

NEW gTLDs APPLICANT GUIDEBOOK APRIL 2011 DISCUSSION DRAFT

PUBLIC COMMENT SUMMARY AND ANALYSIS

Sources:

Public Comment Postings (15 April 2011-15 May 2011). The full text of the comments may be found at <http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm>.

GENERAL COMMENTS

Support for New gTLD Program

Key Points

- As in previous rounds, ICANN continues to listen, analyze and incorporate constructive Community feedback into this version of the Applicant Guidebook as one of the implementation steps towards launch.
- ICANN has worked hard to resolve any remaining outstanding issues and move forward with the program.
- We understand that there is a demand for the program to launch as there are opportunities for promoting competition, consumer choice, and innovation.
- While not perfect, the Applicant Guidebook is on its way to being robust enough to support the launch of the new gTLD application process

Summary of Comments

Support for current version of guidebook.

The current applicant guidebook substantially addresses most of the outstanding issues and is robust enough to support the launch of the new gTLD application process. A document of this complexity and importance can never be “perfect” or “complete” in the eyes of every stakeholder member. The guidebook will evolve over time as ICANN becomes aware of issues or difficulties arising during the application process and the launch of the first new gTLDs. *Network Solutions* (12 May 2011). *Minds + Machines* (15 May 2011). *M. Neylon* (15 May 2011). *Bayern Connect* (15 May 2011). *Demand Media* (15 May 2011). *AFNIC* (15 May 2011). *AusRegistry* (16 May 2011). *Domain Dimensions* (16 May 2011). *R. Tindal* (16 May 2011).

The ICANN Board should keep its commitment to a 20 June 2011 vote to preserve the legitimacy of the consensus-driven policy making program. We look forward to final acceptance of the AGB and launch of the new gTLD program. The AGB has evolved into a program that fully protects rights yet retains objective standards for launching new gTLDs. The potential public benefit of new TLDs has already been demonstrated by the success of the IDN Russian TLD and the recent re-launch of the .co ccTLD. The public is hungry for more domain options

and the new gTLD program answers that need while strongly protecting consumers, trademarks, and governments from bad actors. The AGB provides more protections than any other policy put into practice up to this point. Trademark holders and consumers will benefit from at least ten new protection policies that are not in place in current TLDs. *Minds + Machines* (15 May 2011).

The AG should be approved by the ICANN Board and the communications program should start at the ICANN Singapore meeting. Innovation will result from the new gTLD program. The protections in the AG far exceed those in the existing gTLDs. Either new gTLDs will create a massive benefit which will far outweigh any harms, or we need not worry about protections. The GAC role inside of ICANN is important and should evolve separately from and not be driven by the new gTLD process. The adoption of the AG should not be contingent on “finalizing” the role of the GAC, nor should it be impacted by narrow interests lobbying national governments. The AG, hopefully approved in Singapore, is simply doing what should have been done in 1999 and what would have been done if ICANN had then been in a stronger position. It is a natural step that is twelve years too late but better late than never. *Tucows* (15 May 2011).

We look forward to the release of the final AG on 20 June in Singapore. With regard to the latest attempts to delay the new gTLD process further based on claims that new gTLDs introduction should not be done “in a rush,” ICANN’s bottom-up multi-stakeholder model has provided over the past six years there have been thousands of opportunities for all parties to comment and participate. The nature of the bottom-up model is a compromise which naturally cannot meet everyone’s wishes. *DOTZON* (15 May 2011).

It is time to bring the process of establishing the rules for new gTLDs to a close and commence with the opening of the application period, with additional revisions to new gTLD policy being made in the future based on actual experience rather than overhyped projections. Any continuation of this process is only likely to provide additional time for the GAC to pursue its ill-considered goal of eroding registrant rights on behalf of large corporate trademark interests. *ICA* (15 May 2011).

“Cause-based TLDs”. Some new initiatives have designed business plans with the primary purpose of benefiting the greater and global public good—i.e., “cause-based TLDs” –which can offer benefits useful to people around the world regardless of how or if they use the internet. Time is crucial for some of these, so ICANN’s Board and the GAC are urged to avoid further delays and allow TLD innovation and the benefits of cause-based TLDs to commence by approving a 2011 application window for new TLDs and consider shortening the application window to 30 days. *DotGreen* (15 May 2011).

Opposition to New gTLD Program

Key Points

- There are inherent risks to the program whether ICANN limits the amount of gTLDs available per round or not. Were ICANN to go ahead with limiting the number of gTLDs in a round, it could potentially still introduce new levels of risk and simultaneously lose the anticipated benefits of new gTLDs.

Summary of Comments

The new gTLD program should be stopped—the internet society is not interested in it.
ICANN has not presented evidence and convincing arguments to support the idea of introducing the new gTLD program. The internet society (legitimate owners of the internet—private users and companies owning domain names) is not interested in the new gTLD program. They are not given reasonable representation in the decision boards, so ICANN can get away with not presenting evidence to support introducing the new gTLD program. Comments and concerns, especially regarding the protection of trademark rights, are not taken into account by ICANN. Brand owners will have to fight for exactly the same domain names with the new proposed program as they are with the present system, but with much more money involved. There is nothing to be gained from the perspective of the internet users. Those who will earn money from this new, very expensive program (registrars and ICANN itself) are the ones who are interested in it. The process of introducing this expensive new gTLD program should be stopped immediately and only considered again once ICANN has produced convincing documentation that the internet society is interested in this program. The present, well-functioning and low cost set up for the internet secures freedom of speech for the many. The new gTLD program has very high costs and could evolve into a limitation of the freedom of speech for the many. *H. Lundbeck (4 May 2011).*

It is time for ICANN to go back to first principles and reboot the new TLD program in its entirety. ICANN is rushing to implement a plan that is not supported by the public. ICANN's policies do not maximize consumer welfare but rather raise consumer costs. The DOC, NTIA, DOJ and GAC should compel ICANN to go back to the drawing board. In the alternative, if ICANN does not demonstrate a willingness to do so, it is time to end the ICANN "experiment," end the outsourcing of TLD management to ICANN, and instead restore management of TLDs to the DOC/NTIA. *G. Kirikos (15 May 2011).*

ICANN should reconsider overarching issues before any new gTLDs are released.

Until the overarching issues are satisfactorily and comprehensively addressed, it is premature to proceed with the launch of the new gTLD proposal. The stated objectives of the work on new gTLDs still do not seem to be achieved with the applicant guidebook. ICANN has not shown that the new gTLDs will bring innovation, consumer choice and lower prices or that they serve any public interest. ICANN has definitely not shown that with new gTLDs "the need for brand protection and the opportunity for user confusion will be greatly diminished" (p. 2, ICANN Feb. 21, 2011, Public Comment Summary). Quite the opposite seems to be the realistic outcome of the release of the new gTLDs. *LEGO (Module 5, 12 May 2011). Arla Foods (13 May 2011). Adobe Systems (13 May 2011). CADNA (13 May 2011). IACC (15 May 2011).*

No compelling economic need.

ICANN's own economic studies indicate that there is no compelling economic need to introduce new gTLDs and that the current gTLD structure adequately accommodates Internet users' current and forecasted needs. *AIPLA (13 May 2011). Partridge (14 May 2011). INTA (14 May 2011).*

ICANN never provided proof of a demonstrable need or demand for new gTLDs or that the economic benefits will outweigh the costs. *CADNA (13 May 2011). INTA (14 May 2011). G. Kirikos (15 May 2011). DIFO (15 May 2011). MarkMonitor (16 May 2011).*

New gTLD program--getting it right.

ICANN must get the new gTLDs launch right. The success of the multistakeholder model depends on it. In recent months tremendous progress has been made on the applicant guidebook. ICANN should approve an AG only when the community supports it. We remain willing and available to provide input. *News Corporation* (13 May 2011).

ICANN should continue to refine the new gTLD program with the goal of getting it right, not just getting it done, even if it takes beyond June 20, 2011, to do so. *Time Warner* (14 May 2011). *Microsoft* (15 May 2011).

Limited launch--Pilot Program.

A wide-open new gTLDs program should not proceed until mechanisms to address IP protection and other concerns are fully developed and tested. These issues need to be addressed before the business and intellectual property community can support ICANN's new gTLD plan. If ICANN believes that further delays are unacceptable then it should proceed with a small pilot program as previously suggested by the GAC for a strictly limited number of gTLDs designed to serve linguistic, geographical, and cultural communities. The pilot could provide actual data that could be used to refine and improve the application rules for subsequent rounds. The lack of economic need for new gTLDs demonstrates that there is adequate time to test new gTLDs through a pilot program. *A/PLA* (13 May 2011). *Partridge* (14 May 2011). *Coca-Cola* (15 May 2011). *Hogan Lovells* (15 May 2011).

We are perplexed by ICANN not following the advice of its own economic studies and the GAC to do a pilot program (a limited launch) of new gTLDs. A detailed explanation for this rationale would be appreciated. *News Corporation* (13 May 2011). *INTA* (14 May 2011).

ICANN has a critical overall task of appropriately narrowing the focus of the entire new gTLD project. ICANN's refusal to re-orient the scope, pace and targeting of the new gTLD launch is profoundly disappointing and casts serious doubt on ICANN's claim to be acting in the public interest and in conformance with a consensus of stakeholders. COA urges ICANN to grasp what may be the last opportunity to re-focus the new gTLD launch on the types of applications that offer the greatest potential benefits for the public, while minimizing the costs imposed on third parties. Some proposed new gTLDs may be targeted toward enhancing the Internet experience for "the next billion Internet users," whose everyday languages are written in non-Latin scripts, or toward fulfilling clearly specified needs of limited and well-defined communities; others will add little but confusion and noise to an already chaotic online environment. As ICANN must realize by now, unless it relaxes its insistence on welcoming all these new gTLD applications without distinction, it will do nothing but buttress the position of those clamoring to call the ICANN experiment a failure and to move to an entirely different method of managing the Domain Name System. ICANN must not adhere obsessively to the arbitrary deadline set by the Board to take final action on the applicant guidebook by 20 June. ICANN must take the additional time needed to re-orient this exceptionally important initiative into a more targeted, better focused and more incremental approach. *COA* (15 May 2011). *SIIA* (15 May 2011).

The IPC joins with the GAC in urging ICANN to: (1) authorize only a discrete and limited number of new gTLDs; (2) undertake with respect to each application an evaluation of the social benefits and costs of each new gTLD application and to implement mechanisms for the denial of the application if such benefits are not clearly weighted in favor of consumer protection; and (3) implement data reporting for all approved new gTLDs on the subjects of malicious conduct, cyber squatting and other RPMs to assist ICANN in evaluating social costs of the new gTLD program. *IPC* (15 May 2011). *MarkMonitor* (16 May 2011).

DIFO is skeptical about the idea that 1,000 (or less) new TLDs will benefit the global Internet Society and would have been more confident if the new TLD introduction were limited to 50 new TLDs. *DIFO (15 May 2011)*.

The new gTLD program threatens brand integrity with attendant financial impact for brand owners and poses significant risk of consumer detriment. ICANN should not proceed with a full-scale new gTLD program until these issues have been properly addressed. *BBC (Module 5, 13 May 2011). Adobe Systems (13 May 2011). CADNA (13 May 2011). INTA (14 May 2011). MARQUES/ECTA (15 May 2011). Coca-Cola (15 May 2011). NCTA (Module 2, 13 May 2011).*

Risks to ICANN with unlimited rollout. ICANN cannot avail itself of a “safe harbor.” If registries begin to fail, they will likely take more risks to stay afloat, including turning a blind eye to fraud and malicious conduct on a massive scale. Without significant compliance and enforcement monitoring, ICANN may unwittingly be subject to liability for acts of fraud or malicious conduct it should have been aware of and which were allowed to continue. ICANN’s future will be tied to the success and failure of future registries. A large number of such failures could impact its global reputation as a trusted custodian of the Internet. *MarkMonitor (16 May 2011)*.

Analysis of Comments

Throughout the development of the new gTLD program and the Applicant Guidebook, there have been discussions about limiting the number of new gTLDs in the first round and/or adding categories (i.e., beyond open and community such as brand). It is possible that such measures could mitigate some risks with new gTLDs; however, they may also introduce new and unpredictable risks, i.e., abuses. Additionally, curtailing the introduction to certain categories of TLDs will severely limit the anticipated benefits of new TLDs: innovation, choice and competition. The full discussion of these issues has taken place under separate cover, in previous comment summaries and in public meetings. Finally, while the round is not limited by category, it is limited by rounds. The GNSO policy stated that the introduction of new TLDs should take place in rounds until well tested. The round is limited by the number of applications received during the limited open window. While a second round is planned, several assessments will be done prior to the launch. So the launch is not unlimited. Rather, it is limited in a way that takes advantage of lessons learned in previous rounds, provides protections, and provides the best chance of achieving the anticipated benefits. For these reasons, the process remains as it is today, limited.

ICANN continues to execute on its mission and the bottom-up, multi-stakeholder model has provided an opportunity for all parties to participate and comment. The recent, intensive involvement of governments is one example of this collaboration, along with the extensive public comment rounds for the evolution of the Applicant Guidebook.

Based on the principles embodied in ICANN’s founding documents, it is believed that the expansion of the generic top-level domain (gTLD) space will allow for a greater degree of innovation and choice.

Implementation of this program is a complex and involved process that has required the coordination and consensus of many groups and factions.

While not perfect, the Applicant Guidebook is on its way to being robust enough to support the launch of the new gTLD application process and ICANN is committed to diligently working towards consensus on implementation and operational solutions.

ICANN PROCEDURES

Key Points

- ICANN's Governmental Advisory Committee has reiterated its intent to follow its Operational Procedures and the GAC will advise the ICANN Board on both consensus concerns and the concerns of several members as required.
- The gTLD program will remain flexible to implement changes as needed to improve the program and address community concerns on a timely basis going forward. A process to identify, prioritize, and implement necessary changes is being built into the program.

Summary of Comments

Explicit definition of “GAC Consensus” needed. The current applicant guidebook makes reference to “GAC consensus” and its ramifications for a new gTLD application. We do not see a definition for “GAC consensus” in the guidebook; this term needs to be promptly and explicitly defined. We are not confident that the ICANN community’s concept and application of “consensus” matches that of the GAC. Any misunderstanding on this point will be detrimental to the new gTLD process, to potential applicants and to ICANN in general. *Network Solutions (12 May 2011)*.

GAC-ICANN negotiations.

Asociacion Puntogal is comfortable with all the points that already have been agreed to in the GAC-Board negotiations to improve the applicant guidebook. Improvements made in response to GAC advice such as early warning and trademark protection measures will help achieve a more robust process. These changes are easy to implement by truly community-based cultural and linguistic TLDs or other solid and non-controversial initiatives. Asociacion Puntogal urges the Board and the GAC to find an agreement where possible on the remaining points.
Asociacion Puntogal (13 May. 2011).

It is perhaps disappointing that it has taken a strong intervention by the GAC to ensure that the concerns of IP rights holders have been taken into account in the new gTLD program, especially when one considers the levels of participation in the public comment periods to date. Thus many do question whether commenting in such a forum is an efficient means to put forward constructive comments. *Hogan Lovells (15 May 2011).*

U.S. government restrictions. It is worrying that a new TLD applicant may not be considered due to a restriction imposed by the U.S. government (i.e. OFAC) and this could be seen as a weakness of ICANN’s links to the U.S. *M. Neylon (15 May 2011).*

New gTLD Program—Ongoing Reviews.

We support the logical decision of ICANN to collect data from each launch and review systems such as the URS after a year to improve policy and procedure. *News Corporation (13 May 2011)*.

ICANN must remain flexible to future amendments as the community identifies problems during the launch of the first round of new gTLDs. ICANN should establish more concrete plans for evaluating the launch of new gTLDs and rapidly implementing modifications and enhancements to address any problems that arise. *USCIB (15 May 2011)*.

Analysis of Comments

A comment requests that GAC consensus have an explicit definition in the Guidebook to avoid potential issues with varying definitions by the GAC and the ICANN community. The GAC has stated that, “the GAC will clarify the basis on which consensus advice is developed.” In its “GAC comments on the ICANN Board’s response to the GAC Scorecard” dated 12 April 2011 (see <http://gac.icann.org/press-release/gac-comments-board-reponse-gac-scorecard-following-san-francisco-meetin>) the GAC maintains its “intention to follow its Operating Procedures when developing advice for the Board’s consideration related to objections raised by its membership.” The GAC will advise the ICANN Board on both consensus concerns and the concerns of several members as required. The GAC has expressed the intention to develop a vocabulary for use in its advice so that the meaning is clear and can be consistently understood by all parties.

A comment expresses concern about certain legal restrictions imposed by the U.S. government on ICANN (i.e., the Office of Foreign Asset Control (OFAC) requirements). The intention with inclusion of this section in the Guidebook is to be transparent about this aspect of ICANN’s current legal structure and obligations. ICANN considers it important to disclose this information to prospective applicants, as well as to detail what steps ICANN takes in handling such cases (e.g., seeking and obtaining licenses).

A few comments suggest that the gTLD program should remain flexible and establish more concrete plans to timely implement improvements or address problems identified by the community. We agree and this is already part of the gTLD program. ICANN is working to identify critical success factors and will implement a process to identify, prioritize, and implement improvements to the program based on these factors as well as lessons learned from various sources including the applicant and general community.

TIMELINE/MODELS

Key Points

- There is a plan to announce a final timeline, with appropriate caveats, once the Applicant Guidebook is approved.

Summary of Comments

Reliable timeline needed.

A reliable timeline is the only way to restore the credibility of the process. The vote scheduled is especially relevant for the viability of cultural and linguistic TLD applicants who will foster cultural diversity on the Internet. Any further delays will harm their cause. The more than 12,000 Internet users and 100 cultural organizations that have already signed up to support Asociacion Puntogal help to demonstrate that there is a real social and economic need for new gTLDs. *Asociacion Puntogal (13 May 2011)*.

What prospective applicants now need, above all, is the final timeline. *AFNIC (15 May 2011)*.

Date certain for subsequent rounds. To avoid numerous panic applicants (concerned about the risk of not applying and about a possible lengthy gap between application rounds) a date certain should be announced for the subsequent new gTLD application round. It should not be later than one year after the first round. It is no problem if there is overlap between the first and the subsequent round. The correct time to start evaluation is immediately at the moment when all strings are published. The evaluation of the first round will be meaningless if it was dominated by “panic applicants.” ICANN should therefore announce opening of the coming 60-day TLD application period for a set day in November 2011, and announce at the same time that the subsequent round will open on a set date in November 2012. *W. Staub (15 May 2011)*.

Analysis of Comments

Comments request that a definitive timeline be provided for the initial application round as well for a subsequent round. The former will help applicants with planning and the latter would help mitigate the risk that some set of applicants will simply apply to avoid the uncertainty of when the next round will launch.

The plan following the approval of the Applicant Guidebook is to announce a final timeline that is expected to cover all aspects of the application program (e.g., communication campaign, the launch date, initial evaluation). The timeline will include all appropriate dependencies. The timing of subsequent application rounds will be determined based on these factors as well as experiences gained and changes required after the initial round is completed.

COMMUNICATIONS

Key Points

- ICANN is planning a global communications campaign that will incorporate outreach activities in the five ICANN regions, including targeted outreach to developing countries.
- As part of the communications campaign, ICANN plans to continue to publish critical program documentation into the six UN languages – Arabic, Chinese, English, French, Russian and Spanish.
- The communications campaign will highlight specific areas of the program, such as timelines for submission of applications, the evaluation process, the objection process, and rights protection mechanisms.

Summary of Comments

Effective communications and outreach activities are essential to the success of gTLD expansion. ICANN's communications effort must do more than simply promote new gTLD applications. It must also fully inform user and business communities around the world of all the major changes coming with the introduction of new gTLDs. BC (15 May 2011).

Global awareness and understanding of new gTLD program. Geographic name strings raise concern given that many countries (especially developing nations) will not know when to object to them (e.g., early termination). Governments will likely end up having to go to a U.S. court and pay for associated costs, which will only make the U.S. more rich. Indonesia, in particular, has more than 200 million people, and faces a challenge in understanding all the details of the new gTLD program and the DAG (i.e. translation issue). Also, why must all parties bow to U.S. law and use a U.S. court? Why not use PNG's laws and courts, or have Indonesia host all the domain cases? Regarding the GAC's proposal to ICANN that it translate the DAG into languages for places where there are large numbers of Internet users, what about PNG, Timor Last, Fiji, and Palau, which do not use English as the mother tongue--does ICANN never count people who live there as internet users? This raises doubt about ICANN's vision to make one world, one connection. ICANN does not seem to have significant efforts to socialize the DAG all over the world and the ICANN website is not well-known. Most countries still do not understand or do not even know about the DAG. *D. Elfrida (6 May 2011)*.

Publicizing Rights Protection Mechanisms (RPMs). It is incumbent on ICANN to publicize the RPMs as fully as it publicizes the overall gTLD program in the four month period between approval of the guidebook and the opening of the first window for new gTLD applications. Also, so that the public can timely determine whether to seek such protection and how to do it, ICANN needs to make available on a continuing basis into the future literature that clearly advises the general public of the existence of these RPMs and how to access and use them. *IBM (13 May 2011)*.

Analysis of Comments

The goal of the planned communications campaign is to increase global awareness of the new gTLD program. This campaign will raise awareness among interested parties and applicants worldwide on the who, what, when, where and why of new gTLDs. It will address a range of audiences. The goal is to educate so that interested parties are aware of the program details and things they need to consider, whether applying for a new gTLD or not.

As part of the communications effort, ICANN translates the Applicant Guidebook into the six UN languages. Other critical material relating to the program such as the Objection Process and Rights Protection mechanisms will be adequately communicated and translated as well.

As part of our communications efforts we intend to reach as many people as possible through global outreach in each of ICANN's five regions – Africa, Asia (including the Middle East), Europe, Latin America, and North America. These outreach efforts will include informative sessions, new conferences, speeches and targeted media interviews to gain the furthest reach possible. The education process will include helping people understand both the opportunities and risks associated with applying for a new TLD as well as how this program will ultimately change the Internet.

We have and will continue to publish critical program documents in the six UN languages – Arabic, Chinese, English, French, Russian, and Spanish. Interested parties will always be provided with ways of obtaining more information either from our website or through a dedicated email address.

It is agreed that critical elements of the program such as the Objection Process and Rights Protection Mechanisms be adequately communicated so people are well informed about when and how to object and the steps they can take should they determine whether and how to seek such protections. As part of the communications plan we will call out these areas to make them more accessible to those seeking such information.

APPLICATION PROCESS

Key Points

- Further details on the GAC Early Warning and Advice processes are requested for applicants to understand potential impact and allow for appropriate action as necessary. Additional detail is provided here and in the Guidebook; and we will work to provide additional details and answers to clarifying questions.
- Clarification on a number of questions regarding the application process is being provided in the updated Guidebook. In addition, a robust customer service process will be implemented to help applicants with specific questions during the application process
- While it is virtually impossible to ensure no “bad actors” secure a Top-Level Domain, additional protective measures have been put in place such as an expanded background screening and a GAC Early Warning process. (See Malicious Conduct summary for more details.)

Summary of Comments

Support for GAC changes made by ICANN. UNINETT Norid is pleased that ICANN has listened to the Governmental Advisory Committee and included paragraphs on Early Warning in 1.1.2.4 and Receipt of GAC Advice on New gTLDs in 1.1.2.7. These changes will reduce possible conflicts and objections later on and minimize the costs for all parties. *UNINETT Norid (Module 1, 11 May 2011). DIFO (15 May 2011).*

GAC Early Warning.

CADNA is pleased with the GAC Early Warning addition to the Guidebook. This could be improved upon with stronger wording, forcing the ICANN Board to take a warning into consideration instead of being able to entirely disregard it. Governments should have more and stronger ways of raising formal complaints about a TLD application, of course without the ability to abuse the system. *CADNA (13 May 2011).*

Regarding 1.1.2.4 Early Warning, it is very important that the Early Warning Notice to the applicant be accompanied by the reason for the warning and that it identify the objecting countries with applicable points of contact; otherwise it will be difficult for the applicant to try to mitigate the concerns and/or make a timely decision about withdrawing the application. *RySG (15 May 2011).*

GAC Advice. CADNA is encouraged by the addition of GAC Advice which enables the GAC to provide public policy advice directly to the ICANN Board for consideration on any application, although this provision should be more strongly worded (e.g., it is unclear what is meant by the phrase that the Board must “strongly” consider GAC advice when deciding whether to approve an application). A measure should be put in place to show how GAC advice will be taken into account and the reasons for which the Board decides to disregard it and proceed with approving the application. *CADNA (13 May 2011)*.

GAC guidelines for Early Warning and Advice. ICANN should clarify the guidelines which the GAC will refer to when making GAC Early Warnings and GAC Advice. The current explanation does not make it clear as to what kind of issues would cause a string to be considered questionable or sensitive. At the moment it seems that almost anything falls into the scope of GAC decision making. *Brights Consulting (14 May 2011)*.

Eligibility –restrictions. CADNA applauds the detail added to applicant eligibility provisions. Conducting more thorough background checks and placing tougher restrictions on eligibility will hopefully ensure that there are fewer opportunities for applicants with bad intentions to proceed and that only those applicants who should be applying for new gTLDs make it through the process. *CADNA (13 May 2011)*.

Dot Brand Applicants.

It will greatly benefit potential dot brand applicants if a separate application category were created for them (dot brand model is mentioned in the Registry Code of Conduct) or alternatively if such a model were to be identified in the main body of the applicant guidebook. *Brights Consulting (14 May 2011)*.

It is disappointing that there is not a specific dot brand category available for essentially what may be closed or defensive registries. There should be a separate dot brand category defined and more clarification as to how businesses applying for a dot brand should structure their application. *Hogan Lovells (15 May 2011)*.

Applicants for a dot brand TLD need more details in the final AGB for planning reliability on costs, requirements and processes. So far only a few details are included in the AGB like in the Registry Code of Conduct. *DOTZON (15 May 2011)*.

Regulated and professional sector gTLDs. It is not just geographical designations that are sensitive in nature and in need of special protections. Special care should also be given to regulated sectors (e.g. financial) and professions as the potential for damage and harm to society is high (financial harm and loss of trust in e-commerce and the internet at large). ICANN must mitigate the risks of sensitive strings being controlled or operated through rules and safeguards and the applicant guidebook should not be approved without their inclusion:

- (1) Applicants for a regulated profession, industry or sector (e.g. .bank, .insurance) should be required to submit a written endorsement of their application by the relevant supervisory bodies or authorities (analogous to the government support requirement for geographical names) or a valid and in-force license to operate such a business, and such applications should not be admitted to delegation absent such endorsement or valid license.
- (2) Analogous to community-based applications, regulated sector applications should also be subject to certain post-delegation contractual obligations to operate the gTLD

- in a manner consistent with the restrictions associated with this regulated sector designation and to take adequate measures to avoid consumer confusion and harm, including but not limited to the obligation to take action against a second level domain registrant, or suspend such registration(s) or service(s) upon intervention or complaint by a competent national regulatory or supervisory body.
- (3) As proposed by the GAC, the application evaluation process should include review by governments, via the GAC explicitly also for applications relating to sectors that are subject to national regulation (i.e., GAC Early Warning and GAC Advice should be applied to such applications). Intervention by a competent supervisory authority via the GAC would create a strong presumption for the ICANN Board that the subject application should not be approved.
 - (4) The Limited Public Interest Objections should explicitly include objections based on national regulations for the protection of consumers and sector specific national regulations that are also intended as consumer protections.

Swiss Re (15 May 2011).

Updated timelines. ICANN should clarify the application process by providing a diagram with the updated timelines for each portion of the process. As of now there are some places that have confusing information. *Brights Consulting (14 May 2011).*

Section 1.1: ICANN should take into account external holiday calendar events as well as the timing of ICANN meetings, and adjust accordingly the Application Program timeline. *RySG (15 May 2011).*

Batching. ICANN should provide details in the final AG on the batching process. Details are not yet available, apart from basic information that a separate process still has to be established. *DOTZON (15 May 2011). RySG (15 May 2011). AFNIC (15 May 2011).*

The first batch should be significantly less than 500 applications in order to test the operational readiness of newly designed application processing and objection/contention systems. A significant portion of the first batch should be comprised of Community-Based applications. Subsequent application rounds should be launched as quickly as possible but only after ICANN adjusts the application process and guidebook to reflect experience learned in the initial round. *BC (15 May 2011).*

Fee reductions/packaged pricing for IDNs and other languages.

Applicants should be granted fee reductions for additional versions of the applied-for string in IDN scripts and other languages. This would serve as an incentive mechanism for build-out of IDNs and underserved language-script communities. If the applicant is seeking new translations of a current gTLD, then all registrants should have the option to register their second level names in all of the linguistic variations offered by that TLD. *BC (15 May 2011).*

The ICANN Board and staff should work with the community to provide an approach that enables applicants to offer multiple (“bundled”) applications that include different script versions of the same string at a lower, packaged price. Packaged pricing fits ICANN’s values by, among other things, promoting diversity; makes budget sense; and would stay within ICANN’s cost neutrality guidelines. Packaged review of related applications will lower ICANN’s review costs and lower the costs to applicants—leading to more IDN build out around the world. *R. Andruff et al. (15 May 2011). C. Roussos (16 May 2011).*

Not-for-profit pricing option (1.5.1). ICANN should provide a not-for-profit new gTLD applicant pricing option which could only be available to a subset of not-for-profits based on criteria. *NPOC (16 May 2011).*

Legal compliance (module 1, p.23). Regarding the requirement that “ICANN must comply with all U.S. laws, regulations and rules, and prohibits offering license to the individual or entity of the U.S. Treasury SDN list,” this provision is inconsistent with ICANN’s multi-stakeholder model and bottom-up process, which makes it difficult for ICANN to be open, fair and equitable to other governments and other stakeholders. ICANN should bear in mind the development and application characteristics and trends of the Internet, having full consideration of the interests of all stakeholders and making appropriate amendments to the provisions. *Internet Society of China (27 May 2011).*

Background screening (1.2.1). Background screening should occur at the level of the entity, named individuals, and entity affiliates and subsidiaries. When the ICANN Board eliminated any restrictions on cross ownership or vertical integration, it increased the importance of screening applicants for prior abusive conduct. Cyber squatting has been documented at affiliates and subsidiaries of the registrars and registries who are likely to be applicants for new gTLDs. ICANN should expand disqualification criteria to apply to affiliates or subsidiaries of the applicant entity. *BC (15 May 2011).*

Modify the “three strikes” UDRP reference for applicant disqualification.

This criteria should be adjusted to take into account the size of an applicant’s domain portfolio as well as the percentage of adverse UDRP decisions rendered against them in comparison to all UDRP proceedings they have been involved with. If unchanged, ICA intends to carefully monitor the actual enforcement of this disqualification criteria for both companies and individuals and suspects that ICANN will exercise a significant degree of enforcement flexibility based upon the “exceptional circumstances” and “generally be considered” phrases in the current proposed language, rather than bar applications for new gTLDs submitted by large registrars. Any flexibility in applying this criteria should be accorded equally to both corporate and individual new gTLD applications. Individual owners of large domain portfolios, unlike corporations, cannot establish subsidiaries or affiliates of themselves, yet may otherwise be in the same position as regards their UDRP histories. *ICA (15 May 2011).*

A hard and fast line—whether an entity or person has lost 3 or more UDRP cases—is not appropriate and will unintentionally disqualify otherwise qualified applicants. Further, the language is not clear on what constitutes cyber squatting. ICANN should revert to the DAGv4 definition of “bad faith in regard to domain name registration” and in conjunction with this definition use a definition of history or pattern of cyber squatting that does not involve a specific number but rather is closer to a “customary way of operation or behavior” and thus allows for a contextual analysis for each applicant. *Demand Media (15 May 2011).*

“Adverse, final” in revised Sec. 1.2.1.m. New language in this section referencing “adverse, final” decisions appears to be responsive to ICA’s December 2010 comments that a UDRP loss that has been reversed on appeal should not count against an applicant and ICA thanks ICANN for that adjustment. *ICA (15 May 2011).*

Reverse Domain Name Hijacking (RDNH)—Equivalent Treatment. New language in Section 1.2.1m that disqualifies entities who have engaged in RDNH under the UDRP or bad faith or reckless disregard under the ACPA or equivalent legislation is responsive to ICA’s December

2010 comment seeking equivalent treatment and ICA thanks ICANN for that adjustment. *ICA (15 May 2011).*

Sec. 1.1.2.3: Where clarification is sought from the applicant because consideration of the comments has impacted the scoring of the application, how will the clarification sought by the evaluators and the clarification provided be recorded and made public? This should be explained. *RySG (15 May 2011).*

Sec. 1.2.8: This section is entitled Voluntary Designation for High Security Zones. Considering the final report of the High Security Zone TLD Advisory Group, shouldn't this section be deleted? *RySG (15 May 2011).*

Answer length requirements. Where there are requirements for numbers of pages per answer (applies to a number of the 50 questions), ICANN should provide details regarding the necessary font size, page size and spacing between lines (correspondent with those used in TAS), or alternatively ICANN should set the length of the answers by number of words or characters. *Brights Consulting (14 May 2011).*

More TAS information. Once the AG is approved by the ICANN Board at the 20 June 2011 meeting, it would be useful to have more information about the TAS and how it will work. A demo version or Operational Testing Environment (OTE) of the TAS should be made available as soon as possible. *AusRegistry (16 May 2011).*

Analysis of Comments

Several comments express their appreciation and support for incorporating GAC Early Warning and Advice processes and a more comprehensive background screening check into the gTLD program.

A number of comments also request more details about the GAC Early Warning and Advice processes, such as clarification/guidance on what might raise an issue or concern, requiring that the GAC provide specific details in their Early Warnings to enable Applicants to take timely and appropriate action, and a clear process for how the Board will consider GAC Early Warnings and GAC Advice.

Note that the purpose of the Early Warning process is to provide GAC members with an opportunity to raise concerns directly with the applicant over their string(s) and/or their application(s) early in the process. While definitive guidance has not been issued, the GAC Scorecard indicated that strings that could raise concerns include those that “purport to represent or that embody a particular group of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non exhaustive)” and “those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse.”

In the case of an Early Warning, the GAC has been requested to provide the reasons for the Early Warning and to identify the countries raising the concern in order to best inform applicants so that the applicants can make informed decisions.

Existing processes for how the Board considers GAC Advice have not changed, although the Board may now consider Early Warnings provided to the applicant as part of its review of GAC Advice received later.

A few comments continue to request the creation of a dotBrand category. While we have discussed the concerns with introducing categories in response to previous comments, the central issue appears to focus on how certain applicants can meet the requirements to secure a gTLD given their unique registry/business model. For example, an applicant might secure a TLD with the intent of having a “closed” or internal facing registry (i.e., having no intent of allowing the general public to register domains). It should be noted that the pre-establishment of special requirements in the application for such TLDs would likely not meet all possible circumstances, “dotBrand” TLDs mean different things to different parties, and does not cover the possibility that the applicant’s intended registration approach may change, especially in those cases where the applicant has not designated itself as a community-based TLD.

The application form is designed to allow evaluation of the necessary financial, technical, and operational components of the applicant’s plans. We do understand that additional guidance may be necessary for applicants in particular cases in relation to particular questions while progressing through the application process. Accordingly, we will continue to provide necessary updates and guidance on submitting an application and will implement a robust customer service program to provide clarification where necessary.

Another comment highlights the concerns associated with certain strings that may be deemed sensitive by various parties and requests that regulated sectors and professions should be given special care to minimize the potential harm and damage to the public. As discussed in response to previous comments, there are issues with introducing a new category of strings. For “sensitive” strings, there is no general agreement on what qualifies as a “sensitive” string nor has a definitive and agreed on list of such strings been provided. Concerns about particular strings may be addressed via the independent objection and dispute resolution process, or through the GAC Early Warning and GAC Advice processes.

Further comments request that background screening scope be expanded to include affiliates, subsidiaries, and other entities that have relationships with the applying entity. These comments presumably focus on preventing “bad actors” from securing certain Top-Level Domains. The potential benefits of expanding the scope of background screening for all applicants must be weighed against the costs for processing all applications and increased costs incurred in performing background screening on an extended chain of related entities. ICANN has discussed and considered the process suggested to screen applicant affiliates as well as applicants themselves. Such a step would introduce significant complications and costs to the background screening process without a balancing benefit. For example, in addition to ICANN screening the affiliate, it would also need to do so for the directors, officers, partners, etc. of the affiliate. This additional screening is cost and time prohibitive and would probably not result in many disqualifications given the level of scrutiny the applicant is subject to under the process. Affiliates are often distant and have no role in operation or conduct of a TLD to be operated by the applicant. Also, such an inquiry would lead applicants to set up new entities to provide separation between themselves and affiliates. This would not be just to mask prior bad conduct – it could simply be to avoid the expense and intrusion of background checks into their associates who will not play a role in the process.

However, while it is nearly impossible to ensure no “bad actors” secure a new Top Level

Domain ICANN has implemented several protective measures to minimize this risk. Those measures include:

- Expanding the scope of the background screening check to include additional crimes as suggested by the GAC. This also includes obtaining input from law enforcement representatives on the selection of a background screening service provider.
- Adding language to the Registry Agreement that requires Registry Operators to take reasonable steps and respond to any reports (including from law enforcement and governmental consumer protection agencies) of illegal conduct utilizing the Registry TLD. Failing to comply with this provision could lead to termination of the Registry Agreement.
- Making public the names and titles of key officers, directors, partners and controlling shareholders of each applicant to enable comment.
- Providing a GAC Early Warning process that allows members of the GAC or any individual government through the GAC to provide a notice to certain applicants.

Comments request clarity on timelines and consideration given to holidays and other meetings. Holiday periods in the various regions of the world are being taken into account in considering the possible timelines involved in launch of the program.

Comments request additional information regarding the batching process, with some suggestions for placing a limit on the first batch to test operational readiness, and for ensuring that a significant portion of the first batch be comprised of community-based applications. Additional details regarding the batching process will be provided in the event the batching process must be implemented. This allows some flexibility in processing timelines. For example, if slightly over 500 applications are submitted then a decision to extend Initial Evaluation by some amount of time to accommodate all applications may occur so long as the maximum delegation rate limits are not impacted. Also, the batch limit is dictated by processing capacity, which is based on understanding the impact to operational readiness through the build and testing of those activities. So at this point, though the small first batch is a good idea, there will not be further test operational readiness after the launch of the program. Even if the smaller batching were done, allowing one type of applications to proceed over others may provide an unfair advantage over other applicants that may be promoting to a similar group of registrants.

Comments regarding fee reductions have been addressed in previous versions of the Guidebook. The evaluation fee is revenue neutral and is based on an estimate of the costs to process applications. As this will be the first round of processing applications, there are a significant number of uncertainties that must be accounted for. Accordingly, reducing fees under any circumstance is not envisioned in the initial round. However, ICANN will conduct an analysis at the end of the initial round to determine where efficiencies can be gained and savings passed on in future rounds.

A comment requests clarification on how comments will be considered by evaluation panels and clarifications sought from applicants. Any comment directly impacting the score of a specific applicant will require clarification from the applicant before a final score is provided. An applicant may choose to provide its response within the public comment forum. However, there is an opportunity for the panel to provide questions to the applicant and the applicant can then reply. The evaluation results are publicly available after the evaluation process has been completed.

A comment asks if Section 1.2.8 – Voluntary Designation for High Security Zones should be removed from the Guidebook. The Guidebook has been updated with regard to the working group's final report, and indicates that ICANN will support independent efforts to develop a voluntary high-security TLD designation.

Comments request additional information on the TLD Application System (TAS) including clarification of answer length requirements. A plan is in place to release additional information on TAS in relation to look and feel. However, for security reasons, a test version of the tool will not be released for public use. Finally, additional guidance on application requirements (i.e., character limits for answers) will be provided in the next version of the Guidebook.

Comments expressed support for the clarifications concerning UDRP decisions and reverse domain name hijacking. Comments also called for greater flexibility in reviewing an applicant's history of UDRP proceedings. It is important that there be an objective standard to avoid the additional cost and potential inconsistent results of an ad hoc review, and provide greater predictability for applicants. Previous comments on this section called for additional information on what would constitute a "pattern" of behavior, with the expectation that the standard should be generally available to applicants. An objective standard has been put in place. The standard of three or more decisions with one or more occurring in the last four years accounts for both a threshold of repeated behavior and a relevant span of time. The intent of this test is to prevent those who are likely to engage in cybersquatting from obtaining a TLD. This is why the standard provides discretion: the test is stated to be a "general rule," which can be reconsidered if warranted by exceptional circumstances. A variety of factors might influence that decision.

Finally, there is a comment regarding ICANN compliance with US national law and how that might lead to actions working contrary to the multi-stakeholder model. ICANN has little choice but to comply with US law as that is where its headquarter is located. ICANN attempts to obtain licenses in order to serve requests wherever possible.

EVALUATION

Key Points

- Comments/questions focused on clarifying the application questionnaire should be sent to newgtld@icann.org. ICANN will capture and provide a central repository of responses for all applicants going forward.
- Metrics/criteria used to facilitate the weighing of potential benefits/costs should be 1) tangible, 2) transparent, and 3) measurable.

Summary of Comments

Applicant Review Process—Governmental Entities (Cities). The City of New York seeks to be treated the same as publicly traded corporations in the ICANN applicant review process (Guidebook, section 2.1.1 at 2-2, General business diligence and criminal history). Indicating that governmental entities subject to independent audit, GAAP compliance and public integrity controls will be treated similarly to private entities would encourage responsible governments to proceed with gTLD applications directly to ICANN. This will provide diversity and local

representation to the Internet framework, which is one of the goals of the new gTLD program. *City of New York (13 May 2011).*

Post Launch Compliance. ICANN should require post-launch compliance with the policies and procedures offered by applicants during the application period. Further, ICANN should impose and enforce such requirements with the registries for the existing TLDs. *NCTA (Module 2, 13 May 2011).*

Reserved names list—Olympic and Olympiad. The terms Olympic and Olympiad should be added to the Reserved Names list, which would be consistent with the laws of the U.S. and numerous other countries around the globe, and allow the U.S. Olympic Committee to focus its limited resources on its primary mission, rather than on defensive registrations and a cumbersome process of filing formal objections against infringing gTLD applications. The RPMs in the guidebook are insufficient to protect the Olympic movement. Both the USOC and the International Olympic Committee (IOC) have repeatedly advocated that reserving the words Olympic and Olympiad in the top and second levels of all new gTLDs serves the public interests of the international community and comports with accepted principles of law. As explained in detail in past comments submitted to ICANN, more than thirty nations have enacted *sui generis* legislation reserving exclusive use of the words Olympic and Olympiad to the IOC and the National Olympic Committees. More than sixty countries have signed the Nairobi Treaty on the Protection of the Olympic Symbol, establishing special protection for the Olympic Movement as an internationally accepted principle of law. The GAC has advised the ICANN Board to approve the request to add Olympic and Olympiad to the Reserved Names list. *USOC (13 May 2011). IOC (15 May 2011).*

Reserved names (2.2.1.2)—include ccTLD regional organizations.

The names of ccTLD regional organizations must also be included on the reserved names list (e.g., CENT, APTLD, LACTLD, in the same status like LACNIC, ARIN, RIPE, Afrnic or APNIC). It is necessary to the community to feel and know that ICANN is also protecting the ccTLD communities. Note that this is the third time that this comment has been sent and that the four RO's are observed in ccNSO and are part of ccNSO committees and are recognized by all the community. *E. Iriarte Ahon (16 April 2011).*

It would be helpful to understand why ICANN has not included the regional organizations for ccTLDs on the reserved names list (e.g. CENTR). *M. Neylon (15 May 2011).*

Reserved names—remove ICANN mark. Equity and fairness dictate that the ICANN Mark should be removed from the reserved names list. ICANN should bear the same burden and expense of protecting its mark against cyber squatters as other brand owners must. *Microsoft (15 May 2011).*

Two-character labels.

The newly added reservation of “two-character labels” should be deleted from the applicant guidebook; it may cause problems and lacks a rationale. Confusion with the “two-letter codes” of ccTLDs or technical reasons are by all means not evident. Reservation of two-character labels has never been a publicly discussed point and putting it into the guidebook rules without a community discussion is outside the policy development process. Its timing is odd because at least a dozen gTLD and ccTLD registries have released “two-character labels” just recently or are planning to release them in the near future, with ICANN’s approval in the case of gTLDs. Reservation of two-character labels will create legal challenges in many new gTLDs (e.g. in Germany DENIC, the operator of the .de ccTLD was in 2010 forced by competition and

trademark laws to release all “two-character labels”). *dotBERLIN* (11 May 2011). *DOTZON* (15 May 2011). *dotKoln* (16 May 2011). *C.Roussos* (16 May 2011)

Single character IDN gTLDs.

Before it adopts any implementation models for single-character IDN gTLDs, ICANN must put those models out for a meaningful public comment period. *Microsoft* (15 May 2011).

Regarding 2.2.1.3.2, consistent with the original new gTLD Recommendations approved by the GNSO Council and the Board regarding Reserved Names and with the recent GNSO Council recommendation, the RySG strongly supports the JIG recommendation that single character IDN gTLDs be allowed as proposed by the JIG. *RySG* (15 May 2011)

Internet Society of China presented comments to ICANN on JIG single character international top-level domains on January 12, 2011, expressing its concerns about single character IDN gTLDs. Internet Society of China requests again that single character IDN TLDs be analyzed in regard to different languages on a case-by-case basis, and related policies should be considered after the IDN variant word policy solution comes out. Regarding Chinese characters, words composed of two or more characters usually have explicit meaning. But in some cases a single Chinese character has more than one meaning. Some Chinese characters represent geographical names (hereinafter referred to as or commonly known as), and the nation, the surname, etc. If these characters are used as domain names, it is easy to cause confusion and misunderstanding. *Internet Society of China* (27 May 2011).

CNNIC welcomes allowing IDN single-character TLDs into the market. The single Chinese character string often shares similar meaning with a two-character Chinese string, and some single Chinese characters are used by Chinese people as acronyms to refer to geographical names or other specific noun phrases. The guidebook might address it to avoid users' confusion. Moreover, single Chinese characters also have variant issues. ICANN should comprehensively consider the IDN variants issue and single-character issue in the application guidebook. *CNNIC* (27 May 2011).

Chinese IDN variants—timetable concern. ICANN attaches great importance to the IDN variants issue and has instructed formation of the VIP WG to find a management mechanism; however, the timetable is unfavorable for IDN variant applicants if they want to apply for an IDN TLD in the first application round. The ICANN VIP group should expedite the process so that the variant issue can be properly addressed and the variant issue should be treated on a case-by-case basis and first come-first serve basis to meet the demand of potential applicants. Based on registry operation experience, Chinese TLD operators have developed a concrete and feasible solution to meet the needs of Chinese users worldwide. Chinese solutions have been fully tested out by the delegation and operation of Chinese IDN ccTLDs. To date, registries have not received any complaints regarding variant management and no abuse of variant domain names is reported. The Chinese Domain Name Consortium produced a detailed report on the Chinese experience last year in its letter to ICANN. CNNIC believes that the work of the Chinese community will serve as a good foundation for the VIP WG. *CNNIC* (27 May 2011).

Data gathering.

USCIB is pleased to see that the AG now requires applicants to detail the expected benefits from their TLDs as well as how the TLD operating rules will minimize “social costs.” Gathering appropriate data is key to helping identify problems during the initial rollout. USCIB supports the Economic Study's suggestion for ICANN to gather information in order to more clearly identify the general benefits and costs of implementing new gTLDs. USCIB also recognizes

ICANN's commitment to this endeavor under Article 9.3 of the Affirmation of Commitments that requires ICANN to organize a review of the introduction or expansion of gTLDs and associated processes. *USCIB (15 May 2011). NCTA (Module 2, 13 May 2011).*

Any criteria or metrics created to facilitate weighing potential costs and benefits to the public in the evaluation and award of new gTLDs, as recommended by the GAC, should be tangible and transparent in order to evaluate the success of the program and help form recommendations for its continual improvement through future rounds and expansion. Specific applications should highlight the potential community costs and benefits of any new gTLD. Any such costs and benefits identified in an application should be: (1) measurable; (2) directly affect whether an application is approved or not; and (3) be used to hold registry operators accountable for the operation of the gTLD. *MarkMonitor (16 May 2011).*

NPOC supports the questions (2.2.2) regarding applicant intent as part of the application process and suggests that the Board consider scoring answers to those questions as part of the application review. *NPOC (16 May 2011)*

Costs and benefits review criteria (2.2). The Board should incorporate review criteria for weighing the costs and benefits to the general public for all new gTLD applications. E.g., in the not-for-profit community there is concern about strings such as .DONATE, .CHARITY, .GIVE, etc. which offer tremendous opportunity for both good and harm. Such strings should be carefully considered during the application review process without requiring a costly objection to be filed first. *NPOC (16 May 2011).*

Dot Brand Applicants. The evaluation questions should take more account of the needs of dot brand applicants. E.g. question 18, which requires applicants to state the mission/purpose of their registry, has been significantly expanded in this draft of the AG with a series of sub-questions which are not directly applicable for dot brand applicants. The application process would be improved if alternatives were provided for dot brand applicants, asking about, e.g., how a new gTLD will be used to support the strategic aims of the brand. *Valideus (13 May 2011).*

Question 11—proposed alternative address disclosure. The requirement in question 11 for directors of applicant companies to disclose their permanent place of residence raises concern. An alternative would be to ask for an address within the application company. This is more appropriate when the application is being made on behalf of the company. *Valideus (13 May 2011).*

Question 11—due diligence improvements.

COA commends ICANN for reversing at least partially its proposal to cloak in anonymity the identities of key players behind new gTLD applications (evaluation criterion 11(a)). *COA (15 May 2011).*

Regarding new criterion 11(d) dealing with applicants whose legal form lacks directors, officers, partners or shareholders, COA suggests that the individuals whose identities must be disclosed should include not only those with "direct responsibility for registry operations" but also those with legal or senior management responsibility for such operations, which is roughly equivalent to what must be disclosed by other applicants. *COA (15 May 2011).*

Criterion 11(e) appears (perhaps as a drafting error) to relieve applicants of the responsibility to disclose all felony convictions within the past ten years. For clarity and comprehensiveness the

language here should be conformed with that of section 4.3(f) of the draft Registry Agreement, which disqualifies a person convicted of “any felony” from continuing to serve as an officer or director of a registry operator. COA (15 May 2011).

Question 18(c) –Domain Parking. ICANN must remove clause iv from Question 18(c) in the Attachment to Module 2. A policy that discourages a certain form of legal commercial speech at new gTLDs is a form of content regulation and is therefore unacceptable. This question is an inappropriate intrusion into a registrant’s right to utilize a domain name for a lawful purpose. It would impose pressure on applicants to impose rules that would limit parked websites at domains registered within their new gTLD, and equates domain parking with “social costs” and “negative consequences/costs.” Such derogatory association is unfounded and registry-imposed constraints are unjustified and unnecessary. A domain name registrant that has paid the registration fee for a name is entitled to engage in any legal activity with that name, or in fact to not use it at all. Display of ad links on non-infringing generic word domains is equal in legitimacy and usefulness to the paid ad links displayed by major search engines when the same word is entered into them. The suggestion that parking a name and publishing links to data and/or advertising alone is a negative or harmful practice is at best misinformed and certainly incorrect. For ICANN to suggest a role in defining legitimate or illegitimate content is extraordinarily dangerous to the interests of the entire Internet community. This new evaluation criterion is also completely at odds with recognition elsewhere in the April 2011 Discussion Draft that domain parking in and of itself is not a negative criterion under the proposed URS. WIPO has recently adopted a similar view for the guidance of examiners under the UDRP. Oversee.net (15 May 2011). ICA (15 May 2011).

Question 18(c)iii –agreement term clarification. ICANN should clear up the ambiguity in question 18(c)iii and Sections 2.10(a) and (c) of the registry agreement regarding the period of contracts for domain name registrations (“permanent” or “no greater than ten years”). AusRegistry supports allowing permanent registrations, particularly in the case of single registrant, single user TLDs. AusRegistry (16 May 2011).

Rapid takedown or suspension systems. The clarification of requirements necessary to obtain 2 points on questions 28 and 29 is useful, but ICANN missed a tremendous opportunity to make an important contribution to the security and stability of the Internet by failing to require that all new gTLD registry operators implement a rapid takedown or suspension system. Further, ICANN compliance must have the resources and mandate to ensure that applicants abide by the representations made in their applications on questions 28 and 29. Microsoft (15 May 2011).

Question 28--Orphan glue records. Regarding the issue of management and removal of orphan glue records, SSAC offers the following comments:

- (1) Orphaned glue is an ambiguous term for which no definitive definition exists. The SSAC has prepared a definition that it recommends be included in the Applicant Guidebook.
- (2) Orphaned glue can be used for abusive purposes; however, the dominant use of orphaned glue supports the correct and ordinary operation of the DNS. Thus it is inappropriate to include the management of orphaned glue under the rubric of “abuse prevention and mitigation” and SSAC suggests that it be removed.
- (3) To mitigate the actual abuse of orphaned glue, registry operators should take action to remove these records when provided with evidence that the glue is indeed present to abet malicious conduct.

SSAC (Module 2, 13 May 2011).

Question 39 clarification.

The terms “Recovery Point Objectives” and “Recovery Time Objective” are not defined or explained and it is unclear what applicants are being asked to do. These terms should be explained in the guidebook. *RySG (15 May 2011). AFNIC (15 May 2011).*

It is unclear what “vital business functions” are in question 39. The statement should be reworded as: “Identification and definitions of vital business functions, defined as those business functions critical in supporting the delivery of Registry Services as defined in Specification 6 of the New gTLD agreement, as well as any other Services defined in the applicant’s response to Evaluation Criteria Question 23.” *AusRegistry (16 May 2011).*

Definition and consistency of terms used. Question 23 and many other areas of the guidebook use the terms “Registry Services”, “Registry Functions”, and “Registry Operations” interchangeably. Each of these terms should be defined and a consistency check and appropriate update should be performed to ensure clarity. *AusRegistry (16 May 2011).*

Mark questions 24 and 26 as non-public. Questions 24 and 26 should be marked non-public as they ask the applicant to describe the technical implementation of SRS and Whois systems respectively. Publicizing specific implementation details, such as network designs, can assist an “attacker” in planning system attacks. *AusRegistry (16 May 2011).*

Question 43—correction. Question 43 under the Scoring column—1-Meets Requirements-- appears to have an error. The second half of the sentence states that registries will offer provisioning capabilities to accept public keys from registrants, and implies registries will also provide key exchange, generation and storage. This does not match AusRegistry’s understanding of the intent of this Criteria. AusRegistry requests that “(generation, exchange and storage)” as stated at the end of the bullet point be removed. *AusRegistry (16 May 2011).*

Question 50 B (i), Letter of Credit (LOC). The current version of the guidebook states: “The LOC is subject to the International Standby Practices (ISP 98) International Chamber of Commerce (Publication No. 590).” According to several bank contacts, ISP 98 is not a commonly used LOC outside of the U.S. and we understand that under the current requirements Japanese banks will have difficulties obtaining such a document. *UrbanBrain (16 May 2011).*

Analysis of Comments

A comment suggests that government entities, which are subject to independent audit and other public integrity controls, be afforded the same background screening process as publicly traded organizations listed in the top 25 stock exchanges. To clarify, the approach in section 2.1.1 has been put in place to avoid duplicating the background check process on individuals that is already conducted on directors by the top 25 stock exchanges and to keep application processing economical. It is not intended to preclude ICANN from conducting a background screening if required. In addition, typically financial audits conducted by independent third party audit firms do not require extensive background checks of the key individuals responsible for the entity. Accordingly, there would be no duplication of processes or leveraging of work already done by other parties thus background checks of the individuals responsible for the registry will continue as described in the Guidebook

A comment suggests that a post-launch compliance review be conducted of policies and procedures proposed in the application. Compliance reviews are conducted against the terms of the Registry Agreement. To the extent that certain policies and procedures from the

application period are included in the Registry Agreement then those areas will be reviewed. In addition, the application requires that applicants warrant that the statements and representations contained in the application are true and accurate and complete in all material respects. Any material misstatement could cause an application to be rejected.

Commenter recommend that names such as Olympic trademarks, regional ccTLD organizations, and Red Cross names should be placed on the Top Level Reserved Names List in section 2.2.1.2.

With regard to the inclusion of specific entities' names on this reserved list, it is understood that some names have statutory protection internationally. These can be handled on an objection basis. ICANN is considering the nature of these protections, and whether they should be extended to few and certain entities.

With regard to the ccTLD organizations, this was considered; however, the top-level reserved names list is intended to be as narrow as possible, and cover only those names that have an impact on the DNS infrastructure or are part of the organizational structure of ICANN. The bodies mentioned are important DNS community members, but fall more into the category of constituencies, which are self-formed and self-governed, and it would expand the list considerably to include all of these as reserved names.

Other comments suggested that ICANN should remove its own name from the Top-Level Reserved Names List in section 2.2.1.2. This has been considered, but not adopted yet. It should be noted that ICANN was included on this list as a logical extension of being the organization responsible for operating the program rather than as a means of claiming special trademark protection. It should also be noted that "ICANN" is reserved only at the top level – there is no reservation of "ICANN" at the second level, and ICANN thus uses the same processes for addressing any problematic registrations at the second level as does any other organization.

Some comments suggested that reservation of two-character labels from registration at the second level (per Specification 5 to the Registry Agreement) should be eliminated. Although some commenters took this as a new requirement, this it has been in place since the first draft of the Guidebook and is also contained in current registry agreements. New gTLD operators will have the option to propose release of these labels based on implementation of measures to avoid confusion with the corresponding country codes. A number of existing gTLD operators have submitted and been approved for such requests.

A comment expressed support for the implementation of the Joint ccNSO-GNSO IDN Working Group (JIG) recommendations on enabling one-character IDN TLD labels, while another comment expressed a need for public comment on such provisions prior to implementation. The proposed recommendations for allowing one-character IDN TLD strings are currently under consideration. ICANN is responding to the latest, recently received JIG report with questions on implementation to ICANN's policy and technical Support Organizations and Advisory Committees.

Application Questionnaire

A number of the comments ask for clarity of certain question terms and, in some cases, have provided suggested wording changes. We thank everyone for providing these comments and request that further questions regarding clarification of terms in the questionnaire be sent to newgtld@icann.org. ICANN will capture and provide a central repository of responses for all

applicants going forward. Each of the relevant comments is addressed below and, as appropriate, will be added to this central repository.

A comment requests that the terms Registry Services, Registry Functions, and Registry Operations be used consistently throughout the application. These terms will be reviewed and the questionnaire adjusted appropriately to ensure consistency.

Question 11 – Applicant Background

Comments generally support the expanded background screening process and have included possible improvements to the process. For example, a comment suggests that legal or senior management responsible for registry operations be included especially for those entities whose legal form might lack directors, officers, partners or shareholders. Other comments express concern over the detail being requested of applicants (i.e., home address of key individuals) or the appearance of inconsistency with the draft Registry Agreement (i.e. not requiring disclosure of felony convictions beyond ten years).

The comment suggesting legal and senior management be included has merit and the Guidebook is updated. We also understand the concern with collecting private/confidential information such as a home address for a key individual. However the purpose of requesting the personal home address in Question 11 is for the requirements of the background screening process. Without this information the background screening may not be able to provide relevant, positively confirmed, information about the individual. Consequently the background screening process would be ineffective. We understand that this information is confidential and it will be kept as such as it is submitted and maintained by ICANN.

The term “felony” has been removed to expand the scope of the review to include the conviction of any crime. All criminal convictions need to be disclosed as part of question 11. The ten-year time limit in the questionnaire is for the initial background screening check only. The terms in the Registry agreement remain in place and provide notification to the registry operator that any future convictions of the crimes listed in 4.3(f) do not have a time limit.

Question 18 – Mission / Purpose

Comments generally support the inclusion of certain economic questions that will help the community understand better how the TLD will provide benefit and minimize “social costs.” Comments also request that metrics/criteria used to facilitate the weighing of potential benefits/costs should be 1) tangible, 2) transparent, and 3) measurable. In addition, some comments suggest that review criteria should be incorporated that would directly affect whether an application is approved, and be used to hold registry operators accountable for the operation of the gTLD. Finally, a comment suggests that an applicant might secure a TLD with the intent of having a “closed” or internal facing only registry (i.e., having no intent of allowing the general public to register domains) and thus the economic benefit questions under Question 18 would not apply or should be rewritten to account for this type of application.

We agree with the concept that metrics/criteria captured as part of the questionnaire be tangible, transparent, and measurable. However, as has been discussed over several versions of the Guidebook and in several economic studies, exact measurements are difficult to ascertain without first having some relevant, concrete set of data to begin development. The expectation is that data collected in this first round will be used to gauge the effectiveness of the program and will be refined as the program progresses. Relevant data gathered during this review may help inform future rounds, including possible additional criteria for determining whether an application is approved.

We appreciate the clarification sought on Question 18 for “closed” or internal facing only strings. These questions have been added at community request to help inform reviews of the effectiveness of the program. We believe these questions are applicable whether or not the applicant chooses to make the registering of names available to the public. If an applicant indicates that the question, as worded, is not applicable then they must provide rationale to this effect. Note, while these questions will not be scored they will be viewable by the public and will form the basis for future economic studies.

Some comments objected to the inclusion of a question concerning policies on domain parking or advertising in the new set of questions included to inform economic studies. It is acknowledged that these activities are not necessarily equated with negative social costs, and this question has been removed.

Another comment cited confusion on the reference to “permanent” contracts for domain names in question 18(b)(iii). The Registry Agreement requires that: “Registry Operator shall offer registrars the option to obtain initial domain name registrations for periods of one to ten years at the discretion of the registrar, but no greater than ten years.” Additionally, the Registry Agreement requires advance written notice of price increases. The question essentially concerns provisions impacting registrant pricing, and the previous section referencing “permanent” contracts has been removed.

Questions 24 and 26 – SRS and Whois

A comment suggests that certain information being requested and made public for these questions could increase the potential for harm as they could be used in planning system attacks. It is important to strike a balance between transparency, particularly regarding public-facing processes, and safeguarding information that could be easily vulnerable to misuse. ICANN is considering whether there are aspects of these questions that should be withheld from public disclosure due to the significance of the risks.

Questions 28 and 29 – Abuse Prevention and Mitigation and Rights Protection Mechanisms

A comment suggests that the rapid takedown/suspension systems called for in Questions 28 and 29 should be required for all applicants and that compliance have necessary resources available to conduct reviews as required. We understand the nature of this concern; however, the same type of rapid takedown/suspension requirements may not be necessary or desirable for all types of TLDs. Future policy work within the community might yield best practices for such procedures. In the meantime, the registry has the ability to implement procedures that fit the circumstances of the particular TLD.

Some comments suggested changes to the requirement on orphan glue records in Question 28, including a definition for orphan glue records, and a requirement for a registry operator to remove such records when presented with evidence that they are being used for to abet malicious conduct. These comments have been incorporated.

Question 39 – Registry Continuity

A comment requests clarification of the terms “Recovery Point Objectives” and “Recovery Time Objectives” included in question 39. The terms are common Continuity Management (i.e. Business Continuity Planning) terms that focus on the recover of critical data and functions, as defined by the organization.

- A Recovery Point Objective (RPO) refers to the point in time to which data should be recovered following a business disruption or disaster. The RPO allows an organization to define a window of time before a disruption/disaster during which data may be lost and is independent of the time it takes to get a system back on-line (the Recovery Time Objective). If the RPO of a company is two hours, then when a system is brought back on-line after a disruption/disaster, all data must be restored to a point within two hours before the disaster.
- A Recovery Time Objective (RTO) is the duration of time within which a process must be restored after a business disruption or disaster to avoid what the entity may deem as unacceptable consequences. For example, pursuant to the draft Registry Agreement DNS service must not be down for longer than 4 hours. At 4 hours ICANN may invoke the use of an Emergency Back End Registry Operator to take over this function. The entity may deem this to be an unacceptable consequence therefore they may set their RTO to be something less than 4 hours and will build continuity plans accordingly.

These definitions have been added to Question 39 as a reference for applicants.

Another comment provides additional clarity on what are “vital business functions” and includes a revised language. This language will be considered as an update to the questionnaire.

A comment suggests a clarification to specific language used in Question 43 on DNSSEC; this suggestion has been incorporated.

A comment states that the International Standby Practices (ISP 98) for a Standby Letter of Credit are not generally followed by financial institutions in some regions. The Guidebook has been updated to allow an alternative standard to be incorporated into the letter of credit, if it can be demonstrated to be reasonably equivalent.

TRADEMARK PROTECTIONS

OVERALL RIGHTS PROTECTION MECHANISMS

Key Points

- Comments from every section of the ICANN community and broader Internet community have been thoroughly considered in the development of the trademark protection mechanisms in the Applicant Guidebook.
- Discussions between the Board and the GAC led to numerous changes in and improvements to the RPMs, which were further informed by continued community consultation.
- The trademark protections in the most recent version of the Applicant Guidebook provide stronger protections than any previous version and are intended to create a balance between all interested parties.

General

Support for trademark protections in current guidebook.

Substantial trademark protections have been developed for new gTLDs. ICANN has come a long way in providing protections for trademark owners in the new gTLD process with a substantial amount of additional protections at the top and second levels compared to what is afforded today for existing gTLDs. *Neustar et al. (15 May 2011)*.

Following extensive work by the ICANN Board and the GAC, we now appear to be much closer to the original IRT proposals and we applaud ICANN for making these important and welcome changes. *Hogan Lovells (15 May 2011). FICPI (Module 3, 15 May 2011)*.

The RPMs are inadequate.

ICANN's plan does not meet its Affirmation of Commitment obligations (para. 9.3). To prevent abuses such as consumer fraud as well as user confusion, the plan still requires businesses to pay for defensive registrations or file IP claims in hundreds of new gTLDs at prices that are unconstrained by ICANN or other regulatory bodies. The legal expenses and other costs of defensive registrations and IP claims will not be offset by potential economic or informational value to either registrants or Internet users. *AIPLA (13 May 2011)*.

The critical issue of trademark protection remains unresolved in the revised guidebook, even at this late stage. *Adobe Systems (13 May 2011). NCTA (Module 2, 13 May 2011)*.

The RPMs are still substantially weaker than those recommended by the IRT. *BC (15 May 2011)*.

It is frustrating and unreasonable that ICANN and its staff have failed to address numerous constructive suggestions made by the ICANN community for modifying specific RPMs on the basis that the proposals are beyond those proposed by the IRT. Regardless of that issue, much work remains to be done to implement effective RPMs consistent with those recommended by the IRT and as discussed with the GAC. *IACC (15 May 2011)*.

There should be a globally protected marks list (GPML). Absent a GPML, trademark holders must pay for unwanted defensive registrations. *BC (15 May 2011). Coca-Cola (15 May 2011)*.

RPMs must be cohesive, implementable and consistent with existing frameworks.

If the current RPMs are now presented as complete, their actual "design" unfortunately can seem almost random, with lobbied positions tacked on as an expedient. This not only harms the stated purpose of the RPMs, but risks a disservice to the DNS itself, missing a contractual opportunity for a forward-looking approach to the functional integration of norms. WIPO remains committed to workable IP dispute prevention and resolution solutions and is available to share its experience and expertise with ICANN. *WIPO Center (13 May 2011)*.

It is paramount that the processes that ICANN sets be practical and capable of implementation in order to make the process fully reliable. *MARQUES/ECTA (15 May 2011)*.

ICANN's approach to RPMs should be consistent with the principle of adhering to existing IP frameworks and not creating new law. *USCIB (15 May 2011)*.

Role of WIPO. Far greater weight should be given to the views of WIPO as the leading non-profit organization with extensive experience in resolving IP disputes in the domain name space and wider. *MARQUES/ECTA (15 May 2011)*.

Single registrant TLDs –RPMs. Existing RPMs (e.g. UDRP and sole remedy of transfer of a second-level registration) may not function in respect to single-registrant TLDs. In the case of a single-registrant TLD there should be an additional remedy as an alternative to transfer of the registration. It is suggested that it be allowed that the second level name is reserved and non-resolving. Single registrant TLDs should not be required to allow unaffiliated registrants to hold registrations in a single registrant TLD. Such third party registrations could cause consumer confusion and in extreme cases be a vehicle for fraud. *BC (15 May 2011)*.

Analysis of Comments

Comments from every section of the ICANN community and broader Internet community have been thoroughly considered in the development of the trademark protection mechanisms in the Applicant Guidebook.

Some commenters applaud and support the most recent version of the Guidebook and the trademark protections as they have evolved. Others continue to state that the trademark protections are still not enough to protect trademark holders or minimize the need for defensive registrations (with some repeating the call for a globally protected marks list). Still others question the cohesiveness of the scheme of trademark protection mechanisms or whether they can properly be implemented.

Reflecting on the chronology of events that led to the development of the trademark protections now included in the New gTLD Program continues to be important. This historical review must be understood within the ICANN framework of a multi-stakeholder, bottom-up consensus building organization.

As most will recall, after the early versions of the Applicant Guidebook were posted, the trademark community made clear that more and specific trademark protections were needed. ICANN heeded those remarks. Accordingly, the Board resolved to establish an Implementation Recommendation Team (IRT), to help identify and propose rights protection mechanisms (RPMs) for trademark holders within the New gTLD Program (see <http://www.icann.org/en/minutes/resolutions-06mar09.htm#07>).

The IRT described itself as 18 people experienced in trademark protection on the Internet. The Board asked the IRT to develop a workable and acceptable set of RPMs for the New gTLD Program. The IRT engaged in intensive substantive discussion and, just as in most such ICANN processes, the public was invited to respond to ongoing IRT work.

Ultimately, the IRT developed specific recommendations reflecting the views of business and trademark interests, which included proposals for an IP or Trademark Clearinghouse (Clearinghouse), a Uniform Rapid Suspension System (URS), and a Trademark Post-delegation Dispute Resolution Procedure (PDDRP). The Clearinghouse included an IP Claims Service, a Sunrise Service, and a Globally Protected Marks List (GPML). (<http://icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>).

Concerns from the broader ICANN Community immediately emerged with respect to several

IRT recommendations. After significant public comment, through both the public comment forum and numerous face-to-face meetings, refinement of the IRT proposals were called for to balance the interests of the community as a whole, the trademark holders, and registrants with legitimate interests in registering domains that might also be the subject of a trademark. Compromises were also required in light of the implementation difficulties of some of the IRT proposals.

The next iteration of the Guidebook included nearly all of the trademark protection mechanisms suggested by the IRT, including the Clearinghouse (including IP Claims and Sunrise processes), the URS and the PDDRP. The GPML was not included in light of, among other things, the implementation difficulties with, and the significant opposition to, such a list. In 2009 the Board noted that a GPML was not adopted and noted some of the reasons:

[I]t is difficult to develop objective global standards for determining which marks would be included on such a GPML, such a list arguably would create new rights not based in law for those trademark holders, and it would create only marginal benefits because it would apply only to a small number of names and only for identical matches of those names. See <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.6>.

After further comment, discussion and revision, the Board requested the GNSO Council's view on whether the then versions of the Clearinghouse and URS proposals were consistent with the GNSO's proposed policy on the introduction of new gTLDs. The Board asked whether these RPMs were appropriate and effective for achieving the GNSO's stated principles and objectives.

In response to the Board's request, the GNSO established the Special Trademark Issues Review Team (STI), consisting of members of each Stakeholder Group, At-Large, Nominating Committee Appointees, and the GAC. The STI recommended several revisions to the Clearinghouse and the URS proposals (see <http://www.icann.org/en/announcements/announcement-2-17dec09-en.htm>), which were unanimously adopted by the GNSO.

ICANN also invited community participation in an open consultation process to discuss and propose revisions to, among other things, the PDDRP. This group was formed as the temporary drafting group (TDG).

Together, the IRT recommendations, the STI revisions, the TDG revisions, and comments from every section of the ICANN community and broader Internet community were taken into consideration in the development and iteration of the RPMs. As a result of public comment, a requirement to maintain a "tick Whois" database was added to the proposed registry agreements.

Over the past several months, the RPMs have undergone some significant further refinements in response to advice from ICANN's Governmental Advisory Committee (GAC). In its Cartagena Communiqué (http://gac.icann.org/system/files/Cartagena_Communique.pdf), the GAC identified 12 specific areas in the New gTLD Program with which it had concerns. The GAC later provided ICANN with an "Indicative Scorecard" indentifying 80 individual items for discussion (<http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>).

The Board and GAC subsequently engaged in extensive discussions, including numerous calls with individual GAC members and Board members (topic leads), a dedicated two-day consultation between the ICANN Board and the GAC in Brussels, an exchange of follow-up written comments and responses from both the Board and the GAC, additional face-to-face

consultations between the GAC and Board in the ICANN San Francisco meeting, additional individual calls among GAC and Board topic leads, and a GAC/Board telephonic consultation on 20 May 2011.

These discussions between the Board and the GAC lead to numerous changes in and improvements to the RPMs, which were further informed by continued community consultation.

The trademark protections in the most recent version of the Applicant Guidebook provide stronger protections than any previous version and are intended to create a balance between all interested parties with a main focus of protecting consumers, including both registrants and Internet users.

The trademark protections now part of the new gTLD Program include:

- The requirement for all new registries to offer both a Trademark Claims service and a sunrise period.
- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for trademark holders, registries, and registrars.
- Implementation of the URS that provides a streamlined, lower-cost mechanism to suspend infringing names.
- The requirement for all new gTLD operators to provide access to — thick Whois data. This access to registration data aids those seeking responsible parties as part of rights enforcement activities.
- The availability of a post-delegation dispute resolution mechanism that allows rights holders to address infringing activity by the registry operator that may be taking place after delegation.

In addition, the existing Uniform Domain Name Dispute Resolution Policy (UDRP) continues to be available where a complainant seeks transfer of names. Compliance with UDRP decisions is required in all new, as well as existing, gTLDs.

Each of the recommendations above is intended to provide paths to protect rights other than defensive registrations for trademark holders.

Further, the application process itself, based on the policy advice, contains an objection-based procedure by which a rights holder may allege infringement by the TLD applicant. A successful legal rights objection prevents the new gTLD application from moving forward: a string is not delegated if an objector can demonstrate that it infringes their rights.

One group recommends that WIPO be consulted in light of its role in trademark disputes. WIPO's contributions have been extremely valuable throughout the development of trademark protections in the New gTLD Program. WIPO has agreed to serve as the dispute resolution provider for all pre-delegation legal rights objections and was instrumental in the drafting of the standards under which such objections will be reviewed. Inputs from WIPO to all other RPMs are also important to the entire multi-stakeholder consensus process that has been at the heart of the New gTLD Program.

Finally, one group representing business interests comments on the applicability of existing trademark protection mechanisms, such as the UDRP, specifically the transfer remedy, to single

registrant or .BRAND TLDs. While this is not something relevant to the new RPMs, this is something for later consideration depending on how single-registrant TLDs evolve.

Trademark Clearinghouse (Clearinghouse)

Key Points

- The Clearinghouse is meant to be a database of intellectual property rights; its purpose is not to house data that would support blocking of domain name registrations.
- Requiring the trademark claims process to continue beyond the launch of registry operations, could potentially knock out businesses that already offer Watch services, and require development of a very different technological solution than what is planned for the Clearinghouse.
- Limiting Trademark Claims and Sunrise protection to identical match of a trademark, at least until the system can be tested in practice and reviewed, is an appropriate limitation.
- The requirement for demonstration of “use” is universal, no jurisdictions are favored over the other based on the level of review trademarks receive in that jurisdiction

General

Summary of Comments

Purpose.

The purpose of the Clearinghouse should be to list a number of different “name” rights that, depending on the jurisdiction, could be used as a basis to create an obstacle to registration of a certain domain name. A Complainant in a .eu domain name dispute can rely on, *inter alia*, registered national and Community trademarks and, in as far as they are protected under national law in the Member-State where they are held: unregistered trademarks, trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works (Article 10(1) of the European Commission regulation 874/2004). The Clearinghouse should allow collection of such prior rights, whereas it will be up to each gTLD provider to regulate if only registered and common law trademark rights may be relied upon or whether other nationally protected name rights can form the basis of an objection as well. FICPI notes that 3.2.1’s revision to cover “nationally or multi-nationally registered word marks from all jurisdictions” is a step in the right direction—e.g. now European Community trademarks are given the same status as U.S. trademark registrations. *FICPI (Module 3, 15 May 2011).*

More details needed.

TLD applicants need more details on the Clearinghouse processes and costs for proper business planning. This information should be included in the final applicant guidebook. *dotBERLIN (11 May 2011). DOTZON (15 May 2011). dotHotel (15 May 2011). AusRegistry (16 May 2011).*

Clarification remains outstanding on such matters as the relation to trademark office determinations; fee apportionment measures; any envisaged process for Clearinghouse

removal of marks; and treatment of non-Latin script and word+design marks. *WIPO Center* (13 May 2011).

ICANN proposes that the Clearinghouse provider may actually be two entities—the “authenticator/validator” and the “administrator,” which is confusing because only the second entity will really be “the clearinghouse.” ICANN needs to clarify what roles each entity is to play, including with respect to Sunrise Eligibility Requirement complaints. There is no information in the guidebook on what a Sunrise Dispute Resolution Policy will even look like or how it will be implemented, highlighting a further gap in the new gTLD proposal. It is also unclear how the Clearinghouse itself is supposed to provide Sunrise services, rather than simply be a repository of information that is used in support of such services. More broadly, the Clearinghouse is still full of “proposals” of what the requirements “should be” rather than proposed firm requirements. Other issues are left open, such as penalties for failure to keep information in the Clearinghouse up-to-date, which if significant enough could cripple the entire system. Neither ICANN nor the Internet community really knows what final Trademark Clearinghouse requirements are being proposed. *INTA* (14 May 2011).

Proposal: Draft Trademark Claims Notification Process. Neustar et al. has produced a proposal to assist ICANN with the construction of the RFP for Clearinghouse Providers and to provide guidance to the new gTLD Registry applicants on how an implementation of a 60-day Trademark Claims Notification process could work. Neustar et al. recommends a flexible, yet consistent mechanism that also preserves options for a multitude of business models that may emerge for potentially hundreds of new gTLDs. Neustar et al. would like the several assumptions it makes in the proposal to be included in the final version of the AG. *Neustar et al.* (15 May 2011).

Clearinghouse Service Provider(s). ICANN should contract with a single entity for the Clearinghouse functions, covering the validator and administrator roles. This places accountability with a single body and enables the Clearinghouse to evolve its business processes over time and without concern or conflicts with organizational boundaries between the administrator and validator roles. Contracting with two parties introduces complexity which could result in delays in implementation of the Clearinghouse and possibly also in the introduction of new gTLDs. The process to find a Clearinghouse service provider must commence without delay, and ICANN should convene a working group from the ICANN community to share ideas on the design of the Clearinghouse. (*Note:* For specific Module 5, section-by-section comments and suggested language edits for Trademark Clearinghouse, see EnCirca comments at pp. 2-5). *EnCirca* (14 May 2011).

Clearinghouse relationship to other RPMs.

The Clearinghouse is only utilized during initial launch and is not integrated with other RPMs such as the URS. *Adobe Systems* (13 May 2011).

ICANN should explain how the Clearinghouse and the URS will be linked in order to save trademark owners costs, and ultimately protect end users from fraud. *News Corporation* (13 May 2011).

INTA continues to stress the importance of minimizing costs by integrating the Clearinghouse to support the URS, in addition to Sunrise/Claims services. Depositing a mark in the Clearinghouse should not be a prerequisite to using the URS, but the validated information in the Clearinghouse should be available to support a URS complaint, e.g. to establish ownership of a registered mark. *INTA* (14 May 2011).

Use of Clearinghouse in UDRP. Trademark owners should be able to take advantage of using the Clearinghouse when seeking relief from abuses under the UDRP both for purposes of registrations for new gTLDs and under the existing gTLDs. *AutoTrader.com (Module 2, 13 May 2011).*

Word Choice. Section 4.3 and elsewhere in the Clearinghouse proposal refer to notice of a trademark claim being given to the “registrant” prior to the domain name being registered. Prior to registration the entity receiving the notice is only an “applicant.” Misuse of the term “registrant” invites confusion. ICANN should also make clear that the “notice” system involves two notices—one to the applicant that there is a match of the proposed domain name to a mark in the Clearinghouse, and another to the trademark owner if the applicant proceeds to register the domain name anyway. *INTA (14 May 2011).*

Name change. The name should be “IP Clearinghouse,” as recommended by the IRT. *FICPI (Module 3, 15 May 2011).*

Analysis of Comments

One commenter suggests that the Clearinghouse’s purpose should be “to list a number of different ‘name’ rights that could be used as a basis to create an obstacle to registration of a certain domain name.” It is true that the Clearinghouse is meant to be a database of intellectual property rights, but it was not established to house data that would support blocking of domain name registrations. This same commenter suggests that registries should have discretion as to what it protects in the various RPMs it must offer. Such discretion is available - after mandatory protections are provided. Registries must recognize certain trademarks, but they have discretion to recognize and protect additional intellectual property marks that are allowed in the Clearinghouse. Finally, this commenter does recognize and appreciate that registered trademarks from all jurisdictions are treated equally in terms of what must be recognized.

Some suggest that more details are needed with respect to Clearinghouse operations and others note that the development process should begin without delay, and in consultation with the community. We agree and are working to a timeline that ensures the availability of the Clearinghouse in time for the anticipated launch of the new gTLD process.

Implementation details are now in development. In particular, some community members have produced a proposal to assist with the construction of the RFP for Clearinghouse Providers and to provide guidance on implementation of a 60-day Trademark Claims Notification process. This proposal is a part of developing specific operational details for the Clearinghouse, which will evolve according to a plan in consultation with all interested community members and the selected Clearinghouse Provider(s). The selection process will also inform the decision as to whether one or two separate providers will be required.

Some commenters seek clarification on how the Clearinghouse will be integrated in relation to other RPMs. As noted in both the URS and the PDDRP, data that is housed in the Clearinghouse can be used as evidence to support standing in both RPMs. For example, proof of use of a trademark is required to support either a URS or PDDRP proceeding; the proof of use that is validated by the Clearinghouse can serve as such evidence in those RPM proceedings. How the Clearinghouse can be used to support existing RPMs such as the UDRP has not been a topic of discussion in the new gTLD Program.

One suggests that “registrant” be changed to “applicant” when discussing trademark claims process notices before the registration is actually completed. This comment is well-taken. Accordingly, “registrant” in this context will be revised to be “prospective registrant.”

No changes will be made to the name of the Trademark Clearinghouse.

Fees and Costs

Summary of Comments

Funding from multiple sources. The cost of inclusion of a mark in the clearinghouse should be kept as low as possible with funding coming equally from users of the system, e.g. trademark owners, registries, registrars and from ICANN itself. *Valideus* (13 May 2011).

Costs and operations timing. The Clearinghouse should be established well in advance of the commencement of operation of any of the new gTLDs and the cost for setting up the clearinghouse system should be fully borne by ICANN as part of the expenses of the new gTLD program. Setting it up well in advance in an open and transparent manner and providing public guidance on its operation may reassure many brand owners that they will be able to protect their trademarks. ICANN bearing the cost will advance consumer confidence in ICANN and new gTLD applicants’ shared fiscal responsibility in implementation of the new gTLD program. Brand owners have many trademark costs outside the clearinghouse (e.g., obtaining and maintaining trademark registrations to permit participation in the clearinghouse) and should only be responsible for reasonable charges for recording their trademarks in the clearinghouse. In this way trademark owners will have some reasonable assurance that the gTLD program will not significantly increase their operating costs. *IBM* (13 May 2011).

Reasonable costs. The costs related to the Clearinghouse need to be reasonable in order for it to remain an effective tool for brand owners. *MARQUES/ECTA* (15 May 2011).

Reduced fees for not-for-profit organizations (8.0). The Clearinghouse should feature reduced fees for not-for-profit organizations and ICANN’s negotiations with the Clearinghouse provider should incentivize such reduced fees. *NPOC* (16 May 2011).

Analysis of Comments

One commenter suggests that funding should come from the users of the system. That is precisely how the Clearinghouse is expected to be funded. See Section 8 of the Clearinghouse proposal: “Costs should be completely borne by the parties utilizing the services. Trademark holders will pay to register the Clearinghouse, and registries will pay for Trademark Claims and Sunrise services. Registrars and others who avail themselves of Clearinghouse services will pay the Clearinghouse directly.” Further, it has always been the intent the Clearinghouse costs are reasonable and that will be considered in the solicitation process.

With respect to who will fund the initial establishment of the Clearinghouse, it has always been planned that ICANN and the Clearinghouse Service Provider(s) shall bear that burden, as deemed appropriate.

At present there is no plan to make reduced Clearinghouse fees available to any particular section of the community, such as non-profit organizations. That is a possibility that can be discussed with potential Clearinghouse Service Provider(s).

Eligibility for Inclusion and Protection

Summary of Comments

Marks to be Included in Clearinghouse.

AIPLA supports the change made in the most recent version of the guidebook that any “marks which constitute intellectual property” can be included in the Clearinghouse. *AIPLA (13 May 2011). Partridge (14 May 2011). Time Warner (14 May 2011).*

INTA recommends that paragraphs 1.3 and 1.5 be revised to clarify that the data regarding other types of intellectual property is not an “ancillary service” and paragraphs 3.2.4 and 3.3.6 be revised to correctly articulate what constitutes intellectual property. *INTA (14 May 2011).*

CADNA would like more elaboration on the change made removing the language that no common law marks should be included in the Clearinghouse. CADNA is pleased with the idea of expanding the definition for inclusion in the Clearinghouse, although it seems that marks that constitute intellectual property of other types than those specifically described will be determined by the registry operator and Clearinghouse, which seems to give those two entities a significant amount of power. *CADNA (13 May 2011).*

The Clearinghouse should include common law trademarks, rather than limiting the Clearinghouse to court-validated or registered trademarks. Extending protection to common law trademarks that are substantively authenticated would streamline other RPMs, such as the UDRP (and other domain name dispute resolution policies) and the URS, which allow claims for relief based on common law rights. IACC suggests that at a minimum registry operators should be permitted to include such marks in their RPM, and in order to do so will need the data about those rights in the Clearinghouse. *IACC (15 May 2011).*

Sections 2.2.1, 3.2.1 and 3.2.3 need to be amended to include figurative registered trademarks. The developed UDRP/WIPO precedent and the clearly inclusive intention of the GAC towards both figurative trademarks and word marks leave ICANN with a clear directive to include both legally recognized forms of trademarks in the DAG and the Trademark Clearinghouse. *M. Harper (16 May 2011).*

The Clearinghouse should also be allowed to validate stylized marks that are nothing more than a word mark presented in a different font. In addition to presenting the stylized mark, certificates of registration present the mark in standard font, so the Clearinghouse would not have to exercise either discretion or subjectivity in order for stylized marks to be protected by the RPMs. *NCTA (Module 2, 13 May 2011).*

The Clearinghouse should accept marks that include a TLD. It is incorrect to state that a dot-TLD mark cannot indicate source—it depends on how it is used. Numerous marks that incorporate a TLD, many of which are well-known, are registered in the U.S. and other jurisdictions worldwide. Despite its repeated position that all registered trademarks should be treated alike, the Board has singled out this one category of marks that will be denied protection under the RPMs. It is the gTLD by itself that is generic and does not identify source. As a

practical matter there is no material difference between a mark consisting of a term followed by a TLD and the term alone. Thus either adding or deleting the TLD from a registered mark is permitted by the U.S. Patent and Trademark Office. NCTA urges ICANN to adopt the same approach—i.e., permit the validation of marks that incorporate a TLD and categorize them as the same mark without the TLD. *NCTA (Module 2, 13 May 2011). AutoTrader.com (13 May 2011).*

NCUC opposes use of the Clearinghouse in the future as a database for intellectual property rights beyond trademark—it is a mechanism for trademarks and should remain as such. To effect this, in Section 3.2.4 the phrase “but certainly not copyrights, patents, designs or any other form of intellectual property” should be added after the words “intellectual property.” The meaning of the term “other marks” in Section 3.2.4 should also be clarified by ICANN. *NCUC (Module 5, 15 May 2011). A. Gakuru (Module 5, 16 May 2011).*

The recent creeping expansion in scope of the fee-based Clearinghouse must be viewed with caution. In determining appropriate types of identifiers, ICANN should bear in mind international and national IP norms. *WIPO Center (13 May 2011).*

Mandatory Claims Service and Sunrise Process.

AIPLA supports the change that now requires gTLD registries to provide both of these mechanisms. *AIPLA (13 May 2011).*

It is encouraging and ICANN is to be applauded that the trademark claims and sunrise registration services have been made mandatory. *CADNA (13 May 2011). Microsoft (15 May 2011). Hogan Lovells (15 May 2011). USCIB (15 May 2011). NPOC (16 May 2011). FICPI (Module 3, 15 May 2011). NCTA (Module 2, 13 May 2011).*

INTA agrees that Sunrise services should be limited to a 30-day period before the launch of a gTLD. *INTA (14 May 2011).*

Post-launch Claims.

While we are pleased that all new gTLD registries must have both a Trademark Claims Service and a Sunrise process, neither of these mechanisms have proven sufficient to hinder or reduce the number of domain names registered in bad faith. Both are for the pre-launch or initial launch period. Infringements of rights occur not just in the launch phase but more often after such a phase and for as long as the registry operator is active. The Trademark Claims Service needs to be post-launch as well to have any real value. *LEGO (Module 5, 12 May 2011). Arla Foods (13 May 2011). IPC (15 May 2011).*

The Claims Service requirement should be extended to the first 6 months to provide notice to the trademark owner and potential registrant. *NPOC (16 May 2011).*

The amount of time a registry must maintain the Claims service needs improvement. Section 6.1 implies that the registry can cease offering Trademark Claims services after sixty days, which should not be the case. Registries should be required to post Trademark Claims whenever a party attempts to register a domain which incorporates a mark on the Trademark Clearinghouse. *AIPLA (13 May 2011). Partridge (14 May 2011). BBC (Module 5, 13 May 2011). News Corporation (13 May 2011). Time Warner (14 May 2011). INTA (14 May 2011). COA (15 May 2011). SIIA (15 May 2011). UrbanBrain (16 May 2011).*

AIM recommends a change for Trademark Claims (6.1.1) that “[ne]w gTLD Registry Operators must provide Trademark Claims services AT ALL TIMES for marks in the Trademark Clearinghouse.” (Once set up, to continue to use this service will add large benefit at small cost). *AIM (Module 5, 12 May 2011)*.

The gTLD Registry Operators should offer trademark Claims Service at any time a domain name is registered. *BC (15 May 2011)*.

The Trademark Claims Service should be allowed to run in perpetuity for the life of the gTLD Registry. *Hogan Lovells (15 May 2011). NCTA (Module 2, 13 May 2011)*.

The planned limitation to the proposed 60-day Trademark Claims construct invites gaming. *WIPO Center (13 May 2011)*.

There are additional costs involved with extending the trademark claims period beyond 60 days and expanding notices beyond identical matches. As a compromise, the Clearinghouse could accomplish these goals outside of the envisioned trademark claims process and thereby avoid incurring extra costs on registrars and registries and mitigating chilling effects on registrants. *EnCirca (14 May 2011)*.

Mandating that new gTLD registries implement a perpetual Trademark Claims has the potential of placing the new gTLDs at a competitive disadvantage to the incumbent TLDs who do not have to implement that RPM. If the ICANN community believes that there should be a perpetual IP Claims process required for all TLDs (both new and existing), it can decide to launch a bottom-up policy development process to require its implementation. This should only be done after we get some experience dealing with the Trademark Claims process so that the community can properly evaluate the yet untested RPM. *Neustar et al. (15 May 2011)*.

We generally object to the idea of the Trademark Claims Service to be extended 60 days after the initial launch. One would think that the Claims Service and Sunrise period services both allow the trademark community to make legitimate claims before anyone else. We cannot understand the rationale of allowing a trademark claim service after initial launch and believe it will be an administrative nightmare for registries and an additional disadvantage to registrants. Accordingly in Section 6.1.1 the following sentence should be deleted; “This launch period must occur for at least the first 60 days that registration is open for general registration.” *NCUC (Module 5, 15 May 2011). A. Gakuru (Module 5, 16 May 2011)*.

Identical Match Limitation.

The Trademark Claims service needs to cover more than identical matches. Most cyber-squatting is not an identical match to the trademark being squatted but contains different generic words. Such cases of trademarks plus generic terms must also be covered by the Trademark Claims Service if ICANN intends for such a service to have any real value. *LEGO (Module 5, 12 May 2011). Arla Foods (13 May 2011). Adobe Systems (13 May 2011). Hogan Lovells (15 May 2011). SIIA (15 May 2011). IPC (15 May 2011). NCTA (Module 2, 13 May 2011)*.

The Clearinghouse should not be limited to identical matches. It should include trademarks paired with a descriptive term. At a minimum, a match should include plurals of and domain names containing the exact trademark. Inclusion of such provisions will help avoid expensive enforcement actions and defensive domain name registration. *IACC (15 May 2011). COA (15 May 2011). Coca-Cola (15 May 2011). NPOC (16 May 2011). FICPI (Module 3, 15 May 2011)*.

Protection needs to be wider than identical matches to include in particular plurals, “mark plus descriptive term” and “mark plus device.” Cyber squatting is not restricted to identical marks and this needs to be recognized. *BBC (Module 5, 13 May 2011)*.

IP Claims services should be expanded to cover all strings which comprise the exact match, or plurals of the exact match, or the exact match along with key terms associated with the goods or services relating to the mark (such terms being identified by the mark owner in the Clearinghouse application), or typographical variants of the mark (identified by the mark owner in the Clearinghouse application). Strings falling into these categories could be flagged by software, thus eliminating the need for the Clearinghouse to exercise discretion. *INTA (14 May 2011)*.

In the Claims Service, a notice should be sent if an application contains a character string that features in the Clearinghouse (rather than consists of a mark in the Clearinghouse). Many infringements take a trademark and add a descriptive term such as PRADA-BAGS. Such notices could help reduce conflicts. *Valideus (13 May 2011)*.

The Claims Service should apply to domain names that either consist of or contain textual elements of marks entered into the Trademark Clearinghouse. Limiting the scope to only domain names that consist of textual elements of these marks is too narrow and does not correspond to the unfortunate reality that the vast majority of abusive domain name registrations are for domain names that are MARK+word. *Microsoft (15 May 2011)*.

AIM suggests the following change because sunrise will only be effective if it matches the behavior of fraudsters: “This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match or CONFUSINGLY SIMILAR to the name to be registered during Sunrise.” *AIM (Module 5, 12 May 2011)*.

The need for an exact match is recognized in sunrise services in order to ensure that the system affords appropriate trademark holders an opportunity to register their marks early. However, the standard of “identical or confusingly similar” should be applied in the ongoing IP claims service. *News Corporation (13 May 2011)*.

The Sunrise service should be provided for marks which are an identical match or confusingly similar to the name to be registered during Sunrise. *BC (15 May 2011)*.

The planned limitation to exact matches invites gaming. *WIPO Center (13 May 2011)*.

Trademark Claims and Sunrise Services should extend beyond identical matches. If UDRP or Suspension proceedings determine that there is a “confusing similarity” between a domain name and a trademark, then the trademark owner should be able to place that second level domain name in the Clearinghouse, and refer to it in Claims and Sunrise Services. Otherwise, the same second level domain name could arise repeatedly in various new gTLDs, even after being cancelled or frozen in successful UDRP or Suspension System proceedings. *IOC (15 May 2011)*.

If ICANN considers going beyond exact matches for Trademark Claims where the added term relates to the trademark in a “significant way” (Public Comment Summary Feb. 21, 2011 at pp. 50, 62), it could limit the additional term to any goods or services identified in registrations for the mark. Limiting the number of additional entries to a particular number would be arbitrary and

would disadvantage trademark owners whose mark is used to brand numerous products. *NCTA (Module 2, 13 May 2011)*.

Proof of Use.

The guidebook should be revised to make it clear that the function of establishing use is separate from the function of validating registered marks and that owners of registered marks have the option of offering evidence of use (those that do not will only be able to utilize the Trademark Claims service). *NCTA (Module 2, 13 May 2011)*.

The declaration/proof of use (5.2, 7.2) should be submitted to the Clearinghouse for marks not protected via court, statute, or treated only periodically—perhaps every 3 years—not a requirement prior to the participation of each Sunrise period. *NPOC (16 May 2011)*.

Regarding proof of use, we agree that one party should not arbitrarily be able to stop another party from using a mark. However, in addition to dropping proof of use in trademark service claims, it should also be dropped for sunrise service, URS, and PDDRP because it makes the RPM tapestry cumbersome and complicates the process. In effect, ICANN will create separate criteria from established systems in sovereign countries. RPMs were not meant to be a substantive review system; they were meant to protect brand owners and ultimately consumers. *News Corporation (13 May 2011)*. *Microsoft (15 May 2011)*. *IPC (15 May 2011)*.

If the use requirement is maintained, there should not be a requirement for a specimen. Neither ICANN nor the Trademark Clearinghouse has the requisite expertise to evaluate the sufficiency of a specimen. A sworn declaration is all that should be required. *NCTA (Module 2, 13 May 2011)*.

The requirement of use does little to stop the ability of a registrant to “game the system.” Today, digital renderings of products and services can be easily and quickly created. Instead, the protections surrounding the “use requirement” that the Board seeks are delivered by requirements of sworn statements and the power to address fraudulent claims. *Microsoft (15 May 2011)*.

Requiring the Trademark Clearinghouse to make determinations about use threatens to add considerable and wholly unneeded complexity and cost to its function. The use requirement should be dropped. *Time Warner (14 May 2011)*. *INTA (14 May 2011)*. *IPC (15 May 2011)*.

Requiring proof of use on top of a trademark acquired in accordance with national law is potentially a denial of such a right and/or an additional cost for trademark owners to bear. *Hogan Lovells (15 May 2011)*.

Showing “proof of use” seems inconsistent with the purposes of the Trademark Clearinghouse, when the trademark systems of many nations do not require use. *SIIA (15 May 2011)*.

By insisting that use be shown in both the Clearinghouse and the URS, without specifically linking the two as recommended by the IRT, there could be two different decisions on a mark’s protectability in the new gTLD system. The use requirement should be eliminated. If it is maintained, then the Clearinghouse determination that a mark is in use should determine that issue for the purpose of a URS proceeding in which the mark is cited. *INTA (14 May 2011)*.

By eliminating the substantive review requirement for Trademark Claims, URS and the PDDRP and by expanding the role of the Clearinghouse to validating use of marks, ICANN has also

eliminated the absolute grounds evaluation requirement. Presumably this change was unintended but needs to be corrected. *NCTA (Module 2, 13 May 2011)*.

Date limitation.

The fixed date of 26 June 2008 is not appropriate as it excludes newer trademarks and goes against the spirit of innovation which is driving the new gTLD opportunity. A flexible date is preferred, such as six months before submission into the Clearinghouse which will serve the Clearinghouse going forward. *Valideus (13 May 2011)*.

Participation in Sunrise services for first round new gTLDs should be restricted to registrations that issued on or before the effective date of the relevant gTLD Registry Operator's Registry Agreement and that were applied for before ICANN announced the new gTLD applications received in the first round. This restriction will decrease gaming but is broad (and recent) enough to be appropriately inclusive. If ICANN rejects this restriction, it should eliminate the failure to meet this requirement as a ground on which a Sunrise Eligibility Dispute Procedure can be based (6.4.2). *Microsoft (15 May 2011)*.

The date 26 June 2008 has been deleted elsewhere in the April guidebook; why is this date retained for 7.2 Sunrise services? *BC (15 May 2011)*.

The 26 June 2008 should be deleted for 7.2 Sunrise Services as modified in other provisions, allowing word marks protected by future statutes and treaties the same protection. *NPOC (16 May 2011)*.

The use requirement is an additional evidence measure on the trademark owner. It must not become a deterrent measure for newly registered marks which are not in use yet. This is in favor of all kinds of enterprises, including small companies with less means. We would welcome a date being set later than 2008. *MARQUES/ECTA (15 May 2011)*.

Protection in Claims. IBM notes with appreciation the requirement that registries must recognize and honor all word marks that have been or are: (i) nationally or multi-nationally registered; (ii) court-validated; or (iii) specifically protected by a statute or treaty in effect at the time the mark is submitted to the Clearinghouse for inclusion and that demonstration of substantial examination or use is not required. *IBM (13 May 2011)*.

Analysis of Comments

Many comment on what types of marks should be included in the Clearinghouse and some suggest additional items that should be included. In particular, commenters suggest inclusion of common law marks, stylized marks, figurative marks and marks that include a TLD label (such as icann.org). Some support the addition of "any marks which constitute intellectual property." Others seek additional clarification. Further, there are also commenters that question and caution against the expansion of the Clearinghouse data base beyond trademarks.

Except for marks with a TLD that are specifically excluded, such as icann.org, all of the other marks suggested by commenters are allowed in the Clearinghouse database. But, as one commenter suggested, protection or recognition for anything beyond what the registry operators are obligated to honor in either claims or sunrises processes, will be up to the registry. Further, how such recognition is effectuated will be up to the registry operator and the Clearinghouse to work out as part of an ancillary service.

As previously noted several times, marks with TLDs are not allowed in the Clearinghouse. The Clearinghouse is designed to be a repository for trademarks. To fulfill the objectives of the IRT and the STI, it has been decided that those marks that actually function as trademarks, i.e., indicate source, are those that will be eligible for inclusion. Many safeguards have been established to prevent abuse and to ensure neutral application of validation standards, including objectively verifiable data that the mark does serve a legitimate trademark purpose. It has been successfully argued that TLDs standing alone do not serve the trademark function of source identification. Instead of telling consumers "what" a product is or who makes it, they tell consumers where to get it. Because the TLD, standing alone, does not indicate source, and because allowing marks in the Clearinghouse that include a TLD will increase the likelihood of confusion, abuse and gaming, on balance they are excluded. This exclusion will also obviate the need for registration of defensive trademarks in this area.

Commenters universally support the recent revision making both Trademark Claims and Sunrise processes mandatory. Many suggest, however, that Trademark Claims should be required to continue beyond the initial 60-day period now called for. Some suggest it continue in perpetuity. At this juncture, but subject to review as the new gTLD program progresses, registry operators will only be required to maintain a trademark claims process for 60 days before standard registry operations begin that includes the resolution of domain names and registering names on a "real-time" basis. Requiring trademark claims to continue in perpetuity, not only could potentially knock out businesses that already offer Watch services, but from a development perspective it is a very different technological solution to build a Clearinghouse that provides IP Watch services. If the Clearinghouse wants to expand (or others want to use Clearinghouse data) beyond the mandatory time period it is free to do so, but as an ancillary service.

Another topic that has garnered significant comment is whether the Trademark Claims or Sunrise protections should extend beyond identical match to the relevant trademarks. Some suggest identical match + keywords, others suggest including plurals of trademarks and still others suggest typographical errors or all words that contain the trademark should be included.

At present there is no plan to extend mandatory protection beyond identical match. It is important to note that both the IRT and the STI recommended that such protections be limited to identical match. Further, the Clearinghouse is an automated system, and would require additional structural engineering if trademark claims went beyond identical matches. In trademark disputes, for example, there is a judge or a panel with the ability to determine if a domain is substantially similar to a trademark, but there is complex analysis going into such a determination. That is why allowing "substantially similar" to be a standard in URS and not in trademark claims is appropriate and not inconsistent. With respect to Sunrise processes, this is a very superior right (a first right to a domain name) that is not necessarily based in trademark law. Thus, limiting mandatory protection to identical match, at least until the system can be tested in practice and reviewed, is an appropriate limitation. ICANN's Governmental Advisory Committee recently stated that mandating protection beyond identical match is something that can be placed in abeyance pending review after new gTLDs have been in operation.

Comments continue relating to the proof of "use" requirement. Some still question whether proof of use is needed to support Trademark Claims – the answer is no. Proof of use of a trademark is not required in order to receive notice in a trademark claims service.

The proof of use required to receive Sunrise protection has been extensively discussed, debated and considered with the community. Everybody recognizes that it is important to

protect business interests and especially intellectual property owners. A sunrise registration opportunity, or first right to exclude all others, is creating a powerful protection mechanism. One must not be allowed, therefore, to simply register a mark without using the mark, and then be granted such powerful protection. Thus, in order to ensure that those who can exclude others from using a domain name with a trademarked term are not abusing that exclusionary ability, all trademark holders must show proof of use.

The requirement for demonstration of use is universal, no jurisdictions are favored over the other based on the level of review trademarks receive in that jurisdiction. While proof of use will not be deleted as a requirement at this stage, just as other aspects of the program, this will be reviewed after being in practice for the first round to ensure it is having the desired effect.

Some question or call for clarification as to when the date limitation of 26 June 2008 is applicable. This is the date that ICANN approved the GNSO Policy Recommendations on New gTLDs. This date limitation only applies to Sunrise protection and only to marks that have been protected by statute or treaty. Thus, all other marks that must be recognized and honored in Sunrise processes, and all marks that must be recognized and honored in Trademark Claims services, have no date limitation. There is no plan to change this limited restriction on sunrise protection, although this will be revisited to ensure the requirement is not obsolete.

Uniform Rapid Suspension System (URS)

Key Points

- Through community input including the IRT, the STI, the GAC, and the At-Large community, the URS has evolved into a rapid mechanism that will provide trademark holders a more cost-effective method for dealing with the most clear cut cases of abuse.
- Many of the protections in the URS remain substantially the same or even stronger than what was proposed by the IRT.
- All trademark holders must show proof of use before having standing to initiate a URS proceeding.
- The intent of the URS is to address the most clear-cut cases of abuse - given that directive requiring clear and convincing evidence is appropriate.

General

Summary of Comments

Support for revisions. Although it still has concerns about some of the elements of the URS, NCUC commends ICANN for many of the revisions to date—i.e. fair use provisions (5.8), appeal opportunity (12), forbidding transfer and acknowledgement of the need for review of the URS one year after its operation (14). *NCUC (Module 5, 15 May 2011).*

The URS must be rapid per se, and ICANN is proposing a more acceptable solution in our view. If the URS is not a cheap, quick alternative, brand owners will probably be forced into expensive defensive registrations. *MARQUES/ECTA (15 May 2011).*

URS is inadequate.

The URS is still much weaker than the version proposed in the IRT report. It does not seem to be more rapid or cheaper than the ordinary UDRP. *LEGO (Module 5, 12 May 2011). Arla Foods (13 May 2011).*

The URS sets the bar so high that few complainants will prevail and few trademark owners will seek to employ it. *NCTA (Module 2, 13 May 2011).*

The URS as currently proposed is still wanting in many respects (see, e.g., WIPO Center's letter of 2 December 2010, www.wipo.int/amc/en/docs/icann021210.pdf). These issues are not mere details but go to the functioning of the URS both on its own terms and in relation to the UDRP. Sensible policy choices must be made to safeguard URS stability and enforceability. *WIPO Center (13 May 2011).*

The Board should not be picking and choosing select components of the IRT/STI recommendations that it finds most favorable. If the Board wishes to rely on the stated standard of "clear and convincing evidence" then it should reinstate the URS as developed by the IRT. *IPC (15 May 2011).*

More details. The process definition of the URS is broad; further operational definition is required to ensure end users enjoy a consistent, predictable and reliable experience. *AusRegistry (16 May 2011).*

Reduced fees for not-for-profit organizations (2.1). The URS should feature reduced fees for not-for-profit organizations and ICANN's negotiations with the URS provider should incentivize such reduced fees. *NPOC (16 May 2011).*

Analysis of Comments

As an overall note, it is important to recognize the significant community efforts that went into the development and refinement of the URS. From the IRT, to the STI, to the GAC, to the At-Large, as well as overall community input, the URS has evolved into a rapid mechanism that will provide trademark holders a cost-effective method for dealing with the most clear cut cases of abuse.

Although some commend the recent revisions and improvements that have been made to the URS, others still suggest that the URS is inadequate, is weaker than what was recommended by the IRT and sets the bar too high for the URS to be effective.

Specifically, as noted in previously comment analysis, the IRT proposal was reviewed by the STI and was modified. The concept of the URS, however, has not been challenged. The proposal underwent further significant public comment, including extensive discussions with the GAC that lead to further modifications. Although some comments seem to suggest that the current proposal is much weaker as an RPM than the IRT URS proposal, many of the protections remain substantially the same or even stronger than what was proposed by the IRT. For example:

- The response time is the same - 14-days (the current version provides for a one-time extension of no more than seven days if a good faith basis exists)
- All other time frames are the same or faster than what was recommended by the IRT

- Which trademarks can be the basis of a URS claim is broader than recommended by the IRT
- The burden of proof is the same as the IRT recommendation – clear and convincing evidence
- The requirement for showing bad faith is the same as the IRT recommendation – must be registered and used in bad faith
- The fact that Examination is required even in default cases is the same as the IRT recommendation
- The time for a Panel to render a decision is limited in current URS proposal (goal of three (3) days, no later than 5 days) – there was no such limitation proposed by the IRT.
- The remedy is the same as the IRT recommendation - suspension.
- The length of suspension in the current URS proposal can be extended by a year after current registration expires – there was no such possibility of extension in the IRT proposal.
- The evil intended to be addressed is the same – clear-cut cases of abuse.

The changes that have been implemented are the result of input from numerous stakeholders and reflect an attempt to balance the rights of trademark holders with those of legitimate registrants that may happen to have registered domain names that involve a trademark from somewhere in the world.

One commenter has called for additional operational details, which are being developed as part of the call for expressions of interest for URS provider(s).

The call for reduced fees for non-profit organizations is something that the community may want to consider, but it should be recognized that the fees are already relatively low and those fees would have to be funded from some other source.

Procedures

Summary of Comments

URS Examiners.

CADNA applauds ICANN's new specification that URS Examiners must have demonstrable relevant legal background, such as in trademark law. URS proceedings are meant to be done rapidly, so it is critical that Examiners be properly trained and suited to consider URS cases in order to deliver the correct determination. *CADNA (13 May 2011). FICPI (Module 3, 15 May 2011).*

In 7.2, add the phrase “from both practice and academia” after the words “relevant legal background” and add “human rights law and competition law” after the words “trademark law.” *NCUC (Module 5, 15 May 2011). A. Gakuru (Module 5, 16 May 2011).*

In 7.3 delete the phrase “are strongly encouraged to” and replace with “must” (“URS providers must work equally with all certified examiners...”). *NCUC (Module 5, 15 May 2011). A. Gakuru (Module 5, 16 May 2011).*

Response Time/Word limits.

Microsoft supports the reduced word limits for both Complainants and Respondents and the shorter time periods for conducting administrative review and issuing determinations. *Microsoft (15 May 2011). Hogan Lovells (15 May 2011).*

It is disappointing that Sections 5.1 and 5.3 of the current URS draft do not respond to the request for restoring the STI-RT's recommendation for a 20-day response time or for guidance on the grounds for which a 7-day "good faith" request for response extension will be granted. At a minimum, additional guidance should be provided regarding acceptable grounds for a good faith extension. *ICA (15 May 2011).*

NCUC is concerned with the very short deadlines afforded to the respondent, which feeds substantially to the increase of default cases. The need for speed in the URS is understood, but due process should not be sacrificed. NCUC has strongly supported a model that recognizes the different Internet experience in different parts of the world and the need to respect due process for both parties. *NCUC (Module 5, 15 May 2011). A. Gakuru (Module 5, 16 May 2011).*

Publication of proceedings. Section 9.4 should be removed—it sounds as if ICANN with the assistance of the URS providers will be blacklisting domain names that may in the future be registered for fair and legitimate purposes. Further, and for reasons of transparency, Providers, just like in the UDRP, should publish their proceedings. *NCUC (Module 5, 15 May 2011). A. Gakuru (Module 5, 16 May 2011).*

Bar to presenting defense. The GAC request for permanently barring individuals or entities who had five URS actions from mounting any defense in future actions against them should be rejected, as no registrant should ever be barred from presenting a valid defense in a singular case. *ICA (15 May 2011).*

Bar to presenting Complaint. If there can be no "five strike" provision against repeat cyber squatters under the Suspension System based on due process principles that every registrant should always be able to present a defense, then the same principles of due process dictate that every complainant should have the opportunity to be heard. *IOC (15 May 2011).*

Disable Internet access after initial administrative review. If the point of the URS proceeding is to address blatant abuse such as a site selling counterfeits or engaging in fraudulent phishing schemes, then the domain should not be allowed to continue to resolve to the abusive website once the proceeding is initiated and passes the initial administrative review. Instead Internet access should be promptly disabled. *Coca-Cola (15 May 2011).*

Initial Review. Perhaps this is already the guidebook's intention, but the URS Examiner should receive "clear and convincing evidence" before any registrant is burdened with a claim and required to defend themselves. With the URS process so cheap to launch (\$300 USD) and the penalty for misuse so light, Examiners must be certain there is a solid case to move on before registrants are even contacted or inconvenienced in any way. *M. Menius (16 April 2011).*

Notice (4.2). Add the word "potential" before the word "effects" ("as well as the potential effects if the registrant fails to respond and defend against the Complaint.") *NCUC (Module 5, 15 May 2011). A. Gakuru (Module 5, 16 May 2011).*

Analysis of Comments

Some have commented on the nature and requirements for the URS Examiners, including the improved specifications requiring trademark experience. Others suggest adding some additional criteria and requirements. At this stage, the added requirements shall remain as is, but will certainly be looked at after the URS has been tested in practice.

Commenters appreciate the reduced time limits as well as word limitations, while others are concerned that the time limits may be too short. The very nature of the URS calls for short time limits and efficient procedures to ensure a rapid mechanism. The level of the time limitations are in line with what the IRT recommended, with consideration paid to all other community comments, including the STI.

With respect to publishing URS Determinations, it is agreed that Providers should publish their Determinations. The editorial comments in section 9.4 of the URS that the URS determinations will be published "in order to provide notice to the next potential registrant" will be deleted because it may seem like a "blacklist" as suggested by one commenter (and good practice calls for such comments to be omitted from procedural documents).

The Applicant Guidebook is in line with the comment suggesting that no bar should be set prohibiting a respondent from presenting a defense. With that, a separate commenter suggests that if respondents are not barred, then no complainant should ever be barred. There is a key distinction between two. The complainant has other avenues in which to seek redress from an alleged infringer. If a URS proceeding is initiated against a respondent, however, it must have the opportunity to respond or fear losing control of what might be a legitimate, non-infringing domain name.

One commenter suggests that simply passing the administrative review should be enough to cause the challenged domain name to be suspended. The whole purpose of the URS, however, is to have a fair evaluation on the merits, but in an expedited manner so that true cases of abuse can be brought to an end quickly. The URS should not be a mechanism where the burden of proof shifts from the complainant to the respondent at the outset.

Another commenter seems to suggest that one must actually be deemed to have submitted "clear and convincing" evidence before the respondent is even brought into the proceedings. Such a threshold requirement in a rapid, low-cost process would not be efficient. Only a URS Examiner can determine if clear and convincing evidence has been presented. The cost of the proceedings would be prohibitive if the Examiner had to separately analyze the complaint, make a determination on the existence of sufficient evidence, and then had to again examine the evidence in light of the response.

The comments suggesting that the word "potential" be added in section 4.2 ("the *potential* effects if the registrant fails to respond and defend against the Complaint) has been followed and will be included in the 30 May 2011 URS proposal.

Standards, Burden and Evaluation

Summary of Comments

Proof of use.

Proof of use should not be a requirement for participation in the URS. In a majority of countries, trademark rights arise through registration and not use. Moreover, requiring a showing of use in the URS would go well beyond the criteria purposefully mirrored from the UDRP. *INTA* (14 May 2011).

Proof of use should not be a requirement for URS. Requiring proof of use presumes that the URS provider will be qualified to meaningfully examine that evidence of use and such a presumption is not realistic. If a complainant wanted to rely on proof of use previously submitted to and validated by the Clearinghouse, how recent must such a submission be? *Microsoft* (15 May 2011).

Given some concern exists over the proof of use, ICANN should consider carefully whether to move forward in establishing this requirement. *USCIB* (15 May 2011).

Burden of proof.

The URS has the same legal requirements as a UDRP but a substantially more onerous standard of proof which is inconsistent and unwarranted under the URS as currently proposed. *INTA* (14 May 2011).

IACC supports the GAC position that the burden of proof should be “preponderance of the evidence.” *IACC* (15 May 2011).

The GAC request to lower the standard of proof should be rejected as this would erode critical distinctions between the URS and the UDRP. *ICA* (15 May 2011).

IPC urges stakeholders to consider the IPC’s compromise position that would properly deter registrants from cyber squatting and lower costs for rights holders: the IPC proposes shifting the burden of proof to the Respondent in a URS proceeding when the Respondent has lost 5 or more URS proceedings. *IPC* (15 May 2011).

Bad faith.

The GAC request for removal of the requirement that a complainant establish registrant bad faith should be rejected as this would result in a URS having a critical evidentiary element that is lower than the UDRP requirements. *ICA* (15 May 2011).

Bad faith should remain a requirement upon the same standard as set in the UDRP. *USCIB* (15 May 2011).

ICANN has refused to change the “bad faith” standard in the URS and also added factors, not proposed by the IRT, that all but decide in favor of the respondent a substantial number of URS cases that could be brought. If the URS is supposed to be modeled on the UDRP ICANN should not adopt rules that fly in the face of decisions under the UDRP. *NCTA (Module 2, 13 May 2011)*.

Trademark + Keyword Cases

The GAC request to expand the URS to “trademark + keyword” cases should be rejected as these are not the “slam dunk” cases the URS was purportedly designed to address. *ICA* (15 May 2011).

ICANN should either bring “exact trademark + goods/services/other generic words” within the scope of the URS or acknowledge that “exact trademark + goods/services/other generic words” domain names are confusingly similar to the trademark. *NCTA (Module 2, 13 May 2011)*.

Fair use (5.8.1). Delete “and the Registrant is making fair use of it” in this section. The phrase is not necessary—a domain name that is generic or descriptive cannot raise trademark claims whether the use is fair or not. *NCUC (Module 5, 15 May 2011)*. *A. Gakuru (Module 5, 16 May 2011)*.

Evaluation.

We support the GAC recommendation that the URS apply to registrations that are identical or confusingly similar to protected marks as well as terms associated with goods and services. *News Corporation (13 May 2011)*. *INTA (14 May 2011)*.

URS Examiner decisions should be based on the evidence actually presented only, not based on the evidence “available” to an Examiner. Examiners should not be conducting independent investigations for information that is “available” to them. *INTA (14 May 2011)*. *Microsoft (15 May 2011)*.

In 5.9.1 change the phrase from “Examiner will review each case on its merits” to “Examiner must review each case on its merits.” *NCUC (Module 5, 15 May 2011)*. *A. Gakuru (Module 5, 16 May 2011)*.

Scope. FICPI commends the revision to 1.2.6.1 accepting all officially registered trademarks. *FICPI (Module 3, 15 May 2011)*.

Analysis of Comments

Some continue to question the requirement that a trademark holder show proof of use of a trademark that is the basis of a URS proceeding. The proof of use required to be the basis for a URS proceeding (as well as for the PDDRP and protection in Sunrise procedures) has been extensively discussed, debated and considered with the community. In order to ensure that those who can exclude others from using a domain name with a trademarked term are not abusing that exclusionary ability, all trademark holders must show proof of use before having standing to initiate a URS proceeding. This requirement will not be changed at this juncture, but as other aspects of the program, this will be reviewed after being in practice for the first round to ensure it is having the desired effect. The requirement for demonstration of use is universal, no jurisdictions are favored over the other based on the level of review trademarks receive in that jurisdiction.

Commenters continue to push for lowering the burden of proof while others oppose doing so. Still another group suggests that the burden should shift to the respondent after five failed defenses to a URS proceeding. Neither the level nor the party on whom the burden rests will be changed. The intent of the URS is to address the most clear-cut cases of abuse. The IRT stated that contestable issues are not appropriate for URS resolution. (See page 34 of final IRT Report located at <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>). Given that directive, requiring clear and convincing evidence is appropriate.

It appears that all commenters agree that the bad faith requirement in the URS should remain as is so as to ensure the URS' connection with the UDRP and not to make any decisions that fly in the face of the UDRP. Accordingly, no further analysis is required on this point.

One group notes that trademark + keyword cases should not be adopted, but another notes that it should be adopted or that ICANN should declare that a trademark + keyword is confusingly similar to the trademark alone. Trademark + keyword will not be adopted and there will be no declaration that such would be confusingly similar to the trademark at issue. However, terms that are confusingly similar to the trademark, will be afforded consideration in the URS. Each URS proceeding should be considered by an experienced and qualified Examiner whose job it will be to determine if a challenged domain name is identical or confusingly similar to the trademark at issue. ICANN is not qualified to make sure a determination.

No changes will be made in response to the comment calling for a revision to section 5.8.1 ("and the Registrant is making fair use of it"). This is merely an example of a defense and is not meant to be exhaustive or even required.

There is a comment that the URS should apply to domain names that are identical or confusingly similar to the trademark at issue - this is always how the URS has been proposed.

With respect to the evidence available to Examiners, the Examiner may look to the evidence presented by complainant as well as other evidence, if available. Although, nothing requires the Examiner to review evidence other than what is presented by the parties.

The particular suggestion for a word change: "Examiner will review each case on its merits" to "Examiner must review each case on its merits," shall be implemented.

The final comment is simply recognition and approval of revisions. Accordingly, no analysis is required in that regard.

Default and Appeals

Summary of Comments

Time to seek Relief from default.

In the newest version of the URS, a registrant will have six months to appeal a judgment after a default. A shorter time period, such as sixty to ninety days, would be more appropriate. *A/PLA (13 May 2011). Partridge (14 May 2011).*

The period should be shortened to 90 days or the expiration of the domain, whichever is shorter. Even with the latest time frame reduction, tracking and management of these default cases will be unduly burdensome for corporate legal departments and directly conflicts with the URS's intended cost-effective and expedited approach. *IACC (15 May 2011).*

The period should be no longer than 120 days given the URS *raison d'être*. *Hogan Lovells (15 May 2011).*

We are pleased that ICANN shortened the time allotted for appeal from two years to six months. *News Corporation (13 May 2011).*

There is no justification for allowing as long as six months for a dilatory response, particularly for what is supposed to be a quick and streamlined remedy, but the reduction from two years to six months is a significant improvement. *NCTA (Module 2, 13 May 2011)*.

Respondent should not be permitted to obtain an additional 6-month extension (beyond the initial 6 months) in which to seek review of a decision in a default case. The likelihood that a respondent with legitimate rights or interests in the disputed domain name(s) actually needs more than 6 months to seek this review is virtually nonexistent. After all, a respondent with a legitimate claim to registration and use of the disputed domain name(s) will have tremendous incentive to seek review almost immediately after decision. *Microsoft (15 May 2011)*.

Even with the reduction in the time for registrant appeal in default cases, any registrant who believes he has been the victim of a wrongly decided URS should have sufficient time to obtain a de novo appeal. *ICA (15 May 2011)*.

Appeal.

INTA appreciates and supports the clarification by ICANN that appellants must identify specific grounds for appeals. *INTA (14 May 2011)*.

IPC supports the GAC's position that as every appeal will be decided de novo, that the appeal process not require a separate evaluation of the rationale. *IPC (15 May 2011)*.

USCIB agrees with the GAC on the issue of de novo review. One cannot seek de novo review from the same body that made the URS determination. Therefore, the standard for appeal in the URS should be the same as in a UDRP where an appellant seeks de novo review in court, not with the UDRP provider. If the URS carries over the criteria of the UDRP it should also use the appeal process. *USCIB (15 May 2011)*. *IPC (15 May 2011)*.

Support for removal of possible defense language. Deletion of the requirement that URS panelists consider in default cases if there was a possible defense that could have been submitted by the Respondent is a huge improvement. *Hogan Lovells (15 May 2011)*. *NCTA (Module 2, 13 May 2011)*.

Analysis of Comments

There are still comments about what many refer to as the time to appeal after default. To clarify, no matter what, the time to file an appeal is no more than 14 days after a URS Examiner's Determination is issued. What has recently been changed is the time in which a defaulting respondent can seek relief from default. This time period was decreased from the initial suggestion of two years, down to six months with an option if good cause exists to extend for an initial six months. The six-month time period is a balance between the calls for a shorter time by trademark interests and the GAC and the calls for a longer time period so that legitimate registrants will have the opportunity to respond even if they initially failed to do so. Either way, it should be noted that unless the defaulting respondent prevails after seeking relief from default, the domain name will remain in suspended status.

With respect to appeals, one commenter supports the clarification made requiring an appellant to identify the specific grounds on which an appeal is filed while others suggest that an appeal should only be made to a court and not to the URS provider. The appeal mechanism was developed and included by the STI as a check and balance of sorts to ensure that legitimate

registrants had a voice and were not improperly overshadowed by trademark holders. It will remain as part of the URS, pending a review of the URS after it has been tested.

One commenter notes the improvement resulting from the removal of the reference to a URS Examiner considering “possible defenses.” No analysis is required in response to this comment.

Remedies and Fee Shifting

Summary of Comments

Transfer/First Right of Refusal.

There should be an option in the URS for a winning challenger to obtain transfer of a domain. *Valideus* (13 May 2011). *Adobe Systems* (13 May 2011). *MARQUES/ECTA* (15 May 2011). *IOC* (15 May 2011). *IACC* (15 May 2011). *Coca-Cola* (15 May 2011).

If the URS determination is in favor of the complainant, the complainant should have the right of first refusal for the transfer of the disputed domain name(s) after the suspension period expires. *NPOC* (16 May 2011).

AIPLA is concerned that a lock on the domain name is the only remedy available to a URS complainant. Greater consideration should be given to allowing the complainant the option of obtaining the domain name after the appeal period has ended. This would avoid unnecessary time and expense to seek further relief in court or via the UDRP. *AIPLA* (13 May 2011).

Partridge (14 May 2011).

We are pleased that the latest version of the URS does not include a transfer option and urge that the UDRP remain the sole means by which a complainant can obtain possession of a disputed domain. If this issue should again arise ICA urges that the concerns of registrants and complainants be accommodated by the win-win approach of placing suspended domains on a permanent ineligible for re-registration list. *ICA* (15 May 2011).

A successful URS complainant should have the right to cancel the domain or to obtain control of the domain (except in specialized gTLDs), or that the URL resolve to an error notification to avoid the possibility of causing damage to the goodwill associated with the trademark contained in the URL. ICANN’s proposal that the remedy be that the URL resolves to a website that is an informational page about URS removes control of the trademark in the URL from the trademark owner. Consumer confusion when following the URS to a site not associated with the trademark owner raises the possibility that the goodwill associated with the trademark will be damaged. *IBM* (13 May 2011).

Support for loser pays model.

We are pleased that ICANN decided to implement a partial loser pays component. *News Corporation* (13 May 2011). *CADNA* (13 May 2011). *USCIB* (15 May 2011). *FICPI* (Module 3, 15 May 2011).

The “loser pays” model is welcome and we would have liked the model to be more widely available. *MARQUES/ECTA* (15 May 2011).

IACC supports the GAC position on including a “loser pay” provision. *IACC* (15 May 2011).

The limited loser pays model is to be applauded for targeting cyber squatters, but it is unclear if 25 is an appropriate number; this should be explained. *Hogan Lovells* (15 May 2011). *UrbanBrain* (16 May 2011).

If the limited loser pays mechanism is retained, there should be no reduction in the number of domains giving rise to the requirement. *ICA* (15 May 2011).

There is no loser pays mechanism which would be essential in a URS, or even a fee for filing a response to a complaint. The addition of a limited “loser pays” model if the complaint lists 26 or more domain names does not make any sense. There is no justification for the number 26 and a loser pays mechanism should be a general mechanism, not one that will not realistically have any effect. *LEGO* (Module 3, 12 May 2011). *Arla Foods* (13 May 2011). *BBC* (Module 5, 13 May 2011). *NCTA* (Module 2, 13 May 2011).

The threshold for “loser pays” must be lowered to be somewhere between 5-10 domain names. If the more than 25 domain name cut off is implemented, cyber squatters will simply make registrations in batches of 25 per fictitious registrant name, enabling them to continue to profit from bad faith use of domain names until caught. *Time Warner* (14 May 2011). *INTA* (14 May 2011). *USCIB* (15 May 2011).

The loser pays model should apply to any situation where the registrant has filed for 5 or more domain names, and the Response Fee must be equivalent to the filing fee charged to the Complainant. *IPC* (15 May 2011).

The threshold should be reduced to 8 or more disputed domain names; 26 is exceptionally high for the standard of complaint set by the URS. *NPOC* (16 May 2011).

The “loser pays” threshold should be reduced from at least 26 domain names to 10 domain names. *Microsoft* (15 May 2011).

BC members’ real world experience suggests that a more practical figure for the “loser pays” threshold would be 15. *BC* (15 May 2011).

The limited loser pays figure of 26 domain names is arbitrary. AIM proposes the following for 2.2: “A limited ‘loser pays’ mechanism has not been adopted for the URS. Complaints listing fifteen (15) or more disputed names will be subject to [a] Response Fee which will be refundable to the prevailing party.” *AIM* (Module 5, 12 May 2011).

The NCUC is concerned that the limited loser pays model ICANN is proposing will feed into the existing culture of trademark bullying and will be abused by trademark owners who will seek to intimidate legitimate registrants. In addition the provision is open to interpretation (e.g. it is unclear if the 26 domain names will have to be registered by one single registrant or the Complainant will have the ability to activate this provision if he manages to identify 26 domain names incorporating his trademark which are registered by a multitude of registrants). The phrase “against the same registrant” should be added to clarify this issue. The URS lacks the checks and balances found in traditional means of adjudication that uses a loser pays model. In the URS the loser pays model will provide room for gaming of a model that is only meant to be limited to very specific cases. *NCUC* (Module 5, 15 May 2011). *A. Gakuru* (Module 5, 16 May 2011).

Remedies for abuse of URS process. The penalties outlined in the new gTLD guidebook are not sufficient regarding misuses of the URS process and will not deter abusive complaints. A one-year bar from URS use is monumentally inadequate, particularly in lieu of the paltry \$300 fee required for launching a URS claim. There should be a substantial financial penalty and permanent ban (on first attempt) for any complainant found to have used the URS without cause. *M. Menius (16 April 2011)*.

Analysis of Comments

Several comments relating to remedies under the URS have been received. Some argue that transfer, rather than suspension, or first right of refusal after suspension period concludes, should be the ultimate remedy. While others suggest that suspension is the right remedy for the URS. This topic has been widely discussed and debated. The IRT proposed suspension, not transfer. The STI did not alter this remedy. Since the URS is intended to be a prompt mechanism dealing with clear cut cases of abuse, the remedy reflects the evil that this RPM is designed to prevent. There was significant community support for the suspension, not transfer, remedy in public discussion in the San Francisco meeting. Recall, however, that the complainant will have the right to extend the registration, and thus the suspension, for an additional year after the initial registration period expires. This extension provides an option for the domain name to be suspended even longer than the period recommended by the IRT.

Many have commented on a loser pays models. Some applaud the inclusion of the limited "loser pays" model, although some still think it needs to be further enhanced by lowering the number of domain names at issue needed in order to require a "Response Fee." Others have commented that no changes should be made at this point while still others are concerned that any loser pays model will be manipulated by trademark holders. As is evident, there are numerous and varying views on whether a loser pays model is appropriate. In an effort to address and balance all of the competing concerns, a limited loser pays model requiring a 'Response Fee' when a single complaint involves 26 or more domain names, has been adopted. Note that the Response Fee will be refundable if the respondent prevails in the URS proceedings. Further, it has been made clear that the Response Fee shall not exceed the URS Filing Fee. There are independent concerns that administration of loser pays will result in higher URS fees. That issue will be discussed with potential URS providers.

While some suggest that the number 26 or more domain names may seem somewhat arbitrary; so too would any other specific number that has been suggested. Thus, since the IRT as a self-identified group of 18 individuals representing those with trademark interests recommended 26, that is the number that has been adopted. The clarification that the 26 or more domain names must be as to the same registrant has been made as suggested.

One commenter suggests that the remedies for abuse of the process are not nearly sufficient to deter bad behavior. The remedies adopted were put in place to balance the possibility that trademark holders would use (or abuse) the URS, a relatively low cost mechanism, to constantly put legitimate domain name holders on the defensive. This is a new mechanism and any suggestion of a permanent ban, as this commenter makes, must be considered very carefully before implementing.

Notwithstanding any of the above, note that a full review of the URS, including the of the remedies adopted, is intended after the first round of new gTLDs has been completed and the URS has been tested.

Post Delegation Dispute Resolution Procedure (PDDRP)

Key Points

- Given the severe nature of the remedy in this procedure, and given that generally, registries have no privity of contract with the registrant, the burden of proof of clear and convincing evidence is appropriate.
- In order to ensure that those who can exclude others from using a domain name with a trademarked term are not abusing that ability, all trademark holders must demonstrate “use” before having standing to initiate a Trademark PDDRP proceeding.

General

Summary of Comments

Call for long-term, positive collaboration. Beyond positions already on record, little can be said about ICANN stakeholders’ reluctance to engage in constructive discussion of substantive criteria and safe harbor consideration factors. Yet, it would seem illusory to expect rights holders to continue to turn exclusively to lower-level enforcement options in a vastly expanded DNS. The WIPO Center is pleased that ICANN has taken up its suggestion for establishing a PDDRP in the first place. However, intermediary financial gain from registration activities that infringe third party rights comes with appropriate responsibility. This should be a time for positive collaboration in a longer-term view. *WIPO Center (13 May 2011)*.

PDDRP is too weak.

The PDDRP continues to contain a number of provisions that severely and perhaps fatally weaken its effectiveness to potential complainants, raising concern that unless changes are made potential complainants will elect to forego the PDDRP entirely and pursue their grievances in civil courts. This would defeat the point of creating the PDDRP. *INTA (14 May 2011)*.

The PDDRP has been revised so extensively and in accordance with the wishes of the Registry Stakeholder Group that Microsoft questions its utility as an RPM. ICANN should implement the PDDRP format as outlined in the IRT Final Report. *Microsoft (15 May 2011)*.

Standards and Burden

Willful Blindness.

The PDDRP still fails to capture recurring circumstances of willful blindness. To limit the scope to affirmative conduct and to exclude willful blindness will considerably reduce the benefit of the PDDRP and encourage situations where a party sticks its head in the sand to seek to avoid liability, as is too often the case. *Hogan Lovells (15 May 2011). NCTA (Module 2, 13 May 2011).*

Burden of proof.

While IACC supports the majority of Trademark PDDRP provisions, it shares the GAC's concerns regarding the requirement that Complainants prove systematic infringement or improper conduct by clear and convincing evidence. ICANN should reconsider this and lower the standard to preponderance of the evidence. The Trademark PDDRP can be likened to a civil action for contributory trademark infringement or unfair competition, under which a plaintiff need only prove wrongdoing by a preponderance of the evidence. Requiring a PDDRP complainant to meet the lower standard is sufficient to meet the goals of the Trademark PDDRP and will not unfairly prejudice a registry operator. *IACC (15 May 2011)*.

To balance the generally watered down RPMs adopted by ICANN in the current version of the applicant guidebook, the PDDRP standard of proof in Section 6 should be "preponderance of the evidence." *IPC (15 May 2011). NCTA (Module 2, 13 May 2011)*.

The PDDRP contains unrealistically high burdens of proof at both the first and second level. The levels of proof exceed showing bad faith (must show "specific bad faith") and a pattern or practice of bad faith (must prove "substantial pattern and practice" by clear and convincing evidence. Even if a complainant wins, there are no sanctions against a registry and no corresponding duty by ICANN to investigate or sanction the registry. *BC (15 May 2011)*.

Proof of use.

Proof of use should not be required. *IPC (15 May 2011)*.

FICPI positively notes with respect to clause 9, "Threshold Review", that all registered trademarks, independent of the national or regional registration system, are accepted, and therefore FICPI can accept the new regulation that the trademarks have to be in "current use." *FICPI (Module 3, 15 May 2011)*.

Vertical integration. Further clarification is still required—section 6 should be revised to provide that vertically integrated registries may not attempt to shift blame for second-level bad faith actions to the registrar. *IPC (15 May 2011)*.

Support for revisions. *FICPI* supports the revisions made to Sections 6.1(a) and 6.1(b), as well as 6.2(b) (ii) and (iii) deleting the words "unjustifiably" and "impermissible," therewith creating stronger trademark owner protection. *FICPI (Module 3, 15 May 2011). NCTA (Module 2, 13 May 2011)*.

Procedures

Notice. The section 7.2.3(d) requirement that the complainant must notify the registry operator at least 30 days prior to filing a complaint is unduly burdensome; the notice period should be reduced to 10 days. A registry operator does not need 30 days for an investigation and it seems more likely than not that the registry operator would use the extra 20 days to initiate preemptive litigation. *IPC (15 May 2011)*.

Filing fee—registry operator. ICANN should reinstate in Section 10 the requirement that the registry operator pay a filing fee when submitting its response so that the complainant and registry operator share costs during the proceeding, maintaining the practice of refunding the costs paid by the prevailing party at the end of the proceeding. Without a mechanism for both

parties to pay up front in place, the process of refunding fees to the prevailing party will be hampered. *IPC (15 May 2011)*.

Define fees and costs. Fees and cost ranges in Section 14 should be defined more clearly no later than the release of the final applicant guidebook to assist with budgeting for the possibility of a PDDRP complaint. *IPC (15 May 2011)*.

Remedies

ICANN discretion. CADNA would like more clarification on the implication that ICANN is allowed to impose a remedy other than what was recommended by the expert panel and in what cases. CADNA also seeks clarification on what qualifies as the “extraordinary circumstances” that enable ICANN to impose a remedy not in line with what is recommended by the expert panel and what such remedies would entail. *CADNA (13 May 2011)*.

Section 18.1 clarification. This section should be clarified regarding exactly how suggested remedies may differ if the registrant is found to be under the ultimate control of the registry operator, i.e., whether in this case the second-level domain name registrations may be recovered by the PDDRP complainant or disabled. *IPC (15 May 2011)*.

Registry operator challenge to remedy under arbitration provision. Section 21.4 should be revised to provide explicit assurance that ICANN may implement the remedy once arbitration has been concluded if the PDDRP has been upheld. Without such assurance, a registry operator may be able to bypass any unfavorable decision recommending a remedy by initiating arbitration, thus drastically limiting the PDDRP’s usefulness. *IPC (15 May 2011)*.

Analysis of Comments

As noted in prior comment analysis, not all suggested revisions have or could have been included in the PDDRP as some were either not implementable or were directly at odds with each other, thereby requiring some balancing of interests. All comments have all been carefully considered in the development of the implementation details of the PDDRP, even if not implemented.

One commenter calls for long-term collaboration on the PDDRP while others question its effectiveness as currently drafted. Community-wide collaboration has been part of the entire development process. Furthermore, ongoing collaboration is contemplated and will be welcomed as the implementation of the new gTLD program and its dispute resolution mechanisms are developed and reviewed after the first round of applications. Ongoing enhancement and improvement of the PDDRP is certainly contemplated and will, as always, be based on overall community input.

One commenter continues to call for inclusion of willful blindness as a standard for finding registry liability while others continue to suggest that the burden of proof be lowered. As set out in the latest version of the Trademark PDDRP proposal and set forth in the last version of the PDDRP Comment Summary and Analysis, willful blindness is not and properly should not be included as part of the standard under which the registries will be reviewed. The portion of the trademark PDDRP that can hold a registry liable for infringement at the second level is a large step in providing trademark protections. It must be done carefully. Registries do not have a

direct interface to customers; that happens at the registrar level. Registries maintain the database. In any large registry there might be a relatively large number of infringers even if the registry is fulfilling all its duties; the registry may be aware of some of them but will also be unaware of others. To hold registries accountable for all instances of infringement would have unknown effects on the ability of the registry to conduct business.

The registry should, however, be liable for its affirmative conduct resulting in infringement of trademarks; the standards for the PDDRP are crafted to achieve that goal. Accordingly, while some may still think that the standard should include willful blindness, or some derivative of willful blindness, or that the burden of proof should be lowered, there is no plan to make those changes. There are many other avenues that can be employed to pursue registrants that are infringing trademarks.

Given the nature of liability on a registry, that generally has no privity of contract with the registrant, the burden of proof of clear and convincing evidence is appropriate.

One group representing intellectual property interests still suggests that proof of use should not be required, while another group representing intellectual property interests now accepts this proof of use requirement given that trademarks from all jurisdictions are treated equally. The proof of use required in a PDDRP proceeding (as well as for the URS and protection in Sunrise processes) has been extensively discussed, debated and considered with the community. In order to ensure that those who can exclude others from using a domain name with a trademarked term are not abusing that ability, all trademark holders must show proof of use before having standing to initiate a Trademark PDDRP proceeding. This requirement will not be changed at this juncture, but as other aspects of the program, this will be reviewed after being in practice for the first round to ensure it is having the desired effect. The requirement for demonstration of use is universal; no jurisdictions are favored over another based on the level of review trademarks receive in that jurisdiction.

One commenter suggests that section 6 needs revision to ensure that vertically integrated registries may not attempt to shift blame for second-level bad faith actions to the registrar. The definition of registry operator in section 6 does just that:

For purposes of these standards, "registry operator" shall include entities directly or indirectly controlling, controlled by or under common control with a registry operator, whether by ownership or control of voting securities, by contract or otherwise where 'control' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership or control of voting securities, by contract or otherwise.

No further revisions are necessary at this time.

One group suggests that requiring 30 days advance notice to the registry operator before bringing a PDDRP is unduly burdensome. The current requirement is in place to provide the registry with a reasonable amount of time to investigate and take appropriate action if a trademark holder notifies the registry that there may be infringing names in the registry. This notice requirement was further discussed with the GAC, which has now accepted this requirement. In light of all of the community discussions on this topic, the timing of this notice requirement will not be revised.

With respect to fees, one group comments that the registry operators should be required to pay PDDRP fees up front, noting that without a mechanism in place for both parties to pay up front, the process of refunding fees to the prevailing party will be hampered. However, registry operators will be required to comply with the PDDRP, including the prevailing party determination. Failure to comply, including reimbursing a successful PDDRP complainant for all provider and panel fees, will be deemed a breach of the registry agreement. Thus, the registry operator will be subject to all available remedies under the agreement for breach, up to and including termination. Accordingly, there appears no need to revise the fee provisions. This same commenter requests that additional detail be provided relating to the amount of fees for budgeting purposes. Such details will be forthcoming as the PDDRP mechanism is tested. As noted in the Applicant Guidebook, such fees are intended to be reasonable, and will of course be subject to review after being in practice to ensure the fees are not prohibitive. One reminder, however, the prevailing party will get its money back.

Some seek clarification with respect to remedies, and when they might deviate from those recommended by the Expert Panel. As suggested by the GAC, the PDDRP has been revised to note that “[i]mposition of remedies shall be at the discretion of ICANN, but absent extraordinary circumstances, those remedies will be in line with the remedies recommended by the Expert Panel.” Any deviation will be based on ICANN’s understanding of the particular circumstances, but with the ultimate goal of protecting registrants. To the extent a recommended remedy may provide risk to innocent registrants, ICANN must take that into consideration when imposing any such a remedy.

In that same vein, section 18.1 of the Trademark PDDRP notes that a recommended remedy may not call for deletion, transfer or suspension of a domain name, unless “registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator.” If the PDDRP Panel finds such connection, then it is free to recommend such remedies relating to the domain name, a recommendation that ICANN will then have the discretion to consider.

Finally, one commenter suggests that section 21.4 of the Trademark PDDRP be revised to provide assurance that ICANN may implement the remedy once arbitration challenging a ICANN remedy has been concluded if presumably found in favor of ICANN. Such clarification, however, is already found in section 21.3:

[ICANN], will not seek to implement the remedy for violation of the Trademark PDDRP until it receives: (i) evidence of a resolution between the Complainant and the registry operator; (ii) evidence that registry operator’s lawsuit against Complainant has been dismissed or withdrawn; or (iii) a copy of an order from the dispute resolution provider selected pursuant to the Registry Agreement dismissing the dispute against ICANN whether by reason of agreement of the parties or upon determination of the merits.

Accordingly, while this comment did lead to a couple of minor clarifying revisions, no additional revisions are required to address the overall comment.

REGISTRY RESTRICTION DISPUTE RESOLUTION PROCEDURE (RRDRP)

Key Points

- If a registry is affirmatively participating in infringing conduct, the PPDRP is the proper dispute resolution mechanism to use. If there are simply names in a registry that violate the restrictions of the registry agreement, whether infringing or not, then the RRDRP is the proper mechanism to invoke.

Summary of Comments

RRDRP is ineffective and biased toward registry operators. Potential complainants must not be required to first file a claim through the Registry Restriction Problem Report System. The WPDRS, on which the RRPRS is clearly based, has not historically been effective. There is no reason to think that such a system will be effective here. It is arbitrary and unfair to prohibit RRDRP complainants from filing PDDRP complaints relating to the same facts or circumstances. Each DRP is intended to deal with different harms, but ICANN's tying them together in this matter bears the imprimatur of the Registry Stakeholder Group which has succeeded in rendering both DRPs ineffectual. In their current form neither the RRDRP nor the PDDRP is properly balanced and both clearly favor registry operators. *Microsoft (15 May 2011)*.

Analysis of Comments

One commenter objects to a prerequisite of submitting a Registry Restriction Problem Report before an RRDRP claim can be filed. This was made a prerequisite, however, to help avoid, if possible, the more costly and time-consuming mechanism of the RRDRP. The idea was to provide registry operators, who have agreed via contract to certain registry restrictions, the opportunity to cure possible breaches simply by providing them with information about potentially violating names in the registry.

This same commenter questions the prohibition on the use of both RRDRP and PPDRP simultaneously. But, if a registry is affirmatively participating in infringing conduct, the PPDRP is the proper dispute resolution mechanism to use. If, on the other hand, there are simply names in a registry that violate the restrictions of the registry agreement, whether infringing or not, then the RRDRP is the proper mechanism to invoke. Further, for those infringing names simply in a registry, the UDRP and now the URS will be available as alternate dispute resolution mechanisms for trademark holders.

PRE-DELEGATION OBJECTION PROCEDURES

Key Points

- ICANN funded objections: beyond one funded objection per government, each request for funding will be analyzed on a case-by-case basis depending on the particular facts and circumstances.
- The time limitations set out in the Applicant Guidebook for GAC Advice are meant merely to clarify that "for the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the

Objection Filing Period."

Summary of Comments

Fees.

Applicants should not be required to pay a Response Filing Fee in order to defend the rationale already included in their original application. *BC (15 May 2011)*.

The description of the process and the objection filing fee is not very accurate in the Discussion Draft, so it becomes uncertain what the costs of objections are. The amounts shown in table 7 of the explanatory memo "Discussion Draft: Exemptions to Objection Fees for Governments" shows an estimated total cost of US\$58K for "community" objection and US\$124K for "limited public interest" objection. These sums are prohibitive for most organizations or communities. It is very important to have a well described, low-cost possibility to file an objection, especially as a community. *DIFO (15 May 2011)*.

ICANN's guarantee of funding for advance payment of costs and for a minimum of one objection per government will relieve concerns of some smaller governments who might have expressed concerns about the cost of objection filing fees. CADNA would like more information on what will happen for subsequent objections and in which cases ICANN would be willing to provide the funds for other objection filing fees. *CADNA (13 May 2011)*.

Protection of all geographic names should be the first priority. The GAC early warning does not meet our demand. Geographic names are important public property. Governments will have to file objections to prevent misuse and abuse of them. There should be an exemption from objection fees for governments regardless of the number of objections that a government files. *Tokyo Metropolitan Government (13 May 2011)*.

GAC Advice.

(3.1)--RySG supports the fact that the process of considering GAC Advice is planned to happen without causing delays to the evaluation process. What happens if the GAC reaches consensus to oppose a string without a sound global public policy basis? (item 5) Is it correct to conclude that if GAC consensus opposes a string and there is no remediation of the opposition then a string will be denied automatically? (item 8) What does "[t]he receipt of GAC advice will not toll the processing of any application" mean? Does it mean that the GAC will not be charged a fee for objecting? RySG is concerned that the GAC's definition of consensus could lead to a single country having de facto veto power over new TLDs. If GAC consensus is defined, at a minimum, as only one country opposing where no other country objects to that opposition, it appears that it could in practice be a unilateral veto. *RySG (15 May 2011)*.

(3.2)-Regarding the statement that the independent dispute resolution process does not apply in cases of GAC advice, does this mean that the GAC may submit advice on any topic and is not restricted to the four enumerated grounds in Section 3.2 (i.e., string confusion, rights protection, limited public interest, community)? Or does it mean that the GAC does not have to follow the procedures for dispute processes for any of the four areas? It is assumed that it is the former, but this should be clarified. *RySG (15 May 2011)*.

Independent Objector (3.2.5).

Is it correct that the Independent Objector (IO) may not consider comments received after the comment period? *RySG (15 May 2011)*.

ICANN should provide additional information regarding the role of the IO regarding IO selection, support, application review and the decision whether or not to object. *NPOC (16 May 2011)*.

Expert Panel.

If at least one of the parties to a dispute is willing to pay for a 3-member panel, they should be given that option. *RySG (15 May 2011)*.

If a decision is not posted in full, will the parties to the dispute be given the full documentation of the decision? (see also Attachment to Module 3, New gTLD Dispute Resolution Procedures, Article 21(g)). *RySG (15 May 2011)*.

Dispute resolution provider—ICC. According to page 8 in Module 3, the ICC still serves as the dispute resolution service provider (DRSP) for the limited public interest and community objections in the guidebook. Grounds for these objections include “incitement to or promotion of violent lawless action...discrimination based up on race, color, gender, ethnicity, religion or national origin...child pornography” etc. These areas are obviously out of the scope and expertise of the ICC. The ICC’s neutrality and global representativeness as a public interest DRSP or community DRSP would be questionable. More representative and more neutral authorities should be introduced to take on the duty of DRSP for public interest and community objections. *Internet Society of China (27 May 2011)*.

Limited public interest objection--International law. In module 3, section 3.5.3, one of the limited public interest objection adjudication criteria is to “determine the applied-for gTLD string be contrary to specific principles of international law as reflected in relevant international instruments of law.” For historical reasons, countries around the globe have different laws and legal definitions of various matters (e.g. pornography). If the limited public interest objection is judged only by international law principles, it is very likely to approve some gTLDs while conflicting with the laws of some countries, which is obviously inappropriate. It is suggested that compliance with the limited public interest objection principles be determined according to both the principles of international law and the laws of each nation-state. *Internet Society of China (27 May 2011)*.

Publication of objections. Microsoft supports the planned publication of all filed objections. *Microsoft (15 May 2011)*.

English language requirement. The requirement in Module 3, page 11 to use English for the text of submitted objections disparages non-English-speaking communities in use of their own languages following objection proceedings to defend their interests and is inconsistent with ICANN’s commitment to multi-lingual process and procedure. As one of the world’s most widely used languages and as an official U.N. language, Chinese should also be a language for the text of objection. *Internet Society of China (27 May 2011)*.

Community Objection.

Microsoft supports the revision to the community objection standard. *Microsoft (15 May 2011)*.

The revised standard in the discussion draft in section 3.5.4 is much more appropriate and realistic. *COA (15 May 2011)*.

Remove cumbersome, unnecessary requirements. Module 3, page 23 requires the party who raises the objection to prove that a considerable number of community members have objection views. In China, a permanent community organization has its own operational rules and procedures. While the permanent organization is established for community service, the views represent the views of all community members. It is recommended to reduce the relevant aspects of community opposition procedures which are cumbersome and unnecessary requirements. *Internet Society of China* (27 May 2011).

Analysis of Comments

Several comments about fees have been received. These comments include: a suggestion that response filing fees should not be required; a request for more clarity as to fees: a recognition that ICANN's funding for at least one argument per government addresses some concern but lacks clarity on what happens after one objection; and one comment suggesting that ICANN should fund an unlimited number of objections by individual governments related to geographic names.

A response fee will be required as it is meant to cover the administrative fees, which are incurred as a result of both the complainant and the respondent in the dispute. With respect to more clarity, certain pre-delegation objections will be based on the hourly rate for panelists, along with additional administrative work. The dispute resolution service providers (DRSP) and the individual panels with which they work establish the fees. Absent a specific allowance for funding by ICANN, all parties will be required to pay the fees as they are established by the independent DRSPs. With respect to ICANN funded objections beyond the one per government, each request for additional funding will be analyzed on a case-by-case basis depending on the particular facts and circumstances. Circumstances might include availability of funds and objection history of parties.

The protection for geographic names has undergone extensive discussion, review, and refinement throughout the entire development process of the new gTLD program. At present, country names will not be delegated at the top or second level. (At the second level, country names can be registered via a ".INFO-like" process.) In addition to the GAC Early Warning, there is also the GAC Advice process that may be used for the protection of geographical names. GAC advice can raise a strong presumption that the application should be rejected by the ICANN Board. As mentioned above, ICANN will fund the provider and panel fees for at least one objection per national government. Committing to an unlimited number of ICANN funded objections for individual governments, without some type of check and balance, is not workable – there is not sufficiently available funds (and those funds are essentially provided by registrants) and such a process can be subject to abuse.

One group has submitted several questions about the GAC Advice process. At bottom, the GAC Advice process is nothing different than what is already called for in the ICANN Bylaws. The GAC is entitled to provide the ICANN Board with advice on public policy matters, which the Board is required to consider. There is no automatic veto, although as always, GAC advice will be given the weight and consideration that GAC advice should be given under the circumstances, the strength of the stated advice, and ICANN's Bylaws requirements. The time limitations set out in the Applicant Guidebook for GAC Advice are meant merely to clarify that "for the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period." See Applicant Guidebook, section 3.1 at <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution->

[procedures-redline-15apr11-en.pdf](#). Additionally, GAC advice stated in a certain way will raise a strong presumption that the Board should reject the application.

With respect to the question about whether the GAC will be charged a fee to provide an Early Warning or Advice, the answer is no. As written, it is contemplated that the GAC will not be filing an “objection” with an independent DRSP, but rather, submitting advice to the ICANN Board. Since dispute resolution fees are paid directly to the service provider, there would be no fees as the GAC is sending advice directly to the Board.

Some have commented on the Independent Objector (IO) and asked what the IO may consider. The IO can file objections based on limited public interest or community grounds only. The IO will not be prohibited from considering comments received at any time. It is contemplated that the IO will use the application comment forum or alternative comment forum, if one is established for the IO, as a source for comments. In terms of additional detail relating to the IO function, it will be published as the selection process is executed.

In terms of Expert panels, some pre-delegation dispute resolution processes call for 3-member panels and some call for one panelist. The number of panelists were chosen based on the complexity of issues addressed and other considerations. These options will not be revised at this stage, but will be reviewed, along with all other processes, as the first round of the new gTLD Program progresses. With respect to panel decisions, it is anticipated that the parties, which will be subject to the DRSPs confidentiality requirements, will receive the full text of an Expert Determination even if some parts are redacted before posting.

One commenter has questioned whether the ICC is the appropriate DRSP to administer the limited public interest and community objections. It should be recalled that in this context, the ICC International Centre for Expertise will administer the dispute resolution procedure; it will not adjudicate the dispute. Rather, the expert panel that is to simply be selected by the ICC will hear and issue a determination on the dispute. ICANN considers that the ICC’s International Centre of Expertise, with its extensive experience in administering various types of international disputes is well qualified to act as a DRSP. The rules of the International Centre for Expertise are available at: <http://www.iccwbo.org/court/expertise/id4379/index.html>.

A question has been posed about one of the criterion for limited public interest objections and its reference to principles of international law. This particular criteria has been to topic of several community-wide discussions and extensive debate, which resulted in the way this criterion presently reads. Further, this reference to internal law principles was part of the original GNSO policy and thus will remain as stated.

With respect to posting objections as they are filed the only comment received is supportive of the current stated position and thus does not require analysis.

One commenter questions the English language requirement with respect to the objection procedures. ICANN carefully considered this requirement, particularly in light of its commitment to operating as a multi-lingual organization. While it is true that at least for the first round the authoritative language will be in English, a party is permitted to “submit supporting evidence in its original language, provided and subject to the authority of the Panel to determine otherwise, that such evidence is accompanied by a certified or otherwise official English translation of all relevant text.” It is also expected that the dispute resolution service providers, and the panels, will use some discretion during the proceedings to ensure that they are fair to all parties, including as it relates to native languages. Requiring English to be the .authoritative language

for objection proceedings will certainly be reviewed after the first round.

In terms of community objections, one commenter suggests that requiring objectors to show that a considerable number of community members have objection (in other words - substantial opposition) is cumbersome. The requirement to show substantial opposition is part of the actual policy recommendation and thus will cannot be changed (see GNSO Policy Recommendation 20 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”).

Other commenters are supportive of the recent revisions to the community objection standards.

MALICIOUS CONDUCT

Key Points

- A requirement for applicants to disclose their affiliates to enable ICANN to disqualify applicants based on affiliates’ conduct would not be effective and make the background screening unmanageable.
- Limiting the number of new gTLDs in the round by introducing new categories of TLDs would introduce new levels of risk and eliminate the benefits of the new gTLD program.
- ICANN has carefully considered comments from governments and the intellectual property community and introduced a number of mechanisms to protect users where TLDs are targeted to a population or industry that is vulnerable to online fraud or abuse.
- The GAC approach, calling for enhanced protections in proposed new gTLDs that “refer to particular sectors, such as those subject to national regulation,” has not been addressed by creating new categories, but has been addressed in an alternate way.

Summary of Comments

Vetted registry operators. ICANN’s broadening of the scope of offenses that render an applicant or entity ineligible to operate a new gTLD is commendable, but in light of the Board’s elimination of the vertical separation requirement, ICANN should require applicants to disclose their affiliates (defined in Sec. 2.9(c) of the new gTLD Agreement) and ICANN should be permitted to disqualify applicants based on affiliates’ conduct. This is particularly true where numerous affiliates of likely applicants have been found to have engaged in cyber squatting in UDRP proceedings. *Microsoft (15 May 2011)*.

Prevention and protection measures need to go further.

COA commends the security improvements made in the discussion draft (e.g., evaluation criterion 30, enabling public comment and evaluation of the adequacy of security measures contemplated, as well as the recognition that this requirement is not limited to financial services-oriented TLDs but also applies to “other strings with exceptional potential to cause harm to consumers”); however, COA urges that ICANN go further to reduce the risks of opening up an unlimited range of new gTLDs. *COA (15 May 2011)*.

COA supports the GAC approach which unfortunately so far the ICANN Board has rejected. The GAC proposal calls for enhanced protections in proposed new gTLDs that “refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse.” This formulation would clearly signal that ICANN would provide more rigorous scrutiny for any proposed new gTLD string targeted to sectors such as music, movies, or videogames, in order to guard against the risk that the new gTLD would be infested with copyright infringement. Regardless, COA believes that new gTLDs targeted to copyright industry sectors clearly fit the “exceptional potential to cause harm” criterion in the current draft applicant guidebook. COA requests confirmation from ICANN of this interpretation, such as by specifying that any gTLD targeted to a population or industry that is especially vulnerable to online fraud or abuse is also a string with exceptional potential to cause harm to consumers. COA (15 May 2011).

Regarding evaluation criterion 35, COA commends ICANN for providing incentives to applicants to commit themselves to mechanisms for preventing and remedying abusive or malicious behavior and to safeguard against domain name hijacking through requirements such as multi-factor authentication to process update or delete requests. ICANN should incorporate these mechanisms into the minimum requirements for “abuse prevention and mitigation” so that applicants failing to commit to them will receive a failing score of zero on this criterion. COA (15 May 2011).

Analysis of Comments

The new gTLD process seeks to protect registrants and users against malicious conduct. One solution is to conduct background checks on those applying for a new TLD. ICANN has discussed and considered the process suggested to screen applicant affiliates as well as applicants themselves. Such a step would introduce significant complications and costs to the background screening process without a balancing benefit. For example, in addition to ICANN screening the affiliate, it would also need to do so for the directors, officers, partners, etc. of the affiliate. This additional screening is cost and time prohibitive and would probably not result in many disqualifications given the level of scrutiny the applicant is subject to under the process. Affiliates are often distant and have no role in operation or conduct of a TLD to be operated by the applicant. Also, such an inquiry would lead applicants to set up new entities to provide separation between themselves and affiliates. This would not be just to mask prior bad conduct – it could simply be to avoid the expense and intrusion of background checks into their associates who will not play a role in the process.

Throughout the development of the new gTLD program and the Applicant Guidebook, there have been numerous discussions about limiting the number of new gTLDs in the first round and/or adding categories (i.e., beyond open and community such as geo, brand, etc.). It is possible these additional measures may mitigate some risks with new gTLDs, and they may also introduce new and unpredictable risks (i.e., abuses to the process). Some of these risks include: applicants registering to file an application to secure their place in a limited round and subsequently attempting to sell that slot to the highest bidder, underserved communities that may be disadvantaged and lose their opportunity in the round to large, well-funded entities who are capable of assembling their application quickly and inexpensively, and entities may be formed exclusively to qualify for a new category of TLD though they may have intentions of altering the purpose of the TLD after-the-fact and this could disadvantage another entity for the same string that did not prevail in a contention resolution proceeding. Also, limiting rounds

would also severely limit the anticipated benefits accruing from increased competition, choice and innovation. For these reasons and others, the process remains as it is today.

The GAC approach, calling for enhanced protections in proposed new gTLDs that “refer to particular sectors such as those subject to national regulation,” has not been addressed by creating new categories, but has been addressed in an alternate way. Long discussions of TLD categories in previous comment fora led to a conclusion that creating additional categories of TLDs were problematic. However, ICANN sought to address the GAC issue through the implementation of GAC Early Warning and GAC Advice processes. In that way, the GAC request that sensitive strings such as those purporting to address the needs of certain industry sectors can be reviewed, and if appropriate, objections can be lodged or the GAC can give public policy advice on these applications directly to the ICANN Board.

ICANN has listened to and responded with changes to the concerns of governments and the intellectual property community about the need to add enhanced measures to protect new gTLDs that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. To address these concerns, numerous protection mechanisms have been added to the new gTLD Applicant Guidebook including: the GAC Early Warning and Notice processes, the Trademark Claims Service (during Sunrise and at least the first 60 days of general registration), the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP), the Registration Restrictions Dispute Resolution Procedure (RRDRP), and the Uniform Rapid Suspensions System (URS).

In the recent version of the evaluation criteria in the Applicant Guidebook, ICANN provided a scoring incentive (i.e., two points vs. one) for applicants that committed to taking extra measures for example to prevent and mitigate abuse. This is a strong incentive. Applicants must score more than “1” on some questions in order to pass the evaluation. This opportunity to obtain the extra point is clear – it was purposely made so in the anticipation that nearly all applicants will take advantage and describe additional mitigation measures. Some in the community have suggested that these extra measures should be incorporated to the minimum requirements for abuse prevention and that failure to do so should result in a failing score of zero. A difficulty is that we don’t know exactly what these “extra measures” might be – taking much objectivity out of the scoring is a score of “1” is based on some unknown increment to the standard. The existing mitigation measures are those recommended by the working group considered to be experts in this area. Therefore, it is thought a score of one in this area is acceptable and applicants that agree to take on the extra operational and technical costs associated with implementing additional measures should be rewarded for doing so. In contrast, some applicants may exceed the requirements in the other evaluation criteria and in doing so may find it unnecessary, for the purpose of their TLD, to score a two in the abuse prevention and mitigation category. It would be unfair to issue a failing score of zero in this area if the applicant has proposed a plan, a plan that may only require a score of one, that meets the proposed needs of their TLD.

ROOT ZONE SCALING

Key Points

- ICANN, its advisory committees, the root server operators, and others have taken numerous steps involving thorough study and analysis to ensure ongoing stability of the root zone.
- Given the published limits on delegation rates, there is agreement in the technical community that the delegation on new TLDs will not be a danger to root zone stability.
- ICANN has committed to reviewing the effects of the new gTLD program on operations of the root zone system and to deferring second-round delegations until it is clear that root zone system security was not jeopardized by new gTLD delegations from the first application round.

Summary of Comments

Subsequent application rounds--security and stability studies.

ICANN should not be reviewing the effects of the new gTLD program for security and stability after the first round; it should be conducting those types of studies before it even thinks about launching potentially hundreds of new TLDs and compromising the safety of businesses and consumers around the world. This point is an acknowledgement that ICANN knows that there is a danger associated with new TLDs. CADNA would like more details on how ICANN plans to conduct such studies, considering the controversy that surrounded its earlier economic studies. *CADNA (13 May 2011).*

Microsoft supports ICANN's commitment to reviewing the effects of the new gTLD program on operations of the root zone system and to defer second-round delegations until it is clear that root zone system security was not jeopardized by first-round new gTLD delegations and its decision to publish the names and positions of individuals associated with a new gTLD application. *Microsoft (15 May 2011).*

Analysis of Comments

Investigation undertaken by ICANN to study and understand the effects of new TLD delegations on root zone performance has included:

- commissioning an independent report, which indicated that the root zone might be most affected by rate of delegation rather than the overall number of delegations,
- performing delegation rate studies that resulted in caps to delegation rates,
- informing every root zone operator of those limits, with confirmation from every root zone operator that those delegation rates would not negatively affect the performance of their root server, and
- conducting an in-depth study of the ICANN-operated L-root that determined that many multiples of anticipated delegations would not affect L-root performance.

Most of the most recent work has involved root-zone provisioning: ensuring that the administrative infrastructure can accommodate delegation work.. Bolstering the IANA function to accommodate root management services for new registries is to be taken seriously, but is not an overly difficult undertaking. Currently ICANN receives, on average, one root management request per day (for approximately 272 TLD registries). The new TLD round may double or triple that number. Instead of processing one request per day, the IANA function might process two or

three. According to documentation published separately, this will result in two or three additional staff members. Continuation of IANA function services at the same level of excellence offered today is an extremely serious consideration, but it is expected that the new demands can be readily accommodated according to the plans in place

To expand slightly another comment made, ICANN will collaborate with root server operators and others in the technical community to measure any effects of the first round delegations on root zone stability. This will include the root zone administrative provisioning system of delegations into the root zone and providing root zone management services to the new TLDs. There will be no second round delegations until those effects are measured.

Finally, beyond the responses to these comments, it should be noted that ICANN, through its recent consultations with the GAC, has committed to several actions to ensure ongoing stability of root zone operations and provisioning.

STRING SIMILARITY AND STRING CONTENTION RESOLUTION

Key Points

- For the initial evaluation, the proposed position is to keep the similarity assessment restricted to visual similarity only, especially in view of the complexities involved with assessing for example aural similarity, which can be invoked in the subsequent string similarity objection process. Final decisions on similarity will be made by a panel, as string similarity algorithm outcomes are only indicative, not authoritative. Community discussions have made it clear that human assessment is a necessity.
- Allowing for agreements between applicants to have confusingly similar strings coexist as TLDs would imply risks for registrants and end users and can only be considered when policy has been developed on provisions and procedures to reduce or eliminate such risks. Similar concerns may relate to linguistic variations of a string from a single applicant, while also noting that there are special provisions in the current approach for variant handling for IDN strings.
- The community views remain diverged on the Community Priority Evaluation threshold and the proposed position is to keep this value at 14 points.
- The wording in the AG will be clarified to explain why a certain flexibility regarding the contract establishment deadline must be kept to allow for differences in complexity, rather than giving a runner-up in a contention resolution an automatic right to proceed if the winner fails to meet the deadline.
- Auction proceeds will be kept separate and only used for purposes agreed to by the community, for example to reduce fees as suggested, provided this meets with community approval.

- The risk that an applicant in a contention set may cause intentional delays is minimized by the fact that the application completeness check has a time limit for the applicant to provide any missing material.

Summary of Comments

Visual similarity (Module 2, Section 2.2.1.13).

Similarity should be limited to “visual.” “Aural and meaning similarity” should be removed. If not, then in the case of IDNs an incumbent ASCII registry will be practically entitled to have or block all TLDs equivalent in meaning or sound to the current ASCII TLD, and in all languages. If phonetic and meaning similarities are to be considered, then a current gTLD registry that is based on a generic word is granted the right for that word and concept in all languages and all scripts. This is not only unjustifiable from a cultural and social point of view (leading to the best IDN gTLD concepts in any script to be owned and operated by large Western ASCII-oriented corporations as opposed to poorer, native in-IDN country players), but it is not clear that it is even legal. *Y. Keren (Module 2, 16 May 2011). I. Genov (Module 2, 16 May 2011). S. Subbiah (Module 2, 16 May 2011). P. Kolev (Module 2, 16 May 2011).*

When deciding the issue of “confusingly similar”, not just visual, but audible/phonetic must be considered too. Future technologies that rely on speech recognition or for the disadvantaged such as sight impairment must be protected. Those who argue for “visual” only do so because they are operating an alternate root that includes many of the IDN gTLDs likely to be applied for. Alternate roots promote user confusion and should be outlawed and eradicated. *F. Ulosov (16 May 2011).*

“Meaning similarity” should not be considered because it can ban every IDN TLD that will come into the field in the future, harming the interests of non-English speaking countries in IDNs and resulting in a monopoly for the current TLD holders. *S. Soboutipour (16 May 2011).*

String Similarity—Proposal for Avoiding Contention Sets. To avoid creation of a contention set (and possible auction) in some cases caused by the application of the similarity assessment tool (e.g., hypothetically, “.bbc” and “.abc” applications from two well known companies, where both strings are used in the “.com domain” without any problems but the similarity assessment tool result is 92%, showing high similarity/high probability of user confusion), a small addition should be made to the chapter called “Similarity to Other Applied-for gTLD Strings (String Contention Sets)” on page 2-5 of the Guidebook: i.e., when ICANN notifies the applicants who are part of a contention set, it would give the applicants a fixed period of time to submit written statements that they do not object to the other applications in the set. This would reverse the contention set and allow the applications to proceed. This suggestion may offer a solution to many potential applicants who now see big hurdles in the area of string similarity and may decide not to apply because of the high risk of failure. *T. Mustala (Module 2, 12 May 2011).*

Co-existence recognition. The AG does not take into account co-existence agreements or natural co-existence between trade mark owners with similar marks (e.g., currently a successful application from NBC in round one would preclude ABC or BBC or NBA in future years. DHL could preclude the NHL, despite that these organizations co-exist in the real world.) ICANN should not be creating conflicts where they do not exist. There should be a mechanism so that trade mark owners that co-exist in the real world without causing consumers any confusion can co-exist at the top level of the DNS. *Valideus (13 May 2011). MARQUES/ECTA (15 May 2011).*

The string contention provisions should be modified to accommodate consent and co-existence agreements. Where all non-identical applications in a contention set consist of brands registered in at least ten national or supra-national trademark registries, the contention set should be dissolved if all the applicants inform ICANN that they believe the TLDs can co-exist without significant risk of consumer confusion. Such a mechanism would encourage brand owners to participate in the new gTLD process rather than resolving these issues through litigation (which could involve ICANN). *IPC (15 May 2011)*.

Contention sets—linguistic variations. String similarity contention sets should not include similar strings requested by an applicant seeking linguistic variations of the applicant's other applied-for string. *BC (15 May 2011)*.

Community priority should be given to applicants scoring at least 13 points, not 14. The intention of Community Priority will not be realized if Community applicants cannot reasonably reach the 14 point threshold. E.g., just two objection filings would make it impossible for an applicant to achieve the required 14 points. The BC remains unconvinced that staff has adequately analyzed the possibility and probabilities of applicants reaching 14 points. Other stakeholders have supported a 13 point minimum score (e.g., COA, IPC). *BC (15 May 2011)*.

Runner-up applicant. In 4.4, why shouldn't the runner-up applicant have the right to proceed and why should it be at ICANN's option? Without reasonable justification, these provisions seem to be unsatisfactory. *RySG (15 May 2011)*.

Use of auction proceeds.

ICANN still has not provided detail on potential uses of funds generated by auctions to resolve string contention between competing new gTLD applicants. If skeptics prove correct, auctions could generate considerable revenue to ICANN. The interests of accountability and transparency call for ICANN to present a more specific plan for use of these proceeds for consideration by the community well before the new gTLD round launches. *COA (15 May 2011)*.

Proposal for use of auction proceeds. Discussion of the issue of the use of auction funds is still open and subject to resolution before the release of the final guidebook (see footnote from section 4.3 of April 2011 draft applicant guidebook). The comments of A. Doria propose a process by which these funds can be allocated to resolve some of the pending issues involved in fee reduction --to address the GAC concern for inclusiveness and fair access to the application process—for applicants who meet the JAS WG's eligibility criteria. *A. Doria (Module 4, 16 May 2011)*.

Section 1.1.2.10 revision. We expect this section can be used in competing applications (contention sets) to take speculative advantage of intentionally caused delays by delaying the said completion of all aspects of evaluation. The following sentence should therefore be added: "Applicants should be given a limited time of not more than 4 weeks to submit missing parts of their applications." *dotHotel (15 May 2011)*.

Analysis of Comments

The comments regarding the scope of the similarity assessment are well taken. As has been stated in relation to previous public comment periods, the string similarity assessment in the initial evaluation is solely focused on visual similarity. The support from many for that approach is noted, as is the diverging view that aural similarity be considered, an approach that is controversial in principle and very difficult to perform in practice, while such similarity can indeed

be invoked in a subsequent string similarity objection process. The proposed position is to keep the established approach unchanged. One comment suggests that, "Aural and meaning similarity" should not be considered at all. As reinforced by community discussion, possible examination for these types of similarity was included in the policy recommendations of the GNSO that was approved by the Board. The idea is that user confusion should not be likely to occur – no matter what the cause of that confusion. Therefore, absent other policy advice, the current objection model that includes all types of confusion will remain in place, although the similarity assessment during initial evaluation will be limited to visual similarity.

Regarding suggestions that applicants can agree on coexistence for confusingly similar strings, it has repeatedly been clarified in responses to previous public comment periods that a finding of confusing similarity cannot as such be resolved thru mutual agreement by the involved applicants. Such an approach would not make the strings appear less confusingly similar to the internet user, which is the fundamental aspect to consider, especially given the considerable security risks for registrants and end user that such similarities can entail over the whole lifespan of the involved TLDs. A policy basis for agreement provisions and safeguards to eliminate such risks must be developed before such an approach can be considered. This matter has already been addressed in previous public comment analyses and the proposed position is not to change the current approach in the Applicant Guidebook in this regard.

Regarding the noted high similarity scores provided by the algorithm for strings that arguably can coexist, given that they have coexisted on the second level under .com without causing problems, it must be emphasized that the algorithm score is only one input to be considered by the string similarity panel and not authoritative in any way regarding findings of similarity. Community discussions have made it clear that confusion is a human reaction and that consideration by humans is indispensable for truly assessing similarity, which will thus be the task of a panel. It is the intention to refine the algorithm in view of the panel's findings and thereby improve it for future rounds, but the algorithm outcomes will be considered as solely indicative for now. No change in that approach is foreseen for the first round.

For the claim that "linguistic variations" of a string from a single applicant should not be put in a contention set, one has to distinguish between a couple of different cases. If the intended meaning is "variant TLD strings" declared by an applicant as described in the Guidebook (see separate section), thus occurring within a single IDN gTLD application, they will be handled according to those rules and not be put in a contention set based on the applicants declaration of variants, while still being considered as a basis for assessing similarities with other applied-for strings. If the intended meaning is translations/transliterations/transcriptions, the strings would appear in separate applications and be assessed for visual similarity and may indeed be found to be confusingly similar, for example in the case of an ASCII string and a Cyrillic string. Such strings will not be permitted to coexist as gTLDs in the DNS, regardless of whether they are put forward by the same applicant. Future policy development may potentially change this approach, provided sufficient safeguards can be identified, but for the first New gTLD application round no change in this approach is foreseen.

As noted in previous analyses of public comments regarding the threshold for winning in Community Priority Evaluation, community views on the required score diverge, with strong arguments put forward for either 13 or 14 points as the most appropriate value. Regarding the example given in the comment, implying that two groups' opposition would make the applicant lose two points and likely score overall below the threshold, this will be the case if the opposition is duly reasoned and comes from sizeable groups within the addressed community - arguably a sign that the support is undermined. However, as explained in the definitions and guidelines for

criterion 4, the standards are set high for any opposition to be taken into account as relevant in order to prevent that spurious or obstructionist opposition would affect the score. The definitions and guidelines for the criteria are as important as the criteria themselves for the scoring and have been gradually developed in the light of comments like the one provided here. In fact, the same comment on risks with opposition scoring for community applicants was submitted for an earlier AG and prompted in depth consideration and refinement of the guidelines for criterion 4. The proposed position is not to change the wording of the guidelines.

The comment on the rights of a runner-up relates to the text in section 4.4 that "If a winner of the contention resolution procedure has not executed a contract within 90 days of the decision, ICANN has the right to deny that application and extend an offer to the runner-up applicant, if any, to proceed with its application. For example, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time." The reason why this is at ICANN's option only is in order to provide appropriate flexibility for a process that, as experience has shown, may justify extensions of the 90-day period in complex cases. The comment is appreciated as the current text lacks this explanation and clarifying language will be inserted.

Regarding the comments about potential auction proceeds, it has repeatedly been stated by ICANN that those will be kept separate from ICANN's normal budget and used in ways agreed to by the community. To use such proceeds for fee reductions for needy applicants, as suggested by one comment, is indeed an option, provided it meets with community agreement.

The Guidebook (recently revised) states:

The purpose of an auction is to resolve contention in a clear, objective manner. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

The amount of funding resulting from auctions, if any, will not be known until all relevant applications have completed this step. Thus, a detailed mechanism for allocation of these funds is not being created at present. However, a process can be pre-established to enable community consultation in the event that such funds are collected. This

process will include, at a minimum, publication of data on any funds collected, and public comment on any proposed models.

Concerning the comment about applicants causing intentional delays for a full contention set, it must be noted that any delays for any application in a contention set, due to for example extended evaluation or objections, will indeed delay the ultimate resolution of the contention set. Contention resolution cannot take place until every involved application have passed the preceding steps or been eliminated in them. First at that point will the configuration be clear of the final contention set to resolve, as applications rejected in the previous steps may change the configuration in important ways and potentially even eliminate the need for contention resolution. However, the risk that any applicant will cause intentional delays by not providing missing parts of its application is limited as the applicant, after the initial completeness check has identified deficiencies in the application, must complete its application within a required timeframe or face rejection.

GEOGRAPHICAL NAMES

Key Points

- Additional protections for geographical names are available through new GAC Early Warning and GAC Advice procedures.
- Protections for capital city names are available for multiple representations of that name, as described in the Guidebook.
- Regional and continent names identified in specific list will require approval of super-majority of governments for reasons stated.
- Processes exist for release of geographic second-level names that rely on approval of ICANN, GAC or governments. They will be clarified in Guidebook.

Summary of Comments

Protect all geographical names. Non-capital city names should be protected to the same degree as capital city names. All geographical names (regardless of existence in the ISO 3166 list) which the national government specified per the right of the national government should be protected to the same degree as capital city names. These protected names would be listed by each government and pre-registered with ICANN. *Tokyo Metropolitan Government (13 May 2011)*.

Protect variations of capital city names. Variations of capital city names (in any language) should be protected by requesting documentation of support from the relevant governments (e.g., “Tokyo” and “Tokyo-to” both represent the capital city of Japan). *Tokyo Metropolitan Government (13 May 2011)*.

Sufficiency of implementation schedule. Given procedures for government or public authority letters of support, public objection and dispute, as well as the fact that several important items have not yet been mutually agreed upon by ICANN and the GAC, the entire process must allow sufficient implementation time from final approval of the DAG to the beginning of the new gTLD program and deadline of application. It is requested also that ICANN immediately present a new

schedule that includes the timeline of acceptance and evaluation, etc. *Tokyo Metropolitan Government (13 May 2011)*.

IDN gTLDs. Introduction of IDN gTLDs is especially important for the Internet community in Asia. With the introduction of IDN ccTLDs, users increasingly expect IDN gTLDs to be accessible. *DotAsia (Module 2, 3 May 2011)*.

Support for government/public authority procedures. UNINETT Norid is pleased that the post delegation procedure for geographical names now seems to be in place. The wording in both text of the guidebook, 2.2.1.4.3 Documentation Requirements and in the attachment to Module 2—Sample Letter of Government Support (“ICANN will comply with a legally binding order from a court in the jurisdiction of government/public authority”)—will together with the changed wording in the New gTLD Registry Agreement 7.13, make it possible for governments/public authorities to give their support. It is absolutely necessary that this agreement make it clear that ICANN will respect any order from a court of competent jurisdiction. *UNINETT Norid (Module 2, 11 May 2011)*.

DIFO is pleased with the language ICANN added to the text in the Discussion Draft guidebook in 2.2.1.4.3. and finds that it is a compulsory part of the procedures in order to keep trust in ICANN and the multi-stakeholder model. *DIFO (15 May 2011)*.

Jurisdiction. DIFO is still concerned about the jurisdiction of geographical TLDs. The Danish ccTLD .dk is operated under Danish jurisdiction, and DIFO finds it obvious that a TLD relating to a geographical name, e.g. “copenhagen” or “jylland” should be governed by Danish law and not by other jurisdictions. *DIFO (15 May 2011)*.

Regional TLDs.

The fixed arbitrary numeric “cut off” percentile mechanism (Module 2, Section 2.2.1.4.2, Point 4 of the current guidebook) may be inappropriate for regional initiatives and would seem insensitive to diversity. Each region is different and has its own unique circumstances within its technical and Internet community, geo-politically and in other aspects. More important is a process that would allow an applicant of a regional initiative to explain how it would outreach to and continue to engage the respective governments not only before or during the application process but continuing forward post delegation. In addition, regarding what is most important, it may not be about what percentages of countries started or have joined a regional initiative, but whether the initiative has appropriate open doors and enlargement policies, demonstrating a continued commitment to inclusiveness. Demonstrated commitment, through a process such as a GAC early-warning system, is most important to ensure that an applicant proposing a regional initiative is the appropriate candidate for such an undertaking. We believe that the DotAsia initiative experience has shown that an early warning system can work, and that a more collaborative approach between the GAC and the applicant/registry operator can be successful for the community at-large. *DotAsia (Module 2, 3 May 2011)*.

We are supportive of the comments of the DotAsia initiative that: (1) a one size fits all arbitrary percentile for regional TLD initiatives is inappropriate; (2) the new gTLD process should respect the diversity and different cultural, geopolitical and Internet community conditions for each regional initiative; and (3) commitment from the applicant to continue (beyond the application stage) to respond to governments in the region is more important. *B. Burma (Module 2, 5 May 2011); K. Huang (Module 2, 6 May 2011); J. Disini (Module 2, 6 May 2011). H. Hotta (Module 2, 11 May 2011). LIM Choon Sai (Module 2, 12 May 2011). RySG (15 May 2011). A. Saleh*

(Module 2, 16 May 2011). IDN WG-TWNIC (Module 2, 16 May 2011). T. Matsumoto (Module 2, 15 May 2011). InternetNZ (Module 2, 16 May 2011).

Regional TLDs—5-macro regions. It is recognized that the new gTLD program is designed with scalability in mind; however, given that there are only 5 macro-regions (and a very limited number of listed sub-regions), a more accommodating process respecting the vast diversity between each region should not pose a problem. *DotAsia (Module 2, 3 May 2011)*.

Regional TLDs—GAC input. GAC input should be sought for all regional name applications. An early warning system, followed up by the applicant, that provides the applicant, ICANN and GAC with flexibility to more appropriately address the issues unique for each regional initiative will form a much better and more comprehensive process. *DotAsia (Module 2, 3 May 2011)*.

New language offered for Module 2, Section 2.2.1.4.2, Point 4 (in italics). DotAsia offers the following rewrite for ICANN's consideration: “In the case of an application for a string appearing on either of the lists above, *ICANN will consult with the Government Advisory Committee as part of its evaluation process. [delete “documentation of support will be required from at least 60% of”]. The applicant should present documentation demonstrating the outreach to and correspondence with the respective national governments in the region, and there may be no more than one unmitigated written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region. Furthermore, the applicant is required to describe and explain how its governance and operations support continued responsiveness to and cooperation with relevant governments in the region and/or public authorities associated with the continent or the region.*

Where [delete “the 60% rule is applied, and”] there are common regions on both lists, the regional composition contained in the ‘composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings’ takes precedence. *DotAsia (Module 2, 3 May 2011)*.

Government “no objection procedure” –criticism. The 2.2.1.4.2 requirement of document of support from at least 60% of the respective national governments in the region is very difficult to achieve or in some cases irrelevant for the following reasons:

- (1) Governments are inclined not to provide written documents to a private company, especially on a topic they are not very interested in. This means that many of the governments will not send a “no objection” document even if they have no objection.
- (2) Especially for IDN TLDs, many governments will not be very interested and it is unlikely that a “no objection” document will be written by such governments.
- (3) The appropriateness of IDN TLDs cannot be decided by governments other than those who use the characters of the specific IDN TLD (e.g., the Japanese TLD string for .asia will not interest governments other than Japan. Such governments cannot decide the appropriateness of the Japanese TLD string, and they will not write a “no objection” document).

H. Hotta (Module 2, 11 May 2011).

An arbitrary figure of 60% is not practical or feasible for implementation:

- (1) Most government agencies and/or statutory boards need to maintain impartiality and will find it difficult to provide a written statement of support to a private commercial entity in such a situation, even if these government agencies and/or statutory boards in essence do not object to the application.

(2) One region may be home to numerous different languages and cultures, with one country's official language differing from another's. It is unfair and inappropriate to ask for a government to support an application for a language that is not analogous to its own official language.

LIM Choon Sai (Module 2, 12 May 2011).

Country and territory names. UNINETT is pleased that country and territory names are still taken out of the new gTLD program. Even if it is stated that this applies only for *this application round* (page 2-14), we take it for granted that this will apply until the ccNSO Study Group on Country and Territory Names has completed their work. This evaluation was removed from the CCPDP on IDN, as country and territory names include both Latin and non-Latin names.

UNINETT Norid (Module 2, 11 May 2011). DIFO (15 May 2011).

Country codes.

ICANN's proposed prohibition of country codes at the second level is unrealistic and anti-commercial and will be hard to police. It would prohibit a dot brand applicant from registering a country name at the second level for a perfectly logical and legitimate reason (e.g. us.budweiser). As there is no prohibition on the creation of folders (e.g. www.budweiser/uk) this is an artificial restriction that should be lifted. *Valideus (13 May 2011). MARQUES/ECTA (15 May 2011).*

Evaluation Question 22 implies a registry operator can formulate a plan to release geographic names, but Specification 5, Section 2 of the Registry Agreement states that a registry operator can release two-character country codes but not geographic names. AusRegistry requests that Specification 5 be modified to match language in Question 22 and therefore allow the registration of geographic names under the TLD. *AusRegistry (16 May 2011).*

Use of Geographic Names at Second and Other Levels--Dot Brand Applicants. The importance of protecting geographic names is understandable but we ask ICANN to recognize the special nature of potential dot brand applicants and either relieve them of this requirement (question 22, DAG) or provide (or grant permission to independently develop and employ) a universal solution which will allow dot brand applicants to release the reserved geographic names (as well as two-label country codes) for their exclusive internal use all at once. GAC could implement a universal solution whereby a centrally maintained list of countries and ccTLD operators who have agreed to their country names/country codes being registered under dot brand TLDs (without the need for special procedures) is made available. As a result, any Registry who wishes to use such names will simply enter into an agreement with GAC or another relevant body, rather than having to consult with over 200 different governments individually. If introducing such a mechanism is not viable, dot brand applicants would benefit greatly from being exempt from the requirement to create reservation and release mechanisms for geographic names. Alternatively, GAC could provide a list of contact points for the government representatives associated with each second level string. Moreover, governments could be obliged to respond to a request from the registry within a set period of time. Internet users will benefit greatly from being able to find and access their preferred brands according to the geographic locations. This may be delayed unnecessarily if the release procedures for geographic names are overcomplicated. *Brights Consulting (14 May 2011).*

Subject to approval from relevant national governments, a single-registrant TLD should be allowed to register both two-letter abbreviations and full country and regional names at the second level (add this language to Section 2.6 "and except for single-registrant TLDs with respect to geographical names at the second level"). Single-registrant TLDs will reasonably

want to create second level domains for their operating units or chapters in each country or region (e.g. Canada.canon). *BC* (15 May 2011).

Brand TLDs may require the use of e.g. "jp" or "Japan" at the second level. According to Specification 5 of the draft Agreement, registries must first initially reserve names on the ISO 3166-1 list. Though it is specified that the applicant may propose a release of these reservations, the process for releasing these names should be outlined in the final applicant guidebook. *UrbanBrain* (16 May 2011).

Specification 5.5 notes that country and territory names contained in the ISO 3166 list shall be reserved at the second level and specifically points toward only the short form English equivalent of the country or territory name. There is no mention of alpha-3 names. Given the purpose behind the reservation of country and territory names, this leaves some with the question if second level names such as "JPN.TLD" can be registered. ICANN should clarify this in the upcoming version of the guidebook. *UrbanBrain* (16 May 2011).

Analysis of Comments

Protection of capital and other city names

ICANN takes the interests of governments and public authorities in protection of geographic names seriously. The issues regarding which geographical names should be protected have been extensively discussed. To provide adequate protection to capital city names, the Guidebook indicates that protection extends to "a representation, in any language," of a capital city name. Governments may use the GAC Early Warning or objection processes to identify a capital city name if it has not been identified by the applicant.

Non-capital city names have also been discussed extensively. Briefly, there are millions of city names, many of which are also generic words in which entities other than governments have legitimate interests. Even the definition of what constitutes a city may be uncertain in many circumstances. City names present challenges because city names may also be generic terms or brand names and, in many cases, city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process.

An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name, will require support or non-objection from the relevant government or public authority.

Applicants are required to provide a description/purpose of what the TLD will be used for, and to adhere to the terms and conditions of submitting an application including confirming that all statements and representations contained in the application are true and accurate. The Registry Agreement has the same clause.

While, a workable method for clear identification and reservation of city names cannot be developed, other protections have been put in place and there are notable recent improvements to those protections. In consultations with its Governmental Advisory Committee (GAC), ICANN has developed GAC Early Warning and GAC Advice processes. Through these, governments can identify sensitive TLD applications and provide advice directly to the applicant and the ICANN Board that those applications be denied. Details for these new processes were first in

the April 2011 Discussion Draft and have been updated in the newly posted version of the Guidebook.

Timelines for government action

ICANN also acknowledges the comments on suggestions regarding the publication of timelines – ensuring sufficient time exists for objections, expressions of support and other procedures. ICANN will develop detail in its timelines to demonstrate how these processes work together.

Requirement for approval of continent and regional names

ICANN understands the objections made to a “one size fits all” approach for government approval of continent and regional names. Several models have been explored before and after the publication of the requirement that TLDs for continent names listed in independent, official lists be approved by 60% of the governments in that region. As has been described in earlier analysis, a conservative approach has been taken in providing a methodology to delegate continent names.

ICANN agrees that the new processes for GAC Early Warning and GAC Advice provide new avenues for governments to directly object to sensitive strings and geographical names in particular. However, GAC advice and recent discussions have not indicated that release of continent or regional names should be liberalized as a result. The Guidebook recommends that these types of geographic names be released if 60% of the countries in that region approve the delegation to the applicant and no more than one government objects. The commenters seek to eliminate the approval criteria, in favor of demonstrated cooperation with governments and no more than one government objection. Some comments state that many or most governments do not care about this issue and so approval is difficult to achieve. There are very few regional names and their delegation should be handled conservatively. There are many other names through which community members can find representation in the DNS other than these few names on official lists.

At the Mexico City meeting, the Board asked staff to provide greater specificity concerning government approval requirements for region and continent names. The definition developed as a result provides applicants with more clarity about what qualifies as a regional or sub-regional name and the degree of approval required. The requirement for 60% approval means that a slightly greater than a majority of governments in each area affirmatively approve the application and the applied for string. In this case, mere non-objection does not apply. The reasonableness of the 60% figure was checking by calculating at the number of countries / territories required for approval within each of the UN defined regions. The requirement that there be more than one written objection means that no single government has a veto power. The mechanism adopted is aligned with UN practices (which in most cases is by a simple majority in committees of the General Assembly: http://www.un.org/ga/60/ga_background.html).

While the 60% requirement is a constant for all such regions, when tested, it appears to make sense for regions with few and with many countries.

Second-Level Geographic Name Registration

Well-intentioned, well-thought out and well-taken comments see clarification on which geographic names are reserved at the second-level and more specificity about the procedures for releasing them.

As the Guidebook indicates, both two-character country-code names and country names that are specifically indicated on certain lists are reserved on the second level. Additionally, as indicated in the Guidebook, those names can be released through a process. One suggested process in the Guidebook is: "For reference, applicants may draw on existing methodology developed for the reservation and release of country names in the .INFO top-level domain," referencing http://gac.icann.org/system/files/dotinfocircular_0.pdf.

Applicants can seek to release country-name labels (two-letter codes and reserved country names) either in their application or after delegation through the process defined by the agreement. Additionally, as indicated, processes approved by governments or the GAC may be employed for the release of country names at the second level.

Comments indicate that the language in the Guidebook and in the agreement are inconsistent. The language will be clarified to clearly indicate the availability of these processes for release of second-level, reserved country names and two-letter codes.

REGISTRY AGREEMENT

General

Key Points

- ICANN expects all applicants to enter into the agreement substantially as written, and it is not possible at this stage to anticipate what changes from the agreement might be acceptable and which would require Board review – it will depend on the unique circumstances of each agreement.

Summary of Comments

Changes to Agreement. The guidebook states that additional Board review of the registry agreement will not be necessary if there have been no "material changes to the base agreement." The RySG asks that ICANN clarify what it considers "material changes to the base agreement," and generally under what circumstances ICANN plans to negotiate changes to the base agreement. The RySG thinks that the imposition of new obligations or risks upon registry operators, or reduced indemnification for registry operators, could constitute "material changes." RySG (15 May 2011).

Analysis of Comments

As indicated in the guidebook, ICANN expects all applicants to enter into the agreement substantially as written. Applicants may attempt to negotiate exceptions, but that could delay delegation of the TLD. Whether a particular requested change will require Board review will depend on the unique circumstances of each agreement and it is not possible to anticipate now exactly which changes or categories of changes would be considered to be material and thus

require Board review. Further work might be done on developing ICANN processes and guidelines regarding this issue between now and when new gTLDs begin to be delegated under the program.

Vertical Integration (VI)

Key Points

- The Applicant Guidebook applies to registry operations only. Entities that engage in both registry and registrar operations will also be governed by the agreements and mechanisms applicable to both registry operators and registrars.
- Registry Operator is required to give notice to ICANN in the event a registry service subcontractor or other affiliate becomes a registrar or registrar reseller and should structure its third party contracts to account for this.

Summary of Comments

Update fully to account for VI Decision. ICANN needs to go back and check that the draft applicant guidebook and all mechanisms therein fully account for vertical integration issues. E.g., Specification 7 of the registry agreement refers to new registries complying with the PDDRP, RRDRP, and URS, but has no reference to registries complying with UDRP decisions (which registrars would have to comply with). Moreover the PDDRP refers only to conduct by the registry. The ICANN Board's decision to eliminate vertical separation is likely also to have important implications and consequences for existing consensus policies. *INTA (14 May 2011)*.

Use of Subcontractors. In Section 2.9(b), the current language states that if a registry subcontracts provisioning of a registry service to an ICANN-accredited registrar, it has to disclose such arrangement to ICANN. What if the registry's subcontractor is not an ICANN-accredited registrar initially, but obtains registrar accreditation at some later point? Or starts operating as a reseller? Or its own affiliate does so? Is the registry supposed to somehow find that out and inform ICANN? This may be not an insignificant obligation; especially given the definition of Affiliate is quite broad. The RySG recommends further clarification of this issue, specifically as it relates to the actions of third parties after the fact. *RySG (15 May 2011)*.

Analysis of Comments

The applicant guidebook is designed to apply to new registry operators and is limited in scope to the operation of new registries. To the extent that a registry operator also engages in registrar operations, those operations will be governed by a registrar accreditation agreement between the registrar and ICANN. The registrar would thus be subject to the UDRP and all other mechanisms binding on accredited registrars.

To the extent that a subcontractor or affiliate of Registry Operator becomes an accredited registrar or registrar reseller, Registry Operator is required to notify ICANN. Registry Operator should ensure that its agreement providing for subcontracted services requires the subcontractor to notify Registry Operator if the subcontractor or one of its affiliates becomes an accredited registrar or registrar reseller. Registry Operator will then be in a position to notify ICANN of such arrangement.

Pricing

Key Points

- The definition of “Qualified Marketing Programs” will be further refined in the new draft Registry Agreement based on community comment.

Summary of Comments

Renewal pricing. Microsoft supports the revisions to Section 2.10(c) to prohibit abusive and/or discriminatory renewal pricing practices. *Microsoft (15 May 2011)*.

The revised clause in Section 2.10 in AGv6 is an improvement but there is still ambiguity about discounted renewal pricing. This ambiguity could be removed if ICANN changed the exception (“Qualified Marketing Program”) to encompass discounts or incentives that formed part of a promotional program authorized by the registry agreement and deleted the new definition of “Qualified Marketing Programs.” (See text of RySG comments at pp. 10-11 for specific proposed language to revise Section 2.10 to address RySG’s concerns.) *RySG (15 May 2011)*.

The term “Qualified Marketing Programs” does not have the same scope as allowable promotional programs elsewhere under the agreement or in the Code of Conduct. Thus, there may be uncertainty in whether a registry could offer discounted renewal pricing, even when the renewal price would correspond to the price of the original registration, where that registration was discounted. (See text of RySG comments at pp. 10-11 for specific proposed language to revise Section 2.10 to address RySG’s concerns.) *RySG (15 May 2011)*.

Analysis of Comments

The draft provision regarding “Qualified Marketing Programs” is designed to allow Registry Operator to offer short-term targeted marketing programs that benefit registrants. No other provision in the Registry Agreement or the specifications to the Registry Agreement specifically references marketing programs. The new draft Registry Agreement contains revisions in response to community comments further refining the definition of Qualified Marketing Programs in response to concerns raised in the comments. The exact revisions suggested in the comments could be broadly construed to allow for discriminatory pricing programs and were not adopted. The addition to the end of this provision suggested in the comments is unclear and could lead to confusion. Registry Operator may offer renewal discount pricing to any registrar regardless of whether or not the registration in question was originally registered as part of a discount program so long as Registry Operator complies with the notice provisions of Section 2.10(b) and the uniform pricing provisions (which include criteria for discount programs) in Section 2.10(c).

Use of Registrars

Key Points

- There is no requirement to submit the registry’s initial Registry-Registrar Agreement to ICANN for approval.

- Registry Operator must directly contract with registrars through the Registry-Registrar Agreement for the TLD.
- In accordance with prior GNSO guidance, registry operators may not discriminate against registrars, regardless of the type of TLD.

Summary of Comments

Process for RRA (Section 2.9). What will be the process and timing for approving the initial form of the registry-registrar agreement (RRA) for each registry, and what criteria will ICANN use in approving the initial form of registry-registrar agreement and any revision thereof? The RySG has two areas of concern. One: that approval of new TLD RRAs may get bogged down and inhibit launches. Two: that ICANN may introduce new obligations on registries and/or registrars via the RRA approval process. *RySG (15 May 2011)*.

Governmental entities—Agent for Registry-Registrar Agreements (RRAs). The assumption in Module 5 at 5-12 and 5-13 that a registry operator will enter into direct contracts with registrars raises concern for governmental entities that operate under a wide range of constraints in their contracting processes. For example, given the contracting processes of the City of New York, it is unrealistic for the City to enter directly into contracts with ICANN-approved registrars, particularly since registrars will not provide goods or services directly to the City. The City of New York anticipated having its selected registry operator vendor (who will be named in any TLD application and be subject to review and approval of ICANN) directly enter into registrar agreements. The City of New York suggests that permitting an applicant to act through a responsible agent in entering into RRAs that are compliant with ICANN policies ought to be allowed in compliance with Module 5 and the gTLD Registry Agreement. Failure to take into account the strictures of government contracting in allowing flexibility in this regard could substantially limit the applicant pool for government-sponsored TLDs and the ultimate success of any TLDs delegated to applicants that include a governmental entity. *City of New York (13 May 2011)*.

Single-registrant TLD discrimination exception. The base agreement should be amended to include the same exception for single-registrant TLDs that is contained in Item 6 of the Code of Conduct. The registry agreement should not unduly restrict single-registrant TLDs from using only a wholly-owned or closely affiliated registrar to register and manage names that it controls. *BC (15 May 2011)*.

Analysis of Comments

The draft Registry Agreement does not require Registry Operator to have its Registry-Registrar Agreements approved by ICANN. Registry Operator may negotiate those agreements, subject to any obligations of Registry Operator set forth in the Registry Agreement or ICANN policies, without ICANN involvement. Once those agreements are in place, Registry Operator is required to obtain ICANN's consent for any amendments to those agreements.

Successful applicants that subcontract operation of a registry must be a party to the registry's Registry-Registrar Agreement for the TLD. The subcontractor may not enter into that agreement directly with registrars. However, the applicant/Registry Operator is required to

ensure that its subcontractor complies with the obligations of Registry Operator set forth in the Registry Agreement as well.

Per Principle 19 set forth in the GNSO's Final Report – Introduction of New Generic Top-Level Domains, "Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars." The GNSO report did not provide for different treatment for single-registrant or ".brand" TLDs. It would be inappropriate to include a provision in the registry agreement for new TLDs that is contrary to GNSO guidance on the new gTLD program. Contrary to the assertions in certain community comments, the obligations and restrictions of Section 2.9 are intended to apply to all new TLDs, regardless of type. However, registrants can choose any registrar that meets the registry's specifications for accreditation. Registrants are free to register names in the TLD with one registrar.

Other Registry Operator Covenants

Key Points

- In response to comments that the obligation to investigate and respond to all reports of illegal conduct in the TLD may be onerous, the obligation has been revised in the new draft Registry Agreement to apply only to reports from governments or governmental agencies.
- The obligation to provide registry data for use in economic studies has been clarified in the new draft Registry Agreement to exclude analyses and work product of Registry Operator.
- All data transmissions of registry data to ICANN or other third parties pursuant to the Registry Agreement must be done in compliance with privacy laws.

Summary of Comments

Illegal conduct reports (Section 2.8). Microsoft supports the new requirement in section 2.8 of the new gTLD Registry Agreement that requires the Registry Operator to take reasonable steps to investigate and respond to reports of illegal conduct in the TLD. However, ICANN should provide some illustration of what constitutes "reasonable steps." Lack of clarity of this requirement will undermine its effectiveness. *Microsoft (15 May 2011)*.

The new language creates "an undefined obligation to 'investigate and respond to any reports . . . of illegal conduct in connection with the use of the TLD.' The language as drafted can be interpreted to require a Registry Operator to investigate and take some form of affirmative action in response to "any" complaint raised, either from a government agency or a private party. Additionally, what constitutes "illegal conduct" can vary from country to country and may include activities such as dissenting speech that would be legally protected forms of conduct in other countries. Registry Operators should not be mandated to comply with or take some form of affirmative action in response to any such request, particularly where such requests are in contravention of the Registry Operator's internal policies or the laws of the country in which the Registry Operator is located. Registry Operators should not be required to respond in any fashion to an inquiry from a private party. The use of the term "governmental and quasi-governmental agencies" is overbroad. The RySG suggests revising the provision as provided in its comments. *RySG (15 May 2011)*.

The scope of the obligation to investigate and respond ought to be better defined as well as the associated notion of illegal conduct. *AFNIC (15 May 2011)*.

Cooperation with Economic Studies (Section 2.15). Microsoft supports the new section 2.15 requiring registry operators to cooperate with any ICANN initiated or commissioned economic study of the impact or functioning of new gTLDs on the Internet. *Microsoft (15 May 2011)*.

As drafted, this provision would grant ICANN unfettered access to confidential and proprietary information, including internal reports and analyses, maintained by the Registry Operator. Therefore, the data that is required to be provided should be limited to raw operational data maintained by the Registry Operator, which should be sufficient for any economic studies being performed. Additionally, the provision should require ICANN to seek written consent from a Registry Operator before it provides, as a result of legal process (i.e., subpoena, civil discovery request, etc.) or otherwise, any data collected from a Registry Operator to a private party or a government agency. *RySG (15 May 2011)*.

Regarding 2.15 and Specification 4, the scope of the data to be requested of the registry operator, including “confidential data,” should be better defined. Provisions on the use, storage, and destruction of such data by ICANN or its designee should also be discussed. Under French law, entities based in France which seek to transfer personal data to a non-EU-based entity must comply with requirements that strictly regulate such transfer and require adequate protection of this data. As a consequence, under French law this provision of the registry agreement may not be sufficient to ensure full disclosure of data to ICANN. Additional guarantees and contractual arrangements may be required. *AFNIC (15 May 2011)*.

Analysis of Comments

The requirement for Registry Operator to take reasonable steps to investigate and respond to reports of illegal conduct was inserted in response to the GAC Scorecard. This provision has been revised in the new draft Registry Agreement in response to community comment in order to limit its scope. For example, Registry Operator will only be required to take reasonable steps with respect to reports from governments and governmental agencies. The provision is designed to require cooperation with legitimate government concerns regarding conduct within the TLD. Registry Operator is required to take reasonable steps to investigate and respond to reports regarding such conduct but the appropriate actions will be dependent on the facts and circumstances of each report. As such, it would not be appropriate to provide for detailed required actions or to define what may be considered illegal conduct. ICANN acknowledges that certain non-governmental organizations play an important role in combating malicious conduct in the DNS, and those organizations could work with ICANN and law enforcement to explore ways to facilitate cooperation between such organizations and governments in order to ensure that such reports receive all due attention. The provision has been further revised to clarify that Registry Operator will not be required to take any action in contravention of applicable law.

The obligation of Registry Operator to provide data for economic studies has been further revised in response to community comment to clarify that disclosure of internal analyses and work product of Registry Operator is not required. ICANN’s obligation under this provision to aggregate and make anonymous such information is intended to function as a documented assurance of this treatment. A new provision has been added to the draft Registry Agreement obligating Registry Operator to notify all registrars of the intended uses of personal data that is

transferred to ICANN by Registry Operator pursuant to the Registry Agreement and to require registrars to obtain the consent of registrants to such uses.

ICANN Covenants

Key Points

- ICANN will not be responsible for possible censorship of some TLDs by governments or other entities.

Summary of Comments

ICANN Obligations with respect to the Authoritative Root Database. The new proviso is not appropriate as it would allow ICANN to disclaim all responsibility of blocking or restricting access to a TLD regardless of whether or not they may have contributed to the event or could have taken steps to prevent such event (including where it failed to exercise or enforce a contractual right). We recommend that the new language be deleted. *RySG (15 May 2011)*.

Analysis of Comments

ICANN will not and cannot directly block access to a TLD by itself, and ICANN is not party to contracts whereby it can prevent government entities, ISPs or other entities from blocking or restricting access to certain TLDs. In the event that such blocking or restriction takes place, it would not be appropriate to hold ICANN liable, and Registry Operator should seek redress directly against the entity responsible for the blocking.

Renewal

Key Points

- Presumptive renewal provisions benefit the Internet community.

Summary of Comments

Presumption of renewal (Article 4). The presumption of renewal is a policy item on which the community has not yet reached agreement. This issue should be discussed by the community and should not be made policy by being enshrined in a contract. At the very least a clause should be added that, should a Policy Development Process ('PDP') be held on the topic of presumption of renewal, the consensus view of such a PDP would be applicable to future considerations of renewal for the contract. *A. Doria (15 May 2011)*.

Analysis of Comments

Presumptive renewal provisions are included in all other current ICANN gTLD registry agreements. These renewal provisions encourage long-term investment in robust gTLD operations, and this has benefitted the community in the form of reliable operation of the registry infrastructure. Including a provision stating that ICANN could unilaterally re-write the renewal provision would discourage investment in top-level domains, since any money invested in marketing and operating the TLD might end up "wasted" if ICANN were to take away the TLD

and hand it over to another operator. Specification 1 to the Registry Agreement specifically excepts registry agreement renewal modifications from the category of matters that can be modified by Consensus Policies, which is also consistent with ICANN's current gTLD registry agreements.

Termination

Key Points

- Previous revisions to the termination provisions regarding bankruptcy related actions in response to community comment have provided adequate flexibility.

Summary of Comments

Termination by ICANN based on Bankruptcy Related Actions. Although this timing is better than the original 30 days, the new version continues the exception for proceedings that are not dismissed in 60 days. An extension of this period to 120 days might make it more meaningful. In addition, adding the term "imminent" before "material" would be helpful. RySG (15 May 2011).

Termination by ICANN based on Certain Criminal Acts. Microsoft supports the additions to section 4.3(f) that allow ICANN to terminate the new gTLD Registry Agreement if the registry operator does not terminate employees or board members convicted of certain crimes, found by a court to have engaged in fraud or violated fiduciary duty, and substantive equivalents thereto. Microsoft (15 May 2011)

Analysis of Comments

The provision relating to ICANN's termination right in connection with certain bankruptcy related actions was revised in the April 2011 discussion draft Registry Agreement to give Registry Operator additional time to secure dismissals of certain actions. This change was made in connection with community comments and provides adequate flexibility. Any material threat to the viability of the registry for the TLD in this context, regardless of whether or not it could be argued to be imminent, will trigger this provision.

Transition Following Termination

Key Points

- The criteria that must be met and demonstrated to ICANN in order for Registry Operator to have a consent right in the event of a re-delegation of the TLD has been conformed to similar criteria provided in the Code of Conduct.
- Some potential TLDs meeting the specified criteria might not be associated with established or widely recognized trademarks. Future delegation of certain of these TLDs without the consent of the previous registry operator might be appropriate, but any future delegation of a previous TLD would be subject to "Legal Rights" objections.

Summary of Comments

Redelegation of dot brand gTLDs. ICANN still has not satisfactorily addressed concerns raised by numerous commenters about its plan to reserve to itself the sole discretion to redelegate a dot brand TLD if the trademark owner registry operator chooses to no longer operate the TLD. The revisions to section 4.5 are unclear and insufficient—are “sub-domains” second-level domains? ICANN must not transition a dot brand TLD to a successor registry without the written consent of the registry operator, which can be withheld, conditioned, or delayed. The potential for consumer confusion and fraud if a dot brand TLD is operated by entity not affiliated with or authorized by the brand owner is both tremendous and troubling. *Microsoft (15 May 2011)*.

INTA appreciates the recent changes to Section 4.5 of the Registry Agreement but believes that further clarification is needed to specify the circumstances under which a brand owner can reasonably withhold consent to redelegate a TLD reflecting its brand name. In addition, the exception should not be limited to registries where the domains are registered to the registry operator or its affiliates but should include where registrants are licensees of the pre-existing trademark incorporated in the dot brand top-level string. Many dot brand operators such as franchisors may wish that domains for which independent licensees are responsible be registered to the licensee. These provisions should apply to all uses of dot brand registries. If ICANN does not address these issues, the potential loss of control over the mark that could result from redelegation of a dot brand registry over the brand owner’s objection could present a fundamental obstacle to brand owners applying to run new gTLD registries. *INTA (14 May 2011)*.

Section 4.5 helps to remove one barrier to companies considering dot brand applications—the risk that the company will lose control of the TLD string corresponding to its brand or company name if it chooses to discontinue operation of the TLD. *COA (15 May 2011)*.

Single-registrant TLD Definition. The exception in Section 4.5 should reference a common definition for single-registrant TLD instead of defining it separately (i.e., “Provided however, that for Single-registrant TLDs, ICANN may not transition operation of the TLD...”). In circumstances where ICANN transitions a single-registrant TLD to a new operator, IP rights of the original operator should not be conveyed to the new operator or to ICANN, as transferring registry data may reveal trade secrets to a third party, including customer lists. *BC (15 May 2011)*.

The following definition should be added to the guidebook and registry agreement: “Single registrant TLD: a TLD where the Registry Operator is the registrant of record for all domain names in the TLD.” *BC (15 May 2011)*.

Analysis of Comments

The revisions to Section 4.5 in the April 2011 discussion draft Registry Agreement were intended to respond to multiple community comments regarding the ability of ICANN to re-delegate certain TLDs. The criteria that must be met (and demonstrated to ICANN) in order for Registry Operator to have a consent right over re-delegation in the event of a termination or expiration of the Registry Agreement has been conformed to the related criteria in the Code of Conduct located in Specification 9 to the new draft Registry Agreement (which has been revised in response to community comments). However, because this criteria (as well as the significantly broader criteria suggested in the community comments) could result in TLDs meeting the criteria that have a TLD string that is not an established or widely recognized trademark, the provision has been revised to clarify that such TLDs will not be transitioned upon

expiration or termination of the Registry Agreement without Registry Operator Consent, but the TLD strings associated with such TLDs could be available for future delegation, subject to established “Legal Rights” objections available at the time of such future delegation. This approach will allow both trademark and non-trademark based TLDs that fall within the specified criteria, while providing for a mechanism for trademark-based TLDs to prevent future delegation of an abandoned TLD if such delegation would infringe legal rights as recognized under “Legal Rights” objection processes.

The criteria in this provision and in the Code of Conduct is intended to describe TLDs in which the Registry Operator maintains use of all registrations in the TLD for itself or its affiliates. Expanding the criteria to cover TLDs that permit use of registrations by unaffiliated third parties could result in the operation of TLDs that avoid the Code of Conduct obligations of other TLDs while utilizing a similar business model.

Dispute Resolution

Key Points

- Community comments have not articulated what potential conflict of interest is created by the use of the ICC for more than one area of dispute resolution.

Summary of Comments

Arbitration forum. The ICC International Court of Arbitration should not be the exclusive forum for arbitration of disputes arising under the Registry Agreement; the ICC will be under contract with ICANN as the dispute resolution provider for the Limited Public Interest and Community objection procedures, thus creating a potential conflict. *IPC (15 May 2011)*.

Analysis of Comments

The ICC International Court of Arbitration provides a set of rules and procedures for the adjudication of disputes. Community comments have not articulated what potential conflict of interest is created by the use of those rules and procedures for more than one area of dispute resolution. Individual arbitrators will be subject to conflict of interest rules and properly excluded if they have a preexisting relationship with a party to the arbitration.

Change in Control of Registry Operator and Assignment

Key Points

- The current provision regarding assignment and subcontracting gives ICANN the ability to evaluate any assignee or successor to Registry Operator based on the then-current criteria.
- An initial time-based complete bar on such transactions is unnecessary.
- Assignees of the Registry Agreement will be subject to all obligations of Registry Operator.

Summary of Comments

Assignment Restrictions. The possibility of an active secondary market in gTLDs raises significant concerns. ICANN should take action to minimize the likelihood that such a secondary market will come to fruition and to the extent it does that participants do not successfully evade the examination and objection processes. Four measures are immediately identifiable:

- (1) ICANN should revise section 7.5 of the Registry Agreement to prohibit assignments within a defined period (12-18 months) after delegation, which would decrease “gTLD flipping”;
- (2) ICANN should ensure that post-delegation dispute resolution procedures apply to assignees of the Registry Agreement, which would mitigate considerably the risk that the gTLD assignee itself or its intended use of the gTLD would essentially elude the objections that could have been levied had the gTLD assignee been the original applicant.
- (3) ICANN should develop “Assignment Guidelines” that set forth the conditions and criteria that a proposed gTLD Assignee must satisfy to obtain ICANN’s approval of the proposed assignment. These conditions and criteria at a minimum must be the equivalent of the full range of evaluation criteria for new gTLD applicants.
- (4) The guidelines comparable if not identical to the Assignment Guidelines should be developed to ensure that a change in control is not used as a mechanism to evade substantive evaluation of the new controlling entity or person. *Microsoft (15 May 2011).*

Analysis of Comments

Section 7.5 of the Registry Agreement provides that Registry Operator must give certain notices and obtain ICANN’s written consent in connection with an assignment or change of control transaction. Further, ICANN shall be deemed to have reasonably withheld its consent to any such transaction in the event that ICANN reasonably determines that the person or entity acquiring control of Registry Operator or entering into such subcontracting arrangement (or the ultimate parent entity of such acquiring or subcontracting entity) does not meet the ICANN-adopted registry operator criteria or qualifications then in effect. Currently, such criteria and qualifications would include the evaluation criteria for new gTLD applicants. These criteria and qualifications may be revised from time to time and ICANN must maintain flexibility regarding the criteria it will apply to any specific transaction based on the facts and circumstances (including community objections) relating to such transaction. There is no compelling reason, given ICANN’s ability to evaluate and approve assignment transactions, to impose an initial time-based complete bar on such transactions.

If ICANN consents to an assignment of the Registry Agreement, all obligations of Registry Operator will be binding on the assignee, including all post-delegation dispute mechanisms and other rights protection mechanisms.

Whois-Specification 4

Key Points

- ICANN is committed to enforcing the thick Whois requirements of the new gTLD program.

- Whois “verification” is addressed by the Registrar Accreditation Agreement, and any changes should be discussed through the GNSO.
- Searchable Whois will continue to be an optional service.
- Handling of Whois data must be done in compliance with privacy laws.

Summary of Comments

Compliance improvement. While we recognize that ICANN is working toward improving Whois, the system, particularly enforcement of the agreements, is not yet adequate in the current DNS. ICANN needs to clearly address how it plans to provide adequate compliance and enforcement as enforcement will become even more difficult with the introduction of new gTLDs. *News Corporation (13 May 2011)*.

Purpose of TLD or its business model. The defined Whois output described in Specification 4 of the Registry Agreement does not account for the purpose of the TLD or its business model. ICANN should consider giving applicants the ability to propose relevant Whois output. *AusRegistry (16 May 2011)*.

Whois accuracy--mandate verification and monitoring.

Although Time Warner is pleased that ICANN has recognized the importance of accurate Whois by offering new gTLD applicants an extra point in the evaluation process if they verify and monitor Whois, we see no reason why this should not be made mandatory. Such a requirement, if vigorously enforced, could help prevent a wide range of abuses. *Time Warner (14 May 2011)*.

Mechanisms to promote Whois quality should be incorporated into the minimum requirements for the “abuse prevention and mitigation” criterion so that applicants failing to commit to them will receive a failing score of zero on this criterion. *COA (15 May 2011); SIIA (15 May 2011); IPC (15 May 2011)*.

In addition to specifying and mandating accurate Whois efforts as part of the required minimum requirements, ICANN should, after the first round of applications is received and reviewed, revise the minimum requirements for any abuse policies and procedures to incorporate best practices contained in the various applications. Otherwise, different registries may employ drastically different standards, which will lead to greater abuses for the gTLDs with the laxest standards. *NCTA (Module 2, 13 May 2011)*.

ICANN has taken a step backwards by not requiring all the new gTLDs in this round to take on all of the expanded Whois data quality and accessibility obligations agreed to by three of the gTLDs in the previous round (.asia, .mobi, .post). These eminently reasonable and practical requirements represent the current best practice for gTLD registry agreements, and ICANN has never adequately explained why all new gTLD registries should not be required to meet them. *COA (15 May 2011); SIIA (15 May 2011); IPC (15 May 2011)*.

Searchable Whois should be mandatory. Awarding of an additional point to applicants that will provide it is positive but insufficient. Access to searchable Whois is extremely valuable to entities that combat online fraud, abuse and infringement, and the search specifications in Specification 4 will be very useful in combating online fraud and abuse. It is regrettable that ICANN allowed a committee of its Board to make the arbitrary determination that searchable Whois would not be required. *Microsoft (15 May 2011)*.

Standardize Searchable Whois. Searchable Whois, described in Evaluation Criteria Question 26 and in Specification 4 of the Registry Agreement, requires further technical definition. The way it is currently described will create multiple, potentially incompatible implementations which will give end users inconsistent results and leave them confused. Searchable Whois should be standardized prior to opening the Application Period. If Searchable Whois is not standardized prior to the Application Period opening, then the “exceed requirements” for Evaluation Criteria Question 26 should be removed. *AusRegistry (16 May 2011)*.

The Whois improvements in the April 2011 discussion draft do not go far enough. Also, regarding evaluation criterion 26, ICANN has never explained why a fully searchable Whois presents greater risks of abuse than the current model offered by registrars in the thin Whois environment. Under ICANN’s stewardship, Whois service has been allowed to degrade to its current feature-poor level. *COA (15 May 2011)*.

Zone File Access Requests. The RySG recommends that ICANN re-insert language requiring the submission of IP address and host name from all parties requesting zone file access. This information is critical to enable the registry operator to prevent abuse. *RySG (15 May 2011)*.

Clarification. The information required under the “Bulk Registration Data Access” provision in Specification 4, Section 3 of the Registry Agreement does not match the minimum information required in the Data Escrow Specification 2 of the Registry Agreement and is in fact a subset of such data. It would be helpful to understand how providing Bulk Registration Data Access to ICANN ensures operational stability of Registry Services, or facilitates compliance checks on accredited registrars as requiring a subset of the Data Escrow data requires the Registry Operator to develop and support what is seemingly an additional unnecessary process. *AusRegistry (16 May 2011)*.

National privacy laws. Sections 1.4, 1.5 and 1.6 of Specification 4 require the Registry Operator to provide specific elements of output for the Registration Data Directory Service. However, in some countries publication of some elements listed in these sections violates national privacy laws. AusRegistry suggests a provision be added which requires the provision of Whois as stated in Specification 4, unless the Registry Operator’s national privacy laws prohibit some elements from being displayed. If those laws do so prohibit display, the Registry Operator must document this in the Application to ICANN and describe what elements of Whois can be provided under national privacy laws. For elements which will remain undisclosed as part of the Registry Operator’s legal obligations, key/value pairs must still be present and the value of the undisclosed field must still comply with the format requirements in section 1.7 of Specification 4. *AusRegistry (16 May 2011)*.

Analysis of Comments

ICANN is committed to enforcing the thick Whois requirements of the new gTLD program. Accurate and high-quality Whois data will be an important component of new gTLDs and applicants offering robust Whois services will receive extra credit in their applications for such efforts. However, the benefits of additional mandated Whois requirements must be weighed against countervailing technical and privacy concerns, the increased costs of providing such services and ICANN’s enforcement resources. After considering community comments, the Whois requirements in the new draft Registry Agreement are considered to be appropriate minimum obligations for each registry. Registry Operator may require additional Whois outputs consistent with its business model, subject to applicable laws. Any departures from these

baseline/status quo Whois requirements should be discussed in ICANN's GNSO. "Maintenance of and access to accurate and up-to-date information concerning domain name registrations" is specified as being within the "picket fence" of topics on which ICANN may establish new Consensus Policies.

Whois "verification" is the subject of Registrar Accreditation Agreement section 3.7.8, which provides that registrars will comply with any Consensus Policies established by ICANN "requiring reasonable and commercially practicable (a) verification, at the time of registration, of contact information associated with a Registered Name sponsored by Registrar or (b) periodic re-verification of such information." Any new Whois verification requirements for gTLDs should be discussed and approved through the GNSO.

The issue of searchable Whois was referred by ICANN to the ICANN Board Data Consumer Protection Working Group <<http://www.icann.org/en/committees/consumer-protection/>>. The DCP-WG's final report noted "The DCP-WG advises the Board that making searchable Whois mandatory is a policy matter that would have to be referred to the GNSO, but we accept it being optional as proposed in current version of the Applicant Guidebook. We flag that there are consumer and data protection issues that could be raised through a searchable Whois system." <<http://www.icann.org/en/committees/consumer-protection/report-on-recommendations-07dec10-en.htm>>.

At its meeting in Cartagena, the ICANN Board adopted this recommendation and therefore searchable Whois will continue to be offered at the option of each registry rather than as a mandate applicable to all new registries. This is consistent with the current gTLD agreements, a few of which do mention that searchable Whois will be offered. The provisions governing the searchable Whois requirements in each of the current registry agreements that provide for it were inserted voluntarily by the applicable registry as part of the negotiation process and were not required by ICANN. Those provisions all mention that the service would be offered "subject to applicable privacy policies," and therefore the guidebook's approach of taking into account privacy considerations is not inconsistent with current practice.

The community has yet to develop a standardized specification for searchable Whois that could be incorporated into Specification 4. Because of the lack of consensus on such a specification, Specification 4 provides only high-level guidelines on the requirements for searchable Whois in those registries that chose to provide it.

The information required under the "Bulk Registration Data Access" provision in Specification 4, Section 3 of the Registry Agreement does not match the minimum information required in the Data Escrow Specification 2 of the Registry Agreement because ICANN does not require full escrow data for the purposes of compliance checks and verification of registrar utilization.

ICANN has previously established a procedure for handling Whois conflicts with privacy laws available at <http://www.icann.org/en/processes/icann-procedure-17jan08.htm>. Since the inception of this procedure, no submissions have been received. A new provision (utilizing language from provisions in existing ICANN registry agreements) has been added to the new draft Registry Agreement requiring compliance with applicable privacy laws that will be applicable to all handling of personal data, including Whois data.

Reserved Names-Specification 5

Key Points

- The ICANN Board is considering criteria that must be met for a limited class of established global organizations to qualify to have their marks reserved from registration. However, this process is ongoing and no decisions have been reached regarding implementing this criteria into the new gTLD program.
- Pursuant to GAC advice, geographic names appearing on predetermined lists and country codes will be initially reserved at the second level, regardless of the type of TLD. Those names may be released in connection with the consent of the applicable government or pursuant to procedures approved by the GAC (e.g. the .INFO procedures).

Summary of Comments

Reserved names list—Olympic and Olympiad. The terms Olympic and Olympiad should be added to the Reserved Names list, which would be consistent with the laws of the U.S. and numerous other countries around the globe, and allow the U.S. Olympic Committee to focus its limited resources on its primary mission, rather than on defensive registrations and a cumbersome process of filing formal objections against infringing gTLD applications. The RPMs in the guidebook are insufficient to protect the Olympic movement. Both the USOC and the International Olympic Committee (IOC) have repeatedly advocated that reserving the words Olympic and Olympiad in the top and second levels of all new gTLDs serves the public interests of the international community and comports with accepted principles of law. As explained in detail in past comments submitted to ICANN, more than thirty nations have enacted *sui generis* legislation reserving exclusive use of the words Olympic and Olympiad to the IOC and the National Olympic Committees. More than sixty countries have signed the Nairobi Treaty on the Protection of the Olympic Symbol, establishing special protection for the Olympic Movement as an internationally accepted principle of law. The GAC has advised the ICANN Board to approve the request to add Olympic and Olympiad to the Reserved Names list. USOC (13 May 2011). IOC (15 May 2011).

Reserved names—remove ICANN mark. Equity and fairness dictate that the ICANN Mark should be removed from the reserved names list. ICANN should bear the same burden and expense of protecting its mark against cyber squatters as other brand owners must. *Microsoft* (15 May 2011).

Two-character labels. The newly added reservation of “two-character labels” should be deleted from the applicant guidebook; it may cause problems and lacks a rationale. Confusion with the “two-letter codes” of ccTLDs or technical reasons are by all means not evident. Reservation of two-character labels has never been a publicly discussed point and putting it into the guidebook rules without a community discussion is outside the policy development process. Its timing is odd because at least a dozen gTLD and ccTLD registries have released “two-character labels” just recently or are planning to release them in the near future, with ICANN’s approval in the case of gTLDs. Reservation of two-character labels will create legal challenges in many new gTLDs (e.g. in Germany DENIC, the operator of the .de ccTLD was in 2010 forced by competition and trademark laws to release all “two-character labels”). *dotBERLIN* (11 May 2011). *DOTZON* (15 May 2011).

Protect all geographical names. Non-capital city names should be protected to the same degree as capital city names. All geographical names (regardless of existence in the ISO 3166 list)

which the national government specified per the right of the national government should be protected to the same degree as capital city names. These protected names would be listed by each government and pre-registered with ICANN. *Tokyo Metropolitan Government* (13 May 2011).

Protect variations of capital city names. Variations of capital city names (in any language) should be protected by requesting documentation of support from the relevant governments (e.g., “Tokyo” and “Tokyo-to” both represent the capital city of Japan). *Tokyo Metropolitan Government* (13 May 2011).

Country codes at the second level.

ICANN’s proposed prohibition of country codes at the second level is unrealistic and anti-commercial and will be hard to police. It would prohibit a dot brand applicant from registering a country name at the second level for a perfectly logical and legitimate reason (e.g. us.budweiser). As there is no prohibition on the creation of folders (e.g. www.budweiser/uk) this is an artificial restriction that should be lifted. *Valideus* (13 May 2011). *MARQUES/ECTA* (15 May 2011).

Use of Geographic Names at Second and Other Levels—Dot Brand Applicants. The importance of protecting geographic names is understandable but we ask ICANN to recognize the special nature of potential dot brand applicants and either relieve them of this requirement (question 22, DAG) or provide (or grant permission to independently develop and employ) a universal solution which will allow dot brand applicants to release the reserved geographic names (as well as two-label country codes) for their exclusive internal use all at once. GAC could implement a universal solution whereby a centrally maintained list of countries and ccTLD operators who have agreed to their country names/country codes being registered under dot brand TLDs (without the need for special procedures) is made available. As a result, any Registry who wishes to use such names will simply enter into an agreement with GAC or another relevant body, rather than having to consult with over 200 different governments individually. If introducing such a mechanism is not viable, dot brand applicants would benefit greatly from being exempt from the requirement to create reservation and release mechanisms for geographic names. Alternatively, GAC could provide a list of contact points for the government representatives associated with each second level string. Moreover, governments could be obliged to respond to a request from the registry within a set period of time. Internet users will benefit greatly from being able to find and access their preferred brands according to the geographic locations. This may be delayed unnecessarily if the release procedures for geographic names are overcomplicated. *Bright Consulting* (14 May 2011).

Subject to approval from relevant national governments, a single-registrant TLD should be allowed to register both two-letter abbreviations and full country and regional names at the second level (add this language to Section 2.6 “and except for single-registrant TLDs with respect to geographical names at the second level”). Single-registrant TLDs will reasonably want to create second level domains for their operating units or chapters in each country or region (e.g. Canada.canon). *BC* (15 May 2011).

Brand TLDs may require the use of e.g. “jp” or “Japan” at the second level. According to Specification 5 of the draft Agreement, registries must first initially reserve names on the ISO 3166-1 list. Though it is specified that the applicant may propose a release of these reservations, the process for releasing these names should be outlined in the final applicant guidebook. *UrbanBrain* (16 May 2011).

Specification 5.5 notes that country and territory names contained in the ISO 3166 list shall be reserved at the second level and specifically points toward only the short form English equivalent of the country or territory name. There is no mention of alpha-3 names. Given the purpose behind the reservation of country and territory names, this leaves some with the question if second level names such as "JPN.TLD" can be registered. ICANN should clarify this in the upcoming version of the guidebook. *UrbanBrain* (16 May 2011).

Evaluation Question 22 implies a registry operator can formulate a plan to release geographic names, but Specification 5, Section 2 of the Registry Agreement states that a registry operator can release two-character country codes but not geographic names. AusRegistry requests that Specification 5 be modified to match language in Question 22 and therefore allow the registration of geographic names under the TLD. *AusRegistry* (16 May 2011).

Analysis of Comments

The ICANN Board is considering criteria that must be met for a limited class of established global organizations to qualify to have their marks reserved from registration. However, this process is ongoing and no decisions has been reached regarding implementing this criteria into the new gTLD program.

In accordance with GAC advice, all country names appearing on the ISO 3166-1 list, as well as all two-letter country codes will generally be reserved from registration at the second level in new gTLDs. Specification 5 provides that ICANN may authorize exceptions to this requirement. Specification 5 has been revised to clarify that these names may be released with the consent of the applicable governments or pursuant to procedures approved by the GAC. The applicant will be responsible for describing whether it will seek to release such second-level strings and if so what procedures would be used. Such plans will be subject to GAC and community review prior to ICANN authorizing any exceptions. Any such exceptions might be granted on an individual basis, or on a blanket basis as long as each registry agrees to certain procedures. For example the GAC has previously indicated a preference for the procedure utilized for the release of country names in the .INFO TLD. Further work might be done on developing ICANN processes and guidelines regarding this issue between now and when new gTLDs begin to be delegated under the program.

Protecting all city names would not be feasible given the number of names potentially included in such categories. Also, names that happen to relate to some city, town, village, or hamlet somewhere might also have other legitimate uses that are not related to that city, town, village, or hamlet. This reasoning is described in detail under the geographical names section of this summary and analysis and in prior comment analyses.

Continuing Operations Instrument-Specification 8

Key Points

- All registry operators, including government entities, will be required to maintain a continuing operations instrument.
- Proposed alternatives to the continuing operations instrument may not provide the necessary resources to ensure stable registry functions.

Summary of Comments

Local governments—different treatment. The continued operations instrument requirement in Specification 8 would be particularly onerous for local governments in light of their budgeting processes. ICANN has elsewhere recognized in the draft Registry Agreement that TLDs operated by government entities should be treated somewhat differently than other TLDs--e.g., Article 4, section 4.5 alternative language for intergovernmental or governmental entities regarding transition of registry upon termination of agreement makes no reference to a continuing operations instrument. This is the correct approach since governmental entities are not subject to disappearing after registry launch and work under particular statutory requirements inconsistent with a continued operations instrument requirement. In addition, GAAP accounting principles do not permit the City of New York to carry balances between fiscal years, so maintenance of a continuing operations instrument over a 5-year period would violate annual accounting requirements intended to ensure compliance with state and local law as well as GAAP. The City of New York has sufficient assets to maintain registry operations at a level that should provide the requisite assurances ICANN seeks to address through a continuing operations instrument. *City of New York (13 May 2011)*.

Objection to Continued Operations Instrument and proposed alternative. The description of the continued operations instrument in the current guidebook is not sufficiently clear. The continued operations instrument requirement has been a significant impediment to new applicants in their ability to raise funds or engage in appropriate business planning. RySG proposes a replacement to the continued operations instrument: the creation of a pseudo-insurance fund paid for by each of the new gTLD Registry Operators for the first 5 years following launch of the new gTLD (e.g. requiring each registry operator to pay an additional \$5,000 in Registry Fees per year to ICANN (or its designee) for the specific purpose of funding two or three Emergency Back End Registry Operators should be sufficient; see text of RySG comments for additional details). The function of the continued operations instrument also could take the form of an insurance policy written by a highly rated reputable insurer. If private insurance is not available, then the captive insurance fund described in RySG comments could be created. The \$5,000 per registry per year figure should be viewed as a straw man until proper underwriting of the risk is done to determine an appropriate contribution. ICANN could hire the appropriate expert to calculate the appropriate contribution and pool size, and the cost of the expert could be reimbursed from the pool. *RySG (15 May 2011)*.

Analysis of Comments

Exempting government or quasi-governmental applicants from the requirement to maintain a continuing operations instrument could jeopardize registrants in the event that such applicants/operators either decide or are unable to maintain the operation of the TLD for any reason. Because of this risk, the continuing operations instrument is required of all applicants, including governmental entities, in order to ensure stable registry operations and protection of registrants in the TLD. If ICANN were to exempt all government or quasi-governmental applicants from this obligation it could lead to abuses and cases where entities walk away from their TLD. Governments might abandon TLDs when governments change or during budget cuts.

The alternatives to the continued operations instrument described in the community comments have been considered by ICANN and determined to not be feasible. A registry funded emergency fund may not provide adequate resources to ensure stable registry function. Should a large number of registry operators fail within a short period following the launch of new gTLDs,

there would be insufficient participants in the such a fund to provide adequate funding to maintain emergence operations in the failed registries.

Code of Conduct-Specification 9

Key Points

- Registry Operators that are able to demonstrate to ICANN that they meet certain criteria described in Section 6 of the Code of Conduct may qualify for an exemption from the Code of Conduct but will still be required to comply with the other non-discrimination provisions of the Registry Agreement.
- The reservation of names that pose a threat to the security and stability of the DNS is permitted by Section 2.6 of the Registry Agreement
- ICANN will make reports regarding compliance with the Code of Conduct public consistent with its accountability and transparency obligations.

Summary of Comments

Input on Abuses and Compliance. Before or during the application process ICANN should seek community input on potential abuses (including lists developed by the VI and RAP working groups), detection data, the data needed to detect, and protection mechanisms and compliance methods. Community input should also be sought on punitive measures to ensure compliance. *BC (15 May 2011).*

Dot Brand Applicants. We are pleased to note that provisions which take into account the situation of potential dot brand applicants have now been included in the Registry Code of Conduct. *Bright Consulting (14 May 2011).*

The definition of unaffiliated third party needs to be clarified in this context – Need to limit use with respect to customers, subscribers, employees? Etc. *RySG (15 May 2011).*

Exempting certain dot brand registries from the strictures of the Registry Operator Code of Conduct and in particular from the non-discrimination requirement among accredited registrars is a step in the right direction. ICANN should take the next logical step and allow the registry operator in this situation to dispense with the use of accredited registrars altogether. *COA (15 May 2011).*

ICANN should clarify how the dot brand exceptions in Specification 9 and in Section 4.5 of the draft registry agreement operate before finalizing the applicant guidebook. Each exception applies only under stated conditions which differ from one another. It is not clear whether this distinction is intended or inadvertent and it may be unclear to potential dot brand applicants how they should structure themselves in order to benefit from either one or the other of these exceptions. *COA (15 May 2011). IPC (15 May 2011).*

The language “otherwise make available” in the exception provision for the dot brand/single registrant TLDs is too broad and should be replaced with “transfer control of the registration.” The phrase “otherwise make available” might be interpreted to include instances where a single-

registrant operator allows non-affiliated parties to post content to websites where the registration is still entirely controlled by the operator. *BC (15 May 2011)*.

Treatment of Registrars (Section 1(a)). The provision should only obligate Registry Operator to provide an equal level of operation access to the registry's systems and support services. The current language would appear to prohibit a broad array of arrangements that would be common practice between affiliated companies. For example, it would appear to prohibit a registry from providing an initial capital contribution to an affiliated registrar, or from providing shared services or facilities to such a registrar. Prohibiting a registry from providing these kinds of assistance to an affiliated registrar would render it impracticable for a registry to establish such a registrar, which would be inconsistent with the Board's directive to permit such arrangements. It could also put the registrar at a competitive disadvantage with other registrars that may enjoy such support from their affiliated companies. In addition, as only registrars have access to a registry's systems and support services, we do not believe it is necessary to prohibit registries from providing a preference or special consideration to resellers. *RySG (15 May 2011)*.

Registration of Names by Registry Operator (Section 1(b)). This Section does not provide a carve-out for registration of names in order to preserve security and stability of the DNS (i.e.; conficker). This omission could negatively impact the capability of registries to operationally protect the security and stability of TLDs. *RySG (15 May 2011)*

Clarifications needed. Key terms such as "other related entity" have not been defined. All second level names which the registry intends to register in its own right as "necessary for the management, operations..." should be publicly specified either as reserved names in the registry operator's application or as "additional registry services" through the RSTEP process. Otherwise, the exception in 1(b) of the Code of Conduct provides too wide a loophole and invites abuse by the registry operator over a wide range of second level domains. *IPC (15 May 2011)*.

Proposed revision to Section 1(e), Specification 9. RySG recommends these changes (underlined): "Fail to adopt, implement and enforce policies and procedures reasonably designed to prevent the disclosure of confidential registry data or...except (i) as necessary for the management and operations of the TLD, and (ii) to the extent [delete "unless"] all unrelated third parties..." *RySG (15 May 2011)*.

Internal Compliance Reviews. The RySG notes that publication of the results may deter discussion of confidential matters, which may be an unwanted result. *RySG (15 May 2011)*.

Internal compliance review--checklist. The internal compliance reviews required by item 3 should be specified in more detail (e.g. a checklist of items to be included). *IPC (15 May 2011)*.

Analysis of Comments

Through the previous two public postings of the draft Code of Conduct, ICANN has sought community input on the types of practices that should be prohibited or required in connection with the introduction of vertical integration. ICANN will continue to work with the community to mitigate any potential harms from vertical integration through appropriate revisions to the Code of Conduct.

The criteria that Registry Operator must meet and demonstrate to ICANN in order to qualify for a possible exemption from the Code of Conduct is intended to describe TLDs where all registrations are maintained by Registry Operator for its own use or the use of its affiliates. See the Analysis of Comments under “Transition Following Termination” for further discussion on the appropriate criteria. It is important to note that, consistent with GNSO Principles on the new gTLD program, Section 2.9 of the Registry Agreement, which mandates non-discrimination among ICANN-accredited registrars continues to be applicable to all types of TLDs.

Paragraph 1(a) has been revised in the new draft Registry Agreement in response to community comment to clarify that the non-discrimination restrictions apply to availability and use of registry services and not to other typical business arrangements between affiliates. Further, the reference to resellers has been removed as inapplicable.

A carve-out to Paragraph 1(b) allowing for the registration of names by Registry Operator in connection with the preservation of the security and stability of the DNS is not necessary as Registry Operator is permitted to reserve such names from registration in its discretion pursuant to Section 2.6 of the Registry Agreement. Registry Operator will not be required to list any names that it registers pursuant to Paragraph 1(b) but Registry Operator will be required to demonstrate how such names are necessary for the operation and management of the TLD if requested by ICANN. Should the registration of any such names violate a third party's legal rights, the PDDRP will be available to resolve disputes arising from such violation.

The adoption of policies and procedures designed to avoid disclosure of confidential registry data is not sufficient. Registry Operator must covenant not to make such disclosures. As such, the proposed revisions to Paragraph 1(e) have not been adopted.

The results of internal reviews of compliance with the Code of Conduct will be made public consistent with ICANN's accountability and transparency obligations to the community. ICANN may develop a required format to be used in connection with such reports following further study of the implementation of the Code of Conduct and reporting practices.

Registry Performance Specification – Specification 10

Key Points

- Registry response times will be subject to publication.
- All relevant ICANN contact information will be made available to registries.

Summary of Comments

Monitoring Results. ICANN is proposing a system by which ICANN will monitor registry response times over the Internet. The RySG has pointed out to ICANN that this monitoring method will yield variable results depending upon Internet traffic and transit issues beyond every registry operator's control. The RySG would like confirmation that ICANN does not plan on publishing the monitoring results, which might for example be prejudicial to registry operators in certain parts of the world. *RySG (15 May 2011)*.

ICANN Contacts (Sections 7.1 through 7.3). There should be an obligation for ICANN to publish to all Registry Operators the e-mail address and phone number for ICANN's emergency operations department. *RySG (15 May 2011)*.

Analysis of Comments

In connection with its accountability and transparency obligations, ICANN does intend to publish monitoring results. Information regarding response times may be important to registrants and other members of the community regardless of whether or not Registry Operator has full control over such response times.

ICANN will make all necessary contact information needed for "Emergency Escalation" available to Registry Operators as needed and appropriate.

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