



The Internet Corporation for Assigned Names and Numbers

January 20, 2012

The Honorable Greg Walden  
Chairman, Subcommittee on Communication and Technology  
Committee on Energy and Commerce  
U.S. House of Representative  
2125 Rayburn House Office Building  
Washington, DC 20515-6115

Dear Chairman Walden:

Thank you for the opportunity to testify before the Subcommittee's hearing on December 14, 2011 regarding ICANN's new gTLD program. In response to your letter of January 5, 2012, attached please find ICANN's responses to the written questions for the record.

Best regards,

Kurt Pritz  
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cc: The Honorable Anna G. Eshoo, Ranking Member  
Subcommittee on Communications and Technology

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## Questions from the Honorable Henry Waxman, Ranking Member

**Question 1: Could you generally describe how ICANN achieves “consensus” through its multi-stakeholder, bottom-up model? How did ICANN determine that a consensus existed for moving ahead with the expansion?**

**Answer:**

For issues such as the expansion of new top-level domains, ICANN relies on its Internet community-driven policy development processes. Within the ICANN Bylaws-defined policy development processes, it is not ICANN’s Board, management or employees defining the policies. That work is instead done through community working teams, comprised of members across Internet stakeholders. These working teams produce reports of proposed recommendations, which are posted for public comment by all who wish to become involved. Once public comment is considered and recommendations are finalized, the recommendations are presented to the appropriate organization of ICANN community members – such as the Council of the Generic Names Supporting Organization (GNSO) – to consider whether these recommendations should be provided to the ICANN Board.

The GNSO Council is comprised of all facets of the Internet community: Intellectual Property interests; business and commercial users; ISPs; non-commercial institutions, and ICANN’s contracted registries and registrars. The Council determines by consensus whether the recommendations are passed to the ICANN Board. In the case of new gTLDs, a Bylaws-described voting procedure resulted in a 19-1 vote of those interests in favor the new gTLD Policy (the lone dissenting vote by a non-commercial interest found that the approved model had *too many restrictions*). Once the Council approves policy recommendations, the Board – after additional periods of public comment – considers whether to adopt the policy recommendations. Neither the ICANN Board nor ICANN staff crafts the policy recommendations – the community does.

ICANN’s Advisory Committees also are necessary parts of the policy development process and ICANN consensus building. For example, if the community-crafted and approved policy recommendations touch on matters of public policy, the Governmental Advisory Committee – currently comprised of representatives of over 100 governments – may provide advice to the ICANN Board regarding the public policy issues. The Board is required to consider the GAC’s advice and work to find a good-faith solution where the Board’s action may not be consistent with the GAC’s advice. As part of consensus development, the GAC reviewed the New gTLD Policy proposals in great detail. After extended, face-to-face discussions between governments and the GAC, consensus between those two groups was reached that: the expansion would be launched with certain enhancements to the new trademark protections and commitment to study the effects of trademark protections after the first round.

Similarly, the At-Large Advisory Committee (ALAC, representing the interests of Internet users), the Security and Stability Advisory Committee (SSAC, comprised of Internet security experts), and the Root Server System Advisory Committee (RSSAC, comprised of root server operators) may also provide input into the policy development process. For example, each of the root server operators was consulted to get their unanimous agreement that the expansion as planned would not affect root zone operation reliability or stability. In this way, all voices of the Internet community are present in policy development.

The policy recommendations to guide the introduction of new gTLDs were created by the GNSO over a two-year effort through its bottom-up, multi-stakeholder policy development process. In 2005, the GNSO initiated a formal, Bylaws-defined policy development process on the addition of new gTLDs. After the GNSO approved policy recommendations in 2007, they were submitted to ICANN's Board of Directors. In 2008, the ICANN Board approved the recommendations<sup>1</sup> and directed ICANN staff to commence the implementation phase.

After the directive to implement, ICANN continued working with the community on the design of the New gTLD Program to meet the policy recommendations. Since 2008, the New gTLD Program has been refined through ten independent expert working groups, 59 explanatory memoranda and independent reports, thousands of comments in no fewer than 47 extended public comment periods, and 1400 pages of comment summary and analysis. All comments were listened to and taken into account across eight versions of the *Applicant Guidebook*. The *Applicant Guidebook* implements the consensus policies developed by ICANN's multistakeholder community.

Lawrence Strickling, Assistant Secretary of Commerce for Communications and Information of the National Telecommunications and Information Agency, U.S. Department of Commerce, recently described the process of building consensus in ICANN's multistakeholder model, as well as the importance of respecting the outcomes reached, as follows:

**The multistakeholder process does not guarantee that everyone will be satisfied with the outcome. But it is critical to preserving the model of Internet governance that has been so successful to date that all parties respect and work through the process and accept the outcome once a decision is reached.** When parties ask us to overturn the outcomes of these

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<sup>1</sup> GNSO Final Report on the Introduction of New Top Level Domains ("Final Report"), at <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-a>

Also see The GAC Principles Regarding New gTLDs, at [http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf) (Mar. 28, 2007).

processes, no matter how well-intentioned the request, they are providing “ammunition” to other countries who attempt to justify their unilateral actions to deny their citizens the free flow of information on the Internet. This we will not do. There is too much at stake here. [Emphasis added.]<sup>2</sup>

ICANN’s opening of the application window for new TLDs is in fulfillment of ICANN’s role of accountability to the outcomes of the multistakeholder model. ICANN remains accountable to evaluation of the expansion and implementing refinements to the New gTLD Program that may arise through the multistakeholder model.

**Question 2: Although the application window for new gTLDs will commence on Jan. 12, 2012, the actual launch of such gTLDs will not take place until 2013. At the hearing, however, it became clear that additional rights protection mechanisms are still being refined. Why should interested parties applying for new gTLDs before all relevant details have been finalized?**

**Answer:**

The rights protection mechanisms for new gTLDs are being implemented according to a project plan. Consensus-based design decisions that ensure that the rights protection mechanisms achieve their intended benefit have been made and are complete. Because these protection mechanisms must be operational by early 2013, service providers are now being recruited and the specific rules by which they operate are being written.

When the ICANN Board approved the New gTLD Program in June 2011, the Applicant Guidebook included commitments to the implementation of rights protection mechanisms, both at the first level (for the top-level domains, or names to the right of the dot such as .org) and at the second level (second-level domains, like icann.org). Among those rights protection mechanisms for the second level is the formation of the Trademark Clearinghouse in advance of the introduction of the first new TLD approved through the Program.

There have been concerns raised that ICANN does not have all of the operational details of the Trademark Clearinghouse in place prior to accepting applications for new TLDs. However, the necessary details of the Trademark Clearinghouse, including the scope and applicability of the requirements, have been in place since the June 2011 approval of the launch of the New gTLD Program. Use of the

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<sup>2</sup> Remarks of Assistant Secretary Strickling at the Practising Law Institute's 29th Annual Telecommunications Policy & Regulation Conference, December 8, 2011, available at <http://www.ntia.doc.gov/speechtestimony/2011/remarks-assistant-secretary-strickling-practising-law-institutes-29th-annual-te>.

Trademark Clearinghouse will be mandatory for all new TLDs. With these details, TLD applicants have the information necessary to understand the scope of protections they must offer at the launch of a new TLD.

As stated above, the work that is still underway is defining the operational details of how the Trademark Clearinghouse will be operated and who will provide the service. The operational planning for the Trademark Clearinghouse is proceeding on time and in accordance with a project plan, and the Trademark Clearinghouse will be in operation prior to the introduction of new TLDs into the Domain Name System. Additional information on the status of implementation is available at <http://www.icann.org/en/minutes/board-briefing-materials-4-05jan12-en.pdf>.

**Question 3: The Coalition Against Domain Name Abuse (CADNA) has called on ICANN to initiate a process to determine when a second round of new gTLD applications would be open. Has ICANN initiated a proceeding to examine this request? If not, why not?**

**Answer:**

ICANN is committed to opening additional rounds of new gTLD applications, and work is underway to determine when the next round may take place. It is important to note that the timing of the next round is not an issue for a policy development process. The Consensus Policy for the introduction on new gTLDs approved by the Board in June 2008 requires ICANN to schedule additional rounds. One of the initial policy recommendations arising out of the Generic Names Supporting Organization is that, “[t]his policy development process has been designed to produce a systemized and ongoing mechanism for applicants to propose new top-level domains.”<sup>3</sup>

ICANN is still working to identify a clearer timeline for the next round of applications. As part of the consensus-building process, ICANN has agreed with governments and trademark holders that the next round should occur after studying the impact of this round’s delegations on root zone stability and conducting a study on whether new trademark protections should be adjusted. ICANN will undertake these studies as soon as is practicable, in consultation with stakeholders. ICANN will also provide public updates on the ongoing process to determine the timing of the next round.

ICANN is also mindful of its obligations in the Affirmation of Commitments to, “organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer

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<sup>3</sup> GNSO Summary of Policy Recommendations, at <http://gns0.icann.org/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>.

choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion.”<sup>4</sup>

**Question 4: What protections are in place to ensure that any surplus fees collected through the new gTLD program will be handled transparently?**

**Answer:**

As a Not-for-Profit Public Benefit Corporation, ICANN is committed to its not-for-profit mission. For ICANN, that commitment requires us to assure that excess funds generated through the New gTLD Program (i.e., those that exceed the costs incurred for the processing, evaluation and other components of the New gTLD Program) are used in furtherance of ICANN’s mission. The evaluation fee has been calculated to recover costs and not exceed those costs. If evaluation fees exceed actual costs, future evaluation fees will be reduced. If costs exceed fees, then ICANN will absorb that and future fees will be increased to meet the actual costs.

Other aspects of the New gTLD Program may result in additional funds accruing to ICANN (other than evaluation fees). The *Applicant Guidebook* addresses the issue in this way:<sup>5</sup>

It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN’s Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants

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<sup>4</sup> See <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

<sup>5</sup> See Module 4, Page 19 of the *Applicant Guidebook*, version 2010-01-11.

(ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

ICANN handles its budgeting processes in an open and transparent manner. Not only will the community discussion regarding the use of excess funds be the subject of community consultation, but the funds will also be tracked and accounted for within ICANN's publicly-posted financial documents.

**Question 5: You testified at a previous hearing that ICANN is currently engaged in bilateral negotiation with registrars concerning the twelve Law Enforcement Due Diligence Recommendations. Are such negotiations subject to public comment and input?**

**Answer:**

Yes. ICANN and its accredited registrars are providing regular public updates on the status of negotiations. Those negotiations have included several face-to-face meetings in Los Angeles and Washington, D.C. Considerable progress has been made on all 12 recommendations. Updates on the negotiations are available at <https://community.icann.org/display/RAA/Negotiations+Between+ICANN+and+Registrars+to+Amend+the+Registrar+Accreditation+Agreement>. ICANN will publicly post proposed amendments to address the law enforcement recommendations (and more) for public comment. ICANN and the accredited registrars are also planning to hold a public session on the negotiations at ICANN's March 2012 meeting in Costa Rica. We are also planning meetings among law enforcement, registrars and ICANN to gain a unified understanding of the law enforcement requests.

**Question 6: What sort of contingency plans has ICANN put in place in case one of the new registry operators goes out of business after obtaining and launching a new gTLD?**

**Answer:**

Among other safeguards, ICANN has in place provision for an "Emergency Back End Registry Provider" to take over operations for a failed registry to ensure the interests of registrants are protected and domain names continue to resolve.

The issue of registry failure has been considered in detail through the work on the New gTLD Program. First, the extensive evaluation process will help assure that only companies that meet the stringent financial requirements are able to operate

new TLDs. Of course, this pre-emptive evaluation process may not fully protect against future registry failure, and ICANN has included multiple additional protections within the New gTLD Program to address potential failure.

During the application process, applicants are required to provide evidence that critical functions of the registry will continue to be performed even if the registry fails. This includes a requirement that the costs for maintaining critical registry functions over an extended period of time (between three to five years) be estimated as part of the application process, and registries must have available a Continuing Operations Instrument (funded through a letter of credit or an escrow account) that ICANN may invoke to pay a third party to maintain the critical registry functions.

ICANN is currently working to identify the entity that will serve as an Emergency Back End Registry Operator (EBERO), which will step in to perform the critical registry functions during the three-to-five year period. These provisions are expected to protect registrants against the risk of immediate registry failure.

To facilitate any need for emergency transition, ICANN also requires the escrow of registry data that the EBERO would be allowed to access for the purpose of providing the registry services.

In the event of a termination of a Registry Agreement, and in consultation with the registry operator, ICANN maintains the right to determine whether to transition the operation of a TLD to a successor registry operator as is necessary to protect the public interest. Transition is not required, however, if a registry operator's use of the TLD is for its own exclusive use and all names are registered and maintained by the registry operator.

**Question 7. Please elaborate on the new program recently approved by the ICANN Board that will help reduce the costs for not-for-profit organizations that intend to apply for their .BRAND gTLDs? How many not-for-profits will benefit from this program if there is a \$2 million cap on the assistance?**

**Answer:**

This Applicant Support program was created through the input and recommendations of the Joint Applicant Support Working Group, a cross-community working group.

One part of the Applicant Support Program is embodied in the New gTLD Financial Assistance Handbook, which was released on January 11, 2012, and details the criteria for applying for financial assistance. Under this program, there are two types of assistance available: (1) a reduction in application fee to \$47,000, reduced from \$185,000; or (2) allowing an applicant to pay the \$185,000 according to a



payment plan, instead of requiring full payment at the time of application. Those who qualify for financial support will have to meet demonstrated criteria, including that the proposed TLD will operate in the public interest, as well as demonstrating financial need and the financial capability to operate a registry. While the Financial Assistance program is not solely targeted to assist not-for-profit organizations in applying for new gTLDs, the involvement of a not-for-profit organization in an application provides an additional point towards scoring an applicant's eligibility for either form of assistance.<sup>6</sup> The evaluation of Financial Assistance Applications will be performed by an independent Support Application Review Panel (SARP) that is being comprised.

ICANN has committed to contribute \$2 million to a seed fund for applicant support, and is evaluating how additional funding could be contributed to expand the size of this fund. The size of the fund in November 2012 – the date of making financial assistance award determinations – will dictate the number of applicants receiving the \$138,000 award (\$185,000 minus \$47,000). Those applicants rated highest by the SARP will be eligible for the \$138,000 fee reduction, until the fund is exhausted. After exhaustion, the remaining applicants who met the minimum qualifying criteria for applicant support may elect to proceed on a staggered payment schedule, or may withdraw their application and seek a refund.

Another part of the Applicant Support Program intended to reduce costs for not-for-profit organizations is the Applicant Support Directory, an online workspace created to connect potential applicants who wish to establish a new public interest gTLD registry in their community with organizations who wish to offer either financial or non-financial assistance.

**Question 8. I understand that ICANN believes concerns over defensive registrations at the second-level domain names would partially be alleviated by mechanism such as a Trademark Clearinghouse. However, the proposed Clearinghouse only runs for 60 days of any new gTLD. Why shouldn't this Clearinghouse be extended permanently?**

**Answer:**

The Trademark Clearinghouse is part of a suite of rights protection mechanisms that were created through expert input. The Clearinghouse is a database of registered trademarks and other forms of intellectual property. The Clearinghouse will provide protections through the operation of "Sunrise" and "Trademark Claims" processes.

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<sup>6</sup> Neither the Applicant Guidebook nor the Financial Assistance Handbook reference ".BRAND" applications. There are some limitations on eligibility for financial assistance if a string is intended to reference a trademark, however, applications for names of communities or non-governmental agencies may still be considered even if they have obtained legal trademark protection.

“Sunrise” gives rights holders the right of first refusal on any second-level name before there is general availability. The Claims process provides a warning notice to anyone trying to register a trademarked name during the registry start-up period.

Both of those processes were designed by intellectual property experts to provide protections during the start-up phase for any new gTLD. Other protections are designed for longer-term operation. For example, “IP Watch” services are already provided by private firms, and it was not necessary for the rights protection mechanisms specific to the New gTLD Program to compete with those ongoing watch services already available. In addition, rapid take down and new dispute resolution processes have designed to provide protection during ongoing registry operation.

The Trademark Clearinghouse can also be used for other purposes. The way has been paved for those providing IP Watch services to improve by using the Clearinghouse database.

The issue of the length of the Trademark Claims service has been an area of extensive debate within ICANN. The Trademark Claims service was developed through two community expert groups – the Implementation Recommendation Team (IRT), comprised of 18 intellectual property experts, and the Special Trademark Issues (STI) Team, comprised of representatives of each of the GNSO Stakeholder Groups. The 60-day post launch operation of the Trademark Claims service actually *exceeds* the final recommendation of the STI, which suggested that no mandatory post-launch claims service was required.

These protections were also enhanced in response to consultation with ICANN’s Governmental Advisory Committee (GAC). In addition, ICANN has agreed to undertake studies of a post-launch review on the feasibility of enhancing both the scope of the words registered within the Clearinghouse and the length of the Trademark Claims notification process. If further protection is warranted and feasible, these enhanced protections could be included in future gTLD application rounds.

**Question 9. Leading providers under Uniform Dispute Resolution Policy (UDRP) have complained that current fees collected are inadequate to cover the costs of retaining qualified trademark attorneys. Has ICANN considered using surplus funds from the new gTLD program to support stronger rights protection mechanisms, such as using the extra funds to subsidize costs to rights holders when a losing party skips out on payment (or simply refuses to show up) during the dispute resolution process?**

**Answer:**

It is possible for community members to raise such suggestions through ICANN's annual public cycles of strategic planning and budgeting. As discussed in response to Question 4 above, the use of excess funds generated through the New gTLD Program is a matter for continued community consultation. No commitments have been made on the use of the funds. ICANN will of course consider any proposals from the community on directing excess funds to subsidize disputes under the Uniform Domain Name Dispute Resolution.

**Question 10. Some critics have pointed to the inadequacies of the “thick” Whois system. Has ICANN considered mandating registrant verifications? If not, why not?**

**Answer:**

ICANN seeks to improve access to Whois information and accuracy of Whois information. By mandating “thick” Whois within all new gTLDs, there will be more information available on registrants – making bad actors easier to locate. In addition, there is a strong incentive for applicants to implement “searchable” Whois. Both of these measures are recommended by intellectual property rights and domain name security experts to make it easier to access information and combat malicious conduct where it occurs. In addition, the new Program provides centralized access to registry data, creating for the first time a one-stop shop for accredited parties to view data in all registries. These requirements represent significant improvement for combating malicious conduct.

ICANN is also working to improve Whois accuracy. We cannot currently require verification or authentication at the time of registration by an accredited registry of a new second-level domain name applicant. The ICANN community has been considering Whois-related issues for years,<sup>7</sup> and ICANN is actively working to enhance Whois and to provide an improved environment for law enforcement and consumers through improving Whois accuracy and access to data.

As discussed in response to Question 5, ICANN is currently in negotiations with its accredited registrars over amendments to the Registrar Accreditation Agreement. ICANN is negotiating amendments regarding to the verification of Whois data, and expects its accredited registrars to take action to meet the rising call for verification of data. ICANN expects that the RAA will incorporate – for the first time – Registrar commitments to verify Whois data. Proposed amendments should be posted prior to ICANN's March 2012 meeting in Costa Rica. The amendments are expected to be in force prior to the launch of the first new TLD in 2013.

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<sup>7</sup> A comprehensive listing of the past work regarding Whois is available at <http://gnso.icann.org/issues/whois/>.

In addition, ICANN has committed substantial resources to Whois data-related issues. There are five separate studies currently underway regarding Whois services. These studies including issues on misuse, registrant identification and privacy/proxy services.<sup>8</sup> Most of these studies are expected to conclude within 2012. This work is intended to inform, facilitate and expedite ongoing policy work within the GNSO on Whois data issues.

ICANN is also committed to fully evaluate the implementation of the final recommendations of the Whois Review Team convened under the Affirmation of Commitments. The Review Team's draft recommendations are now the subject of a public comment proceeding.

Combined with the enhanced access to data under the New gTLD Program, the expected commitments to verification achieved through the RAA negotiations will be a significant improvement to the state of Whois data today. As studies and further policy development continue within the GNSO, further Whois improvements may continually be introduced.

**Question 11. I understand that ICANN recently initiated four major studies of Whois. Why were these studies initiated so close to the gTLD application date?**

**Answer:**

As discussed within the response to Question 10, Whois work has been ongoing within ICANN for over ten years. For the current studies underway, some have been in planning stages for multiple years, and have gone through iterations of scoping, feasibility of the studies, budgeting, receiving requests for proposals and the ultimate selection of vendors. These studies are proceeding on a timetable independent of the New gTLD Program; indeed the timetable for the New gTLD Program was not determined until June 2011. The Whois work today is largely focused on studying Whois-related issues within existing registries, but the outcomes of these studies will continue to inform the development of Whois improvements in both existing and new gTLDs.

**Question 12: How confident is ICANN that the “thick” Whois to be required for the rollout of new gTLDs will adequately address existing issues with the Whois system? Specifically, what are the accompanying new requirements for these databases to be authenticated and accurate?**

**Answer:**

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<sup>8</sup> The Whois studies are identified at <http://gns0.icann.org/issues/whois/studies>.

ICANN does not believe that work on Whois stops with implementation of thick Whois databases, or with the other measures to increase ease of access to data: searchable Whois and centralized access to TLD data. In response to Question 10, ICANN provides a discussion of how the enhanced Whois-related requirements within the New gTLD Program will be improved through the expected commitments on verification to be achieved in the RAA negotiations and additional study.

With these combined protections, law enforcement and consumers will observe improvements to Whois database issues. However, Whois presents complex policy issues for both law enforcement and privacy interests. ICANN is committed to work through these issues with law enforcement agencies and others to develop policies that will provide effective tools for the protection of consumers.

**Question 13: Please provide a breakdown of the \$185,000 application fee.**

**Answer:**

The \$185,000 application fee was determined through a comprehensive and complex process that included identifying over 100 separate tasks required for the evaluation of a new gTLD application and seeking guidance from experts. The fee includes development costs (\$26,950 per application); application processing and evaluation costs (\$97,800 per application); and costs for risk mitigation steps, including allowance for unanticipated costs and variations between estimates and actual costs incurred (\$60,000 per application). A 14-page document setting out the methodology and further breakdown of the fee component is available at <http://www.icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf>. This document is an update to the earlier “Cost Considerations of the New gTLD Program”, published in October 2008, available at <http://www.icann.org/en/topics/new-gtlds/cost-considerations-23oct08-en.pdf>.

**Question 14: How will ICANN determine whether the application fees cover the actual application processing and evaluation costs? Will ICANN make that information publicly available?**

**Answer:**

Throughout the development of the New gTLD Program, ICANN has been transparent about the basis of the estimation of costs for the new gTLD program, and ICANN will continue to be transparent regarding reporting actual costs incurred. It is only upon review of the actual number of applications and a comparison of the actual costs to the estimates that ICANN can complete the determination requested above. ICANN has already committed to community reporting regarding the fees and expenses as the implementation of new gTLDs

progresses, and to handling any surplus or deficit with community consultation. The basis for the New gTLD Program budget is provided in an October 2011 Explanatory Memorandum, available at <http://www.icann.org/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf>.

**Question 15: Has ICANN evaluated the revenue to be generated from second-level domain name registrations under new gTLDs to be launched, including revenue to be garnered from defensive registration?**

**Answer:**

ICANN has not undertaken an evaluation of additional revenue to be generated from defensive second-level domain name registrations under new gTLDs. As new gTLDs become operational, those registries are obligated to pay ICANN annual fees with a fixed component and, for large registries, a transaction-based component. For registries with fewer than 50,000 registered names, there is a fixed fee but no transaction-based fees. All of these fees are targeted to provide ICANN services to meet the needs of the community of registrants and Internet users through: a robust contractual compliance program, Internet security work, root-management services, formation of additional protections and other programs.

Per-registration transaction fees have decreased over the past several years. In FY08, ICANN reduced the registrar-level transaction fee from \$.25 to \$.20. That number decreased further in FY10, to \$.18 per transaction. As a not-for-profit, the transaction fees are one component of how ICANN maintains its budgeted operations. If, however, additional transaction-level fees would exceed ICANN's operational needs, ICANN may reduce those fees to an appropriate level as measured against the budgeted expenses.

**Question 16: In 2003, ICANN shifted from a fixed-fee model to a transaction-based fee model on the theory that such model would provide more predictable and sustainable funding for ICANN. Please explain why ICANN as once again switched over to a cost-recovery model in assessing fees?**

**Answer:**

The cost-neutral model of the New gTLD Program does not represent a fundamental shift from a transaction-based fee model. First and foremost, ICANN is a public benefit, not-for-profit entity. Consequently, ICANN operates generally on a cost-recovery basis. The transaction-based model for on-going registrar and registry fees was designed to ensure that ICANN could grow services in a way that corresponds with growth in the Domain Name System.

The requirement that new gTLD application fees be designed as cost neutral within the New gTLD Program itself is in direct response to the GNSO policy recommendation that “Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process.” The application fee was designed so that the new gTLD implementation will be fully self-funding, so that ICANN’s technical coordination work and other activities will not subsidize the new gTLD application process. In a sense, the new gTLD evaluation fee is a transaction-based fee also – one fee per application. ICANN fees across the board are administered in a consistent way.

Once the new TLDs are operational, the transaction-based fees currently in place for ICANN’s registries and registrars will be operative for the domain name registrations within those new TLDs.

**Question 17: Why hasn’t ICANN adopted a full “loser pays” system to deter cybersquatting in the new gTLD program?**

**Answer:**

New gTLD dispute resolution processes implemented in this program are loser pays systems:

- If a trademark holder files a formal objection to a proposed new registry based on infringement, that dispute is resolved on a loser-pays basis.
- If a trademark holder files a claim using the new ICANN procedure against a registry that is already in operation, that dispute is resolved on a loser-pays basis.
- If a trademark holder files a Uniform Rapid Suspension claim and that claim is for 15 or more names, that dispute is resolved on a loser-pays basis.

The exceptions to a loser pays methodology involves limited (not all) filing fees for disputes and URS claims of less than 15 names. As discussed in response to Question 8, the trademark protections – including the Uniform Rapid Suspension System – were developed through two community expert groups, e.g., the Implementation Recommendation Team (IRT), comprised of 18 intellectual property experts.

The IRT did not recommend moving to a full loser-pays system for domain name disputes related to cybersquatting. The IRT suggested that claims for 26 or more names in a URS claims might be done on a loser-pays basis. The IRT raised a concern that the time and effort that would be required for collection efforts would ultimately increase the costs of the URS, as many registrants may never appear in the suit and could be hard to locate. The specter of a full loser-pays model may also

discourage individual domain name registrants from filing responses, out of fear of increased costs.

After consultation with the Governmental Advisory Committee, the threshold to enter the partial loser-pays system was reduced to disputes that involve in excess of 15 domain names. This partial loser-pays system helps to meet the stated goals of the URS to be “fast and fair.”

**Question 18: I understand that ICANN may conduct competitive bidding for the right to operate new gTLDs if there are multiple interested parties. Has ICANN considered using the same auction process for the right to maintain existing registry contracts that could actually help keep prices in check and reduce costs for registrants, as well as consumers?**

**Answer:**

The availability of an auction process in the event that there are multiple applicants for the same TLD is intended as a last-resort method. ICANN encourages applicants to work together to arrive at a mutually-agreeable solution instead of allowing the competing applications to proceed to an auction.

While auctions are available to resolve contention for a gTLD at the time of application, auctions are not considered to be a viable mechanism for assuring the continued operation of a TLD. The proposed gTLD Registry Agreements allow for presumption of renewal of the Registry Agreement so long as the registry operator remains in compliance with the conditions of the Agreement. The U.S. Federal Communications Commission has a similar “renewal expectancy” policy with respect to spectrum licenses.

ICANN undertook a serious balancing of benefits and risks regarding the development of this model. Requiring competitive bidding for the renewal of registry agreements will put the gTLD operator at risk of needing to “payoff” competing bidders and does not provide any guarantee of better service. Without some assurance of renewal, today’s applicants for new gTLDs would be hesitant to innovate and invest in a registry. Instead, the presumptive renewal gives incentive to registry operators to develop new technologies without fear of losing their investment.

In addition, ICANN expects that “switching” a registry operator upon a completion of an auction would not be a simple or straightforward process, and that factors other than price may also be attractive to consumers. The New gTLD Program allow for community-based TLDs, as well as other TLDs that will have special attributes that will not make them easily transferable to the highest bidder. For example, work has been conducted towards creating a higher security TLD for the financial services industry, where the registry operator would commit to additional protections for



the development of a TLD where consumers know they are making financial transactions in a trusted space. Security – and not price – may be the determining factor for the success of such a TLD. However, making the investments necessary to create this more secure zone may not be attractive to an applicant who does not have some assurance of renewal of its registry agreement.

**The Honorable Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology**

**Question 1: During your testimony, you indicate that ICANN had recently approved a reduced application fee of \$47,000 for non-profit organizations. What criteria must be met in order to receive the reduced fee? How many non-profit organizations will be able to take advantage of this discount in the first round of applications?**

**Answer:**

As explained in response to Congressman Waxman's Question 7, this Applicant Support program was created through the input and recommendations of the Joint Applicant Support Working Group, a cross-community working group.

One part of the Applicant Support Program is embodied in the New gTLD Financial Assistance Handbook, which was released on January 11, 2012, and details the criteria for applying for financial assistance. Under this program, there are two types of assistance available: (1) a reduction in application fee to \$47,000, reduced from \$185,000; or (2) allowing an applicant to pay the \$185,000 according to a payment plan, instead of requiring full payment at the time of application. Those who qualify for financial support will have to meet demonstrated criteria, including that the proposed TLD will operate in the public interest, as well as demonstrating financial need and the financial capability to operate a registry. While the Financial Assistance program is not solely targeted to assist not-for-profit organizations in applying for new gTLDs, the involvement of a not-for-profit organization in an application provides an additional point towards scoring an applicant's eligibility for either form of assistance. The evaluation of Financial Assistance Applications will be performed by an independent Support Application Review Panel (SARP) that is being comprised.

ICANN has committed to \$2 million to a seed fund for applicant support, and is evaluating how additional funding could be contributed to expand the size of this fund. The size of the fund in November 2012 – the date of making financial assistance award determinations – will dictate the number of applicants receiving the \$138,000 award (\$185,000 minus \$47,000). Those applicants rated highest by the SARP will be eligible for the \$138,000 fee reduction, until the fund is exhausted. After exhaustion, the remaining applicants who met the minimum qualifying criteria for applicant support may elect to proceed on a staggered payment schedule, or may withdraw their application and seek a refund.

Another part of the Applicant Support Program intended to reduce costs for not-for-profit organizations is the Applicant Support Directory, an online workspace created to connect potential applicants who wish to establish a new public interest gTLD registry in their community with organizations who wish to offer either financial or non-financial assistance.

**Question 2: What was the application fee for the last five gTLDs that ICANN rolled out?**

**Answer:**

ICANN has operated two prior application rounds for new gTLDs, one in 2000 and one in 2004. The application fee in 2000 was US\$50,000. The application fee in 2004 was US\$45,000. The last five gTLDs approved by ICANN were all from the 2004 round.

While the application fee of the 2004 round was intended to cover the costs of the application evaluation process, experience has shown that the US\$45,000 fell far short of the actual costs incurred. In fact, it is estimated that that the staff costs, consulting costs, and outside services resulted in at least \$180,000 in costs per application. One of the experiences learned from the 2004 round was the true scope of the evaluation panels needed, and the cost estimates for today's New gTLD Program applications are made taking into account the lessons learned in 2004.

Detail on the process, assumptions and estimates used to reach the \$185,000 per application fee for the New gTLD Program are set out in a 14 page document on the cost considerations of the New gTLD Program. That document is available at <http://www.icann.org/en/topics/new-gtlds/cost-considerations-04oct09-en.pdf>.

**Question 3: When does ICANN intend to announce the details for the second round of applications?**

**Answer:**

As discussed in response to Congressman Waxman's Question 3, ICANN is committed to opening additional rounds of new gTLD applications, and work is underway to determine when the next round may take place. It is important to note that the timing of the next round is not an issue for a policy development process. The Consensus Policy for the introduction on new gTLDs approved by the Board in June 2008 requires ICANN to schedule additional rounds. One of the initial policy recommendations arising out of the Generic Names Supporting Organization is that, "[t]his policy development process has been designed to produce a systemized and ongoing mechanism for applicants to propose new top-level domains."<sup>9</sup>

ICANN is still working to identify a clearer timeline for the next round of applications. As part of the consensus-building process, ICANN has agreed with governments and trademark holders that the next round should occur after

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<sup>9</sup> GNSO Summary of Policy Recommendations, at <http://gns0.icann.org/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>.

studying the impact of this round 's delegations on root zone stability and conducting a study on whether new trademark protections should be adjusted. ICANN will undertake these studies as soon as is practicable, in consultation with stakeholders. ICANN will also provide public updates on the ongoing process to determine the timing of the next round.

ICANN is also mindful of its obligations in the Affirmation of Commitments to, "organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion."<sup>10</sup>

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<sup>10</sup> See <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

## The Honorable John D. Dingell

**Question 1: Cybersquatting is a problematic trend among dot-com sites. What assurance do we have that this practice will not persist or worsen under ICANN's new gTLD program? Please explain your response.**

### **Answer:**

We do not expect instances of malicious conduct to increase. New gTLDs come with heightened protections. Taking these and other factors into account, we expect that new TLDs will be a less fertile ground for wrongdoing and, as a result, the Domain Name System, as a whole will be improved.

The New gTLD Program includes many new trademark protections to help protect intellectual property rights and combat the abuses that are prevalent in the heavily trafficked gTLDs such as .COM. These include:

- Uniform Rapid Suspension: A rapid, inexpensive way to take down infringing domain names;
- Trademark Clearinghouse: a one-stop shop so that trademark holders can protect their property right in ALL new TLDs with one registration;
- Mandatory sunrise *and* Trademark Claims processes for *all* new gTLDs;
- The requirement to maintain thick Whois information, provision of centralized access to zone data, and a strong incentive to provide a searchable Whois database – all to make it easier to find infringing parties; and
- A post-delegation dispute procedure where rights holders can assert claims directly against TLD registry operators for domain name abuse if the registry has played an active role.

In addition, there are new measures designed to mitigate malicious conduct on the Internet, and increase security of the Internet, formed with teams of experts:

- Background reviews of TLD applicants, including reviews for criminal history (including the use of telecommunications or the Internet to facilitate crimes, illegal sale of drugs, and others);
- Rejection of applications where the applicant has a pattern of adverse decisions under the UDRP (Uniform Domain Name Dispute Resolution Policy), or has been found to act in bad faith or reckless disregard under

cybersquatting legislation – a protection targeted directly against cybersquatting activities;

- The requirement to have a plan to implement domain name system security extensions (DNSSEC), reducing the risk of “man-in-the-middle” attacks and spoofed DNS records;
- A requirement to maintain enhanced, or “thick”, WHOIS records at the registry level to allow more rapid search capabilities, facilitating efficient resolution of malicious conduct activities;
- A centralized zone file access system to allow for more accurate and rapid identification of key points of contact within each gTLD. This reduces the time necessary to take corrective action within TLDs experiencing malicious activity; and
- A requirement to establish a single point of contact responsible for the handling of abuse complaints (as requested by law enforcement authorities).

With these and the other protections detailed within my written testimony, the New gTLD Program provides a baseline for more secure TLDs, reducing opportunity for malicious conduct.

**Question 2: The Association of National Advertisers (ANA) has raised a number of concerns with ICANN’s new gTLD program, including that such program will cause the misappropriation of intellectual property, spur defensive registrations, lead to domain navigation dilution, increase cybersquatting, reduce investment by intellectual property owners, and bring about losses from failed top-level domain names. What has ICANN done to address these concerns? Does ICANN plan to do more? Please explain your responses to both questions.**

**Answer:**

As detailed in response to your Question 1, the years of policy and implementation design work that have gone into the New gTLD Program have formed a program that will result in TLDs that are required to offer more protections than TLDs that have already been introduced into the Domain Name System. The program was designed over more than six years, with input from no less than ten independent expert and community working groups addressing the issues that ANA continues to raise outside of the multi-stakeholder process. There are significant trademark protections designed by intellectual property experts. There are substantial protections against registry failure, including requirements for registry transition planning and designation of emergency registry operators, so that even in the event

of registry failure, consumers will have a period of three to five years until basic registry operations are concluded.

One of the hallmarks of ICANN is its ability to call together world-class experts to consider issues facing the ongoing stability and security of the Internet. For the new gTLD program, ICANN formed teams of: intellectual property experts to develop trademark protection mechanisms; Internet security experts to develop consumer protections; registry operators to create mechanisms to access registry data; financial services providers to develop thresholds for “secure” TLDs; and linguists to avoid user confusion.

With the opening of the application window, ICANN’s work continues. ICANN has already committed to solicit information as expeditiously as possible from the intellectual property community. This commitment, set out in a January 11, 2012 letter to Assistant Secretary for Communications and Information, Lawrence Strickling, also committed ICANN to submit any new proposals or recommendations arising out of that work for evaluation and comment from the ICANN stakeholder community.

ICANN has already committed to review the impacts of the rollout of the New gTLD Program, including a post-launch study on the effectiveness of the new trademark protections and any effects on root zone operations, and a post-delegation economic study on the results of the first set of new gTLDs. ICANN has also committed to undertake reviews in accordance with the Affirmation of Commitments between the United States Department of Commerce and ICANN, including a review “that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion.” There will be opportunities for public input regarding all of this post-launch work.

ICANN looks forward to ICANN and Internet community members continuing their involvement within the multi-stakeholder model and bringing their proposals for discussion among all of the Internet’s stakeholders.

**Question 3: In an October 27, 2011 letter from ICANN’s Governmental Advisory Committee (GAC), the GAC expressed concern that 12 recommendations put forward by the law enforcement community had not been implemented by ICANN. Why were none of these recommendations implemented? Moreover, what steps does ICANN plan to take to help mitigate the concerns of both the law enforcement community and the GAC? Finally, does ICANN expect to complete negotiations with law enforcement in time so that the results of such negotiations will apply to gTLDs issued under ICANN’s new program? Please explain your responses to all questions.**

**Answer:**

ICANN is actively working to address all twelve of the law enforcement recommendations referenced in the GAC's October 27, 2011 communication. Specifically, as directed by the Board, ICANN is currently in negotiations with its accredited registrars on amending the Registrar Accreditation Agreement (RAA) to meet the recommendations raised by law enforcement authorities. Amendments are expected to be in force prior to the entry of the first new TLD in 2013.

These negotiations include face-to-face meetings with law enforcement agencies to ensure understanding of law enforcement requirements. The negotiation anticipates substantial and unprecedented steps to improve the accuracy of Whois data. ICANN is taking a strong stand in regard to issues relating to the verification of Whois data and expects the accredited registrars to take action to address the demands of governments and law enforcement worldwide. Updates on the negotiations are available at

<https://community.icann.org/display/RAA/Negotiations+Between+ICANN+and+Registrars+to+Amend+the+Registrar+Accreditation+Agreement>.

By February 20, 2012, proposed amendments to address the law enforcement recommendations (and more) will be posted for public comment. One important aspect of the negotiations focuses on the verification of Whois data, and work is underway to plan a targeted forum, including representatives of law enforcement and experts in verification. This forum would be open to the public and is expected to take place before the ICANN meeting in Costa Rica.



## **The Honorable Bob Latta**

**Question 1:** What type of cost/benefit analysis was carried out before ICANN proceeded with its proposal to expand the top level domain space on an unlimited basis?

### **Answer:**

Prior to this rollout, ICANN commissioned five economic studies that examined anticipated benefits and costs of the new gTLD program, the effects of price constraints, and the benefits of vertical integration. All support a conclusion that Internet users stand to benefit from the introduction of new gTLDs.

Those five reports are:

- Dr. Dennis Carlton, Report Regarding ICANN’s Proposed Mechanism for Introducing New gTLDs, at <http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf> (“Carlton I”);
- Dr. Dennis Carlton, Preliminary Analysis Regarding Price Caps for New gTLD Internet Registries, at <http://www.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf> (“Carlton II”);
- CRA International, Revisiting Vertical Separation of Registries and Registrars, at <http://www.icann.org/en/topics/new-gtld-crai-report-24oct08-en.pdf>;
- Michael Katz, Gregory Rosston and Theresa Sullivan, An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names, at <http://www.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf> (“Katz/Rosston Phase I”); and
- Michael Katz, Gregory Rosston and Theresa Sullivan, Economic Considerations in the Expansion of Generic Top-Level Domain Names – Phase II Report: Case Studies, <http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf> (December 2010) (“Katz/Rosston Phase II”).

The reports are detailed. Briefly summarized, the reports indicate that: benefits will accrue from the opening of this market in a way similar to other markets; innovation (and thus benefit) is difficult / impossible to quantify; and costs should be mitigated through the adoption of new trademark and consumer protections.

This work followed the careful consideration of the Internet community through ICANN’s bottom-up process. The first question considered in that process was whether new gTLDs should be introduced and how that introduction should be constrained. The Policy conclusion was that new gTLDs should be introduced in

rounds and that safeguards be introduced to protect rights and public policy interests.

For issues such as the expansion of new top-level domains, ICANN relies on its Internet community-driven policy development processes. Within the ICANN Bylaws-defined policy development processes, it is not ICANN's Board, management or employees defining the policies. That work is instead done through community working teams, comprised of members across Internet stakeholders. These working teams produce reports of proposed recommendations, which are posted for public comment by all who wish to become involved. Once public comment is considered and recommendations are finalized, the recommendations are presented to the appropriate organization of ICANN community members – such as the Council of the Generic Names Supporting Organization (GNSO) – to consider whether these recommendations should be provided to the ICANN Board.

The GNSO Council is comprised of all facets of the Internet community: Intellectual Property interests; business and commercial users; ISPs; non-commercial institutions, and ICANN's contracted registries and registrars. The Council determines by consensus whether the recommendations are passed to the ICANN Board.

To be clear, the New gTLD Program provides for a limited rollout of new TLDs: limited by round and by demand. Stringent qualification requirements and the finite application window also limit the opening of TLDs. ICANN has set a high bar, rigorous technical, financial and operational requirements that applicants must meet in order to be eligible. Applying is only viable for those that can demonstrate these requirements. Although the application window opens on January 12, 2012 and closes 90 days later, the first new TLDs will not be operational until early 2013. The first entries will likely be those that are least controverted and the delegations will occur in a distributed way well into 2014. New TLDs will be added as other applicants are able to pass through the scrutiny of objection processes and evaluation. Great care and deliberation is built into this roll-out.

In the Affirmation of Commitments between the United States Department of Commerce and ICANN, ICANN committed to organizing a review that will examine the extent to which the introduction or examination of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. This review is to take place if and when new gTLDs have been in operation for one year.

Given the scope of the economic study already undertaken, as well as the commitment to measuring the effects of new gTLDs once there is actual data to inform that assessment, the Board and the Governmental Advisory Committee agree that further economic study would not be beneficial prior to the opening of the application round. Instead, the Board and the GAC focused on the collection of

information that will inform the analysis of the effects of the introduction of new gTLDs after this first round. The *Applicant Guidebook* now includes application questions that are specifically targeted to collect information relating to stated purposes and anticipated outcomes of each application, for use in later studies.