

February 14, 2014

Mr. Cherine Chalaby

Chair, New gTLD Program Committee

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

VIA EMAIL

Dear Chairman Chalaby:

We are writing in response to Christine Willett's letter of February 4th (<http://www.icann.org/en/news/correspondence/willett-to-andruff-et-al-04feb14-en>) which provided ICANN's management's response to our letter of January 27th (<http://www.icann.org/en/news/correspondence/andruff-et-al-to-chalaby-27jan14-en>) that was directed to you. That letter requested that ICANN put out for public comment the proposed Policy Advisory Board (PAB) model for protecting the public interest in new gTLDs implicating regulated industries and professions.

We echo the disappointment expressed widely within our communities that management and staff of ICANN's new gTLD division do not believe that a public comment period on the PAB model is warranted. Protection of the public interest is inherent in ICANN's mission and should not be subordinated to business concerns. ICANN committed in Section 3(a) of the Affirmation of Commitments (AOC) (<http://www.icann.org/en/about/agreements/aoc/affirmation-of-commitments-30sep09-en.htm>) to "ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent". Similar commitments to the public interest appear in Sections 4, 8(c), and 9.1 of the AOC.

We are of course aware that the general topic of implementation of Governmental Advisory Committee (GAC) Category 1 advice has already been the subject of a prior comment period. However, because that topic remains an open subject of community discussion and governmental concerns the PAB model was created to address them.

We have also reviewed the minutes of the NGPC meeting of November 16, 2013 (<http://www.icann.org/en/groups/board/documents/minutes-new-gtld-16nov13-en.htm>)

as well as NGPC PAPER NO. 2013.11.16.NGxx contained in the briefing materials prepared for that meeting (<http://www.icann.org/en/groups/board/documents/briefing-materials-2-16nov13-en.pdf>). It is regrettable that the delayed posting of these documents meant that we were not able to correct some apparent mistakes, or misunderstandings. The topic of timely posting of staff materials remains a community wide concern, as having significant gaps and delays in providing information to the community on staff prepared briefing documents is inimical to transparency and accountability. We do not believe that staff accurately portrayed our presentation of the PAB model in oral remarks that stated that “the model represents a departure from the role of the registry operator as contemplated in the Applicant Guidebook and Registry Agreement”, or in the provision of background materials that selectively presented certain aspects of the initial PAB model rather than containing the complete five-page letter sent to you on September 25, 2013 (<http://www.icann.org/en/news/correspondence/andruff-to-chalaby-25sep13-en.pdf>).

Certain aspects of that initial model, such as the involvement of the registry operator in setting gTLD policies and cost allocation, have been subsequently altered through dialogue with other stakeholders within the ICANN community, reflecting the bottom-up nature of the evolution of the PAB approach as we seek improvements and consensus. And, of course, a major benefit of putting the current model out for public comment would be to receive additional feedback that could lead to further beneficial modifications. As for the memo’s contention that “there does not appear to be substantial support for the PAB model from the GAC”, the minutes of the meeting state that “Heather [Dryden, GAC Chairman] indicated that the Policy Advisory Board proposal was circulated to the GAC and it may generate discussion during the Committee’s upcoming meeting with the GAC.” Indeed, there was interest among GAC members. As our letter of January 27th described, the PAB model was discussed by the GAC in Buenos Aires, no objections were voiced to its substance, and some members expressly noted an interest in having it put out for public consultation. Finally, new gTLD applicants were on notice and agreed that the provisions of the Applicant Guidebook could be altered at any time, especially in response to concerns raised by the GAC.

As for the staff observation that a registry operator is not prohibited from voluntarily implementing a PAB model, we view that approach as wholly inadequate in addressing the public interest and policy concerns raised by strings implicating regulated industries and professions. Our position has been reinforced by our review of the Approved Resolutions emanating from the NGPC meeting of February 5, 2014 (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-05feb14-en.htm>). In its adoption of the GAC’s Beijing advice regarding Category 1 safeguards reflected in Section 9 of Annex 1 (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>) the NGPC adopts the advice through an

implementation framework contained in Annex 2 (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-2-05feb14-en.pdf>). Upon initial review, our high level concerns with this framework include:

- The majority of the strings identified non-exclusively by the GAC in Beijing as giving rise to concerns have been determined, without revelation of the method used, as only constituting “Regulated Sectors” requiring application of safeguards 1-3: while a minority has been characterized as “Highly-regulated Sectors” requiring the application of all eight safeguards. From a consumer protection standpoint, we can discern no reason why gTLDs like .hospital, .bank, and .attorney would be properly placed in the Highly-regulated category while gTLDs such as .health, .loans, and .architect would be placed in the Regulated category subject to only three safeguards. Indeed, while the GAC advice indicated that its list was non-exhaustive and could even be expanded, the NGPC response has been to dramatically curtail the list of strings that would be subject to broad public-interest protections.
- The safeguards for Highly-regulated Sectors are insufficient in multiple ways. For example, Safeguard 4 requires registry operators to “proactively create a clear pathway for the creation of a working relationship with the relevant regulatory or industry self-regulatory bodies”, but requires no similar pathway for inclusion of expert consumer advocacy organizations and the other entities that will be impacted, as encompassed by the PAB model. Given ICANN’s proactive advocacy of its unique role as a multistakeholder based organization, the exclusion of other concerned stakeholders is a significant gap in ICANN’s staff’s understanding of accountability in a multistakeholder model. Further, Safeguard 6 is entirely insufficient in only requiring that Registrars include in their Registration Agreements a provision requiring “a representation” that the Registrant possesses any necessary authorizations, charters, licenses, or other credentials for participation in the industry or profession the highly-regulated string is associated with. In actual practice, such representation will probably consist of little more than clicking on a box indicating such possession without any further investigation, inquiry, or request for submission of reliable documentation, which is inconsistent with the verification inquiry requested by the GAC for strings implicating regulated industries. Such reliance on “self-certification” is widely regarded as insufficient evidence of qualifications, is not acceptable in the non-digital world, and would invite fraud and consumer confusion on a global scale. We believe that ICANN should act as a trusted steward, and fulfill its responsibility to ensure adequate safeguards and their effective enforcement.

Indeed, in a February 4th, 2014 letter sent to ICANN Board Chairman Stephen Crocker by U.S. Assistant Secretary for Communications and Information Lawrence Stickling

(<http://bit.ly/LQUAnC>), Mr. Strickling emphasized that “the concept of “*representation*” is different from the affirmative obligation for the registry operator to verify or validate the credentials of domain names registrants that indicate participation in certain professional and regulated sectors, as the GAC requested”. His letter also indicates continuing questions regarding whether the NGPC action effectively prevents a gTLD registry operator using restricted registration policies from granting undue preference to any particular party, or subjecting potential registrants to any undue disadvantage. This dilution of the GAC’s requested safeguards appears at odds with one of ICANN’s Core Values, as stated in Section 1.2.11 of the Bylaws (<http://www.icann.org/en/about/governance/bylaws>):

In performing its mission, the following core values should guide the decisions and actions of ICANN:

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

While we appreciate the difficult and complex issues that the NGPC has had to grapple with, we do not regard its recent resolution as foreclosing continued discussion of the adequacy of the adopted safeguards, particularly as ICANN has yet to respond to the GAC’s questioning in its Buenos Aires communique of the sufficiency of PICs. Regulated industries and professions raise inherent public interest and consumer protection concerns recognized at all levels of governments and international intergovernmental bodies. Requiring strong and enforceable registrant requirements in such associated strings is therefore necessary. The PIC model puts an undue (and exclusive) burden on parties deemed to be directly affected, while disenfranchising anyone who cannot prove explicit material harm. It is wholly unreasonable for ICANN to demand that governments and regulatory agencies bear the expense of the complex monitoring, representation and enforcement demanded by this approach.

We also believe that ICANN should minimize any new monitoring or enforcement burden placed on public authorities, particularly at a time of strained governmental resources. ICANN has adequate financial resources to fulfill such inherent obligations given the large sums it has collected in new gTLD application fees. And, as ICANN has undertaken the introduction of the new gTLDs, it must also accept and address risks and issues that are inherently associated with that introduction and the subsequent operation of the new gTLDs. At a time when ICANN’s accountability and commitment to the public interest are being strongly challenged, effective measures that protect the public interest in regulated strings should be viewed as a foundation to credible defense of the multistakeholder model. The inadequacies of the proposed NGPC adopted

measures to prevent widespread consumer deception through new gTLD domains will be extremely harmful to ICANN's credibility and reputation.

Therefore, given our continuing concerns, we respectfully disagree with the staff communication we received from Ms. Willett, and will continue to gather feedback and build consensus around safeguards such as those in the PAB model that can best assure meaningful public protection in regard to regulated sector gTLDs.

We respectfully request that this letter and any forthcoming reply be promptly posted to the ICANN Correspondence page.

Sincerely,

Ron Andruff

Marilyn Cade

Olivier Crépin-Leblond, on behalf of the ALAC Leadership Team

Alan Greenberg

Evan Leibovitch

Cc: Christine Willett, Vice President gTLD Operations