RySG Input to ICANN Board Notes on the GAC New gTLDs Scorecard

15 March 2011

This document contains the Registries Stakeholder Group (RySG) input to the ICANN Board's notes on the "GAC indicative scorecard on new gTLD outstanding issues" of 23 February 2011.

General Statement from the REGISTRIES STAKEHOLDER GROUP

The Registries Stakeholder Group appreciates this opportunity to contribute to the consultation of the ICANN Board of Directors and the Government Advisory Committee.

We want first to compliment the members of the GAC and the Board for the significant time and effort that they have committed to this effort and for the excellent progress made to date. Thanks to all of you as well as to the Staff that have been providing support.

As you continue your good faith efforts to resolve differences, our recommendation is that you keep in mind the huge bottom-up policy development process and the significant implementation work that has led us to this point. Hundreds of hours of work were performed by a multitude of impacted parties from all over the globe. No group achieved everything they wanted but diligent efforts were made to develop compromise solutions that a supermajority of the GNSO Council supported. In the multiyear implementation work that has occurred since then, the ICANN bottom up process has continued to involve all interested parties; solutions were developed through very long hours of work that the majority have been willing to support.

We caution the Board and the GAC to be careful about making significant changes to major compromises that were reached by the broader community. To do so could disenfranchise stakeholder groups who contributed to the agreed-to solutions and, more importantly, could undermine the bottom-up policy process in the future.

We want to make it clear that we fully support the good faith efforts of the GAC and the Board to try to resolve differences; we believe that is an essential part of the process before introducing new gTLDs. In no way should it be concluded that we think this good faith effort undermines the bottom-up processes that have occurred; rather, we think the good faith efforts are an essential part of the overall process. We strongly believe, at the end of day, that it is critical that any decisions reached between the Board and the GAC not reverse key community developed compromises that were reached in a bottom-up and inclusive manner that was open to the entire community.

Additionally, we want to point out that the ICANN Bylaws call for the good faith effort now underway to be completed in "a timely and efficient manner". We sincerely hope that the GAC and Board can reach agreement on all remaining issues. As discussions continue, we request that the Board and GAC seek and consider input from registry operators and registrars as to the practicality of policy implementation. Registrars and

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registries met in late February in Brussels with international law enforcement representatives and made substantial progress on policy issues important to that community on the basis of understanding what is and is not easily applicable to operational systems.

We ask that, at minimum, should the Applicant Guidebook not be approved at the Silicon Valley-San Francisco meeting, the Board approve and publish a timeline for finalizing the Guidebook, opening applications, and introducing new gTLDs by no later than the scheduled April ICANN Board meeting.

Comments on Specific Issues

The table below is a subset of the original Board table containing only the issues on which the RySG commented. The RySG comments are highlighted in blue font in the Notes column.

Item #	GAC Scorecard Actionable Item	Position	Notes
2.	Procedures for the review of sensitive strings		

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2.1.2	GAC advice could also suggest measures to mitigate GAC concerns. For example, the GAC could advise that additional scrutiny and conditions should apply to strings that could impact on public trust (e.g. '.bank').	2	If the GAC were to provide suggested changes to mitigate concerns, we are concerned that the advice would lead to ad hoc changes to the evaluation process based on subjective assessments. RySG Comments: Assuming the following solution can be developed without any ad-hoc changes to the process and that it can be done within 30 days, the RySG believes that this issue could be moved from "2" to "1" provided the "additional scrutiny" does not involve the introduction of new evaluation criteria. GAC advice suggesting "measures to mitigate concerns" for "strings that could impact the public trust" should be shared with such applicants, which could choose whether or not to implement the recommended measures. If they choose not to, they do so at risk of further GAC advice and the Board's right not to approve a string if it is not in the public interest.

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2.2.1	"Community-based strings" include those that purport to represent or that embody a particular group of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non exhaustive). In addition, those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse, should also be considered "community-based" strings.	2	Any community is eligible to designate its application as community-based. Bona fide community applicants are eligible for preference in the event of contention for a string. Also, ICANN has provided a community objection process in the event that there is "substantial opposition to it from a significant portion of the community." (A community objection may be lodged against any application, whether or not it is designated as community-based.) The GAC's list of groups and sectors appears to be an example of the kinds of communities that may be able to achieve standing to raise a community objection. ICANN will review the standards for the community objection process to ensure that they are appropriate. Revised standards will be included in the forthcoming version of the Applicant Guidebook. RySG Comments: The RySG support the Board's rationale because: 1) We don't believe that groups as described by the GAC could meet the community based criteria, in particular the existing nexus requirements in the Guidebook, to be a community TLD. If we are correct, then accommodating the GAC recommendation would require starting all over on the community criteria. 2) We also do not believe that the GAC proposal would accomplish what they wish to accomplish while the Board proposal would accomplish this.

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2.2.2	Applicants seeking such strings should be required to affirmatively identify them as "community-based strings" and must demonstrate their affiliation with the affected community, the specific purpose of the proposed TLD, and –when opportune evidence of support or non-objection from the relevant authority/ies that the applicant is the appropriate or agreed entity for purposes of managing the TLD.	2	The GAC's suggestion would require applicants to designate themselves as a community, even if they might not be. Strings may have many meanings, not all of which might implicate a community. Reducing the context for how strings may be used is contrary to an important goal of the new gTLD program, which is to help encourage competition, innovation and consumer choice. RySG Comments: The RySG supports the Board position for reasons stated with respect to 2.2.1. In addition, what is being introduced by the GAC would subject the applicant to community criteria even when there is no contention. This would be a material change to the Guidebook.

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2.2.3	In the event the proposed string is either too broad to effectively identify a single entity as the relevant authority or appropriate manager, or is sufficiently contentious that an appropriate manager cannot be identified and/or agreed, the application should be rejected.	2	The community objection process is intended to deal with applications where "there is substantial opposition" to the application "from a significant portion of the community." This GAC advice seems to suggest that unless everyone can agree on an appropriate applicant for a given string then the string should not be approved. Again, this seems contrary to the goal of increasing competition and providing additional choice to all consumers. Further, the phrase "sufficiently contentious" is vague and it is unclear who the GAC is suggesting would need to agree on an "appropriate manager." Thus, this suggestion does not seem to be workable in light of the goals of the new gTLD program. RySG Comments: The RySG supports the Board position for reasons stated with respect to 2.2.1 In addition, what is being introduced by the GAC in 2.2.2 would subject the applicant to community criteria that are not in contention. This would be a material change to the Guidebook.

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4.	**Market and Economic Impacts**		
4.1	Amend the final Draft Applicant Guidebook to incorporate the following: Criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs.	**2**	It is not planned that information gathered as part of the application will be used to predict the net benefit of the prospective TLD – that would be too speculative to be of real value. However, during the discussions between the GAC and the Board in Brussels, the GAC indicated that the weighing of costs and benefits should instead take place as part of the new gTLD program review as specified in section 9.3 of the Affirmation of Commitments. RySG Comments: The RySG supports the Board's position because this approach would introduce a new requirement for weighing criteria and there is no current provision for this in the Guidebook except for community-based gTLDs in certain circumstances. Moreover we support the Board's approach to evaluate market impacts at some future point post launch.
5.	**Registry – Registrar Separation**		

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	Amend the proposed new registry agreement to restrict cross-ownership between registries and registrars, in those cases where it can be determined that the registry does have, or is likely to obtain, market power.	2	ICANN sought to implement a marketplace model that would enhance competition, opportunities for innovation and increase choice for consumers while preventing abuses in cases where the registry could wield market power. While lifting restrictions on cross-ownership, ICANN reserves the right to refer issues to appropriate competition authorities if there are apparent abuses of market power. As previously resolved by the Board, registry agreements will include requirements and restrictions on any inappropriate or abusive conduct arising out of registry-registrar cross ownership, including without limitations provisions protecting against misuse of data or violations of a registry code of conduct. RySG Comments: The RySG supports the Board's position. The RySG believes the GAC-Board disagreement might be resolved with additional clarity in the GAC's language. It is clear that both agree any abuse of registry market power related to cross ownership should be a violation of the registry Code of Conduct and referred to competition authorities. If this is the GAC's intended position, this could be re-classified as "1."
6.	Protection of Rights Owners and consumer protection issue		

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6.1.2	Sunrise services and IP claims should both be mandatory for registry operators because they serve different functions with IP claims serving a useful notice function beyond the introductory phase.	2	The IRT and STI suggested an either/or approach. Please advise reasons for advocating both. RySG Comments: The RySG supports the Board's position on this standard of proof.
6.1.3	IP claims services and sunrise services should go beyond exact matches to include exact match plus key terms associated with goods or services identified by the mark) e.g. "Kodakonlineshop") and typographical variations identified by the rights holder.	2	ICANN recognizes that trademark holders have an interest in receiving notification in the event that strings are registered that include their mark and a key term associated with goods or services identified by the mark. This remains an area of discussion. RySG Comments: We agree with the Board; the GAC proposal does not appear feasible particularly with respect to typographical variations and their ability to intrude on other words and marks of rights holders.

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6.1.4	All trademark registrations of national and supranational effect, regardless of whether examined on substantive or relative grounds, must be eligible to participate in the pre-launch sunrise mechanisms.	1B	All trademark registrations of national and supranational effect, regardless of whether examined on substantive or relative grounds, will be eligible for inclusion in the Trademark Clearinghouse and for the Sunrise/TM Claims service subject to the following. Registries that utilize a sunrise process must require submission of evidence of use of the mark by holders of all trademark registrations, regardless of the jurisdiction of registration. Use of the trademark may be demonstrated by providing a declaration from the trademark holder along with one specimen of current use. Further discussion should take place relating to proof of use. RySG Comments: We agree with the Board's position, as without a showing of use there is a risk of gaming.

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6.1.7.1	The TC should continue after the initial launch of each gTLD.	2	The Trademark Clearinghouse will be an ongoing operation. The Sunrise and TM Claims service will operate only at launch (in accordance with the recommendations of the IRT and the STI). Trademark holders will continue to be able to subscribe to "watch" services that will be able to utilize the Centralized Zone File Access system to be able to efficiently monitor registrations across multiple gTLDs. RySG Comments: The RySG agrees with the Board's analysis that this issue is a 2 because, after launch, the zone files will be available and watch services will exist.
6.2.6	The standard of proof (para 8.2) should be lowered from "clear and convincing evidence" to a preponderance of evidence".	2	The principle of the URS is that it should only apply to clear-cut cases of abuse. "Clear and convincing" is the burden of proof that was recommended by the IRT and endorsed by the STI. RySG Comments: The RySG agrees with the Board's position which is consistent with the bottom-up implementation process including the IRT and STI.
6.2.7	The "bad faith" requirement in paras 1.2f), 1.2g) and 8.1c) is not acceptable. Complainants will in only rare cases prevail in URS proceedings if the standards to be fulfilled by registrants are lax. Correspondingly, the factors listed in paras 5.7a) ("bona fide") and b) "been commonly known by the domain name") can hardly allow a domain name owner to prevail over the holders of colliding trademarks.	2	The standard applied for the URS is based on the UDRP standard. Both require a finding of bad faith. RySG Comments: The RySG's position is that given that the purpose of the URS is to apply to clear cut situations of abuse, we fail to see how this could be established without the bad faith requirement.

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6.2.8	A 'loser pays' mechanism should be added.	2	A loser pays mechanism was investigated, but ultimately was not adopted. The UDRP does not have a loser-pays mechanism. It is unlikely that complainants would ever be able to effectively collect based on clear-cut cases of abuse, since the names in question will already have been suspended. Notwithstanding, ICANN will monitor URS procedures once launched to see whether a loser pays mechanism or some other methodology to reimburse mark holders is feasible. RySG Comments: The RySG agrees with the Board's position.
6.2.9	Registrants who have lost five or more URS proceedings should be deemed to have waived the opportunity to respond to future URS complaints (this amendment corresponds to the "two strikes" provision which applies to rights holders).	2	Due process principles require that every registrant should always have the opportunity to present a defense. RySG Comments: The RySG agrees with the Board's position.
6.2.10.1	However, there should be a clear rationale for appeal by the complainant.	2	The Board has asked the GAC to clarify if it intended to refer to "complainant" (as opposed to respondent) in this statement. Every appeal will be decided de novo, and therefore the appeal process does not require a separate evaluation of the rationale for filing the appeal. RySG Comments: The RySG agrees with the Board's position.

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6.2.10.2	The time for filing an appeal in default cases must be reduced from 2 years to not more than 6 months.	2	The IRT originally suggested a URS without any appeal process. The STI suggested the inclusion of an appeal process (without any mention of a limitation on the ability to seek relief from a default). In response to comments, the Applicant Guidebook was revised to include a two-year limitation period on the opportunity to seek relief from a default. RySG Comments: The RySG believes this position should be changed from a 2 to a 1. The RySG agrees with the change from 2 years to 6 months. The GAC position seems reasonable as the registrant will receive multiple notices, both on the filing of the URS and of the decision at the conclusion of the URS proceeding. There should be ample notice and hence six months should provide a sufficient opportunity for a response. Question: What happens if before the six month period is up the name has been deleted?

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6.2.12	A successful complainant should have the right of first refusal for transfer of the disputed domain name after the suspension period so that the complainant is not forced to pursue a UDRP proceeding to secure a transfer.	**1a (should be 1b or 2)**	A successful complainant should have the right of first refusal to register the disputed domain name after the expiration of the registration period and any extension of the suspension period. This right of first refusal upon expiration will not diminish the registration period, or the period of time available for the registrant to seek relief from default, or in any other way harm the rights of any registrant.
			RySG Comments: The RySG does not believe this is a 1A; it is either a 1B or 2. Neither the GAC position nor the Board position follows the community, bottom-up process agreed to via consensus, beginning with the IRT, and it creates new rights for challengers. The Board's proposed new procedure is operationally difficult, and has not been vetted in consultation with registry operators for viability. The proposed process may not be commercially feasible, and may impose additional liabilities upon registry operators.

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6.2.13	The URS should go beyond 'exact' matches and should at least include exact + goods/other generic words e.g. "Kodakonlineshop".	2	As recommended by the IRT, the URS only applies to registrations that are identical or confusingly similar to protected marks as described in the Guidebook. As noted above, the URS is only intended to apply to clear-cut cases of abuse. RySG Comments: It is the RySG's understanding that the URS goes beyond "exact" match and applies to registrations that are identical or confusingly similar to protected marks. And, therefore the GAC and the Board are very close and this should be a 1.
6.3.1	*3. Rights Protection: Post-delegation Dispute Resolution Procedure (PDDRP)* The standard of proof be changed from "clear and convincing evidence" to a "preponderance of evidence".	2	This was the standard developed by the IRT. RySG Comments: The RySG supports the Board's position and reminds the community the PDDRP is designed to address the behavior of the registry and not registrants and may result in the termination of the registry together with all the registrations.

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6.3.2	The second level registrations that form the underlying basis of a successful PDDRP complaint should be deleted.	2	The registrants are not parties to the proceedings, thus keeping a registrant from using the domain name or stripping the name from the registrant should be effected through an alternative proceeding, such as URS or UDRP. Note that to the extent registrants have been shown to be officers, directors, agents, employees, or entities under common control with a registry operator, then deletion of registrations may be a recommended remedy. RySG Comments: The RySG supports the Board's position and reminds the community the PDDRP is designed to address the behavior of the registry and not registrants. The RySG opposes a process for the deletion of second-level registrations that do not afford the right of the registrant to due process.
6.3.3	The requirement of "substantive examination" in para 9.2.1(i) should be deleted.	1B	There is no requirement that any registration of a trademark must include substantive evaluation. Each trademark registration must be supported by evidence of use in order to be the basis of a PDDRP complaint. Use of the trademark may be demonstrated by providing a declaration from the trademark holder along with one specimen of current use. Further discussion should take place relating to proof of use. RySG Comments: The RySG supports the Board's position.

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6.3.5	Regarding the second level (para 6.2), the registrant operator should be liable if he/she acts in bad faith or is grossly negligent in relation to the circumstances listed in para 6.a)-d).	2	Changing the standard from requiring "affirmative conduct" to "gross negligence" would effectively create a new policy imposing liability on registries based on actions of registrants. RySG Comments: The RySG strongly supports the Board's position. We do not believe the GAC position has been supported by recent case law in multiple jurisdictions.
6.3.6	The requirement in para 7.2.3 lit.d) that the complainant has to notify the registry operator at least 30 days prior to filing a complaint is burdensome and should be reduced to 10 days if not deleted entirely.	2	The current requirement is in place to provide the registry with a reasonable amount of time to investigate and take appropriate action if a trademark holder notifies the registry that there may be infringing names in the registry. RySG Comments: The RySG supports the Board's position. We believe adequate time should be provided before a PDDRP is filed as per the Applicant Guidebook PDDRP 7.2.3(d) so that the affected parties may have an adequate opportunity to investigate and to find a resolution to the issue.

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6.4.2	A registry operator must assist law enforcement, government agencies and agencies endorsed by governments with their enquiries about abuse complaints concerning all names registered in the TLD, including taking timely action, as required, to resolve abuse issues.	1B	ICANN agrees that the registry operator must assist appropriately in law enforcement investigations. There might be a difference between local and International law enforcement agencies. There is a question about whether this requirement would be stronger than what is already required by law. Changes to the Guidebook will be made after consideration of those issues. RySG Comments: The RySG believes any assistance must be in compliance with applicable law in the jurisdiction where the registry operator is located. The RySG supports the Board position and is committed to working with registrars and law enforcement along the lines of the recent law enforcement meeting in Brussels.
6.4.4	**Vetting of certain strings** gTLD strings which relate to any generally regulated industry (e.g. .bank, .dentist, .law) should be subject to more intensive vetting than other non-geographical gTLDs.	2	ICANN has requested clarification from the GAC of the intended meaning of "generally regulated industries", but generally believes that *a priori* categorization of strings is inherently problematic. RySG Comments: The RySG supports the Board's position.
8.	**Use of geographic names:**		

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8.1.1.2	and to define names that are to be considered geographic names.	2	The process relies on pre-existing lists of geographic names for determining which strings require the support or non-objection of a government. Governments and other representatives of communities will continue to be able to utilize the community objection process to address attempted misappropriation of community labels. ICANN will continue to explore the possibility of pre-identifying using additional authoritative lists of geographic identifiers that are published by recognized global organizations. RySG Comments: The RySG supports the Board's position because of the rationale in the Applicant Guidebook.
8.1.3	Review the proposal in the DAG in order to ensure that this potential [city name applicants avoiding government support requirement by stating that use is for non-community purposes] does not arise. Provide further explanations on statements that applicants are required to provide a description/purpose for the TLD, and to adhere to the terms and condition of submitting an application including confirming that all statements and representations contained in the application are true and accurate.	2	There are post-delegation mechanisms to address this situation. In addition, the "early warning" opportunity will offer an additional means to indicate community objections. RySG Comments: The RySG believes this disagreement between the GAC and the Board could be resolved by further clarification of question 18 in the TLD Application, which requires applicants to describe the intended purpose of a TLD. The proper reply to this question should address the GAC's concern.

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8.2.1	*2. Further requirements regarding geographic names* The GAC clarifies that it is a question of national sovereignty to decide which level of government or which administration is responsible for the filing of letters of support or non-objection. There may be countries that require that such documentation has to be filed by the central government - also for regional geoTLDs; in other countries the responsibility for filing letters of support may rest with sub-national level administrations even if the name of the capital is concerned. GAC requests some clarification on this in the next version of the Applicants Guidebook.	1A	This principle is agreed, and this can be clarified in the Guidebook. ICANN invites governments to identify appropriate points of contact on this issue. RySG Comments: The RySG welcomes this clarification in the Guidebook by ICANN, and requests some identification of the appropriate contact points of contact in governments. The RySG believes this will further ensure the feasibility and reduce the complexity of the required level of support and document of proof in the final version of the AG.