



## New gTLD Program Explanatory Memorandum

# Description of Independent Objector for the New gTLD Dispute Resolution Process

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### Background - New gTLD Program

Since ICANN was founded over ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles, recognized by the United States and other governments, has been to promote competition in the domain-name marketplace while ensuring Internet security and stability. The expansion will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 21 generic top-level domain names. In a world with 1.5 billion Internet users—and growing—diversity, choice and competition are key to the continued success and reach of the global network.

The decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008 at the ICANN meeting in Paris. A thorough brief to the policy process and outcomes can be found at <http://gnso.icann.org/issues/new-gtlds/>

This paper is part of a series of papers that will serve as explanatory memoranda published by ICANN to assist the Internet community to Applicant Guidebook. A public comment period for the draft Applicant Guidebook, version 2, will allow for detailed review and input to be made by the Internet community. Those comments will then be used to revise the documents in preparation of a final Guidebook. ICANN intends to release the final Guidebook later this year. For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

## Summary of Key Points in this Paper

- One main purpose of the new gTLD dispute resolution process is to make it as independent as possible so that the applicants, the community and ICANN have the benefit of expert opinion.
- Allowing an Independent Objector to object within the dispute resolution process that has been developed is an important step to achieving the goal of independence.
- The Independent Objector would not act on behalf of any particular persons or entities, but will act solely in the best interests of the public who use the global Internet.
- The process is designed so the Independent Objector will object only in limited circumstances so that few, if any, objections are filed that could unnecessarily delay consideration of an application.

### I. Executive Summary

Throughout the public comment period and among discussions with staff and the community, the following question has been raised: “What will be done if there is an application for a highly objectionable name but there are no objections within the process?”

One answer to this question might be that a mechanism be put in place to object to such anomalous applications on behalf of Internet users, and particularly in the public interest. The existence of an “Independent Objector” could mitigate the risk that, at least in some instances, valid objections might be available with respect to proposed TLDs, but the persons or entities that logically might lodge those objections have elected not to do so for any number of reasons.

One main purpose of the new gTLD dispute resolution process is to make it as independent as possible so that the applicants, the community and ICANN have the benefit of expert opinion. Another objective is to address risk to the process and to ICANN by providing a path for considering controversial applications that might otherwise result in litigation or criticism to the process or the ICANN model. Thus, allowing an Independent Objector to object within the dispute resolution process that has been developed is an important step to achieving the goal of independence.

## II. Background and Discussion of Issue

It is widely understood that a goal for the new gTLD program is to make an independent dispute resolution process available to all parties with standing to assert an objection to a proposed string. Indeed, the GNSO made clear that “[w]hilst ICANN does have a technical co-ordination remit, it must also put in place a system of handling objections to strings or to applicants, using pre-published criteria, that is fair and predictable for applicants.” See GNSO Report ([http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#\\_Toc43798015](http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015)). Further, the GNSO’s stated preference is that this system for handling objections be an external process. See <http://forum.icann.org/lists/gtld-council/msg00357.html>

The Independent Objector would not act on behalf of any particular persons or entities, but will act solely in the best interests of the public who use the global Internet. In light of this goal of the public interest, this person would be limited to filing objections, without requirement of direct standing, pursuant to GNSO Recommendation 6 (Morality & Public Order) or Recommendation 20 (Community). But not be authorized to file objections pursuant to GNSO Recommendation 2 (String Confusion) or pursuant to GNSO Recommendation 3 (Existing Legal Rights).

As stated above, the need for an “Independent Objector” would arise when no objection is filed to a TLD that would be considered objectionable across many jurisdictions. Discretion to act must be strictly limited. For example, it is possible that a proposed string would be interpreted in all jurisdictions as explicitly and clearly inciting violent lawless action but that no formal objection is filed. Without an entity such as an Independent Objector to object in such circumstances, a highly controversial string, that ought to be excluded, might be placed into the root. The Independent Objector would be in a position to file an objection to this proposed string, which would result in a decision by an independent dispute resolution panel.

As another example, a party, such as a government might have an objection to a highly controversial and clearly objectionable string, but chooses not to utilize the independent dispute resolution process and instead would use courts or an outside agency to attempt to block the application outside of the new gTLD process. The Independent Objector is intended as another avenue for objection within the dispute resolution process.

In both instances above the Independent Objector role is intended to address risks to the process by: ensuring the proposed TLDs that are clearly encompassed by the limited Community-based and Morality & Public Order objection standards are not entered into the root; and that the risks of entities going outside the process (and potentially seeking to halt the process) are reduced.

It is anticipated that in each instance the Independent Objector would make an independent assessment as to whether an objection is warranted. In making that assessment, the Independent Objector should be allowed to consider public comment. Neither ICANN staff nor the Board should have authority to direct the Independent Objector to file or not file any particular objection. As an example, ICANN expects that the Independent Objector would have the same level of independence as the ICANN Ombudsman. It is anticipated that the Independent Objector will have the discretion and judgment to only act in clear cases where the grounds for objection seem strong.

## III. Selecting the Independent Objector

Draft—for discussion only—please refer to the disclaimer on the title page of this document.

It should be an absolute that the Independent Objector would be selected by ICANN through an open and transparent process, and be retained as an independent consultant. The Independent Objector: (i) should be a person with considerable experience and respect in the Internet and legal communities; (ii) possess the judgment required to accurately predict which (and only which) TLD strings will be rejected by the Dispute Resolution panels; (iii) would have to be unaffiliated with any of the TLD applicants; and (iv) would have an adequate administrative support to assist the Independent Objector<sup>1</sup>.

#### **IV. Funding**

ICANN will fund the Independent Objection out of the proceeds of the TLD applications. Funds for this have two separate uses. The first would remunerate the Independent Objector and support staff. The second fund would be drawn against to financially support the objections the Independent Objector lodges to proposed TLDs. This discretionary fund would be used to pay for dispute resolution fees as well as attorneys' fees and costs. Money in the discretionary fund that is not used will be reverted to ICANN and processed with all other proceeds from applications.

#### **V. Conclusion**

In trying to respond to questions such as "[w]hat will be done if there is an application for a highly objectionable name but there are no objections within the process?" ICANN has developed the concept of the 'Independent Objector.' As noted above, the existence of an "Independent Objector" could mitigate the risk that, at least in some instances, valid objections might be available with respect to proposed TLDs, but the persons or entities that logically might lodge those objections have elected not to do so for any number of reasons. While preventing certain risks, it is also important that the role be configured so that few, if any, objections are filed that could unnecessarily delay consideration of applications. ICANN is very interested in, and invites the community's views on, the idea of an Independent Objector, which is still under development and consideration.

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<sup>1</sup> The last requirement for staff support (and that support is not furnished by ICANN) is to ensure complete independence of the Independent Objector.