NEW gTLD DRAFT APPLICANT GUIDEBOOK-VERSION 2: ANALYSIS OF PUBLIC COMMENT

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INTRODUCTION AND EXECUTIVE SUMMARY

Background

Since it was founded in 1998, one of ICANN's key mandates has been to create competition in the domain name market. In addition, the Joint Project Agreement that ICANN has with the U.S. Department of Commerce says: "ICANN shall maintain and build on processes to ensure that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs."

The policy making process in the ICANN model is driven by people from around the world. Those discussions have involved representatives of governments, individuals, civil society, the technology community, business, and trademark lawyers. The consensus they came to, through discussions at the Generic Names Supporting Organization (GNSO), one of the many groups that coordinate global policy in ICANN, was that new gTLDs were needed and could be introduced.

The current new gTLDs project has been in the study and planning stages for more than 3 years. See http://gnso.icann.org/issues/new-gtlds/. Its origin goes back even further – to the first two rounds of top-level domain applications held in 2000 and 2003. Those rounds were used to shape the current process.

In June 2008, the ICANN Board adopted the GNSO policy to introduce new gTLDs and directed staff to continue to further develop and complete a detailed implementation plan, continue communication with the community on the work, and provide the Board with a final version of the implementation proposals for the Board and community to approve before the new gTLD introduction process is launched.

In October 2008, a Draft Applicant Guidebook, with six explanatory memoranda was released and a consultation period of 76 days was held on the first draft. In addition to the comment period, there have been face-to-face consultations held at ICANN meetings and special consultations.

An analysis of over 300 comments to the Guidebook resulted in substantial changes, reflected in the second version of the Guidebook published in February 2009. Again, there has been substantial commentary reiterating previous positions and staking out new ones for consideration.

Overview of the Analysis

ICANN conducts numerous public comment periods. They can be found here:

http://www.icann.org/en/public-comment/. In 2008, more than 50 comment periods were held. This process shapes policy direction and effects change to important technical, contract, and policy implementation documents. While ICANN relies heavily on this process, many have suggested that it is often difficult to understand how comments have shaped outcomes and if not, why not.

For the comment period to the second version of the Guidebook, ICANN followed the approach taken on comments to the first version and is providing here a detailed analysis of comments received. The comments were again divided into major categories and then subcategories.

An analysis was written to address issues raised in the categories and subcategories. The analysis identifies commenters and provides a summary of issues with which commenters are associated, and then provides an explanation of the proposed position regarding the issues raised. Therefore, each category is divided into the following sections:

- A summary of the key points made in that category
- A summary where a synopsis of comments and sources is listed
- Analysis including a summary of the issues raised by that set of comments, and an analysis balancing the issues raised by the comments
- A proposed position that is reflected in excerpts Applicant Guidebook for additional discussion.

Guidebook Analysis and Changes

ICANN continues to move forward in the implementation of the new gTLD Program while balancing and addressing community concerns on specific aspects of the program. The public comment period on the second version of the applicant guidebook recently closed and work continues to proceed regarding the discussion of overarching issues.

In order to continue progress and the community discussion, ICANN:

- Will now publish an analysis of comments similar to that published after the first version of the Guidebook
- Will conduct consultations and fora at the Sydney meeting and afterward to develop solutions to the overarching issues
- Publish the third version of the Guidebook after the Sydney meeting when solutions to the overarching issues can be included.

With that in mind, it is anticipated that applications for new top-level domains will be accepted starting in the first quarter of 2010.

Guidebook Analysis

As with the first version of the Guidebook, ICANN has organised and is reporting a synopsis of all the comment made in the ICANN comment forum as well as at the ICANN meeting in Mexico

City. The report analyzes comments by category and balances the different proposals made. The goals of the report are to:

- Analyze the comments in order to develop amendments to the Guidebook that are consonant with the meaningful input of the community, and
- Demonstrate that the comments are taken seriously and carefully considered.

ICANN will not be producing a third version of the Draft Applicant Guidebook for new generic top-level domains before its upcoming June meeting in Sydney, Australia. This is because the discussion of overarching issues will continue through the meeting and beyond (as was expected). Publication of a new Guidebook version without addressing these issues might signal that they are not considered important.

In order to provide specifics and point up discussion, the Comment Analysis will be accompanied by several excerpted redlined sections of the Guidebook so that potential changes can be discussed. These excerpted sections are being developed in response to the recently closed public comment forum and will be published in time for discussion in the Sydney meeting.

Overarching Issues

ICANN previously identified four overarching issues with respect to the new gTLD program. Significant progress has been made on each and the Sydney meeting will be used to focus on that work in the hope of finding solutions.

For example, a session dedicated to trademark issues will take place on Wednesday, 24 June at the Sydney meeting. There will also be an update session on the opening day of the meeting, as well as the usual updates and public forums.

Starting with the first session in Sydney, regional events will be held in Europe, the Americas and Asia, to develop Guidebook solutions to Trademark issues. Those sessions will discuss solutions offered by the Implementation Recommendation Team (http://www.icann.org/en/announcements/announcement-24apr09-en.htm) and other sources.

Progress on other overarching issues will be reported in Sydney.

Timing

The comment analysis and redlined Guidebook sections are published now, in time for discussion at the Sydney meeting. The third version of the Guidebook is scheduled to be published in early September; the comment period for that version will close after the ICANN meeting in Seoul (25-30 October, 2009).

Major Changes in Selected Draft Applicant Guidebook Sections

Even though publication of a new version of the Draft Applicant Guidebook is pending resolution of certain overarching issues, the public comment has resulted in many proposed changes to the Applicant Guidebook. Those proposed changes are posted under separate cover for discussion and comment. The subject areas of these changes include:

Updates to Module 2: Geographical Names

Section 2.1.1.4 on Geographical Names describes the categories of strings that are considered geographical names, the documentation requirements, and the review procedure employed.

The potential changes highlighted in this section provide greater specificity on the scope of protection at the top level for the names of countries and territories listed in the ISO 3166-1 standard, and greater specificity in the support requirements for continent or region names. These updates are in accordance with the ICANN Board's resolution of 6 March, 2009 (http://.icann.org/en/minutes/resolutions-06mar09.htm#08), directing staff to revise the relevant portions of the Draft Applicant Guidebook to provide greater clarity in these areas.

The updated text also provides additional guidance to applicants for determining the relevant government or public authority for the purpose of obtaining the required documentation. (There are also protections for certain geographical names at the second level, see update to module 5.)

Evaluation Criteria

Module 2 of the Draft Applicant Guidebook describes the evaluations that take place during Initial Evaluation of new gTLD applications.

ICANN has made changes to this document based on public comments (see analysis of public comments on Draft Applicant Guidebook v2) and continuing development work by staff. The updates include changes to the following questions / scoring / criteria:

- Proof of Legal Establishment & Good Standing
- Contact information
- Background Check
- Cybersquatting/Domain Name Abuses
- Community-Based Designation
- Technical Criteria
- DNSSEC
- Security
- Protection of Geographical Names at Second Level
- Continuity

String Criteria

Section 2.1.1.3.2 describes criteria established so that strings themselves do not pose DNS Stability or Security issues. The criteria has been clarified to provide clear direction to applicants.

Update to Module 3: Dispute Resolution Procedures

Module 3 of the Draft Applicant Guidebook describes dispute resolution procedures applicable in the gTLD application process; see the full module at http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-clean-18feb09-en.pdf.

Potential changes in these sections are based on public comments (see analysis of public comments on Draft Applicant Guidebook v2) and continuing development work by staff. Areas with updated text are:

- Changes to standing requirements for Morality and Public Order Objections.
- Updates to standing requirements for Community Objections.
- Additional detail on the role of the Independent Objector.
- Changes to the dispute resolution principles (standards) for Community Objections.

Update to Module 4: Comparative Evaluation (Community Priority)

The module describes procedures for resolving string contention: formation of contention sets, comparative evaluation (community priority), and auction.

The potential new language highlighted in this section is based on public comments (see analysis of public comments on Draft Applicant Guidebook v2) and continuing development work by staff. The updates are:

- Deaggregation of criteria.
- Clarifying the criteria.
- Clarification of process name.
- Criteria sequence.
- Modified scoring threshold. Although comments on the previous scoring threshold – 14 out of 16 – diverged, in consideration of these comments and the tests performed, it is suggested to lower the threshold to 13 out of 16.

Update to Module 5: Registry Agreement Specifications

These changes are illustrative – for discussion purposes.

Module 5 of the draft Applicant Guidebook describes procedures applicable at the concluding stages of the gTLD application process, including the execution of a Registry Agreement between the applicant and ICANN.

Potential changes to two of the specifications in the agreement have been drafted based on community discussion and comment (see also the analysis of public comments on draft Applicant Guidebook v2). The updates are:

- Registration Data Publication Services (Specification 4). The specification is modified to reflect **a requirement for a thick Whois service** to be provided by all new gTLD registry operators.
- Schedule of Reserved Names (Specification 5). The specification has been updated with **a requirement for reservation of country and territory names at the second level**, in accordance with the recent GAC report in response to the ICANN Board resolution requesting clarification of protections for geographical names at the second level (http://www.icann.org/correspondence/karklins-to-twomey-29may09-en.pdf). **The relevant excerpts are included below**. Redlined versions showing the changes from v2 of the draft specifications are included for ease of reference.

ICANN encourages comment on the interim language provided.

GENERAL CONCERNS

Timing

I. Key Points

- ICANN continues to pursue the launch of the new gTLD process with alacrity, moving toward accepting applications as soon as possible while ensuring that sufficient time is taken and appropriate effort is spent to resolve remaining issues.
- Phased implementation, as a way to accelerate process launch, is problematic for several reasons and is not part of the current implementation plan.
- Significant and meaningful work is taking place across the ICANN community in order to facilitate a launch with appropriate safeguards and protections for registrants.

II. Summary of Comments

Overall Timing Concern; proposed timeline approach. Self filtering and self prioritizing. We have had much delays and we are now focused on the next round. We are making a big mistake. We are making a big bang after which there will be a pause and people will not take that pause lightly. They will think that the commitment of one year is not going to be met as the track record has shown, so everybody is trying to go into the big bang. You should think about the solution to that. W. Staub, GNSO Transcript at 98 (28 Feb. 2009). The "big bang" can be replaced by a self filtering and self prioritizing timeline if ICANN (1) defines multiple application windows for each round (e.g. each round could have 3 or 4 application windows; this Round 3 could run from October 2009 to October 2011 and have 4 windows, one every 6 months; Round 4 could start in October 2012, etc.); (2) enables affected third parties to object to a given TLD application for "Excessive External Costs" (in addition to community, morality and rights infringement grounds); and (3) stipulates that, as long as there is opposition to an application, additional applications for the same string may be submitted in the subsequent application window. This would work even better if there are graceful withdrawal terms; the costs of withdrawal are still excessive in the current guidebook. *W. Staub (13 April 2009). See also E. Brunner-Williams (Module 3, 14 April 2009).*

Abandon "artificial" timeline. ICANN should abandon an artificially created "timeline" for launching new gTLDs until concerns have been genuinely resolved. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).*

Provide timelines. Publication of a revised, detailed schedule of events/milestones prior to application opening would give needed certainty. The **pre-launch timeline** should be regularly updated showing all the steps in the process such as when the next draft guidebook is due, when comment periods open and close, what events the ICANN team has planned, and key events in the Communication Campaign. The published **post-submission timeline** should

indicate when the Objection Period opens and closes and how that relates to Initial Evaluation. While the Objection Period will open at the end of the Application Period, there still isn't a set time frame for filing objections (e.g., will third parties have 90 days after publication of the applicant strings to object?) IPC (13 April 2009). See also SIIA (13 April 2009). To increase certainty and give prospective applicants more visibility, a detailed schedule of milestones with regular updates should be made available by ICANN*. Lovells (14 April 2009).*

Application windows and next round—exact dates. ICANN should state in the final applicant guidebook exact dates for the application submission window for the next round, and a fixed date for the application window should be announced as soon as possible. *City Top-Level Domain Interest Group (12 April 2009).* The window for new gTLD applications should be opened by the end of 2009. The last minute discovery of overarching issues might well be considered a lack of respect towards all those in the community who have committed time and resources to the new gTLD proposal over the past three years. The Internet is about change and innovation and the process should be kept on track. *eCOM-LAC (13 April 2009).* Given the many gTLD delays already and the negative economic impact on investors and sponsors, ICANN should publish a definite date for the application window no later than at the Sydney meeting in June 2009. eco (12 April 2009). ICANN should state a reliable date for the next application round, and stick to the goal to begin with the next application round within one year after the forthcoming round is completed*. DOTZON, GmbH (13 April 2009).* See also *NCUC (13 April 2009); S. Soboutipour (Module 1, 11 April 2009); DotAfrica (Module 1, 12 April 2009); Y. Keren (Module 1, 12 April 2009); L.Andreff (Module 1, 13 April 2009); S. Maniam (Module 1, 13 April 2009); S. Subbiah (Module 1, 13 April 2009).*

Clarity on scope and resolution of overarching issues. ICANN should state exactly what each issue covers, how the resolution of each of these issues fits into the overall plan for new gTLDs, and state explicitly that the new gTLD launch will not proceed until all these issues have been satisfactorily resolved. *Time Warner (13 April 2009).* See also COA *(13 April 2009).* None of the overarching issues have ripened sufficiently to support ICANN's timeline for rolling out new gTLDs, even as some steps have been taken in the context of one or two of them. *SIIA (13 April 2009).* ICANN must be open to the possibility that an outcome of threshold issue resolution may be a fundamental change to ICANN's initial gTLD implementation proposals. It is still unclear how solutions to the threshold issues will be taken into account and how the implementation process and draft guidebook will be modified. *AT&T (13 April 2009).*

Resolve existing gTLD rounds before opening subsequent rounds. Because of the unknowns on quantity of applications and how that will affect ICANN's capacity to handle them, ICANN should address and resolve existing gTLD applications before opening up the next round. *J. Seng (13 April 2009).*

Need a Reliable Timeline to be published. Despite good staff work by ICANN, it is a scandal that ICANN did not publish any reliable timeline at this time, which is relevant for all parties; we urge ICANN to catch up on this as soon as possible. *dot berlin (27 Mar. 2009).* See also *dot EUS (13 April 2009); NIC Mexico (14 April 2009).*

Process and timing certainty. If ICANN must press ahead with the gTLD process, then it must provide more certainty on process including how the rebate system will work and the roadmap to launch. Selecting a reasonable launch date – e.g., September 2010—would assist many organizations in planning and allow ICANN to benefit from more consultation. ICANN should not proceed until or unless it can implement proper safeguards for trademark owners. *MARQUES (13 April 2009).*

Delay Impact on Cultural and Linguistic TLDs' Planning. The timeline is a big concern and it would help to have a realistic date from ICANN. We don't want to see the gTLD process turn into a never-ending story; for example the Galician culture community is anxious for "dot gal" to become real. Cultural and linguistic TLDs are not the cause of the "overarching issues that are delaying the whole process," so ICANN shouldn't penalize us with another delay*. S. Reynolds, Public Forum Transcript at 17-18 (5 Mar. 2009).* Since cultural and linguistic TLDs (e.g., Basque) seek to enhance Internet diversity and do not create any of the overarching issues, it's really not necessary to delay more and more this process. *I. E. Arribillaga, dot EUS, Public Forum Transcript at 22 (5 Mar. 2009).* The timeline delay is a burden in terms of credibility to local sponsors and supporting environments; how can ICANN help with getting credibility with local partners. *M. Credou, dot BZH, Public Forum Transcript at 29 (5 Mar. 2009).*

Don't Rush Process. As dot music we believe this has to be done right and time does not matter that much until this is done correctly because we have a big responsibility to the at-large community. *C. Roussos, Public Forum Transcript at 23 (5 Mar. 2009).*

Set a precise timeline. Many resources have already been devoted to new TLD initiatives all over the world. Failure to start the new TLD program in a timely manner would have a disastrous impact on ICANN's credibility and be a major blow for further innovative programs on the Internet. While taking due care to address the issues raised by the community, ICANN should set a precise timeline as soon as possible and by the Sydney meeting in June 2009. Prospective applicants need to know when they will be able to submit their applications. *INDOM. com (10 April 2009).* See also *Asociacion PuntoGal (13 April 2009).* ICANN should confirm December 2009 as the opening date of the application period for new gTLDs. *dot BZH (13 April 2009).*

Postpone new gTLDs. New gTLDs should be postponed until alternative solutions have been solicited, tested and evaluated form vantage points that include technical, intellectual property, consumer acceptance, and the impact on cost for, and competition among, name consumers—i.e. businesses in general—not just presumptive registries. The field is open for innovation and technical solutions to be considered (e.g., multiplexed domain names which have been tested and found to work). *K. Ryan (13 April 2009).* Further versions of the guidebook and the timeline for introducing new gTLDs should be delayed until fundamental threshold concerns have been addressed, including:

1 Completing an impartial economic study with evidence supporting the need for new TLDs;

2 Addressing Internet safety and stability concerns;

3 Protecting against malware, phishing and fraud;

4 Establishing protections to curb trademark abuse at all stages of the new TLD process. Until all these issues are resolved, ICANN should limit any new rollout to perhaps a few select IDNs on a trial basis. *Verizon (13 April 2009).* See also *BITS (13 April 2009); CADNA (13 April 2009); eBay (13 April 2009); 3M Company (15 April 2009).* ICANN should not move ahead with new gTLDs when significant problems plaguing existing gTLDs remain unresolved. *NBCEP (13 April 2009).* ICANN cannot reasonably conclude that it must hold fast to a 2009 implementation date for gTLDs. AT&T supports a limited rollout of community based/sponsored gTLDs and the 22 fast track ccTLD IDNs as a pilot to a broader launch. *AT&T (13 April 2009).*

Indefinite postponement of new gTLDs. ICANN, through Board action if necessary, should indefinitely postpone new gTLDs rollout due to the serious and fundamental issues that remain unresolved and which are unlikely to be addressed in the short timeline currently proposed. The process is “at least TWO (if not three) draft Guidebooks” away from being final, making rollout of new gTLDs virtually a technical and commercial impossibility according to the current ICANN timeline. Instead ICANN should focus on areas of IDNs and ccTLDs which were bundled with the original announcement about new gTLDs. *SIIA (13 April 2009).*

Take a slower, phased approach; risks to ICANN and Internet from unlimited applications. The proposal will open up ICANN to a wave of lawsuits, frivolous or not, that may undermine the organization. From a risk management perspective, this could put the entire Internet at risk. A slower, phased approach is recommended, rather than opening up to unlimited applications. *A. Allemann, DomainNameWire.com (6 April 2009).* ICANN must proceed cautiously and should announce in advance a prioritization system to assure orderly and comprehensive review. ICANN has yet to show that it is capable of properly processing hundreds of new gTLD applications simultaneously. *ICA (13 April 2009).* There should be significant delays in between application rounds to allow assessment of how the gTLD implementation is affecting issues critical to the health of the DNS, such as IP rights protection, costs and benefits of introducing new gTLDs. *COTP (13 April 2009).*

Concerns not addressed in second version of guidebook; more consultation time needed. The comments submitted by LEGO in its letter of 4 December 2008 remain valid because the second version of the guidebook has not lessened our grave concerns regarding the release of new gTLDs. There are major outstanding issues still unresolved in connection with the implementation of new gTLDs, also in relation to security and stability issues; further consultations are needed with all relevant parties to find solutions to all of these issues before any new gTLD is implemented. *LEGO et al. (6 April 2009).* ICA’s major issues of concern were not addressed in second version; ICANN should provide longer, sufficient time for review of the

guidebook and should commit to a fourth version prior to finalization and first round application acceptance, assuming that ICA's major issues are adequately addressed in the third version. *ICA (13 April 2009).*

Overarching issues/timing. Introduction of new TLDs is not a subject to be considered lightly; SIDN supports ICANN's decision to work out in detail some overarching issues. This means that we will have to wait until the 3rd draft of the guidebook to see how ICANN proposes to resolve these issues, so comments at the second stage focus mainly on those topics that are not part of the overarching issues. *SIDN (14 April 2009).* See also *auDA (14 April 2009).* If ICANN proceeds with the new gTLDs in the face of such widespread opposition and in spite of the economic downturn, then Microsoft urges ICANN to take the time necessary to consider and address the issues and questions raised by the community about the intended implementation plan; it is essential that ICANN "get it right" and the current, compressed timetable effectively ensures that it will not. *Microsoft (Guidebook, 13 April 2009).*

Start small and soon, then assess application process and subsequent round timing. It is unclear if the application process set up by staff will work and if the one year date for a subsequent round is realistic or could be made more or less frequent. ICANN should start "small" and soon with gTLD applications, assess how the process is working (e.g., is formalism required and, if so, for all applications equally), using the available time and experience of existing registry operators, and then set a schedule for iterations of the application process. "Formalism" should be expended on the applications which must be improved, junked or approved but subject to significant oversight. *E. Brunner-Williams (Module 1, 14 April 2009).*

Phased approach—IDN TLDs first; thoroughly explore issues. If comprehensively pursued, the information generated by inquiry into the four overarching issues will support evidence that the new TLD process should focus first on "those IDN TLDs needed to satisfy documented demand from users who employ non-ASCII scripts as their primary means of communication." Whether that turns out to be the case, ICANN must devote necessary time and resources to thoroughly exploring the issues. This investment if properly managed will bear significant returns regarding protection of consumers, e-commerce security and a safe and stable DNS. *Time Warner (13 April 2009).* ICANN should respond to the change in world economy and scale back plans; e.g., it might initially go ahead with a first round of up to 50 community-based applications. *MARQUES (13 April 2009).* ICANN should establish criteria first for success in the first round, including IDNs, before moving forward; do a limited number of IDN ccTLDs first as a pilot and limit further rollout until sufficient safeguards are in place to protect Internet users, businesses and brand owners. *COTP (13 April 2009).*

Do not use first-come, first served in initial round because of pent-up demand and risk of gaming. ICANN should hold one new round of accepting gTLD applications, the one being developed now, with a fixed deadline and which is subjected to the string contention dispute mechanisms in the guidebook. After this, ICANN should eliminate "rounds" and accept subsequent gTLD applications on a rolling "first come first served" process of string allocation subject to the objection mechanisms. *ALAC (19 April 2009).*

Do not do a preliminary interim round with an arbitrarily limited number of applications as a "trial run". Such an interim round can be gamed no matter what selection process is used and will be unlikely to serve its intended goals. *ALAC (19 April 2009).*

Fast track gTLD solution needed; delay in IDN gTLD creates disadvantages. ccTLDs should not be given a free pass, based on administrative accident, not on performance or consumer demand, to come out of the gate first and effectively define the IDN landscape—which is what will happen if the new gTLD process is delayed. The solution is to add existing gTLDs to the IDN fast-track, and agree to roll them out at the same time as the ccTLDs. This would enable the IDN world to have the same commercial openness and same options common in the Latin script world. *A. Mack (13 April 2009).* Efforts should continue on synchronizing IDN ccTLD and IDN gTLD as much as possible without unduly delaying either and to consider steps in case a significant time gap between the two is unavoidable. *RyC (Modules 1-4, 13 April 2009).* Especially given the negative economic impact on entities doing business in other countries (e.g. the Arabic world), ICANN needs to ensure that at least the current gTLDs are allowed to offer their IDN domains at the same time as the ccTLDs are going to offer them. By fast tracking existing gTLDs ICANN can solve this problem for the benefit of all. *J. Elmorsy (13 April 2009).*

City TLD Fast Track. City TLDs should have a fast track process if the timing gets delayed by legal issues raised by other gTLDs (e.g., IP problems). *Connecting.nyc (13 April 2009).*

Allow time for international effort for a sponsored financial gTLD. ABA requests that the financial services industry be given time to craft an international effort to secure a sponsored financial gTLD through a process that has been established to address issues on a sector-wide and global basis. *ABA (13 April 2009).*

Limit to a precise, small number the maximum gTLDs per year. Limit to 4 maximum per year to bring order and cohesion to a process that might otherwise spin out of control. Approve the pending applications from 2000 at the paid amounts before approving new applications; this is fair and equitable. *M. Housman (8 April 2009).* Limit new gTLDs to no more than 5 per year to allow proper absorption. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).* Regions supports rollout of 4-6 new gTLDs; a "Dutch auction" (start with high asking priced which is lowered until accepted) should be considered with a minimum reserve application price as a way to select the first 4-6 entities who will then proceed through the application. ICANN has not justified its rejection so far of this approach. This approach would mean lower costs and burdens on businesses. *Regions (13 April 2009).*

Resist efforts to restrict number or type of TLDs. This limitation is not a rights protection mechanism and will result in TLDs which do not bring innovation and competition to the Internet. This round is about generic TLDs and competition, not restricted or hobbled TLDs. We should concentrate on real and effective rights protection mechanisms, not on restricting TLDs. *Demand Media (RPMs, 13 April 2009).*

Delay adding new gTLDs. ICANN needs to cure its current failures and bad policy decisions before even considering adding any new gTLDs. If any new gTLDs are to be added, they should be consistent with the sound graduated framework supplied by the U.S. government in its past comments, and only obeying the will of the public (which currently is vastly opposed to their introduction). Any other path is inconsistent with security and stability. *G. Kirikos (7 April 2009).*

Delay Impact on City TLDs. City TLDs will be less contentious, have less risk and less cost. Our shared concern is the timeline and we have the feeling that the current round lasts forever. What can be done to assure that cities will get their TLDs in a timely manner? *D. Krischenowski, dot Berlin, Public Forum Transcript at 25-26 (5 Mar. 2009).*

IDN gTLD Priority. If there is a priority for the gTLD RFP, it is IDN gTLD. In 2008, the largest growth in domain names other than dot com came from Asia, and it is essential that gTLDs will work in Asia. *J. Seng, Public Forum Transcript at 4 (5 Mar. 2009).*

Support for expedient process. New gTLDs are going to be beneficial to everybody, so we support an expedient process. *J. Frakes, Minds and Machines, Public Forum Transcript at 42 (5 Mar. 2009).*

III. Analysis and Proposed Position

Accurate Timeline. Calls for accurate timelines for introducing new gTLDs reflect frustration borne of program delays. This is understandable, as earlier projected launch dates have passed. Balancing that is the need to address all important issues, even though some have been brought to the table late. Therefore, even though some of the remaining issues have been discussed previously, they have not been settled in terms of actual program implementation. By taking the time to examine these important issues, the launch will include: trademark and rights protection mechanisms developed through constituency and community work; specific efforts to combat types of malicious behavior; a better understanding of how the coincident introduction of new gTLDs, IDNs, IPv6, and DNSSEC will affect the root zone; and additional agreements across the community on issues such as how geographical names will be addressed and community-based applications will be scored.

One way to address these concerns is to establish timely goals for implementation – setting the expectation that remaining problems should be resolved in an expedited but accurate and careful manner. With that in mind, goals set for the IRT and GAC reports of April 25 and May 25 have essentially been met. The RSSAC / SSAC scaling study preliminary report will be delivered in August. Initial reports on potential abusive conduct have already been received.

Significant and meaningful work is being accomplished across the community to ensure a timely, careful, well-considered launch. Anticipating the successful conclusion of the work being done by community members, a final Guidebook release date of December 2009 is still being pursued.

Postponement. Calls for temporary or indefinite postponement of the New gTLD Program launch are considered in light of the substantial community discussion and formal policy development work that have occurred, and the mission and core values of ICANN. ICANN has done development work for the program and released application materials for public comment in response to community-developed policy advice and Board direction. As instructed, ICANN has been working toward a timely implementation of the consensus recommendations, starting with the recommendation that: "ICANN must implement a process that allows the introduction of new top-level domains." An indefinite postponement would require further discussion and a new consensus among the community.

The launch of the New gTLD Program represents a significant change in the namespace. ICANN has approached this implementation with due diligence, beginning before the policy was completed, and continuing through the implementation phases. As described later in this document, there are certain overarching issues that must be worked through before ICANN can move forward. ICANN has no plans to conduct a launch absent resolution of these issues.

Technical alternatives to opening up the top-level of the namespace may exist, but have not been vetted by the community or expressed as policy positions.

Phased Approaches/Timing and Prioritization. Some parties who have concerns about the impact of opening up the namespace have submitted suggestions for a phased approach. Such options were considered during the policy development process, and the earlier stages of implementation. A phased approach could happen in a number of ways, such as a limited first round or establishing a category of applications eligible for a 'fast track' process.

ICANN has previously conducted two limited application rounds: the proof-of-concept round in 2000, limited to a small number of new TLDs that would provide an effective proof of concept, and the sTLD round in 2003-4, limited to sponsored-model applications. The experience from another such round might yield further incremental improvements, but the process would be less inclusive and the benefits less widespread than would be possible with an open launch.

Conducting another limited application process via limiting to a certain number, raises the problem of allocation. Random selection of applicants, even if allowed by law, could encourage gaming and favor those with the most money. Auctioning off application "slots" by various methods, including the Dutch auction suggestion, was also discussed earlier in the process and generated very little support for the same reasons. It is also expected that numerical limitations will cause a rush of application volume that could equal or surpass that of an 'unlimited' opening.

Other suggestions for a phased approach focused on a first round limited to certain types of applications, such as IDNs, cities, or applications that appear to be non-contentious.

Experience suggests that any criteria defined for participation in a limited early round will incent applicants with aggressive timelines to adjust their applications according to the set

criteria, even if it is not what best serves the applicant or the user community. Rules for a limited round would need to be carefully drafted and reviewed by the community, which would retard progress for all potential applicants while benefitting only a select group. Opening the process to any one group to start before others raises issues of fairness, and is difficult to align with stated goals of the process such as diversity, openness, and innovation.

A less-defined set of criteria that involves picking out some 'simple' applications would require an objective method for determining in advance which applications are likely to be most and least complex. It is also certainly possible that an application could become contentious in the middle of the process, resulting in disparate treatment among those 'simple' applications. This would be extremely difficult to construct in such a way as to result in a successful, timely introduction round.

ICANN has not ruled out the possibility of phased launches, but currently does not consider that an implementable approach has been developed or that consensus exists to date for any one manner of implementing this. An open launch is preferable as it meets program goals, and to date has continued to emerge as the solution that provides the most benefits. Of course some risk is inherent in this. Some comments have expressed skepticism that ICANN can actually handle a high volume of applications. ICANN is considering scaling and designing a process that can be scaled. In the event that the number of applications far overwhelms the scale that the organization is prepared to handle, an emergency system will be put in place. A root scaling study is looking at issues of volume and the DNS as well.

Time for financial industry to work on ideas. The financial industry occupies a unique position in regard to the consumer trust and the world economy, and ICANN welcomes global coordination by the industry in the area of new gTLDs. There are some safeguards built into the process in the form of an objection mechanism that could address a financially-oriented gTLD application by an unqualified or unsupported applicant.

First come, first served/Rolling. After the first round, ICANN may move to a first-come, first-served process as suggested by the ALAC, or may continue to process applications in rounds. The GNSO's policy advice was that "Applications must initially be assessed in rounds until the scale of demand is clear." It is expected that a community-wide review of the first round will occur to determine the best way to move forward.

Fast track coordination. As has been stated by many in the community, the ideal scenario would be for IDN ccTLD fast track and the gTLD program to launch at the same time. Input received from the GNSO, ccNSO, and others reflect this goal. While it is important to coordinate these two efforts, it is also been determined that one process should not be tolled due to delays in the other. That course has been pursued when it appeared as though the IDN process may lag behing the gTLD process. Now, it appears that the IDN ccTLD process may launch first, a few months ahead of the gTLD implementation.

Balancing the benefits and harms associated with moving ahead with IDNs a few months ahead of gTLDs, the original course appears to be sound – that each process will launch as soon as it is ready. Many countries are ready to move ahead with their community based IDN. Delaying that process would only serve to deprive registrants in those areas of participating in the DNS in their own language and also encourage those waiting for the ICANN process to launch their own version of the root zone.

Program Support/Opposition - ICANN's Role and Mission

I. Key Points

- The new gTLD process implementation effort was borne out of a two-year broad based policy development process that considered carefully the question of whether new gTLDs should be introduced and if so, whether that introduction should be open or limited.
- Present discussions regarding: ICANN priorities, the relative importance of the new gTLD process, and prerequisites to launch are important and serve to ensure that appropriate inquiry, study and changes to the plan are made prior to accepting applications.

II. Summary of Comments

ICANN should focus on other priorities. There is much work left to do on the Mid-Term Review; if ICANN moves ahead with new gTLDs, it is hard to see how continued work identified in the Mid-Term Review can be accomplished adequately, much less at a high standard. ICANN should be working on improving governance, transparency and accountability, implementation of the multi-stakeholder model and security and stability. The new gTLD process has not promoted confidence but rather confusion among stakeholders. ICANN has not institutionalized its consideration of new TLDs in a manner that accounts for the stability/security and governance impacts of quickly adding dozens of new TLDs. *SIIA (13 April 2009).* Any new TLD rollout should be managed holistically in light of other important issues ICANN is working on (e.g. GNSO reform, improving institutional confidence, and enhanced contract compliance efforts). *AT&T (13 April 2009).*

Opposition to new gTLD implementation. AIPLA continues to strongly oppose implementation of new gTLDs until at least the following conditions occur: (1) completion of the economic study called for in Oct. 2006 with public comment; and (2) adequate measures to protect IP rights and prevent cybersquatting and other abuses. *AIPLA (13 April 2009).* Microsoft objects to introduction of an unlimited number of new ASCII gTLDs. *Microsoft (Guidebook, 13 April 2009).*

Lack of Openness and Innovation; Risk of Competing Root Systems. The plan "is central planning of what should be an open and innovative marketplace." It is "larded with private law to enforce private agendas" of privileged stakeholders, it would restrain trade and may engender competing root systems. The costs are "absolutely unrealistic." ("[n]o one has ever asked me, and I operate my own TLD, how much it really costs to run a small TLD. It's a few hundred dollars a month. Not $500,000. That's absurd.") There is a need to start over with a new market-based, competitive new gTLD plan. *K Auerbach, Public Forum Transcript at 30 (5 Mar. 2009).*

New gTLD program problematic; ICANN "empire building" concerns. The new gTLD plan is "anything goes" and was not thought through, and seems to be about ICANN empire building and transforming itself into a regulatory apparatus. A brand new institutional model would be required if transformation into a global policy making apparatus is what ICANN wants to become. ICANN involvement in content regulation through the new gTLD program threatens to have the Internet evolve as levels of walled gardens where there is a chokehold on Web content. ICANN should tend to preserving and managing technical infrastructure only and forget about empire building and the Internet will take care of itself. *D. Harris (29 Mar. 2009).*

Proper ICANN Role. The ICANN Board should "focus on coordinating the management of the DNS and not on issues more appropriately addressed by governments and other entities, including the appropriate advisory committees and support organisations within ICANN." *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Competition and Consumer Choice. There are outstanding issues that must be addressed and acted upon effectively in the revised policy documents before implementing introduction of new gTLDs. For example, in promoting competition and consumer choice, the focus of ICANN should be to lower costs, promote innovation, and enhance user choice and satisfaction, as stated in the Memorandum of Understanding between the Department of Commerce and ICANN. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Radical reform of new gTLD program needed. The proposed new gTLD "experiment" needs to be radically reformed and put on the back burner for a post-ICANN world where the technical coordination function currently outsourced to ICANN is taken back in-house by NTIA. Given ICANN's attempt to force new gTLDs upon the public it is clear that U.S. government employees can represent the public interest in a superior manner. ICANN has been captured by entities that no longer serve the public interest as seen by the manner that the public majority is routinely dismissed in order to favor a select minority through mechanisms such as weighted-voting. The services provided by VeriSign and ICANN can be performed much less expensively either by in-house government employees or by competitive tenders. For any new gTLDs that the community agrees should be added to the root, there should be a tender process to see who would perform that at the lowest cost for a given set of contract specifications. *G. Kirikos (4 Mar. 2009). See also G.Kirikos (7 April 2009); Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).*

Concern re: Internet Future/Censorship/Corporate Dominance. The new gTLD program should not go ahead; corporations are going to buy up the new gTLDs and censure the Internet in ways that no one imagined in the past ("255 people who voted unanimously for the gTLDs, selling something worth 100 trillion for 20 billion…"). *P. Foody, Public Forum Transcript at 6-7 (5 Mar. 2009).*

U.S. government should intervene to protect stakeholders. ICANN ignored the vast majority of first-round comments which were against the introduction of new gTLDs and also introduced changes to the guidebook that were the exact opposite of the recommendations, including those of the U.S. Dept. of Commerce and the U.S. Dept. of Justice. The U.S. government should intervene to protect Internet stakeholders from the detrimental effects of introducing any new gTLDs. *G. Kirikos (7 April 2009).*

Guidebook process for new gTLDs not endorsed. While INTA provides comments on the guidebook version 2, it "reiterates that it does not in any way endorse the process to introduce new gTLDs as envisioned in the Draft Applicant Guidebook." *INTA (8 April 2009).*

III. Analysis and Proposed Position

ICANN recognizes that there are strong concerns about the implementation of new gTLDs for reasons described by a variety of entities.

The launch of the New gTLD Program represents a significant change in the namespace. ICANN exists to ensure the stable and secure operation of the Internet's unique identifier systems. A namespace that allows innovation and promotes competition and choice are principles reflected in ICANN's core values. Expanding the number and availability of gTLDs has been identified since the formation of ICANN as a way to provide greater choice and in the name space. The ICANN community has approached this implementation with due diligence.

The ICANN community worked on opening the space since its inception where the objective has been identified in each of the MoU's between the U.S. Government and ICANN. Based on the experience gained from two trial rounds and other relationship activities with TLD registries and registrars, ICANN undertook a policy development process to guide the opening of the domain space. The GNSO completed an extensive policy development after nearly two years of intensive work. The GNSO constituency groups, with input from other policy making bodies, considered carefully the questions of whether there should be new TLDs and, if so, whether the introduction should be limited in some way.

The current implementation plan follows the direction provided by the ICANN bottom-up policy development. The implementation details furnished in the Guidebook are intended to address several issues within the umbrella of the policy direction:

- Ensuring DNS stability and security;
- Addressing risks to the process;
- Protecting important interests identified in the policy;
- Launching and operating a smooth running, predictable, transparent process; and
- Protecting registrants, enhancing competition and choice for consumers.

The implementation plan, begun during the policy development in order to test some of the conclusions there, is presented in the form of the Applicant Guidebook, accompanying explanatory memoranda, and other supporting documentations.

The implementation plan maps to the policy recommendations and seeks to satisfy the five criteria above. As described elsewhere in this paper, there are certain overarching issues that will be resolved before new gTLDs are delegated.

It should be said that the implementation work, while significant in scope, is not impeding work in other important areas: ICANN accountability, DNSSEC implementation, IPv6 readiness and others. These important efforts are separately and fully staffed and the work in those areas has been competent, timely and successful.

Program Communication Aspects

I. Key Points

- While striving for objectivity, some aspects of the New gTLD evaluation process are necessarily subjective in order to meet the policy goals of the program.
- ICANN will continually upgrade the new gTLD web page to make materials clearer and more accessible.
- ICANN will conduct procurement of evaluation services in a transparent manner and fully disclose all aspects of the evaluation process.

II. Summary of Comments

Accountability and Transparency. The process of introducing new gTLDs should in itself be accountable and transparent to the entire community and be executed according to ICANN's multi-stakeholder model. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Notice to others of gTLD application filings. There is no easy mechanism by which financial institutions would be alerted to the filing of applications they may find objectionable (e.g. financial-related strings, IP infringement, etc.). ICANN should develop a mechanism for institutions to sign up for electronic notices about each new gTLD applicant. *Regions (13 April 2009). See also BITS (13 April 2009).*

Public notice of applications; criteria re: considering public comments (1.1.3). ICANN needs to clarify how it will make the public aware of applications (i.e., will the public have access to the database of applications), and clarify the types of entities permitted to file public comments (i.e., does it include trade associations, corporations and individuals). Better definition is needed regarding the criteria evaluators will use in exercising discretion in considering public comments (perhaps similar to what ICANN proposes for formal objections). *BITS (13 April 2009).*

Making gTLD materials more user friendly. In general the guidebook is clear and well written but it would be helpful to have one single repository with additional information such as a single source for consensus policies and background on them. Especially to help parties not involved with ICANN, perhaps ICANN could review the current gTLD website to make the material more comprehensible to newcomers. *SIDN (14 April 2009).*

Guidebook Terms/Language. The guidebook language and terms were far too loose. Terms such as "as soon as practical", "certain elements", "satisfactory" and many others are commonplace, undefined and too subjective. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

III. Analysis and Proposed Position

ICANN welcomes suggestions on how the application materials can be most useful to potential applicants and the greater community. An introductory section on consensus policies and their role in gTLDs is planned for the next version of the Guidebook.

The implementation of the New gTLD Program is a work in progress. In the earlier stages, processes had been sketched out in general terms to provide a conceptual understanding and allow flexibility while details continue to be worked out. As development of the program continues, ICANN is able to provide greater specificity in the Guidebook. Particularly as evaluators are engaged and systems and resources are put into place, to the plan will define processes and steps more concretely.

Having said that, there are portions of the process that are necessarily subjective. For example, the process for determining whether a community TLD should get a preference in cases of string contention is necessarily subjective: it is a *comparative evaluation*. The technical evaluation must accommodate large registries (requiring significant infrastructure) and small registries (requiring less). In order to have an evaluation that scales, there must be a process that is somewhat subjective. The infrastructure plan must be compared to the projected registry size – also a subjective measure. The implementation work is striving to make these measurements as objective as possible to provide a clear roadmap for applicants but, given the goals of the process, complete objectivity cannot always be attained.

ICANN is also making updates and improvements to the website, to make materials easier to find and to write clear documents that are easily understandable.

Transparency is also a goal. The process for recruiting panelists is being done through a public posting and response process. Questions and answers with prospective service providers will be publicly posted and those submitting expressions of interest will also be disclosed. Panelists will be identified before evaluations commence.

Program Issues - Various

I. Key Points

- Miscellaneous comments indicated concern that the process may be subject to capture or serve to limit (rather than enhance) competition.
- Comments urged the use of additional languages and that TLD applicants should declare the purpose or use of the TLD in the application.
- The implementation plan strives to provide an even playing field for all participants, including those whose primary language is other than one of the U.N. languages.

II. Summary of Comments

Process concerns: New gTLD process capture by registry and registrar interests. The entire new gTLD process has been captured by registry and registrar interests due to double-weighted voting. Companies and consumers representing tens of trillions of dollars of economic activity are being outvoted and bullied by companies representing only hundreds of millions of dollars in economic activity (much of it monopoly-based due to no-bid contracts). The new gTLD proposals: (1) ensure perpetual and presumptive renewal for registries; and (2) ensure cost certainty for registries. This is the opposite of what the priority should be: (1) ensure perpetual and presumptive renewal for registrants; and (2) ensure cost certainty for registrants. Assigned names and numbers are intended to be permanent so that a consumer can rely on them. The only way to ensure registrants are protected is to ensure that registry operators can be replaced if a lower cost supplier makes a competing bid. *G. Kirikos (7 April 2009).* See also *J. Burden (13 April 2009).*

Competition concerns. The gTLD seems like a step towards creating a monopolistic situation where the registrars will effectively eliminate any market opportunity for domain registrants. Opening the door to this type of exploitation by a few corporations seems like a step in the wrong direction. *Pat (12 April 2009).*

Consumer protection. It is important that appropriate mechanisms are in place through all stages of the application process to ensure the protection of consumer interests. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Guidebook needs a TLD "use" definition. The guidebook does not reflect the GNSO recommendation that an applicant granted a TLD string must use it within a fixed timeframe. Simply setting up a website can hardly be considered "use." The following is a proposed "use" definition that would prevent a numerous speculative, vanity and defensive TLD applications: "A TLD is deemed to be in use if and only if second-level or lower-level domains in the TLD are delegated, based on an objective registration process, to a sizable number of third parties that

do not control, nor are controlled by, that TLD's registry operator or sponsoring organization." *W. Staub (13 April 2009).*

Limit number of new gTLDs. ICANN should limit the number of new gTLDs because the fundamental search structure of Internet domain names may be blurred making it difficult for users to navigate if a vast number of TLDs are introduced. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Support more languages. The process should support at least the five official UN languages (e.g., section 5.2 of the draft contract says that the language of arbitration will only be English; this could be a disadvantage to some applicants). *CNNIC (13 April 2009).*

III. Analysis and Proposed Position

The policy recommendations and their implementation strive to enhance competition and choice for consumers. The policy recommendations were approved by a nearly unanimous vote of the GNSO council reflecting broad based support for the compromises reached during the policy development process. The implementation reflects the goals of the policy that, among other things: registrant and user experience is enhanced; and the DNS remains secure and stable.

In order to maintain an even playing field, it is important to not limit the types of TLDs introduced. Attempts at limiting would produce an incentive to game the system to gain first-movers' advantage. An objective method to limit the number of TLDs would be to charge a high application fee – then there could be successive rounds with lower prices each round. This methodology would be contrary to the GNSO recommendation that the evaluation fee be charged on a cost recovery basis. ICANN has no intention of pursuing this avenue to limit the number of applications.

While English is the application language of the first round and materials are provided in the U.N. languages only, the process strives to be inclusive. The application process will accept backup documents in native or official languages. Also, a raison d'être for new gTLDs is the implementation of IDNs – enabling users to use the Internet in their native language. As ICANN becomes facile at processing applications, language restriction may be loosened in future rounds.

gTLD Categories

I. Key Points

- In accordance with policy recommendations, there are currently three TLD categories proposed in the Applicant Guidebook: Community-based TLDs, Geographic Names TLDs, and everything else (Open TLDs).
- A number of additional TLD categories to address individual community requests have been proposed in the public comments (e.g., brand and socio-cultural); each of them is accompanied by requested contractual accommodations such as lower fees, or relief from contractual compliance obligations.
- Such introduction, if accompanied by contractual accommodation, will result in costly and problematic contractual compliance issues.
- A new category program where the applicant self-selects the category and signs a standard form of agreement can be readily implemented in a way that will provide immediate benefit for registrants: a clear DNS TLD roadmap.

II. Summary of Comments

More and different categories of TLDs proposed. The current structure – ccTLD or gTLD (with open and community based subcategorization) – is too limited. Some of the ideas for new TLDs would benefit from an approach that uses multiple categories—this approach was raised in the Mexico City ICANN meeting and needs further consideration by ICANN. SIDN would propose the following categories (and will propose a specific fee structure):

1 Single owner TLD (e.g. for companies, brands or closed communities with one owner) for one company/organization that intends to have its own TLD. Registration would be provided only by the TLD owner and no registrar is involved;

2 Socio-cultural TLD (not for profit, community based) for socio-cultural purposes (to be defined;"social" would mean "for the public") with a non-profit purpose that provide registry services for a well-defined community and the socio-cultural TLD would serve the public benefit. Policies are defined by the community, in a similar way as the LC plays for the ccTLDs. Socio-cultural TLDs would not be obliged to use the gTLD ICANN contracts and to follow the ICANN consensus policies. Multiple registrars would competitively provide registration services to registrants, and registrars could be accredited by the registry but not necessarily accredited by ICANN;

3 Community TLDs (for-profit, for well-described/closed communities including companies) that are very much the same as the current definition of community gTLDs in the applicant guidebook, but it would not be necessary to use only ICANN accredited registrars;

4 Open TLDs (for all other types of TLDs) with the same rules as for the current open TLDs;

5 TLDs for intergovernmental or treaty based organizations that are very much the same as the current gTLDs but the TLD is not obliged to follow the ICANN consensus policies. *SIDN (14 April 2009).*

Create different categories of TLDs with different contractual framework and policy development process. The current model will not work for all TLDs: current gTLDs serve a global community for which it makes sense to have a central and ICANN-based policy development process; however, future TLDs might all have different purposes and serve different communities. Unless ICANN recognizes this by creating different categories of TLDs with each a different contractual framework and a policy development process then there will be an unworkable policy development process within ICANN. *SIDN (14 April 2009).*

gTLD Categorization is Incomplete. Categorizing gTLDs as "open" or "community-based" is incomplete and does not account for all of the issues that differentiate the categories; indeed it is likely that more than two categories may be necessary to address the diversity of stakeholders and potential applicants. Further study is required immediately to further develop the exact categorization, which should not be so complex as to cause confusion or significant logistical problems. Categories should encompass dispute resolution procedure and pricing/recognizing ability to pay in developing and least developed countries. ICANN may allow applicants to assert in advance that their proposed gTLD is based on an existing intellectual property. *ALAC (19 April 2009).*

Create more classes of TLDs. ICANN should also create more classes of TLDs than just the open or community categories (a third geographic category is also implied by the current draft guidebook) and should apply a variable fee structure. *INDOM.com (10 April 2009).*

Differentiated fee structure. ICANN should differentiate the fee structure based on the type of TLD proposed. The current differentiation between ccTLDs and gTLDs will not be sufficient because gTLDs will probably become very large and differentiated and it will be difficult to design a single fee structure that fits all types of applicants. *SIDN (14 April 2009).* Fees should either be lowered or applications should be categorized (e.g. fees pose big obstacle to cultural/linguistic TLDs). *M. Neylon, Blacknight Solutions (13 April 2009).* ICANN should provide a more detailed explanation for its refusal to consider an alternative basis for establishing differential evaluation fees based on differences in the anticipated types of applications that ICANN expects to receive and the GNSO recommendations. *NYC (13 April 2009).*

Open or Community TLD. ICANN should address further the issue of whether in some cases a TLD would be better served as an open TLD instead of a community TLD. *E. Chung, GNSO Transcript at 87-88 (28 Feb. 2009).*

Recognize cultural/linguistic TLD category within community-based designation. ICANN needs to take into consideration the specific needs and constraints of new cultural/linguistic-based TLDs. (See comments text for proposed guidebook language.) *dot BZH (13 April 2009).*

Corporate gTLD category. While such an application—submitted by a corporation whose only intended registrants are employees or agents—shares some characteristics with a "community" application, it could also be considered an "open" application with highly restrictive registration policies. Such applications may deserve separate treatment in the new gTLD process. *COA (13 April 2009).* See also *IPC (13 April 2009).* Creation of a third category for brand owners should be given serious consideration. *Lovells (13 April 2009).*

Cities. Cities should have the option of substituting alternative arrangements for the provision of the registrar function. It is unclear that registrars will be willing to invest in development funds. *Connecting.nyc (13 April 2009).*

New Category Proposed—Brand gTLD (bTLD). A bTLD would be subject to fewer restrictions than community gTLDs but would receive some of their associated benefits. A bTLD is a corporate, branded gTLD for which the brand owner is the applicant, that the brand owner will operate for its own benefit and in connection with the provision of the goods and/or services identified by the brand, and for which the brand owner will restrict the registrant population. *Microsoft (Guidebook, 13 April 2009).*

Minimum Registrant Base/Single-End User (e.g., Corporate Protective) Registration. One of ICANN's core values is to promote competition. Single end user (e.g., corporate protective) registrations do not promote competition on the Internet. They create closed protective registrations arguably making the Internet less operable to the end user. A minimum registrant base for both open and community registrations is one way to evolve this and encourage 2nd/3rd level use with a corporate registration. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Applying for gTLD for limited use. Can applicants apply for a new gTLD and use it for only one domain name? For example, apply for ".companyname" and use only that gTLD to redirect to the applicant's ".com" home page? *F. Hammersley, SAIC (Module 5, 24 Mar. 2009).* Clarification: for example, apply for ".companyname" and register only one domain name within that gTLD (e.g., "companyname.companyname") to redirect to the applicant's ".com" home page? The main purpose would be to prevent others from registering the "companyname" gTLD, but it would still be in use (albeit for one registered second-level TLD that redirects to the company's current home page). *F. Hammersley, SAIC (Module 5, 6 April 2009).*

Comment re: GeoTLDs and Linguistic TLDs; Benefits of Categories. Geo TLDs and community, linguistic TLDs are the biggest community TLDs and they usually are lists that have been agreed at a global level by neutral organizations, similar to the ISO list. Local authorities also provide legal accountability frameworks. Therefore, instead of making things more complex, introducing categories can sometimes make things simpler; the community wants a chance for the concept of categories. *B. de la Chapelle, Public Forum Transcript at 32 (5 Mar. 2009).*

Reserve ".Web". ICANN should retain .web for future consideration. Is it deliberately missing? It strikes us there will be endless open and community applications for this TLD, generating substantial auction revenue. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

"Open" TLD restrictions. Any "open" TLD should be allowed to place restrictions on the use of its domain as it wishes (re: Module 1, 1.2.2). *A. Allemann, DomainNameWire.com (6 April 2009).*

Financial services gTLD. Any domain name associated with financial services should be restricted to financial services companies, with substantial restrictions, guidelines and proof of eligibility. ABA supports the FDIC's strong recommendations for financial gTLDs (see comments text, referring to FDIC comments filed 15 Dec. 2008). The FDIC has offered to meet with ICANN and any community or industry group to develop a workable solution and ABA is willing to participate in such a meeting. ABA is reaching out to the international financial sector to assist in developing the appropriate community, composed of professional financial industry associations or regulatory agencies associated with the financial services industry, to make decisions regarding the approval of any gTLDs whose names suggest they offer financial services or to endorse any applicants of such gTLDs. *ABA (13 April 2009).* If ICANN moves ahead with the new gTLD program, there should be a separate and distinct process for financial sector gTLDs, as recommended by the FDIC. This should include adequate documentation and independent verifications for industry representatives and regulators before any entity is selected as a representative of the financial community to operate a financial sector gTLD. There are many complex issues and cost factors that prevent reaching consensus on the issue of a new financial sector gTLD. Also, it is unclear that consumers would feel more secure about sites within a .bank gTLD. *Regions (13 April 2009).*

Financial services working group. ICANN should partner with the financial services industry to create a working group focused on resolving issues of special importance to the industry. This group might serve to set criteria ICANN would use to evaluate gTLDs whose purpose or name tie to financial services. *BITS (13 April 2009).*

No need for a financial sector gTLD. Regions is unaware of any unmet demand for one or more new community-based gTLDs to serve the financial sector. Regions is not in favor of sponsoring a new gTLD for itself or the financial sector (e.g. .bank or .fin). Instead, the overwhelming concern which we share with other financial institutions focuses on the considerable risks, burdens and costs that the gTLD rollout will impose on consumers and the financial sector, particularly at this time of global economic crisis. Forefront among our concerns is maintaining consumer confidence in banking systems, including Internet banking. *Regions (13 April 2009).* A majority of BITS members regard as low the demand for either an industry wide or institution specific gTLD given costs it would create regarding switching, governance and the current challenging economic climate. *BITS (13 April 2009).*

III. Analysis and Proposed Position (gTLD Categories)

The policy recommendations of the GNSO and GAC have resulted in the creation of three gTLD categories or types:

- Community-based TLDs
- Geographic Name TLDs
- Everything else (called Open TLDs)

Comment from the Mexico City meeting and the public comment forum indicated there should be consideration of many other TLD categories with some special consideration designated for each category.

Community comment suggests the creation of several TLD categories: e.g., Single-owner, Country, Intergovernmental Organization (I/O), Socio-Cultural, Community, Developing Country, and Open. Depending on the category, various accommodations are suggested; for example, no requirements to:

- Execute an ICANN contract,
- Use accredited registrars, and
- Follow consensus policy.

Some might be restricted to not-for-profit status, be eligible for reduced fees, require registration restrictions, and have names reserved in anticipation of registration by certain parties. The table below indicates some of the categories of TLDs and the accommodations proposed in some of the public comments.

TLD CATEGORIES PROPOSED

TYPE	Contract	Use of Registrars	Consensus Policy	May Be For-Profit	Fees	Restrictions	Name Blocked
Single-owner	Yes	No	Yes	Yes	Volume discounts	Restricted	Sometimes
Geographic	No	No	No	Yes	Voluntary	Open	Yes
I/O	Yes	Certain Cases	No	Yes	Normal	Open	Yes
Cultural	No	No	No	No	None	Restricted	No
Community	Yes	No	Yes	Yes	Normal	Restricted	No
Open	Yes	Yes	Yes	Yes	Normal	Open	No

In determining whether and how new TLD categories should be implemented, several issues should be considered:

- The value and benefits of TLD differentiation to registrants;
- What types of accommodation can and should be made for the different proposed types;

- Managing the post-delegation environment, including contractual compliance and ensuring DNS stability and security;
- How categories would be assigned to each TLD applicant; and
- Managing the discussion going forward.

Benefits of different categories. Public comments describe certain benefits associated with the creation of TLD categories: e.g.,

- Socio-cultural or cultural/linguistic TLDs would be "for the public" with a non-profit purpose that provide registry services for a well-defined community and the socio-cultural TLD would serve the public benefit.
- Brand gTLD. A brand TLD would allow registries to self-register names to a restricted population (such as employees) and be subject to fewer restrictions (e.g., use of registrars) than community gTLDs but would receive some of their associated benefits.
    - However, it has also been asserted that single end user (e.g., corporate protective) registrations do not promote competition on the Internet, and create closed protective registrations arguably making the Internet less operable to the end user.

Whether there should be accommodation. The proposals assert that there are benefits to the registries and the registrants in the new classifications. Many of the benefits are related to accommodations or relaxation of contractual requirements. The proposals recommend that some registries need not sign agreements with ICANN, some pay lower fees, and some need not use ICANN accredited registrars.

The .brand TLD proponents argue that a lower registry fee be applied to them because they will be registering several brands and, essentially, one evaluation effort will cover all those applications. Other TLD applicants may differ, arguing that brand holders are among those who are best able to afford fees, especially when compared to small community applications or applications from those in least developed countries. (Assuming a fixed cost environment, lower fees to some TLDs will result in higher fees to others.)

In certain cases, there are restrictions imposed on a new category. For example, it is suggested the socio-cultural TLDs would be required to be not-for-profit.

One question is whether the accommodations serve to benefit the registries or the registrants. Arguably, accommodations that benefit registries, such as lower fees, will also serve to benefit registrants by promoting varied business models.

The effects of these accommodations should be the subject of public discussion. Primary purposes of ICANN agreements are to ensure the ongoing stability and security of the DNS and to ensure a level playing field among its participants. The GNSO included the requirement to use ICANN accredited registrars to ensure the benefits accruing to registrants of the registrar

environment. A yardstick should be that the accommodation should directly benefit registrants and not only the registry operator.

Post delegation environment. The post-delegation environment with many TLD categories will be characterized by:

- A richer TLD environment where categories are created to address certain registrant desires / needs.
- A complex contractual environment requiring substantial compliance activities.

After the delegation of the initial sets of TLDs, registrants will be better able to survey the new field of opportunities if TLDs are classified in some way. A registrant looking for a particular set of services, access, or similarly situated registrants will be able to make a survey more readily if the registries are organized in some way to make those choices more clear. However, the classifications, if embedded in the registry agreements, will introduce their own set of complexities.

Imagine a single use (or brand) TLD where the TLD operator restricts registrations to employees. ICANN will have to monitor those registrations. Are contractors, agents or temps employees? Each single owner TLD might answer that question differently. Registrars will closely monitor registrations because single owner TLDs aren't required to use ICANN accredited registrars. They will call ICANN to task for each questionable registration.

Imagine a socio-cultural TLD restricted to not-for-profit status. ICANN will be required to monitor its tax status and understand tax rules in many different jurisdictions. If the TLD tax status changes, would they then be required to sign an agreement? How would ICANN put that into effect?

The resulting contractual compliance effort would be difficult. The number of gray areas to adjudicate will multiply – areas that are not related to DNS stability or security. Community watchdogs would be a step ahead because they target specific areas. Increased compliance function costs would probably mean increased fees. Reduced fees for some registries will mean higher fees for others.

Self-selection. There are a few models for implementing TLD categories. In one model, the TLD application evaluation process could determine the TLD category of the applicant based on answers to application questions designed to make a category determination.

The public comments seem to indicate a different model, that applicants would self-select the TLD category. In such a case, the applicant might have to meet certain criteria published as part of the application process.

Even more straight forward would be a process where applicants can self-select and announce a TLD category. ICANN could create categories based upon community input such as the new

gTLD comment fora. The application evaluation would not test the application against TLD type or category criteria; it would evaluate the applicant against the stability / security related criteria in the business and technical evaluations only. The applicant would be able to state that it had self-selected itself as belonging to a certain category.

Potential Solutions. One complexity in the introduction of new gTLD categories are the number of different accommodations that are requested. As stated above, these accommodations will lead to a complex and difficult contractual compliance environment. Additionally, there will be considerable debate and discussion in the community as to whether certain accommodations should be made. Should certain gTLDs not be required to have an agreement with ICANN or not be required to follow consensus policy? Should certain TLDs be required to maintain not-for-profit status? These discussions and debates will take considerable time and resources.

One approach would be to reduce or eliminate the accommodations or contractual differences among the TLD types. There are some differences required by policy recommendations of the GNSO and GAC (creating community and geographical names TLDs). Other accommodations could be eliminated, e.g., require that new gTLDs be required to sign a contract and comply with consensus policy. Also, it does not seem necessary to require that certain TLD types retain not-for-profit status, so long as they are not getting some special accommodation such as not complying with consensus policy or reduced fees.

Fees. The certainty of costs and the question of fees will probably be in flux until sometime after the first round; therefore, parsing fees among TLD categories now is difficult. This is due to the uncertain number of applications and thus the current lack of clarity about the extent to which economies of scale can be realized in supporting new gTLDs operationally. It will be difficult to create different fee structures (application or annual fees) in this uncertain environment. Application fees are designed to recover costs. Reductions in some evaluation fees will result in increases to others. This is also true in the area of annual registry fees. The annual fee reduction made between the first and second version of the Guidebook lowered fees to the extent possible given the unknown number of TLDs that will be delegated into the root zone. *ICANN has always stated that the idea of fee categories and lower fees will be investigated after the first round* and following removal of many of the contingencies and uncertainties. Therefore, the possibility of different fee structures in the future remains – and is probable.

Finally, the structure of TLD categories, if granted different accommodations with differing contractual obligations, would result in significantly higher compliance costs and therefore, annual fees. If a self-declaration program is instituted and contractual accommodations are eliminated or minimized, fees can remain constant.

The ICANN community should continue to discuss TLD categories in order to flesh out the benefits and costs of the program. The new gTLD implementation seeks to provide new prospective registrants with an array of choices that will meet their needs.

TRADEMARK PROTECTION

Consideration of Trademark Protection Issues

I. Key Points

- Multiple comments request that ICANN ensure that trademark protections are put in place before the gTLD program is launched.
- The Board formed the IRT to develop solutions and report by before the end of May. The IRT has issued their report, recommending solutions as well as reported meeting notes and responded to comment in a transparent way. ICANN will conduct consultations on trademark issues, beginning in Sydney in June, and throughout the month of July. These consultations will take place in diverse geographic regions, and will provide a forum for ICANN to hear from the community on the effectiveness of proposals that address the overarching issues submitted by the IRT and others.
- The Board gave the IRT an accelerated timeline to develop solutions. The timeline for the launch of new gTLDs was adjusted to accommodate these regional consultations and the development of solutions that adequately address these concerns.

II. Summary of Comments

More Clarity Needed on How Whole System Will Work for Trademark Owners. Despite some changes ICANN made concerning its inadequately defined application and dispute resolution processes, it is still unclear how the whole process will work and whether trademark owners will have priority over other registrants and what form that priority will take. *European-American Business Council (1 April 2009).* It is not clear and ICANN should clarify what is meant by reference to "applicability of this gTLD dispute resolution process." *Microsoft (Guidebook, 13 April 2009).*

Suggestions on Future Process. The impact of the new gTLD program raises large brand protection and consumer abuse/fraud concerns. ICANN should reach out to the pertinent stakeholders to set up expeditiously the appropriate processes so any new expansion of the Internet is a safer one. Not just for businesses (like Time Warner) that offer goods on the Internet, but for those consumers who rely on our legitimate businesses and services. *F. Vayra, Time Warner, Public Forum Transcript at 10-11 (5 Mar. 2009).* The IP Constituency is very concerned that ICANN published the second draft guidebook without addressing any of the trademark protection issues or any of the proposed solutions. Going forward, ICANN should convene a solutions team of persons who have knowledge, experience, and expertise in IP and the interplay of trademarks and the domain name system, charged with developing and proposing concrete solutions that can be implemented and rolled out in connection with the

new gTLDs and with providing a report to the board in advance of the Sydney meeting. *K. Rosette, IP Constituency N. America Rep., Public Forum Transcript at 27 (5 Mar. 2009).*

Adequate Time for Brand Owners to Consider Guidebook Revisions. Since brand owner issues were not addressed yet, brand owners may not have sufficient time to fully digest, analyze and comment on pertinent changes. ICANN has not indicated when it intends to begin the application process; the analysis of the previous public comments suggests December 2009. The current timeline is too tight; ICANN should take its time evaluating comments from all interested parties including brand owners before formally beginning the application process. *MarkMonitor et al. (10 April 2009). See also Visa Inc. (11 April 2009).*

Stronger Protection for Brand Owners. Introduction of new gTLDs should be accompanied by stronger protection for brand owners; this could include more stringent controls within the registration process and more pro-active controls around the integrity of registrant data, with particular focus on consumer-facing brands (e.g., an increased burden of proof of ownership of a trademark brand before rights to a related domain are granted). *P. Taylor, Bradford & Bingley (5 April 2009).*

Second Level Fairness Concerns re: Disputes. Is ICANN considering additional procedures applicable to these new gTLDs for second-level disputes which will either be supplementary or alternative to the existing UDRP? It is unfair and unbalanced to change the rules for second-level disputes in the context of a proposal for expanding at the first level. The way to address that is for a separate comprehensive review of the existing UDRP on its own and not as a kind of tail on this new gTLD dog where only one side's complaints are being really taken into account at this stage. If you are going to have a UDRP for second level postlaunch disputes, it ought to be uniform across all TLDs; there shouldn't be some separate or alternative process that applies to new gTLDs. *P. Corwin, Internet Commerce Association, GNSO Transcript at 91-92 (28 Feb. 2009).*

Resources Concern and Solutions Commitment. Trademark community would like reassurance that if at a time of scarce resources they expend time, money, etc. on these fora, then the process will result in a product that will be acted upon. *K. Rosette, GNSO Transcript at 60 (28 Feb. 2009). See also M. Cade, GNSO Transcript at 62 (28 Feb. 2009); J. Scott Evans, GNSO Transcript at 62-63 (28 Feb. 2009).*

European Brand Owners Perspective. Some European brand owners don't want to address whether they should embrace new gTLDs until we get past the issue of how is ICANN dealing with the problems we face. The proposal to engage a panel of experts will go a long way in bringing brands to the table so they feel they have a place at ICANN. *S. King, Public Forum Transcript at 41 (5 Mar. 2009).*

Adopt the WIPO post-delegation dispute resolution procedures. The WIPO post delegation dispute resolution procedures should be adopted given the significant potential for actual infringement post-delegation by registries, and the policy should be mandated under the

Registry Agreement. *MarkMonitor (10 April 2009).* ICANN should consider adopting the WIPO post delegation procedure for new gTLD registries after it is subjected to comments and review by the community. *Regions (13 April 2009).* Regarding the WIPO Post Delegation proposal, registry operators should be held accountable if they allow the registry to become a safe haven for infringers; whether this should be addressed through a scheme operated by a third party like WIPO or through enhanced contract compliance enforced by ICANN is not yet certain. *MARQUES (13 April 2009).* ICANN should consider the viability of a procedure whereby a trademark holder can bring a claim against a registration authority (registrar or registry) where there is a direct contractual relation with the infringing party—modeled in part on the WIPO post delegation dispute resolution proposal. Unlike the WIPO proposal, the panelist would be limited to a finding of harm to the complainant and then the matter would be referred to ICANN for appropriate action. *M. Palage (14 April 2009).*

WIPO mediation proposal regarding registry abuse. Serious consideration should be given to WIPO's proposal to allow for a mediation process where a trademark holder determines that an ICANN accredited registry is abusing its mandate in the new TLD either through misuse caused by the name itself or through registry misconduct. Without some form of self-help mechanisms, it is unlikely that ICANN can effectively police registry or registrar abuse. *European-American Business Council (1 April 2009).*

Post Delegation Dispute Resolution. INTA continues to support a robust post-delegation dispute resolution process to address post-launch issues, including post-launch infringement (see comments to be provided on WIPO's working draft of Post-Delegation Procedure for new gTLD Registries, 5 Feb. 2009). *INTA (8 April 2009).*

Dynamic Process. The IRT process is promising, but ICANN also must ensure that it moves beyond static definitions of existing definitions and is dynamic so that it can fight new threats to consumers and brand owners that may emerge in the future. In the next version of the Guidebook, ICANN should design a process that encourages applicants to offer more than the minimum requirements (i.e. using innovation) and rewards that initiative. *NetChoice (Module 2, 13 April 2009).*

IRT Transparency. While appreciating ICANN's move to take closer look at trademark protection mechanisms in the new gTLD process, it would have been appreciated if members of the IRT were required to submit an interest disclosure statement about their interests in the new gTLDs as is common practice in ICANN stakeholder groups. *DOTZON GmbH (13 April 2009).*

IRT Process. The IRT recommendations are a first step in a process of shaping the new gTLD launch to protect consumers against confusion by discouraging abuse of trademarks at the top and second registration levels. *Time Warner (13 April 2009).* Any DNS expansion must include mechanisms for brand owners to effectively and efficiently police their trademarks. *Yahoo! (13 April 2009).* The IRT process does not provide valid grounds for ICANN to defer immediate consideration of comments submitted by AT&T and other brand holders on trademark protection concerns and mechanisms. *AT&T (13 April 2009).* The IRT timeframes seem

extremely unreasonable and this adds to an effect of marginalizing IP interests and limiting their opportunity to comment on the issues of greatest concern pending ICANN's response to the IRT's report. *IACC (13 April 2009).*

ICANN Lack of Transparency; Flaws in IRT Process. ICANN is not adequately observing its own transparency obligations in the development of "solutions" for rights holders in the new gTLD process. ICANN has delegated the lead role to the IP constituency and is proceeding in a way that unfairly excludes registrants' views; the domainer community has been excluded from the IRT membership, and we know of no outreach effort. The IRT is not acting in a sufficiently transparent manner. It is of concern that any procedures adopted in the new gTLD process will be retroactively imposed on existing gTLDs. *ICA (13 April 2009).*

Reconsider or Re-Evaluate New gTLD Launch in Light of Trademark/IP Concerns. The launch of new gTLDs as currently proposed by ICANN should be reconsidered or re-evaluated based on these concerns:

1 The immense cost and efforts that will be required to register gTLDs defensively and to defend existing IP rights against any new gTLD that infringes or harms those rights;

2 The risk of severe damage to the IP rights of trademark and brand owners and the related consumer confusion that will result; and

3 The vaguely defined application and dispute resolution processes that place the burden on trademark owners to prevent the registration of new gTLD extensions that infringe on their marks and threaten to cause confusion detrimental to consumers and the public. *European-American Business Council (1 April 2009).* Expansion of TLDs will greatly increase brand management costs and create new opportunities for others to infringe, phish and engage in other deceptive practices. The multitude of second level domains to be sold will be even more vulnerable to phishers, squatters and other fraudulent operators who currently abuse the existing smaller gTLD system. Given these concerns and the extensive consumer confusion which will result, the potential costs of the new gTLD program far outweigh any perceived benefits to business or the general public. Although we continue to oppose this initiative we ask ICANN to consider measures to reduce the burden on trademark holders and seek consideration of five items we noted in our 15 Dec. 2008 letter. *ANA (12 April 2009).* See also *NBCEP (13 April 2009); 3M Company (15 April 2009).*

New Guidebook Release Premature Because Trademark and Consumer Issues Not Addressed and Resolved. The European-American Business Council (EABC) has taken note of the 2nd version of the Draft Applicant Guidebook as well as the outcome of the Mexico City meeting, and realizes that some changes have been made –e.g., relating to the costs and application and dispute resolution process. However, many of EABC's concerns about the impact on trademark owners have not been adequately addressed. ICANN's promises of discussion and further study do not fundamentally provide answers or the robust and comprehensive forms of protection for IP rights owners that will be needed to police and enforce trademarks to combat fraud and confusion in the new TLD rollout. ICANN should not be releasing any new version of the

guidebook without first addressing the trademark, consumer confusion and related abuse issues and finding solutions that are acceptable to the business community. *European-American Business Council (1 April 2009).*

Trademark Protection Issues Remain Unresolved. Trademark protection is the major issue which remains unresolved; the new guidebook fails to address this issue adequately. Adobe welcomes the IRT process to propose solutions for consideration at the Sydney meeting and trusts that the next version of the guidebook will outline these proposed strategies and remedies in significant detail. Much work still needs to be done by ICANN to address trademark owners' concerns about the new gTLD proposal. *Adobe (10 April 2009).*

Difficulty of Resolving Trademark Issues. Trademark issues can never be resolved to the satisfaction of all the parties unless ICANN, its registrars and registries literally police and examine every new domain application prior to registration. New gTLDs will benefit nobody but cybersquatters and those who resolve cybersquatting disputes. *D. Harris (29 Mar. 2009).*

III. Analysis and Proposed Position

Numerous comments called for consideration of and the implementation of trademark protection measures prior to the launch of new gTLDs.

ICANN is pursuing a timely resolution of trademark protection concerns. To solicit proposals on trademark and other overarching issues from members of the community concerned about these issues, ICANN has created a WIKI https://st.icann.org/new-gtld-overarching-issues/index.cgi .

The IRT was commissioned by the ICANN board and given a tight deadline to produce its final report in May to address the issues of trademark protection in new TLDs. The Final IRT Report will then be subject to a public comment period and discussions in public consutations.

The IRT work has resulted in several specific, detailed recommendations, see https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:200904281. The IRT accepted the tight timelines set by the ICANN Board to produce these proposed solutions in a timely manner. The proposed solutions seek, in combination or separately, to address the concerns raised in the public comments periods. While the Board directed the formation of the IRT from representatives from the IP Constituency, the IRT has conducted its work in an open, transparent manner, publishing: team membership information, meeting notes, and reports. The IRT has solicited public comment to the extent possible and invited representatives of other groups to explain their positions on these issues. Finally, the IRT proposals will be open to full consultation in several public sessions.

ICANN will be hosting sessions at the Sydney meeting to discuss the trademark issues and solutions proposed by the IRT and others and will be conducting a series of regional meetings globally in the weeks following the Sydney meeting. These discussions are designed to discuss

the feasibility of implementing the recommendations contained in the IRT Report, as well as other submissions addressing the overarching issues.

ICANN recognizes that identifying solutions for trademark issues is key to finalizing the Applicant Guidebook and the timeline for the rollout of new TLDs. ICANN is prepared to significantly amend the Guidebook in consideration of the work that has been done. The Board has set ambitious timelines for the development and consideration of solutions to facilitate the timely launch of the new TLD process. The IRT has responded in kind, with rapid development of detailed, meaningful suggestions. ICANN will work towards a timely launch of the process but will not move forward until appropriate solutions are in place.

Enhanced Whois Requirements

I. Key Points

- Comments propose that all new gTLDs offer a thick Whois registry to reduce the burden on those seeking to protect against abusive registrations, and provide additional protections for registrants in the event of registry or registrar failures. For discussion, ICANN proposes this suggestion be adopted in a change to the registry agreement.
- In order to address improved accuracy in Whois, ICANN is soliciting proposals on whether practical, cost effective solutions can be adopted for enhanced Whois accuracy in new gTLDs. In the absence of identifying one solution applicable to all new gTLDs, ICANN will consider requiring applicants to identify their procedures for enhancing Whois accuracy in their proposed gTLD.

II. Summary of Comments

Thin/Thick Whois in New TLD Registries. The issue of whether to require new TLD registries to provide thick Whois needs more consideration, and a more detailed, explanatory response on this issue needs to be provided by ICANN. The response in the analysis that "this was not changed because of the multitude of applicable laws in different jurisdictions" is not sufficient. Many commenters explained in the previous round why they were strongly opposed to what was in Version 1 on this question, and changes were not made in Version 2. *S. Metalitz, IP Constituency, GNSO Transcript at 72-73 (28 Feb. 2009). See also SIIA (13 April 2009).* ICANN should reconsider its minimum requirement calling only for a "thin" Whois registry model. Without a centralized Whois database at the Registry Operator level, brand owners will struggle to obtain accurate Whois information required to combat online fraud. We support a requirement being evaluated by ICANN that Registry Operators would have to collect additional data, and we ask that the data be escrowed by the Registry Operator and made immediately available in the event of non-cooperation by any registrar and in the event of online fraud or abuse. Whois issues have not been addressed adequately and absent more stringent policies, registrars will have control over Whois information with no binding obligation to ensure publicly accessible and accurate Whois information. *MarkMonitor et al. (10 April 2009).* Before allowing new gTLDs, ICANN must address the significant problems that currently plague the Whois database. ICANN should require gTLD applicants to commit to participating in an open and transparent Whois database. The Guidebook is conspicuously silent on this issue. *NBCEP (13 April 2009).* Effective implementation of Whois policies needs to be assured in any rollout of new gTLDs; this is a critical aspect of the overarching issues of trademark protection and malicious behavior because it is essential to have a way to ascertain responsibility for malicious or bad faith behavior. *SIIA (13 April 2009).*

Mandate "Thick" Whois. It is unacceptable that ICANN did not mandate thick Whois in all cases. Part of the technical and business evaluation of an application should address the

applicant's commitment to maintaining and enforcing Whois requirements with a focus on standard and accurate information. *AT&T (13 April 2009).* See also *IACC (13 April 2009).*

Thin/Thick Whois in New TLD Registries. ICANN's policy shift on Whois needs to be reversed; every new gTLD should be required to take on so-called "thick" Whois obligations. *COA (13 Feb. 2009).* New gTLDs must operate as "thick" registries. Policies should be established about enforcement of Whois data accuracy and use of proxy or private registrations. *AIPLA (13 April 2009).*

Proxy Registration Services—Universal Standards and Practices. Universal standards and practices need to be developed for proxy domain name registration services, as a condition precedent to the new gTLD program for the global business community. *M. Palage (14 April 2009).*

Require "Thick" Whois Registry Model. ICANN should require that all new gTLDs function as "thick" Whois registries, which will make information about miscreants more accessible to police misconduct and protect victims of phishing and fraud. *INTA (8 April 2009).* ICANN should require a "thick Whois" model for all registries so that access to full ownership records is ensured by ICANN, an especially important issue for addressing consumer fraud enabled by domain name abuse. Thin registries do not afford proper safeguards to protect brand owner rights or support the needs of law enforcement given that control of the registrant's data is largely held by the individual registrar. *MarkMonitor (10 April 2009). Microsoft (Guidebook, 13 April 2009).* All new gTLD registries should be required to adopt the "thick" registry model for capturing and maintaining registrant data; this is beneficial in terms of inter-registrar transfers functions. *M. Collins, K. Erdman, M. O'Connor, M. Rodenbaugh, and M. Trachtenberg (12 April 2009).* By adopting the thick Whois model utilized in the .biz and .info registries ICANN will have a smaller pool of entities to police, and consumers, law enforcement and brand owners will have a more centralized location to obtain accurate Whois information. *Yahoo! (13 April 2009).* See also *Lovells (13 April 2009); COTP (13 April 2009).* All registries should have to maintain thick centralized Whois data as part of their registry agreements and all registrant agreements must include the acceptance of that requirement. The terms of registry and registrar agreements should ensure the maintenance of accurate, publicly accessible and thick Whois data, with appropriate proxy registration services standards, with enforcement throughout the contract hierarchy. *AT&T (13 April 2009).*

Reverse Withholding of Data by Thick Registries (specification 4). ICANN should reverse its inexplicable decision to allow even thick registries to withhold nearly all the collected contact data from registrants via registrars from their publicly accessible Whois services. The omission of a thick Whois requirement which has been imposed on virtually every new gTLD by ICANN throughout its history is unjustified, will have a detrimental impact on a wide range of consumer protection efforts, and should be eliminated*. eBay (13 April 2009).*

Opposition to Thick Whois at Registry Level (Evaluation question 45). Thick data collection or display at the registry level should not be mandated. The guidebook states that thick data is not

intended for display, so by implication this measure is not intended as an IP RPM. New registrar data escrow requirements make it unnecessary at the registry level. It would incent registrars to mask data they send to registries for competitive reasons. It creates additional risk that customer data will be available to spammers, phishers and other abusive parties. It was not required in previous rounds. The registry will not receive the information behind proxy services in any case, so parties who want access to the data will have to go to the registrar. *Demand Media (DAG, 13 April 2009).*

Whois and Privacy. Whois is essentially broken at present. The rights of individuals to protect their privacy needs to be addressed. Any registry operator who proposes a TLD that will differentiate between private and corporate registrations (e.g. .tel and many ccTLDs) should be encouraged and not hampered. *M. Neylon, Blacknight Solutions (13 April 2009).*

Opportunity to Enhance Whois. It was noted that ICANN should not rely on past precedent but use the new TLD process as an opportunity to address some of the concerns related to Whois. One comment noted that it is important to raise the bar for gTLD and ccTLD operators, especially given growth of e-crime (noting that staff in version 2 did not embrace suggestions of NetChoice on how to raise the bar for registry applicants through additional requirements such as industry best practices for consumer protection; a global brand registry to prevent brand-jacking and measures for prevention of phishing/consumer fraud; a thick Whois for all applicants; and a rapid takedown procedure). *S. DelBianco, NetChoice, Public Forum Transcript at 16 (5 Mar. 2009)*.

III. Analysis and Proposed Position

Several comments have suggested enhanced Whois requirements in new TLDs to easily identify potential infringers and cybersquatters. The comments recommend that ICANN mandate thick Whois in all cases. The comments also advise ICANN to increase its compliance activities with regard to maintaining accurate Whois in new TLDS.

Other commentators opposed the requirement of thick Whois, either because of privacy concerns or because it is unnecessary as an IP RPM. One commentator noted that new registrar data escrow requirements and other RPMs make it unnecessary at the registry level.

It was noted that it is important to raise the bar for gTLD AND ccTLD operators, especially given growth of e-crime.

ICANN recognizes the importance of Whois to brand holders and others seeking to address abuse and protect consumers in the new TLDs. To address these concerns, ICANN proposes mandating thick Whois requirements in new TLDs. With the introduction of potentially hundreds or thousands of new TLDs, maintaining a thick Whois is viewed as an alternative to identifying potential abusers through the decentralized Whois systems maintained by registrars. This should lessen the burden on brand holders, law enforcement and others seeking to minimize abuse in new gTLDs.

Several comments requested enhanced accuracy in new TLDs, without providing details on how such accuracy could be achieved. ICANN supports the need for more accurate Whois in new TLDs and is open to suggestions from the Community on appropriate mechanisms to be considered for improved accuracy of Whois in new TLDs. These proposals should focus on practical, cost effective solutions that could be implementable in new TLDs which would result in enhanced accuracy in Whois. In the absence of solutions that can be implemented universally across all new TLDs, ICANN is seeking input on whether contractual revisions to the registry agreements would be an appropriate mechanism to achieve a more accurate Whois system.

Additional Top Level and Second Level Protections

I. Key Points

- As described above, the IRT has been established to propose solutions to protect against trademark abuse at the top and second level. In developing rights protection mechanisms, ICANN was advised not to expand the scope of protection that is available under international trademark law.
- After the conclusion of the public consultations, ICANN will consider recommendations from the IRT and any other proposals submitted to address trademark protection in new TLDs to identify an appropriate solution that is technologically feasible and cost effective.

II. Summary of Comments

Negative Economic Impact on Brand Owners. There is only limited protection for brand owners, the fee structure is unreasonably high as a protection measure, and the administrative procedures are unduly burdensome. The application and objection procedure will be prohibitive in cost and/or time and will exponentially compound the already crowded UDRP space. *Visa Inc. (11 April 2009).*

Trademark Recommendations for IRT's Final Report and ICANN's Revised Proposal

1 **Sunrise Period**—implementation of a detailed, objective uniform and cost-based sunrise process for all new gTLDs, whereby trademark holders can register domain names before the registration process is opened up to the general public; trademark owners could be charged only a reasonable minimum fee to register their protected names;

2 **Protected Name Registry**—as alternative to sunrise period, create a Protected Name Registry allowing brand owners to apply to have their trademark put on a reserved list. This could be achieved by expanding the existing Top Level Reserved Names List in Module 2 to include trademarks or creating a separate database of trademarked terms for pre-registering IP rights to protect them within the proposed new gTLDs; and

3 **Brand Category Applications**—a separate process for applications from trademark owners wishing to register their trademark as a new gTLD string, distinguishing them from open and community-based applications. *European-American Business Council (1 April 2009).* The Czech Republic supports the comments and recommendations of the EABC toward achieving effective, balanced pre-and post-delegation solutions to the trademark protection in connection with the introduction of new gTLDs. *M. Pochyla, Ministry of Industry and Trade of the Czech Republic (10 April 2009).*

Balancing Interests, Including End Users'. Trademark holders may have legitimate concerns; concerns from small, specific user groups should not outweigh the legitimate requests of end users. Brand managers' fear of infringement should not cripple what could amount to a second wave for the Internet in many respects. *M. Neylon, Blacknight Solutions (13 April 2009).*

Defensive Registration Costs. The issue of disproportionately high costs for defensive registration must be managed by ICANN in order to protect national and trademark protection. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).* The new gTLD proposal raises the potential need for entities in the financial services sector to apply for and shoulder the costs of new gTLDs merely for defensive purposes. One of the program's design goals should be to eliminate the incentives or need to engage in defensive registrations. *Regions (13 April 2009).* See also *Lovells (13 April 2009).*

Impact on Financial Sector Costs. Defensive registration costs would be large and burdensome for the financial sector, already under significant strain. Many other direct costs would be involved if the financial community found it necessary to register for new gTLDs because of this program's launch, including switching costs, governance costs, monitoring and enforcement activities and fees and costs for the objection process. *Regions (13 April 2009).*

Concern of Corporate Enterprises. ICANN staff should pay close attention to the trademark issues because the enterprises are getting very concerned with that. And I don't think you have an adequate resolution process in place for them. *T. Davis, GNSO Transcript at 95 (28 Feb. 2009).*

Burden on Companies—Existing RPMs Inadequate. It is unfair to force companies to increase their legal expenditures by requiring expensive sunrise registrations and UDRP filings to correspond to the rising number of gTLDs. These approaches are not reasonable in light of the economic conditions and in the face of potentially thousands of new gTLDs. Sunrise periods have amounted to a fee shifting exercise from registries to brand owners to fund start up costs to launch new extensions. *MarkMonitor et al. (10 April 2009).*

Applicant's Rights to be Acquired in the gTLD (Terms and Conditions, paragraph 10). This paragraph should be revised to distinguish, in the case of branded gTLDs, an Applicant's pre-existing rights in the brand reflected in the applied-for gTLD. *Microsoft (Guidebook, 13 April 2009).*

Open TLD-".brand". Allow legitimate trademark owners to register the extension corresponding to their trademark without requiring the active use of the extension or the fulfillment of technical back-end requirements (trademark blocking registration). *Visa Inc. (11 April 2009).*

Reduce Brand Owner Defensive Costs. Develop a mechanism to safeguard brand owners from massive defensive registration costs. Allow a trademark registration at little or no cost to

holders with real, well established trademarks for each new gTLD, while preventing sham trademarks on clearly non-protectable terms from countries outside the G20 which have issued trademarks on clearly non-protectable terms. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009)*.

Sunrise and Trademark Registry. Create a trademark registry to be used for all subsequent sunrise periods to eliminate the need and cost to validate rights for each extension launch or new gTLD application process; this registry can be used as a reference for both first and second level registrations. *Visa Inc. (11 April 2009).* Dot Eco LLC supports Bart Lieben's trademark validation database proposal. *Dot Eco (13 April 2009); Minds and Machines (13 April 2009).* One RPM could be a uniform sunrise process for all new gTLDs whereby trademark holders could at very low fees register domain names before the general public. An alternative would be a form of protected name registry (centralized database overseen by ICANN) allowing trademark owners and certain other community representatives to apply to have their trademarks or relevant strings placed on the reserve list. *Regions (13 April 2009).* ICANN should create a mechanism for automatic rejection of names infringing on existing legal rights. *BITS (13 April 2009).*

Second Level—Sunrise and Reserved Names. For the second level dispute process, ICANN should mandate a standard sunrise process and incorporate the reserved names for second level domains also. *Hearst Communications, Inc. (13 April 2009).*

Rights Protection Mechanisms. ICANN should take reasonable steps now to develop robust RPM models that will be low-cost, efficient and will scale. If these RPMs are not developed before launch of new gTLDs, large and small businesses will likely be unfairly prejudiced or burdened. Options include: a Reserved Trademark List open to as many trademark owners as possible and subject to challenge; designing a few basic RPM models from which applicants could choose; creating a database of cleared rights; creating a centralized access point interface within each TLD allowing trademark owners to choose which RPMs to participate in, with direct billing provided. INTA (8 April 2009). All applicants should be required to submit a detailed plan of their pre-launch and post-launch RPMs, specifically: the sunrise or challenge mechanism; character string requirements, charter enforcement, eligibility cut-off dates; usage requirements; if there will be a premium names scheme and if so its process; how the maintenance of community IDs will be monitored; how applications will be selected, appeals or reconsideration processes, and cost to rights owners of participation in the RPMs. RPMs should be graded the same way as the Technical and Financial capabilities, and applicants with low RPM scores should fail. MARQUES (13 April 2009).

Rights Protection Mechanisms—Fundamentals for Addressing Trademark Concerns. Fundamental RPMs include:

1 A no-cost or low cost expedited suspension mechanism on a "loser pays" model to combat cybersquatting;

2 Creation of a gTLD Reserved List for global trademark owners for names of new gTLDs and at the second level within each new gTLD; the list should be available to those showing that their marks historically have been subject to cybersquatting and not be turned into a list of famous or well-known marks. The list should minimize or remove the need for defensive registrations of key trademarks;

3 Post-delegation dispute resolution procedures as proposed by WIPO, based on "loser pays" and applied to both registries and registrars; the policy should be required by ICANN under each new registry and registrar agreement. Verizon looks forward to a fuller list of mechanisms after completion of the IRT's work. *Verizon (13 April 2009).* See also *IACC (13 April 2009).*

Rights Protection Mechanisms—Standard, Uniform Set. ICANN should develop a standard set of RPMs which are low cost, efficient and uniform across all new gTLDs and which are in place before any new gTLDs are launched. Uniformity is key to avoid burdening consumers and businesses with having to deal with a diverse set of RPMs. *Regions (13 April 2009).*

Suggested Rights Protection Mechanisms. ICANN and the IRT should consider: (1) an Expedited Remediation Process; (2) an expanded Reserved Names list including marks of rights holders; (3) availability of open, publicly available Whois information with strict proxy registration guidelines; and (4) flexible rights protection mechanisms that can be adopted by new gTLDs. *MarkMonitor et al. (10 April 2009).* At time of registration, registrants should be provided with a warning that, pursuant to terms of the Registry Agreement, any domain names that infringe on IP rights and are being used in bad faith will be confiscated without refund and returned to the legitimate rights owner and subject to the express remediation procedure. *MarkMonitor (10 April 2009).*

Rights Protection Mechanisms—Comment. Any approach to RPM that relies on uniform treatment of all SLDs in all TLDs will not work (e.g., the SLD "mcdonalds" must necessarily be treated differently in the .hamburger, .family and .wendys TLDs.). Lists and mandated uniform sunrise rules are not used in other areas of commerce involving IP rights. Pre-usage approval mechanisms will harm TLDs by hindering their ability to service legitimate registrants. *Demand Media (DAG, 13 April 2009).*

Rights Protection Mechanisms—City TLDs. City TLDs should deploy rights protection mechanisms to protect IP rights of third parties but implementation details should be delegated to the respective community. *City Top-Level Domain Interest Group (12 April 2009).*

Support for Reserved Names List for Top and Second-Level Domains. LEGO et al. strongly support the suggestion by AT&T in its letter of 15 December 2008 regarding the creation of a list of reserved names for both top and second level domains and agree that such a list could be based on the extent of active use of the trademark, registration in multiple gTLDs or ccTLDs, existence of a verifiable web site and evidence for defensive actions against infringers. (See also the similar suggestions of USTelecom, Microsoft, and the U.S. Chamber of Commerce). Such a

list of reserved names for both the top and second levels will reduce the material negative effects of new gTLDs for brand owners without giving rise to problems for law abiding registrants. In this regard, standard terms and conditions are of course necessary across all new gTLDs. *LEGO et al. (6 April 2009).* See also *CADNA (13 April 2009)*.

Address the "Trademark Reserved Names" List. In its Analysis of Public Comment document, ICANN refers to the objections to including ICANN names on a reserved names list but fails to address the common theme of those objections which is to be fair and include a "trademark reserved names" list as well. *INTA (8 April 2009)*.

Use Reserved Brand Names Principle in String Confusion Review (2.1.1.1). The principle of recognized brand names for the Reserved Names Review should also apply in the String Confusion Review. In combating abuse at the second level, experience has shown that detrimental user confusion and misrepresentation has resulted from registrations by unaffiliated parties that include strings that are similar to or include recognized brand names. *IHG (Module 2, 9 April 2009).*

Top-Level Reserved Names List—Financial Sector. To avoid the need for defensive registrations, Regions strongly supports the proposal for a top-level reserved names list that includes certain strings relevant to the financial sector (.bank, .fin, .finance, .banc, .ins, .insurance, .broker) until such time as a representative body of the financial sector makes an appropriate proposal to ICANN. The costs of any challenge are to be borne by the challenger-applicant unless the applicant succeeds in the challenge. If ICANN does not agree to remove financial-type gTLDs from the process, then assurance will be required that any financial sector gTLD registration has both community and regulatory body approval. *Regions (13 April 2009).*

Dilution Protection. Clarification should be provided on whether dilution-type protection will be afforded without requiring a showing that the applicant's mark is famous. *AIPLA (13 April 2009).*

Post-launch—Expedited Takedown for Clear and Blatant Infringement. The optimal protection mechanisms for trademark holders comes after launch with a fast takedown mechanism for clear infringements. Pre-launch lists work poorly for TLDs, and sunrise procedures at launch are a one-time solution. Expedited takedown could also potentially be applied to .com and existing TLDs and it should reduce the ongoing need for UDRPs. (See comments text for specifics of the proposed Expedited Takedown Measure —Demand Media comments at 6-7: complaint via bonded complainer; fee per name to Complainant; complaint assessed by standing judge; notice sent to registrant using existing Whois information if clear and blatant infringement; takedown command directed to registry by judge if no response from registrant within limited period; further judge review if there is response, etc.) The details of this proposal are open to discussion and amendment; goal is to show overwhelming benefits of a takedown procedure for clear trademark infringement, as opposed to other RPMs which have conceptual and practical problems. *Demand Media (RPMs, 13 April 2009).* Dot Eco LLC supports Demand

Media's rapid takedown proposal. *Dot Eco LLC (13 April 2009).* See also *Minds and Machines (13 April 2009).*

At-Launch Sunrise Recommendations. If there is to be a sunrise for new TLDs, it should be separated into two phases: (1) validation phase—with a centralized repository of authenticated and verified trademark holders and their marks, preventing trademark holders from having to be authenticated multiple times at multiple registries; and (2) protection phase—which would allow registries to use the authenticated data to allocate or otherwise protect trademark strings in accordance with their TLD-specific policies. Registries should choose or develop the protection phase method that best suits their TLD, even though the TLD may be open and generic. *Demand Media (RPMs, 13 April 2009).*

RPMs at Top Level—Balance Needed. The need for defensive TLDs at the top level is very low; it is unlikely an entity will pay $185K to for example get .microsoft—the applicant would know it would lose the TLD and the fee during the dispute phase. Also, rational applicants will not want to engage in disputes with large corporations with well-known trademarks. *Demand Media (RPMs, 13 April 2009).*

WIPO Registry Sanctions. There is some merit to WIPO's 13 March 2009 letter to ICANN proposing a graduated series of sanctions on registries with trademark abuse in their TLDs. WIPO does not address key details such as how much abuse, the extent of registry liability and when the sanctions kick in. These details need to be fleshed out if this proposal is to be seriously considered. *Demand Media (RPMs, 13 April 2009).*

ICANN Reserved Name List—Add Famous Trademarks. Famous trademark holders (shown by a final decision of a court or trademark office in any jurisdiction) should be allowed to add their name to the existing ICANN Reserved Name list. *Visa Inc. (11 April 2009).* The reserved name list should include trademarks designated as well-known globally. *Hearst Communications, Inc. (13 April 2009).*

gTLD Reserved Names List for Global Brand Owners. An automatic "Reserve Name List" should be created for global brand owners. To be on the list the global brand owner must have a trademark that is registered in multiple international jurisdictions and at least one jurisdiction must have a stringent review process for registrations. The list database could be run by a third party but ICANN must maintain ultimate responsibility and accountability. It must have an appropriate challenge procedure to seek removal of a name from the list. *MarkMonitor (10 April 2009);MarkMonitor (Module 1, 10 April 2009).* See also *Hearst Communications Inc. (13 April 2009); COTP (13 April 2009); IHG (Module 2, 9 April 2009).* ICANN should extend the benefit of a Reserved Names list, which ICANN has given to itself, to globally strong and well-known trademarks, and is hopeful that the IRT may propose a solution based on this concept and that ICANN will support it. *Microsoft (Guidebook, 13 April 2009).*

Create a Second Level Reserved Names List (specification 5). A second level reserved names list database similar to the reserved names list for gTLDs should be created based upon

submission of trademarks by corresponding rights owners, with a proper challenge procedure for removing any name. Only those rights which have been granted by jurisdictions requiring trademark review and evaluation would be eligible for inclusion in the reserved names list. Only legitimate owners of names appearing in the reserved names list should be allowed to register these domains and variations thereof. *MarkMonitor (10 April 2009).*

Pre-Launch: Include Global Brands on Reserved Names List. The guidebook should be modified to include a category of global brands for inclusion on the reserve list based on clearly defined objective criteria, and with contract terms in registry agreements requiring all new string applicants to adopt and adhere to this list. If an applicant pursues a name on the reserve list, a dispute procedure should be provided with cost borne by the registry applicant. (See comments text for additional objective criteria proposed.) ICANN itself should use the reserve list to deny third party applications for TLD strings that correspond to or are confusingly similar to reserved brands. A WIPO-operated mechanism for appealing ICANN decisions based on the reserve list should be established. In the application process, "automatic opposition" status should apply to applications for TLD strings that correspond to or are confusingly similar to global brands not yet on the reserved list or which have been otherwise identified after the initial application screening. *AT&T (13 April 2009).* See also *M. Palage (14 April 2009).*

At-Launch: Use of Global Brands Reserve List for Second Level; Standard Sunrise Process. The reserve list should also help prevent infringing or confusingly similar third party registrations at the second level. ICANN should mandate a standard sunrise at the second level and the reserve list at the top level should be used to establish eligibility for second level domain sunrise priority rights (but such sunrise protection will not be limited to such names for trademark holders). A centralized credentialing process should be developed by ICANN to allow one stop confirmation of eligibility to participate in the new gTLD sunrise processes and to establish rights in dispute resolution processes. All registry operators should be required to follow and facilitate this standard sunrise approach. *AT&T (13 April 2009).*

Post-Launch Expedited Takedown. Applicants should be required to implement procedures for rapid takedown of registrations that infringe IP rights. *AIPLA (13 April 2009); Regions (13 April 2009); COTP (13 April 2009).* A post-launch rapid takedown procedure has much going for it. *Lovells (14 April 2009).*

Second Level – Expedited Suspension Mechanism. An expedited domain name suspension mechanism is essential to safeguard trademark owners' interests whether implemented exactly as WIPO suggests or like another model. *MARQUES (13 April 2009).* See also *M. Palage (14 April 2009).*

Threat to Olympic Trademarks and Need for Solutions. The concerns of the International Olympic Committee (IOC) about the proposed new gTLD system, including the threatened proliferation of cybersquatting and as expressed in its letter of 5 Dec. 2008, have not been addressed to the IOC's satisfaction. The IOC should not be put in the position of having to spend time, energy and funds to engage in protracted and costly proceedings to protect the Olympic

trademarks against cybersquatting under the new gTLD system. In addition, the possibility of numerous ambush marketing opportunities by third parties would likely threaten the revenue base of the IOC and other members of the Olympic Movement. Notwithstanding the IOC's continued opposition to the new gTLD project, the IOC strongly suggests and holds ICANN responsible for implementing solutions. Measures such as the "Pre-Delegation Dispute Resolution Procedure" and the proposed WIPO "Post-Delegation Dispute Resolution Procedure" are useful starting points to address higher level responsibility regarding the expected increase in cybersquatting from the new gTLD system. The system should expressly provide effective remedies for trademark owners and a list of reserved Olympic Trademarks, based on the statutory protection afforded to the Olympic Movement which sets it apart from other commercial entities. IOC reserves its right to take action against ICANN for damages resulting to the IOC or Olympic Movement from the implementation of the gTLD proposal. *International Olympic Committee (9 April 2009).*

Cost Shifting from Brand Owner to Infringer. LEGO et al. agree with AT&T in its letter of 15 December 2008, that any costs and fees associated with an infringement should shift from the brand owner to the infringer (See also letter of Corporation Service Company, 15 December 2008, and letter of ITT Corporation, 15 December 2008). *LEGO et al. (6 April 2009).*

Bad Faith Registrations. ICANN should consider a less costly and more efficient IP protection solution that shifts burden of proof from legitimate brand owners to bad faith infringers. The application procedure should initially include due diligence by ICANN regarding serial domain name abusers. During the objection period, the DRSP should have discretion to give strong consideration in favor of brand owners when dealing with repeat offender cases. Brand holders should have the ability to consolidate complaints against the same party to lower costs. *Visa Inc. (11 April 2009)*.

Effective Preparation Suggestion re: Trademark and Malicious Conduct Fora. Prior to holding meetings/fora about trademark protection and malicious conduct, it is suggested that a catalog of possible solutions be assembled (e.g., existing practices at gTLD and ccTLD levels) so they can be discussed at the meetings. *A. Abril i Abril, GNSO Transcript at 58 (28 Feb. 2009).* It is important that the forum discussions be highly focused on specific solutions, not just a rehash of what is already known. *C. Gomes, GNSO Transcript at 56-57(28 Feb. 2009).*

Focus on Timing. The forum work and discussions should include a focus on timing –i.e., what can be done pre-registration (e.g., sunrise); at time of registration (e.g., verification and notification) and post-registration (e.g., takedown). *P. Sheppard, GNSO Transcript at 58-59 (28 Feb. 2009).*

Clarification Needed on Cases of Corporate Brand Registry and Subsequent Closing with No Rebidding. Further clarification and thought is needed to cover situation where a company applies for a string identical or confusingly similar to its name, but then decides to shut it down; the guidebook does not seem to have a recognition that this is a unique circumstance and that this type of registry cannot be rebid by ICANN (i.e., rebidding of registry associated with a

trademark and highly identified with a brand would put ICANN at great legal risk). *M. Cade, GNSO Transcript at 69-71 (28 Feb. 2009)*. This concern regarding a shutdown with no rebidding should also be looked at in context of community TLDs. *T. Ruiz, GNSO Transcript at 71 (28 Feb. 2009)*

Clarify Corporate Brands Issue. More clarity is needed on the issue of corporate brands; they don't fit into either the community or open models. *F. Felman, MarkMonitor, GNSO Transcript at 72 (28 Feb. 2009).*

Second Level Fairness Concerns re: Disputes. Is ICANN considering additional procedures applicable to these new gTLDs for second-level disputes which will either be supplementary or alternative to the existing UDRP? It is unfair and unbalanced to change the rules for second-level disputes in the context of a proposal for expanding at the first level. The way to address that is for a separate comprehensive review of the existing UDRP on its own and not as a kind of tail on this new gTLD dog where only one side's complaints are being really taken into account at this stage. If you are going to have a UDRP for second level post-launch disputes, it ought to be uniform across all TLDs; there shouldn't be some separate or alternative process that applies to new gTLDs. *P. Corwin, Internet Commerce Association*, *GNSO Transcript at 91-92 (28 Feb. 2009).* The UDRP by itself could be a subject for a very extensive review to deal with all the problems that have arisen in its application over the last dozen years. We don't want to see far-reaching changes in protections at the second level kind of as an afterthought in the new gTLD process. *P. Corwin*, *Internet Commerce Association*, *Public Forum Transcript at 43 (5 Mar. 2009).*

No Expansion of Rights Beyond Existing Law; Opposition to Trademark Reserved Names List. We need to take care that trademark protection solutions protect existing rights under national and international law and do not give rights in the DNS that don't exist under existing law. *P. Corwin*, *Internet Commerce Association*, *Public Forum Transcript at 43 (5 Mar. 2009).* ICA objects to creation of a reserve list of trademark names as this would provide rights protections beyond the geographic and relevant marketplace limitations of trademark law. *ICA (13 April 2009)*

UDRP Substitution Concerns. ICA also objects to imposition of new rights or procedures to supplant or supplement the UDRP absent extensive consideration of such proposals in a process that ensure consideration of registrant concerns about current UDRP enforcement trends. In particular, WIPO correspondence to ICANN shows that a substantial substitution for and undermining of the UDRP is being put in play in one-sided fashion in the new gTLD process. *ICA (13 April 2009).*

UDRP Enhancement. Efficient, reasonably priced, standardized mechanisms must be available to resolve second level registration conflicts. The UDRP should be reviewed and enhanced as needed to respond to the planned expansion of the domain name space. New registry agreements should ensure operator and registrar adoption and enforcement of any UDRP enhancements. *COTP (13 April 2009); AT&T (13 April 2009).* Such mechanisms could include,

e.g., a central list of strings found to be registered in bad faith via UDRP; automated notice to prevailing party of subsequent registration of previously adjudicated string; opportunity to require registrant to demonstrate good faith registration. *IHG (Module 3, 9 April 2009).*

The gTLD Proposal Opposes the Territoriality Principle; Auction Concern. The new gTLD proposal opposes both the Paris Convention and trademark law principle of "territoriality." The DNS is international and assigns automatically international rights over the uniqueness of the domain name. No such automatic registration system exists for trademarks. If two valid and legitimate trademark owners apply for the same string, the suggested "string contention" procedures do not answer this problem, and therefore the proposed auction mechanism will take place more often than not. Given the nature of the auction mechanism, trademark owners with a stronger financial basis will prevail over other legitimate mark owners. *NCUC (13 April 2009).*

The gTLD Proposal Bypasses the International Trademark Law Classification System and Creates "Genericness" Doctrine Problems. The current international system allows multiple identical marks to exist under different classes of goods and services. How will this be addressed? The proposal also does not address the issue of generic names and how it will determine who will have rights upon words—e.g. if a wine company applies for .wine; this contradicts genericness doctrine of trademark law and raises anti-competition questions. *NCUC (13 April 2009).*

III. Analysis and Proposed Position

Many comments called for enhanced rights protection solutions to address trademark infringement in new gTLDs, including expedited suspension mechanisms, global brands reserved names lists, standard sunrise periods, and post delegation dispute resolution procedures.

Specifically, ICANN was requested to create a trademark registry to be used for all subsequent sunrise periods to eliminate the need and cost to validate rights for each extension launch or new gTLD application process; this registry can be used as a reference for both first and second level registrations. One RPM could be a uniform sunrise process for all new gTLDs whereby trademark holders could at very low fees register domain names before the general public. An alternative would be a form of protected name registry (centralized database overseen by ICANN) allowing trademark owners and certain other community representatives to apply to have their trademarks or relevant strings placed on the reserve list.

It was suggested that a less costly and more efficient IP protection solution that shifts burden of proof from legitimate brand owners to bad faith infringers be considered.

One comment noted that the current international system allows multiple identical marks to exist under different classes of goods and services and proposals should address the issue of generic names and who will have rights upon words.

It was also noted that ICANN needs to take care that trademark protection solutions do not give rights in the DNS that don't exist under existing law.

The implementation issues associated with protection of trademarks are complex and require additional analysis to develop a robust solution that is both practical and cost effective. As described above, public consultations will evaluate the recommendations developed by the IRT, and alternative proposals from the public consultations and comment periods, in order to develop solutions that reduce the burden on brand holders in policing infringing registrations in new gTLDS. The solution should be narrowly tailored wherever possible to address concerns that the new rights protection mechanisms should not expand the rights currently available to brand holders under international trademark principles.

ICANN notes the substantial and significant work of the IRT in developing solutions to address trademark protection issues. The work includes several substantive and detailed implementation recommendations. These proposals will be considered specifically in ensuing consultations. The recommendations can be read at https://st.icann.org/data/workspaces/new-gtld-overarching-issues/attachments/trademark_protection:200904281.

The recommendations include (as explained in the report):

- IP Clearing house, Globally Protected marks and associated rights protection mechanisms, and standardized pre-launch rights protection mechanisms,
- Uniform Rapid Suspension System,
- Post-delegation dispute resolution mechanisms at the top level,
- Whois Requirements for new TLDs, and
- Use of the algorithm in string confusion review during initial evaluation.

While it is anticipated that the proposals will not be adopted verbatim or necessarily as a complete set, they represent an extremely well thought out set of proposed solutions for serious consideration and it is anticipated that the Guidebook will reflect all or most of this work.

The unique issues raised by the financial industry merit additional evaluation and consideration. Because of the increased risk of identity theft and abusive registration targeting the financial industry, ICANN will carefully review the recommendations proposed by the APWG and other industry groups to develop solutions to address malicious abuse in new gTLDs.

TLD DEMAND & ECONOMIC ANALYSIS

I. Key Points

- The economic analysis published to date describes benefits of expanding the domain space.
- The report is being augmented to map more closely to the questions originally set out by the Board and indicate the importance of determining demand for new TLDs.

II. Summary of Comments

No public demand. The public has spoken loud and clear. New gTLDs are not wanted or needed. As stated in the "ICANN at a Crossroads" report, ICANN should constrain itself and do what it is intended to do since its inception which is make sure that the Internet's technical infrastructure works properly. *D. Harris (29 Mar. 2009).* Registration statistics, comments from the U.S. Dept. of Justice and the distribution of UDRP cases all demonstrate user preference for legacy gTLDs. New TLDs are sub-prime. Consumers are not driving the demand for more gTLDs. New gTLDs have been added successfully to the root but they have neither increased user satisfaction nor solved identified problems. Trademark owners have felt the pressure to make defensive registrations. Now we are poised to do the same thing over again. *K. Ryan (13 April 2009).* Additional TLDs are not needed at this time. It is not ICANN's role to dictate policy but to moderate and build consensus among Internet users. Since the vast majority of Internet users oppose any effort to introduce new TLDs it would make sense for ICANN to acknowledge this and act accordingly. *Khamma Group LLC (13 April 2009).* There is no evidence to suggest that new TLDs are in fact needed to promote competition and choice. *NBCEP (13 April 2009).*

Demand study needed; cancel 2009 launch. We ask ICANN to conduct broader, global public studies to validate its assumptions about the demand for these new TLDs. To allow more time for this research, the 2009 launch of the new TLD program should be cancelled. ICANN may ultimately find there is no need for new TLDs to exist since .com has been and continues to be the dominant extension among users. *Visa Inc. (11 April 2009).* Do not dilute the current gTLD pool, there are still a lot of excellent .coms to purchase; the new proposal will bring more ICANN revenue but create problems for everyone else; as in case of .biz and .info, more suffixes doesn't instantly generate more relevancy. *C. Gelinas (13 April 2009).*

Need to justify demand. ICANN has not yet provided meaningful data on consumer demand/need or offered a satisfactory consideration of the potential exposures to consumers and brand owners that could arise from the gTLD program's implementation. ICANN needs to commission and publish an in-depth and neutral scholarly analysis accompanied by thorough fact finding on all the key issues. Anything less is inadequate to justify an undertaking so massively transformational to the Internet and world commerce. *ANA (12 April 2009).* Whether new gTLDs are needed in the first place should be extensively evaluated. *COTP (13 April 2009).*

See also *Lovells (13 April 2009).* Version two of the guidebook did not address the request that ICANN examine seriously for whose benefit the proposed new gTLD round is being launched. The need for the new gTLDs has not been adequately substantiated and as currently scoped presents serious concerns for consumers and brand owners. Launch should be delayed until strong need for more gTLDs is demonstrated with adequate safeguards in place to prevent exploitation of others' brands and consumer confusion and harm. *Time Warner (13 April 2009). See also Hearst Communications, Inc. (13 April 2009).* A majority of MARQUES members question the value of expanding gTLDs, and have great concern that the new gTLD program will increase administrative and financial burdens for trade mark owners. *MARQUES (13 April 2009).* See also *AIPLA (13 April 2009).* Based on industry consultations, there is no demand for new community-based gTLDs in the financial sector. ICANN has not squarely addressed the majority of first round comments, which were against the launch of new gTLDs. ICANN has failed to show that the benefits of new gTLDs outweigh the costs and risks to consumers and businesses. Launch should be suspended until such time as the program can be entirely reconsidered. *Regions (13 April 2009).* There is still a lack of assessment of the need for any new gTLDs that offer a clearly differentiated domain name space with mechanisms in place to ensure compliance with purposes of a chartered or sponsored TLD. *SIIA (13 April 2009).*

TLD Justification. Each applicant should provide a detailed analysis justifying a request to establish a new TLD, identifying any risks to health and safety of consumers, the impact on Internet stability and any economic benefit of the new TLD. The current global recession should be treated as a presumption that strongly weighs against any widespread introduction of new gTLDs. *Verizon (13 April 2009).*

Expand the DNS in a controlled fashion and for specific reasons. Any DNS expansion should be done in a controlled fashion where the clear benefits of expansion far outweigh the attendant costs to Internet users and be done for specific reasons, such as: careful introduction of country-specific IDNs to meet the Internet demand in non-ASCII characters, especially for emerging markets; or expansion of the DNS to include gTLDs that are specific to certain groups or communities, provided that such gTLDs have up-front verification mechanisms to ensure that registrants meet all enunciated registration criteria and have rights in the second level domain they wish to register. In contrast, there is no need to expand the pool of open TLDs beyond those entered into the root in previous rounds of expansion. *Yahoo! (13 April 2009).* Regions would support a very limited rollout of new gTLDs (an option which ICANN appears already to have rejected). *Regions (13 April 2009).*

The new gTLD program is necessary and beneficial. The .com namespace is overcrowded. Opening up the TLD space will allow registrants, for the first time, to be able to obtain reasonable domains at a reasonable price. It will also allow legitimate trademark holders to own their own trademark in a TLD that is relevant to their industry. Domain holders will self designate under top level domains as the process rolls out (e.g., United Airlines might own united.air; United Van Lines might own united.vans). The plan will help consumers. For example with the addition of a top level ".eco", users and search engines can differentiate between sites with an ".eco" labeling that aim to serve an eco-friendly purpose, versus other sites. The new

TLDs will focus the meaning of URLs—as opposed to creating confusion, as some have claimed. *Dot Eco (13 April 2009).*

Demand for new gTLDs exists and competition to .com will emerge from new gTLDs. We cannot support comments that claim there is no demand for new TLDs or those that assert that there is little probability of successful competition to .com market predominance. Competition will evolve as a consequence of many new TLDs in the aggregate (and has begun with .mobi which may become the de facto domain for the mobile environment). *e-COM-LAC (13 April 2009).* The new TLD process will bring innovation and competition to the DNS in a responsible and controlled manner. *Demand Media (DAG, 13 April 2009).*

Support for Expedient introduction of new gTLDs. The At-Large Advisory Committee agrees with and supports the expedient introduction of new gTLDs especially those offering support for IDNs. A number of components of the proposed policy present unnecessary barriers to entry for the broadest possible variety of gTLD applicants*. ALAC (19 April 2009).*

Economic Report Lacks Analysis of gTLD Impact on Emerging Countries. The economic report does not analyze the impact of the new gTLD program on emerging countries (e.g., in Africa, Latin America, Mexico). Many emerging countries are concerned about the new gTLD impact on e-crime and the ability to deal with it. Emerging countries concerns need to be studied to ensure that the new gTLD program does not further the digital divide. *A. Mack, AM Global, Public Forum Transcript at 28-29 (5 Mar. 2009).*

Economic Report generally lacks analysis; need for comprehensive study. The economic statements are not analysis documents, but rather are statements (i.e. position papers). Are we getting a real economic analysis funded by ICANN or must the community fund and do the economic analysis it asked for? *M. Cade, Public Forum Transcript at 39-40 (5 Mar. 2009).* The reports fall far short of the comprehensive economic analysis that helps ICANN identify how to structure the rollout of new TLDs in a manner and pace that will most likely result in increased competition and choice. The posted reports do not meet the criteria for this study set by the ICANN Board more than two years ago. ICANN should commission a comprehensive economic study; its results must be fully considered by the ICANN community before this overarching issue can be considered resolved. *Time Warner (13 April 2009).* See also *3M Company (15 April 2009).* ICANN should make clear that the new gTLD application window will not be opened until it has commissioned, received and published an economic study responsive to the Board's October 2006 directive with reasonable opportunity for public review. Such an approach would not be incompatible with carrying through the IDN ccTLD fast track initiative and perhaps even a limited launch of other IDN gTLDs. *COA (13 April 2009).* See also *AIPLA (13 April 2009).* No clear plan has been presented for how more work will be done on the overarching issue of "demand and economic analysis." *IPC (13 April 2009).*

Economic report is seriously flawed in its gTLD pricing analysis. The report is more in the nature of an opinion piece and the analysis of price caps and pricing issues is deficient. *ICA (13 April 2009).* See also *COTP (13 April 2009).*

Economic report fails to answer basic cost questions. The economic study fails to answer basic questions such as what value registrants place upon their domain names, the level of switching costs, and what the true cost of providing domain registry services is. ICANN fails to explain why domain registration costs at the wholesale level are going up toward $7/year and beyond (and not facing competitive tenders) whereas comparable services for toll-free 800 numbers cost only 10.49 cents/month and have been going down. These are very similar technologically, central databases of comparable size with first-come, first serve allocation methods, deletions, registration records, etc. Internet domain name databases arguably have even lower costs operationally relative to the telephone system. *G. Kirikos (7 April 2009).* ICANN should abandon the March 2009 economic study; it fails to answer any of the questions the Board put to ICANN staff in October 2006. ICANN has not yet made a cogent and defensible case about the economic effect of DNS expansion as proposed in the draft guidebook, and ICANN must do so before moving forward. *Yahoo! (13 April 2009).*

More complex economic analysis needed. The report on competition and pricing is too generic and does not reflect the complex economics of the DNS. SIDN therefore does not comment on the report since this topic needs careful consideration which is not stimulated with such a generic economic approach. SIDN looks forward to providing comments on a more detailed and funded analysis of the economics of the DNS and the impact on it of introducing new gTLDs. *SIDN (14 April 2009).* ICANN needs to complete the “full market” economic analysis as represented by ICANN’s President and CEO at the October 2006 annual ICANN meeting. Failure to do so calls into question the entire foundation upon which ICANN has based the new gTLD process; it is a condition precedent. *M. Palage (13 April 2009,* citing reference article *“ICANN’s Economic Reports: Finding the Missing Pieces to the Puzzle”).* The report has fatal flaws; it lacks empirical data and other academic rigor sufficient to support its conclusions and should be set aside. A new comprehensive empirical study of the domain name marketplace should be undertaken. *COTP (13 April 2009).* Version 2 also lacks a requisite economic and demand basis for the major undertaking of rolling out new gTLDs. Based on public actions to date, ICANN staff have not carried out the directive of the ICANN Board on this matter. The study is insufficient to answer the Board’s questions or to serve as a basis for evaluating the effect of increasing the number of gTLDs before proceeding. *SIIA (13 April 2009).* The two reports ICANN issued after release of version 2 of the guidebook seeking to address consumer benefits and the lack of need for price caps are based on unproven and untested assumptions. *AT&T (13 April 2009).* Economic analysis should not be confined to the issue of predicting TLD demand but rather to identifying through analysis of available data how the new gTLD rollout can be implemented in a way that maximizes competition and increased choice for consumers; comprehensive analysis of the market—as requested by the Board in 2006—is needed before the new gTLD launch proceeds. *eBay (13 April 2009).*

Independent economic study of the market. ICANN should pay for a truly independent economic study of the market (instead of commissioning an economic advocacy paper designed to support its wish to rollout new TLDs). In view of this market analysis it could be determined whether the goal of the scheme is proportionate to the potential effects of new TLDs on

consumers and business owners. In addition, it may show that a gTLD expansion (if any) should be limited until adequate, low or no-cost safeguards are in place to protect consumers, businesses and brand owners from brand abuse, confusion and cyber fraud threats. *European-American Business Council (1 April 2009).* See also *Regions (13 April 2009); COTP (13 April 2009).*

Economic study does not global demand or economic impact on registrants. A study that evaluates global demand and accounts for the current global recession would be more appropriate; it might suggest that ICANN launch a program isolated only to IDNs or geographic-based TLDs that are supported by a significant community demand. *MarkMonitor et al. (10 April 2009).*

III. Analysis and Proposed Position

ICANN appreciates the comments that it has received with respect to the question of demand and the effect of demand upon the new gTLD program. Some of the comments ask ICANN to provide further economic analysis to support a demand for new gTLDs, while other comments suggest that such demand already exists and that no further study is needed. Some of the comments also ask ICANN to commission the economic report that the Board requested in October 2006 in conjunction with other matters.

On March 4, 2009, ICANN posted two reports written by Dennis Carlton, a professor at the University of Chicago and the former chief economist for the United States Department of Justice Antitrust Division. In those reports, Professor Carlton set forth his preliminary views that new gTLDs would enhance consumer welfare in a number of areas, in particular by decreasing prices, increasing output, and increasing innovation.

ICANN has asked Professor Carlton to supplement his work by addressing the comments that ICANN has received on these topics. ICANN intends to post the results of Professor Carlton's work prior to the Board Meeting in Sydney.

POTENTIAL FOR MALICIOUS CONDUCT

I. Key Points

- As the level and sophistication of malicious conduct involving the DNS increase, the processes for combating it must evolve and match those increases in scale. ICANN agrees with the commenters that have recommended that it should enable and promote the development of more efficient processes for mitigation through the incorporation of additional provisions within the registry contracts and registrar accreditation agreements.
- The addition of new gTLDs provides an opportunity to improve the current mechanisms and the enforcement of contractual requirements for implementing those mechanisms.

II. Summary of Comments

Working Group. ICANN should initiate a process similar to the IRT to identify best practices and mandatory rapid response and remediation procedures to minimize consumer harm from fraud and malicious conduct. *AT&T (13 April 2009). IHG (Module 5, 9 April 2009).*

Impact of More TLDs. "About the amplification of malicious conduct, I think malicious conduct is doing very well right now with all the TLDs that are currently in operation. I [fail] to see how adding more TLDs will compound this problem. I think you have to solve malicious conduct. And perhaps if you look at one of the main vehicles for this, which is spam, that's one thing you could probably look at, but I really don't see how adding these – adding a new round of TLDs will increase or severely aggravate this type of conduct." *T. Harris, GNSO Transcript at 57 (28 Feb. 2009).*

Effective Preparation Suggestion re: Trademark and Malicious Conduct Fora. Prior to holding meetings/fora about resolving trademark protection and malicious conduct concerns, a catalog of possible solutions should be assembled (e.g. existing practices at gTLD and ccTLD levels) so they can be discussed at the meetings. *A. Abril i Abril, GNSO Transcript at 58 (28 Feb. 2009).*

Increased risk of fraud and other malicious conduct. The new gTLD proposal will escalate fraudulent and/or malicious activity, particularly through use of Internet domain capture and brand impersonation. The proposed extension of the gTLD space threatens to increase the burden on consumers and service providers without addressing the structure for management of web domains to offset these risks, to the detriment of consumers, businesses and the Internet as a whole. To address this ICANN should consult more widely with the Internet business and consumer communities and with consumer organizations in all of the major geographic areas to assess and address the impact of imperfect domain management on these stakeholders. *P. Taylor, Bradford & Bingley (5 April 2009).* The proposal could escalate fraud (e.g., phishing, pharming) and other malicious activity and further erode public confidence in

the financial sector at a time of general instability. *Regions (13 April 2009).* Concrete steps have not yet been taken to advance efforts to identify, analyze, and make recommendations on the critical issue of malicious conduct, which must be done before a full rollout of new gTLDs can be undertaken. Malicious behavior using false or misleading domain names costs industry as well as society and consumers billions of dollars in efforts to prevent phishing, false domain resolutions, fictitious identities and other malicious behavior. *SIIA (13 April 2009).*

Community outreach encouraged. eBay looks forward to learning more about how ICANN plans to address the third and fourth "overarching issues." Our companies have considerable expertise and experience regarding security and stability issues, and especially with regard to the fight against phishing and other online misconduct, fraud and criminal behavior. We hope that ICANN's approach to these issues will be outward-facing and will take advantage of the considerable community resources available. We commend ICANN for reaching out to the Anti-Phishing Working Group for its assessment of the risks of increased criminal abuse in the new gTLDs and how this risk might best be mitigated. This is a good first step*. eBay (13 April 2009).*

Security and stability threat. INTA views malicious conduct as a threat to the security and stability of the Internet as a commercial marketplace and addressing this issue must be afforded equal weight with the technical security and stability issue. *INTA (8 April 2009)*

Evolving Risks to Health and Safety of Consumers Require Analysis; Burden on Brand Owners. Brand abuse and online fraud will likely increase exponentially upon introduction of hundreds or thousands of new gTLDs. Domain name abuse problems are growing both in numbers of incidents and in complexity and ingenuity of the attacks. Consumers are the ultimate victims, suffering loss of time, money and even health and safety. While the risk may be mitigated by the mechanisms to be proposed by the IRT and adopted by ICANN, the tangible and intangible costs of policing and remediation of top-level and second-level strings will continue to be shouldered by brand owners*. MarkMonitor et al. (10 April 2009).*

Standardize Measures Against Abuse (question 43). ICANN should mandate measures to mitigate abuses so that they can be fully vetted and standardized. Allowing registries to define their own policies for policing, managing and remediating is too vague. There appears to be industry support for a group like the IRT to assist in establishing and developing draft proposals, including an effective mechanism for insertion in registry contracts to deal with malicious conduct. *MarkMonitor (10 April 2009).* Instead of allowing each registry to define policies against abuses which would be inefficient and confusing, ICANN should create standardized mechanisms against abuse, including the adoption of the post-delegation dispute resolution procedure suggested by WIPO. In addition, outside of the de-accreditation process, ICANN should explain how it intends to improve its own internal compliance activities to deal with future registry and registrar abuses. ICANN must ensure there are adequate means to issue sanctions and punishments to any registry or registrar that engages in unlawful activities. *Verizon (13 April 2009).* If the IRT recommends the adoption of standardized measures to serve as a "floor" then Microsoft would endorse such a recommendation. *Microsoft (Guidebook, 13*

April 2009). Consideration should be given to the WIPO post delegation dispute resolution proposal. *COTP (13 April 2009).*

Strong controls on registries, registrars and registrants help prevent malicious conduct. Such controls would include an effective methodology to identify all irresponsible parties and rapid and strong action by ICANN against any party shown to be undertaking or facilitating malicious activity, as well as protection against abuse such as web browser and email security requirements. *BITS (13 April 2009).*

III. Analysis and Proposed Position

Comments suggest that increasing the numbers of TLDs will multiply the opportunity for, and the conduct of, malicious actions. Without much thought, this is obviously true in a set of scenarios. In other cases, increasing the number of top-level domains will serve to decrease opportunities for malicious conduct. Many types of this conduct depend upon the existence of large registries. As the distribution of registrations is spread across more registries, the payback for some of the malicious conduct models decreases. Also, as trademark holders brand their own TLD, consumers will become accustomed to visiting that site rather than the current "brand.tld" model. Since the brand owners will be able to restrict registrations, they can naturally prevent opportunities for malicious conduct. Finally, as the number of TLDs increases, users will rely more on search, denigrating models that depend on typos and URL random searches.

Having said that, the comments recommended that ICANN: 1) establish formal mechanisms to mitigate malicious conduct; and 2) institute a group, similar to the Implementation Recommendation Team (IRT), to oversee the implementation of those mechanisms.

The comments received do not specify which specific types of malicious conduct nor describe scenarios that would cause the most concern but several mention phishing, pharming, spam and other conduct that takes advantage of user confusion and similarity within domain names.

While ICANN did not receive the highest volume of comments on the issue of the potential for malicious conduct on the Internet, this subject is of concern and comments are taken seriously, especially giving ICANN's stability and security mission. Malicious conduct—such as spam, phishing, fraudulent email, the distribution of malware and the control of networks of compromised computers (botnets)—primarily victimizes end users who are not as well represented by organized groups as other stakeholders in the public comment process.

Most comments concern the types of malicious conduct which would take advantage of potential user confusion surrounding domain names. Most of the current criminal activities which take advantage of domain name confusion (e.g., phishing, pharming, fake pharma) take advantage of second level names and do not appear to be linked to numbers of or specific strings of top level names. Most studies report that phishing and pharming are concentrated within a relatively small number of TLDs and take advantage primarily of confusion at the

second level. The most recent additions of new generic TLDs in 2001 and 2002 (.biz, .info, .name, .pro, aero, .coop, and .museum) were not accompanied by notable increases in phishing using those TLDs.

The use of the DNS for general malicious conduct (to propagate malware or control bot networks) is already expanding significantly without the addition of new TLDs. Efforts to combat or mitigate many forms of malicious conduct are not necessarily hampered by the total number of TLDs involved but rather by the number and nature of the registries and registrars involved. The recent example of the Conficker worm illustrates this point. This worm utilized a large number of pseudo-randomly generated domain names to obfuscate its points of control. Effective collaboration to combat the spread of this worm was ultimately complicated not so much by the total number of domain names involved or generic TLDs utilized but instead by the involvement of ccTLDs with smaller, independent registries, without contractual obligations to adopt DNS-wide stability / security measures.

Efforts to control future malicious conduct similar to conficker will be complicated but are likely to be less dependent on the total number of gTLDs than on the number of registries and registrars managing them and how well those bodies are governed by ICANN. The addition of new gTLDs, if managed properly, should pose less concern for potential malicious conduct than more autonomous ccTLD names currently pose. If stronger compliance measures are implemented for new gTLDs, overall improvements in mitigating abuses involving gTLDs should be possible. However, no such potential advantage exists for improving controls over domains within ccTLD operations.

ICANN has been criticized for failing to adequately control current levels of malicious conduct using the compliance mechanisms currently available. Multiple contributors propose that ICANN form a group similar to the IRT to implement controls over registries and registrars. These contributors believe the IRT has acceptance as an effective model for the monitoring and auditing of these bodies.

The addition of new gTLDs provides an opportunity to improve the current mechanisms for enforcing compliance. As the level and sophistication of malicious conduct involving the DNS increase, the processes for combating it must evolve and match those increases in scale. ICANN agrees with the commenters that have recommended that it should enable and promote the development of more efficient processes for mitigation through the incorporation of additional provisions within the registry contracts and registrar accreditation agreements. This process should consider a wide range of possible options and additions to those contracts and attempt to gain consensus for the most effective choices.

The recommendation by some commenters to form a group similar to the IRT for the purpose of overseeing implementation of these measures is a logical one. The practicality of forming such an organization is not clear. The constituents of the IRT are corporations and partnerships representing stakeholders with strong financial interests in protecting intellectual property. An ‘IRT’ for malicious conduct issues (such as phishing, spam, fraud and distribution of malware)

would not have as clear a constituency. It would probably be comprised of security organizations and associations representing those with the greatest financial stake in reducing spam, phishing and the spread of malware.

The overall level of malicious conduct on the Internet and the forms of malicious conduct that utilize the DNS both appear to be increasing. ICANN agrees with the commenters that it should make every effort to establish mechanisms, such as new provisions in registry contracts and the Registrar Accreditation Agreements, to mitigate this conduct.

As an alternative to the formation of a single working group, process improvements can be developed by consulting with several existing groups dedicated toward the same purpose. ICANN has solicited the participation of several organizations concerned with DNS stability and security and, in particular, with preventing malicious acts. ICANN requested and received preliminary studies by the Anti-phishing Working Group (APWG) and the gTLD associations that address similar concerns – e.g. RISG. Those reports will be published when the groups writing them deem them ready. Other groups are being consulted, such as FIRST, and companies that are primary targets of attack that have instituted comprehensive security and preventative measures.

The preliminary reports indicate several areas where changes might be implemented immediately (i.e., included in the next version of the Guidebook:

- Background checks to determine if applicants have criminal records or a pattern/practice of cyber-squatting or other malicious acts,
- Facilitating the creation of security-specific TLDs that adopt stringent safe-guards,
- Implementation of standardized rapid take-down procedures,
- Consideration of heightened requirements for registrar accreditation,
- Amendment of Whois practices – e.g., requiring thick Whois, implementation of IRIS databases to facilitate universal understanding of Whois information in different languages, and
- Requiring removal of glue records for deleted registrations that can be used for phishing attacks.

ROOT ZONE SCALING

I. Key Points

- The study currently being commissioned through RSSAC and SSAC should answer key substantive questions about the effects of the coincident introduction of new TLDs, DNSSEC, IPv6, and IDNs on the DNS infrastructure.
- Secondary effects on other facets of the network and its usage are being considered and addressed in other fora.

II. Summary of Comments

Security and Stability. It must be ensured that the introduction of new gTLDs, including internationalized domain names, will not put at risk the security and stability of the DNS. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).* The Czech Republic recommends the reconsideration of the whole process of the introduction of new gTLDs and that an analysis be carried out which would confirm that the stability and security of the DNS system will not be endangered by this process. *M. Pochyla, Ministry of Industry and Trade of the Czech Republic (10 April 2009).*

Scope of study. Conduct a high-integrity study from a truly neutral company on the potential effects of introducing new gTLDs on Internet stability and massive consumer confusion. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009*). Security and stability, identified as an overarching issue, has received less than adequate attention by ICANN in the context of the new gTLD proposal. The focus on implications for the root zone operations is too myopic given the fundamental changes likely to result from the dramatically expanded approach to bringing new gTLDs online. The effect on the root zone is just one of the key areas touching on the concern regarding security abuses scaling with more TLDs. Broader and thorough review is needed (including assessing implications for many commercial and noncommercial operations which act as key facilitators of DNS distribution),with due regard for the increasingly complex and threatening environment in which security over the Internet takes place and for how stakes and risks have been raised in the current period of global economic uncertainty . *SIIA (13 April 2009).* What has not been and should be addressed is how simultaneous introduction of vast numbers of gTLDs, IDNs, IPv6 transition and the DNSSEC will affect the larger ecosystem of Internet intermediaries (e.g. network operators, ISPs and web hosting entities). *AT&T (13 April 2009).* It is unclear whether many of the technical concerns Microsoft raised in its prior technical comments will be considered within the scope of the SSAC and RSSAC joint study. ICANN should provide further clarity on the manner in which questions will be gathered and catalogued concerning the scaling-up of the root and whether those questions will be answered in this study. Microsoft reserves further comment until the results of that study are made available. Microsoft also welcomes ICANN's acknowledgement that registrant protection and

avoidance of end user confusion are security and stability issues. *Microsoft (Guidebook & Technical, 13 April 2009).*

Registry failures. ICANN needs to have a plan to deal with the possibility of multiple registry failures and conduct further analysis of associated risks to DNS stability and security. *AT&T (13 April 2009).*

Security and stability—financially-oriented sites. ICANN should compel registry operators of such sites to create and operate them only if they adhere to a minimum set of security requirements, including DNSSEC; controls over registry operators such as a limited number of registrars, background checks, approval by regulatory authorities and by the financial community; and other controls over registrars and registrants. The concept of security should extend beyond security of the DNS itself and also cover other situations involving inappropriate security or fraud risks. *BITS (13 April 2009).*

New gTLD proposal will cause instability and be harmful. ICANN, the DOC and the DOJ should review a paper about new TLDs written in 2004 by the W3C Technical Architecture Group and Tim Berners-Lee (http://www.w3.org/DesignIssues/TLD) which resonates about the instability and harm that could flow from the massive introduction of new gTLDs. *G. Kirikos (9 April 2009).* This unlimited TLD proposal should be shelved; the Internet does not need "innovation" but does need stability. Continuing to push for this TLD proposal will threaten the stability of the Internet and further undermine the public's confidence in ICANN's decision making and loyalties. ICANN is failing to address the core criticisms and concerns contained in the public record because the problems posed by the TLD proposal are insurmountable. *M. Menius (10 April 2009).* See also *R. Jackson (11 April 2009).* At some point the number of extensions will cause mass confusion, and the DNS system will be unmanageable for users, domain holders, website owners and trademark holders. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).*

Impact on Security. Quadrupling the name space will only exacerbate the inadequacy of ICANN's existing resources to police the domain name space for problems. Administration of the Internet and cyber security are inversely related – less oversight means more security issues for consumers and businesses. *European-American Business Council (1 April 2009).*

Scarcity of IP Addresses. The introduction of an unlimited/unknown number of new domain names does not seem to take the scarcity of IP-address resources into consideration. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Technical concern: is there major software support for new TLDs. Has ICANN communicated with any of the larger software providers (e.g., Microsoft, Mozilla) and major e-mail services to ensure they support the addition of new TLDs? If they are not willing to support these in a timely manner, it renders the entire new TLD process useless, which could be detrimental to long-term Internet stability and operation. ICANN must enter dialogue with these organizations

and create standards for adding new TLDs to software and other programs prior to such a massive expansion of new TLDs (re: Module 1, 1.2.3). *A. Allemann, DomainNameWire.com (6 April 2009).*

Interoperability concern. In Section 1.2.4 ICANN stresses that although it will delegate the TLD, this cannot force software manufacturers to support that TLD. ICANN needs to accept that its core mission statement is to make the Internet interoperable, stable and secure. If ICANN is not prepared to work with new gTLD applicants to ensure that their new TLD is accepted top down, then this questions ICANN's entire mission statement and the new gTLD program. If ICANN wants to pursue new gTLDs on such a vast scale, then it has to accept, plan and budget for work across the community to ensure their acceptance keeps the Internet operable. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

III. Analysis and Proposed Position

Ensuring security and stability of the Internet as a whole as the number of TLDs grows was a major concern in many of the comments. One comment went as far as to state that the "Internet does not need "innovation" but does need stability" which could be articulated as that innovation should not come at the cost of stability.

With resolution 2009-02-03-04, the ICANN Board asked the Root Server System Advisory Committee (RSSAC), the Security and Stability Advisory Committee (SSAC), and the ICANN staff to study the potential impact on the root zone stability that might arise when IPv6 address records, IDN top level names, other new TLDs, and new records to support DNS security are added to the root zone.

The scope of this study includes all aspects of root zone operations. Root zone operations is understood to mean all aspects of root zone data production, compilation, publication to the root servers, including anycast instances, and serving data from the root servers.

Aspects that are specifically within the scope of this study are:

- Addition of IPv6 to glue records,
- DNSSEC signing the root zone,
- Addition of DS Resource Records to the root zone,
- Addition of IDN TLDs,
- Addition of new TLDs at an accelerated rate and, and
- The impact of accumulated growth of the root zone.

Although changes to the root zone operations may affect user systems such as browsers or may affect local environments, those impacts are outside the scope of this study. They may well merit study in a separate effort.

The work is based upon a detailed terms of reference and the initial report is due in August 2009.

Many of the comments are about the secondary effects that may come from increasing the namespace rather than about how the DNS itself is affected.

Some of the comments are also not directly related to number of additional TLDs but to side effects that could be an issue with any number of additions. Some of these concerns, such as the acceptance of a TLD by software, have already been demonstrated in previous rounds of expansion and have proven not to be a threat to the system as a whole.

Calls for further outreach and study of such side effects of massive expansion run throughout the comments.

The study currently being commissioned through RSSAC and SSAC should go a long way towards answering questions about the effect of introduction of large numbers of new TLDs on the DNS infrastructure. However, it is not designed to answer questions about secondary effects on other facets of the network and its usage.

As a recommended course of action ICANN should continue to catalog all known studies on the expansion of the name space and publish this in a dedicated section of the new TLD site. This would allow the community and other interested parties to more easily find answers to their questions or concerns. It will also allow us to identify places where further study is warranted. Where clear gaps in knowledge are identified, additional independent studies should be considered.

EVALUATION

Procedures

I. Key Points

- The applicant evaluation questions and criteria are intended to clearly describe the information applicants need to provide to ICANN in order for ICANN to conduct the initial and, if necessary, extended evaluation of applications for new gTLD strings. The evaluation process is also intended to be fair and scalable.
- As much as an examination, the evaluation questions and criteria are intended to provide a guide to prospective TLD operators regarding preparatory steps necessary to start and operate a TLD registry.
- ICANN will publish additional information on the evaluators and the selection process, and will provide more detail on the conflicts of interest policy to be followed, after the Sydney meeting.

II. Summary of Comments

Pre-contract review; information re-certification. Given the potential delay between initial application and Transition to Delegation, ICANN should conduct a pre-contract review of each applicant to confirm that all eligibility criteria continue to be met. If material changes are uncovered, then ICANN should have ability to refuse to enter into the Registry Agreement. ICANN should also require that applicants re-certify the information they have provided in their initial application, in particular what is required in Section 1.2.3 of Module 1. ICANN should also state for all stages the responsible person(s) for conducting the pre-contract review and the pre-delegation technical check (Module 5 is silent). *INTA (8 April 2009).*

Fair evaluation process. If an applicant fails initial evaluation and applies for extended evaluation it should have the option to engage the same panel or choose a different panel. *Zodiac Holdings (13 April 2009).*

Objection filing (1.1.2.4). BITS is concerned that for applications that go into extended evaluation and are later approved there will be no opportunity to file an objection because the objection period closes after the initial evaluation stage. *BITS (13 April 2009).*

Who makes decision. More clarity is needed about who will make decisions regarding the need for an extended evaluation. *BITS (13 April 2009).*

ICANN should take a two-pronged approach to evaluation:

1. “Raise the curtain” —provide for greater transparency and stakeholder inquiry of an applicant’s proposed mechanisms to minimize abusive registrations and other activities that affect the legal rights of others—and
2. “raise the bar”—increase the criteria for earning a minimum acceptable score on proposed policies to minimize abusive registrations. A passing score of 1 on Q 31 (now Q 43) should only be given to applicants whose proposed mechanisms for minimizing abuses meet registry best practices. The standard for minimizing such abuses is to look at the best practices employed by existing registries or proposed by other registry applicants in the new round of gTLDs. ICANN should consider NetChoice’s specific suggestions for improving the application evaluation process (see comments text for details of proposed implementation and NetChoice version 1 comments). *NetChoice (Module 2, 13 April 2009).*

Understanding Before Filing an Application the Criteria Used by External Evaluators. ICANN should publish the criteria and information that its external consultants will get so applicants can see what those evaluators are going to see before they apply so they can better judge how many points they might get, whether they would win a dispute, etc. *P. Stahura*, *GNSO Transcript at 96 (28 Feb. 2009).*

Proposal re: Right to Operate Translations/Transliterations of the Same Name. This issue was not addressed in the first and second guidebooks. New gTLDs must be generic words and community-based to qualify for the right to operate translations/transliterations of the same name. Specific industry sector or well-defined global community gTLDs that meet the criteria to manage a top level domain space for such defined communities should be given the further responsibility of offering that community a gTLD in whichever languages or scripts individuals in that community wish to use. User confusion must remain a key concern in approving gTLD strings both in ASCII and IDN. There should be opportunity for applicants that intend to use generic words that hold meaning for well-defined/documented communities they represent to offer their constituents IDN options along with ASCII, rather than financially penalizing them as the current guidebook pricing structure does. One manager of single community ASCII and IDN Domain Names better serves registrants. Allowing the charging of potential community based gTLD applicants multiple times by different operators for each additional translated/transliterated ASCII or IDN name will be confusing to registrants and morally and financially offensive. (See comments text for more details of proposal.) *R. Andruff (13 April 2009).*

IIDN/ASCII Equivalents. Applicants must be permitted to apply for more than one string in an application if those other strings are IDN/ASCII equivalents of the base application, and ICANN must only charge the additional cost recovery fees associated with the string evaluation, not a separate application fee for each string. *M. Palage (14 April 2009).*

Evaluators. The second version of the guidebook contains no selection criteria or qualifications for evaluators. ICANN’s decision to include this information in its 25 Feb. 2009 “New gTLDs: Call

for Applicant Evaluation Panel Expressions of Interest" means it is likely to be read by a significantly smaller population than that which reads the DAGs. *INTA (8 April 2009).*

Lack of appeal. Whether to proceed to evaluate an application is entirely at ICANN's discretion with no appeal on any ground, and the applicant has to agree not to challenge the outcome of ICANN's decision. This contradicts existing common legal practice for organizations serving the public such as ICANN. While ICANN has to limit appeal possibilities to make the process manageable, the right balance between those aspects should be found. In addition, the guidebook lacks information on appeals against decisions of initial evaluation, extended evaluation, objections procedure, contention procedure, board evaluation, and board negotiations. *SIDN (14 April 2009).*

Conflicts policy. What is the ICANN policy for consultants and suppliers to the new gTLD process. No person or organization supplying such services to ICANN during any part of the process should be involved in any application. *MARQUES (13 April 2009).* ICANN should publish a policy for evaluators, other contractors and DRSPs, that makes clear that no person or organization supplying consultancy services to ICANN during any part of the process can be involved in an application in any way and that provides a way for applicants to know who will evaluate their application and to challenge them for cause shown. *IPC (13 April 2009).* Version 2 did not address this need for transparency in the evaluation process. *SIIA (13 April 2009); eBay (13 April 2009).* See also *Microsoft (Guidebook, 13 April 2009).*

Dialog with ICANN constituencies and community. ICANN should require contractors and DRSP providers to ICANN to engage in dialog with constituent parts of ICANN with relevant expertise and hold open meetings with the community where they outline draft procedures and receive feedback. *IPC (13 April 2009).* See also *SIIA (13 April 2009).*

Pre-Application Opinion. Is there a way for ICANN to provide a pre-application opinion regarding whether or not a proposed gTLD is "too similar to a Reserved Name," such that the would-be applicant can get a determination from ICANN before filing the application? *F. Hammersley, SAIC (Module 2, 24 Mar. 2009).*

Application amendment. Section 1.1.1 is unreasonable; considering how complex the process is it is unreasonable to reject an application based on missing documentation. Applicants should be allowed a reasonable timeframe to submit any extra documents. Especially in light of the fees that ICANN is demanding, all serious applications should be given due consideration. *M. Neylon, Blacknight Solutions (13 April 2009).*

Obligation to update application. Microsoft endorses the new requirement that applicants notify ICANN and submit updated information if previously submitted information becomes untrue or inaccurate. *Microsoft (Guidebook, 13 April 2009).*

Evaluation fee payment deadline. In terms of the payment deadline, it is impractical for many businesses to make a payment without being in receipt of any form of invoice; a single payment

may not be viable for some of the community applicants. *M. Neylon, Blacknight Solutions (13 April 2009).*

Electronic filing. Some ICANN language about electronic systems being online and reachable would be helpful (e.g., what if the ICANN servers were undergoing a denial of service attack on the day of the application submission deadline). *M. Neylon, Blacknight Solutions (13 April 2009).*

TLD Policies Question. There is still a surprising lack of "question in the evaluation regarding the policies the TLD will apply…how the TLD would look…" *A. Abril i Abril, GNSO Transcript at 75 (28 Feb. 2009).*

Evaluation panel selection procedures; conflicts. There are no published procedures on selecting Comparative Evaluation panelists. ICANN should conduct a conflict of interest check and institute other procedures. *Minds and Machines (13 April 2009).* Review committees should be chosen in a random fashion to avoid bias and more information is needed on who will be on panels. Conflict of interest guidelines for panels should be published. Panelists should be required to specify and publish conflicts of interest. Review committee members should be reviewed for conflict of interest. Persons with conflicts must be replaced. *Dot Eco (13 April 2009).* ICANN should clarify how expert panels will be formed, including the Geographical Names panel (e.g. who will sit on panels and how will their performance be monitored). *IPC (13 April 2009).* For any community-based financial gTLD, the issue of whether the evaluator should have a general knowledge of the financial service industry should be considered; any financial sector gTLD applications should be referred to the appropriate financial sector regulatory and industry bodies. *Regions (13 April 2009).* The conduct and competency of the external evaluators for .org and later .net redel left a great deal to be desired. While in 2004 there were better evaluators, the scale of the current round makes it possible that less competent evaluators will be selected. *E. Brunner-Williams (Module 2, 14 April 2009).*

Evaluator requests for more information. It is disappointing that the second version made no change regarding evaluators seeking more information. In cases where information required is not made explicit evaluators should be able to easily identify that and be required to make an explicit request for more information. *RyC (Modules 1-4, 13 April 2009).*

Limiting Evaluators' Requests for Further Information; Communications Channels. Providing only one opportunity for clarification (and only upon the evaluator's request) conflicts with the goal of allowing evaluators to obtain sufficient information to decide applications on their merits. *INTA (8 April 2009)*. Additional exchanges of information should be allowed; the current one exchange limitation is extremely inflexible given the level of commitment made by the applicant. Also, the provision for providing additional or clarifying application information should be amended to allow a more structured communication channel between applicants, evaluators and ICANN. *MarkMonitor Inc. (10 April 2009).* The one communication limitation certainly will not work with applicants whose first language is not English, and especially since IDN applications are expected. *NCUC (13 April 2009). DotAfrica (Module 2, 12 April 2009); Y. Keren (Module 2, 13 April 2009); L. Andreff (Module 2, 13 April 2009). S. Subbiah (Module 2, 13*

April 2009); D. Allen (Module 2, 13 April 2009). The limitation in 2.2.1 is too strict and will harm achieving diversity in new gTLD applications. *S. Soboutipour (Module 2, 12 April 2009).*

Fraud Question. Why was there not included a question in the draft application inquiring if the applicant or any of its officers or directors had been found to have committed fraud in the past? *K. Rosette, GNSO Transcript at 80-81(28 Feb. 2009).*

Additional disclosures. Applicants should disclose whether they or their funders have been enjoined from cybersquatting or been found to have violated others' trademark rights. Applicants should also answer the same series of questions as required under the Sponsoring Organization's Fitness Disclosure (see INTA comments text for specific questions). *INTA (8 April 2009).* In addition to requiring proof that an applicant is legally established and in good standing, thorough investigative checks of applicants are necessary, including board members, executives, and funding sources to identify any involvement in criminal or other wrongful activity associated with the domain name industry by those who seek to control a registry. Applicants with significant or repeated ties to illicit or wrongful activities should not be allowed to proceed. Falsification, misleading or omitted data should result in applicant disqualification or in the case of a delegated registry, a re-delegation. *MarkMonitor (10 April 2009).* There is no reason not to require disclosure; the ongoing absence of questions about fraud, fiduciary breaches, financial-related crimes, etc., is startling. *Microsoft (Guidebook, 13 April 2009).*

Applicant's Ethical and Legal Conduct. The initial evaluation process omits consideration of whether the applicant meets minimum standards of ethical and legal conduct; such standards must be considered and met. An applicant with a demonstrated pattern or practice or who has been found liable for cybersquatting, breach of registrar or registry agreements, domain related abuses or other fraudulent conduct should be ineligible to operate a registry. Because the applicant's pattern, practice or liability or unethical, unlawful or fraudulent conduct is not an enumerated basis for filing an objection, this criterion should be included as a ground to be explicitly considered during the evaluation of public comments under section 1.1.3. An application by an applicant that fails to meet minimum standards of ethical and lawful conduct should fail the Initial Evaluation with no possibility of Extended Evaluation. *INTA (8 April 2009).* The application procedure should initially include due diligence by ICANN regarding serial domain name abusers. ICANN should also evaluate the applicant's commitment to maintaining and enforcing publicly accessible, free, and accurate Whois requirements. *Visa Inc. (11 April 2009).* The evaluation process should take into account the record of past abusive conduct by the applicant or its associates in the existing or new TLD space. *Time Warner (13 April 2009).* See also *Hearst Communications, Inc. (13 April 2009); Verizon (13 April 2009); CADNA (13 April 2009).*

Applicant Legal Record. Being convicted of a crime, on its own, should not disqualify someone from being part of an application, with the exceptions of people convicted of fraud and officers of any ICANN-contracted party that has been de-accredited. *ALAC (19 April 2009).*

Trademark Question. As part of the initial round of "Evaluation Questions," a question should be added requiring applicant disclosure of whether it has been involved in any administrative or other legal proceeding, as plaintiff or defendant, in which allegations of trademark infringement of a domain name or cybersquatting (made by or against applicant) have been made, and the applicant should provide an explanation relating to each such instance (similar to SEC reporting requirements of litigation in the U.S.). *INTA (8 April 2009)*.

IDNs Evaluation: Language. Expert panels for all evaluation processes of an IDN TLD must include an expert from the local language community; this should cover initial evaluation, extended evaluation, comparative evaluation and dispute resolution. *CNNIC (13 April 2009).*

III. Analysis and Proposed Position

A number of commenters are concerned about the Initial and Extended Evaluation procedures, when objections can be filed, whether there should be an appeal process, and how ICANN intends to conduct pre-delegation review.

Several comments addressed the applicant evaluation criteria and questions. Some commenters suggested alternate or additional questions focusing on the applicant's ethical or legal conduct, involvement in prior cybersquatting cases or trademark disputes, and applicant plans for use of the TLD or procedures to deal with abusive registrations. Including such questions has always been a consideration, The countervailing concern has been the ease with which such criteria can be avoided or gamed by substituting straw man applicants of some other cloaking devise. Balancing these concerns, it is appropriate that the process signal that applicants involved in unacceptable prior conduct should not apply and, if they do, they will be excluded. Even if this provision is gamed in the application phase, it will still be effective post-delegation – ICANN recently de-accredited a registrar due to the conviction of an officer. These requirements will be reflected in additional questions in the Guidebook.

Comments also noted that ICANN needed to describe in better detail the selection criteria for evaluators, the criteria to be applied by those evaluators to applications, and the policy for dealing with conflicts of interest among evaluators.

The applicant evaluation questions and criteria are intended to clearly describe the information applicants need to provide to ICANN in order for ICANN to conduct the initial and, if necessary, extended evaluation of applications for new gTLD strings. The evaluation process is also intended to be fair and scalable. It is also intended to guide aspiring registry operators. The Guidebook is really a compilation of the discussion and papers written regarding TLD operation and process over the past 10 years.

One commenter suggested that if an applicant fails initial evaluation and applies for extended evaluation, it should have the option to engage the same panel or choose a different set of evaluators. This was not explicitly made part of the process in the past, as it seemed to work against the goal of a relatively speedy process. There are also safeguards in place – e.g.,

evaluator scores will be 'normalized' before publication to ensure consistency among scores. The scores of all panels on one subject will be compared to ensure consistency of results. However, by and large, there is not an overriding interest to disagree with this request, and to the extent that this point was not made clear, the option to request an alternative panel in extended evaluation will be incorporated into the next version of the Guidebook.

Another commenter asked that ICANN clarify who will make the decisions on the need for an extended evaluation. ICANN will identify the evaluators to be used in the new gTLD program. Decisions will be made based on which aspect of initial evaluation was not successfully passed by the applicant. For example, if the applicant failed technical evaluation, the applicant would have to remedy that section of its application. If an applicant applied for a geographic name and did not include an authenticated letter of support from the appropriate government, it would have to update that section before extended evaluation can be conducted. This extended evaluation process is similar to an appeals process. While the evaluation process does not have an "appeal" per se, the process does afford the applicant the ability to remedy application defects after the evaluation is complete. With the next version of the Guidebook, the process will also allow the applicant to select a panel other than the one that performed the initial evaluation. Therefore, the process already includes many of the hallmarks of an appeals process.

A number of comments focused on the evaluators, ICANN's process for selecting evaluators, the criteria to be used by evaluators and the conflicts of interest policy to govern evaluator conduct. ICANN will publish additional information on the evaluators and the selection process, and will provide more detail on the conflicts of interest policy to be followed, after the Sydney meeting.

It was noted that expert evaluators for an IDN TLD must include an expert from the local language community, and that this should cover initial evaluation, extended evaluation, comparative evaluation and dispute resolution. ICANN is in the process of identifying linguistic expertise as part of the applicant evaluation and is examining ways to include representation from the local language community for applications in IDN strings.

Some of these questions might be answered by ICANN's release in April for requests of expressions of interest by companies that might provide evaluation services. The announcement (link below) described the process for securing these services, including that the evaluation process will be open and transparent. The requests defines requirements for evaluation service providers including multicultural / multilingual aspects. Evaluation service providers also will have to address technical aspects of the different evaluation process and the ability to address varying volumes of work. As the process is conducted, additional information will be provided on the process for initial and extended evaluation, when extended evaluation is used, and how information is supplemented from applicants to evaluators. ICANN published the call for expressions of interest for independent evaluators on 2 April 2009 (http://www.icann.org/en/announcements/announcement-2-02apr09-en.htm). This announcement included links to further detail on each of the evaluation roles. Explicit in the

posting is the requirement for each potential provider to disclose all potential conflicts. These responses will be publicly posted. ICANN will publish more information following the Sydney meeting on how the evaluation panels will be formed and the criteria to be used by evaluation teams.

The evaluation process is not complete until a pre-delegation check is conducted. That process will ensure that the applicant continues to meet the criteria published in the Guidebook and has undertaken substantial steps to fulfill the commitments to meet the criteria made in the application. ICANN will provide additional detail regarding the pre-delegation check in the third version of the Guidebook.

In conclusion, ICANN intends to update the applicant evaluation questions and criteria for inclusion in the next Applicant Guidebook.

The deadline for expressions of interest in one of the applicant evaluation roles closes on 11 June 2009. ICANN intends to update the community on the process for selecting evaluators during the Sydney meeting.

DNS Stability & String Requirements

I. Key Points

- Two-letter ASCII names will not be delegated as ICANN relies on the ISO-3166 list as the authoritative basis for country-code TLDs. If a two ASCII letter label were to be allocated as a gTLD, it would create the opportunity for future collision between ISO-3166 country-code TLDs and gTLDs.
- Experience has shown that presentation behavior of strings with leading or trailing numbers can be unexpected and can lead to user confusion. As such, a conservative approach is to disallow numerals leading or trailing top-level domain labels.

II. Summary of Comments

Zone file question. An "important" zone file question posed by Joseph Lam was not answered. In this regard, ICANN should state clearly that registries will not be allowed to insert the TLD string alone as an A record or as an MX record in the TLD zone file. *W. Staub (13 April 2009).*

Two character limit exception. HP requests an exception to the two-character limit; it would prevent the company from acquiring ".hp," putting it at a competitive disadvantage. There should be exceptions and escalated review in cases like this one. HP should also be able to acquire IDNs without the 2-character limit. *HP.com (15 April 2009).* ICANN should accept less than 3 character IDN gTLD applications, especially geographical names. *S. Yanagishima (Module 2, 10 April 2009).*

ISO 3166. The "collision" with ISO 3166 can be solved in a simple way—that ISO 3166 two character namespace is limited, so the IDN provision can be changed so that 2 letter IDN strings visually similar within the ISO 3166 namespace will not be allowed, but any other strings will be allowed. *Y. Keren (Module 2, 12 April 2009). L. Andreff (Module 2, 13 April 2009).*

Purely numeric labels. What are the issues involved with that? *E. Brunner-Williams*, *GNSO Transcript at 98 (28 Feb. 2009.)* In section 2.1.1.3.2, the staff is reasonable in adopting the more conservative view, for the time being. *E. Brunner-Williams (Module 2, 14 April 2009).*

Allow a ".4u" gTLD. The gTLD rules should be changed to allow a .4u gTLD; based on our research there is an inherent desire for a .4u designation. The current process of looking into 1 and 2 character IDNs provides an opportunity to look at this issue. Also, regarding the restriction that a TLD cannot start or stop with a numeric number, this should be changed to allow for a TLD to start with a valid acceptable numeric character. We understand that IETF is removing this except for a numeric 0 or numeric 1. Regarding the restriction that 2 digit TLDs are reserved for country codes, there are no country codes that have a starting numeric digit, and some 2 digit TLDs are not country codes*. R. DeFee (10 April 2009).*

III. Analysis and Proposed Position

The majority of comments in this round were directed at the three character limitations, particularly with respect to CJK script, arguing that

- Risk of confusion between ISO-3166 ccTLDs would be minimal for non-alphabetic strings comprised of less than three characters; and
- Failure to allow fewer than three characters would be problematic for certain cultures and/or business interests.

Two comments indicated clarification is needed for the rationale limiting all-numeric and initial-numeric strings.

Three comments focused on the case where a label consists of an internationalized string, the arguing that the transliteration of that internationalized string should be allowed to be registered by the same applicant at reduced evaluation and annual fees.

One comment expressed concern that ICANN should work to ensure interoperability of new gTLDs.

One comment requested an explicit statement that registries will not be allowed to associate address or mail exchange resource records with the TLD.

These issues are discussed below.

Three-character TLD limitation. The gTLD Applicant Guidebook (version 2.0) stated that *"Applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate"*. It also noted that ICANN has received a number of comments suggesting that gTLDs consisting of fewer than three characters should be allowed in some cases. The cases relating to IDNs are treated separately in the "IDN" section below. This analysis focuses on the non-IDN cases.

The concern with allowing (ASCII) strings of two characters that do not currently correspond to ISO-3166 country codes is a result of the fact that the ISO-3166 list of country codes is not static and assignment of codes is the responsibility of the ISO-3166 maintenance agency. ICANN relies on the ISO-3166 list as the authoritative basis for country-code TLDs. If a two ASCII letter label were to be allocated as a gTLD, it would create the opportunity for future collision between ISO-3166 country-code TLDs and gTLDs.

Leading-, Trailing-, or All-Numeric TLDs. The primary concern relating to leading- or trailing-numeric labels in TLDs is due to issues raised by bi-directional scripts when used in conjunction with labels that have leading or trailing digits. Experience has shown that presentation behavior of strings with leading or trailing numbers can be unexpected and can lead to user confusion. As

such, a conservative approach is to disallow numerals leading or trailing top-level domain labels.

This concern also applies to all-numeric strings; however, a larger concern with those strings is the risk of confusion and software incompatibilities due to the fact that a top-level domain of all numbers could result in a domain name that is indistinguishable from an IP address. That is, if (for example) the top-level domain .151 were to be delegated, it would be problematic to programmatically determine whether the string "10.0.0.151" was an IP address or a domain name.

Transliterated strings. Whether or not requests for transliterated strings by a single applicant should be considered for reduced fees is outside the scope of review for string stability and is covered in the Evaluation Fees section. An analogy can be made to the labels "labor" and "labour" and the arguments as to whether they should be considered for reduced fees if allocated to the same registry may apply.

Interoperability. While ICANN does have as its core mission statement to make the Internet interoperable, stable, and secure, it is beyond the capability and scope of ICANN to ensure acceptance of any top-level domain by all software manufacturers. Indeed, some software manufacturers may choose to disallow certain TLDs for their own reasons. ICANN can and does document and publicize the strings allocated for TLD use; however, software developers are ultimately responsible to ensure their applications work with the changing DNS environment. ICANN will continue to use the tools at its disposal to ensure acceptance of new TLDs by software applications. Those tools include: public relations campaigns, technical papers, and participation in public meetings.

TLD Address and/or Mail Exchange Resource Records. Within the DNS protocol, it is possible for registries to assign address (either "A" or "AAAA") and/or mail exchange ("MX") resource records to the TLD label itself, thereby allowing references to the TLD without any preceding labels to resolve for those lookups. In fact, ICANN notes that several top-level country-code TLDs already permit these assignments. However, the utility of these assignments is limited due to applications automatically appending various strings to non-fully qualified domains or applying other heuristics that would result in DNS queries not being sent to the name servers for the TLD label.

The draft application guidebook currently has no prohibition against address or mail exchange (or other) records at the top-level and there has been no consensus policy decision to prohibit this. However, it is anticipated applicants would be counseled that such records are unlikely to work as they would expect.

In conclusion:

Restrictions against 2 ASCII character top-level domains should remain in place to ensure there is no chance of confusion with current or potential ISO-3166 country codes.

Additional clarification may be useful in explaining the rationale behind restrictions against the use of all-, leading-, and trailing-numeric labels. It is proposed the following text be used:

The primary concern relating to the use of leading- or trailing-numeric labels is due to issues raised by bi-directional scripts when used in conjunction with those labels. Experience has show that presentation behavior of strings with leading or trailing numbers in bi-directional contexts can be unexpected and can lead to user confusion. As such, a conservative approach is to disallow numerals leading or trailing top-level domain labels.

This concern also applies to all-numeric strings, however a larger concern with those strings is the risk of confusion and software incompatibilities due to the fact that a top-level domain of all numbers could result in a domain name that is indistinguishable from an IP address. That is, if (for example) the top-level domain .151 were to be delegated, it would be problematic to programmatically determine whether the string "10.0.0.151" was an IP address or a domain name.

Wording in section 1.2.4 should remain unmodified. Within the communications plan, explicit mention could be made of publicity efforts ICANN will undertake to inform the software development community of the existence of the new gTLDs.

To the extent this information differs from information in the current Guidebook, a proposed revision to this Guidebook section is being published now for comment under separate cover.

String Similarity

I. Key Points

- Comments diverge on the scope of string similarity, where some contend that nothing beyond visual similarity should be taken into account while others urge that wider concepts of similarity be applied. The current approach is to check all proposed strings for visual similarity during the Initial Evaluation, while String Similarity Objections can be assessed based on a wider range of similarities, in line with the adopted policy. The proposed position is to keep the focus on visual similarity for the first check, for reasons of practicability and clarity.
- A comment asks whether a threshold for the string similarity algorithm should be set. Although this is common among trademark offices, a decision has been taken to not employ a threshold in the new gTLD process. The usefulness of the algorithm in providing some automation is expected to increase over time, but ICANN will take a conservative approach in the first round, checking string combinations without reference to a "threshold", and thoroughly evaluate this tool as experience is gathered.
- Some comments propose that strings be checked for similarity to trademarks. This is part of what the IRT and other groups are currently addressing as an "overarching issue"; any response to this awaits the outcome of these discussions.

II. Summary of Comments

String Similarity Examiners—Transparency. ICANN should publish the names, affiliations, and qualifications of the SSEs, require them to abide by a strict conflict of interest policy and allow applicants to submit written objections to an SSE if the applicant has reason to believe that the SSE may have a conflict of interest. *Microsoft (Guidebook, 13 April 2009).*

String confusion objection –negative impact on IDN gTLD applicants. 2.1.1 adds unfavorable terms to all IDN gTLD applicants; objection is not limited to visual similarity but covers confusion based on any type of similarity. This will enable existing ASCII TLD operators to easily block all other IDN applications relying on "meaning similarity theory." The restriction should only apply to TLD applications in the same language string (see comments text for additional detail). *CONAC (13 April 2009).* The "similar meaning" clause should not be applied across different languages but should be limited within the same language. *CNNIC (13 April 2009).* Per 3.1.1., an existing ASCII ccTLD operator can successfully block an IDN application for a "similar meaning" and in effect own ICANN rights to that meaning in every language; this will limit diversity and result in control mostly by Western or global corporations who got in early. *NCUC (13 April 2009). A. Sozonov (Module 3, 9 April 2009). S. Soboutipour (Module 3, 12 April 2009). DotAfrica (Module 3, 12 April 2009). S. Subbiah (Module 3, 13 April 2009).*

Visual similarity only. ICANN needs to clearly state that when it comes to strings between different languages/scripts ONLY visual objection and not sound or meaning based objections will be considered. These criteria should apply not only to the string similarity confusion stage in Module 1 but also in any subsequent objections in Module 3 relating to confusion with existing or currently applied-for strings. The guidebook continues to confuse the "string confusion" issue. *NCUC (13 April 2009).* ICANN has ignored all decisions made in the IDN working group and added other types of similarity. How could two TLDs from different languages conflict with each other only in sound while they are different even in characters or in meanings? *S. Soboutipour (Module 2 & 3, 12 April 2009).* See also *A. Sozonov (Module 2, 11 April 2009); Association Uninet (Module 2, 12 April 2009); DotAfrica (Module 2, 12 April 2009); S. Subbiah (Module 2, 13 April 2009); E. Brunner-Williams (Module 2 & 3, 14 April 2009).* If phonetic and meaning similarities were considered, a gTLD based on a generic word would have the right for that word and concept in all languages and all scripts, which is unjustifiable and may not be legal. Aural and meaning similarity should be removed. *Y. (Module 2 & 3, 13 April 2009); L. Andreff (Module 2 & 3, 13 April 2009); A. Mykhaylov (Module 2 & 3, 13 April 2009);.D. Allen (Module 2, 13 April 2009); Association Uninet (Module 3, 10 April 2009).* String similarity should be explicitly restricted to visual or typographical similarity, and not perceived contextual similarities (e.g. .biz has not caused confusion with .com*). ALAC (19 April 2009).*

String confusion clarification helpful (2.1.1.1). The clarity added to the string confusion definition in the second version—"confusion based on any type of similarity (including visual, aural, or similarity of meaning)"—is helpful for both potential applicants and existing gTLD registry operators. When performing string confusion review against existing TLDs, an appropriate exception should be allowed where the applicant is applying for an IDN version of its existing gTLD name. *RyC (Modules 1-4, 13 April 2009).*

String confusion standard—include phonetic and conceptual similarity. Microsoft continues to believe that the string confusion standard should include phonetic and conceptual similarity. *Microsoft (Guidebook, 13 April 2009).*

String confusion – "preliminary" clarification needed. What is meant by identifying comparison as "preliminary" in section 2.1.1.1? *Microsoft (Guidebook, 13 April 2009).*

String similarity threshold. Has ICANN made a final decision to use a 60% string similarity score as the threshold? If not, what is the new threshold? What is the floor below which no review will be conducted? *Microsoft (Guidebook, 13 April 2009).*

Future new gTLDs (3.4.1). Recommendations regarding future new gTLDs should be maintained and not confused with the current "string confusion" in the applicant book. *DotAfrica (Module 3, 12 April 2009)* Strongly object to 3.4.1. *S. Subbiah (Module 3, 13 April 2009).*

String Evaluation. HSBC/HBOS examples are simply going to encourage early protective registrations that won't be used. There is no semantic relevancy to ICANN's direct comparative string evaluation and there maybe should be. It's open to interpretation of a review across all

others. If 20,000 applications are received, how can ICANN be sure an Examiner's review will be comprehensive with such a vast list to review? *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Expand Initial Evaluation similarity analysis, including trademarks. At the very least the Initial Evaluation period should include more than visual similarity. While INTA appreciates that after the application is approved and during the dispute resolution procedure a trademark owner can object based on other forms of similarity (aural, visual or similarity in meaning; see DAG v 2 at 2-4), including those types of similarity during the Initial Evaluation period would cut down on the number of times a trademark owner has to initiate a high-cost dispute resolution procedure that could have been avoided during initial review. Given the advent of gTLDs in multiple character sets, the string similarity analysis should also encompass trademarks and other reserved names that are the equivalent of the TLD in a foreign language or character set, both in terms of literal meaning (translation) and phonetic or visual similarity (transliteration). *INTA (8 April 2009)*. Use of algorithms based only on visual similarity is not a panacea for protection of IP rights; there must be manual reviews to ensure adequate protection of marks. Visual, aural and semantic similarity should be emphasized. *COTP (13 April 2009).*

III. Analysis and Proposed Position

Multiple comments discuss the scope of the string similarity check and include opposing viewpoints; some contend that nothing beyond visual similarity alone should be taken into account at any stage of the evaluation while others assert that wider concepts of similarity should be applied even in the Initial Evaluation. The current approach is to check all proposed strings for visual similarity during the Initial Evaluation, while String Similarity Objections (in Module 3) can be assessed by the Dispute Resolution Service Provider based on a wider range of similarities, as specified in the adopted policy developed by the GNSO. In this approach, the GNSO policy requirement is fully addressed in the objection process where two policy recommendations stated that: (1) strings should not be confusingly similar to existing TLDs(etc), and (2) ICANN should implement dispute resolution procedures. Therefore, the additional first string similarity check can be called "preliminary." There are good practical reasons to limit the first check to a clear and well-defined scope in view of the potential numbers of such checks that may need to be performed; therefore, the proposed position is to keep the limitation to visual similarity for that first check.

A comment questions whether any threshold has been set for the string similarity algorithm intended to assist the process by highlighting string combinations requiring closer inspection. Although thresholds are set for trademark offices regularly using this algorithm, the decision for the first round is that no threshold will be set in the new gTLD process, since the circumstances differ from trademark office practices and the final decisions are wholly with the examiners. While the objectivity of the algorithm will be of aid to the examiners and its precision will increase thru refinements over time, ICANN intends to take a conservative approach in the first round and thoroughly evaluate this tool as experience is gathered. This may imply manually checking string combinations that score far below any "threshold," both to gain experience and to catch any potential errors in the scoring.

Some comments address the relationship of trademarks in the string similarity checking from another perspective—namely, that the string similarity check should be performed against established trademarks as well. This is one potential aspect of the broad trademark protection considerations being addressed by the IRT group as one of the identified "overarching issues".

Technical/Operational and Financial Evaluation

I. Key Points

- ICANN intends to update the applicant evaluation questions and criteria for inclusion in version 3 of the Draft Applicant Guidebook. This will include updates to the financial instrument, proof of good standing requirement, and financial scoring. This will also include clarifications on the technical evaluation and scoring, and continuity questions.
- Several of those changes – made to improve criteria and scoring clarity - will be published now for comment.

II. Summary of Comments

Evaluation Criteria: Raising the Bar. The ICANN Board should address as openly as possible the tensions between respect for old processes and "precedent" and respect for reality of what is happening in the world right now. E.g., it is important to raise the bar for gTLD and ccTLD operators, especially given growth of e-crime (noting that staff in version 2 did not embrace suggestions of NetChoice on how to raise the bar for registry applicants through additional requirements such as industry best practices for consumer protection; a global brand registry to prevent brand-jacking and measures for prevention of phishing/consumer fraud; a thick Whois for all applicants; and a rapid takedown procedure). *S. DelBianco, NetChoice, Public Forum Transcript at 16-17 (5 Mar. 2009)*.

Evaluation Criteria System Flawed. The overall proposal for the evaluation criteria has too much "calculating" and reflects too little "thinking," and needs more analysis (terms can be misleading, perhaps unintended and nonsensical results will flow from use of this system). *W. Staub, CORE, Public Forum Transcript at 11-12 (5 Mar. 2009)*

Eligibility to apply for a new gTLD (1.2.1). The term "good standing" needs more definition and should at least extend to criminal history or background of applicants, and whether the term "organization" includes legitimate industry-level trade associations should be clarified. *BITS (13 April 2009).*

Financial showing-public and private. There is currently no distinction between public and private bodies when proving financial viability. Assessment of public bodies should be less cumbersome, which should result in a reduction of the costs. *eco (12 April 2009).*

Required Documents—Financial. ICANN needs to add specific minimum requirements. How will the financial statements be used, and what constitutes a viable applicant? Although the latest draft of the guidebook allows organizations created specifically to apply for new TLDs to provide a pro forma balance sheet, it is unclear if this will provide any distinction between a viable and unviable applicant. Is a balance sheet with $1M satisfactory, or more or less? What if

the $1 M is in the form of a note payable? One option is to provide documentation of outside funding commitments. Will precedence be given to applicants with cash in hand as opposed to just commitments from outside parties? There are scaling differences for a limited TLD v. a generally available gTLD, but some sort of baseline needs to be provided (re: Module 1, 1.2.3). *A. Allemann, DomainNameWire.com (6 April 2009).* Microsoft welcomes ICANN's clarification that new gTLD applicants that are newly formed entities may comply with the financial statements requirement by providing a pro forma balance sheet. *Microsoft (Guidebook, 13 April 2009).*

Evaluation Criteria-Scoring. Expanding the evaluation criteria scoring scale is helpful but a broader expansion (to 10 points instead of 4 points) would provide greater flexibility and granularity. *Microsoft (Guidebook, 13 April 2009).*

Further Consideration of Continuation Funding Issues. The guidebook states that the applicant will be asked to provide 3-5 years funding for continued operation in the case of failure. This is naïve and will result in low forecasts from applicants. In addition, businesses fail when they run out of money, not when they say they only have 3-5 years left in the bank. This needs much more thought and maybe contractual protection with deposits, etc. Even then, there will still be statutory legal issues. Also, how regularly will/should ICANN review this cash position? With the volumes expected in the first round, it is likely that registries could fail in the first year as the market is flooded with competing TLDs. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Registry Failure-documentary evidence re: operations continuity. Regarding the guidebook statement –"documentary evidence of ability to fund ongoing basic registry operations for registrants for a period of three to five years in the event of a registry failure or default until a successor operator can be designated"—it seems that a registry will have to prove it can operate the TLD for a certain period of time and have enough cash on hand to operate it for 3-5 additional years if it fails. By definition, a company or registry fails when it runs out of money. This seems like an implausible requirement. Furthermore, the exact amount of money required should be defined (re: Module 1, 1.2.3). *A. Allemann, DomainNameWire.com (6 April 2009).* It is not clear from this requirement whether this can include any portion of advanced but unearned revenue or perhaps be addressed through contract arrangement with third parties. A detailed description of "basic registry operations" is also missing (at a minimum it could include the continued resolution of DNS queries for existing registrations, but blocking the creation of new registrations). *Go Daddy (13 April 2009).*

Continuity. Microsoft continues to believe that the operator of a brand gTLD (bTLD) should have flexibility to decide to stop operating the bTLD and that in such case it would be inappropriate for a third party with no rights in the brand to operate the bTLD. *Microsoft (Guidebook, 13 April 2009).*

Continuity. The Registry Agreement should specifically contain the requirement of continued ability to fund operations for 5 to 7 years. ICANN should also require annual submission of specific evidence of funding sufficient to cover service, not only to "then existing registrants"

but to projected growth. More information is needed on the role of the "Registry Services Continuity Provider" and how it will interact with the Registry Operator under normal circumstances. *INTA (8 April 2009).*

Financial institutions—creditworthiness. ICANN needs upfront to make clear to applicants in light of the global financial crisis the meaning of "creditworthy" institutions that will secure suitable financial instruments. To fulfill the goal of diversity it will have to allow for the creditworthiness of diverse and varied local financial institutions. *NCUC (13 April 2009). A. Sozonov (Module 5, 9 April 2009). Association Uninet (Module 5, 11 April 2009). S. Soboutipour (Module 5, 11 April 2009). Y. Keren (Module 5, 12 April 2009). L. Andreff (Module 5, 13 April 2009). S. Maniam (Module 5, 13 April 2009). DotAfrica (Module 5, 13 April 2009). S. Subbiah (Module 5, 13 April 2009).*

Good standing details; notarized affidavit-concerns. The guidebook allows an applicant to provide a notarized affidavit in lieu of proof of legal establishment and proof of good standing. This is insufficient from the perspective of financial institutions for any community-based gTLD that would purport to represent financial institutions. *Regions (13 April 2009).* ICANN should explicitly describe how it would vet the entity attesting to the applicant's good standing to assure its veracity and legitimacy. ICANN should specify the types of documents accepted to validate good standing (e.g., for financial institutions, a charter from a country's banking regulator). *BITS (13 April 2009).*

DNSSEC clarification. ICANN should clarify very specifically before applications are filed if signing up for DNSSEC will be a requirement of the Registration Agreement if the applicant wins and has no interest in offering DNSSEC. Other countries are still reviewing their position on DNSSEC in light of perceived U.S. control and after winning applicants from these countries should not be caught between their national law and evolving ICANN positions on DNSSEC requirements. *NCUC (13 April 2009). A. Sozonov (Module 5, 9 April 2009). Association Uninet (Module 5, 11 April 2009). S. Soboutipour (Module 5, 11 April 2009). Y. Keren (Module 5, 12 April 2009). L. Andreff (Module 5, 13 April 2009). S. Maniam (Module 5, 13 April 2009). DotAfrica (Module 5, 13 April 2009). S. Subbiah (Module 5, 13 April 2009).* DNSSEC should be required for any new gTLD serving the financial services industry. *Regions (13 April 2009); BITS (13 April 2009).* For technical and business reasons, new gTLDs need to factor into their plans the cost and technical resources necessary to fully implement DNSSEC within the next two years. Failure to prepare applicants for this will give them the "defense" that they were not "informed" of the requirement to support DNSSEC. (See text of comments for proposed language change to Item 50.) *R. Hutchinson (Module 2, 13 April 2009).* Applicants must demonstrate familiarity with DNSSEC and provide an implementation plan when it becomes widespread in line with ICANN policy. *ALAC (19 April 2009).* DNSSEC falls into the category of post-start changes to operating procedure to be sought by consent of the operator. *E. Brunner-Williams (Module 5, 13 April 2009).*

Do not require IPV6 for now. ICANN should provide clarity that IPV6 will not be required for now. It is difficult to find ISPs providing it, and this could be an especial burden for IDN

applicants trying to find IPV6 ready ISPs or data hosting centers in other countries. *NCUC (13 April 2009). A. Sozonov (Module 5, 8 April 2009). Association Uninet (Module 5, 11 April 2009). S. Soboutipour (Module 5, 11 April 2009). Y. Keren (Module 5, 12 April 2009). L. Andreff (Module 5, 13 April 2009). S. Maniam (Module 5, 13 April 2009). DotAfrica (Module 5, 13 April 2009). S. Subbiah (Module 5, 13 April 2009). A. Mykhaylov (Module 5, 13 April 2009). E. Brunner-Williams (Module 5, 13 April 2009).*

IPV6—impact on existing TLDs. Any registry operator for a new TLD should be able to offer a full suite over IPV6, either native or tunneled. If IPV6 is a technical requirement for new gTLDs, will the same criteria be applied to existing registry operators? Any changes that affect new TLDs need to be viewed against arrangements for existing TLD registry operators. *M. Neylon, Blacknight Solutions (13 April 2009).*

Knowledge of IDNs. Applicants must have knowledge of IDNs; however, applicants for non-IDN TLDs should not be required to implement IDN technology. *ALAC (19 April 2009).*

III. Analysis and Proposed Position

The applicant evaluation questions and criteria are intended to clearly describe the information applicants need provide to ICANN in order to ICANN to conduct the initial and if necessary extended evaluation of applications for new gTLD strings. The evaluation process is also intended to be fair and scalable.

The commenters noted that more definition was needed on good standing. It was suggested that ICANN clarify the language on the financial instrument, notarized records and proof of legal establishment and good standing. ICANN intends to update the proof of good standing and legal establishment questions to better describe the approach and documents required.

ICANN intends to update the financial criteria to provide a range of options on the financial instrument. Specific minimum requirements will be added in the next version of the Applicant Guidebook. ICANN will also add detail on how financial statements will be used in the evaluation.

One commenter suggested that ICANN broaden the evaluation scoring to 10 points instead of 4 points. ICANN has examined the scoring and intends to make some changes in the next version of the Guidebook.

Several comments were received on registry continuity, particularly on funding for continued operation in cases of registry failure. ICANN has been developing a gTLD Registry Continuity Plan (25 April 2009 version located at http://www.icann.org/en/registries/continuity/gtld-registry-continuity-plan-25apr09-en.pdf). ICANN intends to update the continuity question in the Applicant Guidebook to provide a range of options to applicants. One option may be to create a continuity fund for registries that would help support the maintenance of critical registry

functions until a successor registry could be identified or notice can be provided to the community of closure of a TLD.

ICANN is aware of the concerns raised by brand owners such as Microsoft that they should have flexibility to decide to stop operating a brand TLD and that it might be inappropriate to identify a third party to assume management of that TLD. This situation is already contemplated in the gTLD Registry Continuity Plan.

INTA noted that more information is needed on the "Registry Services Continuity Provider." ICANN will clarify this in the next version of the Guidebook.

Several commenters stated that ICANN should clarify whether DNSSEC will be a requirement, as applicants need to factor in the additional cost of fully implementing DNSSEC. DNSSEC is currently optional in version 2 of the draft Applicant Guidebook.

This same group of commenters noted that ICANN should not require IPv6 for the first round, as it could be a burden on gTLD applicants. IPv6 is currently mandatory in version 2 of the draft Applicant Guidebook.

ICANN intends to update the applicant evaluation questions and criteria for inclusion in version 3 of the Draft Applicant Guidebook. This will include updates to the financial instrument, proof of good standing requirement, and financial scoring. This will also include clarifications on the technical evaluation and scoring, and continuity questions.

As described above, there will be several changes made to the Guidebook as a result of comment. Some of those have been written for public comment and will be published along with this analysis. Some of these changes are:

- Proof of Legal Establishment & Good Standing: This section has been revised to allow for flexibility according to the entity's type and jurisdiction, so that an applicant may provide proof of legal establishment and good standing in a variety of ways. The documentation requirements are based on consistency of documents with information provided, and ability to show the chain of authority rather than on specific document types which may or may not be meaningful in a given jurisdiction.
- Contact information: Eliminated some redundant questions.
- Background Check: Added requirements for applicant to disclose convictions or other disciplinary actions of its officers, directors, or shareholders, with description of circumstances in which ICANN may deny an application on this basis.
- Cybersquatting/Domain Name Abuses: Added requirements for applicant to disclose history of cybersquatting or domain name abuses, with description of circumstances in which ICANN may deny an application on this basis.
- Community-Based Designation: Revised the questions for community-based applicants to align with the comparative/CPE criteria, to ensure that information provided is

relevant to this task. Added more detail to give guidance to applicants on expected components in answers.

- Technical Criteria: Revised language in technical section so that scoring levels are consistent across questions. (We have not changed the scoring itself.)
- DNSSEC: Clarified that this is an optional service, but that we expect it within 5 years to be a requirement for all gTLDs.
- Security: Enhanced security question to require applicants for a string with a unique trust niche (e.g., financial services) to show what augmented security levels are proposed to be consistent with the nature of the string and to address significant trust issues.
- Financial Statements: Provided a list of options in order of preference, to give applicants greater flexibility. (ICANN continues to encourage audited financial statements.)

FINANCIAL CONSIDERATIONS

I. Key Points

- Significant, thoughtful comment was received regarding the new gTLD Applicant Guidebook Version 2, mostly suggesting some form of fee reduction, either for all applicants or for creating a special class of applicant for the purpose of segregating fee structure.
- Reduced fees for a separate category of TLD based on need will be considered in the second round, taking into account results and data from the first round.
- The evaluation fee is cost-based and revenue neutral. Work will continue to verify estimates and if that work so indicates, the fee will be altered.
- The annual fee has been reduced so that it represents only 1/6 – 1/5 of one full time equivalent for all support for a TLD: registry liaison, contractual compliance, IANA services, finance, and other support functions. If anything, the fee seems too low.

II. Summary of Comments

Annual Fees

Costs still excessive; barrier to entry. The only major change was the proposed reduction of annual registry fee to $25K per year, $6250 per quarter. The gTLD application fee remains unchanged at $185K. These minor changes will do little to offset the significant burden imposed by the proposed system. *European-American Business Council (1 April 2009).* Cost scheme is still prohibitively high. *Adobe Systems Incorporated (10 April 2009); NCUC (13 April 2009).* Fees must be revised to allow smaller players to participate and have a well balanced, sustainable business without excessive or unjustified burdens. The policy development and risk component of the fees should be removed because they are unjustified. There should be a reduced application fee and a pay as you go scheme. Extended evaluation and contention costs would be covered by extended and contentious applications. *NIC Mexico (14 April 2009).* The fees are unreasonable and make ICANN seem to be a big business seeking profit rather than a public service organization. *D. Allen (Module 1 13 April 2009).* The current fee structure is a clear barrier to entry especially for those potential applicants who have no interest in monetizing their TLD. *ALAC (19 April 2009).*

German language issue: Umlaut. An application should be able to comprise more than one string with and without the Umlaut at a reduced application and annual fee since the operation of the registry will be the same. The same should apply to abbreviations or city names or names of regions. *eco (12 April 2009).* See also *dotKoln (13 April 2009).*

Registry Services Review Fee. A separate Registry Services Review fee on top of a $185k application fee is unreasonable, especially since ICANN claims the frequency is going to be very low. *Sophia B (Ethiopia) (12 April 2009); NCUC (13 April 2009). A. Sozonov (Module 1, 11 April 2009); DotAfrica (Module 1, 12 April 2009); S. Soboutipour (Module 1, 11 April 2009); Association Uninet (Module 1, 12 April 2009; Y. Keren (Module 1, 12 April 2009) S. Subbiah (Module 1, 13 April 2009).*

Registry services review fee. ICANN should establish a fee range and identify the fee ceiling. The guidelines should clarify the circumstances under which a 5-person panel would be required instead of a 3-person panel. If ICANN determines that the registry services review fee could exceed $50,000 for a particular application, then ICANN should provide a clear justification for such a high fee. *INTA (8 April 2009)*.

Other Currencies. ICANN should accept payments in other currencies at a rate fixed at the time the applicant's guidebook is published. Accepting only U.S. dollars places high risk on business plans of those applicants that work in other currencies. *P. Vande Walle (23 Mar. 2009).* Regarding Section 1.5.2.4, ICANN should at least support the top 3 global currencies natively. ICANN wishes to separate from their U.S. Government agreement in order to be more global, but will only allow payment in U.S. dollars. In the current climate the particular FX loss/gain can change a business plan overnight. This isn't a global strategy. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Cost recovery. ICANN should charge all registries on an actual cost recovery basis and not an arbitrary or unjustified tax based on registry revenue or a per domain name tax that discriminates between registry operators. *M. Palage (14 April 2009).*

Lower fees. The fees discriminate against smaller entities. ICANN should lower allover fees for the first three years to not more than US $100,000 including the application fee. *eco (12 April 2009).* The registry fee should be lowered for city and linguistic TLDs to $2,500 per calendar quarter. *dotBZH (Module 5, 13 April 2009).*

Should be reduced for city TLDs. We call upon ICANN to reduce the annual fees for city TLDs to not more than $US 10,000 minimum annual fees. *dot berlin (27 Mar. 2009).* The fee for city TLDs should be reduced to $US 10,000 and suggest an annual fee of $US 0,25 from the 10,000th domain name registered by individuals and/or organizations. *City Top-Level Domain Interest Group (12 April 2009).* ICANN's role to encourage DNS innovation is smothered by the proposed fees and reserve recommendations; these will hinder innovation in how the DNS can help to address civic communications needs. ICANN costs will be lower in working with cities and fees should be lower. *Connecting.nyc (13 April 2009).*

Justification of registry fees. ICANN's downward adjustment to the registry fees fails to take into consideration differences among potential gTLDs apart from registry size. ICANN should articulate whey the base amount so far exceeds the annual registry fees for some existing TLDs ($10,000 annually in registry fees for .cat, .travel and $500 annually for .museum). Given ICANN's mandate that any fees represent only cost recovery and its nonprofit status, it is

unclear what the basis is for a $0.25 per year additional fee for registries exceeding 50,000 and what cost ICANN would be recouping by imposing this fee. *NYC (13 April 2009).* Even though reduced in version 2, ICANN has still failed to justify the registry fee. *Microsoft (Guidebook, 13 April 2009).*

Postpone annual registry fee. ICANN should consider postponing for 2 or 3 years the collection of the annual registry fee to allow new gTLD operators to start operating in a financially sound context with no loans and other debts that my compromise their start-up. This would contribute to DNS stability. *P. Vande Walle (23 Mar. 2009).*

Fee justification needed. It is still unclear what the underlying ratio is for the annual fees, especially for the "per transaction" costs. ICANN should provide an explanation similar as it did for the application fee. Also, future registries should know in advance what services ICANN will offer in return and under which conditions and terms. *SIDN (14 April 2009).* ICANN has still failed to provide any acceptable rationale for the imposition of an annual registry fee of not less than $25,000 when one considers that one registry currently pays ICANN only $500. The reality that a number of successful new gTLD applicants—especially community-based applicants—could operate registries with relatively low numbers of registrants underscores this problem. It is therefore reasonable to expect that the next draft of the DAG will reflect a further reduction in the annual fee. *INTA (8 April 2009).*

Lower registry fee in cases of registrant verification. ICANN should impose a lower registry fee to reflect the benefits of registrant verification and the lower costs of administering these types of registrant verified TLDs, consistent with the cost recovery mechanism it should be operating by. *M. Palage (14 April 2009).*

Evaluation Fees

Fees too high for developing nations. The fees are exorbitant in general. The high $185k fee does not support goal of diverse applicants. *Sophia B (Ethiopia) (12 April 2009); NCUC (13 April 2009); DotAfrica (Module 1, 12 April 2009).* Unless high costs are reduced by an order of magnitude, ICANN's goal of diversity, especially for IDN TLDs, will not be met. *S. Subbiah (Module 1, 13 April 2009).* The fees are too high for developing nations. *A. Sozonov (Module 1, 11 April 2009); DotAfrica (Module 1, 12 April 2009); S. Soboutipour (Module 1, 11 April 2009); Association Uninet (Module 1, 12 April 2009).* Fees are exorbitant for a process that is simple and automated, with the exception of dispute resolution. *DotAfrica (Module 1, 12 April 2009); Y. Keren (Module 1, 12 April 2009). L. Andreff (Module 1, 13 April 2009); S. Maniam (Module 1, 13 April 2009); S. Subbiah (Module 1, 13 April 2009).* While price differences raise a risk of "gaming," it is preferable that a small number of new gTLDs are inappropriately given lower fees than to keep the current barriers to entry for would-be applicants in developing and least developed countries.*ALAC (19 April 2009).*

Provide Specific Cost Breakdowns of Major Elements. The $185K fee is too high for well crafted, responsible applications brought by applicants with registry operator experience and

resources. There is no way to show cost avoidance if the "boxes" of costs are not provided. Low cost to process applications should not subsidize high cost to process applications. Applicants should know the real cost of their applications; ICANN staff managing the process also need to understand the costing. ICANN should publish a first guess at the major elements, rephrase the application fee as some sufficient initial commitment, with a variable fee corresponding to the choices the applicant knowingly makes to get the outcome the applicant knowingly seeks, similar to how RSTEP costing is handled. *E. Brunner-Williams (Module 1, 14 April 2009).*

Impact on Cities/Governments. Based on the current economy and very tight budgets, the application, operational and dispute resolution fees for the new gTLD program will be beyond the means of governments already hard pressed to provide core functions and services. ICANN should adopt evaluation and operational fee models that will encourage a broad base of new gTLDs that serve the broader public interest. *NYC (13 April 2009).*

Escrow. In addition to the evaluation fee, ICANN should require an escrow from any registrant to make sure there are funds available to collect in the event of a dispute. *Hearst Communications, Inc. (13 April 2009).*

Longer payment settlement period. ICANN should allow partial payment within ten days and full settlement within 30 days. This will help regarding countries with currency control (e.g., China) where it would take more than ten days to move a large amount of money and have it approved by the relevant authority. *J. Seng (13 April 2009).*

Clarify registration fee. ICANN should clarify the registration fee – one $100 fee per applicant not per application. If that is not the case, ICANN should explain why not. *INTA (8 April 2009).*

Geo gTLD Fees. There should be no preferential treatment for geo gTLDs on registration and evaluation fees, which should in general be as low as possible for all applicants to provide low market entry barriers. *M. Leibrandt (13 April 2009).*

Credit card processing (section 1.5.2.3). ICANN will accept up to $20K on a card with no processing charges. This is not common place in today's world and the membership should not pick up the tab for their acceptance of cards. X% should be charged on top for those wishing to pay by this means. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Cost recovery. The fee structure should be based on actual recovery related to current application evaluation procedures, and must not include: amortization of ICANN's fixed costs or previous gTLD policy work, or speculative "risk" charges. If lower fees result, then the greater numbers of applications submitted would be welcomed. *ALAC (19 April 2009).*

Fee level –discouraging frivolous applications/abuses. The fee level if nonrefundable can deter attempts to register frivolous TLDs, but the new version of the guidebook sets up a graduated refund structure for unsuccessful applications. *CADNA (13 April 2009).* High costs are not going

to be a barrier for speculators and the prevention of problematic gTLDs should come from other provisions within the gTLD process. *Y. Keren (Module 1, 12 April 2009).*

Address the proposal that unsuccessful applicants for the same string can have option of participating in the second round without submitting a new application fee. Version 2 did not address this proposal. If ICANN rejects it, it should give the reason why. If 2 or more applicants apply for the same string, there will be 1 winner and the others will end up with nothing and $185K poorer. Surely applicants who have participated and paid the fee should at least have first option to enter into a 2nd round at a later stage. If this is not done it all comes down to a lottery—if you are lucky enough to be the sole applicant for a name then you win, otherwise you lose everything. *Smartcall (Module 2, 10 April 2009).*

Lower fees—smaller entities; restricted gTLDs; developing countries. The fees discriminate against smaller entities. ICANN should lower allover fees for the first three years to not more than US $100,000 including the application fee. *eco (12 April 2009).* The application fee is still too high and should be reduced for entities such as charitable organizations or a .brand application restricted to employees of a company. *Lovells (13 April 2009).* There is no difference in fees for applicants from different parts of the world; the fee for a nation-specific TLD should be lower than for a world-wide TLD. Perhaps to promote equity, fees could be indexed according to GDP in an applicant's country. *S. Soboutipour (Module 1, 11 April 2009); Association Uninet (Module 1, 12 April 2009); Y. Keren (Module 1, 12 April 2009); A. Mykhaylov (Module 1, 13 April 2009).*

Fees based on actual costs. Evaluation costs should reflect the actual cost of doing the evaluation and should not be based on a hypothetical average across all applicants. In cases where a portion of the Initial Evaluation is identical for multiple applications (e.g. technical and operational capability, financial) evaluation fees should be credited with the projected costs of that portion of the Initial Evaluation less any minor amount needed for evaluating such portion for multiple gTLDs. *RyC (Modules 1-4, 13 April 2009).*

Reduce fee for cultural and linguistic TLDs. The fee should be reduced to $ US 50,000 for cultural and linguistic TLDs. The $ US 185,000 fee is too high if you take into account that many applications will be from non profit, non commercial organizations with limited funding and which may have already spent a significant amount of money on following the gTLD process. *Asociacion PuntoGal (13 April 2009).* ICANN could reduce the fee by setting up a fast track for cultural and linguistic TLDs or by refunding part of the application fee. (See comments text for proposed guidebook language revisions.) *dot BZH (13 April 2009).* The evaluation fee should be reduced; it could exceed our resources. *dot EUS (13 April 2009).*

Should be reduced for city TLDs. We call upon ICANN to reduce the application fees for city TLDs to not more than $US 50,000. *dot berlin (27 Mar. 2009).* The general evaluation fee is too high and not justified for city TLDs; these will be less contentious and cost less. It should be reduced to $US 50,000. *City Top-Level Domain Interest Group (12 April 2009).* ICANN's role to encourage DNS innovation is smothered by the proposed fees and reserve recommendations;

these will hinder innovation in how the DNS can help to address civic communications needs. ICANN costs will be lower in working with cities and fees should be lower. *Connecting.nyc (13 April 2009).* The $185K fee should be lowered for regional gTLDs; overall fees for the first three years should not exceed US $100K. *dotKoln (13 April 2009).*

Application Fee Level and Impact. ICANN's analysis did not adequately consider models for different levels of application fees for different types of applicants (e.g., profit or non profit, size of TLD), even though it was presented with proposals for this. The $185K fee represents a political judgment by ICANN that in the first round only certain larger entities will be able to apply; it would be more honest for ICANN to state this clearly ("that "this is so difficult so we are just starting a first round for these particular type of applicants"). ICANN's representation that the fee level is not so much given that you need at least $500K to run a TLD is flawed (there are some TLDs that have been running for free for 10 years; you really don't need $500K). Explanation on this point should be provided. *V. Bertola, Public Forum Transcript at 7-8 (5 Mar. 2009).* The costs are unrealistic; I run a TLD for a few hundred dollars a month, and $500K is absurd. *K Auerbach, Public Forum Transcript at 30 (5 Mar. 2009).* $500K is not an arbitrary number and is quite realistic for a small or a medium-sized registry. *A. Abril i Abril, Public Forum Transcript at 14 (5 Mar. 2009).*

Reduce application fee. The amount of the application fee should be reduced as the amount may discriminate against less financially resourceful applicants such as small enterprises and communities. J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009). Application fee still seems excessively high and should be reduced*. eCO-LAC (13 April 2009).*

Reduce application fee; impact on community-based applications; allow installment payments. The amount of the application fee should be reduced as it may discriminate against less financially resourceful applicants. It is a mistake to assume, as the high fees imply, that all new gTLD applicants will use the .com mass market approach, selling as much as possible, favoring numbers over quality. This is the wrong approach to community-based TLDs. The high fee may have a deterrent impact about frivolous applications, but it will also limit serious applications that would target a limited community. In particular, ICANN should delete $26K from the fee, which represents the incidence of gTLD development program cost on each application. ICANN's high financial expectations at the application stage may plant the seeds of future registry failure. ICANN should allow installment payments of application fees; a pay as you go approach would make it easier for some applicants to convince investors about their business plans. *P. Vande Walle (23 Mar. 2009).* See also *M. Neylon, Blacknight Solutions (13 April 2009).*

Cost recovery/subsidization. Cost recovery is not just about costs that have been incurred. The $185K also includes an element of risk calculation. I am concerned that the non-contentious, community-based applicants are actually going to finance the risks or the potential risks that will be brought by bad cases. *B. de la Chapelle, Public Forum Transcript at 31 (5 Mar. 2009).*

Burden on Noncommercial Applicants. The $185K fee burdens noncommercial applicants and will bring a higher risk of failure for those applications; this may increase stability problems. *B. de la Chapelle, Public Forum Transcript at 32 (5 Mar. 2009).*

Application fee. We should try to attempt incorporating historic cost into this evaluation, but overall, we should get away from just looking at domain names as a way of funding Internet governance. *W. Staub, Public Forum Transcript at 12 (5 Mar. 2009).*

Evaluation Fee Discounts. Why wasn't a discount considered for "like TLDs" or variants of IDN TLDs? *E. Chung, GNSO Transcript at 85-86 (28 Feb. 2009)*

"Package" application fee approach—IDNs for smaller language groups. The $185K fee bar may be set too high for smaller language groups. ICANN should allow a gTLD operator for such groups the ability to activate all new IDNs as part of a package deal, making it less expensive and more attractive for new gTLD operators to offer service in all new IDN scripts as they become available. *A. Mack (Module 1, 13 April 2009).*

Year 2000 Applicants. ICANN should explain why proof-of-concept applicants from the year 2000 would be offered an $86,000 credit giving them a discount over other applicants for a given gTLD; there is no obvious connection between the applications processes for the to-be-launched gTLDs and the 2000 gTLDs. *INTA (8 April 2009)*. The refund credit of $86K for previous applicants is unfair and does not account for the money that many current potential applicants have spent while waiting years because of ICANN's continuing promises of new gTLDs. *Sophia B (Ethiopia) (12 April 2009).*

Comparative evaluation fee. There should be a set fee range for this with an upper limit set. *INTA (8 April 2009)*.

Excess Revenue

Transparent mechanisms. In regard to ICANN's status as a nonprofit entity, transparent mechanisms for the disposition of excess revenues must be in place. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).* ICANN should commit to expending additional resources to ensure the security, stability and integrity of Internet commerce, including sufficient IP right protection mechanisms for trademark holders. *COTP (13 April 2009).*

Reserves in case of future litigation and registry failures. ICANN should take any gTLD auction proceeds and, instead of putting them into a non-profit charity, ICANN should put them in a financial lockbox in case they need to be used by the ICANN Board to pay for any adverse financial effects of the new gTLD program without negatively impacting ICANN's normal cash flow. *M. Palage (14 April 2009).*

Refunds

Phased fees in place of refunds. An applicant would pay a portion initially and additional fees as each milestone is achieved. ICANN will still be paid up-front for its evaluations, but applicants will only need to pay for the stages that they are able to pursue. *ALAC (19 April 2009).*

Refunds for withdrawn application due to ccTLD fast track. An applicant that withdraws should be able to get a full refund when the applicant did not know that there was a possible IDN ccTLD fast track coming along. *E. Chung, GNSO Transcript at 86 (28 Feb. 2009).*

Refund if Reserve Name Similarity. If ICANN finds that an applied-for gTLD "exceed[s] a similarity threshold with a Reserved Name" (as outlined in Section 2.1.1.2 of Module 2) and the application therefore does not pass the Reserved Names review, will the applicant be refunded the entire application fee? *F. Hammersley, SAIC (Module 2, 24 Mar. 2009).*

Full refunds if an application does not pass string contention. Because there are no concrete examples of what might exhibit string confusion, a full refund should be granted if an application does not pass string contention, unless someone submits a substantial amount of applications to game the system (e.g., typo strings to see if any make it through) (re: Module 2). *A. Allemann, DomainNameWire.com (6 April 2009).*

Refund abuses. While a refund schedule is appropriate, two changes should be made to discourage abuses: (1) the percentage amount of evaluation fee refunded after posting of initial applications should be reduced to 50%; (2) the percentage of evaluation fee refunded should be 35% for applications withdrawn after objections are filed against them—regardless of whether the application has undergone Initial Evaluation. *INTA (8 April 2009)*. *Microsoft (Guidebook, 13 April 2009).*

Refunds of Evaluation Fee During Auction (1.5.5.). This section implies that applicant can withdraw during an auction and receive a refund. If that is not so, then ICANN should make that point explicit. *Demand Media (DAG, 13 April 2009).*

Commentary on Refund Policy. The higher the refund amount and the earlier it is offered, the more applications will be submitted because there is less risk on applicants. With more applications there will be more contention. *Demand Media (DAG, 13 April 2009).*

III. Analysis and Proposed Position

There are many comments regarding financial considerations for the new gTLDs.

Many comments expressed concerns about the size of the fees, and others requested more information on the details related to the methodology used to determine the amount of fees.

Some comments expressed concern with the refund policy and other comments asked for clarification as to how surplus funds will be handled.
(Note: all $ amounts are expressed in US Dollars throughout this document.)

The comments can be grouped into the following issue areas:

Fees, including the evaluation fee and annual fee, may be too high. Many comments suggested that both the $185k Evaluation Fee and the annual registry fee are too high for various reasons. Comments related to these concerns include:

- The application fee for the new gTLD program is still too high and should be reduced for entities such as:
  - Developing nations and governments already hard pressed to provide core functions and services; perhaps to promote equity, fees could be indexed according to GDP in an applicant's country.
  - City and linguistic TLDs:
  - Charitable organizations: or
  - A .brand application restricted to employees of a company.
- The current fee structure is a barrier to entry for those applicants who have no interest in monetizing their TLD.
- ICANN should adopt evaluation and operational fee models that will encourage a broad base of new gTLDs that serve the broader public interest; the high $185k fee does not support goal of diverse applicants.
- ICANN should justify the registry fee and articulate why the base amount exceeds the annual registry fees for some existing TLDs (i.e., $10,000 for .cat, .travel and $500 annually for .museum).
- There should be a reduced application fee and a pay as you go scheme.
- Unsuccessful applicants for the same string should have the option of participating in the second round without submitting a new application fee.
- In cases where a portion of the Initial Evaluation is identical for multiple applications (e.g., technical and operational capability, financial) evaluation fees should be credited with the projected costs of that portion of the Initial Evaluation

Need More Support for Fees. Some comments requested more information related to the details of the evaluation fee development stating that applicants should know the real cost of their applications and ICANN should publish a preliminary estimate of the major elements of the fee. Comments also asked for an understanding of the basis is for the additional fee for registries exceeding 50,000 and what costs ICANN asked for information as to what cost ICANN would be recouping from this fee.

Clarify how Surplus Funds will be Handled. Some comments requested more clarity on how surplus funds, if any, will be handled and mentioned that a transparent mechanism for the disposition of excess revenues must be in place.

Clarify Refunds. Some comments requested additional information regarding the proposed refund policy and many comments provided suggestions on changes to the proposed refund methodology. For example, comments included:

- Nonrefundable fees can deter attempts to register frivolous TLDs;
- Instead of a refund policy, there should be phased fees whereby an applicant would pay a portion of the fee initially and additional fees as each milestone is achieved;
- An applicant that withdraws should be able to get a full refund when the applicant did not know that there was a possible IDN ccTLD fast track coming along.
- A full refund should be granted if an application does not pass string contention, (unless the application was submitted "to game the system").

Payment Terms, Forms of Payment, and Other Financial Considerations. Many comments expressed suggestions related to the actual payments for application, evaluation and annual fees. For example, comments included:

- Applicants should be allowed to remit payments in other currencies (as opposed to only in US dollars) at an exchange rate fixed at the time the applicant guidebook is published;
- ICANN should allow partial payment within ten days and full settlement within 30 days to help countries with currency control (e.g., China) where it would take more than ten days to have the movement of a large sum approved by the relevant authority;
- ICANN should explain why proof-of-concept applicants from the year 2000 would be offered an $86,000 credit when there is no obvious connection between the applications processes for the to-be-launched gTLDs and the 2000 gTLDs;
- An extra percentage should be charged for those wishing to pay by credit card; and
- ICANN should allow installment payments of application fees; a pay as you go approach would make it easier for some applicants to convince investors about their business plans.

Analysis follows below:

Fees, including the evaluation fee and annual fee, may be too high. As described in the Cost Considerations of the New gTLD Program paper http://www.icann.org/en/topics/new-gtlds/costconsiderations-23oct08-en.pdf, the determination of the new gTLD evaluation fee is based upon the following principles:

- The new gTLD implementation should be fully self-funding (costs should not exceed fees; existing ICANN activities regarding technical coordination of names, numbers and other identifiers should not cross-subsidize this new program).
- The new gTLD policy requires a detailed and thorough implementation process to achieve its goals; this process is inherently costly.
- Since this is a new program, it is difficult to predict costs or volumes with certainty. A detailed costing process has been employed, and costs are in line with historical precedent.
- If all cost-related estimates are accurate, there will be no net increase to ICANN's funds as a result of evaluating new gTLD applications; fees will just equal costs. After some

time, there will be a careful assessment on whether the actual costs exceeded the estimates (shortfall) or whether the costs were less than estimated (surplus). If there is a surplus, the excess funds will not be used for ICANN's general operations, but rather will be handled in accordance with community consultations.

- In addition to the one time evaluation fee, other fees will be paid directly to providers based upon the requirements of certain applications for technical issues or disputes.
- For those new gTLD applicants that are delegated a registry, annual fees will be assessed in accordance with contract terms and the overall ICANN budget process.

Although the evaluation fee, at $185k, may be burdensome for certain organizations that are considering applying for a new gTLD, the evaluation fee was developed based upon a policy of revenue-cost neutrality, conservatism, and a detailed cost estimating exercise. The impact on a specific applicant or a class of applicant, by policy, is not a factor in the development of the evaluation fee.

ICANN recently published a solicitation for provision of evaluation services. As those expressions of interest are received and negotiations ensue, ICANN will hone the estimated cost of preparing an application and determine if the application fee (being revenue neutral) should be changed. It is anticipated that with time, greater efficiency and greater certainty, evaluation fees would likely be reduced over time. It may make sense for entities to wait until subsequent TLD rounds to make an application.

Some applications may have lower processing costs than others; they may not require extended review; they may not require technical or other reviews, and they may not require much staff or consultant time to answer questions and process the evaluations. Some applications, such as organizations with multiple strings, may not need discrete applicant evaluations repetitively for each string.

While there are possible reasons why a particular application may cost less than another application to evaluate, it is difficult, if not impossible, to determine which applications will require more or less resources. Application fees are set based upon the estimated average cost of all applications based upon principles of fairness and conservatism.

The GNSO policy recommendations allow for different pricing for different applications. Although the evaluation fee is proposed to be $185k in all cases, individual applicants will pay different amounts due to refunds and due to other fees. Applicants that choose to withdraw an application can pay significantly less. If an application requires dispute resolution or extra technical evaluation, the application may pay significantly more.

In summary:

- ICANN is a not for profit organization and is dedicated to deliver its services as efficiently as possible. ICANN is not established to grow revenue.
- The $185k evaluation fee is based upon the estimated costs associated with the new gTLD program.

- ICANN will continue to evaluate the cost estimates. If further research or adjustments to the evaluation process or cost estimating methodology changes the costs estimated to evaluate the applications, suggested changes to the pricing will be proposed.
- If the actual costs for evaluating the applications end up being less than the $185k Evaluation fee, then the surplus funds will not be used as part of ICANN's general funds. Instead these funds will be distributed in accordance with consultation from the ICANN community.

Need More Support for Fees. The primary financial impacts of the new gTLD program are driven by costs. Accurate cost estimating is a challenge, because this is a new program.

As described in Section 3, Cost Elements, of the Cost Considerations of the New gTLD Program paper http://www.icann.org/en/topics/new-gtlds/costconsiderations-23oct08-en.pdf, the, the $185k evaluation fee was based on detailed analyses of specific tasks and steps needed to be performed during the evaluation. ICANN has taken a detailed and thorough approach to estimating program development costs, process and risk costs associated with this new program, and consistently used a set of principles in applying the estimation methodology. The results have been tested with sensitivity and other analysis, and appropriate expertise has been retained and applied. For example, to ascertain risk costs, ICANN solicited and obtained expert analysis in this area in order to provide the most accurate and defensible estimate possible.

These costs will be described in additional detail in the next version of the cost considerations paper that will be published after potential providers furnish estimates for evaluation services, which is expected to be prior to the ICANN Seoul meeting.

Regarding annual fees, there were some calls for additional reductions in this area even though the fees were reduced significantly from Guidebook version one to version two. The minimum fee has been reduced to $25,000 US. This is about 15%-20% of one full time employee for the year in support, i.e.: registry liaison, contractual compliance, finance, legal, IANA services provided in 300 or less hours per year. Viewed this way, $25,000 does not seem adequate.

Clarify How Surplus Funds will be Handled. As described in the Cost Considerations of the New gTLD Program paper http://www.icann.org/en/topics/new-gtlds/costconsiderations-23oct08-en.pdf, if all cost-related estimates are accurate, there will be no net increase to ICANN's funds as a result of evaluating new gTLD applications; fees will just equal costs.

After some time, there will be a careful assessment on whether the actual costs exceeded the estimates (shortfall) or whether the costs were less than estimated (surplus). In order to comply with the principle of being fully self-funding and avoid cross-subsidy of the new gTLD program by existing ICANN registry or registrar fees, the fees for evaluation are to be segregated and to be used for the new gTLD program only. They are not for general purpose ICANN uses. This requires two important finance actions to ensure compliance with the revenue-cost neutrality principles as well as adherence to ICANN's principles of accountability and transparency:

- **Report on cost accounting.** There must be careful cost reporting performed that captures all relevant costs for the new gTLD program. As described in the cost evaluation paper, the $185k evaluation fee was developed based upon new gTLD development costs initially estimated at $12.8 million (and assumed to be amortized over the first several hundred applications) plus fixed and variable application evaluation costs, initially estimated at $100k per application. Each of these costs and the underlying details of the costs are to be captured and presented in an easily understood and reviewable manner. At some point in the future, currently thought to be in two to three years, the costs will be collected and the new gTLD application round will be deemed closed. The total costs expended will be subtracted from the total of all fees including application and evaluation fees collected by ICANN, less any refunds paid out. This net amount, if positive, will be the new gTLD application round surplus. If negative, the net amount will be the new gTLD application round deficit. If there is a deficit, future rounds will pay a portion of the fee.

- **Dispose of surplus.** If the net amount from the new gTLD application round is a surplus, the excess funds will not be used for ICANN's general operations, instead they will be disposed of in a manner consistent with the community's feedback and the policy recommendations. ICANN's multi-stakeholder model for decision making will be employed to ensure that all decisions regarding the underlying guiding principles, amounts, recipients, timing, and manner of disposition of surplus funds, if any, will be handled in accordance with the communities' wishes. Because the amount of any possible surplus is difficult to forecast (other than the current financial forecast of zero), it is hard to determine in advance how such a surplus should be used. Undoubtedly, this would depend in part on the magnitude of any surplus.

Clarify Refunds. A portion of the $185k evaluation fee could be refunded in certain situations depending on the point in the process at which the withdrawal of an application is made. The refunds allow an applicant to withdraw an application any time prior to completion of the evaluation. The draft Applicant Guidebook (version 2) includes (in Section 1.5.5) details related to refund amounts and timing. In general, the refunds available are roughly based on the principle of returning to the applicant all anticipated costs not yet expended on an application that is withdrawn prior to completion of final processing. The Refund methodology is also designed to encourage unsuccessful or problematic applications to be withdrawn and deter the submission of frivolous applications.

Payment Terms, Forms of Payment, and Other Financial Considerations.

- Because the detailed cost estimation process related to the application evaluation fee (described in the Cost Considerations of the New gTLD Program paper http://www.icann.org/en/topics/new-gtlds/costconsiderations-23oct08-en.pdf) was performed using US Dollars, the associated fee has been stated in US Dollars. This estimation methodology did not take into account risks related to future changes in the rates of exchange between the US Dollar and other international currencies. Therefore, to mitigate the concern regarding currency exchange rate fluctuations, applicants could

consider a currency hedging strategy whereby they exchange $185,000 worth of their local currency into US Dollars, at the time they decide to file an application, and therefore applicants will eliminate the impact of future changes in the rate of exchange.
- Although the dates associated with the opening and the closing of the application submission period have not yet been defined in the Draft Applicant Guidebook, ICANN intends to close the application submission process several months after the publication of final version of the Guidebook. Because the application process will be open for several months, applicants will have sufficient time to obtain approval of for the payment of the application related fees.

The impact on a specific applicant or a class of applicant, by policy, was not a factor in the development of the evaluation fee. When specifying the fee, it was also understood that new registries would require significant additional investment in addition to the application fee to begin registry operations. Therefore, the application fees are not an unreasonable fraction of the entire investment and up-front payment of such fees should be part of the business model developed by applicants.

For the reasons cited above, the Guidebook will remain essentially static pending the completion of final cost data. It is anticipated, but not certain, that the data will verify the cost estimates and the fees will remain constant.
- Retain gTLD Evaluation Fee of $185k.

The proposed gTLD Evaluation Fee remains $185k. Although no additional cost estimates or policy decisions indicate the fee should be altered, the cost estimates will continue to be evaluated as the launch date approaches. If any significant cost estimates are altered due to more information becoming available, then the fee could be adjusted accordingly.

No discounts will be made available in this round of the new gTLDs as there is concern with gaming and possible added complexity in the first round. Discounts may be considered in future gTLD rounds.

Support for Fees. As described in the cost consideration paper (http://www.icann.org/en/topics/new-gtlds/costconsiderations-23oct08-en.pdf), the $185k evaluation fee was based upon detailed analyses of specific tasks and steps needed to be performed during the evaluation.

The costs related to the applicant evaluation process will be described in more details in the next version of the cost considerations paper. Key questions that will be addressed include:
- What are the activities that need to be performed for each phase of the application evaluation?
- How are historical costs factored into the development costs?
- What is the impact of the assumptions used for the number of applications?

Clarify How Surplus Funds will be Handled.
Report on cost accounting: When the new gTLD round is deemed as closed, as well as periodically throughout the first-round process, all costs will be captured and reported on in a detailed and readily accessible manner. The total costs will be compared to the total fees collected, less any refunds and a report of the deficit or surplus will be posted. The report will be available for the community and will be reviewed by an independent accounting firm. (While most costs will be apparent at the "end" of the round, the full realization of risk costs may take up to three years. An estimated final cost will accompany each report.)

Use of surplus, if any: A process will be developed and implemented to engage the community in the disposition of the surplus, if any. This will include likely recipients of the funds as well as clarity on the principles (e.g., application of funds against future rounds), amounts, timing, and manner of disposition of the surplus funds, if any.

Clarify Refunds.

- Depending upon the stage of the application's evaluation processing, refunds for 20%, 35% or 70% of the evaluation fee will be available. Refunds will be made available to applicants whose applications do not proceed through the entire evaluation process. The amount of the refund will be generally based on an amount of the estimated evaluation costs not expected to be spent on the particular application. Any applicant can apply for a refund by submitting a request for a refund along with a request to stop processing the application. Any application that has not been successful is eligible for a 20% refund. The following table summarizes each of the refunds available.
- Applicants should refer to table in Section 1.5.5 of the Draft Applicant Guidebookv2 for further information regarding the refund percentages available.

Payment Terms, Forms of Payment, and Other Financial Considerations.

- To mitigate concern regarding currency exchange rate fluctuations, applicants could consider a strategy whereby they exchange $185,000 worth of their local currency into US Dollars, at the time they decide to file an application, and therefore applicants will eliminate the impact of future changes in the rate of exchange.
- Because the application process will be open for several months, applicants will have sufficient time to obtain approval for the payment of the application related fees.
- The impact on a specific applicant or a class of applicant, by policy, was not a factor in the development of the evaluation fee. When specifying the fee, it was also understood that new registries would require significant additional investment in addition to the application fee to begin registry operations. Therefore, the application fees are not an unreasonable fraction of the entire investment and up-front payment of such fees should be part of the business model developed by applicants.

Registry Services Fees.

- A small fraction of registry service evaluations result in registry services technical panel (RSTEP) review. Each inquiry costs $100K-$125K.

- In an environment with hundreds of TLDs, ICANN would have to budget eight figures to cover these costs alone, There is also a high level of uncertainty as to how many times the RSTEP will be used, so the ICANN budget will have to be conservatively weighted, depriving other uses of those funds.
- Therefore, the RSTEP fee should be paid directly by the beneficiary of the service, the registry operator. Since the fees are paid a relatively few number of times, it should not deter innovation.

GEOGRAPHICAL NAMES

I. Key Points

- Country and territory names can be applied for under the new gTLD process, but applications will require evidence of support, or non-objection, from the relevant government or public authority.
- The requirement to provide evidence of support, or non-objection, from the relevant government or public authority, was developed to reflect the GAC Principles regarding new gTLDs and also address GAC concerns that the objection process was inadequate.
- Greater specificity will be provided on the definition of country and territory names.
- Protection for country and territory names might be provided at the second level – requiring relevant government approval of registration of country names.

II. Summary of Comments

More certainty on scope. The scope of what is to be considered a geographical name should be established with a higher degree of certainty. An exhaustive list of names should be established for the benefit of prospective applicants. *Lovells (13 April 2009).*

GAC Principles. ICANN must take into account the GAC Principles regarding new gTLDs, including national and geographical interests. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Incorporation of GNSO and GAC Advice. There does not seem to be an explanation as to why ICANN staff ignored the GSNO recommendation and went with the GAC recommendation granting a broad new power to the public sector over geo names at the first level. *P. Corwin*, *ICA*, *GNSO Transcript at 92 (28 Feb. 2009).* ICANN should reverse its adoption of the GAC position and revert to the GNSO position that provides governmental entities with standard objection rights. *ICA (13 April 2009).*

Second level geo-domains. Any suggestion that governments have any ability to object to second level geo-domains on any grounds outside the scope of the UDRP should be rejected outright. The direct search industry created by domainers offers consumers an alternative to search engines when they seek information, and geographic names are one of the chief means by which consumers seek relevant information about providers of products and services associated with a particular locality. The GAC continues to press for control of geographic and other names of national significance at the second level of the DNS and ICANN continues to entertain this overreaching. Subjecting second level names to no-cost, on-demand blocking by countries and other entities would be a major policy error detrimental to consumers and entrepreneurs wishing to serve them. ICANN also should not favor multinational companies over smaller businesses in considering this issue. *ICA (13 April 2009).*

Commends consideration of ccNSO WG on geographical names. ccNSO Council appreciates that instead of the official language of the country and the 6 UN languages, all languages are now included, a significant improvement that removes discrimination against languages other than the UN languages. *C. Disspain, ccNSO Council (9 April 2009).*

Government control and other Geo domain concerns. ICANN's proposal is basically putting all geographical domains in the hands of government, which seems inherently unfair. It is also unclear what is meant by "selected economic and other groupings" included in the definition of a Geo domain; what is an example of that (.wallstreet; .winecountry)? What about if cities with the same name apply for their city's gTLD (e.g., .springfield in the U.S.)? At a difficult time for city budgets, citizens' taxes will have to be spent and may have to be increased to give those cities a chance to bid for their extension. ICANN should give governments preference in applications for Geo domains but not absolute control over them. Terms need to be well defined so that people do not expend significant funds to determine if they have interpreted the rules correctly. Geo domains should be awarded to the registry willing to provide the service for the lowest cost and do not make the citizens of a jurisdiction cut government services in order to pay ICANN fees through a bidding war with others. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).* Regarding section 2.1.1.4.1 and 2.1.1.4.2, Utilize the first guidebook approach –with need of local non-objection or support letters when it comes to country exact names and major cities exact names, no more; applying the rule to "appropriate authorities" will open Pandora's box and could lead to a mess and unpredictable results (and how to interpret "widely understood" phrase itself could create confusion—better to avoid it because there is no precise definition of it). *A. Sozonov (Module 2, 11 April 2009).* It may be reasonable to require applicants of names of countries (official or widely understood) and possibly larger regional (e.g. continental) or capital/larger cities to produce non-objection or simple support letters. The process for review by the governments is onerous and ludricous—ICANN seems not know how government works. There is also no need for any of the sub-country name level restrictions. Leave this issue as it was in the first guidebook—where local jurisdictions get some say regarding country names and major cities when it is exact or close to the names and no more. *DotAfrica (Module 2, 12 April 2009).* See also *S. Subbiah (Module 2, 13 April 2009).*

Problems with getting government support. While ICANN says it is the applicant's responsibility to identify which level of government support is required, in many countries there are still conflicts between parallel organizations who are challenging each other about control of the Internet inside the country. In such an area almost no one can succeed in getting government support. Why should government have such control while everybody believes that the Internet must not be under domination of governments*? S. Soboutipour (Module 2, 12 April 2009).* ICANN should define what level of support they require (e.g., a "letter of objection") given that it may be hard to get any government support in some places and in others the government may not be interested in any TLD application*. Association Uninet (Module 2, 12 April 2009).* The government support requirement is problematic –e.g., regarding the suggestion to create registries for the continents, we should not be turning them over to the

very governments which cause the problem we are trying to solve; also consider the lack of service to Africa, South America and large parts of Asia (why does ".africa" have to wait on a "substantial number" of 53 governments). *E. Brunner-Williams (Module 2, 14 April 2009).*

Cities and IDN scripts. Any string that is a representation in any language of New York City should have the highest protections. Re: Section 1.3 IDN applicants, under the existing IDN structure New York City would have to file an additional application and pay an additional fee for each IDN representing the city in other scripts. The assignment of these script IDNs should be readily available to respective cities with fees representing additional processing costs only. *Connecting.nyc (13 April 2009).*

Separate Geo TLD category. Geo TLDs do not fit into a new gTLD process; they are not generic and have more in common with ccTLDs. It would have been better to discuss and establish common rules for them and then start a separate Geo-gTLD process. *M. Leibrandt (13 April 2009).*

Existing ccTLDs and Geo TLDs. There may be legitimate applications for territory, country, or regional gTLDs which appear to conflict with existing ccTLDs. Due to high ccTLD prices or very restrictive registration policies, the relevant government authority and the affected community may support a new gTLD. If a community and/or government authority wish to support a gTLD application, this should be allowed. *Minds and Machines (13 April 2009).*

Geo-gTLD Registry Re-delegation. Clear re-delegation rules need to be established before introduction of geo-gTLDs. Geo-gTLDs should reflect a trilateral relationship between ICANN, the registry and the local Internet community. Early termination of the contract between ICANN and the registry must be possible if significant parts of the local Internet community including the relevant government or public authority are no longer satisfied with the services offered by the relevant geo-gTLD registry. *M. Leibrandt (13 April 2009).*

Support/non-objection of governments. There should be no substitutions for the requirement to provide evidence of support or non-objection from the relevant government or public authority. Sector specific IT regulation dealing with Internet domain names is an important element of operator-independent consumer protection once the geo-gTLD has been introduced. *M. Leibrandt (13 April 2009).*

Subcountry name restrictions. There is no need for sub-country name restrictions since the current ASCII ccTLDs and the upcoming IDN ccTLDs ensure that every country gets its own TLD to run/operate in a name form that it either chooses (IDN) or historically has and accepted (ASCII postal code). This issue should be left the way it was in the first Guidebook version – where local jurisdictions get some say when it comes to country names and major cities when it is exact or close to the names and no more. *NCUC (13 April 2009).*

Multiple labels for the same geographical term. From both an IDN and ASCII perspective, current ICANN rules require double (or triple) payment – e.g., .koln, .cologne. Cities or regions

which are widely referred to by multiple labels should be given an opportunity to use all of these labels for the same price. *Minds and Machines (13 April 2009).*

Geopolitical names. It is going too far to require non-objection or support letters from authorities for names of any place within in a country (e.g., Silicon Valley, Bollywood). *NCUC (13 April 2009).*

Community requirement. Geo gTLDs should always be based on community based applications for the benefit of a restricted population. Concepts allowing unrestricted global use of well known country, territory or place names should be handled with caution. In general, geo gTLD applications not providing evidence of registration rules limiting the use of the TLD to members of the respective local community should be rejected. *M. Leibrandt (13 April 2009).*

Geo gTLD Fees. There should be no preferential treatment for geo gTLDs on registration and evaluation fees, which should in general be as low as possible for all applicants to provide low market entry barriers. *M. Leibrandt (13 April 2009).*

Geographical Names (2.1.1.4.1). Module 2 evaluation procedures are generally acceptable but the identification of city names presents numerous opportunities for collision (at city and even national level, as when two countries share a common language –e.g., U.S. and U.K.) Because the burden falls on the applicant, it is likely that many applications will unknowingly fail to identify all instances of collision. Later modules imply that this would be a material omission and could negatively affect the application's review. *Go Daddy (13 April 2009).*

IDN TLD applications—largest users; government. ICANN should request official authentication from government regarding the largest IDN user community, as an effective and supportive document for ICANN on evaluating registrant competition. *CONAC (13 April 2009).* See also *Internet Society of China (13 April 2009).* In section 2.1.1.3.2 "String Requirements" under the clauses for IDNs the following language should be added: "Applicant must demonstrate proof or non-objection from governments or public authorities of a country or territory, if the applied [for] string is in the language/script that the residents of that country or territory composed of super majority of the users that are using that language/script in the world." *CNNIC (13 April 2009).* See also *NCUC (13 April 2009).* ICANN needs to clarify before the application round opening the issue of government consent needed where local laws have been issued to prevent the deployment of IDN TLDs in local scripts. *A. Sozonov (Module 6, 9 April 2009). S. Soboutipour (Module 6, 12 April 2009). Association Uninet (Module 6, 11 April 2009). DotAfrica (Module 6, 12 April 2009). L. Andreff (Module 6, 13 April 2009).S. Subbiah (Module 6, 13 April 2009). S. Maniam (Module 6, 13 April 2009).*

Recommend no consideration given to interests of governments or public authorities in country or territory names. A geographical community as defined by the process may not be the best organization to launch a particular TLD. Bias should not be given to official government compared with the private sector. In the case of a private party working with the government, this scenario is open to bribery, lobbying, etc. TLDs should be allocated based on ability to

perform functions (or auction), not political influence. The loose definitions of who within that community can provide authority on behalf of the community will lead to confusion. In the event of two communities using the same name, it seems that bias may be given to the larger of the communities (e.g., Paris, France as opposed to Paris, Texas) and the section also has a loophole ("An Application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name…Couldn't I just not 'declare'?"). (re: Module 2, 2.1.1.4). *A. Allemann, DomainNameWire.com (6 April 2009).*

Country Names and Territory Names. They should all be ccTLDs—not gTLDs. The dividing line between gTLDs and ccTLDs will be blurred and eventually disappear if ICANN allows any string that is a meaningful representation of a country or territory name listed in the ISO 3166-1 standard, in any language and any script as a gTLD. It is of utmost importance to keep the distinction between gTLDs and ccTLDs. (See discussion in comments text and specific proposed amendment language for section 2.1.4 to address this concern.) *ccNSO Council (9 April 2009).* auDA strongly supports the ccNSO principle that all country names and territory names are ccTLDs. Any territory name should not be available as a gTLD, including names in any ASCII or non-ASCII script or any recognized language. It is of concern that this has not been fully incorporated in the current version of the draft guidebook. auDA recommends that any meaningful representations or abbreviations of a country and territory name in any script or language should not be allowed in the gTLD space – at least until the related IDN ccTLD PDP has been completed. ICANN should work with appropriate constituencies (e.g. the country code managers and governments through the GAC) to develop a mutually agreeable solution prior to the finalization of the new gTLD applicant guidebook. *auDA (14 April 2009).* See also *APTLD (Module 2, 13 April 2009).*

Illogical process. (2.11.4.1 and 2). These items are illogical—ICANN says there must be no conflict with names of any cities, county, province or state, listed in lists that may change from time to time. In one country during a period of 5 years 4 new Provinces were added. How will this work where new cities are added each year? What is the final border of this limitation? Keeping the field open is very uncontrollable. There must be a restriction somewhere; why not ask governments to show their red lines? *S. Soboutipour (Module 2, 12 April 2009).*

Second Level Clarification/Concerns. If someone applies and is granted dot islands and if someone wants to register Barbados.islands or any specific name of an island at this new TLD, does that applicant need to get the endorsement or at least the non-objection of that government authority, or does that endorsement or non-objection requirement only apply at the top level and not to the second level of new TLDs where the name of the TLD is not any specific country, region, or whatever that's covered by the overall geo rules? What about municipalities (e.g., la.beaches, rio.beaches)? *P. Corwin*, *Internet Commerce Association*, *GNSO Transcript at 92-93 (28 Feb. 2009).* We would like to see from ICANN in writing the clarification that there is no requirement to get the endorsement or non-objection of a city, country or region for specific gTLD names such as Hawaii.beach, Australia.beach, or Rio.beach. *P. Corwin*, *Internet Commerce Association*, *Public Forum Transcript at 43 (5 Mar. 2009).*

Challenge process. There should be an opportunity to challenge the geographical names process (GNP)—preferably within an ADR. This appears necessary to address situations in which the decision of the GNP may be that the application for the new TLD is not a geographical name. *INTA (8 April 2009)*.

III. Analysis and Proposed Position

Country and territory names

Will allowing country and territory names in the new gTLD application process blur the distinction between what is a gTLD and what is a ccTLD?

The ccNSO and other ccTLD managers have raised concerns that allowing applications for country and territory names in the gTLD process will blur the distinction between ccTLDs and gTLDs. They have requested that applications for country and territory names not be allowed in the gTLD process, at least until the completion of the IDN ccTLD PDP, which will address this issue. The current timetable for the completion of this process is mid 2011. Comments received from others support the notion of country and territory name applications being allowed under the gTLD process.

While understanding the concern that it is important to maintain the distinction between a ccTLD and a gTLD, there is also anticipation that governments may want a .country name TLD, and at this time, this is only possible under the new gTLD process. The GAC has expressed the sentiment of a government's sovereign rights over the use of their respective country name. Therefore, it would seem inappropriate to deny a government (or better that ICANN does not have the authority to deny) the right to submit or support an application for a .country name TLD under the new gTLD process. The new gTLD process is clear that an application for a country or territory name must be accompanied by government support.

The treatment of country and territory names, in version 2 of the Draft Applicant Guidebook, was developed in the context of the points raised by the GAC, the ccNSO, and the GNSO policy recommendations. Applications for country and territory names will require evidence of support or non-objection from the relevant government or public authority, and that evidence must clearly indicate that the government or public authority understands the purpose of the TLD string and the process and obligations under which it is sought. The evidence of support requirement is consistent with the GAC Principle 2.2[1]; and the detail to be contained in the letter was developed to overcome the ccNSO's concerns that governments have varying degrees of understanding

Government interests

[1] ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.

What process was undertaken to balance the recommendations of the GNSO with the GAC principles regarding new gTLDs?

Why is evidence of support, or non-objection, from the relevant government or public authority required for the categories of geographic names identified in the Draft Applicant Guidebook?

The new gTLD Program Explanatory Memorandum, Proposed Process for Geographic Name Applications, explains the balancing between the GNSO policy position and the GAC principles http://www.icann.org/en/topics/new-gtlds/geographic-names-22oct08-en.pdf

According to Article XI, Section 2.1.j of the ICANN bylaws—the advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

The GAC expressed concerns that the GNSO proposals do not include provisions reflecting important elements of the GAC principles and did not agree that the objection and dispute resolution procedures described by the GNSO policy recommendations were adequate for ensuring that governments and public authorities are aware of applications for strings which represent their country or territory names, or certain other geographic and geopolitical descriptions. The GAC principles state, among other things, that ICANN should avoid such names "….unless in agreement with the relevant governments or public authorities". The GAC expressed a preference that such applications require the relevant government's or public authority's approval as opposed to relying on the objection process. This is why there is a requirement that the applicant obtain evidence of support, or non-objection, from the relevant government or public authority.

The GNSO's Reserve Name Working Group report does recognize that applicants interested in applying for a geographical name should be advised of the GAC principles and further "…that the failure of the GAC, or an individual GAC member, to file a challenge during the TLD application process, does not constitute a waiver of the authority vested to the GAC under the ICANN bylaws". With this knowledge, a prudent applicant would take steps to discuss their application with the relevant government or public authority, and seek their support, prior to submitting the application to reduce the possibility of being subject to an objection from the government at a later stage in the process. Prescribing evidence of support or non-objection in the Draft Applicant Guidebook is considered a formalization of this step for the applicant.

Will the requirement of evidence of support or non-objection from the relevant government or public authority be onerous on governments?

It is the applicant's responsibility to obtain the evidence of support or non-objection of the relevant government or public authority, and as such the process is not intended to be onerous on governments. The requirement was developed in response to GAC concerns.

Does this requirement mean that governments have control over all geographic names?

The process was developed to respond to the GAC's concerns and is not intended to give the governments control over geographic names. It does not restrict who can apply for a geographic name, but was developed to provide some protection for geographic names. It is also considered a measure to reduce the likelihood of objections.

Does this requirement mean that governments have control over all geographic names?

The process is not intended to give the governments control over all geographic names, the process was developed to respond to the GAC's advice, and is also considered a measure to reduce the likelihood of objections.

Capital city names

Will capital city name applications be given preference over city name applications for the same name that are not capital cities, e.g. Paris, France over Paris, Texas?

The Draft Applicant Guidebook states that "an application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166- standard" and "an application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city" require documentation of support or non-objection from the relevant government or public authority.

This requirement means that an application for .paris, regardless of whether the applicant intends to represent Paris, Texas; Paris, France; the fragrance Paris: or Paris Hilton, will require documentation of support or non-objection from the relevant government or public authority, which, in accordance with the capital city requirement, in this case would be France.

It is important to note that this rule applies only to capital city names. Given the GAC Principles regarding New gTLDs and general principles of conservatism, the process identifies the limited number of capital city names as being important to government / sovereign interests. Other city names require government approval only if they claim to represent a city in the application, and only from the relevant government of the city they claim to represent. The relevant government in the case of city names depends on the location for example, an application purporting to represent Newcastle, England requires the approval of a different government

than an application representing Newcastle, Australia. An application for "Newcastle Ale" or any other brand or unspecified purpose requires no government approval.

Sub-national names

Why are sub-national names afforded protection under the process?

How does the applicant resolve competing claims of authority?

Sub-national names such as states, counties and provinces have been afforded protection in response to GAC advice that place names only be available with the support of the relevant government or public authority. It will be the applicant's responsibility to identify if the string represents a place name, other than city name, and also to determine the relevant government or public authority. Some comments stated that protections provided to country names should not be extended to any sub-national names. National governments have vital interests in the name of the country and also in names of sub-national regions. Sub-regional names can be misappropriated for purposes contrary to national purposes (e.g., national security) and so the requirement for government approval is extended to a limited number of additional names. To make the issue clear to applicants the process has provided a bright line rule by limiting the names protected to the ISO-3166-2 list.

Where the string is a sub-national geographical identifier on ISO 3166-2 list over which more than one government or public authority claims authority, ICANN will require the applicant to supply supporting documentation, or evidence of non-objection, by all the relevant governments or public authorities claiming such authority. ICANN is a technical coordination body not an arbiter of political or territorial disputes. This requirement is not a statement by ICANN on the rights of any claim, but rather a reflection of ICANN's commitment to the stability of the DNS.

Community applications

Should geographic name applications also be community?

In accordance with the adopted policy recommendations, the category of community-based applications was introduced to enable priority for a community-based application to be awarded in a contention situation. Applicants are free to select the preferred category for their applications – community-based or not - and there is no basis in the adopted policy for obliging any applicant to select either category. Therefore, a geographical names applicant can self-select whether to be a community-based application. As a community-based application, the applicant must satisfy the stated criteria: restrictive registration practices, association with and the support of a pre-existing community and so on.

Redelegation

Will there be a redelegation process for geographic names similar to that currently applied for ccTLDs?

The gTLD space does not have a redelegation process as there is a presumption of renewal in all gTLD registry contracts. The gTLD contract also has a change of control provision. In the case of a geographical name that required government approval or non-objection, that change of control will require the approval of the government that supported the initial application. The change of control process is similar to the redelegation process in that the approval of the sponsoring organization, as it exists for that registry, is required.

Also, the ICANN gTLD Registry Continuity Plan was developed to transition a TLD to a successor operator in the event that a registry or sponsor is unable to execute critical registry functions, and continue the operation of a TLD in the longer term. This plan will be amended in light of the new gTLD process and, in the case of geographical names as defined in the limited manner by this process, will require the approval of the relevant government.

Second-level names

Will there be protection of geographic names at the second level?

Recognizing the challenges associated with the GAC principle 2.7[2] relating to national and geographic names at the second level, the ICANN Board sought assistance from the GAC in developing a solution to enable implementation. The GAC submitted a reply in accordance with the ICANN Board request on 24 April 2009. (http://www.icann.org/correspondence/karklins-to-twomey-24apr09.pdf [PDF, 96K]) A final report from the GAC is requested by 25 May 2009.

That report recommends that names contained in certain internationally recognized lists are to be reserved at the second level and that registries develop procedures for the release of those names consistent with GAC principles. It would be the prerogative of the relevant governments to adopt those registry procedures to register the country name.

The report limits the names that would be reserved to those explicitly contained on three authoritative lists:

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[2] Applicant registries for new gTLDS should pledge to: a) adopt, before the new gTLD is introduced, appropriate procedures for blocking, at no cost and upon demand of governments, public authorities or IGOs, names with national or geographic significance at the second level of any new gTLD; b) ensure procedures to allow governments, public authorities or IGOs to challenge abuses of names with national or geographic significance at the second level of any new gTLD.

- The short form (in English) of all country and territory names contained on the ISO 3166-1 list,
- The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World,
- The list of UN member states in 6 official UN languages prepared by the Working Group on Country Names of the United Nations Conference on the standardization of Geographical Names.

Definition of terms

Can more clarity be provided on what is considered a geographical name?

To the extent possible, the geographical name categories are based on an identified list of names. For country and territory names, this is the ISO 3166-1 list; sub-national place names, the ISO 3166-2 list; capital city names are those of the countries and territories contained in the ISO 3166-1 list; and continent and UN regions are based on the UN "Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" list. The only absence of a list is for city names and this is because of the duplication across the world of city names, that many city names can be generic terms, and also are brand names.

At the request of the ICANN Board, further work is being undertaken by staff to provide greater specificity on the definition of a country or territory name. The outcome of this work will be reflected in version 3 of the Draft Applicant Guidebook, and the definition will continue to be based on the ISO 3166-1 list. That portion of the Guidebook is being published at the same time as this document in order to point up discussion.

What is meant by "selected economic and other groupings"?

The term "selected economic and other groupings" is part of the name of the UN list "Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings" used to determine strings which represent a **continent or UN region**. In this context the term relates to developed and developing regions; least developed countries; landlocked developing countries; small island developing states; and transition countries. The full list is available at:
http://unstats.un.org/unsd/methods/m49/m49regin.htm

In conclusion, Country and territory names will be allowed under the gTLD process.

The Draft Applicant Guidebook will be amended to provide new detail for public comment:
- Greater specificity on the definition of what is a country and territory name;

- Greater specificity on the support requirements for continent names as requested by the Board; and
- Clarity on the meaning of what is a 'public authority' in the context of the requirements of the Guidebook.
- Handling of country / territory names (as listed in certain specified sources) at the second-level in accordance with implementation advice received by the GAC.

OBJECTION PROCESS

Procedures

I. Key Points

- ICANN will continue to fine-tune the procedures applicable to the dispute resolution process.
- While it will be at the DRSPs discretion, ICANN will encourage all DRSPs to consolidate objections whenever possible.
- ICANN will consider and will discuss with the DRSPs a process whereby a running list of objections are published as objections are filed during the filing period.

II. Summary of Comments

No TLD awarded to anyone if there is successful objection (3.1.2.1). If an existing TLD operator successfully asserts string confusion and the application is rejected, then the string should not be given to anyone else, including the existing TLD operator who won the objection. *NCUC (13 April 2009). A. Sozonov (Module 3, 9 April 2009). S. Maniam (Module 3, 11 April 2009). S. Soboutipour (Module 3, 12 April 2009). Y. Keren (Module 3, 13 April 2009). L. Andreff (Module 3, 13 April 2009). DotAfrica (Module 3, 12 April 2009). D. Allen (Module 3, 13 April 2009). A. Mykhaylov (Module 3, 13 April 2009).*

Different Languages Issue. It is unclear whether two similar TLD requests will be opposed in two different languages or not. *J. Guillon (2 Mar. 2009).*

Public comments role. The role of public comments in the work of evaluators (including at the comparative evaluation stage) and DRSPs needs to be spelled out. *SIIA (13 April 2009).*

"Base" processes needed for all DRSPs. In so far as possible, there should be a consistent set of "base" processes for all DRSPs to follow so that the system does not become overly complicated. *Regions (13 April 2009).* See also *AT&T (13 April 2009).* ICANN should develop standardized mechanisms for dispute resolution that contending parties can turn to before resorting to auctions; however, no such mechanism should preclude legal processes provided under applicable law. *CADNA (13 April 2009).*

Precedential Value of Successful Objections. In the absence of famous trademarks being added to the reserved names list, successful objections should have precedential value so trademark owners do not have to keep objecting. *European-American Business Council (1 April 2009).* Successful objections by brand owners should have precedential value; this will avoid new case procedures and fees. *Visa Inc. (11 April 2009).* If the objector is successful, then the gTLD should be moved onto the "reserved names" list, and the objector could avoid having to submit and

prosecute objections to the same or similar gTLDs multiple times. *Hearst Communications, Inc. (13 April 2009).* See also *COTP (13 April 2009). IHG (Module 3, 9 April 2009).*

Clarify preclusive effect if any on determinations in string confusion and LRO proceedings. ICANN should clarify whether and, if so, to what extent determinations in string confusion and LRO proceedings will have any preclusive effect. E.g., will an expert determination in a string confusion proceeding apply to a LRO proceeding between the same applicant and objector regarding the same string? Will an expert's finding in a LRO proceeding that the applied-for string is not confusingly similar to the objector's mark preclude a finding of string confusion if the objector applies in the second round for a gTLD identical to the mark on which it based its objection? *Microsoft (Guidebook, 13 April 2009).*

Preclusive Effect of Withdrawn Application due to Objection. The guidebook should specify the preclusive effect of the withdrawal of an application after an objection has been filed against it. An applicant should not be permitted to re-file an application for the same gTLD string if its initial application was withdrawn after an objection was filed. *INTA (8 April 2009)*.

Objection Mechanisms. It is important that appropriate objection mechanisms are in place through all stages of the application process to ensure the protection of consumer interests. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

Objection-Time Limit. Once an objection has been filed, the time limit requirement should be amended to allow for a possible change to the complaint if requested by the DRSP on procedural grounds. This would address a concern that an objector could in some cases run out of time to amend a complaint under the current time limit structure (90 days from the publication of the TLD application). *INDOM.com (10 April 2009).*

Separate responses and fees for each objection. Section 3.2.3 says applicants must respond to each objection separately and pay the filing fee for each response. Some scenarios may occur involving popular and controversial applications that generate an unexpected number of objections. *Go Daddy (13 April 2009).*

Failure to file response to objection. Section 3.1.4 seems to suggest that if an applicant does not file a response the objector prevails. This is too careless about the outcomes of a battle-of-the-forms mechanism. *E. Brunner-Williams (Module 3, 14 April 2009).*

Objector Prevails by Default. If the applicant defaults (whether by failing to respond or by withdrawing application) then the applicant should be precluded from filing another application for the same objected-to string*. Microsoft (Guidebook, 13 April 2009).*

Untimely Objections—Good Cause Exception. The guidebook and procedure should include a principle good cause exception to allow for filing objections past the deadline in exceptional cases. Because all objections must be filed electronically, this exception should include

technically related, unforeseeable circumstances that would prevent an objector from timely filing and "Acts of God" (e.g., floods, earthquake, etc.) would also be included in the exception. *INTA (8 April 2009)*.

Amending Objections Dismissed on Procedural Grounds. DRSPs should allow objectors a short cure period to amend objections dismissed on procedural grounds to cure the defect and avoid the burden of formally re-filing an objection that can be easily corrected. *INTA (8 April 2009)*.

Burden of proof-standards. The guidebook and Article 20 of the procedure should state clearly the burden of proof employed in the objection process (e.g., "on balance of probabilities" civil law standard or "beyond all reasonable doubt" used in U.S. criminal law proceedings). The burden of proof in LRO proceedings should shift to the applicant to show why the application should not be refused if the applicant has unsuccessfully defended more than a given number of UDRP or gTLD claims in a rolling 12 month period. INTA also renews its version 1 guidebook comments on standards for string contention objections and LRO objections. *INTA (8 April 2009)*.

Repeat offender cases. During the objection period, the DRSP should have discretion to give strong consideration in favor of brand owners when dealing with repeat offender cases. *Visa Inc. (11 April 2009)*. Past domain name abuse should be a factor if raised in any objection. See also *Hearst Communications, Inc. (13 April 2009).*

Consolidated Objections—Clarification. INTA supports the possibility of consolidated objection, but requests confirmation that, even if procedurally consolidated, the bases and arguments in support of each individual objection will be considered and decided separately and on their own substantive merits. *INTA (8 April 2009)*. Brand holders should have the ability to consolidate complaints against the same party to lower costs. *Visa Inc. (11 April 2009)*. Regarding section 3.3.7, ICANN should clarify how it will handle filing fee requirements when it consolidates objections (e.g., will fees be divided equally between each "consolidated" objector). *BITS (13 April 2009).* See also *Go Daddy (13 April 2009).*

Refusal of Consolidation. Both the objector and the applicant should be permitted to refuse consolidation of objections proposed by the DRSP. *Microsoft (Guidebook, 13 April 2009).*

Avoid duplication and encourage consolidation of objections. Publishing a running list of objections received could reduce pressure for others to file similar challenges. Consolidating objections into a single proceeding should be encouraged to benefit applicants facing multiple objectors and to benefit objectors who wish to challenge multiple applications for the same or virtually the same string. *COA (13 April 2009).* DRSPs should be strongly encouraged if not required to allow for consolidation of objections where possible and to thereby minimize applicant and objector expenses (1.1.2.6). *RyC (Modules 1-4, 13 April 2009).* It is not clear that DRSPs should have full discretion on whether to consolidate objections; at a minimum they should publish the criteria used to make such a decision, and DRSPs should be encouraged to

consolidate similar objections into one proceeding if requested by the applicant or any objector. *RyC (Modules 1-4, 13 April 2009).*

Combining Multiple Objections and Responses. Objectors should be permitted to file against one application a single objection document that delineates the bases for all of its objections against that application. Similarly, an applicant should be permitted to file a single response document that responds to multiple based objections filed by the same objector. The DRSPs should each issue a decision based on the relevant portion. *Microsoft (Guidebook, 13 April 2009).*

DRSP Transparency. Objections and responses should be made public. Rules and procedures DRSPs will use should be made available and open to public comment. *COTP (13 April 2009).*

Clarify panel selection and procedures. Objectors should be ensured that the panel is comprised of not only independent experts but of opinion-neutral experts also. DRSPs should be required to consider these concerns when selecting panel members. ICANN should also clarify whether ICANN will specify the rules upon which proceedings will be administered. If the procedural rules are to be designated by the DRSPs, the guidebook should state this in the Adjudication section (3.3.5), and public comment on them should be enabled. *NCUC (13 April 2009).*

Binding nature of panel decision. The weight of the expert panel decision should be clarified (see 3.3.6 and 1.1.2.6)—is it final on the objection or merely advice ICANN can accept or reject? There is no reason why an expert panel decision should not be binding. If ICANN is allowed to reject the expert decision, then ICANN's decision making process must be transparent (e.g., ICANN must author a report of its own describing the panel recommendation and why ICANN determined it was not acceptable). *NCUC (13 April 2009). Microsoft (Guidebook, 13 April 2009).* DRSP decisions should be final and binding on ICANN. *COTP (13 April 2009).*

Objection Period. ICANN should provide more information on the objection period duration (the "posted deadline date" in 3.2.1) so that there may be more comment on the sufficiency of the length of time to file an objection. Explicit mention of time periods should be provided (i.e. see 1.1.2.4, 1.1.2.3, a chart at end of Module 3 suggesting a 14 day window). *NCUC (13 April 2009).* The objection filing period should be specified in the next version (1.1.2.4); it should be a function of the number of applications with a minimum of two weeks. *RyC (Modules 1-4, 13 April 2009).*

Objections-Time Zone. The guidebook and procedure should state which time zone will be used to establish the deadline for filing an objection. *INTA (8 April 2009)*.

Cooling off period. There should be an automatic cooling off period if the parties mutually agree that it would benefit the potential for mediation. *INTA (8 April 2009)*.

Negotiation/mediation—extensions of time. Except in cases where applicants are not involved in negotiation or mediation and more time might negatively impact them, granting a small time extension (not more than 30 days) is a reasonable step if all involved parties agree and it would likely encourage negotiation and mediation. *RyC (Modules 1-4, 13 April 2009).*

DRSP Contracts Not Finalized. Given the concern that ICANN has not yet finalized its contracts with each of the DRSPs, INTA reserves the right to provide further comments once WIPO and ICDR have published their respective rules for new gTLD dispute resolution. *INTA (8 April 2009).* To provide certainty, ICANN must complete its agreements with DRSPs and DRSP must finalize all aspects of the respective objection processes. *Microsoft (Guidebook, 13 April 2009).*

Objection Processes—Consistency. The Legal Rights Objection dispute resolution procedures should be consistent with the UDRP and the rules within the finalized framework of the guidebook and procedure. In light of the success of the UDRP, its adoption would provide brand owners a system that is known, workable and proven. *INTA (8 April 2009)*.

Process clarifications—changes to applicant's original proposals. ICANN does not describe a process for situations when an objector is willing to settle with the applicant if the applicant changes a substantial part of its proposal, or the outcome of a dispute resolution process is that the applicant will prevail only when it changes a substantial part of its proposal. Will ICANN require an applicant to stick to its original proposal, knowing that in this case the application will be rejected, or will ICANN allow the applicant to change its proposal and re-enter it in the appropriate phase of the application process? If ICANN allows an applicant to change its proposal, could ICANN indicate what parts can be adapted (i.e. string) and what parts cannot be changed (such as community-based to open, see 1.2.3). *SIDN (14 April 2009).*

Panel Consistency. The number of people on a dispute resolution panel should be consistent—they should be three-person panels. *J. Prendergast, Public Forum Transcript at 20 (5 Mar. 2009).*

Adjudication. Parties should have the right to submit arguments supporting why a panel should require an opposing party to submit particular documents or answer particular questions, if it reasonably would clarify facts helpful in deciding the outcome. Any hearings requested should be public. New gTLD dispute proceedings should be conducted in English, consistent with worldwide practice for similar proceedings. *INTA (8 April 2009)*.

Hearings. Hearings should be possible in more than just rare instances in order to ensure fairness; costs can be mitigated through phone/conference call recorded hearings. *NCUC (13 April 2009). A. Sozonov (Module 3, 9 April 2009). S. Maniam (Module 3, 11 April 2009) S. Soboutipour (Module 3, 12 April 2009). Y. Keren. (Module 3, 13 April 2009). DotAfrica (Module 3, 12 April 2009). S. Subbiah (Module 3, 13 April 2009)*

Judicial Action Not Precluded. The next draft of the guidebook should explicitly state that expert determinations do not preclude any party from initiating a judicial action in a court of

competent jurisdiction to defend its legal rights. INTA does not believe that this principle is clear in the text of the guidebook. *INTA (8 April 2009)*. See also *COTP (13 April 2009).* IP rights holders should have legal recourse and the right to appeal an adverse ruling. The DRSP panel decision should not be subject to further review by ICANN but rather to an appeal process by a third party DRSP and/or a court. *Hearst Communications, Inc. (13 April 2009).* All operative documents must provide that participation in any ICANN registration or dispute resolution process at any DNS level does not foreclose any avenues for rights holders to vindicate their rights in any available forum. *AT&T (13 April 2009).*

"Legal Rights" Process. "Legal Rights" matters tend to be complicated. ICANN is not a court and should not try to substitute one, especially considering their multijurisdictional, multilingual nature*. A. Mykhaylov (Module 3, 13 April 2009).*

DRSP Decision publication. To the extent that the right to refrain from publishing certain types of decisions is intended to be reserved, the guidebook and/or the procedure should specify any circumstances under which expert determinations will not be published on the applicable DRSP's website. *INTA (8 April 2009)*. For transparency, panel decisions should be published. *Hearst Communications, Inc. (13 April 2009).* Every DRSP panel decision should be published on the DRSP's website. *AIPLA (13 April 2009).*

Expert panel—Composition. Either party to the proceeding should have the opportunity to request a three panelist panel and the requesting party should bear the additional costs associated with two additional panelists, which works well in the UDRP system. *Microsoft (Guidebook, 13 April 2009).*

Expert Panel—language abilities. In choosing experts, at least one expert should be from the corresponding language community while processing the individual IDN TLD applications. *CONAC (13 April 2009).* See also *Internet Society of China (13 April 2009); CNNIC (13 April 2009); NCUC (13 April 2009). A. Sozonov (Module 3, 9 April 2009). Association Uninet (Module 3, 10 April 2009).S. Maniam (Module 3, 11 April 2009). S. Soboutipour (Module 3, 12 April 2009).* Panels should feature 3 panelists who know local law and are fluent in languages of each party. *MARQUES (13 April 2009). DotAfrica (Module 3, 12 April 2009). S. Subbiah (Module 3, 13 April 2009). D. Allen (Module 3, 13 April 2009).*

Expert Panel—Principle for String Confusion Objection Evaluation. Section 2.1.1 has expanded the grounds on which string confusion can be claimed, but it is unclear what principles for evaluation the expert panel will use to evaluate the objection. A guiding principle for the expert string panel should be based on UDRP's principle of "bad faith." *Zodiac Holdings (13 April 2009).*

DRSP Panel—Decision Timing. Timely action by DRSPs is important; ICANN should explain why the target timing language was deleted from 3.3.6 (reasonable efforts to issue all final decisions within 45 days of panel appointment). *RyC (Modules 1-4, 13 April 2009).*

Publish Applicable Rules (Article 4). The applicable rules and procedures that the different DRSPs will follow should be published and made subject to comment. *RyC (Modules 1-4, 13 April 2009).*

3-Person Panel Option Should be Added (Article 13). A 3-person panel option should be added. It is contrary to normal commercial dealings to allow a single arbitrator to determine important disputes and would inject uncertainty into the process. *RyC (Modules 1-4, 13 April 2009).*

Discretion/fairness and consistency concerns. ICANN affording DRSPs the discretion to consider what public comment to hear and what not to, does not promote consistency or fairness across applicants. The decision to allow them or not should not be taken at this level. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).* The role of public comments in the work of DRSPs should be spelled out. *SIIA (13 April 2009).*

ICANN Discretion and DRSP Determination. If ICANN intends to reserve the right not to follow in certain circumstances the expert determination entered by a Dispute Resolution Service Provider, ICANN should clarify any circumstances in which ICANN would not follow the advice of the panel. *INTA (8 April 2009)*.

Objection languages. If ICANN is global is it fair to insist objections, responses and dialogue should all be conducted in English, which isn't the world's most spoken language? Multiple languages should be permitted if ICANN is to develop its integrity globally. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Challenge of last resort; ICANN Board discretion. Should ICANN devise a mechanism for a challenge of last resort lest an application threatening the process, stability of ICANN or the interests of the Internet community goes forward without any third party objection? What discretion does the ICANN Board reserve to reject an application that has cleared all the steps in the guidebook and how will that discretion be exercised? While it has addressed the issue for morality and community based grounds by proposing an Independent Objector, ICANN has not addressed whether there would be a right of appeal to the Board based on legal rights or string confusion. *IPC (13 April 2009).*

III. Analysis and Proposed Position

Several comments have urged ICANN to adopt and describe the procedures that will be followed to resolve disputes arising from objections to applied-for gTLDs. Other comments have inquired about specific rules and procedures, such as the burden of proof in dispute proceedings, the preclusive effect of the expert determinations that are rendered in the proceedings and the costs of the proceedings.

ICANN has prepared detailed rules of procedure for the resolution of disputes arising from objections to applied-for gTLDs. The procedure is described in Module 3 of the Draft Applicant Guidebook ("DAG"). The New gTLD Dispute Resolution Procedure (the "Procedure") is an

attachment to Module 3. See http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-18feb09-en.pdf. Many of the specific comments and questions that have been submitted have already been answered in the Procedure. For example:

- The Procedure sets various deadlines for filing objections, responses to objections, etc.
- Article 6(e)'s reference to the "residence or place of business of the addressee" establishes the time zone that will be used to establish the deadline for filing an objection.
- Article 7(e) permits an extension of the deadline for filing objections, thus giving objectors an opportunity to cure objections that have been dismissed on procedural grounds.
- Article 13(c) stipulates that experts "shall be impartial and independent of the parties".
- Article 14 includes detailed provisions regarding the payment and the allocation of costs.

While it is true that each DRSP will have its own rules relating to the administration of the proceedings that may not be covered in the Procedure, those rules are not meant to override or be inconsistent with the Procedures. At present, it is intended that the ICC Rules of Expertise will apply to the Community and Morality and Public Order objections. These rules are already in place and not subject to revision through the ICANN public comment process as they are already in use by an established dispute resolution provider. Both WIPO and the ICDR are developing some supplemental rules, which have not yet been established. It is anticipated, however, that the supplemental rules will not be extensive. ICANN will make the supplemental rules available for review upon their completion.
Other comments and questions focus upon points that are not fully explained in Module 3 or in the Procedure. ICANN is pleased to provide additional explanations on these points:

- **Precedential value of successful objections:** The Expert Determinations that result from the objection procedure will normally be published on the website of the relevant DRSP. See New gTLD Dispute Resolution Procedure, Article 21(g). These decisions will not have binding precedential value, in the common law sense of the term, in other objection proceedings. However, published decisions could be considered persuasive authority. A party could cite a favorable decision in a subsequent objection proceeding (involving that same party or other parties). It should be noted that these considerations apply both to successful and to unsuccessful objections.
- **Preclusive effect of withdrawn application due to objection:** If the applicant fails to file a timely response to an objection, the applicant will be deemed to be in default, and the objection will be deemed to be successful. See New gTLD Dispute Resolution Procedure, Article 11(g). The applicant would in that case forfeit a portion of the evaluation fee that it had paid. See DAG, v.2, Section 1.5.5. Under these circumstances, it seems unnecessary for the legal force of the objection to be extended to any new application(s). It is unlikely that applicants will forfeit a substantial portion of the registration fee for the first application and then make a new application for the same

gTLD, which would require payment of the full evaluation fee again. As a general rule, a decision rendered by default would not be given preclusive effect in these proceedings.

- **Burden of proof:** The burden of proof to which reference is made in Article 20 is clearly a civil law standard (which may be expressed in various ways, such as the "balance of probabilities" or the "preponderance of evidence"). ICANN does not intend to establish special rules or burdens upon applicants (or objectors) that are based upon other legal proceedings outside the new gTLD Program. Each application and objection should be judged upon its own merits. The prior conduct of a party (either applicant or objector) could be relevant to the issues in a pending objection. In that case, the opposing party would be free to submit evidence of that prior conduct in support of its position.
- **Consolidated Objections:** The parties (applicant and objectors) will have an opportunity to present their views in favor or against consolidation, as the case may be. However, the DRSP's decision on consolidation will be final. In a consolidated proceeding, the arguments in support of each individual objection (and, of course, the applicant's responses to each of those arguments) would be considered and decided separately and on their own merits. Thus, in a consolidated proceeding, the arguments advanced by one of the objectors might not be accepted, while those presented by another objector are accepted. If, for some reason, such detailed and particularized consideration is unlikely to be feasible, this would be a reason to refrain from consolidating the objections.
- **Cooling-off period:** The parties are encouraged, but not required, to participate in negotiations and/or mediation. See Procedure, Article 16. If the parties do not wish to negotiate or participate in a mediation, little will be gained (and time will be lost) by requiring them to do so.
- **Consistency with the UDRP:** It is believed that the new gTLD Dispute Resolution Procedure regarding existing rights objections <u>is</u> consistent with the UDRP, although because the new procedure is operating in a different context, the two procedures are not identical.
- **Document production:** Orders for the production of documents should be very rare, although in **exceptional** cases such orders may be issued. See Procedure, Article 18. Of course, parties are free to argue that documents should be produced and answers given. Depending upon the facts of a given case, the panel may draw negative inferences from a party's failure to submit certain documents or to answer certain questions.
- **Hearings:** Article 19 of the Procedure provides that the panel shall decide whether the hearing shall be public or private. If the matter concerns only the applicant and the objector (which may often be the case in legal rights objections), a private hearing may be appropriate. One would expect the hearing in a matter that concerns many people besides the parties (such as a morality and public order objection) to be conducted in public. Note, at any rate, that hearings will be rare, and those that are held will normally be conducted by video-conference.
- **Rights of appeal:** The DAG addresses rights of appeal. Recourse from ICANN decisions is provided for in ICANN's Bylaws, although the basis on which such decisions may be

challenged are limited. This is standard in this type of dispute resolution. More generally, see the explanation provided in the New gTLD Draft Applicant Guidebook: Analysis of Public Comment, 18 February 2009, pp. 86-87 (posted at: http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf).

- **Judicial action:** Participation in the dispute resolution procedure for new gTLDs *does not* preclude judicial action. This principle has been stated in ICANN's responses to comments made with respect to the first version of the DAG, as follows: "It is implicit in the Procedure that an objector does not waive its right to defend its legal rights (e.g., trademark) before a court of competent jurisdiction merely by filing an objection to an applied-for gTLD." See New gTLD Draft Applicant Guidebook: Analysis of Public Comment, 18 February 2009, p. 86 (posted at: http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf).
- **Publication of expert determinations:** Article 21(g) of the Procedure provides that expert determinations shall be published in full on the respective DRSPs' websites, unless the panel decides otherwise. ICANN anticipates that expert determinations would not be published only in cases where it is necessary to protect confidential information or where disclosure would cause identifiable harm to the parties or others. And in those instances, ICANN anticipates that only the confidential portions of an expert determination would be redacted.
- **Public comment regarding pending objection proceedings:** The New gTLD Dispute Resolution Procedure does not provide a separate mechanism for the DRSP panels to review and consider public comments on the matters pending before them, although there is nothing to prohibit the panel from doing so. The panel will base its decision upon the arguments and evidence submitted by the applicant and the objector(s). Of course, the parties to a dispute proceeding are free to provide the panel with information relating to public comment as they see fit.
- **ICANN discretion regarding DRSP panels' expert determination:** As the DAG makes clear, the circumstances under which ICANN would not follow an expert determination would be rare. ICANN cannot describe in advance what those circumstances might be.
- **Objection languages:** Procedure Article 5(a) provides that the language of all submissions and proceedings shall be English. ICANN recognizes the importance of other languages, but for practical reasons, limiting dispute resolution proceedings to English appears necessary and acceptable. The adoption of this rule now does not exclude the introduction of other languages in the future. However, just considering which other languages might or should be introduced shows the complexity of the matter.

It does not appear from the comments that the New gTLD Dispute Resolution Procedure needs to be revised in any significant way. However, fine-tuning remains possible and desirable. For example, it appears that the final sentence of Article 11(g) should be revised to clarify that it refers only to any payments made by the applicant in the dispute procedure – *i.e.*, the filing fee and the advance. In addition, non-exclusive criteria that will guide a panel's decision whether to bar publication of its expert determination could be added to Article 21(g). ICANN will also

encourage the DRSPs to allow for consolidation whenever possible. Finally, ICANN will consider and will discuss with the DRSPs a process whereby a running list of objections is published as objections are filed during the filing period.

Community-Based Objections

I. Key Points

- ICANN agrees that more clarity on the criteria used for standing as a Community-based applicant would be helpful and will revise the next version of the Applicant Guidebook accordingly, and will be posting excerpts concurrently with this analysis.
- If an applicant applies for a non-Community-based TLD, it should not be able to invoke a complete defense in the face of a Community-based objection.

II. Summary of Comments

More details. Further detail is required in the description of the procedure for determining the level of Community support for an objection—i.e., will ICANN survey a community to gauge its opposition to a Community application; is it sufficient that the applicant or objector simply enlist the support of the leadership of the targeted community? *Go Daddy (13 April 2009).*

Explore alternatives to the International Chamber of Commerce as DRSP. As a business advocacy group it is not able to act responsibly as a non-business advocacy group which is what evaluating community objections entails. Also, the objection fees paid by those with standing to object should not be captured by a business advocacy organization. *E. Brunner-Williams (Module 3, 14 April 2009).*

Community and Open Definition needed; standing clarification. There is still no definition of community and scope of standing is still unclear. *NCUC (13 April 2009).* Further clarity is needed on open and community definitions. ICANN should state under what circumstances a corporation could qualify as an "established institution" with standing to pursue a Community Objection. *IPC (13 April 2009).* Regarding point 4 under section 1.2.2.1, the description of the kind of "institution" needs to be more precise, such as the following suggested text: "4. Have its application endorsed in writing by an established representative institution having the authority to act on behalf of the community the applicant has named." It is prudent to have a more restrictive definition for an institution with standing to endorse an application compared to an institution with standing to file an objection. *W. Staub (13 April 2009).*

Eliminate community objection. The community objection along with the entire concept of community should be eliminated (re: Module 3, 3.11). *A. Allemann, DomainNameWire.com (6 April 2009).*

Determining whether institution is established (3.1.2.4). This should be worded to cover global and local communities, like: "level of recognition of the institution within its community" (instead of "level of global recognition of the institution."). *RyC (Modules 1-4, April 2009).*

Community Objection (3.4.4)-revision re: proposed generic string to allow anyone to object. If the comparative evaluation criteria in section 4.2.3 remains unchanged, then where a community is trying to claim a generic word TLD, section 3.4.4 should allow all parties with an interest in the generic word to object, rather than just the specific Community type proposed by the applicant (e.g., .camping proposed by the Boy Scouts). The objector would need to show that awarding community status would prevent access by a broader group of potential users who might want to use the generic string. *Demand Media (13 April 2009).*

Revise the "Complete Defense". The complete defense to a community-based objection should be denied to any application not initially presented as a community based application. The burden of showing entitlement to the defense should be placed on the applicant (prove that it would have standing to maintain a community objection to a hypothetical application for the same string). Rather than constituting a complete defense proof of such standing should at most be a factor for consideration, along with other factors such as strength of opposition, degree of detriment shown, the degree to which the objector represents a wholly distinct community that should not be forced to accept the allocation of the string to an unsuitable applicant. *COA (13 April 2009).*

Remove complete defense language (3.4.4). The complete defense clause must be removed; it means that ICANN, from the outside, imposes some sort of "infallibility dogma" on the community, declaring that certain organizations of that community are immune against opposition from within that community. *W. Staub (13 April 2009).* The provision produces an absurd outcome. *E. Brunner-Williams (Module 3, 14 April 2009).*

Religious Tradition gTLDs Discussion Requested. The Holy See would like to bring to the attention of the ICANN Board the possible perils connected with the assignment of new gTLDs with reference to religious traditions (e.g., .catholic, .anglican, .orthodox, .hindu, .islam, .muslim, .buddhist, etc.) These gTLDs could provoke competing claims among theological and religious traditions and could result in bitter disputes forcing ICANN to abandon its wise policy of neutrality by recognizing to a particular group or to a specific organization the legitimacy to represent a given religious tradition. The Holy See recognizes that the Community Objection process proposed as part of ICANN's draft new gTLD implementation model may be a mechanism for addressing these concerns. Mindful that Article 2.1 of the GAC Principles regarding new TLDs (28 March 2007) prescribes that the latter should respect the sensitivities regarding terms with national, cultural, geographic and religious significance, the Holy See asks the ICANN Board to commence a discussion on the process of assignment of gTLDs with religious significance, including any objection process, before moving forward with its final implementation*. Mons. Carlo Maria Polvani, Holy See's Representative to the GAC (2 Mar. 2009).*

III. Analysis and Proposed Position

The possibility of applying for a community-based gTLD and the opportunity to object to such applications elicited extensive comments. Some questioned the rationale for community-based

gTLDs; others requested more detailed definitions of key elements of this category of gTLDs, such as “community”, “established institution”, etc. The rule that an applicant’s satisfaction of the standing requirement for a community objection would constitute a complete defense to the objection (DAG, v.2, Section 3.4.4) was questioned. In general, there was concern about competing applications for gTLD strings with close connections to certain economic, cultural, religious or other communities.

The New gTLD Program, with its dispute resolution and string contention procedures, is designed to safeguard ICANN’s neutrality and to refrain from purporting to recognize the legitimacy of any specific organization as the representative of any group, religion, etc. There may well be multiple applicants and objectors that compete for the same string. The procedures that ICANN is developing are aimed at resolving the conflicts that arise from those applications without compromising ICANN’s neutrality vis-à-vis the parties and others. In short, ICANN’s eventual approval of an application for a gTLD that refers to a particular community shall not constitute and should not be seen as ICANN’s recognition of any particular group or organization as the legitimate representative of that community.

The preservation of ICANN’s neutrality is one of the reasons for establishing the “complete defense” (DAG, v.2, Section 3.4.4). This rule avoids placing ICANN and the DRSP panel in the position of judging which of two competing institutions is the legitimate representative of a community. If both institutions apply for the same community-based gTLD, the string contention procedure (rather than the dispute resolution procedure) will determine which applicant obtains the gTLD. ICANN agrees with suggestions from the community that the complete defense should only be available to those applicants who apply for a Community-based TLD. An applicant for a TLD that does not first submit its application as Community-based should not be entitled to later claim a complete defense in the face of an objection by stating that the applicant meets the Community standing requirements.

As for names of religious significance, ICANN takes seriously all comments, including (and especially) those from the Holy See. As described in the Applicant Guidebook, the community-based objection, in combination with the role of the Independent Objector, is intended to address the concerns regarding applications for names with religious significance. However, the concerns raised in this comment and potential TLD category should not be answered without dialogue. A community discussion will be engaged as requested on this issue (as it has on others).

Finally, ICANN agrees that more clarity can be provided for some of the criteria relating to Community standing and will endeavor to do so in the next version of the Applicant Guidebook. Further, excerpts of Module 3 will be posted along with this analysis containing additional details regarding Community-based Objections, including revisions in accordance with the discussion above and additional comments received to the first version of the Draft Applicant Guidebook.

Existing Rights

I. Key Points

- The standard criteria are flexible by design so that there is a balance between the legal rights of trademark holders and the rights of the public.
- In its current form, the standing requirement was not intended to be limited to an owner of a registration but speaks to a rights holder; an exclusive licensee is certainly a rights holder.

II. Summary of Comments

Existing Rights Objection—clarification (3.4.2). While the guidebook states that it is grounds for objection if the applied-for gTLD is identical or similar in appearance, sound and meaning to an objector's existing mark, there is a specific sub-situation requiring different treatment and clarification. The party objecting on the basis of similarity under the Legal Rights clause cannot already be an existing TLD operator which is already separately entitled to a similarity review via the String Confusion Analysis. If an existing TLD is not deemed similar in the String Confusion Module 2 step, then it should not be allowed to participate in the Legal Rights objection step. A possible exception could be if and only if that existing TLD string is an issued trademark in every or conceivably every jurisdiction where the Internet is accessible. *NCUC (13 April 2009).* See also *A. Sozonov (Module 3, 9 April 2009). S. Soboutipour (Module 3, 12 April 2009). Y. Keren (Module 3, 13 April 2009). L. Andreff (Module 3, 13 April 2009). DotAfrica (Module 3, 12 April 2009). S. Subbiah (Module 3, 13 April 2009).*

Existing Rights Objection Criteria. The eight non-exhaustive factors provide minimum direction for the LRO and determine rights based on loose criteria, such as similarity based on "appearance, phonetic sound or meaning"; it does not account for factors such as similarity of goods and/or services as used in trademark law. Panels will have wide discretionary powers to determine legitimate rights of mark owners. *NCUC (13 April 2009).* AIPLA supports the likelihood of confusion standards for a LRO and supports the revision protecting unregistered marks when considering LROs. Factor two should be clarified to read: "Whether the objector's acquisition of rights in the mark, and use of the mark has been bona fide." Bona fide acquisition without bona fide use should not be considered determinative. *AIPLA (13 April 2009).* Most of SIIA's specific concerns about the LRO process (e.g. transparency, panelist expertise) were not addressed in Version 2. *SIIA (13 April 2009).* Additional language – "indigenous intellectual property" or "traditional knowledge" or "community common property" would be helpful—first, in expanding the legal protections recognized by contract, and second, by allowing most community objections access to the lowest cost objection mechanism. *E. Brunner-Williams (Module 3, 14 April 2009).*

Existing Rights Objection Standard: How Applied. Greater certainty as to the likely application of the listed factors would be helpful for rights owners and applicants. It is not clear from the list of factors how a DRSP would resolve an objection where both the objector and applicant have legal rights in the same mark, but the geographic scope of the objector's rights far exceeds that of the applicant's, or the objector's mark is more well-known than the applicant's. *Microsoft (Guidebook, 13 April 2009).*

Existing Rights Objection (3.4.2)—maintain a balanced approach. The LRO process must be balanced. E.g., Microsoft should have strong rights to .microsoft, but an entity with a trademark in a generic word (e.g., blog) should not have special objection rights to a .blog TLD. Parties with a dot-generic word trademark cannot meet several of the 3.4.2 objection standards. ICANN should keep this section at its current level of balance. *Demand Media (DAG, 13 April 2009).*

Existing Rights Objection—Standards for Appeal. While in the second draft ICANN appears to have clarified that it will accept the determination and advice of the panel, it does not establish or express standards concerning LRO appeals. *AIPLA (13 April 2009).*

Existing Rights Expert Panel Qualifications. INTA welcomes having three intellectual property experts on a Legal Rights Objection panel if the parties agree. *INTA (8 April 2009)*. *AIPLA (13 April 2009).* Panelists should meet certain standard trademark/IP qualifications. *Hearst Communications, Inc. (13 April 2009).* Panelists for LRO proceedings should have a minimum of five years of experience in dispute resolution. *INTA (8 April 2009)*. Experts in LRO proceedings should be subject to the approval of both parties. *AIPLA (13 April 2009).* The qualifications of the expert in proceedings involving a community objection are unstated. *E. Brunner-Williams (Module 3, 14 April 2009).*

DRSP selection. The At-Large Advisory Committee has serious concerns about the lack of transparency in initial selection of DRSPs before the selection criteria has been fully published. Parties requiring use of DRSPs must have the right to select the appropriate provider. ALAC (19 April 2009).

Existing Rights Objection-Standing. Noting that Section 3.1.2.2 has been amended to reference registered and unregistered marks, INTA believes ICANN should allow both owners of collective marks and certification marks to have standing to file Legal Rights Objections. INTA continues to believe that an exclusive licensee of qualified marks also should have standing to raise a Legal Rights Objection. *INTA (8 April 2009)*

Existing Rights Objection—clarify "unregistered marks" (re: 3.1.2.2. and 3.4.2). ICANN should clarify which type of unregistered trademark can be claimed and if there are differences according to different jurisdictions or countries (e.g., the term can be interpreted as either a common law right (USA) or a sole trademark application (in civil law countries)). *INDOM.com (10 April 2009).*

Existing Rights Objection—identify scope of existing legal rights. Greater precision is needed in identifying the "existing legal rights" about which legal objections can be filed (see e.g., 3.4.2, which seems to place emphasis solely on trademarks and does not specifically mention other IP rights). *INDOM.com (10 April 2009).*

Scope of Protection: International Trademark Treaties. The Legal Rights Objection protocol exceeds existing territorial and class of goods limitations in current international trademark treaties. Section 3.4.2 allows unrestricted LROs based on similarity of "meaning" to trademarks. This would allow trademark protection well beyond that of TRIPS or the Paris Convention. ICANN should not engage in a regime that goes beyond existing international treaties. ICANN also should recognize the non-trademark "traditional knowledge" rights of Indigenous Peoples, in a manner consistent with international treaties. *ALAC (19 April 2009).*

III. Analysis and Proposed Position

Comments have been received on various grounds relating the Existing Rights objections. Those comments raise certain issues, including: that an existing TLD operator should not be entitled to bring an existing rights claim based on similarity; that the criteria provide the panels significant discretion and therefore could lead to uncertainty; that panelists should be highly qualified; and that the scope of the intellectual property rights for which objections can be filed need clarity.

While the string confusion objection and legal rights objection do have some overlap, string confusion is not meant to displace the existing rights objection or vice versa. Nothing should prohibit a party from seeking to protect existing rights, to the extent they exist.

With respect to the factors under which existing rights objections will be considered, they are not meant to be exclusive. As such, in appropriate circumstances the similarity of goods or services can be considered if applicable. With respect to the concerns surrounding bona fide acquisition of the rights versus bona fide use of a mark, the standard is flexible and neither bona fide use nor bona fide acquisition is considered determinative.

Further, the standard criteria are flexible by design so that there is a balance between the legal rights of trademark holders and the rights of the public. Unfortunately, it is impossible to predict or create guidelines that will predict any particular fact pattern involving the competing rights of an objector and an applicant. What ICANN attempted to do is establish a standard and a list of factors to assist in the determination of which entity should prevail.

ICANN agrees that the standing requirement to bring an objection should be broad enough to encompass any rights holder who might be affected by the registration of a mark. In its current form, the standing requirement was not intended to be limited to a holder of a registration but speaks to a rights holder; an exclusive licensee is certainly a rights holder. The references to registered and unregistered marks were included to make it clear that the rights owner need not own a registration, not to limit the universe of objections or rights that may be protected. The GNSO policy recommendation indicates that it is the legal rights of others that should be

considered. By definition, this is not limited to applications or registered marks. Drawing lines based upon the laws of different jurisdictions will only lead to forum shopping and inconsistent results.

Finally, ICANN agrees that panelists should have experience in dispute resolution, but it does not appear necessary to stipulate an arbitrary length of time. The quality of the experience matters more than the quantity. Other types of experience in the relevant field of intellectual property could complement experience in dispute resolution. Panelists in all dispute resolution proceedings will be appointed by the DRSP that is responsible for administering the particular dispute (e.g., WIPO for Existing Rights Objections). ICANN is confident that the DRSPs will select panelists who are well qualified. Subjecting the appointment of panelists to the approval of the parties could extend the duration of the proceedings and generate additional controversies.

ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program. At least for this initial round, disputes arising from each type of objection will be administered by a single designated DRSP. See Procedure Article 3. Parties will not have the right to select some other DRSP.

Morality and Public Order

I. Key Points

- The most fair and logical approach to standing to bring Morality & Public Order objections would be to allow anyone to bring such objections, but also to try to formulate a process whereby frivolous objections are quickly dismissed.
- Panels will have discretion to identify standards outside of the three enumerated (incitement to child pornography, incitement to violent lawless action, discrimination), but those standards must be of the same nature and level of the three that have been enumerated.

II. Summary of Comments

Access to Expert Reports/Research and Clarifications Needed. All the experts' reports and research relied upon to come up with the morality and public order grounds for objection should be published and made available. Nothing much changed in this area in the second version of the guidebook. This will help to illuminate, among other things, the process, international standards and resolution of such objections, and the experts involved. *M. Wong, NCUC, GNSO Transcript at 81-82 (28 Feb. 2009)*.

Eliminate or limit the morality and public order objection. The morality and public order objection should not exist or should be limited to items in 3.3 (re: Module 3, 3.11). Section 3.1.5 should be stricken; objections should not be made on grounds of morality or public order. *A. Allemann, DomainNameWire.com (6 April 2009).* The At Large Advisory Committee calls for the elimination of the morality and public order objection; this is not ICANN's role, and it will eliminate the risk of ICANN bearing responsibility for delegating morality judgment to an inadequate DRSP. Certain extreme forms of objectionable strings may be addressed through minor modifications to the community objection. *ALAC (19 April 2009).* ICA opposes law and public morality objections to new gTLDs unless narrow and clearly articulated criteria for such objections can be established; otherwise the DNS could become an arbitrary censorship regime. ICANN has not provided clear guidance on what would trigger a determination that an applied-for gTLD "would be contrary to equally generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law." *ICA (13 April 2009).* If wikileaks submits an application then no objection arising from section 3.1.2.3 is proper. *E. Brunner-Williams (Module 3, 14 April 2009).*

Greater specificity needed. More specificity is needed regarding the fourth ground on which an applied-for gTLD string may be considered contrary to morality and public order. The current formulation—"the applied-for gTLD string would be contrary to generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law"—provides little guidance. ICANN should at a minimum identify a non-

exhaustive list of such "generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law." *INTA (8 April 2009).*

New guidebook version still does not address the complex legal issues concerning the morality and public order objection category. Some standards in this area are very general and not well-defined. E.g., regarding "incitement to or promotion of violent lawless action", NCUC does not understand how it is possible for a single gTLD to fit in this category; "incitement to or promotion of discrimination" raises significant issues about certain balances involving free speech and NCUC does not see how a simple gTLD registration will involve an incitement or promotion of discrimination. With "incitement or promotion" to engage in child porn, again it appears that ICANN is attempting to regulate content of websites, not URLs, since a domain name cannot be child porn or sexual abuse of children. Regarding the issue of gTLDs being contrary to equally generally accepted legal norms, this minimizes the substantive evaluation criterion as established by the Convention on Cybercrime*. NCUC (13 April 2009).*

International Chamber of Commerce as expert panel. ICANN should explain why the ICC is qualified to settle morality and public order disputes. *NCUC (13 April 2009).*

Standing—Recommendation. The morality and public order objection should be available to anyone that can show a legitimate interest and harm or potential harm concerning the applied-for string, subject to thresholds: (1) General Public (via the Independent Objector); the IO would still be able to raise objections without public petition, but this recommendation would also require the IO to listen to the public and advocate for public objections that the IO deems worthy of representing based on the standing standard; (2) Government Bodies—so long as a given government body is an internationally recognized government body; (3) Communities—so long as the definition of community is met as defined in the guidebook 3.1.2.4 (commercial entities could object through the community category provided they meet the standing standard; they should not have a separate category). *NCUC (13 April 2009).*

III. Analysis and Proposed Position

The possibility of objecting to an applied-for gTLD string on the grounds that it is contrary to norms of morality and public order that are generally accepted under principles of international law, which is one of the policy recommendations of the GNSO, has been supported by some members of the community and opposed by others. Some of the comments that were submitted in this second round reiterated points made in earlier discussions that were addressed in the Analysis in response to version 1 of the DAG.

The second version of the DAG did include an important new element regarding the morality and public order objection. Section 3.4.3 of Module 3 presented certain standards for assessing such objections. One of the comments called for greater specificity, suggesting that the fourth ground listed in Section 3.4.3 ("the applied-for gTLD string would be contrary to generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law") provides little guidance. However, the first three

grounds <u>are</u> specific and <u>do</u> provide guidance. The fourth standard is, indeed, stated in general terms, because panels considering morality and public order should have discretion to consider gTLD strings that do not fit within one of the three specific categories but are nonetheless contrary to generally accepted legal norms relating to morality and public order to the same degree as the first three grounds. Applications for such strings may well be rare or non-existent. However, it appears wise to grant panels the discretion to apply that general rule in appropriate cases. In short, the first three points in Section 3.4.3 are a non-exhaustive list of "generally accepted identified legal norms relating to morality and public order that are recognized under general principles of international law".

Another comment requested information about the legal research upon which the standards for the morality and public order objection were based. ICANN plans to publish a memorandum that summarizes the research on standards of morality and public order that was carried out in various jurisdictions around the world.

The question of **standing** to file a morality and public order objection remained open in Version 2 of the DAG. Three options for standing have been identified and considered: (1) anyone; (2) only governments; and (3) only someone (or some organization) with a legitimate interest who can show harm or potential harm. Pros and cons exist for each. For example, as set forth in version 2 of the DAG, allowing anyone to object is consistent with the scope of potential harm, but may be an insufficient bar to frivolous objections. On the other hand, while groups such as governments are well-suited to protecting morality and public order within their own countries, they may be unwilling to participate in the process. Finally, in considering a mechanism by which those objecting must show a legitimate interest and harm or potential harm resulting from the applied-for gTLD string, it became clear that such a limitation would be inconsistent with the "universal" dimension of morality and public order objections. Certainly, the harm that is done by incitement to violent lawless action; incitement to discrimination based upon race, color, gender, ethnicity, religion or national origin; and by incitement to child pornography or other sexual abuse of children extends far beyond the direct or immediate victim of the offense.

Looking at the negative aspects of each, and the desire to build a process that is robust and utilized, *it seems the fair and workable solution would be to confer standing on anyone to bring morality and public order objections.* In an attempt to decrease the possibility of frivolous claims that might come from this broad standing, ICANN is looking at whether some type of "quick look" process to identify and eliminate frivolous objections could be implemented without requiring a full-blown dispute resolution proceeding. ICANN seeks and encourages any thoughts, suggestions or recommendations on the development and implementation of such a process.

Finally, it should be recalled that the Independent Objector (IO) would be granted standing to file a morality and public order objection under certain circumstances. The IO's standing will also play a role in bringing objections under this type of objection.

Excerpts of the next version of the Guidebook, reflecting standing requirements for filing a Morality & Public Order objection, will be published along with this analysis.

Dispute Resolution Fees

I. Key Points

- For Existing Rights and String Confusion objections, a fixed fee for each dispute will be established.
- Morality & Public Order objections shall be processed generally with a capped filing fee, but panelist's fees will be on an hourly basis. Such fees are difficult to estimate, at least at the outset, given the untested nature of Morality and Public Order objections in this newly identified dispute resolution process.
- ICANN continues to encourage the DRSPs to consider consolidation of disputes, whenever possible, which should lead to lower overall fees.

II. Summary of Comments

More details. Further details on dispute resolution fees would be helpful. *J. Prendergast, Public Forum Transcript at 21 (5 Mar. 2009).* ICANN should confirm and publish a complete table of fees including refund details as soon as possible. *IPC (13 April 2009).* Section 3.3.7 raises the unquantified risk of runaway fees for applicants (different fee structures based on type of objection, possible advanced payment of estimated fees); ICANN should consider a cap on the maximum Objection Response filing fees any given applicant will be expected to incur (e.g. a fixed dollar amount or percentage of the initial application fee). *Go Daddy (13 April 2009).* Staff should have reasonably similar cost numbers for each form of objection so we don't end up with objections filed creatively with respect to the categories (e.g. all being filed as "legal rights"). *E. Brunner-Williams (Module 3, 14 April 2009).*

High costs. The costs for challenging new gTLDs are very high. *Regions (13 April 2009.* We are concerned about the high costs required for objecting to new gTLDs. *BITS (13 April 2009).*

Loser pays. Prevailing brand holders in a dispute should not pay any fees or costs; loser pays should cover all costs and expenses, including attorneys' fees and DRSP filing fees. *COTP (13 April 2009).* IHG supports the rule in 3.3.7 that objection to a gTLD is sustained when an applicant fails to pay the estimated cost in advance, and strongly support DRSP refund of costs paid in advance to the prevailing party. *IHG (Module 3, 9 April 2009).*

Filing Fee Refunds. ICANN should consider filing fee refunds also to the prevailing party. *E. Chung, GNSO Transcript at 87 (28 Feb. 2009)*

Refunds—negotiated disputes. All or a portion of fees should be refunded when disputes are settled by negotiation without DRSP intervention. *RyC (Modules 1-4, 13 April 2009).* If an applicant and objector settle a dispute, per 3.1.4, will a refund of fees be considered in this scenario as no costs to ICANN were incurred? *Go Daddy (13 April 2009).*

Fixed Costs and Ceilings. Costs for morality and public order and community objections should have fixed rates, similar to string contention and LROs. There is an inherent conflict if expert panelists who receive remuneration from parties are paid on an hourly basis in proceedings that are open-ended regarding length and final costs (need for reasonable, pre-set timeframe for resolution and costs particularly a concern with morality and public order and community objections given their likely contentious nature). ICANN has provided no justification for cost disparities. ICANN should provide not only a written explanation to justify costs disparities, but should also set reasonable cost ceilings for all proceedings. *INTA (8 April 2009).*

One objection fee re multiple applications for same TLD. Only one fee should be required in the case of a rights holder's objection to multiple applications for the same TLD. *Hearst Communications, Inc. (13 April 2009).*

Class objections; basis of fees; fee structure favors large entities. Class objections could serve the purpose of more participation and less costs. ICANN should provide the basis for the dispute resolution fee estimates, and describe in more detail what a "proceeding involving a fixed amount" entails. In general the fee structure allows larger, well-funded organizations to dominate the gTLD objection process. *NCUC (13 April 2009).*

Morality and public order objection: fees will render it unavailable. The large amount of fees associated with adjudicating this type of objection will render it unavailable in most situations. This type of objection will be primarily made by non commercial entities. ICANN should attempt to include as many people in the morality and public order objection process as possible by reducing expenses or sharing the cost of this objection with all objectors from all categories. Also, ICANN should state how the Independent Objector will pay the costs of raising a morality and public order objection on behalf of the general public. *NCUC (13 April 2009).*

Impact on governments. Government or sovereign entities may be the most appropriate to raise community or morality and public order objections. While these may be more expensive than legal rights objections, as currently structured by ICANN, governments and sovereign entities making these objections will face the burden of variable fee pricing for these types of objections; ICANN has not set any maximum level for such fees. *NYC (13 April 2009).*

Dispute Resolution Fee Returns; Clarifications. The new gTLD Dispute Resolution Procedure should provide that the filing fee will be returned to the objector in exceptional circumstances, such as when an objection is properly filed and inadvertently not processed by the relevant DRSP. Recognizing that dispute resolution adjudication fees will be refunded to the prevailing party, INTA requests further flexibility enabling a DRSP to return fees in exceptional circumstances. Also, to enable cost management, the guidebook and procedure should also specify when and under what conditions filing and adjudication fees may increase. *INTA (8 April 2009)*.

Dispute Resolution Fee Accounts. ICANN should require each DRSP to provide a mechanism for parties to set up an account from which dispute resolution filing and adjudication fees may be deducted, given the regularity with which some entities (e.g. trademark owners) may find that they have to submit objections. *INTA (8 April 2009)*.

III. Analysis and Proposed Position

In addition to expressing a general preference for lower fees in the dispute resolution procedure, comments raised the question whether fees would be properly monitored to ensure that they are reasonable and asked whether fees could be reimbursed under various circumstances.

Article 14 of the Procedure sets out the rules governing the costs of the dispute resolution procedure. It is important to recall that the loser will pay the costs of the proceedings (i.e., the panelists' fees and expenses and possibly filing fees to the extent that a prevailing party is identified). The amounts paid in advance by the prevailing party will be refunded to that party. ICANN is still discussing with the Providers whether filing fees could be refunded in certain circumstances (such as when a prevailing party is determined). The parties must understand, however, that the DRSPs have administrative costs even if a matter is dismissed or resolved without identification of a prevailing party. Certainly in those circumstances it is unlikely that filing fees would or should be refunded. Further, it would not be practical (e.g., because panel decisions will not be legally enforceable) to take a step further and award attorneys' fees and other costs to the prevailing party.

ICANN has previously explained why costs for morality and public order objections and community objections will not be based upon fixed rates (as is the case for string confusion and legal rights objections). See New gTLD Draft Applicant Guidebook: Analysis of Public Comment, 18 February 2009, p. 91 (posted at: http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf).

The dispute proceedings will not be open-ended, and panelists will not have unfettered discretion to set their own fees. The New gTLD Dispute Resolution Procedure limits the proceedings in various ways (e.g., by permitting hearings only in extraordinary circumstances) and sets certain deadlines (e.g., the panel's expert determination should normally be rendered within 45 days of the constitution of the panel). Part of the DRSP's role as administrator of the dispute proceedings is to ensure that the fees paid to the panelists are reasonable.

For example, the ICC's Rules for Expertise (applicable in proceedings arising from morality and public order objections and community objections) provide, in Article 5(c), as follows:

"The administration of the expertise proceedings by the [International] Centre [for Expertise] shall consist inter alia of: […] supervising the financial aspects of the proceedings".

Appendix II, Article 3(3) of the ICC's Rules for Expertise then stipulates as follows:

"The fees of the expert shall be calculated on the basis of the time reasonably spent by the expert in the expertise proceedings, at a daily rate fixed for such proceedings by the Centre in consultation with the expert and the party or parties. Such daily rate shall be reasonable in amount and shall be determined in light of the complexity of the dispute and any other relevant circumstances. The amount of reasonable expenses of the expert shall be fixed by the Centre."

It was proposed that the Procedure provide for the refund of fees in exceptional circumstances (such as a DRSP's failure to process an objection):

- It is highly unlikely that a DRSP will fail "inadvertently" to process an objection. In addition, the objector (who should be following the proceedings closely) can be expected to react if its objection is not processed within the deadlines stipulated by the New gTLD Dispute Resolution Procedure. However if, for some reason, a DRSP does fail to perform its duty, then remedial steps will naturally be taken. Such steps are more likely to involve continuation of the proceedings, rather than refund of the filing fee, so that the objection can be heard and decided (which is presumably what the objector desires).
- It is unclear what else is meant by "exceptional circumstances" that would "enable" a DRSP to return all fees paid by the parties as the Procedure already provides for reimbursement of the prevailing party's advance payment.

The proposal that DRSPs provide a mechanism for parties to set up dispute resolution fee accounts is worth consideration. ICANN cannot require DRSPs to do this, but will pose the question to the DRSPs and it is possible that the DRSPs would be willing, if asked to do so, in light of the convenience such accounts would offer to the DRSPs.

Filing and adjudication fees may increase in line with other increases in fees paid to professionals and institutions that conduct expert determinations and dispute resolution procedures. At present, inflation is low and economic conditions militate against substantial fee increases. These conditions may, of course, change in the future. ICANN cannot specify when filing and adjudication fees may increase, but will ensure that the DRSPs notify ICANN if and when fees are increased. ICANN will in turn make that information available to the public and those participating in the dispute resolution process.

Independent Objector

I. Key Points

- The ethical rules governing the independence of judges and international arbitrators could provide examples of the means by which the IO would declare and maintain his/her independence.
- The IO's role is to address the situation where, for one reason or another, no objection is filed against a highly objectionable gTLD.
- The standards applicable to morality and public order and community-based objections, will also apply to objections instituted by the IO.

II. Summary of Comments

Independent Objector—Clarifications. Neither the guidebook nor the explanatory memorandum specifies the type of review the Independent Objector will undertake to determine if an application merits an objection, or if there will be a mechanism where a third party can call an applied-for gTLD string to the attention of the Independent Objector. While the explanatory memorandum suggests that the Independent Objector should be allowed to consider public comments in determining whether to file an objection, no mechanism has been identified for the submission of such comments. ICANN should clarify how and when public comments would be solicited by the Independent Objector. Also, if the scope of the Independent Objector's anticipated bases of objection is broader than what is identified in the guidebook, then ICANN should identify with particularity those additional circumstances. *INTA (8 April 2009)*. See also *CADNA (13 April 2009).*

Independent Objector—Role. It is not clear that the IO would be effective in the cases identified as ones where there may be a need for the IO (no objection filed to a TLD considered widely objectionable, or where a government objects but chooses not to use the dispute resolution procedure and instead goes to court or an outside process to block the application outside of the gTLD process). The IO may have some value where its role is limited to providing a means for those not financially able to file an objection to be able to be heard, but use of the IO in this manner must be tightly limited. (See comments text (at 4-5) for criteria suggested.) *RyC (Modules 1-4, 13 April 2009).* Is the IO allocated some budget? Is he or she really independent or is the available budget the actual control over the freedom of action of this role? *E. Brunner-Williams (Module 3, 14 April 2009).*

Independent Objector--Appeal Mechanism. To add transparency to the evaluation process, **the independent objector role should also be able to offer** an independent appeal mechanism in case gTLD applicants believe they were treated unfairly or improperly rejected. *ALAC (19 April 2009).*

At Large Should Handle Public Interest Advocacy, not the Independent Objector. At Large is the logical and natural source for public interest advocacy. While it is a formal ICANN body and may be considered non-independent, its members have nothing more than a memorandum of understanding and often less than that. At-Large has the grassroots connections to make communities aware of gTLD attempts made in their name. *ALAC (19 April 2009).*

Independent Appeal Mechanism. To add transparency to the evaluation process, there should also be an independent appeal mechanism in case gTLD applicants believe they were treated unfairly or improperly rejected. *ALAC (19 April 2009).*

Independent Objector—Qualifications. The explanatory memorandum does not provide sufficient detail about the proposed qualifications for the Independent Objector (IO) or how ICANN will ensure its independence. ICANN should adopt and implement safeguards including accountability and transparency mechanisms to ensure that the IO remains independent and is not inappropriately subject to external influences. The IO selection process should be open and transparent, and ICANN should specify the type and breadth of experience in the Internet and legal communities that is required of successful IO candidates. INTA strongly recommends IO term limits and a regular review process to evaluate IO performance. *INTA (8 April 2009).* See also *Go Daddy (13 April 2009).* It is unlikely to be necessary to insist that an IO is unaffiliated with any gTLD applicant. *E. Brunner-Williams (Module 3, 14 April 2009).*

Standing to challenge objectors. Some mechanism should be established for the responding applicant to challenge the standing of an Independent Objector or indeed any objector without necessarily addressing the merits of the objection. *Go Daddy (13 April 2009).*

ICANN Challenge. Will ICANN reserve a challenge process for itself to cover cases where an application endangers public order (e.g., an extremist group) but does not attract a challenge from a third party? *MARQUES (13 April 2009).*

Independent Objector. There did not seem to be a loud outcry for this proposal in the comments; more detail about it is needed, and why it would be needed (i.e. is there a flaw in the process that has given rise to the proposal for "somebody there to be the last line of defense.") *J. Prendergast, Public Forum Transcript at 19-20 (5 Mar. 2009).*

III. Analysis and Proposed Position

ICANN briefly presented the idea of instituting an Independent Objector ("IO") in the DAG, v.2, **Section 3.1.5**, and in a separate memorandum, dated 18 February 2009. Members of the community have asked for more information about the rationale for an IO, the IO's qualifications, his/her role in the dispute resolution proceedings and the role of public comment in the IO's action.

ICANN explained in its initial memorandum why it sees a need for the IO. The primary reason for creating the position of IO is to address the situation where, for one reason or another, no objection is filed against a *highly objectionable* gTLD. In such circumstances, ICANN anticipates the value and benefit of obtaining an independent expert determination through the established dispute resolution procedure. To reiterate, objections will be made by the IO only in cases where an objection is *clearly* warranted.

ICANN is preparing additional detail to be included in the next version of the Applicant Guidebook that will address the points raised by those who submitted comments and questions. This will include details describing qualifications and independence of the role. In brief: The IO will review applied-for gTLDs in light of the standards that are set for objections under the two grounds that lie within the scope of the IO's mandate (morality & public order and community-based objections). ICANN does not envisage that the standards for the IO would be different from those applicable to other objectors with standing to file a particular objection. Excerpts of the next version of the Applicant Guidebook, including further elaboration on the Independent Objector, will be published along with this analysis.

Internet constituencies are certainly invited to propose candidates for the position of IO. The services of an IO will be procured through an open and transparent process. The IO's (renewable) term would coincide with a given application round for new gTLDs. The ethical rules governing the independence of judges and international arbitrators could provide examples of the means by which the IO would declare and maintain his/her independence. In order to avoid improper influence upon the IO's action, the IO's tenure and his/her salary should not depend upon the number of objections that he/she files. On the other hand, an assessment of the IO's work would necessarily consider whether he/she filed objections in cases where IO action is expected (i.e., manifestly objectionable gTLDs to which no morality & public order or community objection has been filed).

It has been suggested that public comment should play a role in the IO's activities, and ICANN agrees. Receiving public comments and suggestions could be helpful to the IO, although it will remain the IO's sole responsibility and discretion to decide whether or not to file an objection against a particular applied-for gTLD. The IO will have access to public comments as he/she considers potential action. Comments would have to reach the IO before the deadline for objecting to the relevant gTLD if the IO is to employ them in deciding whether to make an objection. Comments received later than that might be used when the IO prepares additional paperwork for the dispute resolution procedure. Whether comments that are sent to the IO should be made public remains an open question.

The purpose of the IO is to file objections where none has been made and an objection is clearly merited. The IO role is not intended to be an appeal mechanism for a dispute resolution procedure result that is unpopular with one of the parties. The dispute resolution procedures have been carefully thought out and most aspects of those procedures have been in place for many years. ICANN must be careful not to circumvent those procedures in implementation of

the IO role and has taken care to integrate the role of the IO with the previously established dispute resolution procedure.

String Confusion

I. Key Points

- String confusion objections can be based on any type of confusion: visual, meaning or aural similarity.
- Given that, a finding of "too similar to coexist in the root" requires that there be a probability of confusion – it is a high bar that is meant to encourage competition while avoiding harm to consumers.

II. Summary of Comments

String Confusion objection—coexisting synonyms and translations (3.4.1.). Consumers are rarely deceived or confused by synonym, translations or like-sounding words. Examples such as .car and .auto, .arrow and .aero and .community, .commerce and .com, can and should reside together at the top level as they do at the second level. This will enhance competition. If we allow synonyms or translations to fall within the charter of confusing similarity we will allow a single registry to block large portions of potential name space. Guidance to DRSPs building on this section should ensure a very high threshold of proof for deception or confusion. The burden of proof should be that the majority of Internet users are already confused or deceived at the second level in existing TLDs such as .com. *Demand Media (DAG, 13 April 2009).*

III. Analysis and Proposed Position

While there were many comments regarding string similarity, this comment referred to the dispute resolution process particularly and was categorized here. The comment suggests that the string confusion objection not be allowed for cases of similar meaning, as that objection would serve to limit competition. The new gTLD implementation follows the GNSO recommendation that implies that string confusion should be tested in all ways: visual, meaning and aural confusion. After all, if harm to consumers would result due to the introduction of two TLDs into the root zone because they sounded but did not look alike, then both TLDs should not be delegated. Having said that, the standard indicates that confusion must be probable, not merely possible, in order for this sort of harm to arise. Consumers also benefit from competition. For new gTLDs, the similarity test is a high bar, as indicated by the wording of the standard. A TLD string that is a dictionary word will not automatically exclude all synonyms of that word (and most TLD strings today are not dictionary words and have no real synonyms).

Therefore, while the objection and dispute resolution process is intended to address all types of similarity, the process is not intended to hobble competition or reserve a broad set of string for a first mover.

REGISTRY AGREEMENT

Obligations for Community and Open TLDs

I. Key Points

- Agreements will impose additional post-delegation obligations on community-based registries.

II. Summary of Comments

Post-delegation Obligations: Apply post-delegation obligations to open and community-based gTLDs. The section 2.11 language about operating the TLD post-delegation in a manner consistent with restrictions should be applied to both community-based and open gTLDs (e.g. an open financially oriented gTLD, registrants to that type of domain should also be restricted as suggested by the language of this section. *BITS (13 April 2009).*

Community-based Obligations. While Section 1.2.2 suggests that ICANN would consider changes to the community-based nature of the gTLD to be material changes, the next version of the guidebook should specifically state if such changes would in fact be deemed material changes and if so under what circumstances ICANN would approve the material changes. *Microsoft (Guidebook, 13 April 2009).*

Selecting Which Registrars Have Access to Registry. Community based and corporate branded/single registrant TLDs need to have the same authority that sponsored TLDs have today in selecting which registrars access their registry. *M. Palage (14 April 2009)..*

III. Analysis and Proposed Position

Registry applicants self-select as to whether to represent themselves as a community-based TLD. With that selection comes a possible benefit. Community representation is a factor in determining which applicant is awarded the TLD in cases of string contention for an identical or similar name. Burdens also come with that selection. The restrictions imposed on community TLDs are part of the registry agreement are the subject of contractual compliance oversight. Changes to this section of the agreement will be considered material changes and be the subject of public comment.

The commentary received to date does not indicate a consensus view, however sectors of the community favor differing contractual terms for community-based TLDs (beyond what ICANN has proposed thus far). Whether there should be different contracts for different TLD

categories is also being discussed. The topic of TLD categories is discussed elsewhere in this paper.

Legal Rights Protection Mechanism

I. Key Points

- Further granularity regarding proposed RPMs is necessary and solutions are being discussed in the IRT and among other groups..
- ICANN is considering mandating collection of thick Whois information by new registries. Publication requirements could differ from data collection and retention requirements.

II. Summary of Comments

Protection of Legal Rights of Third Parties (section 2.7). The RyC restates its concerns about this provision in its comments to version 1 of the Registry Agreement. Registries should not be required to shoulder the huge burden of protecting third parties' legal rights. Registries are required to use the ICANN-accredited registrar channel and, thick or thin, the registries have no relationship with registrants. Even if they did, proxy Whois services permit registrars to keep necessary contact data about registrants. As noted in a U.S. federal court decision registries are not capable of assessing what domain names should or should not be registered under trademark laws because they cannot monitor or control the selection of domain names in what is a fully automated process. *RyC (Modules 5-6, 13 April 2009).*

Thin/Thick Whois in New TLD Registries. The issue of whether to require new TLD registries to provide thick Whois needs more consideration, and a more detailed, explanatory response on this issue needs to be provided by ICANN. The response in the analysis that "this was not changed because of the multitude of applicable laws in different jurisdictions" is not sufficient. Many commenters explained in the previous round why they were strongly opposed to what was in Version 1 on this question, and changes were not made in Version 2. *S. Metalitz, IP Constituency, GNSO Transcript at 72-73 (28 Feb. 2009).* ICANN's policy shift on Whois needs to be reversed; every new gTLD should be required to take on so-called "thick" Whois obligations. *COA (13 Feb. 2009).* New gTLDs must operate as "thick" registries. Policies should be established about enforcement of Whois data accuracy and use of proxy or private registrations. *AIPLA (13 April 2009).* ICANN should require that all new gTLDs function as "thick" Whois registries, which will make information about miscreants more accessible to police misconduct and protect victims of phishing and fraud. *INTA (8 April 2009).* ICANN should require a "thick Whois" model for all registries so that access to full ownership records is ensured by ICANN, an especially important issue for addressing consumer fraud enabled by domain name abuse. Thin registries do not afford proper safeguards to protect brand owner rights or support the needs of law enforcement given that control of the registrant's data is largely held by the individual registrar. *MarkMonitor (10 April 2009). Microsoft (Guidebook, 13 April 2009)* .All new gTLD registries should be required to adopt the "thick" registry model for capturing and maintaining registrant data; this is beneficial in terms of inter-registrar transfers functions. *M. Collins, K. Erdman, M. O'Connor, M. Rodenbaugh, and M. Trachtenberg (12 April 2009).* By adopting the thick Whois model utilized in the .biz and .info registries ICANN will have

a smaller pool of entities to police, and consumers, law enforcement and brand owners will have a more centralized location to obtain accurate Whois information. *Yahoo! (13 April 2009).* See also *Lovells (13 April 2009); COTP (13 April 2009).* All registries should have to maintain thick centralized Whois data as part of their registry agreements and all registrant agreements must include the acceptance of that requirement. The terms of registry and registrar agreements should ensure the maintenance of accurate, publicly accessible and thick Whois data, with appropriate proxy registration services standards, and with enforcement throughout the contract hierarchy. *AT&T (13 April 2009).*

Reverse withholding of data by thick registries (specification 4). ICANN should reverse its inexplicable decision to allow even thick registries to withhold nearly all the collected contact data from registrants via registrars from their publicly accessible Whois services. The omission of a thick Whois requirement which has been imposed on virtually every new gTLD by ICANN throughout its history is unjustified, will have a detrimental impact on a wide range of consumer protection efforts, and should be eliminated. *eBay (13 April 2009).*

Opposition to thick Whois at registry level (Evaluation question 45). Thick data collection or display at the registry level should not be mandated. The guidebook states that thick data is not intended for display, so by implication this measure is not intended as an IP RPM. New registrar data escrow requirements make it unnecessary at the registry level. It would incent registrars to mask data they send to registries for competitive reasons. It creates additional risk that customer data will be available to spammers, phishers and other abusive parties. It was not required in previous rounds. The registry will not receive the information behind proxy services in any case, so parties who want access to the data will have to go to the registrar. *Demand Media (DAG, 13 April 2009).*

Whois and Privacy. Whois is essentially broken at present. The rights of individuals to protect their privacy need to be addressed. Any registry operator who proposes a TLD that will differentiate between private and corporate registrations (e.g. .tel and many ccTLDs) should be encouraged and not hampered. *M. Neylon, Blacknight Solutions (13 April 2009).*

Proxy registration services—universal standards and practices. Universal standards and practices need to be developed for proxy domain name registration services, as a condition precedent to the new gTLD program for the global business community. *M. Palage (14 April 2009).*

III. Analysis and Proposed Position

Comments regarding rights protection mechanisms will be handled in a cohesive fashion with comments on trademark protection issues, which is one of the "overarching issues"; see <https://st.icann.org/new-gtld-overarching-issues/> for additional details. The question of whether ICANN should require registries to offer thin or thick Whois will be the subject of a separate paper published at the same time as this document.

ICANN is recommending (for discussion) that registries will be required to collect thick Whois information. The benefit from a stability standpoint is that thick Whois will provide another source of data in case of failure. It will also provide a different “sort” of the data – data sorted by registry instead of by registrar – thereby decreasing reliance in one source.

Registry-Registrar Separation

I. Key Points

- On specific points, ICANN is essentially adopting for discussion the definition of "affiliates" recommended in the public comment and has opened for discussion the number of registrations small registries can register through a single registrar.
- ICANN will coordinate additional discussion on this issue given recent statements from gTLD registries that separation should be maintained.
- The number of registrations that can be sponsored by an affiliate of the registry remains open for discussion and could be reduced.

II. Summary of Comments

Special allowance for certain registrant TLDs. It is disappointing that ICANN has not taken steps to allow new registries under appropriately defined circumstances to enter into exclusive arrangements with one or more existing accredited registrars to handle the registration process. This could be appropriate for registries set up to accommodate only registrations by a single company, or for other highly specialized registries, or those in which registration rules are especially restrictive. Allowing a registry to create or acquire as an "affiliate" an accredited registrar of its own is not a substitute for allowing exclusive arrangements in these circumstances. ICANN should reconsider this and explain its reasons if it chooses to reject the proposal. *eBay (13 April 2009).* The CRAI report recognized the inefficiencies of the registry/registrar model for corporate branded/single registrant TLDs who should not have to seek separate ICANN registrar accreditation in order for that registry to provide domain name registration services directly to its registrants. *M. Palage (14 April 2009).*

Ability to appoint a single registrar for single-purpose gTLD. MarkMonitor supports nondiscriminatory access for ICANN accredited registrars to offer unrestricted extensions. In cases of gTLDs with a single purpose and use which are limited to defined registrant communities, the registry should be allowed to designate a single registrar. *MarkMonitor (10 April 2009).* A company that runs a TLD like .company or .brand targeting only a certain community should be able to use only one ICANN accredited registrar. *DOTZON GmbH(13 April 2009).* Competition between registrars is essential so any move that would permit a registry operator to appoint a single registrar should be strongly opposed. *M. Neylon, Blacknight Solutions (13 April 2009).*

Quantitative limit relating to relaxation of registry and registrar separation. Section 2.8 tries to create separation between registry and registrar by creating an arbitrary 100,000 limit on registrars affiliated with the registry. Limiting at an arbitrary number does not make much sense; "affiliates" can find ways to legally separate themselves from registry, i.e. loopholes; nondiscriminatory access is good; "uniform agreement" can be biased in registry's registrar favor (e.g., lower pricing if sell certain number of domains which would benefit bit players such

as eNom and GoDaddy). *A. Allemann, DomainNameWire.com (6 April 2009).* ICANN should explain the basis of the 100,000 names figure. A percentage of the name space would make more sense. E.g., if the namespace only had 200,000 names then that would make the registry's subsidiary the largest registrar in that namespace, probably not a good idea. *M. Neylon, Blacknight Solutions (13 April 2009).*

Vigorous enforcement and compliance is needed regarding the narrow exceptions to separation in the CRAI report. The ICANN staff model, a watered down/expanded proposal that is ripe for gaming, should be repudiated. *M. Palage (14 April 2009).* There has been no discernible policy authorization by the GNSO Council or Board regarding how the CRAI document has entered the new gTLD process. *E. Brunner-Williams (Module 5, 13 April 2009).*

Should in general preserve vertical separation. INTA recommends that in almost all cases ICANN maintain the vertical separation of registries and registrars and equal access requirements. The hybrid model where registrars affiliated with the registry may only register names in other registries (or in this case have caps on the number of names registered) is deeply flawed and would require additional levels of infrastructure for ICANN to monitor and enforce. Strict vertical separation and equal access requirements preserve competition, allow easy enforcement and prevent particular registrants from having privileged access to domains in particular registries. Only in very specific circumstances should the Registry Operator be permitted to act as an authorized registrar for the TLD through the same entity that provides registry services—where the number of domain names registered in the TLD is 100 or fewer and where the TLD corresponds to a trademark owned by the Registry Operator which declares intent to use the TLD as a source identifier. Where the TLD corresponds to a trademark owned by the Registry Operator, the number of domains registered is greater than 100, and highly restrictive registration requirements apply (e.g., all registrants are licensees of the trademark, etc.), it may be appropriate to allow the registry to control the registrar or (perhaps preferably) allow the registry to designate an exclusive, nonaffiliated, accredited registrar to administer the registration restrictions. *INTA (8 April 2009).* ICANN should continue adhering to vertical separation and enforcing equal access, with any exceptions limited to a narrow category of single organization gTLDs. *ICA (13 April 2009).*

Strengthen Vertical Separation and Nondiscrimination provisions by amending section 2.8. We support the proposal allowing an affiliate of a gTLD registry to be a registrar for such TLD up to 100,000 domains, but clarification is needed. Loopholes in the new gTLD agreement may lead parties to circumvent the intent of the vertical separation and nondiscrimination clauses (examples provided in text). To close these loopholes, language should be added to section 2.8: "Registry Operator shall not enter into any commercial relationship with any ICANN accredited registrar or any Affiliate thereof or take any other action that would have the effect of providing any ICANN accredited registrar or any Affiliate thereof with any commercial benefit arising out of domain name registrations in the TLD that are not available and reasonably accessible to all ICANN accredited registrars." *Register.com (12 April 2009).* To support enforcement, section 2.8 should also add: "Registry Operator shall notify ICANN of any commercial relationship between itself and any of its Affiliates and any ICANN accredited

registrar and any of its Affiliates, other than pursuant to the registry-registrar agreement for the TLD." *Register.com (12 April 2009).*

Proposal on Registrar-Registry Separation. The approach to the registry/registrar issue is inconsistent with the CRAI Report and has numerous loopholes that will result in gaming of the system. The Registries Constituency proposal is consistent with the exceptions in the CRAI Report, and reduces the loopholes in current gTLD Registry Agreements and the proposed Section 2.8 of the new gTLD Agreement in version 2 of the guidebook. See proposed new contractual provisions (definitions and section 2.8) in the comments. *RyC (Registry-Registrar Separation, 13 April 2009).* Also, why would ICANN allow any and all registries to use an "affiliated" registrar, rather than restricting this privilege to those registries operating under highly registration policies, including but not limited to the single owner TLDs described in the CRAI report). *eBay (13 April 2009).*

Obligation to Use ICANN accredited registrars only limits competition. This guidebook requirement that successful applicants market domain names only using ICANN-accredited registrars strongly limits competition among registrars for many types of TLDs such as small community and single owner (.brand), since few ICANN accredited registrars will be interested in small but useful TLDs. Among SIDN's 2,200 registrars, for instance, a very small number is ICANN accredited although .nl is the world's 4th largest ccTLD and is also one of the safest and most stable. Competition of new products and services is strongly limited if clients are forced to use the same narrow distribution channel. Different categories of TLDs should be created, for which the obligation to use ICANN accredited registrars would be valid in some but not all cases. *SIDN (14 April 2009).*

Allow cross ownership of registry and registrar (section 2.8). There is a lack of rationale why registries should not be able to sell their "product" directly to the public. Arguments that new TLDS are monopolies and therefore must be regulated in this manner do not stand up to common sense scrutiny and are refuted by the Professor Carlton report. Mandating registry/registrar limits seems to be more of a fallback to the decade old .com settlement than an effective mechanism for protecting consumers and promoting competition. *Demand Media (DAG, 13 April 2009).*

Affiliate Definition. Add this definition of affiliate to the Agreement: "An 'Affiliate' of a party means any person, partnership, joint venture, corporation or other entity that: (1) controls, is controlled by, or is under common control with such party; (ii) has a financial interest in such party or, in which such party has a financial interest as a result of ownership, by contract or otherwise. For the purpose of this definition, 'control' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise." *Register.com (12 April 2009).* Affiliate should be defined in the common, traditional sense of an ownership percentage (greater than 50% would be consistent with the objectives of section 2.8). *Demand Media (DAG, 13 April 2009).* It is difficult to address section 2.8 of the agreement without understanding what is meant by an "affiliated" registrar. Further consultation with the

community as previously committed by ICANN staff is necessary, and this issue is "NOT" something to be resolved through online public comment. It is also unclear how the 100,000 limit in section 2.8 will be audited and enforced. *Go Daddy (13 April 2009).* In section 2.8 of the new draft registry agreement, what is the definition of "affiliate"? *K. Rosette, GNSO Transcript at 79 (28 Feb. 2009)*. The definition of affiliate in U.S. securities law could be a source for this. *J. Neuman, GNSO Transcript at 80 (28 Feb. 2009*). ICANN should define "affiliates" for clarity and certainty. *INTA (8 April 2009).* An "affiliate" definition is needed for section 2.8, the impact of which is uncertain without this definition. Also, why would ICANN allow any and all registries to use an "affiliated" registrar, rather than restricting this privilege to those registries operating under highly registration policies, including but not limited to the single owner TLDs described in the CRAI report). *eBay (13 April 2009).*

Remove "double taxation provisions" imposed on corporate/single registrant TLDs. ICANN should remove "double taxation provisions" in the registry and registrar agreements that penalize corporate branded/single registrant TLDs that would have to pay individual per name registry and registrar surcharges/taxes. *M. Palage (14 April 2009).*

III. Analysis and Proposed Position

ICANN recognizes that there are still significant community concerns and a variance of views regarding the proposed registry-registrar separation model. ICANN intends to seek additional opinions on these issues and foster further discussion in order to refine the model and its parameters for the next version of the Applicant Guidebook.

The proposed model, developed through economic analysis and community discussion seeks to address many issues in the new gTLD process. The cross-ownership study was undertaken with the understanding that individuals and entities associated with registrars were going to participate in the new gTLD process and they wished to know the rules by wish they would participate. The CRAI report indicated benefits of integration such as integrated product offerings and also identified some of the risks such as the difficulty in enforcing an even playing field.

The community discussion suggested that the number of names mentioned above, should be set at a number that would help small registries grow. It was preliminarily set at 100,000 names in the first version. As a side benefit, a number of names that could be registered by an affiliated registrar would also address the requests of brand or single-user registrants.

A statement from a majority of the existing gTLD registry operators recently has argued that registry-registrar separation requirements should not be relaxed in a letter posted to the ICANN Board and the ICANN correspondence page <http://www.icann.org/correspondence/raad-to-dengate-thrush-08may09-en.pdf>. The points made in this paper will be the topic for future discussion.

Price Controls

I. Key points

- Absent strict price controls, there are certain price protections for registrants in the proposed agreement: six-month notice of price increases and a requirement to offer 10-year registrations.
- Given that new TLDs are expected to be distributed across the globe, effective price controls would be difficult to implement and enforce across many different economies.
- ICANN will ensure measures are taken to clearly and effectively inform registrants regarding lack of price controls and protections, e.g., perhaps having registrars providing registry pricing rules to registrants.
- Discussion will continue as to whether there should be some type of control on renewal pricing or prohibition on renewal price gouging.

II. Summary of Comments

Effect on Incumbent Agreements. If there are no price controls, will that permit registry operators of dominant, incumbent top level domains to make a case that they should be freed from price controls? Whatever the new contract rules are for new gTLDs, will incumbent operators be allowed to approach ICANN and request the same rules for pricing, dispute resolution, whatever, and will those discussions be revealed to the community or simply the results of those discussions? *P. Corwin, Internet Commerce Association*, *GNSO Transcript at 92 (28 Feb. 2009)*. Until the effect on incumbent registries of usage based or differential pricing by new gTLD registries is adequately addressed, then at a minimum the new registry contract for new gTLDs must specifically prohibit differential pricing based on usage or any other factor. *ICA (13 April 2009).*

Differential pricing prohibition. We are concerned that whatever rules are adopted for new gTLDs will become the rules for incumbent gTLDs as well. ICANN staff has provided squishy answers to the question of whether lack of price controls in new gTLDs will permit differential pricing at the incumbents. At a minimum, even if there are not going to be price controls, there should be a prohibition on differential pricing—that whatever the price is for a domain at a gTLD, it should be the same price for everyone. If registry operators can differentially price, they become tax collectors and are taxing the success of domains. *P. Corwin, Internet Commerce Association*, *Public Forum Transcript at 43 (5 Mar. 2009).* Please prohibit variable pricing for all gTLDs; consistent and equal pricing is fair. *M. Housman (8 April 2008).* The new gTLD process must not be used to resurrect much less validate differential pricing by registries; any exceptions to this policy must only be for a carefully circumscribed group of “closed” registries subject to strict numerical registration limits. A registry fee is compensation for a ministerial service and this fee should be the same for all domains at a particular registry. If

differential or usage based pricing is allowed, registries will be able to “tax” the success of domains. *ICA (13 April 2009).*

Failure to address price caps will harm trademark owners (para. 2.9). Without price caps, new TLD operators could use price discrimination to harm trademark owners and consumers. It may affect existing TLDs operators’ ability to invoke the “equal treatment” clause in their registry agreements. Registries should not be able to increase dramatically or incrementally over time the costs for renewing domain names, particularly those of trademark owners some of whom have thousands of domain names in their portfolios. Registries should not be allowed to speculate in new domains by charging costs based on the fame of the trademark or on discriminatory determinations of what they believe the market could bear. *INTA (8 April 2009).* ICANN should require price caps in all new registry agreements to avoid the potential harm to consumers and brand owners from discriminatory pricing, and the risk that existing gTLD registry operators will demand removal of price caps in their agreements by invoking the equal treatment clause. *MarkMonitor (10 April 2009); See also Verizon (13 April 2009).*

No price controls; backdoor for incumbent pricing power. It is clearly unacceptable that there continue to be no price caps in place to protect registrants in the revised draft base agreement (section 2.9). This is a backdoor way for existing registry operators to get unlimited pricing power of existing domain names through .tv-style tiered pricing. ICANN is only listening to registry operators and prospective registry operators, given they’ve even LOWERED fees for registry operators (section 6.1). Note that price controls were a major source of comments by the public; note also that NeuStar is on public record that it wants elimination of price caps for .biz under the “equitable treatment” clause of existing registry agreements if other registries get it. Even the smaller TLDs have market power over existing registrants (e.g., if you operated abc.biz for 5 years, and NeuStar suddenly decides to raise the renewal price to $1 million/year, that will definitely affect you, and is not something where “competitive forces” are at play. *G. Kirikos (19 Feb. 2009).* Due to the “equal treatment” clauses in all existing gTLDs, bad policy choices in new gTLDs (including but not limited to the elimination of pricing caps) will propagate back into current gTLDs*. G. Kirikos (7 April 2009).*

Notice periods – renewal and initial registration prices (section 2.9). Section 2.9 should be amended so the 6 month period only applies to renewals and transfers. The need for notice periods on renewals is not clear cut, but Demand Media is prepared to accept a mandated notice period for renewals because this is how the market will work in practice — registries will give their customers adequate warning about renewal price increases. A mandated warning period for initial registrations is unnecessary and there is no consumer interest rationale in it. There was little or no public comment advocating a warning period for initial registrations, and the logic of the “captive customer” does not apply to them. A registry that raises prices for an initial registration is not harming anyone (e.g. if .cool will go from $5.00 to $10.00 no one is harmed; a future buyer who does not like the price increase will simply choose not to purchase a .cool name or will go to a cheaper product). With mandated warning on initial registrations, a registry that underprices its product will face a long period of unprofitability before it can

correct its mistake. It could also result in some registries starting their prices higher to avoid the risk of underpricing. *Demand Media (DAG, 13 April 2009).*

Registrants' Reasonable Renewal Expectations from gTLD Registries with "market power." ICANN needs to ensure that the baseline registry agreement has adequate provisions to protect the reasonable renewal expectations of registrants within those gTLD registries with "market power." *M. Palage (14 April 2009).*

Section 2.9 still raises concern—should cap renewal prices. In addition to the 10 year renewal option and 6 months' notice of price increases, there should be a cap on renewal price increases. Allowing for registrations up to 10 years to lock in prices should prevent registries from jacking up prices "because would have 10 years to negotiate settlement." *A. Allemann, DomainNameWire.com (6 April 2009).*

Impose price caps. As the U.S. Dept. of Justice pointed out there should be price capson new TLDs to protect domain registrants and prevent older new TLDs from pricing as they wish (tiered or otherwise) possibly leading to tiered pricing with .com domains. The U.S. DOJ and DOC should remain involved to ensure that ICANN follows through with the many consumer and economically friendly recommendations made. *Tom (8 April 2009; 13 April 2009)).* ICANN should not allow tier level pricing similar to that of .tv. All domain names should be priced at the same level and created equal no matter how valuable the name or brand is on the open market. *Visa Inc. (11 April 2009)*. ICANN should eliminate any possibility now and forever of unregulated pricing for all existing TLDs and any future gTLDs. This issue should be put to rest. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).* See also *M. Neylon, Blacknight Solutions (13 April 2009); Tee (13 April 2009).* Absent market based controls for defensive registrations, ICANN should impose price caps for registration fees all new gTLDs and maintain existing price caps for legacy registries. *AT&T (13 April 2009).*

Registrant control over rate increases through 60% registry ownership. Please require all gTLD registries to give 60% ownership to the registrant thereof; this would allow registrants some control over future rate increases. *M. Housman (8 April 2009).*

III. Analysis and Proposed Position

Additional analysis needs to be done regarding the concerns expressed by members of the community. ICANN has commissioned Professor Carlton to undertake an expanded and comprehensive review of pricing policy and all community commentary related thereto.

One aspect of the price control discussion is ICANN's role and its ability to set prices effectively. This requires an understanding of markets, economics, and the legal environment in every country. These factors make it difficult for ICANN to set prices.

One area within ICANN's ambit is communication. In the case of price controls, or the lack of price controls, ICANN could seek to ensure all consumers are well informed. ICANN could

communicate through many channels on many facets of the new gTLD program, including letting consumers know whether a registry has or doesn't have price controls and what the effects of that situation are upon consumers. Through the registry agreement and the registry-registrar agreement, ICANN might have registrars post on their web site and in their communication with registrants the fact that registries do not have price controls.

Finally, there might be some restrictions on increasing price of renewals in order to avoid a situation where an opportunistic registry would markedly increase prices when the name is renewed. Again, it is difficult to develop a formulaic approach given the expected diversity of business models and economies involved. However, the agreement could have a prohibition on these opportunistic practices, with possible wording to be determined for future public consideration.

Representations and Warranties

I. Key points

- Basic contracting representations on authority and execution should be incorporated into the new gTLD agreement.

II. Summary of Comments

Organization, Due Authorization and Execution (article 1). The representations and warranties regarding these matters should be re-instituted into version 2 of the Registry Agreement. The provisions should be mutual and not just an applicant only requirement in the application form. Mutual clauses from the 05-07 Registry Agreement should be added back to version 2 of the Registry Agreement (see text for contract provision language). The representations and warranties of Section 1.3 (replacement language suggested) are overly broad, and the limitation on remedies from version 1 of the Registry Agreement should be reinstated. *RyC (Modules 5-6, 13 April 2009).*

III. Analysis and Proposed Position

Representations and warranties of the parties in the proposed new draft gTLD agreement were removed to simplify the agreement and focus on business terms. In light of the comment, representations and warranties of the parties as to due organization, valid existence and authority to enter into the registry agreement and obtainment of requisite corporate approvals will be included in v.3 of the proposed new gTLD agreement.

Registry Operator Covenants

I. Key points

- The list of exclusions from consensus policy development incorporated into the proposed new gTLD agreement is are different from those contained in existing registry agreements.
- There should be additional parameters around ICANN's ability to audit compliance with registry agreement terms and related enforcement.
- Zone file access should have additional parameters regarding access and use.

II. Summary of Comments

Different Definitions of Consensus Policies. "Consensus policies are defined in the ICANN contracts with the registries and registrars, and actually currently there is a different definition of what a consensus policy is in the current registry agreements and even the proposed new TLD registry agreements that are different than what is in the RAA, the registrar accreditation agreement…on a personal level, I don't understand why the definitions are different…It just seems like…an avenue that's open for dispute, and I think that's maybe something that at some point the council might want to address." *J. Neuman, GNSO Transcript at 6 (28 Feb. 2009)*

Audits. Contrary to self-certification and possible audit in Section 5.2.1, audits by ICANN should be mandatory and transparent. One alternative to self-certification is a third-party technical audit. ICANN should establish terms and conditions of all audits before the first application round opens. *INTA (8 April 2009).* ICANN should have full authority to audit registries for material misrepresentations made in the application, as well as statements that are no longer true. *Coalition for Online Accountability (13 April 2009).* ICANN should make its audit requests narrowly focused in order to make the process faster and more efficient for registries and to promote a collaborative relationship (section 2.10 language suggested). *RyC (Modules 5-6, 13 April 2009).*

Zone file access for all gTLDs. The inclusion of this requirement is positive. *MarkMonitor Inc. (10 April 2009).* Registry operators should be able to refuse access to abusers (put a reference to 3.4 in 3.1). In 3.3 Grant of Access, it would make more sense not to specify the exact protocols and the details of how the transfer was enabled. *M. Neylon, Blacknight Solutions (13 April 2009).* There is a potential for unreasonable, illegitimate, abusive or excessive requests which could be very costly and time consuming for registries (section 2.4); therefore, a limitation should be applied to allow all reasonable or legitimate requests for zone file access agreements and/or access. *RyC (Modules 5-6, 13 April 2009.*

III. Analysis and Proposed Position

The list of exclusions from consensus policy development contained in specification 1 of the proposed new gTLD agreement has been refined from the list of exclusions incorporated into older registry agreements. The winnowing was intended to remove protections that are no longer relevant. These refinements are due to evolving policy development (e.g. the exclusion of changes to a contractual definition of registry services has been deleted as registry services are now defined in a relevant consensus policy).

ICANN's audit rights are intended to be flexible. These provisions have been both narrowly tailored to provide reasonable reassurance to registry operators that audits will not be overly burdensome, and also broadly written to allow ICANN to serve its enforcement obligations with respect to new TLDs.

ICANN will attempt to address the zone file access comments in the preparation of the next draft of the Applicant Guidebook and proposed registry agreement. It is currently contemplated that there will be a continuation of the current requirement for registries to use a standard template zone file access agreement, e.g. <http://www.icann.org/en/tlds/agreements/org/appendix-03-08dec06.htm> instead of the recently proposed approach in order to create a standard format across all registries.

Compliance

I. Key points

- For new gTLDs that have passed the evaluation criteria and are ready to be delegated, ICANN should do a final review, and require re-certification of information before entering into a registry agreement with applicants.
- ICANN will grow its compliance function to continue a robust process for new gTLDs.
- There should be a standardization of required policies for new gTLDs, particularly with respect to rights protections.

II. Summary of Comments

Pre-contract review; information re-certification. Given the potential delay between initial application and Transition to Delegation, ICANN should conduct a pre-contract review of each applicant to confirm that all eligibility criteria continue to be met. If material changes are uncovered, then ICANN should have ability to refuse to enter into the Registry Agreement. ICANN should also require that applicants re-certify the information they have provided in their initial application, in particular what is required in Section 1.2.3 of Module 1. ICANN should also state for all stages what person(s) are responsible for conducting the pre-contract review and the pre-delegation technical check (Module 5 is silent). *INTA (8 April 2009).*

Contract improvements. The Registry and Registrar Agreements both need improvements to strengthen terms and conditions, particularly regarding: (1) Enforceable contract obligations; and (2) Accurate and transparent registrant or applicant identification and contact details. *IHG (Module 5, 9 April 2009).*

ICANN Enforcement. It is essential that ICANN show sufficient capacity to enforce contract compliance of both existing and new registries. *J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).* There is a need for stricter enforcement of contractual obligations of new gTLD operators, with particular emphasis on a new gTLD operator carrying out verification of a domain name applicant’s eligibility to sanction any failure to act accordingly. *Lovells (14 April 2009).*

Removing Registry Enforcement Role re: Registrars. Regarding Section 2.9 of the agreement, will the provision be taken out requiring the registry to ensure that the registrar has a link up to the ICANN policies page? This issue was raised by NeuStar in the first round but not addressed by ICANN. *J. Neuman, GNSO Transcript at 89 (28 Feb. 2009).*

III. Analysis and Proposed Position

The Applicant Guidebook will require a re-certification of representations and warranties, as well as statements made during the application process, prior to execution of a registry agreement.

ICANN recognizes that the expansion of the gTLD name space and delegation of new top-level domains will require enhanced enforcement oversight, and ICANN will continue to refine and revise its compliance framework for gTLD registries. ICANN is in the midst of establishing and securing resources necessary for operational readiness for administering new gTLDs including: contractual compliance, registry liaison, IANA services, and other functions that devote resources to TLD registry support.

The requirement for registrars to post a link to an ICANN page concerning registrant rights and responsibilities was recently incorporated into the amended form of the Registrar Accreditation Agreement and accordingly will be removed from section 2.9 of the proposed registry agreement.

Registry Technical Requirements

I. Key points

- The Applicant Guidebook indicates that DNSSEC implementation is not mandatory for new gTLDs.
- The Applicant Guidebook indicates that provision for IPv6 is mandatory for new gTLD registries.
- New gTLDs are not required to offer IDNs.

II. Summary of Comments

DNSSEC clarification. ICANN should clarify very specifically before applications are filed if signing up for DNSSEC will be a requirement of the Registration Agreement if the applicant wins and has no interest in offering DNSSEC. Other countries are still reviewing their position on DNSSEC in light of perceived U.S. control and after winning applicants from these countries should not be caught between their national law and evolving ICANN positions on DNSSEC requirements. *NCUC (13 April 2009). A. Sozonov (Module 5, 9 April 2009). Association Uninet (Module 5, 11 April 2009). S. Soboutipour (Module 5, 11 April 2009). Y. Keren (Module 5, 12 April 2009). L. Andreff (Module 5, 13 April 2009). S. Maniam (Module 5, 13 April 2009). DotAfrica (Module 5, 13 April 2009). S. Subbiah (Module 5, 13 April 2009).* DNSSEC should be required for any new gTLD serving the financial services industry. *Regions (13 April 2009); BITS (13 April 2009).* For technical and business reasons, new gTLDs need to factor into their plans the cost and technical resources necessary to fully implement DNSSEC within the next two years. Failure to prepare applicants for this will give them the "defense" that they were not "informed" of the requirement to support DNSSEC. (See text of comments for proposed language change to Item 50.) *R. Hutchinson (Module 2, 13 April 2009).* Applicants must demonstrate familiarity with DNSSEC and provide an implementation plan when it becomes widespread in line with ICANN policy. *ALAC (19 April 2009).* DNSSEC falls into category of post-start changes to operating procedure to be sought by consent of the operator. *E. Brunner-Williams (Module 5, 13 April 2009).*

Do not require IPV6 for now. ICANN should provide clarity that IPV6 will not be required for now. It is difficult to find ISPs providing it, and this could be an especial burden for IDN applicants trying to find IPV6 ready ISPs or data hosting centers in other countries. *NCUC (13 April 2009). A. Sozonov (Module 5, 8 April 2009). Association Uninet (Module 5, 11 April 2009). S. Soboutipour (Module 5, 11 April 2009). Y. Keren (Module 5, 12 April 2009). L. Andreff (Module 5, 13 April 2009). S. Maniam (Module 5, 13 April 2009). DotAfrica (Module 5, 13 April 2009). S. Subbiah (Module 5, 13 April 2009). A. Mykhaylov (Module 5, 13 April 2009). E. Brunner-Williams (Module 5, 13 April 2009).*

IPV6—impact on existing TLDs. Any registry operator for a new TLD should be able to offer a full suite over IPV6, either native or tunneled. If IPV6 is a technical requirement for new gTLDs, will the same criteria be applied to existing registry operators? Any changes that affect new TLDs need to be viewed against arrangements for existing TLD registry operators. *M. Neylon, Blacknight Solutions (13 April 2009).*

Knowledge of IDNs. Applicants must have knowledge of IDNs; however, applicants for non-IDN TLDs should not be required to implement IDN technology. *ALAC (19 April 2009).*

Escrow deposit-clarification. ICANN should make it clear that it will accept escrow companies that are not subject to the U.S. Patriot Act and are outside of U.S. jurisdiction. *NCUC (13 April 2009). A. Sozonov (Module 5, 9 April 2009). Association Uninet (Module 5, 11 April 2009).S. Soboutipour (Module 5, 11 April 2009). Y. Keren (Module 5, 12 April 2009). L. Andreff (Module 5, 13 April 2009). S. Maniam (Module 5, 13 April 2009). (DotAfrica (Module 5, 13 April 2009). S. Subbiah (Module 5, 13 April 2009).*

III. Analysis and Proposed Position

The ramifications of DNSSEC implementation, and IPv6 use by new gTLD registries will be discussed further with the technical community. Requirements regarding provisioning for IPv6, availability of IDNs, and readiness for DNSSEC can be found in the applicant questions found in Module 2. There it is indicated that IDN availability and DNSSEC readiness are not mandatory and that provisioning for IPv6 is mandatory. With the imminent depletion of IPv4 numbers, it was provisionally decided to make IPv6 mandatory. It is also thought that market forces will drive registries toward or away from IDN and DNSSEC as they become valuable and important to consumers.

While not required, points are awarded for implementation of the two optional registry services in the evaluation scoring, so their provisioning / implementation, if undertaken before launch, can be helpful in passing the technical evaluation criteria. As requested by the commentary, ICANN will provide additional clarification in the Applicant Guidebook as to which services are optional and which are mandatory.

The use of non-U.S. resident escrow agents by registry operators has always been permitted by ICANN, and this will also be made clear in the Applicant Guidebook.

Term and Termination

I. Key points

- Renewal provisions in the new gTLD agreement should have the same parameters as ICANN's 2005-2006 registry agreements.
- Additional protections against termination are needed for registry operators in the new gTLD agreement.
- There should be further clarity in the registry agreement regarding termination by registry operators with no successor registry operator.
- Presumptive renewal should be stricken from the new registry agreement in favor of competitive rebidding, and shorter agreement terms.
- Termination of the agreement for specified bad actor events (e.g. failure to enforce rights protections) should be included.

II. Summary of Comments

Renewal and Termination by ICANN (sections 4.2 and 4.3). While version 2 added back some limitations on ICANN's termination rights, edits (suggested in comments text) are needed to preserve the important protections in previous versions of the registry agreement. Version 2 would have the effect of allowing non-renewal or termination for uncured breach of many more categories (e.g., data escrow, monthly reporting, publication of registration data, protection of legal rights of third parties, use of registrars, and compliance audits). Changes need to be made to several of these provisions. If for consistency ICANN requires that material breach of all Article 2 covenants are terminable offenses (even the relatively minor offense of filing monthly reports), then the edits RyC suggests for the provision are a reasonable and appropriate protection. Material breach determinations should be limited to those breaches that materially affect Security and Stability. *RyC (Modules 5-6, 13 April 2009).*

Termination by registry operator. There is no provision for termination of the agreement by the registry operator under any circumstances. At a minimum this right should be recognized in 3 situations: at the end of the 10-year term; after an uncured material and fundamental breach by ICANN of its Article 3 obligations; and after a material change to the agreement which the registry operator has sought unsuccessfully to disapprove per Section 7.2. There is a particularly compelling need to enable the operator to free itself from requirements it never agreed to because there is no obligation in the agreement for ICANN to indemnify the registry operator against any liability it may incur to third parties as a result of a new requirement (or indeed under any circumstances). Whenever the registry operator is allowed to terminate the agreement this right should be subject to transitional measures to protect legitimate interests of existing third party registrants in the TLD. *eBay (13 April 2009).* If the Registry Operator operates a closed, branded gTLD or a gTLD with fewer than a set number of registrants, the Registry Operator should have the right to terminate the Agreement and cease operating the

registry. This right to terminate should be added to Section 4, with appropriate revision to Section 4.4. *Microsoft (Guidebook, 13 April 2009).*

Non-renewal limitation. The revisions in Article 4—which appear to eliminate the possibility that a breach of Article 1 (or some of the other sections of the Agreement) could provide a basis for non-renewal or termination—do not seem prudent. *INTA (8 April 2009).*

Strike Presumptive Renewal. Regarding Article 4, 4.2., presumptive renewal should be struck in favor of RFP, competitive bidding including agreements to provide better services and/or lower prices. *A. Allemann, DomainNameWire.com (6 April 2009).*

Competition and registry contracts. When contracts come up for renewal, Registry Operators should be able to be replaced; the contract should be opened to bid by any capable company and awarded to the lowest bidder. The U.S. Dept. of Justice should investigate the no-bid monopoly nature of all existing gTLD registry operator contracts. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).*

Contract term. All contracts should have a reasonable term of 4 years at which time it goes to a competitive bid where the contract is awarded to the company willing to provide the service for the least cost to the public, on the company willing to pay the most to ICANN. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).*

Termination of Accreditation. ICANN should add language requiring all registry operators to comply with the rights protection mechanisms in the Base Agreement. A registry operator failing to comply should have its accreditation with ICANN terminated (so long as ICANN has provided written warnings and a reasonable time to cure). *MarkMonitor (10 April 2009).*

III. Analysis and Proposed Position

After considering the recommendations of the GNSO and other community input, ICANN determined to propose a longer initial contract term in the proposed new gTLD agreement as a measure to facilitate business planning by prospective new registry operators and encourage investment in new TLDs. Provided that there is sufficient flexibility to allow changes during the life of the agreement, ICANN expects to continue to offer a long initial term for the agreement, with clear parameters around renewal of the agreement.

ICANN recognizes that in certain circumstances an appropriate successor registry operator may not be identifiable for a registry. ICANN intends to consider how best to address these circumstances and clarify further in v.3 of the Applicant Guidebook.

There is comment that there is not sufficient opportunity for the agreement to be terminated and also comment that there is too much opportunity. In light of community comments, ICANN is evaluating including more detail regarding “bad actor” events that could result in non-

renewal of a registry agreement. This will be considered in the overall context of the specified initial term of the agreement and termination rights.

ICANN will also consider conditions under which the registry may terminate the agreement. Termination by a registry would necessarily involve steps described in ICANN's registry continuity program that seek to protect registrants through finding successor operators or providing a "soft landing" for registrants when the registry will be shut down.

Process for Future Amendments to the Agreement

I. Key points

- The process for amending the registry agreement (Article 7) will be modified somewhat to provide clarification, but subject to further community and Board discussion the substance of the amendment process will remain intact in order to be able to address the needs of the DNS marketplace.

II. Summary of Comments

Opposition to ICANN unilateral right to change terms and conditions (article 7). Despite strenuous objections by the RyC and the community, ICANN continues to assert a unilateral right to change the terms and conditions of the registry agreement with the Board able to uphold those changes. RyC repeats its version 1 comments opposing this (sections 7.1 and 7.2). This will create uncertainty and the proposed “safeguards” are not a suitable check on this abuse of power; no check and balance really exists. ICANN has the Consensus Policy mechanism to use for critical changes and it ensures that implementation is balanced across multiple constituencies and stakeholder groups. ICANN should explain the specific things it seeks to amend outside the current Consensus Policy scheme, as it has offered no compelling justification to date. *RyC (Modules 5-6, 13 April 2009).*

III. Analysis and Proposed Position

The proposed process for effecting amendments to the agreement during the life of the contract continues to be the focus of concern by certain sectors of the community. ICANN will propose including in v.3 of the proposed new registry agreement clarifying modifications to Article 7 of the agreement. Specifically, to clarify that amendments and modifications to the agreement may not be retroactive in nature; that the dispute resolution article may not be modified through the Article 7 process; and that changes to limitations on liabilities may not be implemented through the Article 7 process. Any additional changes to the agreement would have to be discussed further by the Board and community, attempting to balance future registries' desire for certainty and predictability with the needs of ICANN and the community to retain flexibility to modify registry agreements in the future in response to marketplace and technological changes.

Registry Operator Fees

I. Key points

- The pass-through of registrar fees to registries remains the same as it is in existing agreements.
- RSTEP fee will be paid directly by operators who use the service: to do otherwise would hobble the ICANN budgeting process and result in some registries paying for use of the service by others.

II. Summary of Comments

Registry level fees (section 6.1) and variable registry-level fee (section 6.4). RyC repeats its version 1 comments to section 6.1 and section 6.4. There should be a cap on the per-registrar component (and further edits are suggested). There is no clear reasoning or justification in the Analysis for the proposed arrangements set out in section 6.4. *RyC (Modules 5-6, 13 April 2009).*

Variable accreditation fees (section 6.4); registry fees in general. ICANN should spell out clearly the circumstances under which registries will be obligated to collect variable accreditation fees from registrars and remit them to ICANN, and should more clearly explain the fees to be charged to new registry operators. *eBay (13 April 2009).* See also *RyC (Modules 5-6, 13 April 2009).*

Registrar Fees Collected by Registries. Section 6.4 of the agreement may require clarification with respect to registrar fees and apparently new language ICANN added regarding a "per-registrar fee." *J. Neuman, GNSO Transcript at 89-90 (28 Feb. 2009).*

Cost recovery for RSTEP (section 6.2). RyC repeats its request in its version 1 comments that ICANN reconsider this provision because it could negatively impact innovation in the TLD space. *RyC (Modules 5-6, 13 April 2009).*

III. Analysis and Proposed Position

The variable registry-level fee (pass through of the registrar fee) is necessary in the event ICANN is unable to collect fees at the registrar level. This fee is intended to be recoverable by the registry operator pursuant to a provision included in the registry-registrar agreement. This pass-through is intended to be consistent with the one found in present registry agreements. Comments are accurate that the conditions under which the pass-through is triggered and how it operates could be clarified and improved. ICANN will work with registries and registrars to develop a clear procedure for this process.

The fees for the RSTEP have been borne to date by ICANN. These fees are expected to continue to grow apace with expansion of the name space, and these fees are not included as part of ICANN's budget process. Each exercise of the RSTEP costs $100,000 to $125,000 US. If the number of registries increases by an order of magnitude or more, ICANN might be forced to set aside an amount in the 10's of millions US in the budget each year. This is a significant amount of the total ICANN budget. That money comes to ICANN from registrants, through registries and registrars. Therefore, in order for ICANN to fund the RSSTEP, it would have to set aside a significant portion of its budget, either delaying other work or increasing the budget. In the end, much of that money comes from registries in some form anyway where registries that don't use the process fund the ones that do.

Regarding the use of the process: the RSTEP is utilized in a small fraction of the number of registry service requests. The vast majority of requests do not require the RSTEP as there are no stability / security concerns with the proposed new service. Even in cases where there is a concern, a similar request that comes after the examined request often does not need RSTEP review. So a second request for DNSSEC implementation and a second request for release of certain reserved words did not have an RSTEP review where the initial inquiry did. It is ICANN's goal to make the registry service request process as inexpensive and timely as possible in order to encourage innovation. In order to continue to provide this service, ICANN must consider a "pay as you go" process for new registry agreements.

Dispute Resolution

I. Key points

- An arbitration panel can be established to resolve disagreements under the registry agreement as opposed to use of a single arbitrator.

II. Summary of Comments

Arbitration (section 5.2). As noted in the version 1 comments, Registry operators object to having a single arbitrator; it is contrary to normal commercial dealings for determining important disputes. At a minimum, the provision should be changed so that a normal, 3 person arbitral panel is used for important disputes (e.g., those involving renewal or termination) or in which ICANN seeks punitive damages, or where claims exceed a certain dollar threshold (e.g. $1 million). *RyC (Modules 5-6, 13 April 2009).*

III. Analysis and Proposed Position

ICANN will consider modifying the arbitration provision in v.3 of the proposed new registry agreement to allow either party to request a three-person arbitration panel instead of a sole arbitrator.

Limitation on Liability and Indemnification

I. Key points

- Punitive damages under the registry agreement were requested by certain community members as part of a sanctions program. Based on this public comment , the warranty disclaimer language will be reinstated.
- The indemnification obligations under the new registry agreement should not be capped as it is merely a cost recovery device.

II. Summary of Comments

Reinstate punitive damages protection (article 5). The clause "Failure to Perform in Good Faith" should be reinstated in the registry agreement. RyC disagrees with ICANN's view that this provision is unnecessary. Punitive damages are an extraordinary measure that are virtually always excluded from commercial contracts; therefore if allowed in registry agreements there must be protective limitations. *RyC (Modules 5-6, 13 April 2009).*

Warranties (section 5.3). Warranty disclaimer language (suggested in comments) should be added as they may be otherwise implied by law. *RyC (Modules 5-6, 13 April 2009).*

Limitation of liability (section 5.3). The broad indemnification obligations proposed in version 2 of the registry agreement must be capped under the limitation of liability (language suggested). The guidebook Analysis suggests that ICANN intended the indemnity to be subject to the cap, so the edit will merely clarify that objective. *RyC (Modules 5-6, 13 April 2009).*

Indemnification. The Clause 5 indemnification provision is extremely broad and is absent in past Registry Agreements (at an extreme, it would allow criminal conduct to go unchallenged). *NCUC (13 April 2009). A. Sozonov (Module 6, 9 April 2009). Association Uninet (Module 6, 11 April 2009). DotAfrica (Module 6, 12 April 2009). L. Andreff (Module 6, 13 April 2009). S. Subbiah (Module 6, 13 April 2009).* The section 8.1 provision is uncapped and overbroad; RyC has offered language to clarify that the indemnity obligation is under the Limitation of Liability, as well as additional edits to limit breadth. RyC also repeats its version 1 comments regarding indemnification and inclusion of protections (e.g. those in the .biz agreement). *RyC (Modules 5-6, 13 April 2009).*

III. Analysis and Proposed Position

The ICANN community has been strongly in favor of providing for sanctions under the new registry agreement to combat bad actor behavior, which is why the proposed new registry agreement does allow ICANN to *ask* for a levy of punitive damages under certain circumstances.

Per the request and in light of the concern of the RyC, ICANN will reinsert the disclaimer language regarding warranties for performance by registry operators

ICANN's right to be indemnified is solely a cost recovery provision for ICANN. The right to seek indemnification for out of pocket costs and damages paid to a third party due to registry operator behavior should not be subject to a cap.

Change of Control; Successor Registry Operators

I. Key points

- ICANN should take measures to prevent new registry operators from "flipping" newly delegated TLDs.
- ICANN has developed procedures for how ICANN will handle termination of registry agreements for which there may be no appropriate successor registry operator.
- The registry agreement does require written approval by ICANN in advance of an assignment of the registry agreement.

II. Summary of Comments

Curbing Secondary Markets. Ways to curb the creation of secondary markets should be discussed more thoroughly – re other possible enforceable and implementable ways to avoid this. *K. Rosette, GNSO Transcript at 81 (28 Feb. 2009).* The draft base agreement with new registries requires notice to ICANN of changes of ownership or control but does not otherwise restrict the ability of a successful applicant to "flip" the registry to a buyer unvetted by ICANN, even immediately after delegation. The risks of a speculative marketplace need to be anticipated. The second draft guidebook does not address this. *IPC (13 April 2009).* This issue was not addressed in version 2; therefore Microsoft restates its version 1 comments on this issue (see text of comments for specific recommendations, e.g. assignment restrictions and guidelines, prior written approval by ICANN, etc.) *Microsoft (Guidebook, 13 April 2009).*

Successor registry (section 4.4). In the case of a TLD dedicated to a single company or its employees, it would not be appropriate for ICANN to designate a successor registry whenever termination occurs, especially if the TLD represents the company's name or brand. It should be clarified that in this circumstance, no successor registry may be designated without the consent of the terminating operator. *eBay (13 April 2009).*

Registry Failures with no successor. The guidebook assumes that all registries will succeed and if they fail, they will be acquired. This will not be the case with the crowded space that could result. Registries will fail and there will not be a buyer at any value. This is totally against ICANN's mission statement to promote a stable, secure and interoperable Internet; it is amazing that no consideration has been given to this. The end user will be the loser and total disarray will result if a registry fails and no one will take it on. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Written approval for change in control. ICANN must reconsider its proposal not to require written approval for change of control of a Registry Operator. Allowing a third party to take over control without undergoing proper due diligence may raise concerns such as the ability to fully enforce the originally agreed upon conditions under which the registry was awarded. A

suggested change would be to require review and written approval in the event of a change. If all conditions of operation as originally committed are verified then written approval should not be unreasonably withheld. Extensive review and pre-approval of a transfer agreement would be required in there is a modification in the terms and conditions. *MarkMonitor (10 April 2009).*

Revision needed re: Notice to ICANN (section 8.4). Section 8.4 continues to provide that ICANN gets nothing more than 10 days' notice whenever a change of ownership or control of a registry operator occurs. ICANN staff should reconsider their rejection of the suggestion that this provision be modified. The entire vetting process for registry operators will be rendered worthless if an operator found to be qualified can, as soon as the TLD is delegated to it, flip the franchise to a buyer that would not have qualified on its own. Since amendments to the RAA now before the ICANN Board require new owners of registrars to certify regarding their qualifications, ICANN should explain why the public should not enjoy at least the same protections, if not more, in the case of change of control of ownership of a registry operator. *eBay (13 April 2009).*

III. Analysis and Proposed Position

The proposed new registry agreement requires ICANN's consent for assignment. In the context of an assignment of the agreement, the actual company acting as registry operator would change. Conversely, a change of control (ownership) may result in no change in operations of the registry operator. The sale of a business by a registry operator is not a transaction ICANN should be in the position to approve or disapprove. A notice requirement for a change of control has, however, been included in the registry agreement to ensure ICANN has sufficient opportunity to ask questions regarding a proposed transaction in the event there are any concerns. In addition, Section 4.3 of the agreement provides protections for ICANN and the community in the event the registry operator fails to perform its material obligations following any change of control of the registry operator.

The termination of registry agreements with a registry operator who holds a relevant trademark or brand name will need to be evaluated on a case-by-case basis, in conformance with ICANN's registry continuity plans <http://www.icann.org/en/registries/continuity/> .

It has always been thought that some of the new registries could fail. It is that risk taking that encourages innovation and ultimate benefit for consumers. Knowing this ICANN has taken several important steps to protect registrants to the fullest extent possible:

- Technical, operations and financial criteria have been written to provide a complete guide to potential registry operators for registry operation.
- In Sydney, ICANN will facilitate a registry best practices workshop to provide information to potential registry operators.
- ICANN has developed over years a registry continuity program to facilitate transfer of registry operations to a successor registry and where that is not possible, provide a "soft

landing" for registrants of a failing registry. That program was developed with the help of registry operators and includes detailed procedures to abet timely transfers.

Miscellaneous Comments

I. Key points

- Use of defined terms in the new gTLD registry agreement should be clear.

II. Summary of Comments

Terminology Clarifications Needed—e.g. "Registry" and "Registry Operator". These terms seem to sometimes be interchangeable in the agreements and in the entire guidebook, but more clarity and care when they are used is needed – i.e. "registry operator" can mean an entity ICANN enters a contract with, but also can mean the "registry operator" that is a third party back-end provider. The terminology has implications when talking about whether that registry operator is also a registrar in the TLD. *A. Kinderis, GNSO Transcript at 80 (28 Feb. 2009).*

Certain Prohibitions. ICANN could implement an anti-warehousing requirement as well as prohibitions against self-dealing in all registrar and registry agreements, including secondary dealings by accredited registries and registrars with agents holding a financial interest. In addition, ICANN should prohibit registries and registrars from engaging in the mass registration of domain names for financial gain of the accredited party and adopt a mechanism to cancel, after appropriate warning, accreditation of a registrar when violations of safeguards are validated. *AT&T (13 April 2009)*.

III. Analysis and Proposed Position

Use of defined terms will be clarified in v.3 of the Applicant Guidebook. In all cases where these terms are used in the agreement the entity intended to be covered is the entity entering the agreement with ICANN (even though that entity might subcontract substantial aspects of the operation of the registry to a third-party "back-end operator").

ICANN's registry and registrar agreements permit ICANN to impose a prohibition on domain speculation or warehousing by registries and registrars, but the details of such a rule would require significant study and discussion and should be addressed through ICANN's bottom-up policy development process. Any such policy would also have the benefit of applying equally to new and existing registries.

Terms and Conditions (Module 6)

I. Key points

- It is unfair to applicants to allow ICANN to deny an application for any or no reason.

II. Summary of Comments

Fairness to applicants. ICANN has the option to unilaterally deny an application at any time, but it appears that if ICANN offers an applicant a Registry Agreement of ICANN's choice, the applicant must sign it and has no right to walk away for whatever reason. This seems unenforceable. *NCUC (13 April 2009). S. Soboutipour (Module 6, 12 April 2009). DotAfrica (Module 6, 13 April 2009). L.Andreff (Module 6, 13 April 2009). S. Subbiah (Module 6, 13 April 2009).*

Specific comments on application terms and conditions. None of the matters INTA raised in Module 6 of version 1 were acted upon in version 2. INTA incorporates by reference its comments on Module 6, version 1 in their entirely and requests consideration of them by ICANN. Para. 1: oral statement must be confirmed in writing, and there should be a clear process for recording or documenting discussions outside the written application process; the phrase "reflect negatively" needs clarification/definition; Para 2: applicant must make full disclosure of all corporate relationships and any other gLTD applications, and a corporate entity should not be allowed to submit more than one application at a time for a particular gTLD; Para. 3: ICANN should be able to reject an application where the applicant intentionally submitted or provided fraudulent information, and no application refund should be issued. Para. 4: There should be notice and cure in the case where an applicant's fees are not received in a timely manner; a late fee should not be grounds for cancelling the application; Para. 6: ICANN has not justified the requirement that an applicant release ICANN from all claims and waive any rights to judicial action and review; this paragraph should be deleted and rewritten with appropriate limits on the release of ICANN from liability. Para. 7: Applicants should be notified before ICANN treats as "nonconfidential" information that the applicant submits as "confidential"; Para. 8: ICANN should require the applicant to keep its personal identifying information current and up to date, with updates required within a reasonable period of time after information has changed. Para. 9: ICANN should not have perpetual, unlimited rights to use an applicant's name and/or logo in ICANN public announcements; the right to use should be limited to announcements relating exclusively to the applicant's application. *INTA (8 April 2009).*

Application terms and conditions suggestions. In provision 1 add the qualifier "to the best of applicant's knowledge"; and amend phrase to read "or willful omission of material information"; provision 6, release of claims against ICANN, is overreaching and inappropriate unless it is amended to include some exceptions for acts of negligence and misconduct on the

part of ICANN or its affiliated parties.; provision 11b should be amended to exclude any part of the application designated by the applicant as "confidential" without the express written permission of the applicant. *Go Daddy (13 April 2009).*

Application procedure—limited rights. Applicants are strongly limited in their rights by agreeing with the application procedure. This is in conflict with the goal to create a clear, uncontested procedure for gTLD applications, since the final outcome of the procedure is at ICANN's sole discretion. *SIDN (14 April 2009).*

Applicant's permission to ICANN (paragraph 9). This should be limited to use of the Applicant's name in ICANN public announcements relating solely to that Applicant. ICANN must obtain specific permission from an Applicant to use its logo. *Microsoft (Guidebook, 13 April 2009).*

Confidential information. Will ICANN treat as confidential applicant material that is clearly and separately marked as confidential (please answer Yes or No)? *NCUC (13 April 2009). A. Sozonov (Module 6, 9 April 2009). Association Uninet (Module 6, 11 April 2009). S. Soboutipour (Module 6, 12 April 2009). DotAfrica (Module 6, 12 April 2009). L. Andreff (Module 6, 13 April 2009). S. Subbiah (Module 6, 13 April 2009).* Microsoft supports the version 2 position that applicant response to security and financial questions will be considered confidential and will not be posted. *Microsoft (Guidebook, 13 April 2009).*

ICANN exclusion of liability. The exclusion of ICANN liability in clause 6 of the Terms and Conditions provides no leverage to applicants to challenge ICANN's determinations to a recognized legal authority. If ICANN or the applicant engaged in questionable behavior then legal recourse and investigation should remain open. *NCUC (13 April 2009). A. Sozonov (Module 6, 9 April 2009). S. Soboutipour (Module 6, 12 April 2009). Association Uninet (Module 6, 11 April 2009).DotAfrica (Module 6, 12 April 2009). L. Andreff (Module 6, 13 April 2009).S. Subbiah (Module 6, 13 April 2009). D. Allen (Module 6, 13 April 2009).* The covenant not to challenge and waiver in Paragraph 6 is overly broad, unreasonable, and should be revised in its entirety. *Microsoft (Guidebook, 13 April 2009).*

III. Analysis and Proposed Position

Prospective applicants cannot appropriately be offered any reassurances that ICANN will enter into a registry agreement with them, otherwise this undermines the purpose and intent of a rigorous application review. Further, ICANN must retain this right to evaluate applicants up to the point of entry into a registry agreement. Under its Bylaws ICANN's actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "Making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to lawsuits from potential unsuccessful applicants. The other specific comments and suggestions on the application terms and conditions will be considered by ICANN in the preparation of version 3 of the Applicant Guidebook.

Registrar Affiliate—100,000 Limit is Arbitrary. ICANN should explain the basis of the 100,000 names figure. A percentage of the name space would make more sense. E.g., if the namespace only had 200,000 names then that would make the registry's subsidiary the largest registrar in that namespace, probably not a good idea. *M. Neylon, Blacknight Solutions (13 April 2009).*

STRING CONTENTION

General/Contention Set

I. Key Points

- Some comments request clarifications of the string contention concept and its handling. Section III below provides some clarifications and the posted companion document "Resolving String Contention" provides additional details.
- Many comments discuss the relationship between string similarity assessment in Initial Evaluation and String Similarity Objections, request clarifications and offer suggestions for consideration. Section III below provides some explanations. Additional clarifications will be made in the next version of the AG (excerpts published coincident with this document). The proposed position is not to change the current approach to keep the string similarity assessment in Initial Evaluation focused on visual similarity alone.
- The comments suggested that a subsequent round should not be launched until all contention situations have been resolved. The proposed position is to adopt this suggestion and make this a clear requirement.

II. Summary of Comments

General

Self resolution. The revised draft is not clear on whether other options besides application withdrawal would be acceptable to ICANN for resolving string contention. If two or more parties come to an agreement to work together despite being classified in string contention by the panel, and they clearly do not mind the presence of the other gTLD string, this should be considered as a possible way of resolving string contention. *Zodiac Holdings (13 April 2009).* There should be some incentive (financial or other consideration) offered to pursue self resolution (section 4.1.3) –e.g. a portion of the application fee(s) could be refunded to the new Joint Application. *Go Daddy (13 April 2009).* The restriction against an applicant changing the string upon detection of contention is excessive. A single change of string or a fee for string change or a bump to the next round, voluntary or forced, seem better outcomes than forcing elimination and the total or partial loss of all fees. *E. Brunner-Williams (Module 4, 14 April 2009).*

Notice of Joint Venture-Resolution*.* If applicants resolve string contention by forming a joint venture, ICANN should post the fact of that joint venture as it may influence decisions by potential objectors whether to object. *Microsoft (Guidebook, 13 April 2009).*

Clarify joint ventures. ICANN states applicants may not resolve string contentions by replacing a formal applicant with a joint venture, yet it also says it "is understood that joint ventures may result from self-resolution of string contention by applicants." It is not clear why ICANN would not allow two qualified applicants to form a joint venture to remove the contention and this point needs to be clarified. *IPC (13 April 2009).* ICANN should replace the confusing formulations with a clear statement favoring resolution of string contention through the formation of joint ventures or similar vehicles by contending applications. *eBay (13 April 2009).* The continuing rejection of the formation of joint ventures seems unreasonable, especially in cases where there are no material changes in applications or need for re-evaluation. *RyC (Modules 1-4, 13 April 2009).*

Voluntary agreements. Does this mean co-existence agreements will remove any string contention? *IPC (13 April 2009).*

Fair process concerns. It seems unfair that a company which established its financial and technical capability to run a gTLD should be forced to start the application process all over again based on a conflict with another applicant. *IPC (13 April 2009).*

Contention sets and objections-clarification. A statement on page 2-5 of the guidebook (objection process will not result in removal of application from a contention set) seems at odds with statement on page 3-3 (in case of unsuccessful objection by one gTLD applicant to another gTLD applicant, both applicants may move forward without being deemed in contention with one another);ICANN should clarify. *Microsoft (Guidebook, 13 April 2009).*

DRSP and contention sets (4.1.2.). Use of a string confusion objection to create a contention set seems a means for a 3rd party to perform the contention set detection. If such an objection is made and prevails, cost should not be borne by either party but by the party tasked with correctly forming contention sets. This seems an edge case where an error by the contention set evaluator could be caught by an affected other applicant or other party and corrected at the affected other applicant's or other party's cost. *E. Brunner-Williams (Module 4, 14 April 2009).*

Content (same purpose) Contention and Semantic (variations of same term) Contention. Will ICANN develop policies to prevent these clashes which could undermine the commercial future of registry operators? *MARQUES (13 April 2009)*

Contention set examples. ICANN should provide simple examples of whether 2 strings would be classified as contentious based on meaning (e.g., would ICANN view .car as colliding with .auto). *Dot Eco (13 April 2009).* Current string contention policies based on meaning as opposed to string similarity may discourage valid applications (e.g. .VIN v. .WINE—these refer to the same commodity but could serve entirely different needs and communities (the French and U.S. wine communities, respectively). If two or more applications serve and are backed by two different communities ICANN should find a way to allow both. *Minds and Machines (13 April 2009).*

Broaden string contention consideration. ICANN should not just consider issues that are semantic in nature (appear similar) but should also consider contention to include cases where names use differing characters but that the public could deem synonymous in their meaning (e.g., .bank and .fin). Conceptually similar strings could be a "public order" questions, so perhaps this issue can be considered in finalizing section 3.1.2.3 (morality and public order objection). *BITS (13 April 2009).*

Contention Set

Process clarification. The fundamental, key aspects of how string contentions will work still need to be documented and explained. *SIIA (13 April 2009).*

Process manipulation. While applications for identical strings should automatically be joined into a contention set, those strings determined by ICANN to be "confusingly similar" raise numerous issues unaddressed in the guidebook. E.g., has the overall approach been thoroughly studied so as to eliminate possibility of manipulation or collusion by one or more applicants; even if unlikely due to high application fees, this scenario could be viable for the most "premium" strings expecting numerous applications. *Go Daddy (13 April 2009).*

Challenge. Can the applicant whose application is identified as belonging to a contention set challenge this inclusion? This is of particular concern in cases involving "indirect" contention. *Go Daddy (13 April 2009).*

Timeframe for resolution. The guidebook mentions no timeframe for resolution of contention sets. Time to market will be essential for new gTLDs, and contending applications should be "held" or "reserved" if they are unresolved at the end of the application round. Alternatively, ICANN can refrain from launching any subsequent rounds of new gTLD applications until all outstanding contention sets are resolved. *Go Daddy (13 April 2009).*

III. Analysis and Proposed Position

String contention—concept explanation. Several of the comments seek explanations and clarifications of the concept of string contention and its handling. An earlier posted explanatory memorandum posted in conjunction with the AG, "Resolving String Contention" (**http://www.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf)** describes the details of establishing contention sets and the distinctions between direct contention (two strings that are identical or confusingly similar) and indirect contention (two strings that both are in direct contention with a third string, but not with each other). It could be added for clarity that "identical" and "confusingly similar" are wholly equivalent qualifiers in this context; both lead to "direct contention" without any further distinction being made between them.

Challenge to findings. Opportunities for challenging a finding of confusing similarity would introduce considerable complexities and delays in the process. The proposed position is not to

change the current approach by adding challenge opportunities. This reasoning is in line with the approach taken for most of the sub-processes, with a view to maximizing the overall efficiency of the New gTLD process. However, a String Similarity Objection can be lodged in cases where no confusing similarity has been identified by the String Similarity Panel during Initial Evaluation. One comment suggests that in the case of successful String Similarity Objection cases, the cost for the objection process should be paid by the Panel, not by any of the parties involved. Admittedly, there is a certain logic to that idea if the finding would reveal a "false negative" that was due to an oversight by the Panel, but not if the finding relates to confusing similarity beyond the remit of the Panel's inspection, which is limited to visual similarity as further explained in the section Evaluation: String Similarity. The proposed position is to maintain the current approach that the losing party pays the objection processing costs in cases of String Similarity Objections.

No subsequent round until all contention situations resolved. In view of the risk of complications with lingering unresolved contention situations when a subsequent round starts, a comment proposes as one option that a subsequent round cannot be launched until all contention situations are resolved. The proposed position is to agree with that view and require that a round be fully concluded regarding contention resolution before a subsequent round can be launched. This requirement also emphasizes the need for timely resolution of contention situations.

Self-resolution. Multiple comments relate to self-resolution of contention situations through agreements between the concerned applicants. It should be noted in this context that an agreement to "let the strings coexist in the DNS" is not acceptable since it would not resolve the fundamentals of the contention - i.e., that the strings have been found to be so similar that they would create confusion and thus cannot be allowed to coexist as TLDs. To resolve the contention through voluntary agreement(s) between the parties is a preferred solution from most perspectives, but does clearly require the withdrawal of one or more applications (while also implying relevant refunds, stated as a desirable incentive in one comment; it should be noted that provisions for refunds have been introduced in the second version of the AG). It is indeed expected that these agreements may lead to the forming of joint ventures, but this must be established without changing the formal applicant of the remaining application in order to avoid the necessity of a renewed Initial Evaluation and other repeated ensuing steps. To keep the formal applicant unchanged is thus required to avoid undue delays for the process and, by consequence, for the conclusion of the round. A comment suggests that such agreements be put up for public comments in order to inform potential objectors. However, the four recognized grounds for objections all relate to the string. Since the string must have survived any objections already to come this far in the overall process and as the string does not change as a result of the agreement, the stated rationale for such a posting would logically not be at hand.

Suggestions for resolving contention. Other solutions suggested in the comments for resolving contention situations, like allowing applicants to suggest alternative strings or change strings if found in contention, were discussed during the development of the adopted policy upon which

the AG is built and rejected already at that stage, as addressed in relation to similar previous comments to the first version of the AG. The proposed position is not to make any such changes.

Clarification. A comment identifies two statements in AG module 2 and 3 as potentially inconsistent. ICANN staff appreciates this observation and will clarify the statements in the next version. The statements may be somewhat unclear (and therefore require improvement) but are in fact consistent: a finding of contention in the Initial Evaluation cannot be revoked through any subsequent objection; a later String Similarity Objection, if upheld, can add another finding of contention, not identified during Initial Evaluation. Conversely, if the objection is not upheld there is no additional finding of contention.

Similarity of purpose and meaning. Several comments raise the issues of similarity of purpose and meaning for consideration in relation to the assessment of confusing similarity. Although the assessment of similarity during Initial Evaluation will be limited to visual similarity, String Similarity Objections can be introduced at a subsequent step and assessed by a Dispute Resolution Service Provider with true expertise regarding the concept of confusing similarity in its full extent. It would not be appropriate for ICANN staff to predict the findings of this provider in hypothetical future cases.

Fair process concerns. A comment questions whether it is fair that otherwise qualified applicants may be declined because of string contention. The process requires and makes clear that the applicant can apply for any string of the applicant's choice. The applicant selects the string fully aware of the potential need for resolution of contention with other applications for the same or similar strings and that there are also other specific application processing steps involving the string (for example checks against existing TLD strings and objection processes) that must be cleared before any string can be awarded. Accordingly, the choice of string is a strategic business decision, made in view of potential outcomes and their consequences - no different from most business decisions and with practical outcomes that are just as fair.

Community

I. Key Points

- Multiple comments have requested clarifications of the distinctions of community-based applications and where in the process they are assessed. Section III below provides clarifications, which will also be mirrored in the next version of the AG.
- Some of the comments relate to the process for Comparative Evaluation. The changes envisaged in that process are described under the subcategory "Comparative Evaluation" (see that section).

II. Summary of Comments

Resolution of Community contention. Section 4.2, the Comparative Evaluation process for community-based applications, may be effective to resolve contention issues between multiple Community applications, but it is unclear if/how it may address contention between one or more Community applications and one or more Open applications. *Go Daddy (13 April 2009).* The approach (section 2.1.1.4.3, 2-15 to 2-16) for geographical identifiers should apply to community identifiers also. *E. Brunner-Williams (Module 2 & 4, 14 April 2009).*

Clarify string contention process—open and community-based. ICANN should publish further types of organizations that would fit in both the open and community-based categories and then explain the selection process if there is string contention between open and community-based applicants and how the "good of the internet community" will be taken into account. *IPC (13 April 2009).*

Community-based priority. AIPLA supports priority rights of "community-based" over "open" applicants. *AIPLA (13 April 2009).* It is concerning that a Community application might expect a low rating in comparative evaluation but still be granted a priority over Open applications. Other factors should be considered before giving priority over open contenders: (1) the community based application must be a not for profit endeavor; (2) the claimed Community cannot be globally distributed; and (3) the Community must be of a sufficiently limited size. ICANN staff should provide further detail on contention scenarios between Community and Open applications. *Go Daddy (13 April 2009).*

Comparative evaluation eligibility: Community-based dispositive (4.2.1). Per the GNSO Council determination, if an application is community-based, that is dispositive in the determination of the award of the string over all other applications in the same contention set that are not community-based. *E. Brunner-Williams (Module 4, 14 April 2009).*

Religious/other moral groups—censorship concern. Religious and other moral groups should not be given more weight than any other group's considerations regarding available choice of

strings and potential reserve lists; otherwise ICANN is effectively hampering freedom of speech and could be seen as censoring. *M. Neylon, Blacknight Solutions (13 April 2009)*.

Community and .brand applications. ".Brand" applicants do not need Community to apply restrictive rules to the SLDs in their TLDs. If applicants want to place restrictive rules they are free to do so. Community is not a required or appropriate vehicle to achieve this goal. ICANN should not override GNSO intent and include brand TLDs or TLDs with low string nexus within Community. If the nexus bar remains low, applicants will be encouraged to game the process by "community-shopping" to improve their chances of winning a generic string. As a best case scenario, ICANN will experience a large number of Community applications that fail Comparative Evaluation, and in the worst case generic words that are attractive to a very broad range of Internet users will be captured for use by one limited group. *Demand Media (DAG, 13 April 2009).*

Community definition (1.2.2.1). In section 1.2.2.1 the phrase "consisting of a restricted population" should be removed; a community may or may not have a restricted population and communities generally have "soft" boundaries (e.g. the Paris community is not just those who are living inside the borders of the city). It may be good to add that a community TLD has a restricted purpose. It is also inappropriate to use the word "open" in the sense of "non-community based"; alternatives include the term "unrestricted" (as in the terminology of the 2000 round). *W. Staub (13 April 2009).*

Proposed Community-based TLD Definition. The community-based TLD definition should be clear, measurable and concise and not subjected to considerable subjective evaluation. Criteria should ensure (1) a mere customer or subscriber base is not deemed to be a community; and (2) to qualify, an applicant must show that community members would likely self-identify themselves as a member of the community. The term community-based TLD "shall mean a TLD that is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community. The following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD directly relates to a UNESCO recognized language." *RyC (Modules 1-4, 13 April 2009).*

Proposed Definitions: Community-based and Commercially Sponsored gTLD. As currently written the definition of community-based could be interpreted very broadly. The following proposed definition is preferable: "a TLD that is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community and the string 'applied for' is a full or abbreviated representation of the term used for self-identity, and the community is neither defined as; a subscriber or customer base; a business or a country or other region that is represented by a ccTLD…Commercially sponsored TLDs should be identified as a separate class of TLD; where the string being 'applied for' is a full or abbreviated representation of a commercial trademark owned by the applicant." E.g. with ".apple" Apple Computer would be prevented from improving their application by using their

customer base as a justification for a "community gTLD." A level playing field would exist, as it should, between Apple Computer and Apple Records when both are applying for the same .apple gTLD. R. Hutchinson (Module 1, 13 April 2009).

Better Community-based Definition Needed. ICANN should provide better definitions than what is currently provided in the guidebook for community-based gTLDs; it is very difficult to understand whether commercial interests that have communities associated with them would be legitimate under this current selection process. *B. Hutchison, Dynamic Ventures, Public Forum Transcript at 25 (5 Mar. 2009).* ICANN should state clearly that an economic or creative sector could qualify as a community for new gTLD purposes. C*OA (13 April 2009).* For determining standing to be able to apply for a community-based gTLD, ICANN should use the definition in section 3.1.2.4 for determining community standing to file an objection. *BITS (13 April 2009).* Version 2 did not clarify and explain by way of further examples the types of organizations that would fit in the categories of open and community-based, despite comments seeking further guidance (e.g., has ICANN decided not to allow the community-based designation to apply to corporate brand owners). The definitions of open and community-based remain unchanged in version 2. There are many issues around the community provisions that all constituencies and stakeholders need to understand better. *SIIA (13 April 2009).*

Eliminate community-based designations from the process. Community-based designations and the rights therein should be eliminated. Bickering has already occurred from groups about religious domains, which begs the question "who within a community can provide authority on behalf of that community?" Bias should not be given to official government or bureaucracy compared to the private sector. In the case of a private party working with the government, this scenario is open to bribery, lobbying, etc. TLDs should be allocated based on ability to perform functions (or auction), not political influence (re: Module 1, 1.2.2). *A. Allemann, DomainNameWire.com (6 April 2009).*

Community based/sponsored TLDs applications-"vetting" concerns. There is significant concern that TLDs proposed to represent limited geographic areas (cities or regions) and commercial communities (e.g. industry sectors such as health care and financial services where reliability and security are paramount concerns) will create difficult vetting issues about whether sufficient public safety concerns will be addressed and consumer safeguards will be in place. ICANN should hold off on accepting applications for these TLDs and focus on the much greater need for both generic IDN TLD and cc IDN TLDs*. COTP (13 April 2009).*

Community and endorsement by established institution. Regarding point 4 under section 1.2.2.1, the description of the kind of "institution" needs to be more precise, such as the following suggested text: "4. Have its application endorsed in writing by an established representative institution having the authority to act on behalf of the community the applicant has named." It is prudent to have a more restrictive definition for an institution with standing to endorse an application compared to an institution with standing to file an objection. *W. Staub (13 April 2009).* The threshold for a community based gTLD endorsement should be higher than one institution representing the community (e.g., this would suggest that one bank

out of 8,000 in the U.S. is enough for an applicant to suggest it deserves a banking community gTLD). To strengthen this area, ICANN could use the section 3.1.2.4 definition on who has community standing to object. *BITS (13 April 2009).*

Section 1.2.2.1—Potential community and geographic names confusion. Section 1.2.2.1 may give rise to inconsistencies and can overlap with geographical names strings (2.1.1.4.1). ICANN should add a separate section in the eligibility for the community-based objection section that "the applicant needs to demonstrate that the community is not opposing and des not contravene accepted principles of international law." *NCUC (13 April 2009).*

Classification of ".Brand": open or community based. Does ICANN consider a ".brand" application to be an "open" gTLD or a "community-based? gTLD? *F. Hammersley, SAIC (Module 2, 24 Mar. 2009).* With respect to .brands, meaning gTLDs owned by a brand owner and only used for this brand owner's specific purpose, is such a gTLD (e.g., .LEGO) considered a community based gTLD or an open gTLD? How is an open gTLD defined? Brand owners should be able to have "closed" gTLDs where access to second level domains are only given to, e.g., registrants from the brand owner's own group of companies or to partners. *LEGO et al. (6 April 2009).* ICANN should clarify if a community-based gTLD may include a "branded" gTLD applied for by the brand owner. Brand-owner applicants should be able to designate their applications as community-based, particularly where there will be only one second-level registration or where second-level domains would be registered to the brand owner's customers, licensees, distributors, or suppliers. If ICANN does not intend to consider such a "branded" gTLD within the scope of community-based gTLDs, it should specifically state that conclusion and its reasoning. *INTA (8 April 2009).* See also *Lovells (13 April 2009).* Companies who file their application for .brand or .company should be open to decide if they apply for an open or community-based namespace. *DOTZON GmbH (13 April 2009).* ICANN should consider whether to have a category of application for brand or trademark owners, or at the very least should clarify the open v. community-based argument and explain how "the good of the internet community" will be taken into account. *MARQUES (13 April 2009).*

Single-purpose or sponsored gTLDs. Numerous rights holders have potential gTLDs that share substantially the same or similar attributes of a community gTLD (e.g., service and broadband providers; industry-wide professional associations, and social networking sites). These rights owners should be recognized for the communities they represent and as such should receive the protections of a sponsored application. *MarkMonitor (10 April 2009).*

III. Analysis and Proposed Position

In light of the comments above, there is a clear need to clarify certain aspects of the process. Such clarifications are provided below and will also be mirrored in the next version of the AG. Suggestions brought up in the comments are also discussed below.

Application category designation. To lodge an application as "community-based" is a choice open to the applicant. Whether the application satisfies any criteria for this distinction is not

assessed unless a community objection is lodged against it or contention resolution through comparative evaluation takes place.

When comparative evaluation takes place. Comparative evaluation is an assessment of whether an application meets certain standards for being a bona fide community-based application and does not involve comparisons between applications. Comparative evaluation only occurs if a community-based application in a contention set has elected comparative evaluation as the preferred method for contention resolution. Comparative evaluation is never performed on "open" applications in such a contention set.

Priority. A community-based application that meets the standards by getting a total score from the four overall criteria above a given threshold is awarded priority for its string above other applications in the given contention set, in line with the adopted GNSO policy (which is the reason for the notion of “community-based”, so it cannot be eliminated as one comment requests). It is not sufficient to base such priority on just a self-declared label as "community-based" without testing against standards as expressed in the Comparative Evaluation criteria.

“.Brand” applications. Since the applicants can self-select to lodge their applications as "community-based", it follows that this could be done by the applicant of a "brand" application as well. As a comment states, there is indeed no need to do so for the sake of introducing restrictions, as that is equally possible in an "open" application. Such a "brand" application could also have a community approach and a string that identifies that community. It is also possible that a "brand" application will be able to assert Intellectual Property Rights to the envisaged string, making it less likely that such an application would end up in a comparative evaluation situation.

No limitations on community. In view of the wide definitions of "community" that exist, community-based applications have not been limited to not-for-profit activities; nor have upper geographical or member number limits been set. For example, a top-level domain could be particularly useful, and particularly justified, for a globally spread community of considerable size. Multiple comments suggest detailed phrasing of a definition of “community”. It should be noted that community-based applications are not vetted in that regard in Initial Evaluation, so there is no definition needed at that stage. The significance of “community-based” occurs at the Objection and Comparative Evaluation steps, where the corresponding criteria serve as decisive factors, rather than any definition per se. The definition suggestions brought up have been considered in the reworking of these criteria.

Community identifiers and geographical identifiers. As noted in the comments, there is a certain overlap between geographical identifiers and community identifiers as many of the former can also be regarded as and used as community identifiers. To apply the same approach as currently foreseen for certain geographical identifiers to all community identifiers, as suggested in the comments, would imply documented community endorsement as a gating factor for lodging a community-based application. This approach could prevent conflicts but would also raise challenging issues of identifying and verifying authoritative community bodies

at the initial stage of the application. Therefore the proposed position is to maintain the current approach, thus not to assess the community-specific aspects unless such an application enters Comparative Evaluation. Community endorsement is, however, an important criterion for applications that do become subject to Comparative Evaluation.

Definition and criteria. Many comments suggested "sharpening" the community definition to make it more objective. As stated under v) above, the scoring criteria embody the requirements, rather than a definition per se, and the definition suggestions have been considered in the significant work undertaken to arrive at the most objective criteria possible. The goal of the GNSO in creating the community-based TLD was to afford them a preference in contention situations. The result though requires the creation of labels, objection processes, compliance mechanisms and evaluations where a latitude for judgments cannot be avoided. The goal of the policy recommendation has been achieved, but with significant difficulty. ICANN is of course willing to discuss ideas for making the criteria and other aspects more objective while still meeting the goal set out by the GNSO and also facilitating a timely, predictable process.

Some of the comments in this subsection relate to the Comparative Evaluation process. See that subsection for details on analysis and refinement of that process.

Comparative Evaluation

I. Key Points

- Multiple comments request refinement and testing of scoring standards and thresholds in order to strike a suitable balance between conflicting objectives. Such tests and refinements have been undertaken by ICANN staff and as a result, a new scoring template with de-aggregated criteria is being prepared for inclusion in the next version of the Guidebook.
- A comment requests a process for appealing a scoring outcome. The proposed position is not to establish an appeal process in view of the ensuing delays and complexities for the process. This reasoning is in line with the approach taken for most of the sub-processes, with a view to maximizing the overall efficiency of the New gTLD process.
- A number of comments request clarifications and corrections of the phrasing in the AG on certain points. These points are being reviewed by ICANN staff and corresponding clarifications and corrections are foreseen for the next version of the Guidebook.

II. Summary of Comments

Comparative Evaluation Procedure. ICANN appears to be conceding the comparative evaluation procedure to each distinct evaluation provider. *IPC (13 April 2009).*

Process manipulation concern. ICANN should further refine the comparative evaluation process to avoid manipulation of the process. The current process may have the unintentional result of inviting applicants to manipulate submissions to garner points with no bona fide intention to abide by representations and criteria once entered into the root (e.g., an applicant could change its business plan after being delegated the applied-for string). ICANN should therefore consider requiring community-based applicants that elect comparative evaluation to demonstrate not only how they currently meet the criteria, but also how they intend to comply with the criteria post-delegation. *INTA (8 April 2009).*

Criteria revision re: community bids: tighten string nexus (section 4.2.3). A community bid, by achieving a score of 4 on all other criteria, can succeed with a score of 2 on string nexus. This means, for example, that the Boy Scouts, as a community, could defeat any open bids for .camping. This loophole is not consistent with the GNSO's intent for Community, would harm competition and restrict or damage the rights other Internet users who might want access to a SLD in a generic TLD. It may hurt communities because by making the string nexus low it will place a high threshold on other criteria, such as Dedicated Registration Policies. Therefore, the nexus criteria should be tightened and the other criteria loosened. (See text of comments for specific language proposal.) A clear and high bar should be set for String Nexus to signal to all applicants that the "Community" path is for true communities only, not for opportunistic

applicants using it as a way to grab generic words and bypass the normal process. *Demand Media (DAG, 13 April 2009).*

Testing the community-based model—apply comparative evaluation to .cat. As a test, the comparative evaluation criteria should be applied to .cat to see if what is thought to be the model for a community-based application actually meets the proposed test. *E. Brunner-Williams (Module 4, 14 April 2009).*

String contention-Clarification (1.1.2.7). The second sentence of the second paragraph should be modified like: "ICANN will resolve cases of string contention either through comparative evaluation if a community-based applicant has requested it or through an auction." Similar changes are recommended for Sections 4.1 and 4.1.1. *RyC (Modules 1-4, 13 April 2009).*

Mandate comparative evaluation. Comparative evaluation on string contention should be mandatory, not optional. The second draft may permit parties to circumvent it by agreement, which could result in launch of confusingly similar top level domains. *AIPLA (13 April 2009).*

Scoring Standard. Comparative evaluation scoring standard probably is "a little bit wrong." *A. Abril i Abril, Public Forum Transcript at 14 (5 Mar. 2009)*

Scoring Proposal. 14 to 16 points to prove community nexus is better, but subjectivity is always there. To assure applicants have a fair chance, ICANN should consider a threshold of 12 to 16 points, which would allow for the margin of error of human fallibility. *R. Andruff, Public Forum Transcript at 22 (5 Mar. 2009). R. Andruff (Module 2, 13 April 2009).* To achieve community status a score of 12 should be sufficient. *Minds and Machines (13 April 2009); Dot Eco (13 April 2009).*

Scoring may need more refinement. Despite revisions (wider range of score 0-4 and that minimum criteria seems to be lower, the minimum criteria may still be too high for a typical applicant. The scoring system/criteria may need further refinement. The litmus test should be whether the sTLDs granted in 2003 can meet this new set of criteria. It would be safe to say that almost all of the sTLDs would be unable to meet the minimum criteria necessary to be a winner. *Zodiac Holdings (13 April 2009).* Even as revised the criteria may end up funneling community applicants to auctions. The requirement to score 14 out of 16 to avoid auction should be relaxed when there is only one community-based applications undergoing comparative evaluation for a particular gTLD string. Additional refinements and clarifications will be necessary if comparative evaluation is to serve its stated purpose. See text and footnotes of comments. *COA (13 April 2009).* See also *CADNA (13 April 2009).*

Priority Determination. Representing a majority of a community for purposes of getting priority may not be easily achieved by any applicant. The word "majority" should be removed from Section 4.2.2. As long as one applicant can demonstrate that it has a significantly larger share of the community than the other applicants, it should be deemed the winner. *Zodiac Holdings (13 April 2009).*

Appeal. Applicants may wish to appeal the comparative evaluation scoring. There should be a system in place for such an appeal to ensure fairness and transparency. *Zodiac Holdings (13 April 2009).*

Possible inconsistency. Section 5.2 (p. 21) of the string contention explanatory memoranda seems in conflict with Section 4.2.2 of the guidebook comparative evaluation procedures. Section 5.2 of the memorandum should be refined to add: "The comparative evaluation process will include all the applications in the relevant contention set. However, open applicants, if any, will not participate in the comparative evaluation." *Zodiac Holdings (13 April 2009).*

III. Analysis and Proposed Position

Multiple comments highlight the need to balance the rights of bona fide communities to get priority for appropriate strings against the risks that the process is used by an applicant seeking undue advantage in a sought-after string. Achieving this balance is a clear objective of developing the Comparative Evaluation process. Many of the comments have proposed modifications of the individual criteria as well as of the threshold for winning in order to improve the balance. Although these comments occasionally conflict, with some in favor of keeping the threshold and some in favor of lowering it, there is recurrent emphasis in these comments on the need for testing against actual cases in order to verify the balance. Regarding the future operational compliance with details in a community-based application, any community-based gTLD will be contractually obligated regarding the community orientation. This will be the case regardless of whether the application has gone straight through the process unchallenged or passed a Comparative Evaluation.

Based on that recurrent emphasis in the comments, ICANN staff has undertaken a series of tests and refinements of the criteria, redrafting in the light of the test outcomes in order to improve balance as well as clarity, logic and objectivity of the criteria. This process has led to rebalancing, rephrasing and de-aggregation of the four criteria (i.e. community establishment, nexus between string and community, registration policies and community endorsement) into constituent parts. These changes are intended to provide more clarity and to produce reasonable outcomes with a proposed lowering of the overall threshold for winning from 14 to 13 out of 16. Other aspects, like the need for research and verifications by the evaluators, have been noted in the testing exercise and will be part of the briefing for the panel performing the evaluations. These changes will be explained in the next version of the AG which will also be posted for public comments.

With respect to a request made in the comments for the opportunity to appeal a scoring outcome, the proposed position is not to accept that suggestion. An appeal could be on the substance, in which case, the appeal process would take longer than the original process. At the end of that, there might be a situation where there is effectively one vote a piece – a situation begging for a tie-breaker. Alternatively, there could be an appeal based on the process, where the appeal is there to ensure the process is followed. ICANN will work with the dispute

resolution provider to ensure that there is a review of each case to ensure the process is followed to obviate the need for this sort of review. Therefore, adding an appeal opportunity to the scoring process would add complexities to the process and impose substantial delays for the process and for all applicants involved. This reasoning is in line with the approach taken for most of the sub-processes, with a view to maximizing the overall efficiency of the New gTLD process.

Regarding the request in the comments that Comparative Evaluation should be mandatory, this request is based on an assumption that applicants with strings in contention could agree to coexist. However, this assumption is false, as voluntary agreements among applicants to resolve contention are only acceptable insofar as they actually resolve the contention, by withdrawing one or more applications. Contention implies that the strings are so similar that they will be confused by end users. This is a fundamental reason to prohibit their coexistence in the DNS and to dismiss as invalid any agreements between applicants to mutually accept such coexistence. This aspect will be further clarified in the next version of the AG.

Multiple comments request clarifications and corrections of the phrasing in the AG on certain points, a number of which are very detailed and which highlight inconsistencies in the AG. ICANN staff appreciates these suggestions and is reviewing those specific points. Corresponding clarifications and corrections are foreseen for the next version of the AG.

Much of the material described above will be reflected in excerpts of the next version of the Guidebook. Those excerpts will be published coincidently with this document.

Auction

I. Key Points

- Comments expressed concern or opposition to the use of auctions for resolving contention among community-based applicants, and the use of funds. Work is being done to make changes to address those concerns while retaining the auction as a last-resort mechanism.
- ICANN has made changes to the process so that only community-based applications will participate in the auction if more than one of them pass the comparative evaluation criteria.
- ICANN has received advice regarding the establishment of a foundation in a manner to retain its present organizational status but has not yet published a position on the use of funds. That work product is forthcoming.

II. Summary of Comments

Community contention/complex scenarios. Auction applied to community situations still raises concerns—i.e., "worst possible" solution. *A. Abril i Abril, GNSO Transcript at 75-76 (28 Feb. 2009).*

Do not use auction—community-based applications. Auction should not be used a tie-breaker in case of two community-based applications applying for the same TLD string. Technically, it could be contention between 2 representative institutions of the same community or between 2 communities. In both case the appropriate solution is not to delegate the TLD as long as there is contention between community-based applications of comparable validity and weight. *W. Staub (13 April 2009). E. Brunner-Williams (Module 4, 14 April 2009).* Also, regarding 4.2.2, using an auction for open and community-based applications if none of the community-based applications meet the minimum score on the comparative evaluation criteria is contrary to the GNSO Council policy which was not modified by the Board*. E. Brunner-Williams (Module 4, 14 April 2009).*

Foundation to Distribute Proceeds. There would be significant complexities setting up the foundation, so the idea needs further development*. J. Prendergast, Public Forum Transcript at 19 (5 Mar. 2009).*

Auction mechanism questioned. INTA questions if auctions are the most efficient and equitable way to resolve string contention—even as a last resort, since such a process inherently will favor the most financially capable applicant, which will not necessarily support ICANN's mission to foster competition and ensure Internet security. Also, the possible collection of significant excess funds via the auction process raises concerns. More thought and definition should be given to acquisition and proposed use of these funds consistent with ICANN's mission. Relying on auctions between community-based applicants, many of whom are non-profit or charitable

groups, and general applicants seems contrary to the general preference for community-based applications. While changes to the criteria and new point system are a slight improvement, inherent subjectivity problems remain. *INTA (8 April 2009).* Using auction as last resort for resolving string contention raises concerns. *AIPLA (13 April 2009); IPC (13 April 2009); COTP (13 April 2009).* It seems that staff could have used any number of low-tech solutions to the problem of auctioning off items which may involve bids in the six, seven and eight figures. *E. Brunner-Williams (Module 4, 14 April 2009).*

Auction—further clarification. INTA commends ICANN for specifying in the revised Section 4.2.2 that any auction between more than one “winner” of the Comparative Evaluation process will exclude all other applicants. One possible ambiguity in the revised Section 4.2.2 should be corrected—the language in the second bullet point relating to community applicants naming the same community should be revised to mimic the language of the third bullet point relating to community applicants naming a different community. *INTA (8 April 2009).*

Resources for auctions; implementation complexity. The auction procedure seems destined to be used heavily, so ICANN should allocate resources sufficient to ensure robust auction systems. Aspects of the auction may be difficult to implement, and the short duration of rounds and auctions themselves do not seem to account for time needed for deliberations about next bids and different time zones. At the other extreme, allowing 4 business days for winning bids to be paid seems overly long. *INTA (8 April 2009).*

Default issues. Further definition is needed on issue of default penalties for failure to timely pay the winning bid on an awarded string. The rationale for using the alternative penalty amount of 10% of the bid as the default penalty is unclear. A middle approach would be a maximum threshold penalty that could not be exceeded under either alternative (e.g., penalty would be greater of difference between the bids, or 10% of the defaulting bid, but not to exceed a specific “sum” which could be the projected average transaction cost to ICANN for conducting the auction. ICANN should also make clear that the default penalties apply to both the initial “winner” and also the next ones in line that confirm they want the TLD and also themselves default. *INTA (8 April 2009).*

Auctions problematic and may cause registry failure. There is still a fundamental contradiction in using auction as last resort for community-based applications. By definition, community-based applications will target smaller communities and use a cost-recovery model, rather than a purely commercial one. For the auction winner, this means recovering its costs through increasing the gross price of registrations. As a consequence, the number of domain names sold may be reduced and the newly launched registry may not meet its business plan. Ultimately auctions may also be a cause of registry failure. *P. Vande Walle (23 Mar. 2009).*

Fairness/favoritism. Auctioning off a community application is not in the spirit of the Internet. It will favor financially stronger community organizations over those that maybe should take that preferential position on the Internet for their cause. *M. Mansell, Mesh Digital Ltd. (2 Mar. 2009).*

Tie breaker—lowest cost to the consumer. Competitive contracts should be awarded to the qualified company willing to run the registry for the lowest cost to the consumer, not the one willing to pay ICANN the most. *Worldwide Media, Inc. (13 April 2009); J. Seitz (11 April 2009).*

Caution against lowest price as determining factor; use comparative evaluation. While auctioning to highest bidder is highly problematic, it is necessary to caution against using price as the determinant criterion; a lower price will attract more speculative domain registrations and makes it more difficult for the registry to operate reasonable validation mechanisms to protect brands, names of public importance and the chartered purpose of the TLD. It s better to use comparative evaluation even for contention between non-community based TLDs. Modes of measurement need not be identical for all TLD applications in the same round, they need only be the same for all applications in a given contention set. Evaluators must be required to document their measurements and objectively explain their conclusion. *W. Staub (13 April 2009).*

The gTLD proposal opposes the Territoriality principle; auction concern. The new gTLD proposal opposes both the Paris Convention and trademark law principle of "territoriality." The DNS is international and assigns automatically international rights over the uniqueness of the domain name. No such automatic registration system exists for trademarks. If two valid and legitimate trademark owners apply for the same string, the suggested "string contention" procedures do not answer this problem, and therefore the proposed auction mechanism will take place more often than not. Given the nature of the auction mechanism, trademark owners with a stronger financial basis will prevail over other legitimate mark owners. *NCUC (13 April 2009).*

Mechanisms to ensure legitimacy and avoid auction gaming, including escrow payments. ICANN should require proof of ability to pay; that 20% of each bid increment should be non-refundable to prevent non-serious bidding; and parties should be contractually obligated to pay in case they win. *Minds and Machines (13 April 2009).* There should be a requirement that funds be escrowed in advance of an auction. Per the Minds and Machines proposal, each party in an auction should pay a small percentage (20%) of each bid increment to ICANN (e.g. of every $10,000 more the bid is raised, the winner and loser must pay $2,000. The objective would be to discourage artificially driving up the price and to encourage parties to resolve matters. *Dot Eco (13 April 2009).* See also *COTP (13 April 2009).*

III. Analysis and Proposed Position

A number of commenters are concerned about the use of auctions to resolve contention in cases where there are two community-based applications for the same string, or cases in which a community-based applicant is in contention with an open applicant (and did not meet the minimum score on the comparative evaluation).

The use of funds from auctions and the potential establishment of a foundation to administer the use of funds also raised concerns. Several commenters questioned whether an auction is the most efficient and equitable way to resolve string contention.

Comments were also raised about details of the proposed auction process, including the handling of defaults, gaming of the bidding process and refunds for withdrawal.
In the development of the draft Applicant Guidebook, the concerns about the efficiency and equity of auctions as a contention resolution mechanism were considered. Community input was considered on the proposed auction model as part of version1 of the Applicant Guidebook, and discussed during the ICANN meetings in Cairo. Four ways to resolve contention were examined (comparative evaluation, selection by chance, selection by best terms, and auctions), and determined that objective criteria is preferable to subjective decision-making, and auctions are preferable to selection by chance as a last resort contention resolution mechanism.

It was submitted that the use of auctions for open and community-based applications (if none of the community-based applications met the minimum score for comparative evaluation) is contrary to the GNSO policy recommendations. The GNSO Recommendations note that contention may be resolved by an “efficient mechanism”, and that there will be cases where two or more identical or nearly identical strings will meet the qualifying criteria and successfully complete all evaluations. Applicants should first be provided an opportunity to resolve contention themselves. In cases where one or more contenders is community-based, comparative evaluation may be used. If comparative evaluation is not used or does not result in a clear winner, the recommendations state that contention may be resolved by an efficient mechanism and Version 2 of the Applicant Guidebook has proposed that this mechanism be auctions. The use of auctions in this manner would be consistent with the GNSO Recommendations.

Some questioned the use of auctions in contention among community-based applicants. It is ICANN’s expectation that contending community-based applicants will have an opportunity to resolve contention without auction

A comment suggested that ICANN should allocate resources sufficient to ensure that the auction systems are robust. ICANN intends to follow that advice and utilize a provider with robust auction systems and international credibility in conducting high-stakes auctions.

A comment noted that the short duration of the rounds and the auctions themselves do not seem to take into account that bidders and their representatives will be in different time zones around the world. The process will schedule any auctions as much as possible at convenient times and for sufficient duration for bidders taking into consideration their locations around the world. Also, the services of a provider that regularly schedules world-wide auctions will be retained so that the sensitivity developed in prior situations can be applied to the new gTLD process.

Another comment noted that short auction rounds do not allow for sufficient time for internal discussions among bidders regarding the next appropriate bid or for obtaining internal approval.
There is considerable, favorable experience in using the same auction formats as proposed in the Applicant Guidebook—and with short bidding rounds—in other sectors, especially electricity and natural gas. In those instances, the short length of rounds has not seemed to pose any problem for bidders, large enterprises or small organizations, or created problems across time zones and locations. There is substantial time provided for parties to resolve contention on their own before the auction commences.

A comment noted that allowing four business days for the winning bid to be paid seemed overly long. (There have been previous comments that the period is too short.) It is understood that winning bids should be paid quickly; however, experience with the transmission of significant international bank wires into the international banking system suggests that the process often requires several days for receipt of the funds. Four business days was selected as a reasonable time frame because that appears to be the shortest feasible time required for such transaction processing.

Another comment questioned how ICANN anticipates collecting the default penalties (at least the amount that exceeds the deposit), and urged ICANN to provide more definition in this section. ICANN will study this comment further; one possibility would be to cap the default penalty at the amount of the deposit, if the conclusion is that there may be difficulty in collecting any penalties exceeding the deposit.

INTA noted "the rationale for using the alternative penalty amount of 10% of the bid as the default penalty is unclear. This alternative amount could be quite significant in some cases and may result in a disproportionate penalty for some bidders. Moreover, collecting an unduly large penalty seems unnecessary given that the monetary loss to ICANN by the default should be relatively small." The basic rationale applied in this approach to default penalties (based on the experience of the auction provider that designed the present process) is that there is no good reason why a bidder should ever submit a bid and then need to default. A bidder should only submit a bid if it intends to carry through with the transaction if it wins. Defaulting behavior has no good justification and should be discouraged. The monetary loss is not the only harm caused by bidding without the intention of carrying through. Defaults also harm the interests of other bidders. This behavior has the general effect of pushing bidding prices higher than they would be absent this behavior. Moreover, it harms the integrity of the overall process. While it is difficult to quantify exactly the total harm imposed on all parties when entities engage in bidding without the intention to pay, advice received indicates that the harm to all parties likely exceeds 10% of the bid amount in the typical situation.

The concern that ICANN should make clear that the default penalties apply to both the initial "winner" and the second, third in line will be reviewed and clarifying language on this matter will be furnished.

It is ICANN's intention that fees and costs of the new gTLD program will offset each other. However, it is understood that the possible use of auctions in the new gTLD process requires a full examination of how auction funds may be used. ICANN intends to release for community discussion information drawn from its research into a possible foundation to administer use of auction funds, and on other options that may have been identified.

In summary, ICANN intends to retain auctions as the mechanism of last resort for resolving contention among competing applications. Additional work is being conducted on uses of auction funds and the establishment of a potential foundation to administer use of auction funds.

Issues addressing contention for community-based applicants continue to be open for discussion.

Detail on the auction process (including defaults, bidding deposits, and refunds) will be provided in the next version of the Draft Applicant Guidebook.

IDN

I. Key Points

- The main comments that were received relating to IDNs were focused around the topic of management of variant strings **and t**he number of characters allowed in a string. Both topics are under discussion and review and ICANN continues to reach for additional community feedback.

II. Summary of Comments

String Requirements for IDN TLDs. It is surprising and disappointing that the second version is still saying that for IDN gTLDs it has to be 3 characters or longer; the justification for this is weak. For example, regarding the possible confusion with ccTLDs, doesn't the string confusion test for gTLDs already address that issue? E. *Chung, GNSO Transcript at 84 (28 Feb. 2009).*

ICANN is still too Anglo-centric. The revised guidebook rule to go from three ASCII characters to three Unicode characters does not work for all languages. Also, the new gTLD RFP is totally silent on the JET guideline on IDN variants. These issues need further consideration. *J. Seng, Public Forum Transcript at 3-4 (5 Mar. 2009); D. Allen (Module 2, 13 April 2009); E. Brunner-Williams (Module 2, 14 April 2009).*

The requirement for a minimum of three characters in the script does not work for Korean scripts because one or two Korean syllables can represent a meaningful word; similar concerns exist for China and Japan. A string computing algorithm is effective for assessing the degree of visual similarity. It is a big mistake if ICANN treats the ASCII TLD and IDN TLD with the same measuring stick. ICANN needs to take this issue very seriously; without single and two character URLs on the top level, introduction of IDN gTLD will be meaningless for Korean Internet users. Possible way forward is a consistent exception for some scripts such as Korean, Chinese, and Japanese. *J. Kim, Public Forum Transcript at 5-6 (5 Mar. 2009).*

ICANN needs to consider and pay more attention to the problems about the "three character limitation" in relation to the Chinese language for the next version of guidebook. *CONAC (13 April 2009).* ICANN should follow the GNSO principle recommendations and lift the restriction on the length of an IDN TLD (i.e. more than two characters) or modify the clause to make it become script specific. Without change the restriction would be a significant deterrent for Chinese TLDs because most meaningful Chinese words are composed only by 2 Chinese characters. *CNNIC (13 April 2009); R. Chen (Module 2, 13 April 2009).*

Recommendation: If a majority of the Unicode characters of the writing system for a particular language possess a meaning on their own, then the restriction of 3 or more characters should not be applied. The applicant should specify the classification of the writing systems of the

string they are applying for, namely Logographic, Syllabic, Alphabetic, Abugida, Abjad and Featural. The rule should apply on a per-string basis and not based on the language (e.g., Japanese hiragana string may still be restricted to 3 or more characters whereas a Japanese kanji string may be allowed on its own). *J. Seng (13 April 2009).*

Recommendation: The 3 character requirement should be lifted from strings whose writing system employ basic building blocks that have generally accepted semantic associations, where single and two-character sequences represent concepts in their own right without the need for abbreviation. These systems do not remotely resemble Latin so visual confusability will not be an issue (there's string review for that). The character repertoire for these scripts is orders of magnitude larger than that of alphabetic or syllabic scripts (e.g., 71,442 Han characters in Unicode version 3.2 versus 26 English alphabets). *W. Tan (13 April 2009).*

The current guidebook should categorically state that in general one or more character IDN TLDs will be allowed "with some possible restrictions that are being discussed". *NCUC (13 April 2009); DotAfrica (Module 2, 12 April 2009); S. Subbiah (Module 2, 13 April 2009).*

An exception should be allowed for Chinese, Japanese and Korean scripts to the 3 or more characters string requirement (2.1.1.3.2). *RyC (Modules 1-4, 13 April 2009).*

III. Analysis and Proposed Position

Minimum characters in gTLD string. The latest version of the Guidebook stated that the required minimum number of characters in a gTLD string must be at least 3 characters. In addition, ICANN posted at the same time an overall analysis around the difficulty in implementing gTLD string with 1 or 2 characters in the string, and in that way additional community feedback was sought.

ICANN appreciates all the comment received on this topic as well as meetings and collaborations since the ICANN meeting in Mexico City. ICANN understands that certain communities (in particular those in which the languages used are Chinese, Japanese and Korean), have expressed a need for gTLD strings shorter than 3 characters due to the fact that a single or two characters in these languages represent a word or a meaning (and in some cases also geographic identifiers). The same argument has been made less well from the European region, where several characters alone or in combination of 2, also represent a word or a meaning.

Some individuals have further suggested that performing a form of trial implementation of a certain number of gTLDs that have less than 3 characters. This would then be used to inform the development of the process for allocating such strings more widely.

In relation to translation of existing TLDs, there has never been a model for "translating" TLDs. They are not standardized abbreviations and abbreviations are not a useful concept in some languages and cultures, no matter what their length. The ccTLDs in particular are a standardized

coding system, chosen as codes for a number of reasons including recognizability and distinctiveness of undecorated Latin character. Currently the IANA delegation function relies on the scarce availability of 2-character combinations, and all of these (when entered in the ISO3166-1 list) are treated as ccTLDs.

ICANN continues to work with the community on suggested solutions.

While the minimum requirement for characters in a gTLD string remains to be 3 characters at this stage, ICANN invites the community to continue the dialogue and explore whether any so far unknown potential solutions could be found to solve this problem.

Variant Strings Management. Comments have been received stating that the Guidebook is not specific enough about how variant strings should be managed.

ICANN has been in the process of analyzing the possibility of allocation of variant strings. ICANN understands the need for implementation of such strings, due to the cultural, linguistic and sometimes software/hardware nature of the way identifiers are entered into various applications. Making sure that the identifier entered into an application is exactly the identifier (for example a web address) that the users intended to enter or access is an increasingly difficult task with the introduction of IDNs. The reason being that several characters in Unicode, although considered the same, will have different codepoints and also can be entered in various ways.

In order to ensure that user confusion is limited as much as possible there is only one reasonable way of introducing variant TLDs in the root zone, and that is by ensuring an aliasing functionality.

Initially there was a belief that the DNAME resource record would enable such aliasing functionality in the root zone, however due to extensive testing, this has been determined not to be possible.

All variant TLDs (as identified by the language tables furnished by the gTLD registry) will be blocked for registration. ICANN encourages the community to initiate review of DNAME and/or development of a technical stable solution that would make aliasing functionality in the root zone possible. When such a solution is in place, the development of an allocation process can be revisited.

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