

# For GNSO Consideration: Trademark Clearinghouse

## October 2009

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### Introduction

The proposal for establishment of the Trademark Clearinghouse was among the potential solutions to trademark protections in new gTLDs. It was developed through community consultations including the recommendations of the Implementation Recommendations Team (see <http://icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>) and others, and feedback gathered in online fora and public meetings. (The Implementation Recommendation Team (IRT) was assembled to help identify and propose rights protection mechanisms (RPMs) for trademark holders within the New gTLD Program.) ICANN has done considerable consultation on this proposal and the feedback received was used to develop an implementable proposal that met as many of the community requests as practicable.

Given that the original GNSO policy direction was very general in nature, the Board is providing the GNSO with the opportunity to offer focused, timely input on this specific area of the proposed implementation plan. The Board is requesting the GNSO’s consensus view on whether the following rights protection mechanisms recommended by the staff are consistent with the GNSO’s proposed policy on the introduction of new gTLDs, and are an appropriate and effective option for achieving the GNSO’s stated principles and objectives.

The clearinghouse is envisioned as a data repository enabling specific information collection and data validation functions for trademark information. Under the proposed model, trademark rightsholders would voluntarily submit data regarding their trademarks to the clearinghouse. The clearinghouse would validate all submitted data initially and on a regular basis thereafter to ensure accuracy.

The clearinghouse would also support any new gTLD registry during its initial launch phases by facilitating services such as: 1) a “Trademark Watch” service to provide notice to trademark holders of any new second-level registrations matching their trademarks, and notice to potential registrants that trademark registrations exist matching their intended second-level domain name, and 2) a “Sunrise Period” registration procedure allowing trademark holders that have registered with the Trademark Clearinghouse an exclusive period of time, prior to general registration of domain names in the TLD, to register domain names matching their trademarks.

It is proposed that the clearinghouse would operate in accordance with the procedure included here. In accordance with public comment, the clearinghouse functions of validation and administration, as originally proposed by the IRT would be split between two entities in order to provide additional safeguards. One entity would validate marks for registration into the database; the other would maintain the database and provide sunrise and Trademark Watch services to the registries.

In the event that a requirement is developed for new gTLD registry operators to offer launch services using data from the Trademark Clearinghouse, the relevant sections of the Applicant Guidebook, including the registry agreement and the evaluation criteria would be modified accordingly. Draft language for incorporating such a requirement is included here for consideration.

Further, the proposal for a Clearinghouse is essentially an interim implementation solution until and if policy development work in this area is undertaken by the GNSO, which may adopt this or a similar solution for use by all registries. Before this proposal is included in the Applicant Guidebook, the GNSO will be given an opportunity to adopt this or an alternative solution to address the concerns that implementation of the Clearinghouse is proposed to address.

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PART I – PROPOSAL FOR TRADEMARK CLEARINGHOUSE

## **PART I - PROPOSAL FOR TRADEMARK CLEARINGHOUSE**

### **1. Introduction**

The proposal for establishment for the Trademark Clearinghouse was among the potential solutions to trademark protections in new gTLDs. It was developed through community consultations including the recommendations of the Implementation Recommendations Team (see <http://icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>) and others, and feedback gathered in online fora and public meetings. (The Implementation Recommendation Team (IRT) was assembled to help identify and propose rights protection mechanisms (RPMs) for trademark holders within the New gTLD Program.) In particular, the Clearinghouse is one implementation mechanism being proposed as an effective way to help further the GNSO Policy recommendation that: "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law."

In general, public commentary thus far suggests that a Trademark Clearinghouse concept is well received. To the extent there are criticisms, they are largely directed to specific implementation issues rather than the concept itself.

### **2. Clearinghouse -- Purpose**

It has been suggested that there is a need for a central repository for information to be stored, validated and disseminated pertaining to the rights of trademark holders vis-a-vis gTLD operators, registrars and registries. As such, the recommendation is that a service provider be awarded the right to serve as a Trademark Clearinghouse with a clearly defined purpose, namely, to accept, validate and facilitate the transmission of information related to registered and unregistered trademarks. This entity will be separate from ICANN to the full extent possible.

The Clearinghouse has two primary functions. First, the Clearinghouse is meant to be a fully operational database of validated trademarks submitted for inclusion by trademark holders. Second, the Clearinghouse shall have the responsibility of communicating with all registries (and possibly registrars) about any validated mark included in the Clearinghouse, thereby obviating the need for multiple registrations by trademark holders in multiple sunrise periods, or pre-launch trademark claims services. The specifics of how the communications would happen, both technically and contractually, are under consideration and will be further defined. Currently, such communications are proposed with respect to trademark claims watch and/or sunrise periods, depending on which RPM each new gTLD registry operator adopts.

As set forth more fully below, although there has been some suggestion that the role of the Clearinghouse be expanded beyond trademark rights and that the data which can be submitted be expanded beyond trademarks and service marks, after careful consideration, these suggestions are not

part of this proposal largely because they are at odds with the core purpose of the Clearinghouse, which is to facilitate cost effective and efficient data validation, maintenance and transmission.

The Clearinghouse will simply be a repository of validated information and disseminator of the information to limited recipients. Its functions will be performed in accordance with a limited charter, and will not have any discretionary powers. The Clearinghouse administrator(s) cannot create policy. Inclusion in the Clearinghouse does not expand any trademark right, nor can any negative influence be drawn from the failure to register a mark with the Clearinghouse. To the extent any changes are made to the Clearinghouse functions, they will undergo the same ICANN public comment period as is being conducted now prior to being adopted.

Public comments have suggested that the name of the organization be changed from IP Clearinghouse, since all forms of intellectual property (copyrights, patents) will not be registered. This suggestion is well taken, and the name will be modified to “Trademark Clearinghouse” to reflect that trademarks can be registered.

### **3. Service Provider(s)**

The selection of Clearinghouse service provider(s) would necessarily encompass a variety of criteria, but the foremost considerations should be the ability to store, validate and disseminate the data at the highest level of technical stability and security without interference with the integrity or timeliness of the registration process or registry operations. Public commentary has suggested that the best way to protect the integrity of the data and to avoid concerns that arise through sole-source providers would be to separate the functions of database administration and data validation. One entity will validate registrations ensuring they qualify as registered or unregistered marks. The other will maintain the database and provide Sunrise and Trademark Watch services (described below). Separate entities will “validate” and then, “administer” the two functions to preserve integrity of the data. In this way, it is thought the validator will have less incentive to approve applications for registration.

The Clearinghouse should be separate and independent from ICANN: not be operated by ICANN and clear and distinct from ICANN. It should operate based on market needs and collect fees from those who use its services. ICANN may coordinate or specify interfaces used by registries and registrars, and provide some oversight or quality assurance function to ensure rights protection goals are appropriately met. The Clearinghouse service providers (validator and administrator) will be selected through an open and transparent process to ensure low costs and reliable, consistent service for all those utilizing the Clearinghouse services.

There must be a form of renewable agreement between ICANN and the Clearinghouse service provider so that if a Clearinghouse service provider is not performing adequately, a successor can be found. Thus, any agreement with any Clearinghouse service provider must and will include provisions for data escrow and transfer of data upon termination to ensure a smooth transition. Agreements with

Clearinghouse providers will be renewed periodically where there will be a review to ensure cost and service levels are maintained or improved.

The providers' revenue will flow from fees paid by Trademark holders and gTLD registries. Trademark holders will pay a reasonable fee to the validation provider to have marks verified and entered into the database. Registry operators will pay a reasonable fee to have the database administrator conduct Sunrise or Trademark Watch services. Registry operators will avoid the cost of conducting their own Sunrise and IP Watch services and pay a fee lower than those costs to a provider. In this way fees are aligned with incremental efforts so that costs and fees can be minimized. The Clearinghouse providers will set the fees.

Some comments suggested that multiple regional entities should be engaged to assist with the data storage and validation responsibilities. The proposed alternative of a single Clearinghouse that has knowledge of local cultural customs and trademark laws could capture all of the benefits of regional clearinghouses, without the perceived detriments that might result from separate regional entities.

For example, one of the core purposes of the Clearinghouse is to provide a cost-effective and efficient way in which to store information about trademark ownership and to make this information available to registrants and gTLD registry operators during sunrise and trademark claims services employed by gTLDs upon launch. Expanding the number of Clearinghouses to provide such services to include multiple regional entities could decrease the efficiencies and cost effectiveness of any such operations. Separate regional Clearinghouses may also result in inconsistent application of standards and might lead to forum shopping. As such, on balance, it is believed that the core purposes of the Clearinghouse would be best achieved with one organization maintaining and disseminating the data and one organization performing validation services.

The specific performance criteria details would be addressed in the contract awarded to the service provider but, should at least require that the provider:

- a) provide 24 hour accessibility seven days a week (database administrator);
- b) employ systems that are technically reliable and secure (database administrator);
- c) use globally accessible and scalable systems so that multiple marks from multiple sources in multiple languages can be accommodated and sufficiently cataloged (database administrator and validator);
- d) have the relevant experience in database administration or validation, as well as accessibility to and knowledge of the various relevant trademark laws (database administrator and validator);  
and
- e) must ensure through performance requirements, including those involving interface with registries and registrars, that neither domain name registration timeliness, nor registry or registrar operations will be hindered (database administrator).

#### 4. **Criteria for Inclusion in the Clearinghouse**

To ensure uniform applicability and to ensure that similarly situated applicants are treated similarly, it is contemplated that the validation procedures would be established by the standards articulated through the IRT Final Report and public commentary. Such standards would not be based upon the laws of any particular jurisdiction. Rather, the standards would be those that reflect the type of use a trademark holder would have to demonstrate to assert rights to the mark. The current standards envisioned for inclusion in the Clearinghouse would include:

- A) ownership of a valid trademark registration from an entity authorized to grant such registrations and that verifies the validity of the trademark; or
- B) in the absence of a registration, evidence of continuous use of the mark in connection with the bona fide offering for sale of goods or services for a period of five years prior to application for membership.

The intent of B above is to capture “common law” trademark ownership since rights do attach through continued use. Thus, it makes sense to have a prescribed use period for any common law trademark holder wishing to be placed on the list. This should also deter fraudulent filings.

The type of data supporting an application for a registered mark would be a copy of the registration or the relevant ownership information, including, the requisite registration number(s), the jurisdictions where the registrations have issued and the name of the owner of record. Data supporting an unregistered mark would have to be clearly identified and must demonstrate bona fide use (i.e., offering for sale goods or services). At the same time, it should not burden the validation process. On balance, it is believed that such data should include copies of labels, tags, promotional materials, advertisements and/or invoices which show the use of the mark in connection with the good and/or service.

In order to weed out fraudulent filings, data that would not demonstrate bona fide trademark or service mark use would include letterhead, domain name registration(s) and/or a pending application for a trademark registration. Moreover, registrations that include top level extensions such as “.com” as part of the trademark or service mark will not be permitted in the Clearinghouse regardless of whether a registration has issued (i.e., if a trademark existed for example.com, example.com would not be permitted in the Clearinghouse).

All trademark holders seeking to have their marks included in the Clearinghouse would be required to submit a declaration, affidavit or other sworn statement that the information provided is true and current and has not been supplied for an improper purpose. The trademark holder would also be required to attest that it will keep the information supplied to the Clearinghouse current so that if, during the time the mark is included in the Clearinghouse, a trademark registration gets cancelled or is transferred to another entity, or in the case of a common law trademark the holder abandons use of the trademark, the trademark holder has an affirmative obligation to notify the Clearinghouse. There would

be penalties for failing to keep information current. Moreover, it is anticipated that there will be a process whereby registrations can be removed from the Clearinghouse if it is discovered that the trademarks are procured by fraud or if the data is inaccurate.

As an additional safeguard, the data validation would have to be renewed periodically by any trademark holder wishing to remain in the Clearinghouse. Electronic submission should facilitate the process and outweigh any perceived burden associated with it. The reason for periodic validation is to streamline the efficiencies of the Clearinghouse and the information the registry operators will need to process and limit the marks at issue to the ones that are in use.

All trademark holders seeking to have their marks included in the Clearinghouse, will have to consent to the use of the information by the Clearinghouse. However, such consent would extend only to use in connection with the stated purpose of the Clearinghouse. The reason for such a provision would be to prevent the Clearinghouse from using the data in other ways. Obviously, centralized data of this kind could have appeal for sale for marketing purposes, etc. but misuse of the data by the service providers would be grounds for immediate termination.

#### **5. Data Validation Guidelines**

One core function for inclusion in the Clearinghouse would be to validate that the data meets certain minimum criteria. As such, the following minimum validation criteria are suggested:

- A) An acceptable list of data validation sources, i.e. the web sites of patent and trademark offices throughout the world, third party providers who can obtain information from various trademark offices, etc.;
- B) Name, address and contact information of the applicant is accurate, current and matches that of the registered owner of the trademarks listed;
- C) Electronic contact information is provided and accurate;
- D) The registration numbers and countries match the information in the respective trademark office data base for that registration number; and
- E) For common law applications, the specimen of use must be examined. Acceptable specimens would include labels, tags, containers, advertising, brochures and something that evidences continued use for the proscribed period of time.

#### **6. Pre-Launch Trademark Claims Services**

The IRT has recommended that each new gTLD registry operator provide either a sunrise registration process or a pre-launch trademark claims service that will utilize the services of the Clearinghouse. It is



proposed that under the trademark claims service, when a registrant seeks to register a domain name, the registrar (through an interface with the Clearinghouse) will notify the registrant if one or more marks identical to the one the registrant is attempting to register is included in the Clearinghouse. The registrant will then be required to affirmatively: (i) acknowledge that it has been notified that the trademark(s) is included in the Clearinghouse but still wishes to register the mark; (ii) represent and warrant that the registrant has legitimate interest in the name; (iii) represent and warrant that the registrant will not use the domain in bad faith; (iv) acknowledge that use of the name in bad faith could result in suspension; and (v) represent and warrant that the registrant's contact information is accurate.

Then, if the domain name is registered, the registrar (again through an interface with the Clearinghouse) will notify the trademark holder(s) of the registration. This notification should not be before the registration is effectuated so as not to provide an opportunity for a trademark holder to inappropriately attempt to block a legitimate registrant from registering a name in which the registrant has legitimate rights.

The interface between the registry, registrar and the Clearinghouse remains open for discussion, consideration and development. Further, "identical" is defined to mean that the domain name consists of the complete and identical textual element of the trademark. Notification should be limited to identical marks so as to ensure operational integrity, limitation of overly broad notifications and an unmanageable volume of processing by the Clearinghouse.

#### **7. Sunrise Registration Process**

In lieu of a pre-launch trademark claims service, the IRT proposes that each new gTLD registry operator be required to provide a sunrise registration process that applies sunrise eligibility requirements (SERs) as a floor, verified by Clearinghouse data, and incorporates a Sunrise Dispute Resolution Policy (SDRP).

The proposed SER's include: (i) ownership of a trademark of national effect that issued on or before the effective date of the registry agreement and was applied for on or before ICANN publishes new gTLD application list that is identical (as defined in section 6 above) to the applied for domain name; (ii) optional registry elected requirements re: international class of goods or services covered by registration; (iii) representation that all provided information is true and correct; and (iv) provision of data sufficient to document trademark registration or facilitate its authentication to the Clearinghouse.

The proposed SDRP must allow challenges based on at least the following four grounds: (i) at time the challenged domain name was registered, the registrant did not own a trademark registration of national effect; (ii) the domain name is not identical to the trademark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect; and (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

## **8. Costs of the Clearinghouse**

For a Clearinghouse to be effective, the new gTLD registry operators would need to have certain obligations to use the information provided to it by the Clearinghouse. Part of the registry agreement would require the operator to use the information provided by the Clearinghouse. Allocating costs properly has been the subject of public commentary. In no way should trademark holders be called upon to bear the sole financial responsibility to fund the Clearinghouse. Because of protections afforded, rights holders will pay a registration and renewal fee. Because of the benefits they will receive from the Clearinghouse, it is envisioned that registry operators would also pay an access fee.

To restate, fees are paid by trademark owners to the Clearinghouse validation service to validate the mark for entry into the database. Registry operators pay fees to the Clearinghouse operator for instances of IP Claims or Sunrise services. Registry operators avoid the costs of designing and operating their own Sunrise or IP Watch services and, in turn for fees that result in lower costs to them, receive standardized, reliable service. In this way fees are aligned with incremental efforts so that costs and fees can be minimized.

## **9. Conclusion**

As indicated, while this implementation mechanism is being submitted to the GNSO for its consideration, ICANN appreciates all of the reasoned comments already received on this implementation proposal for a Trademark Clearinghouse and welcomes any and all further comments on this topic.

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PART II – DRAFT APPLICANT GUIDEBOOK EXCERPTS (MODULE 2)

## **PART II – DRAFT APPLICANT GUIDEBOOK EXCERPTS (MODULE 2)**

The draft Applicant Guidebook describes the various reviews that take place during the Evaluation of new gTLD applications. An attachment to Module 2 (the “Evaluation Criteria”) includes the full set of questions to applicants, and the criteria to be used by evaluators in determining whether the applicant has the operational and technical, and financial capability to successfully run a registry.

In the event that a requirement is developed for new gTLD registry operators to offer launch services using data from the Trademark Clearinghouse, the relevant sections of Module 2 and the evaluation criteria, would be modified to note this requirement and incorporate it into the overall scoring model for the evaluation of all new gTLD applicants.

Module 2 could be modified to read as follows:

### *2.1.2.1 Technical/Operational Review*

In its application, the applicant will respond to a set of questions intended to gather information about the applicant’s technical capabilities and its plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual gTLD registry to pass the Technical/Operational review. It will be necessary, however, for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of a gTLD registry operation. Subsequently, each applicant that passes the technical evaluation and all other steps will be required to complete a pre-delegation technical test prior to delegation of the new gTLD. Refer to Module 5, Transition to Delegation, for additional information.

As part of the technical/operational section of the application, all applicants are required to describe their proposed mechanisms for protecting existing rights in the TLD, to ensure that the proposed mechanisms will meet contractual requirements. These rights protection mechanisms include:

- (i) Use of data from the Trademark Clearinghouse. New gTLD registry operators have the option of implementing either:
  - (a) a Trademark Watch service, or
  - (b) a Sunrise Period to address rights protection in the initial launch phases of the TLD. Registry operators must use the validated data from the clearinghouse for these two services. Applicants must

describe their proposed implementation of the option chosen.

- (ii) Adoption of the Uniform Rapid Suspension system (URS). The URS complements the UDRP by providing a faster means to resolve clear-cut cases of rights infringement, and is recommended for all new gTLDs as a best practice. Applicants must describe their proposed implementation for URS in the TLD, if they elect to adopt it.

In addition, the Evaluation Criteria, included as an attachment to Module 2, could be modified to read as follows:

#	Question	Scoring Range	Criteria	Scoring
36	<p>Rights Protection Mechanisms: Trademark Clearinghouse</p> <p>(a) Applicants should describe proposed policies and practices for protecting the legal rights of others. Answers should demonstrate how the applicant will comply with the requirements in Specification 7 of the Registry Agreement, including: use of the Trademark Clearinghouse during the startup period and establishment of either a Trademark Claims Service or a Sunrise Period. Answers may also include additional measures such as takedown procedures, registrant pre-verification or authentication procedures, or other covenants.</p>	1-0	<p>Complete answer demonstrates:</p> <ol style="list-style-type: none"> <li>1. Highly developed and detailed procedures for rights protection in the TLD.</li> <li>2. Proposed procedures are adequately resourced in the planned costs and are consistent with the overall business approach described in the application.</li> <li>3. Policies and procedures identify and employ rights protection mechanisms for startup and on an ongoing basis.</li> <li>4. Proposed procedures, when executed in accordance with the Registry Agreement, are sufficient to meet contractual requirements.</li> </ol>	<p><b>1 – Meets Requirements</b> Response includes:</p> <ol style="list-style-type: none"> <li>(1) Applicant provides adequate level of detail to substantially demonstrate capability and knowledge required to meet this element;</li> <li>(2) When executed in accordance with the Registry Agreement, Applicant’s plans are sufficient to result in compliance with the requirements in Specification 7 to the agreement; and</li> <li>(3) Policies and procedures are commensurate with overall business approach as described in the application.</li> </ol> <p><b>0 – Fails Requirements</b> Does not meet the requirements to score 1.</p>

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PART III – DRAFT REGISTRY AGREEMENT EXCERPTS (MODULE 5)

### **PART III – DRAFT REGISTRY AGREEMENT EXCERPTS (MODULE 5)**

In the event that a requirement is developed for new gTLD registry operators to offer launch services using data from the trademark clearinghouse, the relevant section of the registry agreement would be modified to incorporate this requirement.

Currently, Specification 7 to the draft registry agreement includes minimum requirements for rights protection mechanisms. Specification 7 could be amended to incorporate the following provisions:

1. **Participation in the Trademark Clearinghouse.** Registry Operator shall participate in the Trademark Clearinghouse (the “Trademark Clearinghouse”) with respect to all registrations of domain names within the TLD, and shall not require any owner of applicable intellectual property rights to use any other service. Registry Operator shall be bound by any data validation determinations made by the Trademark Clearinghouse and shall use the validation and authentication information provided by the Trademark Clearinghouse solely in connection with the administration of the TLD and registration of domain names in the TLD.
2. **Additional RPMs.** In addition to the RPMs implemented by Registry Operator (whether or not mandated by ICANN), Registry Operator shall implement at least one of the following RPMs:
  - a. The pre-launch claims service provided by the Trademark Clearinghouse pursuant to which Registry Operator shall provide notices to both: (a) potential registrants of domain names that identically match trademarks contained within the Trademark Clearinghouse; and (b) owners of trademarks contained within the Trademark Clearinghouse of the registration of domain names that identically match its trademark(s); or
  - b. A sunrise registration procedure pursuant to which, during an exclusive period of time prior to the general registration of domain names in the TLD, the owners of trademarks and service marks that have registered with the Trademark Clearinghouse shall have an opportunity to register domain names that identically match such marks in the TLD, subject to the following terms and conditions:
    - i. Such sunrise registration procedure shall apply standardized sunrise eligibility requirements (“SERs”). The SERs shall include, but shall not be limited to, the following:
      1. Ownership of a registration of national effect that issued on or before the Effective Date and was applied for on or before the date that ICANN published the list of applications received in the relevant gTLD round for a mark that

identically matches the applied-for domain name. An identical match means the domain name consists of the complete and identical name protected by the trademark. In this regard: (a) spaces contained within a trademark that are replaced by hyphens (and vice versa), (b) spaces, hyphens, punctuation or special characters contained within a trademark that are spelt out with appropriate words describing it, and (c) punctuation or special characters contained within a trademark that are omitted or replaced by spaces or hyphens will be considered identical matches.

2. At Registry Operator's option, further requirements relating to the International Class of goods and/or services covered by the relevant registration that it deems appropriate to its TLD.
  3. If the registry permits sunrise registrations to be based on legal rights other than registered trademarks, those other legal rights must be capable of being authenticated and must be recognized under the laws of the country in which the registry is organized.
  4. An affirmation by sunrise registration applicants that all information provided is true and correct, and an acknowledgement that the provision of false information may result in the cancellation of any resulting domain name registration.
  5. Provision of either documentation of the claimed trademark registration (or other legal right, as applicable) or information about it sufficient to facilitate its authentication to the Trademark Clearinghouse.
- ii. The sunrise registration procedures shall include a sunrise dispute resolution policy, which shall allow challenges based on at least the following four grounds:
1. At the time the challenged domain name was registered, the domain name registrant did not own a trademark registration of national effect;
  2. The domain name is not identical to the trademark on which the domain name registrant based its sunrise registration;
  3. The trademark registration on which the domain name registrant based its sunrise registration is not of national effect; or



4. The trademark registration on which the domain name registrant based its sunrise registration did not issue on or before the Effective Date and was not applied for on or before the date that ICANN published the list of applications received in the relevant gTLD round.

ICANN encourages comment on the interim language provided here. This language is for discussion only, and has not yet been incorporated into the Applicant Guidebook. Comments will be considered for the next version of full draft Applicant Guidebook.