costs, lower prices, better distribution of name access, incentives to invest in the DNS system or in the economic valorization of names); and
- Whether real (and useful) innovation is going on, as opposed to ‘mere novelty.’”

Cave recommends that these issues can be addressed through 1) the development of a unified model considering the current registry-registrar market and the possibility of vertical control by ownership, 2) a panel econometric study of the competitive performance of DNS markets (including market facing ccTLDs) and of efficiency indicators, and 3) a forward-looking analysis based on models with the increase in TLDs. See <http://forum.icann.org/lists/crai-report/msg00021.html>.

Paul Tattersfield noted that it would be helpful if consultants such as CRA would do similar analysis on other areas of concern on the introduction of new gTLDs (such as large registries push boundaries of their positions). See <http://forum.icann.org/lists/crai-report/msg00023.html>. He asks a question on what happens to a .brand TLD when brand owners merge.

“One area the report doesn't touch upon are the implications from the creation of pure generic gTLDs and how to guard against the creation of monopoly positions. It is simple to make the statement for allowing open competition and let the market decide, and on the surface many people will support that notion. Of all the people who support the opening up of the DNS to allow generic new gTLDs like .search for example perhaps run

by Afilias or VeriSign etc. How many of those same people would show the same enthusiasm if .search was secured by Microsoft?”

George Kirikos asserted that the CRA Report provided only theoretical arguments, not empirical data, therefore the report should be discounted. He also states that competition should be promoted through a tender process. See <http://forum.icann.org/lists/crai-report/msg00024.html>.

Max Menius stated that he is against existing gTLD registries being able to modify their agreements to remove price caps. See <http://forum.icann.org/lists/crai-report/msg00033.html>.

Issues

1. Why was the CRA Report on Registry-Registrar separation requirements issued?
2. To what extent should the limitation on cross-ownership of registries and registrars be lifted as part of the new gTLD process, and why?
3. If it is determined to permit limited cross-ownership, which model should be considered for further community consultation?

Analysis

Previous Consultations. ICANN has received input from constituency groups, and stakeholders in the community over several years on the topic of registry-registrar separation. During the consultations on the development of the GNSO recommendations, the topic was discussed. The GNSO approved a recommendation (19) that “registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.”

During the ICANN meeting in November 2007 in Los Angeles, California, ICANN conducted an open session on the GNSO recommendations and a number of viewpoints were raised about registry-registrar separation and potential models. ICANN committed to undertaking a study of registry-registrar separation requirements and the effects of lifting such restrictions on the marketplace, most importantly, on registrants.

CRA Report. ICANN requested Charles River Associates International (“CRA”) to perform economic research pursuant to two resolutions of the ICANN Board of Directors: 1) the 18 October 2006 resolution of ICANN's Board of Directors seeking more information relating to the registry and registrar marketplace; and, 2) the 26 June 2008 resolution of ICANN's Board, directing the development and completion of a detailed implementation plan for the new gTLD Policy.

ICANN's policies regarding the relationship between registries and registrars have evolved over time. Current gTLD Registry Agreements prohibit registries from acquiring directly or indirectly more than 15% of a registrar (since the 2001 agreements). ICANN's founding is connected to a core value of fostering competition in the registry and registrar functions. Adding competition at the retail level for domain names is one of ICANN's first major accomplishments.

CRA engaged in interviews with members of the community over the course of several months in the first half of 2008. The Report is based on economics expertise, research and interviews of various stakeholders between February and June 2008. The CRA Report on Revisiting

Registry-Registrar Separation was posted for public comment from 24 Oct to 23 Dec 2008. The CRA Report is available at <http://www.icann.org/en/topics/new-gtld-crai-report-24oct08-en.pdf>.

CRA's report makes certain recommendations regarding the relationship between registries and registrars. The report describes the risks and benefits associated with lifting the current restrictions. CRA notes that ownership separation reduces the risk of discrimination as required by the equal access provision. CRA also notes that some of the proposed new gTLD models would be incompatible with vertical separation (e.g., privately held or ".brand" type TLDs are mentioned). The report suggests that vertical integration could promote the growth of new gTLDs, facilitate registry innovation, and eliminating the 15% restriction may encourage registrars to acquire registries.

It also describes the role of price caps in determining whether restrictions should be lifted. CRA's report suggests that, for registries operating under price caps, the arguments in favor of vertical separation and equal access are less clear-cut. The report recommends lifting the restrictions in a limited way first. The limitations are put in place to guard against the risks identified. For example, completely lifting the restrictions may put at risk the equitable treatment requirement. So a model that limits how many names a registry could "self-register" ameliorates that risk. As the CRA report points out, such a restriction also obviates some of the benefits: innovative bundling of services by cross-owned entities will not occur if the limitation on self-registration is left in place.

In particular, the CRA report makes two proposals that might apply to the implementation of the new gTLD program. These models are meant to inform discussion.

First, CRA proposes that, for single organization TLDs, that organization be permitted to operate both the registry and the registrar that sells second-level domain name subscriptions.

Second, CRA proposes that a registry may own a registrar so long as the wholly-owned registrar does not sell second-level domain names subscriptions in the TLDs operated by the registrar.

After the publication of the CRA report, ICANN convened open consultation sessions to discuss the report and its effects on the proposed new gTLD implementation model.

Recent Consultations. ICANN conducted two open consultation sessions on the CRA report, one in Washington DC on 11 December 2008 and one in Marina del Rey, CA on 19 December 2008. The comments received were summarized (see above), and ICANN is developing a synthesis paper based on the models received in the comments and consultations. Based on the comments and input, ICANN staff is weighing a number of additional models suggested for re-evaluating registry-registrar separation and cross-ownership as part of the new gTLD process.

The comments received on the CRA Report and consultation period generally agree that there should be continued separation of registrar and registry functions, but that a limited form of cross-ownership or self-management may be permitted. There was also general agreement with the GNSO recommendation that registries must use the accredited registrar model. Registrars, registries, and individual commenters noted that registries should treat registrars equitably and provide sufficient notice of domain renewal pricing changes.

Proposed Position (for this version of the Guidebook)

Based on the comments and input, a number of additional models suggested for re-evaluating registry-registrar separation and cross-ownership as part of the new gTLD process are being weighed. To clarify the discussion, one model was selected (based on the findings in the CRA report and public discussion of it) for inclusion into the revised Applicant Guidebook. The limited lifting of the restriction also recognizes that entities will work around organizational restrictions in an environment where there are many top-level domains if the restrictions are maintained.

Possible model taking into account public comment, CRA Report, gTLD implementation and practicalities: The key elements of a proposed limited lifting of restrictions on registry-registrar cross-ownership include the following:

- Maintain separation between the registry and registrar functions (with separate data escrow and customer interface);
- Registries continue to use only ICANN-accredited registrars;
- Registries should not discriminate among registrars;
- With a limited exception, a registrar should not sell domain services of an affiliated registry (this limit may be up to a threshold of 100,000 domain names, although the registrar may continue to manage its existing base once the threshold is met); and
- Reasonable notice should be provided before any pricing changes are made on domain renewals.

This model follows the CRA recommendation for a conservative approach by limiting the number of names a registrar could sell in its co-owned registry. The model also supports small, targeted registries (including community-based applicants or single-entity TLDs), and recognizes that limited cross-ownership may provide economic benefit and competitive benefit in the domain name market.

This model has been incorporated into the Guidebook for discussion by updating the proposed Registry agreement clause regarding the treatment of registrars.

XIV. LIST OF RESPONDENTS

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Abdulaziz Al-Zoman (A. Al-Zoman)
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American Intellectual Property Law Association (AIPLA)
American Registry for Internet Numbers (ARIN)
American Society of Association Executives (ASAE)
Ameriprise Financial, Inc. (Ameriprise)
Ron Andruff (R. Andruff)
Anonymous
Arab Team for Domain Names and Internet Issues (Arab Team)
Asia Pacific Top Level Domain Organization (APTLTD)
Asociacion PuntoGal (PuntoGal)
Association of National Advertisers (ANA)
AT&T Inc. (AT&T)
Bank of America Corporation (Bank of America)
British Broadcasting Corporation (BBC)
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Chinese Organizational Name Administration Center (CONAC)
Citrix Systems, Inc. (Citrix)
City of New York (NYC)
Connecting.nyc, Inc. (Connecting.nyc)
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Coalition Against Domain Name Abuse (CADNA)
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Demys Limited (Demys)
DHK Enterprises, Inc. (DHK)
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dotSCO campaign (dotSCO)
eBay Inc. (eBay)
eCOM-LAC
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eedlee
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Hearst Corporation
HP.com
Intellectual Property Constituency (IPC)
International Anti-Counterfeiting Coalition (IACC)
International Olympic Committee (IOC)
International Trademark Association (INTA)
InternetBar.org (InternetBar)
Internet Commerce Association (ICA)
Internet Commerce Coalition
Internet Society-Australia (ISOC-AU)
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ITT Corporation et al. (ITT)
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Joseph Lam (J. Lam)
Robert Lafaye (R. Lafaye)
Lego et al. (Lego)
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National Cable & Telecommunications Association (NCTA)
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Net Names
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Registries Constituency (RyC)
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U.S. Council for International Business (USCIB)
U.S. Department of Commerce, National Telecommunications and Information Administration
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U.S. Department of Justice, Antitrust Division (U.S. DOJ)
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