

## **18 March 2011 Draft Rationale for Approving Registry Agreement with ICM's for .XXX sTLD**

Note: This draft Rationale is presented with the Approved Resolutions from the 18 March 2011 meeting. The draft Rationale is not final until approved with the minutes of the Board meeting.

### **I. EXECUTIVE SUMMARY**

The .XXX sTLD issue has been debated within ICANN for years. Since shortly after the 2004 introduction of the request for proposals for sTLDs, the ICANN Board has been faced with several contentious debates and decisions on ICM Registry's application. The ICANN community has engaged in extensive debate as well, with this single issue generating higher volumes of community comment than nearly any other issue ever faced within ICANN. Consideration of the .XXX sTLD has tested the resiliency of ICANN, its commitment to adhere to its accountability mechanisms, and has brought to the forefront issues of how the Board considers and addresses advice from the Governmental Advisory Committee (GAC).

The Board thanks all who have contributed comments and input into its consideration of ICM's Application. The Board particularly thanks the GAC for its time, commitment and dedication to forming and participating in a consultation process to address GAC advice spanning over six years. The Board's decision differs from some of the GAC advice received. This decision is a result of careful consideration, and the Board approached the matter of differing with GAC advice with care and concern, working hard to understand the advice and to what the application of advice in this instance would lead.

This decision represents a difficult, careful balance, weighing the extensive community advice both for and against the registry agreement, as well as maintaining adherence to proper and documented process. ICM's inaugural implementation of the Independent Review Process (IRP), and careful review of how to consider the outcome of that IRP, has challenged ICANN in many ways, however the result is decision grounded in extensive review and deliberation.

The Board has determined to approve the ICM Application and enter a Registry Agreement with ICM for the .XXX sTLD in substantially the same form as the one posted for public comment in August 2010. ICM has met the Business/Technical Criteria in accordance with 2004 criteria. Further, the IRP Panel found that the Board had also determined that ICM had fundamentally satisfied the 2004 sponsorship criteria. Consideration of the GAC advice does not change this position, and ICANN sets forth fully below either how this decision is consistent with GAC advice, or the reasons that it differed from that advice. The Board also sets forth its consideration of other comments, and other explanation in support of the approval of the registry agreement.

### **II. ICM'S .XXX sTLD APPLICATION AND EVALUATION OF THAT APPLICATION**

#### **A. sTLD Application and Evaluation**

A sponsored TLD (or “sTLD” as opposed to an unsponsored gTLD) application process was launched in December 2003, as part of ICANN’s mission to foster choice, consumer trust and competition in the domain name system (DNS) marketplace.

On 14 March 2004, ICM submitted a proposal for .XXX as an sTLD. Because an sTLD must have a sponsoring organization to oversee policy development for the sTLD, ICM stated that the International Foundation for Online Responsibility, or the IFFOR, would serve in that role. The Sponsored Community was defined as “the responsible online adult-entertainment community.” The “online adult-entertainment community” is further defined as those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself.”

Applications in the 2004 sTLD round were reviewed by three separate Evaluation Panels to evaluate how the applications measured against the sTLD Selection Criteria specified in the request for proposals. See <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppA.pdf>. The three Independent Evaluation Panels were: (i) Technical; (ii) Business/Financial; and (iii) and Sponsorship and Other Issues (“Sponsorship”). The Sponsorship Panel reviewed both sponsorship information and community value. The Sponsorship Information review included the definition of the Sponsored TLD Community, evidence of support from the Sponsoring Organization, the Appropriateness of the Sponsoring Organization and the policy formulation environment, and the level of support from the community.

ICANN’s Independent Evaluation Panels reviewed the ICM application throughout 2004. Both the Business/Financial and Technical Panels found that ICM satisfied all requirements in those categories. The Sponsorship Panel, however, notified ICANN that ICM’s application failed to satisfy the baseline sponsorship criteria of the sTLD process. Notably, of the ten applications for sTLDs, the Sponsorship Panel determined that only two of those ten met all of the sponsorship criteria. See <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>.

Specifically with respect to ICM’s application, the Sponsorship Panel: (1) “did not believe that the .XXX application represented a clearly defined community”; (2) found that the lack of cohesion in the community, and the planned involvement of child advocates and free expression interest groups, would preclude the effective formulation of policy for the community; (3) was not convinced that there was sufficient evidence of community support outside of North America or from child safety, law enforcement, or freedom of expression organizations; and (4) “did not agree that the application added new value to the Internet name space.”

The ICANN Board decided to give ICM, as well as other sTLD applicants, an opportunity to provide clarifying information and to answer further questions “relating to any potential deficiencies in the application that were highlighted in the independent evaluation.” ICM provided additional materials specifically focusing on sponsorship related issues. This included additional briefings, as well as a 3 April 2005 presentation on the proposed .XXX sTLD to the ICANN Board. The Board continued having discussions on ICM’s meeting of the baseline criteria for a “sponsored community.” The

supplemental materials provided by ICM are available at <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.

On 1 June 2005, the ICANN Board authorized the ICANN President and General Counsel to enter into negotiations with ICM relating to the proposed commercial and technical terms of a registry agreement for the .XXX sTLD, to be presented to the Board for approval. The resolutions state:

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.

### III. CONTRACT NEGOTIATIONS

#### A. Negotiations and Community Discussion

Though the Board had unresolved concerns and open questions about ICM's ability to satisfy the baseline sponsorship criteria, it allowed ICM to proceed to contract negotiations hoping the concerns could be alleviated through those negotiations and resulting contractual terms.

After the 2005 decision, substantial community debate continued regarding ICM's application and proposed agreement. There were multiple public comment forums on versions of a proposed ICM registry agreement. The forums resulted in thousands of comments, as well as individual letters to the ICANN Board from governmental representatives, adult entertainment providers, and others. The GAC also provided its thoughts. On 28 March 2006, the GAC issued its Wellington Communiqué, noting that insufficient detail was provided by ICANN to support the Independent Evaluator Panel's concerns regarding ICM's failure to meet the sponsorship criteria. The GAC also noted its opposition to the introduction of the .XXX sTLD. *See* <http://gac.icann.org/web/communiques/gac24com.pdf>. After the issuance of the Wellington Communiqué, the Board continued to consider the proposed registry agreement, and directed staff to take the GAC's concerns into consideration in recommending amendments to the proposed sTLD registry agreement. *See* <http://www.icann.org/minutes/minutes-31mar06.htm>. As the GAC was providing inputs into the process, both the Board and staff were trying to address the GAC's concerns, including further negotiation of the registry agreement with the GAC advice in mind.

In March 2006, the Board voted against the approval of the revised registry agreement, but not the Application. ICM later submitted another iteration of an agreement, which was posted for public comment in 2007, and subsequently revised again to address GAC, community and Board comments and discussions. In March 2007,

the GAC produced the Lisbon Communiqué, noting that it did not believe the Board had answered the GAC's concerns as to whether the ICM application met the sponsorship criteria. See <http://gac.icann.org/web/communiques/gac27com.pdf>.

#### B. The Board's Decision

On 30 March 2007, the ICANN Board voted to reject the revised proposed sTLD registry agreement and deny ICM's application for the .XXX sTLD. The Board determined:

- ICM's Application and the Revised Agreement fail to meet, among other things, the Sponsored Community criteria of the RFP specification.
- Based on the extensive public comment and from the GAC's communiqués that this agreement raises public policy issues.
- Approval of the ICM Application and Revised Agreement is not appropriate as they do not resolve the issues raised in the GAC Communiqués, and ICM's response does not address the GAC's concern for offensive content, and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The Board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.
- The ICM Application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct.
- The Board agrees with the reference in the GAC communiqué from Lisbon, that under the Revised Agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

See <http://www.icann.org/minutes/resolutions-30mar07.htm>.

### IV. INDEPENDENT REVIEW PROCEEDINGS

#### A. The Proceedings and Declaration

After the Board's rejection of ICM's application, ICM filed a request for independent review of the Board's action, initiating the IRP pursuant to ICANN Bylaws, Article IV, section 3 (see <http://www.icann.org/en/general/bylaws.htm>). The papers filed by ICM and ICANN are located at <http://www.icann.org/en/irp/icm-v-icann.htm>. The Request and subsequent Memorial on the merits alleged that ICANN, in violation of the Articles of Incorporation and Bylaws:

1. Failed to follow its established process in its rejection of ICM's Application. Specifically, ICM alleged that it satisfied the first phase of the evaluation process and proceeded to the second phase of contract negotiations, but ICANN improperly re-opened the first phase decision by determining that ICM did not satisfy the "Sponsored Community";
2. Improperly established new criteria in its assessment of ICM's Application. Specifically, ICM alleged that ICANN applied a "new definition of sponsorship criteria" suddenly prohibiting a self-selecting community that did not have the universal support of all members of the community;
3. Failed to engage in good faith negotiations with ICM for a registry agreement. Specifically, ICM alleged that ICANN repeatedly delayed the negotiations on the proposed .XXX sTLD Application; and
4. Exceeded its mission during the evaluation and the rejection of ICM's Application. Specifically, ICM alleged that ICANN improperly considered "public policy" issues and such consideration goes beyond the technical function of ICANN.

ICANN responded to ICM's claims, challenging the factual premises of the claim as well as ICM's characterization of the Independent Review Process. Specifically,

1. ICANN's evaluation of ICM's proposal, as well as ICANN's negotiations with ICM, were at all times open, transparent, and in good faith.
2. ICM knew that its proposal would be controversial, and that the Board would need substantial time to evaluate the proposed TLD. ICM even requested periodically that the Board defer votes on the proposal so that ICM could provide additional information to the Board and respond to concerns that had been expressed. The Board welcomed and evaluated ICM's additional submissions.
3. ICANN retained at all times the discretion to reject ICM's proposal. At no time did ICANN commit – contractually or otherwise – to approve ICM's proposal, a fact that ICM knew quite clearly throughout the process.
4. ICANN's Bylaws require the Board to consider the opinion of the GAC on public policy concerns.
5. ICANN's Bylaws support that a deferential standard of review be applied to the Independent Review Process, particularly with respect to the nature of ICM's claims. As long as the Board's discussions are open and transparent, its decisions are made in good faith, and the relevant parties have been given an opportunity

to be heard, there is a strong presumption that the Board's decisions are appropriate.

In addition to the ICM and ICANN briefing papers, both provided written testimony to a three-member IRP Panel, which held a five-day hearing in September 2009.

The Panel issued its Declaration on 19 February 2010. The Declaration is available at <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>. In the Panel's 2-1 advisory Declaration, the Panel declared in relevant part, as follows:

1. The holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.
2. The Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.
3. The Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy

One panelist issued a Minority/Dissenting opinion, concluding that ICM never satisfied the sponsorship requirements and the criteria for an sTLD, and that the Board denied ICM's applications on the merits and in an open and transparent forum. The Dissenting opinion concurred with the majority finding relating to the non-binding nature of the Declaration.

#### B. Board Consideration of IRP Panel Declaration

In accordance with the Bylaws, the Board considered the IRP Panel's Declaration at the Board's meeting on 12 March 2010. The Board noted, "in the absence of the process for approving an sTLD six years following the receipt of the original application, the Board wishes to create a transparent set of process options which can be published for public comment." See <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm>.

On 26 March 2010, a draft report and explanatory diagrams describing ICANN's Options following the IRP Declaration on ICM's .XXX Application were posted for a 45-day public comment period, at <http://www.icann.org/en/public-comment/#icm-options-report>. ICANN received over 13,000 comments into the forum – the highest number of comments ever received on a single topic, though many of the comments did not address the substance of the process options document. The Board was provided with a summary and analysis of those comments for consideration of further action on the Panel's Declaration. The Summary and Analysis of Comments is available at <http://forum.icann.org/lists/icm-options-report/msg13297.html>.

At its 25 June 2010 meeting in Brussels, the Board determined the process it would follow in considering the IRP Panel's Declaration. Further, the Board resolved to "act in accordance with the following findings of the Independent Review Process

Majority: (i) ‘the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;’ and (ii) ‘the Board’s reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.’” See <http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#5>.

Thus, the Board formally accepted the Panel’s finding that the June 2005 vote constitutes the Board’s determination that ICM met all of the required criteria of the sTLD RFP, including Technical, Business/Financial and Sponsorship requirements.

#### **IV. FOLLOWING THE IRP**

##### **A. What stakeholders or others were consulted?**

1. The applicant, ICM Registry, LLC
2. The Governmental Advisory Committee
3. Legal Counsel/Staff
4. All other Stakeholders and Community members through public comment forum and other methods of participation.

##### **B. Due Diligence, Contract Negotiation, Public Comment**

In June 2010, after decided to act in accordance with relevant portions of the IRP Declaration, the Board directed “staff to conduct expedited due diligence to ensure that: (1) the ICM Application is still current; and (2) there have been no changes in ICM’s qualifications.” See <http://www.icann.org/en/minutes/minutes-25jun10-en.htm>.

ICANN staff conducted the expedited due diligence, including requesting and receiving numerous documents from ICM, as well as participating in telephonic conferences, a face-to-face meeting and a video conference with ICM representatives. The expedited due diligence showed that the ICM Application remains current and that there have been no negative changes in ICM’s qualifications.

ICM also provided ICANN with a new proposed registry agreement that included additional provisions, requirements and safeguards to address the issues that the GAC and other community members had raised with respect to the previously proposed agreement. ICM further provided information during the due diligence phase responding to questions raised regarding how the proposed Sponsoring Organization, the International Foundation for Online Responsibility (IFFOR), would work and who would likely be participating in it. Further discussion of how the due diligence documentation and the proposed registry agreement address the GAC concerns is provided below.

In August 2010, the ICANN Board authorized staff to post for public comment ICM’s supporting due diligence materials and proposed registry agreement for the .XXX sTLD. The Board also directed staff, upon completion of the public comment period, to provide the Board with a summary and analysis of comments and recommend whether

the proposed registry agreement is consistent with GAC advice on the proposed .XXX sTLD. See <http://www.icann.org/en/minutes/minutes-05aug10-en.htm>. The ICM materials were posted at <http://www.icann.org/en/public-comment/#xxx-revised-icm-agreement>, and over 700 comments were received.

As discussed in the public comment summary and analysis, available at <http://forum.icann.org/lists/xxx-revised-icm-agreement/msg00723.html>, over 50% of the submissions were in favor of proceeding with the .XXX agreement, however, most commenters did not address the substance of the registry agreement. The most frequent theme of comments in opposition involved the sponsored community defined in the registry agreement. Many commenters questioned the propriety of the definition, the veracity of the support of the sponsored community, and whether ICM was relying upon pre-registration information to demonstrate that support. Another major theme of comments related to the transparency of information available, including calls for release of the IFFOR Board members' names as well as an identification of who would serve on the IFFOR Policy Council. Similarly, commenters noted the lack of definition of IFFOR Policies.

### C. GAC Advice

In addition to public comment, ICANN had to address the prior GAC advice on ICM's proposed registry agreement for .XXX. Accordingly, for the Board's 28 October 2010 meeting, ICANN staff provided the Board with its recommendation as to whether the proposed registry agreement is consistent with GAC advice. Three areas where the approval of a registry agreement may be in conflict with GAC advice were identified, though the registry agreement otherwise appears to contain sufficient protections to address earlier stated concerns by the GAC. A chart of the identified areas of potential conflict is available at <http://www.icann.org/en/tlds/agreements/xxx/icm-gac-advice-chart-28oct10-en.pdf>. On 10 December 2010, the Board noted its agreement with staff's assessments of potential conflicts with GAC advice, and directed staff to communicate those recommendations to the GAC. In addition to the chart reflecting the identified conflicts with GAC advice, a document was presented clearly setting out the Board's position on GAC advice for further GAC consultation. That position paper is available at <http://www.icann.org/en/correspondence/jeffrey-to-to-dryden-10feb11-en.pdf>.

In that position paper, the Board set forth the reasons for determining that the proposed registry agreement met many of the concerns the GAC had raised regarding earlier iterations of the agreement.

On 16 March 2011, in advance of a face-to-face Bylaws consultation with the GAC, the GAC provided the ICANN Board with a letter providing further advice on the ICM application. The GAC advised:

- There is no active support of the GAC for the introduction of a .xxx TLD.
- While there are members, which neither endorse nor oppose the introduction of a .xxx TLD, others are emphatically opposed from a public policy perspective to the introduction of a .xxx TLD.

The GAC also stated "the GAC would like to inform the ICANN Board that an introduction



of a .xxx TLD into the root might lead to steps taken by some governments to prohibit access to this TLD. The GAC therefore calls the Board's attention to concerns expressed by experts that such steps bear a potential risk/threat to the universal resolvability and stability of the DNS."

The GAC closed its letter, stating:

- The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria.
- The GAC further shares concerns expressed by others that with the revised proposed ICANN/ICM Registry agreement, the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which could be inconsistent with its technical mandate.

## **V. APPROVING .XXX sTLD APPLICATION AND AGREEMENT**

### **A. ICM's Application Meets All sTLD Criteria**

ICANN has determined to approve ICM Application and entering into a registry agreement for the .XXX sTLD is because the criteria have been, or are deemed to have been, met. As identified by the Independent Evaluation Panels, in 2004 ICM satisfied the Technical and Business/Financial Criteria; this determination has never been challenged. Further, as set forth above, the IRP Panel declared that the Board has also determined that ICM had satisfied the sponsorship criteria. In June 2010, the Board resolved to act in accordance with the IRP Panel Declaration. Further, through the expedited due diligence performed by staff in July and August 2010, staff confirmed that ICM's Application remains current and that there have been no negative changes in ICM's qualifications based on any of these criteria.

Following the process set forth for the 2004 sTLD round is key to ensuring the accountability of ICANN and its process. Indeed, the Board's initial denial of ICM's Application and resulting registry agreement was challenged using one of ICANN's own accountability mechanisms. The result of that challenge is a finding that ICANN had previously determined that ICM had satisfied all requisite criteria needed to prevail in its Application for the .XXX sTLD. ICANN is committed to being accountable to the community and is thus committed to following the results of the mechanism that challenge that accountability; doing so is in the public interest. ICANN is committed to following any such determination if it is not detrimental to ICANN's mission.

The ICANN Board is vested with broad discretion in implementing its responsibility such as is mentioned in the "business judgment rule." The business judgment rule is the standard the California courts apply in deciding whether a director, acting without a financial interest in the decision, satisfied the requirements of careful conduct imposed by the California Corporations Code. See *Gaillard v. Natomas Co.*, (1989) 208 CA3d 1250, 1264. As codified in Section 309 of the California Corporations Code, the business judgment rule provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent

person in a like position would use under similar circumstances.” Cal. Corp. Code § 309(a); see also *Lee v. Interinsurance Exch.*, (1996) 50 CA4th 694, 714.

B. The Proposed Registry Agreement is Consistent with GAC Advice.

Based on the current status of the Application, it was appropriate for staff to proceed to contract negotiations with ICM. Working from a 2007 version of the proposed registry agreement, ICM produced a proposal that included terms to address both GAC and community concerns raised in regards to prior iterations of the registry agreement.

In the Wellington Communiqué, the GAC identified four specific public policy aspects to be included in the proposed registry agreement, and requested information on the degree the .XXX registry agreement would address those areas. Notably, many of the GAC concerns are consistent with broader community concerns regarding a .XXX sTLD, therefore aligning the terms of the registry agreement to be consistent with GAC advice serves to address broader community comment. For example, ICM’s providing terms to address restriction to access to illegal content, protection of vulnerable members of the community, and enhanced intellectual property and trademark protection mechanisms respond not only to GAC concerns but also to community concerns.

The Wellington Communiqué stated that a registry agreement must include “enforceable provisions covering all of ICM Registry’s commitments” that:

- “Take appropriate measures to restrict access to illegal and offensive content;”
- “Support the development of tools and programs to protect vulnerable members of the community;”
- “Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be;” and
- “Act to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers drawing on best practices in the development of registration and eligibility rules.”

The Board considers that each of these four aspects are appropriately addressed within the proposed registry agreement, and provides detailed discussion below. The discussion below also meets the GAC’s request for “[c]onfirmation from ICANN that the proposed Agreement would include enforceable provisions covering all of ICM Registry’s commitments.” See Wellington Communiqué.

In the GAC’s 16 March 2011 letter to the Board and in the 17 March 2011 Board/GAC consultation, the GAC did not raise any opposition to this confirmation that the registry agreement addresses each of these items of GAC advice.

**1. The Registry Agreement includes appropriate measures to restrict access to illegal and offensive content.**

The Board considers that the proposed registry agreement contains terms that are appropriate to restrict access to illegal and offensive content. The registry agreement terms are set forth in Appendix S to the registry agreement, available at <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-appendix-s-clean-23aug10-en.pdf>. Some of the terms the Board considered to determine that this issue has been satisfied include:

- Part 1.2, obligating ICM to “promote the development and adoption of responsible business practices designed to combat child pornography, facilitate user choice and parental control of access to content.”
- Part 5, at page 9 of the Appendix, provides a description of the registrar selection process, requiring each registrar to demonstrate “understanding of the principles and intentions underlying the .xxx registration policies” (Item II); “willingness and ability to propagate and enforce sTLD policies . . . in accordance with policies and procedures prescribed by Registry Operator” (Item IV); and “demonstrated systems designed to avoid submission of clearly inappropriate applicants” (Item VII).
- Attachment 1 to the Appendix, at page 20, includes a product listing introducing “.xxxlock”, a “service intend[ed] to provide registrants with the ability to prevent modifications, transfers, or deletions of domain names without explicit permission from the registrant. The service’s main purposes are to prevent malicious domain hijacking and domain transfer errors.” The anticipated protections against malicious conduct reduce the risk of domain name hijacking, which could result in posting of illegal or offensive content.
- Attachment 1 to the Appendix, at page 21, also includes a specification for offering of digital certification services requiring registrants “to provide appropriate credentials to verify their organization and their right to use their .xxx domain name. Certificates give the end users of Web sites a higher level of trust; ensure their privacy, and provid[e] a secure mechanism for any online financial transactions.”

These terms impose a clear requirement for validation of registrants. ICM also provided information regarding the Verification System Agreement, setting out the obligation for the registrant to represent and warrant its compliance with the sponsoring organization policies and best practices, to not sell or trade the credential, as well as to maintain current contact information, and to remain subject to a disqualification policy. The registry also retains the right to freeze the use of a domain name outside of a UDRP process. The Verification System Agreement is at <http://www.icann.org/en/tlds/agreements/xxx/terms-for-verification-credentials-contract-26jul10-en.pdf>, and also includes a term that the registrant will comply with all applicable laws and regulations. The Verification System Agreement will reduce the

opportunity for a .xxx domain name to be registered and then licensed or sold to a third party that will not comply with the registry policies and requirements.

Appendix S, at Attachment 1, page 20, also describes a “xxxProxy” service, a service via Authorized Proxy Agents. When a registrant opts for this service the actual verified identity of the registrant will also be stored in the registry Authentication Database.” With this requirement for authorization of proxy service providers and agreements to store the registrant identity, creates an expectation that all registrants will abide by the sTLD policies as they cannot mask their identity from the Registry.

Placing further specification regarding other types of “offensive” material would require ICANN to take a role in content management.

**2. The terms of the Registry Agreement supports the development of tools and programs to protect vulnerable members of the community.**

Appendix S, as cited above, includes an obligation for ICM to promote development and adoption of responsible business practices designed to combat child pornography, facilitate user choice and parental control of access to content. In addition, ICM assumes the obligation for policy making authority “relating to terms and conditions for registration in the .XXX sTLD relating to child safety and preventing child abuse images.” <http://www.icann.org/en/tlds/agreements/xxx/iffor-responsibilities-obligations-20jul10-en.pdf>. The due diligence documentation – including this identification of ICM and IFFOR Responsibilities and Obligations, demonstrates the commitment to adopting best business practices in accordance with safeguarding children online, combating child abuse images, prohibiting misuse of personal information, ensuring clear and accurate consumer disclosures and prohibiting deceptive marketing. See <http://www.icann.org/en/tlds/agreements/xxx/iffor-responsibilities-obligations-20jul10-en.pdf>.

The Sponsoring Organization (IFFOR) will specifically assume this responsibility under its agreement with ICM, including operating to “promote the development and adoption of responsible business practices designed to combat child pornography, facilitate user choice and parental control regarding access to online adult entertainment” (page 1); and creating best practices to “safeguard children online and combat child pornography [and] implement innovative approaches to reduce the incidence of children exposed to online adult entertainment.” (Page 4.) The IFFOR/ICM Agreement is available at <http://www.icann.org/en/tlds/agreements/xxx/iffor-sponsoring-organization-agreement-26jul10-en.pdf>. Further, the IFFOR Policy Council will include a Child Protection Advocate as one of its members. <http://www.icann.org/en/tlds/agreements/xxx/appendix-d-iffor-organizational-chart-26jul10-en.pdf>.

ICM provided materials describing a robust Compliance Reporting System, under which ICM – working with IFFOR – will facilitate referral of complaints regarding child abuse images and other complaints. ICM commits to “follow hotline and/or law enforcement direction with respect to these complaints.” The Compliance Reporting

System is described at <http://www.icann.org/en/tlds/agreements/xxx/appendix-c-compliance-reporting-system-26jul10-en.pdf>.

Appendix S also includes a rapid takedown provision for use in challenging abusive registrations including unauthorized registration of personal names. The Rapid Takedown service is described at Attachment 1, page 20. The provisions of the registry agreement are supplemented through ICM's Registry Policy on Preventing Abusive Registrations, available at <http://www.icann.org/en/tlds/agreements/xxx/preventing-abusive-registrations-20jul10-en.pdf>.

**3. The terms of the Registry Agreement require the maintenance of accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be.**

The registry agreement, at Appendix 5 (page 48), imposes Whois data availability requirements on the Registry. *See* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-clean-23aug10-en.pdf>. The Whois requirement are supplemented under Appendix S to the registry agreement. Part 6 of the Appendix, beginning at page 6, includes privacy capabilities for additional data to be associated with the registration (page 12), as well as an obligation that the Whois data will be searchable on multiple data points. The "xxxProxy" service, described above, requires that even when a registrant elects to use a privacy service, "the actual verified identity of the registrant will also be stored in the registry Authentication Database." (Appendix S, page 20.)

ICM's verification system, which imposes requirements on use of websites and updating of registration information, in addition to the Compliance Reporting System discussed above, provide heightened assurance regarding the availability of registrant contact information.

**4. The terms of the Registry Agreement ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers drawing on best practices in the development of registration and eligibility rules.**

The registry agreement contains many protections against abusive registrations that do not exist within other registries to date. ICM also propounds an ICM Registry Policy on Preventing Abusive Registrations that includes "common-law trademark claims, personal names, [and] cultural or religious terms" in the types of terms that can qualify for special protections within the Registry. This includes the creation of a mechanism whereby the GAC and/or the governments of any country or economy participating in the GAC may identify for reservation names that match words of cultural and/or religious significance. *See* <http://www.icann.org/en/tlds/agreements/xxx/preventing-abusive-registrations-20jul10-en.pdf>.

Appendix 6 to the registry agreement contains a Reserved Names list, following standard Registry reservation requirements including a prohibition on two-character reservations, and the reservation of geographic and geopolitical names on the ISO 3166-1 list, in English and all related official languages. *See* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-clean-23aug10-en.pdf> at page 56.

Appendix S to the registry agreement contains a Start Up Trademark Opposition Procedure to allow intellectual property claimants to challenge registrations (page 19); an “IP Protect” service to allow Intellectual Property owners to designate non-resolving registrations and imposing “strict conditions regarding transfer” (page 20); and a Rapid Takedown process, “a mechanism for rapidly changing an active domain to non resolving status in the clearest of cases of trade- or service-mark abuse, or abusive registrations such as the unauthorized registration personal names, to be adjudicated by an Approved Third Party Adjudicator pending a full UDRP filing.” (Page 21.)

Finally, the registry agreement also specifies the applicability of ICANN consensus policies, including the UDRP. *See* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-clean-23aug10-en.pdf>, Article III, Section 3.1 (b), at page 3.

#### C. Board Completed Bylaws Consultation With GAC on Remaining Items

The Board identified three specific items about which the Board could benefit from consultation with the GAC prior to taking action. On 16 March 2011, the GAC identified further items that the Board and the GAC addressed in its 17 March 2011 consultation mandated under Article XI, Section 2.j of the ICANN Bylaws, at <http://www.icann.org/en/general/bylaws.htm#XI-2>. Set forth below are the items on which the Board and GAC consulted for which the Board and the GAC could not reach a mutually acceptable conclusion. To the extent the Board’s approval of the registry agreement is not consistent with these items of GAC advice, the Board’s reasons for not following this advice are set forth below. The Board considers that ICANN’s position as a public benefit non-profit corporation make it essential that community input, including the advice provided by the GAC, is carefully considered in making this decision.

#### **From the Wellington Communiqué, the GAC’s statement:**

“[S]everal members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD.” This statement was reiterated in a 3 February 2007 letter from the GAC Chair. This statement was reiterated in the 16 March 2011 letter from the GAC, stating “[t]here is no active support of the GAC for the introduction of a .xxx TLD” and “[w]hile there are members, which neither endorse nor oppose the introduction of a .xxx TLD, others are emphatically opposed from a public policy perspective to the introduction of a .xxx TLD.”

#### **Reasons for not following GAC Advice:**

There is no contradiction with GAC advice on this item. Active support of the GAC is not a required criteria in the 2004 sTLD round. Further, this is not advice from the GAC

either to delegate .XXX or to not delegate .XXX, and therefore the decision to delegate .XXX is not inconsistent with this advice.

**From the Lisbon Communiqué:**

“The GAC also calls the Board’s attention to the comment from the Government of Canada to the ICANN online Public Forum and expresses concern that, with the revised proposed ICANN-ICM registry agreement, the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate.” This concern was reiterated in the 16 March 2011 letter from the GAC.

**Reasons for not following GAC Advice:**

ICM’s proposed compliance system will mitigate much of the concern that ICANN will be asked to oversee content. ICANN’s compliance role is not about content *per se*, but about registry compliance with and enforcement of its policies regarding the use of second-level registrations. As with any other TLD, registrants and others will likely turn to ICANN for assistance with content-related issues, regardless of the merit of such requests. Therefore, entering into the proposed registry agreement for the .XXX sTLD, while it may increase the overall numbers of requests to ICANN for content-related assistance, does not represent ICANN’s movement towards a content management or oversight role.

**From the 4 August 2010 letter from the Chair of the GAC:**

“The GAC therefore recommends that community-wide discussions be facilitated by ICANN in order to ensure that an effective objections procedure be developed that both recognizes the relevance of national laws and effectively addresses strings that raise national, cultural, geographic, religious and/or linguistic sensitivities or objections that could result in intractable disputes. These objection procedures should apply to all pending and future TLDs.”

**Reasons for not following GAC Advice:**

The IRP panel declaration makes clear that ICM’s application has to be evaluated under the processes and criteria set forth in the 2004 sTLD Criteria, and should not be subject to additional processes. The GAC has recognized the importance of adherence to the criteria set forth in the application process. In the GAC Principles Regarding New gTLDs, at Section 2.5, the GAC stated: “All applicants for a new gTLD registry should [] be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.” See [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf).

**From the 16 March 2011 Letter**

“The GAC would like to inform the ICANN Board that an introduction of a .xxx TLD into the root might lead to steps taken by some governments to prohibit access to

this TLD. The GAC therefore calls the Board's attention to concerns expressed by experts that such steps bear a potential risk/threat to the universal resolvability and stability of the DNS."

### **Reasons for not following GAC Advice**

The issue of governments (or any other entity) blocking or filtering access to a specific TLD is not unique to the issue of the .XXX sTLD. Such blocking and filtering exists today. While we agree that blocking of TLDs is generally undesirable, if some blocking of the .XXX sTLD does occur there's no evidence the result will be different from the blocking that already occurs.

### **From the 16 March 2011 Letter**

"The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria."

### **Reasons for not following GAC Advice**

The Board has provided all requisite information to the Board regarding the GAC's concerns as to whether the ICM application meets the sponsorship criteria. At the time of the 2005 Board decision, the Board had not reached a decision about the sponsorship criteria being met. However, the Board has now accepted the IRP Panel's finding that the June 2005 Board decision decided that the sponsorship criteria was met, and the Board will not revisit that decision. The sTLD process does not afford the Board an opportunity to revisit the 2005 decision, and a rejection today of ICM's proposed registry agreement on sponsorship grounds would revive the same procedural issues that led to ICM's initiation of the IRP. If the GAC wishes to review additional information that supported the IRP Panel's Declaration that the sponsorship criteria was met in 2005, the GAC can review the Declaration and the papers submitted to the IRP. Those materials are available at <http://www.icann.org/en/irp/icm-v-icann.htm>.

#### **D. The Board has Considered Public Comment**

The 2010 public comment forum on the proposed registry agreement demonstrates that the community remains divided on whether the Board should approve *any* .XXX sTLD registry agreement – not just the specific registry agreement posted for public comment on [24 August 2010](#). Given ICANN's continued focus on accountability to its processes, and the Board's acceptance of the IRP Declaration findings, the Board is not in a position to simply disregard its earlier decisions and determine now that it disagrees with the concept of the introduction of the .XXX sTLD.

Many of the commenters disagree with the assessment that ICM has met the required sponsorship criteria, arguing that ICM misrepresented of scope of the sponsored community and there is a lack of actual support within the adult entertainment community, as well as other related arguments. Because the Board accepted the Panel's finding that the June 2005 Board decision decided that the sponsorship criteria was met, the Board will not revisit that decision at this time. The sTLD process does not afford the Board an opportunity to revisit the 2005 decision, and



a rejection today of ICM's proposed registry agreement on sponsorship grounds would revive the same procedural issues that led to ICM's initiation of the IRP. Further, the sTLD RFP process did not require that a sponsored community be comprised of all possible Internet content providers within a broad community; the community referred to in the sTLD RFP is the community that the sponsorship organization wishes to serve. Those who do not wish to be part of an sTLD sponsored community can remove themselves from the self-selecting definition.

Some commenters oppose the proposed registry agreement because of price-related issues, identifying that the registration fee is too high, or that price caps should be instituted into the registry. No changes to the proposed registry agreement are required to address these comments. The pricing of registry services is generally left to the discretion of the registry. While ICANN has included price caps in some historical registry agreements, those caps were included as a result of specific negotiation between ICANN, VeriSign and the Department of Commerce, or at the request of the registry. To the extent commenters are addressing issues regarding the costs and obligations of defensive registrations in the .XXX sTLD, as discussed above, ICM has taken steps to mitigate these costs and offer rights protection mechanisms.

Commenters oppose the proposed registry agreement because of a lack of definition of "adult content," which could lead to governmental filtering of content on vague standards. The registry agreement cannot be modified to address these comments. If terms regarding the definition of adult content were inserted into the .XXX sTLD registry agreement, ICANN would move impermissibly into the realm of content enforcement through its contractual compliance efforts. The better definition of content can be defined through the refinement of policies with the sponsoring organization, which is not a matter for ICANN to oversee.

Many commenters argued that the policies of the IFFOR are not yet well defined, and expressed concerns regarding the introduction of the .XXX sTLD and the ability to fully comment on the proposed registry agreement without full disclosure of those policies. These comments do not require any change to the proposed registry agreement. Appendix S to the proposed registry agreement, at <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-appendix-s-clean-23aug10-en.pdf>, delegates policy making authority to ICM and IFFOR. The IFFOR policies are therefore not included in the proposed registry agreement, and further definition of specific policies are not required in order for the Board to proceed to approval of the registry agreement. This delegation of policy making authority is part of all sTLD registry agreements, such as .ASIA (<http://www.icann.org/en/tlds/agreements/asia/appendix-s-06dec06.htm#2>) and .CAT (<http://www.icann.org/en/tlds/agreements/cat/cat-appendixS-22mar06.htm>). ICM has made certain representations to ICANN regarding what the baseline policies for the .XXX sTLD will be, as defined in the [IFFOR Baseline Policy](#) document, and it is in reliance on ICM's adherence to those baseline policies that the Board is moving forward with the approval of the proposed registry agreement.

Commenters also provided specific suggestions regarding further enhancement of intellectual property and trademark protections within the proposed registry agreement. As identified above, the Board considers that ICM proposes intellectual

property and trademark protections that are sufficient to meet the concerns raised by the GAC and that also exceed the protections currently in place in many other registries. While the Board encourages further innovations in registry protections, it is not necessary to require modification to the proposed registry agreement in response to these comments. If ICM wishes to take any of the suggested proposals comments under consideration prior to executing the registry agreement, ICM may return to ICANN with a revised proposed registry agreement.

The approval of the .XXX sTLD registry agreement is supported by many in the community, and the Board acknowledges those comments as well. The introduction of the .XXX sTLD will serve ICANN's mission to introduce competition in the registration of domain names. The approval of the .XXX sTLD registry agreement will further ICANN's commitment to accountability and transparency, and is in line with ICANN's commitment to its accountability processes, as it is consistent with the Panel's Declaration arising out of the very first use of ICANN's Independent Review Process. Many commenters are eager for the timely introduction of the .XXX sTLD for a variety of reasons, and the approval of the registry agreement is responsive to these concerns.

## **V. IMPACT**

### **A. Positive or Negative Community Impacts From the Approval of the Registry Agreement**

Given the contention in the community regarding the introduction of the .XXX sTLD, any decision on the registry agreement will result in both a positive and negative community impact. On the whole, the Board concludes that ICANN's adherence to its accountability mechanisms, and completion of the processing of ICM's 2004 sTLD application, will provide a positive community impact. This decision affirms and gives the ICANN community renewed confidence in ICANN's commitment to accountability and to adhering to its processes.

The negative community impact will most likely be on those that do not support the idea of the introduction of the .XXX sTLD. However, refusing to approve registry agreements with strings that do not have unanimous community support is not an acceptable option as ICANN continues to move toward the introduction of even more new gTLDs.

### **B. Fiscal impacts/ramifications on ICANN (Strategic Plan, Operating Plan, Budget); the community; and/or the public**

Upon launch of the .XXX sTLD registry, ICANN will be entitled to registry fees and per-name registration fees for registrations in the .XXX sTLDs as specified in the registry agreement. These fees will support ICANN's operations, including registry-related activities and compliance activities. ICANN may also face fiscal impacts in the event that threats are carried out to initiate legal action if the Board approves the registry agreement. Further, as the level of contractual compliance complaints are presently unknown, so too is the fiscal impact on that aspect of the organization.

Those members of the community and public that are members of the sponsored community may choose to register names in the .XXX sTLD and incur the specified

registration fees. In addition, there may be fiscal impact to other members of the community based on the business choices made regarding intellectual property and trademark protection purposes, among other things.

C. Security, Stability or Resiliency issues relating to the DNS

ICM has satisfied the initial technical criteria of the sTLD RFP and has engaged Afilias, an established registry operator, to perform its back-end operations. Therefore, there is facially no basis for a technical concern of security, stability or resiliency issues relating to the DNS based upon the introduction of this single new top-level domain. The Board is aware of the concern that the existence .XXX sTLD may facilitate the ability to use the string to block access to .XXX websites. However, the Board notes that if some blocking of XXX does occur there's no evidence the result will be different from the blocking that already occurs, and the Board does not identify this as a risk to the overall security, stability or resiliency of the DNS.

VI. **SIGNIFICANT MATERIALS REVIEWED BY THE BOARD**

- A. The Request for Proposal ("RFP"). See <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-part-15dec03.htm>.
- B. The Sponsorship and Community Independent Evaluation Panel's report. See <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>.
- C. ICM Supplemental Evaluation Materials. See <http://www.icann.org/en/tlds/stld-apps-19mar04/AppE-30nov05.pdf>.
- D. Declaration of the Independent Review Panel (19 February 2010). See <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>.
- E. Board Position Paper on Consistency with GAC Advice (11 February 2011), at <http://www.icann.org/en/correspondence/jeffrey-to-to-dryden-10feb11-en.pdf>.
- F. August 2010 ICM Proposed Registry Agreement and Due Diligence Materials, at <http://www.icann.org/en/public-comment/public-comment-201009-en.htm#xxx-revised-icm-agreement>.
- G. Public Comments received on the proposed registry agreement, available at <http://forum.icann.org/lists/xxx-revised-icm-agreement/>, including the Summary and Analysis of Public Comment, at <http://forum.icann.org/lists/xxx-revised-icm-agreement/msg00723.html>
- H. GAC communications, including: 1) the [Wellington Communiqué](#); (2) a [2 February 2007 Letter](#) from the Chair and Chair-Elect of the GAC to the Chair of the ICANN Board; (3) the [Lisbon Communiqué](#); (4) a [4 August 2010 Letter](#) from the Chair of the GAC to the Chair of the ICANN Board; (5)

the [Cartagena Communiqué](#); and (6) a 16 March 2011 Letter from the GAC to the Chair of the Board.