



23 November 2010

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GAC Comments on version 4 of the new gTLD Applicant Guidebook

Dear Heather

Thank you for your letter of 23 September 2010, providing GAC comments on version 4 of the Draft Applicant Guidebook. I also thank you for your letter of 4 August 2010, relating to procedures for addressing culturally objectionable and/or sensitive strings. I will respond to both letters in this communication.

As you know the Board met in Trondheim on 24 and 25 September 2010, and discussed outstanding issues relating to the implementation of the New gTLD program in order to identify potential ways forward. To the extent possible, the Board took into account the GAC's comments of 23 September 2010; however, as much of the preparation briefing had been provided to the Board well before the meeting, this was difficult to do. You will note, in the resolutions from Trondheim, that staff is directed to determine if the directions indicated by the Board are consistent with GAC comments, and recommend any appropriate further action in light of the GAC's comments.

The adopted Board resolutions from the Trondheim meeting are available at:

<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm>

I would encourage the GAC to read these resolutions in conjunction with the response to the GAC letter.

As you will appreciate, the development of the Applicant Guidebook and the resolution of the overarching issues identified during the process, has been a challenging task. The multi-stakeholder model under which ICANN operates means that we are responsible to a diverse range of stakeholders, and I believe that the ICANN community has done an outstanding job of considering, in many cases, diverse views on issues and finding workable solutions. That said, we do recognize that the new gTLD process cannot be all things to all people, and that some issues can be better addressed in successive rounds.

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The guiding principles in developing the Applicant Guidebook have been to: preserve DNS stability and security; provide a clear, predictable and smooth running process; and, address and mitigate risks and costs to ICANN and the global Internet community. The Applicant Guidebook was developed around the recommendations from the GNSO policy development process and one of the additional challenges for staff in this context, was to be careful not to reopen for debate issues that had been discussed and resolved during that process.

### Root zone scaling

On 6 October 2010, staff published two root server scaling reports for public comment.

- The *Delegation Rate Scenarios for New gTLDs* <http://www.icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf>
- The *Summary of the Impact of Root Zone Scaling* <http://www.icann.org/en/topics/new-gtlds/summary-of-impact-root-zone-scaling-06oct10-en.pdf>

In the analysis done in the “Delegation Rate Scenarios for New gTLDs”, ICANN staff estimates that the expected rate of new TLDs entering the root will be of the order of 200 to 300. The same paper indicates that regardless of the number of applications, there will be a process-imposed limited in the addition of new TLDs of less than a maximum of 1000 new gTLDs per year. In addition, advice from the root zone operators indicates that delegation rates of up to 1000 can be accommodated.

Based on this analysis, and taking into consideration the results of the studies into the effects of scaling the root summarized in “Summary of the Impact of Root Zone Scaling,” ICANN believes that projected growth of the root zone will be well within what the root server system and the DNS as a whole can accept. However, with that said, a recommendation documented in “Summary of the Impact of Root Zone Scaling” is the establishment of a monitoring system to ensure that changes relating to scaling of the root management systems don’t go unnoticed prior to those changes becoming an issue. ICANN staff is currently evaluating the monitoring system and alerting mechanisms necessary to meet this recommendation.

Avoidance of congestion at the operational level is a requirement for moving forward with the new gTLD program; however, as documented in “*Root Zone Augmentation and Impact Analysis*”, a reasonably configured root server can easily support several orders of magnitude more IDN and generic top-level domains than are projected to be added in the foreseeable future. As discussed in the “*Summary of the Impact of Root Zone Scaling*”, scaling effects are much more likely to be felt within the context of internal ICANN systems, such as application processing, legal review, IANA processes, etc. ICANN staff will be carefully monitoring these internal systems to ensure resources are applied appropriately to meet demand.

### Market and Economic Impacts

The analysis of whether new gTLDs should be introduced into the market place, and under what circumstances, was undertaken during the policy development process by the GNSO. As the GAC is aware, the Board approved the GNSO policy recommendations in June 2008, thereby agreeing to open up the new gTLD space and tasked staff with developing an implementation plan.

A number of economic studies have been undertaken to date and these were highlighted in my correspondence of 5 August 2010 to the GAC. We await the latest of these.

The economist reports to date reflect that the benefits of innovation, or the effectiveness of trademark protection developed by the intellectual property constituencies, are too speculative to predict with accuracy. However, the Board does not agree that "... an initial 'fast track' round for a limited number of non-controversial applications which should include a representative but diverse sample of community, cultural and geographical applications, would be a preferable course for ICANN to take." The process outlined in the Applicant Guidebook already provides equity and fair play for all applicants globally. An attempt to limit the process to "non-controversial" would be by its very nature controversial, since it will provide a first movers advantage and an incentive for misuse of the process that would be difficult and expensive to manage. I note that at the time the Board was considering the Expression of Interest (EOI) proposal, which was also put forward as a proposal to assist with addressing the question of the economic impact of the introduction of new gTLDs, the GAC questioned the benefits of pursuing a separate EOI as it could distract attention and resources from finalizing the New gTLD Program.

The GAC has raised the issue of "track differentiation between categories" in their comments on versions 2 and 3 of the applicant guidebook, and while I appreciate that this is in a slightly different context, on previous occasions, I responded in essence that we are not opposed to categories, which we expect will become self-evident over time. However, the introduction of a number of new gTLD categories with a number of different accommodations will lead to a complex and difficult application, administration and evaluation process, in addition to a very complicated contractual compliance environment.

### Registry-registrar separation

The Board agrees with the GAC that the registry-registrar separation issue must result in a solution that fosters competition and innovation in the DNS market. The Board notes that registries and registrars will continue to be subject to all applicable national and local laws intended to protect consumers and competition.

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The GNSO recently confirmed that its Vertical Integration Working Group has been unable to achieve consensus <<http://icann.org/en/correspondence/gomes-to-dengate-thrush-07oct10-en.pdf>> on recommending a model for addressing vertical integration of registries and registrars. As indicated at the time of the publication of version 4 of the draft Applicant Guidebook, the Board again reviewed this issue on 9 November 2010, and voted to allow new gTLD registries to own registrars, opting not to create new rules prohibiting registrars from applying for or operating new gTLD registries.

Under the Board resolution additional enforcement mechanisms have been added. New gTLD registry agreements are to include: (1) a Code of Conduct prohibiting any misuse of data or other abusive conduct arising out of registry-registrar cross-ownership; (2) robust auditing requirements; (3) graduated sanctions up to and including contractual termination and punitive damages; and (4) ICANN's right to refer competition issues to appropriate government competition authorities.

The full resolution is available at: <http://www.icann.org/en/minutes/resolutions-05nov10-en.htm>

### Protection of rights owners

The Board understands the concerns expressed by the GAC regarding the potential costs of defensive registrations, and notes that the community spent a significant amount of time considering this issue, notably through the Implementation Recommendation Team and the Special Trademark Issues Working Group. The Board considered the many recommendations and supports the resulting protections now outlined in the Applicant Guidebook. These include:

- The requirement for all new registries to offer a Trademark Claims service or a sunrise period at launch.
- The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for TM holders, registries, and registrars.
- The existing Uniform Domain Name Dispute Resolution Policy (UDRP) continues to be available where complainant seeks transfer of names. Compliance with UDRP decisions is required in all new, as well as existing, gTLDs.
- Implementation of a Uniform Rapid Suspension (URS) system that provides a streamlined, lower-cost mechanism to suspend infringing names.
- The requirement for all new gTLD operators to provide access to “thick” Whois data. This access to registration data aids those seeking responsible parties as part of rights enforcement activities.

- The availability of a post-delegation dispute resolution mechanism that allows rights holders to address infringing activity by the registry operator that may be taking place after delegation.

Each of these is intended to provide a path other than defensive registration for trademark holders.

The application process itself, based on the policy advice, contains an objection-based procedure by which a rights holder may allege infringement by the TLD applicant. A successful legal rights objection prevents the new gTLD application from moving forward: a string is not delegated if an objector can demonstrate that it infringes their rights.

The application form also requires applicants to disclose and describe the implementation of their proposed rights protection mechanisms during startup and launch of the TLD. This allows ICANN to ensure that the applicant will meet the minimum requirements, as well as providing the community with knowledge about that registry's expected practices.

The Board does not concur with the GAC's recommendation that the match criteria for searches be extended to include results that combine a trademark and a generic term such as "Kodakcameras" unless of course this is a registered trademark. Instead the Board has adopted the recommendations of the intellectual property community as represented in the IRT regarding match criteria.

In addition to the outreach that has already been conducted on the new gTLD program, a comprehensive four month communication campaign will be undertaken prior to the launch of new gTLDs.

#### Post delegation disputes with governments

Regarding the question of whether the operations of registry operators of "geo-TLDs" should conduct business under the legal framework of the country providing the letter of support or non-objection to ICANN: the government approving the applicant can impose that requirement on the applicant as a condition of support.

While an agreement between the gTLD registry and the government or public authority, would not be enforceable by ICANN, ICANN would comply with a legally binding decision from a court of competent jurisdiction. Further, if the application is submitted as a "community-based" TLD, the processes and remedies of the Registry Restrictions Dispute Resolution Procedure are also available to governments or public authorities.

This detail is set out in the New gTLD Program Explanatory Memorandum—Withdrawal of Government Support for Registry – Post delegation options

<http://www.icann.org/en/topics/new-gtlds/withdrawal-government-support-28may10-en.pdf>

### Use of geographical names

The Board has sought to ensure, throughout the process of developing a framework for new gTLDs, that there is 1) a clear process for applicants, and 2) appropriate safeguards for the benefit of the broad community including governments. The current criteria for defining geographic names as reflected in version 4 of the Draft Applicant Guidebook are considered to best meet the Board’s objectives and are also considered to address to the extent possible the GAC principles. These compromises were developed after several consultations with the GAC – developing protections for geographical names well beyond those approved in the GNSO policy recommendations. The current definitions, combined with the secondary avenue of recourse available by way of objections were developed to address the GAC’s concerns.

A detailed account was provided in my letter of 5 August 2010, to the GAC.

### *Country and territory names*

I understand that the issue of the use of country and territory names will not be part of the IDN ccPDP; however, the ccNSO is considering options available to consider this issue and the Board anticipates a policy process which provides direction on this issue. The Board will, after the first round of new gTLDs, reconsider the treatment of country and territory names in the new gTLD process.

As stated in previous communications, the Board sought to remove the ambiguity of the term ‘meaningful representation’ from the definition of country and territory names to provide greater clarity for applicants and appropriate safeguards for governments and the broad community. The current definition is objectively based on the ISO 3166-1 and other published lists to provide clarity for potential applicants and the community.

### *City names*

It is acknowledged in the Guidebook (and in previous missives to the GAC) that city names present challenges because city names may also be generic terms or brand names, and in many cases no city name is unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names can not be afforded universal protection. However, the process does provide a means for cities and applicants to work together where desired.

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Applicants are required to provide a description/purpose for the TLD, and to adhere to the terms and conditions of submitting an application including confirming that all statements and representations contained in the application are true and accurate.

*Objection process*

The criteria for community objections was created with the possible objections to place names in mind and as such the objection process “appropriately enables governments to use this.” The *New gTLD Dispute Resolution Procedure* is outlined in an Attachment to Module 3, pp P-1 to P-11 and was also developed so that it is equally accessible to those who wish to utilize the process.

The Board discussed the GAC’s position that governments should not be required to pay a fee for raising objections to new gTLD applications, and does not agree with the GAC on this point. It is the Board’s view that governments that file objections should be required to cover costs of the objection process just like any other objector; the objection process will be run on a cost-recovery and loser-pays basis (so the costs of objection processes in which governments prevail will be borne by applicants). How would the dispute resolution process be funded: a speculative increase in application fees or increased fees to gTLD registrants? Either of these cases or others seem difficult to implement and unfair.

*Letter of support*

While appreciating that governments need time to consult internally before deciding whether to support an application, obtaining government support or non-objection is the responsibility of the applicant and is stated in Module 2 of the Applicant Guidebook. While it has not been decided how long the application period will be open from the time of launching the new gTLD program, there is a requirement that a four month communications campaign be undertaken prior to launch.

Legal recourse for applicants

As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.

ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.

The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.

Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.

### Addressing the needs of developing countries

The Board notes that through the IDN ccTLD Fast Track process much has been done to meet the global public interest in promoting a fully inclusive and diverse Internet community and infrastructure, at very minimal cost to applicants. The new gTLD process has been developed on a cost-recovery model, and owing to a level of uncertainty associated with the launch of new gTLDs, the fee levels currently in the Applicant Guidebook will be maintained for all applicants.

As stated in correspondence to the GAC of 22 September 2010, '... the experience gained from the initial round of applications will inform decisions on fee levels, and the scope for discounts and subsidies in subsequent rounds. 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.'

The Board supports the publication of a list of organizations that request assistance and organizations that state an interest in assisting with additional program development, for example pro-bono consulting advice, in kind support, or financial assistance so that those needing assistance and those willing to provide assistance can identify each other and work together. The new gTLD Deployment Budget, available at <http://www.icann.org/en/announcements/announcement-22oct10-en.htm> contains US\$200,000 to help identify, educate, and promote the organizations willing to provide such assistance and an additional US\$100,000 has been added to the Application Processing Budget to increase Customer Support processes for all applicants.

### Morality and Public Order

In accordance with the GAC request, ICANN has facilitated the cross-community discussions on the process for addressing the GNSO policy recommendation that, "[s]trings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law."

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The Board welcomes the report from the Recommendation 6 Working Group and has requested staff to undertake analysis of the report to determine how recommendations could be incorporated into the Guidebook and conduct a consultation with the Working Group before the Cartagena meeting with the aim of finding additional areas of agreement for incorporation into the Applicant Guidebook.

I wish to make a few points regarding the GAC letter of 4 August on this topic. I do not consider this to be a stability issue per se but rather a policy issue where ICANN is implementing the consensus position developed by the GNSO. There are controversial names delegated and registered now at different levels of the domain name system that do not result in security or stability issues.

Additionally, the new gTLD implementation to date has addressed the issues described in the Affirmation of Commitments: competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection. The issues raised by the GAC are neither stability / security nor AoC issues – but they merit the full attention of the community.

The solution that appears in version 4 of the Applicant Guidebook was developed following extensive legal research that examined restrictions in a representative sample of countries, which included Brazil, Egypt, France, Hong Kong, Malaysia, South Africa, Switzerland and the United States of America. Various competing interests are potentially involved, for example the rights of freedom of expression versus sensitivities associated with terms of national, cultural, geographic and religious significance. While freedom of expression in gTLDs is not absolute, those claiming to be offended on national, cultural, geographic or religious grounds do not have an automatic veto over gTLDs. The standards summarized by Recommendation No. 6 indicate that a morality and public order objection should be based upon norms that are widely accepted in the international community.

In addition to the Draft Applicant Guidebook (Module 3), ICANN has published explanatory memoranda, dated 29 October 2008 <http://www.icann.org/en/announcements/announcement-29oct08-en.htm> and 30 May 2009 <http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>, that set out the specific standards that have been adopted for such objections and the legal research upon which those standards is based.

Importantly, in addition to the Morality and Public Order objection and dispute resolution processes, the Community Objection standards were developed to address potential registration of names that have national, cultural, geographic and religious sensitivities.

I understand that some GAC members have expressed dissatisfaction with this process as it was first described in version 2 of the Guidebook. The treatment of this issue in the new gTLD context, was the result of a well-studied and documented process which involved consultations with internationally recognized experts in this area. Advice containing thoughtful proposals for amending the treatment of this issue that maintains the integrity of the policy recommendation would be welcomed. The expression of dissatisfaction without a substantive proposal, does not give the Board or staff a toehold for considering alternative solutions. While the report of the recently convened working group still does not constitute a policy statement as conceived in the ICANN bylaws, ICANN staff and Board are working to collaborate with the community to adopt many of the recommendations.

Once again, I appreciate the GAC's commitment to the new gTLD process and hope you find this letter responsive to GAC concerns.

The proposed final version of the Applicant Guidebook has now been posted and I look forward to discussing the introduction of new gTLDs in Cartagena.

Regards,



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