Implementation Advisory

Domain Tasting – Implementing GNSO Recommendations and Proposed ICANN Budget Changes

16 June 2008

Status of the Document

An advisory to the ICANN community prepared by ICANN Staff

Summary

This document identifies implementation considerations regarding the GNSO Council's 17 April 2008 Recommendation and the Proposed FY 09 Operating Plan and Budget as it pertains to new registrar-level transaction fees for FY 09 – both intended to address domain tasting. The document examines each component of the GNSO Recommendation and identifies particular implementation steps that should be considered to put the GNSO Recommendation and the FY 09 Budget Plan in place.

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Introduction:

The purpose of this document is to provide an initial assessment of the implementation considerations raised by the Council's recommended AGP modification and the new AGP fee structure proposed in the Proposed FY 09 Operating Plan and Budget. In organizing this document, each specific component of the GNSO recommendation is examined with notes addressing the challenges and opportunities presented by each of those concepts. Following those observations this document reviews other potential implementation issues as they relate to the relationship between the GNSO recommendation and the Proposed FY 09 Operating Plan and Budget. At its meeting in Paris on 29 June 2008, the ICANN Board is scheduled to consider both items. Following Board consideration and subject to Board approval, the staff intends to proceed with a formal implementation process by producing a Draft Implementation document to be thoroughly reviewed and commented upon by the ICANN community before a final policy is put in place. The Budget will be effective 1 July 2008.

Discussion:

A. THE GNSO COUNCIL RECOMMENDATION:

Set forth below is a section-by-section analysis of the GNSO Council's recommendation identifying various implementation issues that are currently being considered by the ICANN Staff.

1. REGISTRIES ARE AFFECTED BY THIS POLICY CHANGE:

The first section of the GNSO recommendation reads:

"The GNSO Council recommends to the ICANN Board of Directors that:

> **1. The applicability of the Add Grace Period shall be restricted for any gTLD which has implemented an AGP ("Applicable gTLD Operator"). Specifically, for each Applicable gTLD Operator:"**

If a gTLD registry operator currently utilizes the AGP, the applicability of that grace period will now be restricted by certain new policies designed to eliminate abusive domain tasting by removing the economic incentives for following the practice.

Staff Assessment:

Scope Staff research indicates that eleven of sixteen gTLD registries offer an AGP in their operations; .ASIA, .BIZ, .COM, .INFO, .JOBS, .MOBI, .NAME, .NET,

.ORG, .PRO and .TRAVEL. The five gTLDs that do not utilize the AGP are: .AERO, .CAT, .COOP, .MUSEUM and .TEL (which does not launch until later in 2008), do not appear to offer an add-grace period.

Timing   Using the Registry Services Evaluation Process (or "funnel'), Neustar (.BIZ) and Afilias (.INFO) pursued voluntary efforts to cap excessive domain tasting within their own TLDs (see http://www.icann.org/registries/rsep/) and on 27 March 2008 obtained approval from the Board to take action. The measures they proposed were almost identical to those adopted by the GNSO Council on 17 April 2008.

Individual discussions with these registries suggest that implementation of the changes to their internal AGP processes (including the necessary notifications to registrars) will range from three (3) to six (6) months. As a result, implementation of an AGP cap solution by these registries could be completed relatively quickly.

Unlike the voluntary funnel process, Board action on the GNSO recommendation will be effectuated pursuant to the consensus policy provisions set forth in ICANN/Registry contracts. Other registries will not be required to revise their internal AGP processes until they receive official notice from ICANN. Although business processes and practices differ among registries, the time needed to implement the GNSO's recommendation should not vary widely. Using the .BIZ and .INFO experiences to date as a guide, registries that do not begin implementation efforts until the ICANN Board concludes its deliberations on this issue will not likely have the new AGP cap in place for at least three to six months after Board action and subsequent formal notice from ICANN.

2. **THE PERCENTAGE CAP MECHANISM:**

The next subsection of the GNSO recommendation reads:

> **"a. During any given month, an Applicable gTLD Operator may not offer any refund to a registrar for any domain names deleted during the AGP that exceed (i) 10% of that registrar's net new registrations in that month (defined as total new registrations less domains deleted during AGP), or (ii) fifty (50) domain names, whichever is greater."**

Staff assessment:

If the Board accepts the GNSO Council recommendation, individual registries will be in the best position to evaluate and implement the new AGP cap formula. Although the language of Section 2 is quite specific on the minimum registry obligations regarding the new 10%-50 name limits of the AGP, there is no predetermined implementation methodology prescribed in the recommendation. This flexibility will enable individual registries to craft an AGP cap system most

appropriate to their billing and support systems and their own unique registrar and reseller relationships.

3. AVAILABILITY OF EXEMPTIONS:

The next subsection of the GNSO recommendation reads:

> **"b. A Registrar may seek an exemption from the application of such restriction in a specific month, upon the documented showing of extraordinary circumstances. For any Registrar requesting such an exemption, the Registrar must confirm in writing to the Registry Operator how, at the time the names were deleted, these extraordinary circumstances were not known, reasonably could not have been known, and were outside of the Registrar's control. Acceptance of any exemption will be at the sole reasonable discretion of the Registry Operator, however "extraordinary circumstances" which reoccur regularly will not be deemed extraordinary."**

Several early commenters noted the need to define the broad terms "extraordinary circumstances" and "reoccur regularly" used in this subsection. One party recommended that the motion be amended to include an illustrative list of what constitutes "extraordinary" in this subsection. Another recommendation suggested that staff develop guidelines for the types of circumstances that are "extraordinary" and the meaning of "reoccur regularly" as used in the resolution. Ultimately, the GNSO's Domain Tasting Working Group retained the original language of the proposal without further definition of the terms.

Staff assessment:

More clarity and specificity in the context of this subsection is needed. Through implementation of this Consensus Policy effort, the staff intends to provide registries and registrars with guidance that will clearly define the terminology in this recommended section. For example, guideline language could be created noting that registrars requesting "extraordinary circumstances" more than "X" times per calendar year will not be deemed extraordinary, depending on the specific facts of the circumstances. Guidance would be particularly helpful for compliance with the reporting requirements described in subsection "c" of the recommendation (Section A.4. immediately below.

The community will be given full opportunity to comment on this concept, and others, as part of the implementation phase. The Consensus Policy implementation process has been used effectively in a variety of other contexts (see, http://www.icann.org/general/consensus-policies.htm) and seems like a suitable vehicle in this case to provide clarity for the community.

4. DOCUMENTING EXEMPTIONS:

The next subsection of the GNSO recommendation reads:

> **"c. In addition to all other reporting requirements to ICANN, each Applicable gTLD Operator shall identify each Registrar that has sought an exemption, along with a brief descriptive identification of the type of extraordinary circumstance and the action (if any) that was taken by the Applicable gTLD Operator."**

Some public comments have said public disclosure of information regarding the names, circumstances and ultimate disposition of each exemption request will enhance transparency and accountability as well as facilitate independent assessment of the effectiveness of the proposed changes in eradicating domain tasting. Additional arguments suggest that such disclosures could help ICANN ensure the security and stability of the Internet. The Registry constituency opposed the public disclosure of this information.

Staff assessment:

The GNSO recommendation does not specify the form or substance of the exemption process information that each "applicable gTLD operator" should collect and/or provide to ICANN. The recommendation also fails to define the degree of confidentiality that such information should be accorded. Staff expects that this will be a subject that requires additional guidance for registries and registrars in order to provide clarity regarding the format, scope, and timing of the information that registries must collect and report in this area. Staff will likely propose in the draft implementation of the Consensus Policy that registries standardise a new line item or section to their regular reports to ICANN that identifies, on a monthly basis, all instances when exemption requests are submitted, processed and/or resolved by a particular registry. ICANN currently treats regular registry reports as confidential for three months and then publishes them on its web site (see, http://www.icann.org/tlds/monthly-reports/).

In general, the staff expects that specific/individual information reported to ICANN should be kept confidential. In appropriate circumstances, specific information determined by Staff to impact the security and stability of the Internet should be shared with the Board and/or SSAC leadership.

That same information, in the aggregate, should be shared as necessary with other appropriate ICANN supporting organizations and advisory committees. The information should be produced subject to the same deadlines and timetables that other registry reports are generated for ICANN staff and subsequently incorporated, as appropriate, into each six month reporting cycle described below in subsection 2 of the recommendation.

5. MONITORING PROGRESS:

The second section of the GNSO recommendation reads:

"2. Implementation and execution of these recommendations shall be monitored by the GNSO. Specifically;

a. ICANN Staff shall analyze and report to the GNSO at six month intervals for two years after implementation, until such time as the GNSO resolves otherwise, with the goal of determining;

i. How effectively and to what extent the policies have been implemented and followed by Registries and Registrars, and

ii. Whether or not modifications to these policies should be considered by the GNSO as a result of the experiences gained during the implementation and monitoring stages,"

Public comments from the ICANN community have posed many questions about the monitoring and evaluation of information and data regarding the ultimate impact of the new AGP cap plan. Some of those questions include:

- What will the oversight activities at ICANN look like?
- Where is the guarantee that the oversight activities will actually take place and will not be neglected or misused?
- Will the GNSO be responsible for the oversight activities?
- When will reports be required?
- How timely will public reports be?
- What standards will be used to measure the success of the effort – a reduction in tasting or its complete elimination?

Staff assessment:

A reliable, accurate, consistent and trusted information collection and reporting system is critical to an appropriate evaluation of the efficacy of the domain tasting elimination effort. The new consensus policy will directly impact registries and their relationships with registrars

Forming a Reporting Team   A team comprised of representatives of the ICANN staff responsible for registry services, registrar services, compliance, policy development and legal should be formed to determine and create a timely, effective and efficient methodology for tracking and reporting on the implementation and impact of the new AGP cap plan. This team should be formed as soon as possible to effectuate efficient implementation of the GNSO Council resolution and/or established by the new FY 09 budget. This Reporting Team should give serious consideration to creating a system that collects

information from registries in a timely manner and reports aggregate information as soon as possible.

Before new information is collected, it will be important to establish a baseline measure of AGP use and domain tasting activity. The last confirmed tasting numbers produced in any official document are from May of 2007. Those figures should be updated and a monthly report should be designed, produced and regularly evaluated by ICANN staff for at least the duration of the two-year evaluation period recommended by the GNSO.

At least one registry representative has publicly commented that the community should expect to see an immediate reduction of domain tasting abuse once the policy is put into place by individual registries. But several constituencies have publicly expressed concern that the current three-month delay in seeing registry information will make it difficult to determine quickly if the new AGP restriction policy is working. ICANN Staff intends to discuss with the affected gTLD registries whether some additional information can be produced to track early progress of the implementation. If that is not possible some consideration may also have to be given to expanding the current registry reporting requirements in a fashion similar to the additional reporting requirements for exemption requests discussed in Section 4 above.

ICANN should make information available to the public (either in the form of statistics or a database capable of generating public reports) in aggregate form that tracks how many/and when individual registries formally implement their new AGP cap plans. Consideration should be given to determine the appropriate degree of confidentiality for all data. In all cases, registries should expect the same level of confidentiality they are currently accorded under the existing ICANN reporting system, but the staff should investigate additional opportunities to generate aggregate data reports that can be of immediate use to the broader ICANN community as soon as possible.

Measuring Success   Earlier in the PDP process, one commenter suggested the proposal should "virtually eliminate" tasting for it to be declared successful, but even some of the strongest proponents of the GNSO recommendation confess that the new policy will not entirely eliminate all forms of domain tasting abuse. Some effort should be made by GNSO members and ICANN staff to agree on what constitutes a successful result of the new AGP restrictions policy. ICANN Staff will conduct a review of what took place when .ORG instituted excess delete fees as a means of determining a potential benchmark for evaluating the success of this new consensus policy.

6.   **OPPORTUNITY FOR FUTURE MODIFICATIONS?:**

> **"b. The purpose of these monitoring and reporting requirements are to allow the GNSO to determine when, if ever, these**

recommendations and any ensuing policy require additional clarification or attention based on the results of the reports prepared by ICANN Staff."

Staff assessment:

At least one commenting party said the GNSO should take action promptly at the end of the prescribed two-year period if the new AGP restriction policy doesn't virtually eliminate tasting. But, instead of waiting two years, the ICANN staff hopes that it will be prepared to offer a preliminary evaluation whether the policy is having any impact at the time of its very first six-month progress report to the GNSO Council. In fact, if ICANN transaction fees are applied as of July 1, then results may be observed more quickly than six months.

Additionally, the staff should be able to assess what factors are contributing to positive or negative trends that are observed in each report. Each six-month evaluation will need to take into consideration how many registries have implemented the new policy and the number of exemptions that have been sought for extraordinary circumstances in each reporting period.

7. TIMING OF IMPLEMENTATION:

Forum commenters noted that the draft motion contained no timeframe or deadlines for implementation. It was suggested that creating such dates calculated from the date of Board action regarding the proposal would both ensure prompt implementation of the new policy and a faster determination whether the policy was actually effective in eliminating abusive domain tasting. A registry representative has pointed out that such a deadline requirement could be problematic in light of specific ICANN contractual language. ICANN Registry agreements provide that registry operators shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Specifications or Policies in which to comply with such policy or specification, taking into account any urgency involved.

Staff assessment:

As outlined in section 1 above, registries that do not begin implementation efforts until the ICANN Board concludes its deliberations on this issue will not likely have the new AGP cap in place for at least three to six months after Board action and subsequent formal notice from ICANN. To start that clock as soon as possible following Board adoption of the GNSO recommendation, staff will need to communicate to the ICANN community news of the new policy and publish the policy implementation plan as soon as possible. Consistent with their contracts, all registries and registrars must receive formal notice of the decision by registered courier or fax delivery and postings about the decision should be made on the ICANN web site.

The ICANN community has made the effort to eliminate domain tasting an urgent matter. Many stakeholders hope to see results of the process as quickly as possible. The ability to quickly issue the required implementation notices after the Board decision is a significant part of the implementation effort.

The timing of the staff reporting obligations outlined in Section 6 above should begin six months after the first registries have implemented the consensus policy in accordance with there obligations.

ICANN staff will also need to expeditiously prepare and propose specific implementation processes and have them circulated to the industry for review as soon as possible.

To the extent possible, ICANN Staff should read the standard urgency clause in registry contracts as broadly as possible and, absent extremely reliable information to the contrary, all registries should have the ability to have a new AGP cap process consistent with the new policy in place no later than six months after the date final consensus policy implementation processes are announced.

B.   THE FY 09 BUDGET PROPOSAL

The new AGP fee structure language set forth in the Proposed FY 09 Operating Plan and Budget reflects the AGP limitation components of the GNSO recommendation. There are, however, several significant differences between the two proposals. First, the time it will take to practically implement the two proposals is significantly different. Second, the reporting requirement system mandated in the GNSO recommendation for both registries and the ICANN staff is not part of the budget proposal. (Although registry data regarding add-grace deletes will be included in registry monthly reports, as it is now.) Third, the respective duration of each solution is different. Fourth, the post-Board approval implementation processes vary significantly between the two proposed solutions. And finally, the solutions differ in their fundamental orientation -- while the consensus policy solution primarily impacts registries and their relationships with registrars, the budget proposal primarily impacts ICANN and its relationship with the registries and registrars, collectively.

The proposed budget change can be implemented more quickly than the consensus policy approach because the budget is effective on 1 July 2008 while the Consensus Policy requires the development of an implementation plan and community review. Also, while not of significant concern, the new AGP fee structure in the FY 09 budget proposal, if approved, will only be in place for FY 09 and will presumably have to be proposed and re-approved for subsequent fiscal years. By contrast, the consensus AGP policy will conceivably be permanent - absent a new policy effort to replace it or repeal it.

1. **THE FY 09 TRANSACTION FEE PROPOSAL:**

The Proposed FY 09 Operating Plan and Budget anticipates implementing a form of AGP cap limitation that is consistent with the 10% - 50 name cap limits set out in the GNSO recommendation. The proposed budget states:

> **"Each "transaction" will continue to be defined as a one-year domain registration increment caused by a successful add, renewal or transfer commend, but this year any domain names deleted during the AGP (if offered) will be included as transactions if they exceed the maximum of (i) 10% of the registrar's net new registrations in that month (defined as total new registrations less domains deleted during AGP), or (ii) fifty (50) domain names, whichever is greater. Therefore per-transaction fee will continue to be charged for each one-year increment of every transaction (e.g., at a $0.20 fee level, the fee for a three year renewal will be US $0.60), and registrars will continue to have the option to "defer" payment of the fees for the years beyond one for each transaction."**

Because of its streamlined nature, the budget proposal does not include any of the various reporting expectations found in the GNSO recommendation. ICANN Staff anticipates they will continue to use the existing registry reporting system for calculating and invoicing registrars on a quarterly basis.

2. **REGISTRAR APPROVAL AND TIMING ISSUES:**

In order to be collected directly from registrars, the registrar fees, including the new AGP fee structure proposed in the FY 09 Operation and Budget Plan must be reviewed and approved by the Registrar community – even after the Board approves the overall budget. Specifically, any such fees to be collected directly from registrars must be expressly approved by registrars who account, in the aggregate, for payment of two-thirds of all registrar-level fees collected by ICANN.

Since the transaction fees are intended to be calculated based on transaction activity beginning July 1, it will be important to broadcast information about the new Consensus Policies as soon as possible. This advisory is intended to be the first step in that ongoing communications effort. Once the appropriate mechanisms are in place, all contracting parties will need to accurately track and record monthly transaction activity. There could be a gap between the time of Board approval of the new AGP fee structure and registrar approval, but it is staff's current understanding that no new information tracking or collection mechanisms will be required by registrars to continue their current practice of monitoring and recording the utilization of AGP services by active registrants.

It is not clear what internal process changes, if any, registrars will need to institute regarding the proposed new fees. However, some registrars have relationships with hundreds of resellers who must all be informed of the new fees if they are to change their behavior. This makes expeditious Staff action a critical component of a successful implementation of the proposed new AGP fee structure.

3.   ICANN BILLING SOFTWARE CHANGES:

In order to implement this new fee process, the ICANN Staff may need to develop a mechanism that calculates the new transaction fee structure consistent with the approved budget proposal. Under current practices, ICANN invoices registrars for their transaction fees on a quarterly basis. This process will continue. Thus, if the Board approves the FY 09 fee structure (including the new AGP transaction fee proposal), the first invoices reflecting the new fee will be transmitted in October 2008.

At this time, ICANN Staff anticipates that registries will develop the programming necessary to correctly capture and calculate the new transaction fees as part of the implementation, but no formal determination has been made on that approach. Staff may have to make adjustments in its programming and is comfortable that the programming will be in place in time for the first quarterly invoices for FY 09 (October) to be prepared and transmitted.

4.   RELATIONSHIP OF BOTH PROPOSALS:

Staff Assessment:

Significant effort was made to conform the new AGP fee structure in the FY 09 budget plan to the GNSO recommendation. Now, with both proposals in general conformity, they can be adopted together without significant negative consequences.

In fact, the implementation time frames of the two proposals compliment each other. If both strategies were adopted, registrars would have the operational flexibility afforded by the AGP 10% - 50 name limitations under both proposals and the community would have the opportunity to learn quickly if the new AGP fee structure mechanism is as successful as many community members expect it will be. Since the budget proposal goes into effect almost immediately but will only last for one year, it compliments the long-term consensus policy that will take several months to fully implement.

Conclusion

Pending ICANN Board action later this month, this document is intended to advise the ICANN community of several of the prospective implementation matters being considered, studied and investigated by the Staff as we move toward a more formal implementation process intended to curb domain tasting. Observations and comments are welcomed at policy-staff@icann.org.

Annex 1: Domain Name Tasting Motion Approved By the GNSO Council on 17 April 2008

Whereas, the GNSO Council has discussed the Issues Report on Domain Tasting and the Final Outcomes Report of the ad hoc group on Domain Tasting;

Whereas, the GNSO Council resolved on 31 October 2007 to launch a PDP on Domain Tasting;

Whereas, the GNSO Council authorized on 17 January 2008 the formation of a small design team to develop a plan for the deliberations on the Domain Tasting PDP (the "Design Team"), the principal volunteers to which had been members of the Ad Hoc Group on Domain Tasting and were well-informed of both the Final Outcomes Report of the Ad Hoc Group on Domain Tasting and the GNSO Initial Report on Domain Tasting (collectively with the Issues Report, the "Reports on Domain Tasting");

Whereas, the GNSO Council has received the Draft Final Report on Domain Tasting;

Whereas, PIR, the .org registry operator, has amended its Registry Agreement to charge an Excess Deletion Fee; and both NeuStar, the .biz registry operator, and Afilias, the .info registry operator, are seeking amendments to their respective Registry Agreements to modify the existing AGP;

The GNSO Council recommends to the ICANN Board of Directors that:

1. The applicability of the Add Grace Period shall be restricted for any gTLD which has implemented an AGP ("Applicable gTLD Operator"). Specifically, for each Applicable gTLD Operator:

a. During any given month, an Applicable gTLD Operator may not offer any refund to a registrar for any domain names deleted during the AGP that exceed (i) 10% of that registrar's net new registrations in that month (defined as total new registrations less domains deleted during AGP), or (ii) fifty (50) domain names, whichever is greater.

b. A Registrar may seek an exemption from the application of such restriction in a specific month, upon the documented showing of extraordinary circumstances. For any Registrar requesting such an exemption, the Registrar must confirm in writing to the Registry Operator how, at the time the names were deleted, these extraordinary circumstances were not known, reasonably could not have been

known, and were outside of the Registrar's control. Acceptance of any exemption will be at the sole reasonable discretion of the Registry Operator, however extraordinary circumstances" which reoccur regularly will not be deemed extraordinary.

c. In addition to all other reporting requirements to ICANN, each Applicable gTLD Operator shall identify each Registrar that has sought an exemption, along with a brief descriptive identification of the type of extraordinary circumstance and the action (if any) that was taken by the Applicable gTLD Operator.

2. Implementation and execution of these recommendations shall be monitored by the GNSO. Specifically;

a. ICANN Staff shall analyze and report to the GNSO at six-month intervals for two years after implementation, until such time as the GNSO resolves otherwise, with the goal of determining;

i. How effectively and to what extent the policies have been implemented and followed by Registries and Registrars, and

ii. Whether or not modifications to these policies should be considered by the GNSO as a result of the experiences gained during the implementation and monitoring stages,

b. The purpose of these monitoring and reporting requirements are to allow the GNSO to determine when, if ever, these recommendations and any ensuing policy require additional clarification or attention based on the results of the reports prepared by ICANN Staff.

Annex 2:   Background Documents

Issues Report, 14 June 2007 (http://gnso.icann.org/issues/domain-tasting/gnso-domain-tasting-report-14jun07.pdf)

Outcomes Report, 4 October 2007 (http://gnso.icann.org/drafts/gnso-domain-tasting-adhoc-outcomes-report-final.pdf)

Board Discussion of Domain Tasting and Potential Budgetary Response (http://www.icann.org/minutes/minutes-23jan08.htm) see meeting agenda item 5.

Initial Report, 7 January 2008 (http://gnso.icann.org/issues/domain-tasting/gnso-initial-report-domain-tasting-07jan08.pdf)

Summary of Comments (<http://forum.icann.org/lists/domain-tasting-2008/msg00068.html)

GNSO Final Report on Domain Tasting, 4 April 2008 (<http://gnso.icann.org/issues/domain-tasting/gnso-final-report-domain-tasting-04apr08.pdf>)

GNSO Council Report to the ICANN Board, Recommendation for Domain Tasting, 25 April 2008 (<http://gnso.icann.org/issues/domain-tasting/domain-tasting-board-report-gnso-council-25apr08.pdf>)

Proposed FY 09 Operating Plan and Budget, Version 2 posted 23 May 2008 (<http://www.icann.org/public_comment/ - op-budget-fy2009>)