Reference Material

New gTLD Program Committee Submission 2013-02-01-01

TO: New gTLD Program Committee
TITLE: Update on Addressing GAC Advice on Enforcing Applicants' Commitments

As described in the accompanying paper, staff is requesting New gTLD Program Committee approval to publish for comment a proposed "Public Interest Commitments" specification to be added to each new gTLD registry agreement including:

1. an obligation to only use registrars under the 2013 RAA
2. an option to designate elements from the application to be included in the agreement
3. an option to specify additional commitments to be included in the agreement seek public comment on a proposed mechanism for implementing GAC advice to convert new gTLD applicants' plans into binding contractual commitments.

This proposal is being put forward in an attempt to find a possible mechanism for implementing the advice from the GAC to transform applicants statements of intent into binding contractual commitments. The GAC advice touches on an important issue, that there are plans contained within applications that are not currently reflected as obligations in the base Registry Agreement. Also, some applicants might want to offer to be subject to additional obligations in order to satisfy concerns raised by the GAC or its members. Once the Registry Agreement is entered into, that – and not the application – will serve as the basis of the relationship between ICANN and the registry operator. In order to comply with the GAC advice ICANN would need a new mechanism by which applicants have could incorporate these commitments into their Registry Agreements.

Staff has developed a proposed process through which these commitments could be incorporated into the Registry Agreement:

1. ICANN is developing a Public Interest Commitment Specification (PIC Spec) for inclusion in the Registry Agreement. With the Committee's approval staff will commence a public comment period on the proposed PIC Spec and other updates to the registry agreement. A draft of the PIC Spec and a summary of the other updates to the Registry Agreement are included below in these reference materials.

2. The PIC Spec will have one mandatory provision – that the Registry Operator must only use those registrars that sign onto the 2013 Registrar Accreditation

Agreement. The PIC Spec will have two optional provisions as well. One would allow the Registry Operator to commit to follow the commitments made in certain sections of its application for the gTLD (the specific sections to be selected by the Registry Operator). The other would allow the Registry Operator to identify specific additional commitments – which could be even broader than those undertaken in the application – that it will follow in the operation of the registry.

3. The PIC Specifications, once completed by the applicants, will be posted for public review in advance of the Beijing meeting.

4. Once finalized, the PIC Spec would be attached to the Registry Agreement. The Registry Agreement would not be signed until the PIC Spec is completed.

5. The commitment to use only Registrars on the new RAA will be enforceable through the regular contractual compliance process within ICANN. The additional commitments would primarily be enforceable by third parties through a revised Post-Delegation Dispute Resolution Process.

6. Once the Registry Agreement is in operation, third parties who suffer actual harm as a result of the Registry Operator's alleged noncompliance with the additional commitments or restrictions contained in the PIC Spec would have the opportunity to proceed to dispute resolution. This dispute resolution procedure would be incorporated into the approved dispute resolution procedures for Registry Restrictions (RRDRP) and Post-Delegation (trademark/PDDRP) disputes <http://newgtlds.icann.org/en/applicants/agb>. First, there would be a mandatory conciliation phase during which the third party and the Registry Operator are expected to see if the complaint can be resolved. If the issue cannot be resolved, the third party complainant will then proceed to a Public Interest Commitment Dispute Resolution Procedure (PIC-DRP) operated by a dispute resolution provider. If the provider issues findings and recommendations that the Registry Operator is violating the PIC Spec, the matter would then proceed to ICANN's Contractual Compliance for enforcement.

The proposed timeframe for the introduction of the PIC is:

5 February 2013	Webinar with applicants to explain the purpose of the PIC Spec
5 February 2013	Posting of proposed PIC Spec as part of revisions to Registry Agreement, for public comment
5 February 2013	Invitation to applicants to optionally designate which parts of their application and which additional promises they will agree to have included in their contracts
5 March 2013	Applicants submit PIC Spec for each application. Each

	applicant's PIC Spec would be posted for public and GAC review
8-12 April 2013	Beijing Meeting; Committee approval sought for the addition of the PIC Spec to the base New gTLD registry agreement.

Below are the current drafts of the PIC and the current draft list of proposed changes to the registry agreement.

Specification 11

Public Interest Commitments

   1.   Registry Operator will use only ICANN accredited registrars that are party to the Registrar Accreditation Agreement approved by the ICANN Board of Directors on _____ ____, 2013(or any subsequent form of Registrar Accreditation Agreement approved by the ICANN Board of Directors) in registering domain names. A list of such registrars shall be maintained by ICANN on ICANN's website.

   2.   ☐Registry Operator will operate the registry for the TLD in compliance with all commitments, statements of intent and business plans stated in the following sections of Registry Operator's application to ICANN for the TLD, which commitments, statements of intent and business plans are hereby incorporated by reference into this Agreement. Registry Operator's obligations pursuant to this paragraph shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN (as it may be amended by ICANN from time to time, the "PICDRP"). Registry Operator shall comply with the PICDRP, including by implementing all decisions and determinations issued by PICDRP panels.

[Registry Operator to insert specific application sections here, if applicable]

   3.   ☐Registry Operator agrees to perform following specific public interest commitments, which commitments shall be enforceable by ICANN and through the PICDRP. Registry Operator shall comply with the PICDRP, including by implementing all decisions and determinations issued by PICDRP panels.

[Registry Operator to insert specific commitments here, if applicable]

Summary of Draft Proposed Changes to New gTLD Registry Agreement

In connection with the ongoing review of applications for new gTLDs, ICANN staff has conducted a review of the terms and conditions of the new gTLD form registry agreement (the "New gTLD Registry Agreement") set forth in Module 5 of the Applicant Guidebook. As a result of this review, ICANN staff is recommending certain changes to the New gTLD Registry Agreement. As set forth in the terms and conditions of the new gTLD program (Module 6 of the Applicant Guidebook), ICANN reserved the right to make reasonable updates and changes to the New gTLD Registry Agreement during the course of the application process. If approved by the Board, the New gTLD Registry Agreement will be revised to reflect the following changes and the revised New gTLD Registry Agreement will be posted for public comment, revised as necessary to reflect public comment and submitted to the Board for final approval as the form agreement that will govern the obligations of all registry operators of new gTLDs. In addition to certain changes that are being implemented as enhanced public interest commitments (which are the subject of a separate briefing paper), the following changes are recommend by ICANN staff for the reasons set forth in the following chart:

Proposed Agreement Change	Rationale
1. Add a new "Public Interest Commitments" specification obligating registry operators to only use registrars on the 2013 RAA and optionally allowing registry operators to designate which parts of their application and which additional promises they will agree to have included in their registry agreement.	All domains in new gTLDs should only be registered under the new form of RAA and its new protections recommended by law enforcement. In order to address GAC advice, registry operators may optionally agree to be bound by statements and commitments in their applications for the TLD and/or additional commitments in the public interest.
2. Require Registry Operator's WHOIS output to be compatible with ICANN's common interface for WHOIS (InterNIC)	Implementation of Board directives regarding WHOIS. This change will help to ensure universal WHOIS output compatible with InterNIC.
3. Require Registry Operator to implement recommendations of the Expert Working Group on gTLD Directory Services if such recommendations are approved by the Board following public comment, so long as implementation is commercially reasonable.	Implementation of Board directives regarding WHOIS. This change will help facilitate improved WHOIS functioning while ensuring that the Board has control over final WHOIS implementation and all stakeholders are able to comment upon Expert Working Group recommendations.

4.	Require Registry Operator to provide a link to ICANN WHOIS policy and education materials.	Implementation of Board directives regarding WHOIS. This change will improve access to WHOIS policy and education materials for the purposes of keeping registrants and the community at large up to date with WHOIS obligations and policy.
5.	Require Registry Operator to reserve (i.e. prevent registration) of IOC and Red Cross/Red Crescent names, as well as those of any other IGOs designated by the Board.	Implementation of New gTLD Program Committee resolutions regarding protection of IOC, Red Cross/Red Crescent and other IGO names.
6.	Clarify that fixed registry fees commence at signing of the agreement (rather than delegation into the root).	Although this may be inferred from the current language of the agreement, staff recommends clarifying the intended start date of these fees as existing TLDs were not required to pay fixed fees until delegation.
7.	Add provision clarifying that Registry Operator is responsible for all taxes imposed on registry services.	This change is being recommended to clarify that Registry Operator may not offset any tax liability against fees paid to ICANN. Certain jurisdictions have indicated that registry services are subject to taxes and this change would make clear that such taxes are the responsibility of Registry Operator. Similar provisions are already present in certain Registry-Registrar contracts and in the draft 2013 RAA.
8.	Clarify that provision allowing for registry operator to develop non-discriminatory criteria for qualification to register names in the TLD applies to registrars and not registrants.	This change is recommended to address applicant confusion on this issue. This requirement is meant to apply to Registry Operator's dealings with registrars and not registrant specific restrictions.
9.	In lieu of requiring cooperative engagement in the event of a dispute, allow either party to initiate a formal mediation prior to being permitted to bring an arbitration claim.	Previous experience has shown that requiring informal cooperative engagement for a short period before an arbitration may be initiated is not effective at resolving disputes. A formal, third party lead mediation may resolve more disputes in the pre-arbitration period.

10. Clarify performance thresholds for trigger of Emergency Back End Registry Operator ("EBERO").	This change would clarify the interaction between the technical performance thresholds that must be maintained and ICANN's ability to re-delegate the TLD to an EBERO in the event those thresholds are not maintained. Staff does not consider this to be a substantive change.
11. Add that ICANN may run financial, operational and technical checks on any proposed assignee of the agreement, as well as run criminal and UDRP/cybersquatting background checks, prior to consenting to an assignment of the agreement or change in control of the registry operator.	New gTLD applicants are being thoroughly vetted as part of the application process. In the event that a registry changes hands after delegation of the TLD, ICANN must retain the ability to ensure that the new registry operator meets the stringent ICANN criteria for operation of a new gTLD registry.
12. Swap the descriptions of fields 17 and 18 in the Registry Operator monthly report.	This is a technical correction.
13. Revise the data escrow specification to permit regular full deposits (only) instead of specifying both full and incremental deposits.	This change is in response to applicant comments. Technical staff has advised that differential deposits are not necessary.
14. Clarify that a missed data escrow deposit will trigger a notification to ICANN.	This change will facilitate data escrow compliance efforts.
15. Clarify that all times in specifications are UTC.	This change will help to ensure uniformity of report timing.
16. Update Specification 6 technical requirements to require Registry Operator to publish DNSSEC Practice Statements following the format described in RFC 6841.	RFC 6841 was recently adopted. This change is recommended to update the technical requirements.
17. Clarify that Registry Operator may reserve (but not use/activate) the names required to be reserved by Specification 5 itself (not through registrar)	This is a technical clarification. Registry Operators may need flexibility in the way that they reserve names that are required to be reserved by Specification 5. Registry Operator does not necessarily need to use a registrar if it chooses to register these names itself in order to reserve them from registrants.

18. Update the requirements for the Continued Operations Instrument (letter of credit or cash escrow account) to conform to the provisions of the Applicant Guidebook and ICANN guidance during the application period.	Throughout the application process numerous questions have been asked regarding the requirements of the Continued Operations Instrument and ICANN staff has issued guidance to applicants. These changes are recommended to address certain inconsistencies in the requirements and conform the contract to the Applicant Guidebook and publicly issued guidance.

Submitted by: Samantha Eisner (Senior Counsel)
                                        Daniel Halloran (Deputy General Counsel)

Date Noted: 25 January 2013

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2013-02-02-01-new-gtld-comm-reference materials-Closed-Generic.doc

TITLE: **"Closed Generic" gTLD Applications**

This paper includes follow-up analysis based on the Committee's discussion of this topic at its 10 January 2013 meeting, as well as recent correspondence received on this issue.

Recent Discussions

Discussion by committee members during the previous meeting included the following points:

- The Board can be guided by the global public interest as well as specific policy guidance. It was noted that the term "public interest" can be used in many ways, and a fuller definition of what is meant by "public interest" would serve to support a number of discussions.

- The exemption process for the Registry Code of Conduct should be more fully explained and such information should be published. This is supported by the staff recommendations. However, it should be noted that the exemption addresses registry-registrar interaction; the exemption has never been intended to prevent registries from being "closed" in terms of registration eligibility requirements. As described in the previous papers (Exhibit A), an exemption from the Code of Conduct is not necessary for a registry to have registration restrictions.

- Rather than attempting to identify which applications are for "generic terms," the issues can be defined in terms of what is a regulated sector. This is a similar approach to that by suggested the GAC in its scorecard on program issues in 2011.[1] ICANN responded that identifying such categories up front would be extremely complex, and added measures to the vetting process for all applications, including an expanded scope for background screening, requirements for cooperation with law enforcement, and the GAC Early Warning process.

- ICANN's communications concerning the program should make sure to provide information about the new ways that the Internet will be available in terms of top-level names, and the reasons for supporting competition in the space.

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[1] The GAC Scorecard noted: "gTLD strings which relate to any generally regulated industry (e.g. .bank, .dentist, .law) should be subject to more intensive vetting than other non-geographical gTLDs." See http://archive.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf.

- A review of previous discussions on the question of the appropriate use of generic terms as TLDs would be helpful. Some relevant references are listed below:

  o The GNSO's Final Report on policy recommendations for the New gTLD Program stated: "In the past, a number of different approaches to new top level domains have been considered including the formulation of a structured taxonomy of names, for example, .auto, .books, .travel and .music. The Committee has opted to enable potential applicants to self-select strings that are either the most appropriate for their customers or potentially the most marketable. It is expected that applicants will apply for targeted community strings such as .travel for the travel industry and .cat for the Catalan community as well as some generic strings." In this report, the Non-Commercial Users Constituency provided a minority statement on Recommendation 20 (concerning community objections). They stated: "The proposal is further flawed because it makes no allowances for generic words to which no community claims exclusive 'ownership' of. Instead, it wants to assign rights to use language based on subjective standards and will over-regulate to the detriment of competition, innovation, and free expression."

  o The concept of "generic" TLD strings was discussed in the development of the community objection process, as well as the legal rights objection process. The "nexus" criterion, which is one factor in the community objection standard, was discussed in particular in the public comment process, relating to the association between the applied-for string and the community objecting to the application. Generic terms were also discussed in connection with the legal rights objection, with some expressing concern that rights holders would attempt to overreach or expand trademark rights.

  o The NCUC submitted public comments critical of the program as including no means for determining who will have rights, "for example, if a wine company applies for .wine; this contradicts genericness doctrine of trademark law and raises anti-competition questions."

  o Some public comments suggested that applicants for specific industry sector or generic words should have a right to operate TLDs that are translations or transliterations of the same word. Other comments opposed the viewpoint that an

existing "generic" TLD would have a right to a particular term or concept in all languages and scripts.

- o The Code of Conduct was added to the (draft) gTLD Registry Agreement in November 2010 to mitigate possible abuses that could result from the lifting of restrictions on registry-registrar cross-ownership. The text of the Code of Conduct was revised for clarification based on public comment, including the possibility for an exemption in certain limited circumstances.

- o It was suggested in comments that the exemption should be available to various other types of registries. This expansion was not made. ICANN stated in its analysis of comments: "The criteria in this provision and in the Code of Conduct are 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."

Recent Correspondence

A letter from 12 community members as signatories was submitted to ICANN on 22 January 2013, as a follow-up to a 25 September 2012 letter from Kathryn Kleiman (Exhibit B). The recent correspondence includes three suggestions:

1. Issue an advisory to all applicants indicating that an "open" TLD is the default model, and applicants seeking to use other business models must explicitly request an exception from ICANN.

2. Establish a procedure to evaluate exception requests, and process them according to criteria set by the Board.

3. Grant exemptions only to those meeting the criteria included in Specification 9:

   (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use;

   (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator; and

(iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

With regard to the first recommendation, the assumption that the default model is open, and that other models must request an exemption is not supported. The Applicant Guidebook has no requirement for a business model open to all potential registrants. As described previously, the Code of Conduct exemption does not relate to registration restrictions, and ICANN should issue guidance to aid community understanding in this area.

The recommendations to publish the exemption process and to abide by the criteria specified in the Guidebook are supported in the staff recommendations.

Submitted by:	Karen Lentz
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EXHIBIT A – PREVIOUS COMMITTEE SUBMISSIONS

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New gTLD Program Committee Submission 2013-01-10-01

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TO:	**New gTLD Program Committee**
TITLE:	**"Closed Generic" gTLD Applications**
PROPOSED ACTION:	**For Review and Discussion**

EXECUTIVE SUMMARY

Following the publication of the gTLD applications in June 2012, ICANN has been contacted by some in the community concerning certain applications for strings which are labeled as "generic terms." These applications are considered problematic by some due to the proposed use of the TLD by the applicant, e.g., using the TLD in a manner that is seen as inappropriately exclusive, particularly in the sense of creating a competitive advantage. These applications have been the subject of public comments and Early Warnings, as well as discussion among members of the New gTLD Program Committee.

Many of the communications link the issue of registration restrictions for a TLD with the Code of Conduct (Specification 9 to the gTLD Registry Agreement). However, it should be clarified that the Code of Conduct refers to registry-registrar interactions, rather than eligibility for registering names in the TLD. Rather than the Code of Conduct, the true issue of concern being expressed appears to be that in certain applications, the proposed registration policies are inappropriate.

The New gTLD Program has been built based on policy advice developed in the GNSO's policy development process. The policy advice did not contain guidance on how ICANN should place restrictions on an applicant's use of a TLD, and no such restrictions were included in the Applicant Guidebook.

Defining a "generic" category of strings is a complex undertaking as strings may have many meanings. However, there are mechanisms built into the program (e.g., objection processes, GAC processes) as a means for concerns about specific applications to be considered and resolved as they arise.

Additional background and analysis on this issue are available in the annex to this paper.

The recommended approach is as follows:

1. Following discussion by the Committee, ICANN should publish a response to the relevant community correspondence to provide clarification of the issue (i.e., explaining the purpose and scope of the Code of Conduct as distinct from questions about eligibility requirements for registering domain names in a TLD).

2. Staff does not believe it is appropriate at this time to create a new category of generic-term applications with new provisions – the Applicant Guidebook did not indicate expected restrictions from ICANN on an applicant's use of a TLD, and there is no existing policy advice that can be used to define this. There are objection mechanisms in place to support consideration of issues for applications that a party considers problematic, and these processes should continue to be used where relevant.

3. If action is desired to create category rules among the current gTLD applications, the appropriate basis for establishing such rules would be policy guidance from the GNSO. Seeking policy guidance is not recommended at this time, as this will introduce delay to the evaluations in process as well as raising liability on the introduction of additional criteria to the process.

Submitted by:	Karen Lentz
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Date Noted:	7 January 2013
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TO: **New gTLD Program Committee**

TITLE: **"Closed Generic" gTLD Applications**

PROPOSED ACTION: **For Board Review and Discussion**

Following the publication of the gTLD applications in June 2012, ICANN has been contacted by some in the community concerning certain applications for strings which are labelled as "generic terms." These applications are considered problematic by some due to the proposed use of the TLD by the applicant, e.g., using the TLD in a manner that is seen as inappropriately exclusive, particularly in the sense of creating a competitive advantage. These applications have been the subject of public comments and Early Warnings, as well as discussion among members of the New gTLD Program Committee.

Several of the public comments on applications cite a 25 September 2012 letter[2] from Kathryn Kleiman expressing concern about negative impacts on competition and consumer choice as a result of "generic" TLD strings adopting a "closed" type of business model and suggesting an Advisory from ICANN on the enforcement of the Code of Conduct (The Code of Conduct is Specification 9 to the gTLD Registry Agreement and relates to registry-registrar interactions such as operational access to registry systems and disclosure of user data). The 25 September letter notes that a number of applications include a stated intention to request an exemption from the Code of Conduct from ICANN, and that it would be inappropriate for ICANN to grant such an exemption in a "closed generic" case. Other individuals have contacted ICANN staff and Board members with similar views.

It should be noted that the Code of Conduct refers to registry-registrar interactions. Rather than the Code of Conduct exemption, the true issue of concern being expressed appears to be that in certain cases, the proposed registration policies are inappropriate, given the string applied for and the use proposed. There is a particular market behaviour relating to excluding competitors from registering domain names that these parties are looking to ICANN to prevent.

This paper reviews the current provisions of the New gTLD Program, the concerns expressed in recent feedback, and possible actions to be taken by ICANN.

ANALYSIS:

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[2] See https://www.icann.org/en/news/correspondence/kleiman-to-icann-25sep12-en

The Initial Evaluation processes defined in the Applicant Guidebook for the review of string and applicant information are underway. As provided in the Guidebook, the objection filing period is currently open; however, no formal objections have been filed to date. During this period, the Independent Objector may also file an objection to any application on behalf of the global Internet community.

The Applicant Guidebook provides processes for both Early Warnings and GAC Advice on applications. Early Warnings were issued in November 2012.[3] The Department of Broadband, Communications and the Digital Economy (DBCDE), on behalf of the Australian Government, issued Early Warnings to 82 applications (including 10 IDNs) on "competition" grounds, stating that: "Restricting common generic strings for the exclusive use of a single entity could have unintended consequences, including a negative impact on competition," and proposing a dialogue for enhanced understanding of the government and the applicants. The suggested remedy in these Early Warnings is that the applicant should specify registration criteria without "anti-competitive or discriminatory conditions relating to access by third parties," which should be formalized as part of the applicant's agreement with ICANN and thus subject to compliance oversight. The Guidebook provides that, upon receipt of an Early Warning, the applicant may elect to withdraw the application for a partial refund or may elect to continue with the application (this may include meeting with representatives from the relevant government(s) to try to address the concern).

Upon completion of the evaluation and dispute resolution processes, all successful gTLD applicants will be eligible to enter into a Registry Agreement with ICANN prior to delegation of the TLD. Subject to the gTLD Registry Agreement:

1. Registries MUST offer non-discriminatory access to registrars. This is in keeping with current practice and is consistent with the GNSO's policy recommendation 19: *Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.*

2. Registries MAY establish policies for the registration of domain names in the TLD. This is particularly relevant to applications designated by the applicant as "community-based," and the Registry Restrictions Dispute Resolution Policy (RRDRP) was developed to provide a path for complaints that a registry is not properly enforcing its registration restrictions.[4]

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[3] See https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings

[4] See http://newgtlds.icann.org/en/applicants/agb/rrdrp-04jun12-en.pdf

This procedure was seen as particularly important in cases where support or non-objection for an application was tied to the registration policies.

3. Registries MUST comply with a Code of Conduct. The Code of Conduct was added to the (draft) gTLD Registry Agreement in November 2010 to mitigate possible abuses that could result from the lifting of restrictions on registry-registrar cross-ownership.

   The text of the Code of Conduct was revised for clarification based on public comment, including the possibility for an exemption as follows:

   Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

   As noted above, the Code of Conduct refers to registry-registrar interactions. The potential for an exemption was intended to provide flexibility to operators to the extent appropriate so long as the TLD is used by the registry operator solely for its own operations, and registrations are not sold or made available to consumers or other third parties.

   A registry could have registration eligibility policies and still be abiding by the Code of Conduct in its dealings with registrars. Alternatively, a registry could have registration eligibility policies and seek an exemption from the Code of Conduct provisions relating to its interaction with registrars based on the absence of third-party registrations in the TLD. The process ICANN will use to consider Code of Conduct exemption requests is being developed as part of the contracting procedure and has not been published to date.

The New gTLD Program has been built based on policy advice developed in the GNSO's policy development process. As noted above, the concerns being expressed about exclusive use of a TLD string relate to the domain name registration policies of the registry, rather than the Code of Conduct. There is currently no additional policy advice to guide ICANN in setting parameters for registry business models or how such should be derived from a particular TLD string.

Defining a "generic" category of strings is a complex undertaking as strings may have many meanings. Within any definition there are likely to be sub-cases, for example, where an applicant's

company name may be also considered a generic term, (e.g., APPLE, BOOTS), which would require additional consideration. Even a broad set of categories might not address all the cases of concern. However, there are mechanisms built into the program as a means for concerns about applications to be considered and resolved as they arise.

RECOMMENDATIONS AND RATIONALE:

Having reviewed the current provisions and the concerns expressed, staff makes the following recommendations.

1. Following discussion by the Committee, ICANN should publish a response to the relevant community correspondence to provide clarification of the issue (i.e., explaining the purpose and scope of the Code of Conduct as distinct from questions about eligibility requirements for registering domain names in a TLD).

2. Staff does not believe it is appropriate at this time to create a new category of generic-term applications with new provisions – the Applicant Guidebook did not indicate expected restrictions from ICANN on an applicant's use of a TLD, and there is no existing policy advice that can be used to define this. There are objection mechanisms in place to support consideration of issues for applications that a party considers problematic, and these processes should continue to be used where relevant.

3. If action is desired to create category rules among the current gTLD applications, the appropriate basis for establishing such rules would be policy guidance from the GNSO. Seeking policy guidance is not recommended at this time, as this will introduce delay to the evaluations in process as well as raising liability on the introduction of additional criteria to the process.

Submitted by:	Karen Lentz
Position:	Director, Operations & Policy Research
Date Noted:	7 January 2013
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EXHIBIT B - CORRESPONDENCE

January 22, 2013

Mr. Cherine Chalaby, Chair of ICANN Board New gTLD Committee
Mr. Akram Atallah, COO, ICANN
Dr. Steve Crocker, Chair, ICANN Board
Mr. Fadi Chehadé, President & CEO, ICANN
The New gTLD Committee & the ICANN Board

Dear Mr. Chalaby, Mr. Atallah, Dr. Crocker, Mr. Chehadé:

Last September, several members of the ICANN Community wrote to the Board expressing concerns about Closed Generic TLD applications. **Michele Neylon** urged ICANN to "increase competition and choice," not "segregate and close-off common words.[1] **Steve DelBianco** alerted ICANN that many Closed Generic applications came from companies with "a significant market presence as a competitor" in the business or industry of the closed generic term.[2] **Kathy Kleiman** observed that a number of applications seek to run "'generic word' strings in a completely closed and vertically integrated fashion."[3]

At the Toronto Public Forum, these individuals and others asked ICANN to resolve the ambiguity surrounding these applications, and provide clarity for New gTLD applicants. The central questions on this issue are: What are the exceptions to the New gTLD Registry Code of Conduct? What applications will qualify for this exception? How can applicants request this exception, and what if their request is denied?

For several years, community members have worked extensively on these questions. Some have signed below, others are cited with respect. We offer these proposals in the hope of advancing an exceptions process in a manner that is fair and consistent for applicants.

I.   Non-discrimination in New gTLDs
The default for new gTLDs is an "open" model. This is established in the Applicant Guidebook, which states that TLD registries commit to provide "non-discriminatory access to Registry Services to all ICANN-accredited registrars"[4] while ensuring that they will <u>not</u> "directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems."[5]

These principles are consistent with the obligations of most existing TLDs, including .COM, .NET, .ORG, and .INFO. Their Registry Agreements require that they provide equal and non-discriminatory access to ICANN-accredited registrars.   This was also true in the initial draft of the Registry Code of Conduct, which had no exceptions: all new gTLDs were "open."[6] Notably, the concept of a "closed" TLD was advanced by the Business Constituency (BC), who noted that <u>brand owners</u> would not need registrars if their <u>Brand TLD</u> was operated for limited or internal

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[1] https://www.icann.org/en/news/correspondence/neylon-et-al-to-chehade-et-al-24sep12-en

[2] http://www.fhhlaw.com/TorontoPublicForumPresentationsonClosedGenericTLDConcerns10-18-2012.pdf

[3] https://www.icann.org/en/news/correspondence/kleiman-to-icann-25sep12-en

[4] Section 2.9(a), Base Agreement & Specifications, http://newgtlds.icann.org/en/applicants/agb

[5] Specification 9, Section 1(a), Base Agreement & Specifications http://newgtlds.icann.org/en/applicants/agb

[6] November 2010 draft of Applicant Guidebook, http://archive.icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-12nov10-en.pdf

purposes.[7] Thereafter, the second version of the Registry Operator Code of Conduct included an exception to the equal access and non-discrimination provisions with clear comments noting its use for dot-brand TLDs.[8]

II.   Exception Procedures for the Registry Code of Conduct

A fair and consistent process for granting exceptions to the Code of Conduct is crucial for TLD applicants and the community. In general, such a process should include:

A. **Notice**: An advisory to all applicants that the default model is that of an "open" TLD. Applicants seeking a Registry Agreement that does not comply with this model must explicitly request an exception from ICANN.
B. **Procedure**: ICANN Staff must establish a procedure to evaluate exception requests, and process them according to criteria set by the Board.
C. **Criteria**: In keeping with the intent of the exception, we recommend that ICANN grant exceptions only to those applications meeting the requirements in the Registry Operator Code of Conduct:[9]
    i. *"all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use"*; and
    ii. *"Registry Operator does not sell, distribute, or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator";* and
    iii. Proof that *"application of this Code of Conduct to the TLD is not necessary to protect the public interest."*

Requirements (i) and (ii) are evidence-based, and reference definitions of "Affiliate" and "control" already established in Section 2.9(c) of this Agreement. For requirement (iii), we propose that ICANN affirm this is met if the applicant can prove:

- "The trademark to which the .brand is an identical match must be the subject of trademark registrations of national effect in at least three countries in each of at least three of the five ICANN regions", and
- " For first round applicants, the registrations of national effect referenced in (a) above must have been issued on or before June 27, 2008", and
- the trademark is otherwise eligible for inclusion in the Trademark Clearinghouse.

The first two points above were defined by the Intellectual Property Constituency, during the Vertical Integration Working Group's discussion of the dot-brand exception, to create a "balance of fairness and seeking to ensure that there is no gaming."[10]

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[7] BC Position on Registry-Registrar vertical separation September 2009, https://community.icann.org/display/gnsovertint/Initial+Report+Vertical+Integration+PDP+WG+Posted+For+Comment +23+July+2010

[8] April 2011 draft of Applicant Guidebook, http://archive.icann.org/en/topics/new-gtlds/draft-agreement-specs-redline-15apr11-en.pdf.

[9] Specification 9, Section 6, Base Agreement & Specifications, http://newgtlds.icann.org/en/applicants/agb

[10] IPC Proposal, Initial Report Vertical Integration PDP WG Posted For Comment 23 July 2010, https://community.icann.org/display/gnsovertint/Initial+Report+Vertical+Integration+PDP+WG+Posted+For+Comment +23+July+2010

As an alternative, we propose that a test determining whether a TLD string is a brand could be designed to mirror that of the proposed Trademark Clearinghouse with appropriate safeguards to prevent gaming.

Once ICANN has determined that an application has satisfied the criteria set out above, the exception request should be granted. If the application fails to meet these requirements, ICANN should (i) notify the applicant that they do not qualify for the exception; and (ii) permit the applicant to either modify its application to conform to an "open" model, or withdraw the application and receive a refund of all fees paid in accordance with program rules. In all cases, the process to evaluate and grant or deny the exception request must be fair and expeditious, and provide applicants with the necessary certainty to develop their business plans with confidence.

III. The Alternative: A Difficult, Confusing, and Lengthier Process

However, ICANN might adopt a different approach. Qualifying brand owners would still request and receive an exception according to the expedited procedure defined above. But other applicants might also request an exception if they can demonstrate that their application will "protect the public interest" by proving that it is:

A. Not a "significant market presence as a competitor" in the market or industry characterized by the TLD string;[11]
B. Not "seeking exclusive access to a common generic string that relates to a broad market sector";[12] and
C. Not likely to engage in any number of activities or abuses that the non-discrimination and equal access provisions of the Registry Operator Code of Conduct were created to prevent.

These proceedings must be open and public, allowing stakeholders in the ICANN Community, including Governments, to provide comment and evidence. We anticipate that this process would be lengthy, inconsistent, and that few applicants would pass.

We are well in to the application evaluation process, and most TLD applicants cannot risk any further delays due to program uncertainty. With this in mind, we thank you for consideration of these proposals, and offer our assistance in any manner that can benefit this task.

Thank you,
Michele Neylon, CEO, Blacknight, Ireland
Kathy Kleiman, Fletcher, Heald & Hildreth, US
Nigel Roberts, CEO, CI Domain Registry Ltd., Guernsey Alex Gakuru,
Chair, ICT Consumers Association of Kenya Frederic Guillemaut,
Mailclub, France
Paul Andersen, CEO, Artic Names, Canada
Gerardo Aristizábal P., Managing Director, CCI REG S.A., Colombia
Luc Seufer, Chief Legal Officer, EuroDNS, Luxembourg
Benny Samuelsen, Registry manager, Nordreg AB, Sweden
Jordan Carter, Acting Chief Executive, InternetNZ (.nz) Jay Daley,
Chief Executive, .nz Registry Services (.nz)
Debbie Monahan, Domain Name Commissioner, Domain Name Commission (.nz)

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[11] Comments of Steve DelBianco,
http://www.fhhlaw.com/TorontoPublicForumPresentationsonClosedGenericTLDConcerns10-18-2012.pdf
[12] Australian GAC Early Warnings of 82 Closed Generic TLDs, see e.g.,
https://gacweb.icann.org/download/attachments/22938690/Autoinsurance-AU-
86372.pdf?version=1&modificationDate=1353381252000

September 25, 2012

Re: An Open Letter to the ICANN Board and CEO, GAC Members, Evaluators, the Independent Objector and Members of the ICANN Community

Dear Dr. Crocker, Mr. Chehadé, Ms. Dryden, Mr. Chalaby, Governmental Advisory Committee Members, Independent Objector, gTLD Application Evaluators and the ICANN Community:

The new gTLD program is underway and applications have commenced the comprehensive evaluation process. Yet several applicants have misinterpreted the rules and propose to operate "generic word" strings in a completely closed and vertically integrated fashion, simultaneously serving as registry, registrar and registrant – even though this gTLD model was intended to be reserved solely for brand strings. Such a monopolistic framework will, if implemented, radically disrupt competition and consumer choice on a global scale, and more importantly, threaten the very existence of the free, open and competitive Internet that has flourished under ICANN's steadfast governance since 1999.

These applications, if approved, will grant the registry exclusive authority and market power within the Internet ecosystem to (i) deny entry to current and future competitors who operate within the same business landscape; (ii) dictate products or services that consumers must purchase in order to participate within the new gTLD string, or face being completely excluded; (iii) create private DNS-enabled networks beyond the oversight of any government or governing body, which could raise law enforcement and national security concerns worldwide.

To address this, ICANN should issue an Advisory (i) affirming its commitment to the principles of competition and consumer choice, as reinforced by the New gTLD Registry Operator Code of Conduct ("Code"); (ii) stating that exemptions to the Code will only be granted to branded strings in narrowly-tailored circumstances; and (iii) notifying applicants requesting an exemption that they must clearly demonstrate satisfaction of its narrowly-defined parameters. ICANN should quickly issue its Advisory, allowing affected applicants the opportunity to amend their string, demonstrate compliance with the Code, or withdraw applications. This should not delay the evaluation of unaffected applications.

1

I.   Introduction

Since the new gTLD program was announced in 2008, ICANN has proclaimed that its goals are to "enhance competition and consumer choice and enable the benefits of innovation via the introduction of new gTLDs".[1]   Further, ICANN's former CEO advised Congress in February 2012 that, "In the end, the new gTLD program is intended to benefit the billions of Internet users (and not just the hundreds of potential applicants) by providing business opportunity, language and cultural diversity, protections for consumers and property, and choice for Internet users."[2]

Now, three months after the application period closed and the proposed strings were published by ICANN, the new gTLD program is at a critical procedural juncture. Submitted applications for new gTLD strings are being reviewed by ICANN evaluators, which will result in their approval, rejection, or reopening for further amendment by the applicant. Many of these applications seek an exemption from the New gTLD Registry Operator Code of Conduct ("Code" or "Code of Conduct").

Yet any contemplated granting of the requested exemptions will be contrary to the Code of Conduct's guiding principles of non-discrimination and equal access, and undermine the new gTLD program's goals of promoting competition and consumer choice. Indeed, the precepts of non-discrimination, equal access, competition, and consumer choice have promoted the exponential growth of a free and open Internet. To ensure that these crucial principles are preserved, ICANN should reaffirm its intention to enforce its Code of Conduct. Because this reaffirmation should be made prior to the deployment of any new gTLD, this letter is addressed to the ICANN Board and CEO, Government Advisory Committee Members, the Independent Objector, gTLD Application Evaluators, and members of the ICANN community.

II.   Equal access and non-discrimination are the hallmarks of the new gTLD program.

ICANN has promulgated both a New gTLD Registry Agreement and Code of Conduct with which all approved new gTLD applicants (i.e., Registry Operators) must comply. Notably, Section 2.9 of the New gTLD Registry Agreement requires all registries to *"…provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD."*[3] Further, Section 1 of the Code of Conduct unequivocally states that new gTLD registries shall ***not***:

- directly or indirectly show any preference or *provide any special consideration to any registrar* with respect to operational access to registry systems and related registry services;

- *register domain names in its own right*, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD;

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[1] *ICANN New gTLD Micro-Site (http://newgtlds.icann.org/en/about/program);* Other ICANN publications have echoed the program's hallmarks: "New gTLDs help achieve that commitment by paving the way for increased consumer choice by facilitating competition...*" (http://archive.icann.org/en/topics/new-gtlds/faqs-21oct11-en.pdf)*
[2] http://www.icann.org/en/news/correspondence/beckstrom-to-leahy-02feb12-en.pdf
[3] *Applicant Guidebook, Draft New gTLD Registry Agreement* (http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-04jun12-en.pdf)

- register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution request by consumers.[4]

Yet despite ICANN's core precepts of equal access and non-discrimination, several generic word new gTLD applications seek an exemption from these very obligations and commitments. The result would be Registry Operators that simultaneously function as a registry, registrar, and registrant within the new gTLD that they seek to operate. Their proposed model is a "completely closed" and vertically integrated framework that undermines competition and consumer choice – the very goals of the new gTLD process -- in numerous ways:

- First, a Registry Operator's exclusive use of a generic term that refers to an entire industry could readily limit or deny access to competitors who also operate within the industry landscape. For example, granting a completely closed category string such as ".TRUCK" to a single manufacturer could lead to other manufacturers being barred from using the string to promote their own business on an equal and fair footing.

- Second, a Registry Operator could directly (or indirectly) compel the purchase or use of other products/services in conjunction with the string, thereby eliminating the consumer's choice to use competing products and services available in the marketplace. This could then negatively impact innovation, as entrepreneurs and inventors might be inhibited from bringing new products to market for fear that a large segment of the marketplace will be closed to them.

- Third, allowing Registry Operators to segregate and limit access to common words for which they do not possess legally recognized intellectual property rights, allows them to circumvent the legal process for securing those rights. That is, they could obtain intellectual property rights in a generic term that they would not otherwise obtain via established trademark protection processes.

- Fourth, consumer confusion will increase exponentially as they try to ascertain which strings are operated on a free and open Internet vs. those that operate as "walled gardens" controlled by one entity and encumbered by restrictions. This consumer confusion will be exacerbated by the fact that consumers today associate many of these proposed generic word "closed gTLDs" with entire industries, but if granted to one corporation, these generic words could be used in the future by one specific company for their specific corporate goals.

- Fifth, consumers with moral, personal, or other objections to conducting business with a Registry Operator that has secured "exclusive use" rights to a generic word string, will be compelled to use that Registry Operator or not participate in the Internet ecosystem. Freedom of choice in the Internet marketplace will be eliminated.

- Sixth, allowing vertical integration between registrars, registries and registrants in generic word TLDs not only represents competitive and consumer harm, but also threatens the single, open and competitive Internet. A vertically integrated Registry Operator with unchecked power to restrict who can register a domain and who can access the generic word gTLD, could create a private DNS-enabled network that is beyond the oversight and reach of existing Internet governance. This could raise law enforcement and national security concerns, as a closed network would be subject to arbitrary terms of service and not open and public policy.

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[4] *Ibid*., Specification 9, Section 1.

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Apply Only in Limited Circumstances.

Those new generic word gTLD applications that have indicated a desire to be released from the Code of Conduct's equal access and non-discrimination provisions would do so in reliance on Section 6:

> Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (**i**) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own *exclusive use*; (**ii**) Registry Operator does not *sell, distribute or transfer control* or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator; and (**iii**) application of this Code of Conduct to the TLD is not necessary to *protect the public interest*.[5]

Such reliance is misplaced. As discussed below, this exemption was never intended to eclipse or eliminate the Code of Conduct, but rather, to allow companies with a legally recognized intellectual property right and corporate need, to manage a small set of domains names for their exclusive use.

A. "Exclusive use"

The exemption's initial prong requires that, "all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own *exclusive use*." For those familiar with the vertical integration debates that took place within the ICANN community in anticipation of the launch of the new gTLD program, the intent of the "exclusive use" provision is unambiguous. This section is clearly limited to those new gTLDs that incorporate a legally recognized brand name, trademark, or other intellectual property right (e.g., .APPLE, .NIKE) -- in other words, "Brand Registries" -- and who wish to register a small number of domain names for their affiliates, employees and franchisees.[6]

B. "Sell, distribute or transfer control"

The exemption's second prong mandates that, "Registry Operator [shall] not *sell, distribute or transfer control* or use of any registrations in the TLD to any third party that is not an *Affiliate of Registry Operator*." Notably, the prior ICANN definition of "affiliate," refers to relationships solidly grounded in joint management, joint ownership and employees.[7] It follows then, that there must be legal control/ ownership between the Brand Registry Operator and the entities or persons that are registrants in the TLD.

More importantly, it excludes relationships with third party registrants, who must use ICANN-accredited registrars. Thus, the second prong of the exemption dictates that it applies only to brand word

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[5] *Ibid*., Specification 9, Section 6.

[6] As such entities are clearly bound to the Brand Registry, the Brand Registry would maintain "exclusive use" of domain names and the uses to which they are put. Moreover, discussions at the time readily observed that it was unfair to require a company possessing intellectual property rights to use commercial 3rd party registrars for domain name registrations solely for its own use.

[7] *See New Registry Agreement*, Section 2.9 (c): 'Affiliate' means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirect-ly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise. (http://newgtlds.icann.org/en/ applicants/ agb/base-agreement-specs-04jun12-en.pdf)

TLDs and **not** generic word TLDs.   Further, it would enable the wholesale discrimination of access to domain names in certain generic-word TLD Registries by competitors or others they choose to discriminate against for reasons having nothing to do with the operation of the gTLD.

C.   "<u>Protect the public interest</u>"

The exemption's final prong dictates that requestors clearly demonstrate "application of this Code of
Conduct to the TLD is not necessary to protect the public interest." This may be the highest standard of
all, in large part because ICANN has since 1999, consistently defined the "public interest" in terms of non- discrimination, equal access, competition, and consumer choice. These public interests have served the Internet community exceedingly well. Accordingly, and other than the case of Brand Registry gTLDs, it is difficult to imagine a set of circumstances where the granting of the exemption outweighs the overarching public interests that ICANN has already adopted and consistently heralded.

IV.   Conclusion

During the past several years, the ICANN community established the rules of the New gTLD process: the community shaped them, debated them and negotiated each word. All parties and applicants agreed to abide by the rules contained within the Applicant Guidebook, as well as the new gTLD Registry Agreement and Code of Conduct. Current and future stakeholders then disbursed to formulate business plans and strategies around new gTLDs, confident in the knowledge that ICANN was committed to continuing its long-established level playing field for registries, registrars and registrants alike.

Should ICANN now relax its interpretation of vertical separation, or liberally grant exceptions to the Code it will be changing the rules of the game midstream, and threatening the free, open and competitive Internet that has flourished under its able stewardship since 1999. Now is not the time to do so.

Instead, it is imperative for ICANN to issue a clear and timely Advisory (i) publicly reaffirming its commitment to competition and consumer choice, and thus, strict enforcement of the Code of Conduct; (ii) reiterating the narrow and limited scope of the exemption to the Code of Conduct; and (iii) notifying applicants seeking exemptions (either overtly or impliedly) that they must clearly demonstrate satisfaction of the exemption's narrowly-defined criterion. This work should be done now, even as applicant Evaluators review the applications, so that applicants may consider whether to withdraw or amend their applications. This work should not delay the New gTLD process, but promote clarity and certainty to its outcomes. *Clear, fair and consistent application and enforcement of ICANN's guiding principles and established program rules **is** critically important at this time.*

Respectfully,

Kathryn Kleiman

Kathryn Kleiman
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