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August 27, 2021

Attn: Goran Marby, President and Chief Executive Officer ICANN  
(sent via email)

It has come to our attention through the recent publication of the RSEP amendments that there are two proposed registry services called DropZone, dated August 13, 2021 which will affect a large quantity of Top-Level Domain names operated by Donuts.<sup>1</sup>

We believe this new registry service raises significant competition concerns and warrants referral to the appropriate competition authorities, as defined in section 2.5 of the Registry Services Evaluation Policy.<sup>2</sup>

Specifically, in 2008, the United States Department of Justice Antitrust Division said TLD operators should “not require the purchase of other services from the registry operator as a condition of registration” and “ICANN should take steps to protect consumers from the exercise of market power by gTLD operators.”<sup>3</sup> The Division also expressed concerns with “price discrimination, bundling, and tying” by TLD operators. The Donuts RSEP proposal does precisely what the Antitrust Division warned against in 2008.

In the domain name business, registries operate their own line of commerce.<sup>4</sup> Registry services have always operated on the principles of equal access to all ICANN accredited registrars and offering domain names on a first-come, first served basis. The proposed DropZone offering will change these core principles. A vague and undefined fee structure is being proposed, which is a significant change to the standard registry services. The result is a new transaction fee that the registry is able to force upon registrars as a condition of a domain registration. These new fees will be required to participate in the market. It appears these fees can be changed, modified, increased, edited, or morphed into entirely new fee or other toll structures in the future without future review or scrutiny.

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<sup>1</sup> Two proposed RSEP requests for Binky Moon LLC (Donuts) and Dog Beach LLC (also Donuts), (“Donuts DropZone RSEPs”) - <https://www.icann.org/resources/pages/rsep-2014-02-19-en>

<sup>2</sup> <https://www.icann.org/resources/pages/registries/rsep/policy-en>

<sup>3</sup> <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>

<sup>4</sup> <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets>

The standard paid registry functions have always been create/renew/transfer in SRS for the central registry database. But what is being proposed is an entirely new fee which must be paid to use the “create” command on a subset of available domains. This is an entirely new concept and radically different from how the domain name system has operated for more than 25 years.

The introduction of the DropZone services will alter the dimension of what is sold and where it is sold in a manner that substantially affects the marketplace. DropZone will fundamentally change the way registrars access inventory, essentially requiring them to pay for a higher cost service (and pass those costs on to consumers) or settle for a picked-over inventory of less appealing names. The end result will be higher prices (or lower quality) for consumers. This should be reviewed to ensure the coordinated interaction<sup>5</sup> with the registrars that must participate in DropZone for access is not mistaken as a manner to drive tacit coordination among the narrower participating group of registrars, that would include Donuts itself.

Because each TLD operates a natural monopoly under essentially what are perpetual contracts with ICANN, the proposed pay-to-play toll fees will be levied upon registrars without justification, by adding a required additional cost to registrars to participate in the market. As one industry blogger suggested, “Dropping domains might get more expensive at Donuts” and “such charges would presumably be passed on to registrants.”<sup>6</sup>

To the extent there was a review of the impact of the combination of Afilias, Donuts, Name.com registrar and other known or unknown affiliates within Ethos in December 2020, the addition of Drop Zone requires additional analysis.

In sum, we believe the DropZone services threaten the core principles of offering equal access and providing registry functions on a first-come, first served basis. These principles have been in place since the inception of ICANN and should not be abandoned without a thorough review with input from all stakeholders.

We elaborate on the reasons for our concerns below.

### **ICANN must independently study and define the relevant market and impact on competition.**

In this RSEP, Donuts indicates the relevant market is “*Registry Platform Services*”. And Donuts answered “No” to the question if the proposed service offering would affect the ability for other companies/entities that provide similar products or services to compete.

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<sup>5</sup> See Coordinated Interaction:

<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects>

<sup>6</sup> <http://domainincite.com/26958-dropping-domains-might-get-more-expensive-at-donuts>

We do not agree with these answers. For example, prior ICANN studies indicate TLDs are parallel monopolies<sup>7</sup> and that domains do not serve as substitutes for one another. And we believe DropZone will have a fundamental impact on the expiring domain market and will most certainly impact other companies in a negative way.

But more importantly: Will ICANN simply rely on Donut's three-word and one-word answers to such vital questions? Or will ICANN perform its own independent, detailed analysis? At the very least ICANN must have firm answers (based on facts and expert analysis) to key questions including:

- What is the relevant market?
- What are the long-term competitive impacts by introducing new fees as a condition of domain registration?
- If Registrars do not agree to pay extra fees are they denied from participating in the market?
- How will conditional fees as a pre-requirement to register a domain name evolve over time with the rest of the industry?
- Does this new offering have the potential to disrupt or eliminate other business models?
- What is the impact on consumers and/or registrants?
- Will other registries seek parity with these services, or perhaps introduce other incremental advances towards registry auction or wait list services that have been denied or controversial from competitive perspectives?

### **DropZone raises serious vertical integration and other cross-ownership issues.**

In particular, Name.com is a top-ten scale registrar offering services to end users for acquiring expired (aka dropping) domain names. Name.com is owned and operated in common with the party submitting the Donuts DropZone RSEPs. When Afilias previously submitted its DropZone RSEP in January of 2020, it did not hold affiliated registrars of scale anywhere near this, nor did it participate in helping clients acquire rights to expired domain names through such ICANN accredited registrars.

Indeed, the ownership of a large market registrar Name.com by a large market registry holder of the scale that Donuts represents has to have care and consideration on its own, conceptually. Name.com is a robust player in both the primary and secondary markets for domain names. Deleting inventory being made available by immediate acquisition processes requires some arms-length protections.

The Afilias DropZone seemed to slip through the prior RSEP process while there was significant attention to the matter of the Ethos acquisition of Public Interest Registry and .ORG that may have distracted the due scrutiny it deserved. While one might consider the Afilias RSEP and its approval to stand on its own, and the acquisition of Afilias by Donuts on its own as simple and clear matters, the challenge comes under thoughtful review of the combination and the manner of affectation within the market competition. The combination of the Afilias RSEP and an entity owning a significant

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<sup>7</sup> <https://archive.icann.org/en/tlds/new-gtld-eval-31aug04.pdf>

market share like Name.com within the registrar space should trigger the current Donuts RSEPs for DropZone to receive due attention to competitive concerns.

Vertical Integration at this scale creates unfair competitive advantage on behalf of Donuts and its affiliates to the global ICANN Accredited Registrar marketplace. And the relationship between Donuts and its vertically integrated registrar(s) creates serious issues in the future as well. As more consolidation occurs within the industry (registries acquire more registrars and vice-versa), the long-standing effects of these issues need to be addressed before allowing new systems (like DropZone) that will create added benefits to those who are vertically integrated and aligned.

ICANN should strive to prevent anti-competitive behavior from any vertically integrated ICANN Accredited registries/registrar(s). After all, this is why the federal Government split out the registry and registrar functions when it broke up Network Solutions in the early 2000's - to promote equitable competition.

### **DropZone increases the “ODDS of WINNING” for Donuts’s self-owned subsidiary, Name.com.**

The DropZone process interferes within the well-documented gTLD lifecycle, injecting a special handling period, system, and access to these gTLD domains, prior to deleting names being sent to the shared registry system on a first-come, first-served registration by the first successful add command.

Financially, Name.com as Donuts’ affiliated company can use left-hand to right-hand accounting or balance transfers within their company to hold an unfair advantage in accessing the DropZone. The cost to Name.com will effectively be free while the costs to any other registrars are actual tangible monies giving Name.com, along with any other registrars or future owned registrars, including partnerships, a unique and unfair advantage given the vertical integration.

Because Donuts (or its common ownership) hold controlling interest in Name.com, Donuts will entirely self-benefit through this common ownership and control of both entities in the newly proposed DropZone.

Will Name.com decline to participate or be barred from accessing the DropZone? What will Donuts do in order to ensure equitable competitive use of the shared registry system among competitors that are not holding common ownership with the registry? Who will police these activities going forward? Will ICANN take on a greater role in monitoring this type of behavior and vertical separation issues?

Also unclear is how to ensure that Donuts does not restrict access to the DropZone to only their owned or operated affiliates. And how Donuts would prevent proprietary knowledge sharing of how the backend systems work which would give Donuts’ owned and operated registrars an unfair advantage over competitors.

If the “application fee” is merely a fee for sending in the create command to the central registry (which we suspect it is), would Name.com not place blanket multiple create commands for every expiring domain name every day (as it is essentially free), thus manipulating the market and driving the cost higher for all other participants? The splitting of registry and registrar in a shared registration system (SRS) that allowed for equitable competition was a foundational tenet of ICANN’s formation. Maintaining clear lines of separation from the registry and registrar functions has helped to promote competition.

It is of the utmost importance to explain the serious competition issues that arise should Donuts allow Name.com or any future registrars controlled by Donuts to participate in such a model. Name.com would be paying its parent entity, while all outside registrars would have to pay a third party, giving an unfair and inequitable advantage to Name.com and Donuts. This RSEP deserves a comprehensive and in-depth competitive review.

### **Approval of Affilias’ DropZone is not precedent for rubber-stamping this one.**

The Donuts DropZone RSEPs and the contemplated platform, references the Afilias DropZone platform’s prior review and approval and suggest it is precedent for the rapid approval of the Donuts DropZone RSEPs. But there are several important differences between the Afilias RSEP and the Donuts’s proposal.

Afilias’ prior approval of a similar, although different DropZone, is not an apples-to-apples comparison for reasons beyond the consideration of Name.com as a large-market Registrar now being a factor as a consideration that did not exist at the time of the Afilias RSEP<sup>8</sup>. There are important (and missing) aspects of the proposed Donuts DropZone program that are not clear about fairness and competitive equity. And most importantly, TLD operators, who hold natural monopoly positions in their respective TLDs<sup>9</sup>, are proposing required additional fees on top of the standard registry service offering.

At the time Afilias’ RSEP was approved, Name.com was not part of the common ownership, as Donuts was a separate company from Afilias. Afilias did hold some ownership in some ICANN Accredited Registrars, but none held market scale similar to what Name.com represents today, nor did any participate in the robust manner that Name.com does within the secondary market or for expiring/dropping domain names.

The changes in the makeup of Donuts’ affiliated company as compared to Afilias’ create an entirely different conflict of interest scenario in the context of the DropZone that did not exist previously.

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<sup>8</sup> Afilias DropZone RSEP was submitted in January of 2020; Donuts (who own Name.Com Registrar) acquired Afilias in December of 2020.

<sup>9</sup> <https://www.itu.int/ITU-D/cyb/ip/docs/itu-draft-cctld-guide.pdf> Page 3, Paragraph 2, “Registries are by definition a monopoly”

Separately, the RSEPs in question specifically states “[Binky Moon/Dog Beach], LLC is replicating a known good process for domain expiry as previously implemented by Afiliast”, however this statement is inaccurate.

The Afiliast RSEP being cited for the justification of rapid approval for the Donuts DropZone RSEP, was communicated as an effective create fee, higher than the typical create fee. But here Donuts is seeking to create an *entirely new fee* in addition to the standard create fee in the case of this RSEP. This additional tax which registrars are forced to pay to the central registry is a profound and fundamental change, contrary to what the RSEP inaccurately claims is “replicating a known good process”. This significant difference merits competitive review, for the reasons identified within this letter explain how such a fee schedule as stated could evolve in a variety of directions.

Furthermore, this RSEP specially says “Dropzone service can support additional application fees to be configured on a per TLD basis” - but the term “application fee” can mean many different things. It could be a fee on top of sending in the create command to the central registry. Thus, Donuts operating the registry, could potentially be collecting hundreds of thousands of non-refundable fees on individual domain names. It could be a pre-registration fee before domains are released, it could be an auction bid fee, whereby the highest bidder obtains the rights to the domain, it could be a backorder fee, or any other of various permutations.

We believe this proposal cleverly hides the fact that this service will be a “fee” to send in a create command to buy an expired domain in the DropZone, no matter if the purchase attempt is successful or not. Therefore registrars will have to send in numerous create commands in hopes that they successfully buy a domain, but even failed registration attempts will see this surcharge. Thus not only creating a new service, but offering a pay-for-non-performance type model which is even more complicated and confusing. Does this pay-for-non-performance model favor the players in the industry with the deepest pockets - thus putting others at a disadvantage? Or worse, does this pay-for-non-performance favor Name.com and give it a completely unfair advantage as it is in effect paying itself when the competition has to pay real-world money to a third party?

### **There is no stability to the proposed application fee structure.**

The Donuts RSEP introduces additional fees from registrars, and though it is defined by the registry today as a monetary figure, it is not clear that there is any stability to the pricing or consistency to the pricing across the registrar channel that might participate in the restricted pool of participating registrars.

Although established initially, it is not clear that the registrar fees per name will not not be raised or changed, what notice periods this would have on changes, or any other clarity like registry fees/transfers or other paid costs registrars may incur.

Additionally it is unclear if there is a plan to have rebates or other discounts provided on DropZone Acquisition fees to registrars with affiliated ownership (or otherwise.)

This point should be moot however, given the fact that Donuts is creating a new service out of thin air to make more money, without providing an actual service, and complicating every aspect from ICANN accounting to Registrar accounting to creating an anti-competitive environment. This is simply an additional tax being introduced on behalf of the domain registry that is in a monopoly position. A tax that does not nourish ICANN, but rather directly nourishes Donuts. The fact is, such a new service should not be introduced, especially as it lacks definitive details on how it won't be morphed into a worse idea and system for everyone but Donuts.

### **The RSEP raises the possibility of unequal registrar access to DropZone.**

While Donuts DropZone does state that it provides access to the same pool of registrars that are otherwise approved to connect to their SRS, there could be an enhanced code of conduct that may be restrictive upon the general registrars and there is an opportunity for selective enforcement without recourse. Again, this raises a host of competitive-balance issues and questions, including:

- Why would TLD operators be given such leeway?
- Who will be responsible for monitoring equitable treatment of all registrars?
- How will the dimension of competition be identified and measured?
- What might the mechanisms be that would prevent Donuts from loosely enforcing it's owned and operated Registrar(s) such as Name.com or using pedantic methods or technicalities applied to competitors to eliminate their participation in this DropZone?
- Additionally, what would prevent Donuts from charging certain registrars, at its own discretion, \$50,000 or other fees to access the DropZone?

The market share can potentially be constrained by the operator without clarity to this, and such details are not present in the RSEP or other available information about the Donuts DropZone. Given Donuts failed to make one mention of competition issues in the RSEP, it is reasonable to assume Donuts might focus on shareholder value over self-regulation.

While the intention might be to create incentives to good actors, there must be safeguards to prevent this service from being restricted in anti-competitive ways. Further, if such a fee were to be assessed to all registrars, including that fee being to Name.com to access to the DropZone, this would be paid for and collected by Donuts, and it would in turn provide Name.com and Donuts unfair advantage to have access to the DropZone.

The RSEP completely fails to specify the details of creating a fair marketplace through the DropZone or specify how such mechanisms would operate. What is to prevent Donuts from holding unfair policies that do not give equal access to all registrars across the board, no matter of registrar size, registrar country, etc.?

### **This activity is opaque to the ICANN registry reporting systems for gTLDs and adds overwhelming costs to ICANN, Registrars, Registrants and other Third Parties.**

The proposed changes will require countless hours from the ICANN organization and from every Registrar to incorporate such changes which are solely for Donuts' financial interest. Donuts is effectively asking every entity in the ICANN ecosystem to bear the costs of introducing a new service with no benefit outside of a financial benefit to itself, while forcing all registrars to spend more money and resources to register available domain names.

Will ICANN update its monthly registry reports<sup>10</sup> to include the volume and numbers of these extra and required fees for transparency purposes? Has ICANN budgeted for these technical changes? Has ICANN considered the amount of work that is required to do this on its own behalf, or has it sought input from other constituencies with relation to how this will affect domain name Registrars and their respective systems?

In addition there are numerous data collators, rights monitoring services and other parties that provide essential reporting and inputs to security and other systems that track domains that expired and were subsequently 'dropcaught' by mapping the successful registrar IDs from publicly available information. The DropZone process could impair drop monitoring by those parties due to the activity being lumped in with what might otherwise appear to be standard registration in publicly available information.

## **Conclusion**

Given the many issues detailed above, and many other examples which will likely be discovered under close examination by experts, we believe further scrutiny is paramount.

In line with ICANN's obligation and core value to promote competition in the DNS, we request a serious examination as to exactly what is being proposed and that ICANN make a formal request to the proper competition authorities for competition guidance.

Thank you for your prompt attention to this matter.

Respectfully,

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<sup>10</sup> <https://www.icann.org/resources/pages/registry-reports>