

**Comment to Community Priority Evaluation
Application by GMO Registry, Inc. for <.SHOP>**

TO: Economic Intelligence Unit, CPE Evaluation Panel

FROM: Donuts Inc.

RE: Community Priority Evaluation for New gTLD Application No. 1-890-52063 (.SHOP)

This comment is being submitted on behalf of Donuts Inc. ("Donuts") concerning the above-referenced New gTLD application (the "Application"). Donuts supports and joins in the analysis of the Application recently submitted by Radix Registry ("Radix"). To the extent it may further assist the Panel, Donuts highlights the deficiencies of the Application in the context of the community scoring criteria of the New gTLD Applicant Guidebook ("AGB" or "Guidebook").

As the Panel knows, an application must earn 14 out of a possible 16 points to attain community status and "trump" all competing standard applications. AGB at 4-10. The 16-point potential total consists of four points in each of the following four categories: (1) community establishment; (2) nexus between the proposed string and the asserted community; (3) registration policies; and (4) community endorsement. AGB § 4.2.3. Each has subcategories of different point-value ranges, which we compare below to the Application.

1. Community Establishment

This category considers, and will permit up to two points each for, "delineation" and "extension." The former "relates to the membership of a community," and whether or not it is defined clearly and understandably. The latter "relates to the dimension of the community," including its "number of members," its "geographical reach" and "foreseeable activity lifetime." AGB at 4-11. The Application does not qualify for even one of the four available points under these standards.

a. Delineation (2 points available – ZERO points achievable)

The Guidebook makes scoring this subcategory simple: (i) a clearly delineated, organized and pre-existing community gets two points; (ii) a community satisfying (i), but not "organized," can earn no more than 1 point; and (iii) a community not preexisting or clearly delineated gets none. These standards entitle the Application to zero of the two possible "delineation" points.

The "Community" Is Not "Organized." The Application identifies no "one entity mainly dedicated to the community, with documented evidence of community activities." AGB at 4-11. GMO concedes "[t]here is no worldwide coordinating body representing the entire community." See Appln., Ans. To Ques. 20(a). Instead, it cites to "organizations and associations related to the industry at regional, national, state, and city levels, such as Chambers of Commerce, professional employer organizations, etc."

The "community" proffered here resembles in many respects the extremely broad and heterogeneous groupings of "business entity" type strings that underwent CPE, namely:

- .LLC: <http://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>
- .INC: <http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>
- .GMBH: <http://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf> and
- .LLP: <http://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>

In each of these cases, the EIU Panel found that the alleged community lacked organization, in that there could be no “documented evidence of community activities...[a]s there is no entity that is mainly dedicated to the community as defined” in the application at issue, and deducted the one possible “organization” point. *See, e.g., .LLC Evaluation at 2-3.*

The “Community” Is Neither “Clearly Delineated” Nor “Pre-Existing.” The Application describes the “community” as consisting of “business entities or organizations that deploy commercial activities in an online or offline environment or provide information in relation thereto over the Internet.” Such a broad definition cannot “delineate” a “community.” Under the Guidebook’s “Criterion 1 Guidelines,” a “delineated community” must have “awareness and recognition of the community ... among the members.” AGB at 4-12. GMO admits that does not exist within its alleged community, which is “broad and heterogeneous,” “not defined by any geographical borders, limited to certain cultures or forms of trade,” and ever-changing (“On a daily basis, new businesses appear, and existing merchants go out of business”). *See Appln., Ans. To Ques. 20(a).*

GMO similarly concedes that its “community” is not “pre-existing.” Indeed, the Application states that community members are currently “organizing themselves in an attempt to promote use of the Internet in commercial activities, and establish trust in ecommerce. *See, Appln., Ans. To Ques. 20(a).* This is insufficient to for purposes of CPE analysis, in that the community at issue needs to *already be* “organized.” *See* AGB at 4-11; EIU Guidelines at 4. Rather, GMO simply references a “construed community,” manufactured in an effort to gain priority for an otherwise generic string, a tactic consistently rejected by panels passing on it. *See, e.g., .GMBH CPE at 3.*

The Application lacks all three components for delineation. As such, it can earn none of the two points available on this subcriterion.

b. Extension (2 points available – ZERO points achievable)

A community of “considerable size and longevity” qualifies for two “extension” points. A community of one or the other gets one point. A community of neither gets zero.

The Application Cannot Ascribe a Size to the Alleged Community: GMO admits that, “[g]iven its nature, it is difficult to demonstrate community size.” *See Appln., Ans. To Ques. 20(a).* It cannot even place within several orders of magnitude the “thousands to millions of entities who sell products and services using the Internet.” *Id.* A group of such undefinable size with many disparate entities spread throughout the world would not have an “awareness” or

“recognition” among its members of belonging to a “community” posited by GMO, which other panels have acknowledged in not awarding a point for “size.” See .LLC CPE at 3-4.

The “Community” Has No “Longevity.” As shown above, the Application concedes that the alleged “community” is still being formed. Again, the “community” is simply “construed” for purposes of obtaining a highly desirable generic string, for which panels uniformly have refused to award points. See, e.g., .TAXI CPE, <http://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>, at 3.

None of the two available points should be awarded for extension. Combined with the absence of any permissible points for delineation, the Application should receive zero of the four possible points for community establishment.

Receiving a total score of zero or one for any one factor is fatal to an application in CPE. It means that the applicant can score no more than 13 points when 14 are needed to “pass” CPE. See .IMMO Evaluation, <http://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>, at 1.

2. Nexus Between Proposed String and Community

This category has two subfactors: (a) “nexus,” for which up to three points are available; and (b) “uniqueness,” where an applicant can receive no more than one point. Again, it appears that GMO can earn none of the four points possible on this factor.

a. Nexus (3 points available –ZERO points achievable)

The Guidebook again lays out exactly what is needed to earn the different levels of points available in this subcategory. A string that “matches” the “name of the community” or a “well-known short-form” of it earns three points. A string that “identifies the community, but does not qualify for a score of 3,” receives two points. A string that “does not fulfill the requirements for a score of 2” earns none. AGB at 4-12.

The String .SHOP Does Not “Match” the “Name” of Any “Community.” We are not aware of any community that goes by the name “SHOP.” Neither is GMO, which admits that the “target community does not have one ‘name.’” As such, the Application cannot score a three. See, e.g., .MUSIC CPE, <http://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf> at 5-6.

Nor Does the String .SHOP “Identify” a “Community.” A string “identifies” a community when it “closely describes” one, “*without overreaching substantially beyond the community.*” AGB at 4-13 (emphasis added). “The word ‘SHOP’ has many meanings,” according to the Application. See Appln., Ans. To Ques. 20(d). These “many meanings” prevent the string from “closely describing” any “community.” The string substantially overreaches beyond any claimed community. As such, it cannot earn *any* “nexus” points. See, e.g., .INC CPE at 4-5.

b. *Uniqueness* (1 point available –ZERO points achievable)

Because the Application scores a zero for nexus, it must therefore also score a zero for uniqueness. See AGB at 4-14; EIU Guidelines at 9-10; see also .MUSIC CPE at 6.

3. Registration Policies

This criterion has four subfactors worth 1 point each if achieved: (a) eligibility; (b) name selection; (c) content and use; and (d) enforcement. AGB at 4-14 to 4-15.

a. *Eligibility* (1 point available –ZERO points achievable)

An application that proposes to limit registration to community members can receive an eligibility point, while a largely unrestricted approach will earn no points. According to GMO, the .SHOP TLD will be open to “[b]usiness entities or organizations that deploy commercial activities in an online or offline environment or provide information in relation thereto over the Internet, including, but not limited to, merchants, retailers, business-to-business sales channels, marketplaces, etc.” Names will supposedly also be made available to “business entities or organizations that currently do not deploy commercial activities, but that *have expressed intention to engage in these activities within one year* following the registration of a .SHOP domain name.” See Appln., Ans. To Ques. 20(d). (emphasis added). This standard is extremely inclusive, and could be satisfied by virtually anyone. It cannot earn a scoring point. See EIU Guidelines at 11.

b. *Name Selection* (1 point available –ZERO points achievable)

A point is available in this subcategory where an applicant proposes name selection polices “consistent with the articulated community-based purpose of the applied-for gTLD.” AGB at 4-15. According to the Application, GMO will allow registrants to register “domain names that are identical or similar to their current *or future* trademark, business name, trade name, business identifier, name of business entity or organization, names under which they are commonly known, *slogans, acronyms, etc.*, including *combinations thereof.*” *Id.* (emphases added). This would allow the registration of just about any word in the English language, whether conceptually related to the term “SHOP” or not. Giving this type of broad discretion is not a “registration policy” at all, and cannot earn a name selection point.

c. *Content/Use* (1 point available – ZERO points achievable)

As to content/use, GMO’s two primary limitations are that names should: (i) only be used for “commercial” activities; and (ii) not be registered solely for purposes of “selling, exchanging, trading or leasing” them. “Commercial” activities go beyond conduct described by the word “shop,” and can include corporate transactions, loans, stock transfers, security interests, investments, banking, services and anything having to do with “commerce” that does not involve a “shop” or the act of “shopping.” Such content and use of .SHOP domains does not appear “consistent with the articulated community-based purpose of the domain name.” See AGB at 4-16; EIU Guidelines at 14. By failing to restrict content and use to the stated “community,” the Application cannot achieve a content/use point.

d. Enforcement (1 point available – ZERO points achievable)

Many (if not virtually all) of GMO's stated policies and procedures are stated in the *future tense*, and are often preceded with qualifying and noncommittal terms such as "may." This demonstrates that a great deal of policy development for the TLD is still yet to be determined. The rigorous standards in the AGB require more to warrant a scored point. A CPE applicant is expected to present a "coherent set" of procedures that have been given extensive thought and deliberation, and carry a high degree of specificity. See AGB at 4-15 to 4-16; EIU Guidelines at 14.

GMO also makes no mention whatsoever of an appeals process, and this is another requirement to obtain a point for enforcement. See AGB at 4-15; EIU Guidelines at 14; .MUSIC Evaluation at 7. The Application should receive no points for enforcement.

GMO's claims continue to fail. It can receive none of the 12 points available this far in the analysis.

4. Community Endorsement

This final four-point factor awards up to two points for "support" and up to another two points for lack of or insignificant "opposition." AGB at 4-17.

In its Application, GMO concedes that "[t]here is no worldwide coordinating body representing the entire community." GMO therefore cannot be the "recognized community institution/member organization," nor would it have any "documented support" from such an entity, as it does not exist in the first place. See AGB at 4-17; EIU Guidelines at 16.

There is also no evidence that GMO "has otherwise documented authority to represent the community," or that any of the entities that have expressed support for GMO's Application serve in that role. Indeed, while GMO may flout the "third of a trillion US dollars" in purported trade, the fact remains that GMO's supporters — all *five* of them — originate from just two areas of the world: (i) Europe (and Belgium in particular); and (ii) Japan (where GMO itself is based). No support is shown from other geographic regions where people may "shop," such as Africa, Latin America, the USA, Canada, Australia, the Middle East or even other parts of Asia, such as China, Russia or Korea. As noted in the AGB and the EIU Guidelines:

With respect to 'Support,' it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that level, but only a 1 *if the string implicitly addresses similar communities in other nations.*

See EIU Guidelines at 17. As such, the Application can earn at most one "support" point.

5. Conclusion

Donuts does not dispute that GMO's application in general is competently executed. However, more than this is required to meet the intentionally highly rigorous CPE criteria.

ICANN has deliberately set a “high bar” to avoid the use of the community label by those seeking to use it to exclude other bona fide applications (*e.g.* a “false positive”). A generic word like “SHOP” cannot possibly describe a “community” as that concept is defined by the New gTLD program, and the CPE Panel should have little difficulty in finding that at least *three* out of the 16 possible points should be deducted to disqualify the Application from community priority.

Indeed, the analysis that Donuts has gone through herein shows GMO losing 13 of the 16 point otherwise available to it. Only *five total* points were awarded to the analogous strings .LLC, .INC, .GMBH and .LLP. No more than three appear achievable here, but even if the number were four times as high, the Application would not – and it cannot – qualify for community priority.

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Respectfully submitted,

THE IP & TECHNOLOGY LEGAL GROUP, P.C.
dba New gTLD Disputes

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