

Dear Directors & Liaisons,

Please find the notice of the following New gTLD meeting:

BOARD COMMITTEE – NEW gTLD COMMITTEE MEETING TELECONFERENCE

Date: 10 January 2013

Time: 15:00 UTC – 17:00 UTC

A fixed time and date calculator can be found here -

<http://www.timeanddate.com/worldclock/fixetime.html?msg=New+gTLD+Committee+Meeting&iso=20130110T15>

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The materials will be posted to Board Vantage and will be available in a workbook form in the Committee Folder under 2013 Meetings – 10 January 2013

Contact Information Redacted

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gTLD-Closed-Generic-summary-7jan13.doc

New gTLD Program Committee Submission 2013-01-10-01

TO: New gTLD Program Committee
TITLE: “Closed Generic” gTLD Applications
PROPOSED ACTION: For Review and Discussion

EXECUTIVE SUMMARY

Following the publication of the gTLD applications in June 2012, ICANN has been contacted by some in the community concerning certain applications for strings which are labeled as “generic terms.” These applications are considered problematic by some due to the proposed use of the TLD by the applicant, e.g., using the TLD in a manner that is seen as inappropriately exclusive, particularly in the sense of creating a competitive advantage. These applications have been the subject of public comments and Early Warnings, as well as discussion among members of the New gTLD Program Committee.

Many of the communications link the issue of registration restrictions for a TLD with the Code of Conduct (Specification 9 to the gTLD Registry Agreement). However, it should be clarified that the Code of Conduct refers to registry-registrar interactions, rather than eligibility for registering names in the TLD. Rather than the Code of Conduct, the true issue of concern being expressed appears to be that in certain applications, the proposed registration policies are inappropriate.

The New gTLD Program has been built based on policy advice developed in the GNSO’s policy development process. The policy advice did not contain guidance on how ICANN should place restrictions on an applicant’s use of a TLD, and no such restrictions were included in the Applicant Guidebook.

Defining a “generic” category of strings is a complex undertaking as strings may have many meanings. However, there are mechanisms built into the program (e.g., objection processes, GAC processes) as a means for concerns about specific applications to be considered and resolved as they arise.

Additional background and analysis on this issue are available in the annex to this paper.

The recommended approach is as follows:

1. Following discussion by the Committee, ICANN should publish a response to the relevant community correspondence to provide clarification of the issue (i.e., explaining the purpose and scope of the Code of Conduct as distinct from questions about eligibility requirements for registering domain names in a TLD).
2. Staff does not believe it is appropriate at this time to create a new category of generic-term applications with new provisions – the Applicant Guidebook did not indicate expected restrictions from ICANN on an applicant’s use of a TLD, and there is no existing policy advice that can be used to define this. There are objection mechanisms in place to support consideration of issues for applications that a party considers problematic, and these processes should continue to be used where relevant.
3. If action is desired to create category rules among the current gTLD applications, the appropriate basis for establishing such rules would be policy guidance from the GNSO. Seeking policy guidance is not recommended at this time, as this will introduce delay to the evaluations in process as well as raising liability on the introduction of additional criteria to the process.

Submitted by:	Karen Lentz
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gTLD-Closed-Generic-annex-7jan13.doc

Annex: New gTLD Program Committee Submission 2013-01-10-01

TO: New gTLD Program Committee
TITLE: “Closed Generic” gTLD Applications
PROPOSED ACTION: For Board Review and Discussion

Following the publication of the gTLD applications in June 2012, ICANN has been contacted by some in the community concerning certain applications for strings which are labelled as “generic terms.” These applications are considered problematic by some due to the proposed use of the TLD by the applicant, e.g., using the TLD in a manner that is seen as inappropriately exclusive, particularly in the sense of creating a competitive advantage. These applications have been the subject of public comments and Early Warnings, as well as discussion among members of the New gTLD Program Committee.

Several of the public comments on applications cite a 25 September 2012 letter¹ from Kathryn Kleiman expressing concern about negative impacts on competition and consumer choice as a result of “generic” TLD strings adopting a “closed” type of business model and suggesting an Advisory from ICANN on the enforcement of the Code of Conduct (The Code of Conduct is Specification 9 to the gTLD Registry Agreement and relates to registry-registrar interactions such as operational access to registry systems and disclosure of user data). The 25 September letter notes that a number of applications include a stated intention to request an exemption from the Code of Conduct from ICANN, and that it would be inappropriate for ICANN to grant such an exemption in a “closed generic” case. Other individuals have contacted ICANN staff and Board members with similar views.

It should be noted that the Code of Conduct refers to registry-registrar interactions. Rather than the Code of Conduct exemption, the true issue of concern being expressed appears to be that in certain cases, the proposed registration policies are inappropriate, given the string applied for and the use proposed. There is a particular market

¹ See <https://www.icann.org/en/news/correspondence/kleiman-to-icann-25sep12-en>

behaviour relating to excluding competitors from registering domain names that these parties are looking to ICANN to prevent.

This paper reviews the current provisions of the New gTLD Program, the concerns expressed in recent feedback, and possible actions to be taken by ICANN.

ANALYSIS:

The Initial Evaluation processes defined in the Applicant Guidebook for the review of string and applicant information are underway. As provided in the Guidebook, the objection filing period is currently open; however, no formal objections have been filed to date. During this period, the Independent Objector may also file an objection to any application on behalf of the global Internet community.

The Applicant Guidebook provides processes for both Early Warnings and GAC Advice on applications. Early Warnings were issued in November 2012.² The Department of Broadband, Communications and the Digital Economy (DBCDE), on behalf of the Australian Government, issued Early Warnings to 82 applications (including 10 IDNs) on “competition” grounds, stating that: “Restricting common generic strings for the exclusive use of a single entity could have unintended consequences, including a negative impact on competition,” and proposing a dialogue for enhanced understanding of the government and the applicants. The suggested remedy in these Early Warnings is that the applicant should specify registration criteria without “anti-competitive or discriminatory conditions relating to access by third parties,” which should be formalized as part of the applicant’s agreement with ICANN and thus subject to compliance oversight. The Guidebook provides that, upon receipt of an Early Warning, the applicant may elect to withdraw the application for a partial refund or may elect to continue with the application (this may include meeting with representatives from the relevant government(s) to try to address the concern).

Upon completion of the evaluation and dispute resolution processes, all successful gTLD applicants will be eligible to enter into a Registry Agreement with ICANN prior to delegation of the TLD. Subject to the gTLD Registry Agreement:

² See <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>

1. Registries MUST offer non-discriminatory access to registrars. This is in keeping with current practice and is consistent with the GNSO's policy recommendation 19: *Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.*
2. Registries MAY establish policies for the registration of domain names in the TLD. This is particularly relevant to applications designated by the applicant as "community-based," and the Registry Restrictions Dispute Resolution Policy (RRDRP) was developed to provide a path for complaints that a registry is not properly enforcing its registration restrictions.³ This procedure was seen as particularly important in cases where support or non-objection for an application was tied to the registration policies.
3. Registries MUST comply with a Code of Conduct. The Code of Conduct was added to the (draft) gTLD Registry Agreement in November 2010 to mitigate possible abuses that could result from the lifting of restrictions on registry-registrar cross-ownership.

The text of the Code of Conduct was revised for clarification based on public comment, including the possibility for an exemption as follows:

Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

As noted above, the Code of Conduct refers to registry-registrar interactions. The potential for an exemption was intended to provide flexibility to operators to the extent appropriate so long as the TLD is used by the registry operator

³ See <http://newgtlds.icann.org/en/applicants/agb/rrdrp-11jan12-en.pdf>

solely for its own operations, and registrations are not sold or made available to consumers or other third parties.

A registry could have registration eligibility policies and still be abiding by the Code of Conduct in its dealings with registrars. Alternatively, a registry could have registration eligibility policies and seek an exemption from the Code of Conduct provisions relating to its interaction with registrars based on the absence of third-party registrations in the TLD. The process ICANN will use to consider Code of Conduct exemption requests is being developed as part of the contracting procedure and has not been published to date.

The New gTLD Program has been built based on policy advice developed in the GNSO's policy development process. As noted above, the concerns being expressed about exclusive use of a TLD string relate to the domain name registration policies of the registry, rather than the Code of Conduct. There is currently no additional policy advice to guide ICANN in setting parameters for registry business models or how such should be derived from a particular TLD string.

Defining a "generic" category of strings is a complex undertaking as strings may have many meanings. Within any definition there are likely to be sub-cases, for example, where an applicant's company name may be also considered a generic term, (e.g., APPLE, BOOTS), which would require additional consideration. Even a broad set of categories might not address all the cases of concern. However, there are mechanisms built into the program as a means for concerns about applications to be considered and resolved as they arise.

RECOMMENDATIONS AND RATIONALE:

Having reviewed the current provisions and the concerns expressed, staff makes the following recommendations.

1. Following discussion by the Committee, ICANN should publish a response to the relevant community correspondence to provide clarification of the issue (i.e., explaining the purpose and scope of the Code of Conduct as distinct from questions about eligibility requirements for registering domain names in a TLD).

2. Staff does not believe it is appropriate at this time to create a new category of generic-term applications with new provisions – the Applicant Guidebook did not indicate expected restrictions from ICANN on an applicant’s use of a TLD, and there is no existing policy advice that can be used to define this. There are objection mechanisms in place to support consideration of issues for applications that a party considers problematic, and these processes should continue to be used where relevant.

3. If action is desired to create category rules among the current gTLD applications, the appropriate basis for establishing such rules would be policy guidance from the GNSO. Seeking policy guidance is not recommended at this time, as this will introduce delay to the evaluations in process as well as raising liability on the introduction of additional criteria to the process.

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**2013-01-10-New gTLD Program Committee-
Enforcing_Commitments.doc**

New gTLD Program Committee Submission 2013-01-10-02

TO: New gTLD Program Committee
TITLE: Addressing GAC Advice: Enforcing Applicants' Commitments
PROPOSED ACTION: For Committee Action and Decision

Background

When submitting applications, applicants identified certain business plans that they intend to incorporate into the operation of their registry. For example, some applicants identified heightened rights protection mechanisms above those specified in the Applicant Guidebook, or specific objectives for testing and phasing for the roll-out of a TLD. Outside of community-based TLDs, however, there are no currently existing mechanisms for requiring these plans and objectives to be incorporated into the Registry Agreement. The GAC's Toronto Communiqué provided advice to the Board that "it is necessary for all of these statements of commitment and objectives to be transformed into binding contractual commitments, subject to compliance oversight by ICANN".

Staff Recommendation

Staff recommends that the New gTLD Program Committee direct the President and CEO to develop a mechanism by which ICANN could meet the GAC advice. The President and CEO must seek public comment on the mechanism, and should obtain from applicants the proposed commitments that would be incorporated into their Registry Agreements.

Analysis

The GAC advice touches on an important issue, that there are representations contained within applications that are not currently reflected in the base Registry Agreement. Once the Registry Agreement is entered into, that – and not the application – will serve as the basis of the relationship between ICANN and the registry operator. As part of a broader review of the base Registry Agreement, it makes sense to develop a mechanism by which applicants have the ability to incorporate these commitments into their Registry Agreements. It is anticipated that some of the applicant additions would serve to address GAC member concerns regarding some of the applications.

Though still in preliminary discussions, we have started to work on how these commitments could be incorporated into the Registry Agreement. Under this proposal, ICANN would identify a group of public interest commitments that would be included as an appendix (the PIC Appendix) to the Registry Agreement. These

baseline PICs could be items such as a requirement for annual self-certification of compliance with the Registry Agreement, or adherence to a Registrant Bill of Rights. Each applicant will have the opportunity to add additional commitments or restrictions to the PIC Appendix, which would include any statements in the application that the applicant intended to be considered as a binding contractual commitment (rather than as part of a non-binding plan that is subject to change). The proposed additions would be posted for public comment, and could be modified to include restrictions resulting from GAC advice or public comments. Once finalized, the PIC Appendix would be attached to the Registry Agreement. The Registry Agreement cannot be signed until the PIC Appendix is completed.

Once the Registry Agreement is in operation, third parties who suffer actual harm as a result of the Registry Operator's alleged noncompliance with the commitments or restrictions contained in the PIC Appendix would have the opportunity to proceed to dispute resolution. This dispute resolution procedure would be similar to the approved DRPs for Registry Restrictions (RRDRP) and Post-Delegation (trademark/PDDRP) disputes <<http://newgtlds.icann.org/en/applicants/agb>>. First, there would be a mandatory conciliation phase during which the third party and the Registry Operator are expected to see if the complaint can be resolved. If the issue cannot be resolved, the third party complainant will then proceed to a Public Interest Commitment Dispute Resolution Procedure (PIC-DRP) operated by a dispute resolution provider. If the provider issues findings and recommendations that the Registry Operator is violating the PIC Appendix, the matter will then proceed to ICANN's Contractual Compliance for enforcement.

We anticipate a short timeframe for the development of this mechanism to address GAC advice. A proposed goal is a base PIC Appendix to be included in a version of the Registry Agreement for posting at the beginning of February 2013. The applicant's proposed PIC Appendices (with additional commitments) would be posted in advance of the Beijing meeting (and the GAC's meeting to provide advice on strings). The goal is for the PIC Appendix to be incorporated in the very first Registry Agreement signed under the New gTLD Program.

This proposed mechanism is being forecast for the GAC in a letter to be sent on 11 January 2013 in response to the Toronto Communiqué.

Proposed Resolution:

Resolution Not Considered

Resolution Not Considered

Proposed Rationale:

Rationale Not Considered

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**2013-01-10-New gTLD Program Committee Status
Reporting_(6).doc**

New gTLD Program Committee Submission 2013-01-10-03

TO: New gTLD Program Committee
TITLE: Modus Operandi / Program Status Reporting
PROPOSED ACTION: For Board Review and Discussion

In recent weeks members of the New gTLD Program Committee have exchanged ideas on how to best provide the oversight and management needed to the New gTLD Program. A set of recommendations was put forth on 29 November 2012 by Committee member Ray Plzak on the use of periodic project reviews to provide the Committee with routine oversight of the New gTLD Program. This proposal is as follows:

“Building on the conversation that you and I had the other day, I would like to add to the agenda for our upcoming meeting a discussion about the NGTLD Committee exercising its oversight function through the use of periodic project reviews. As you know, one of the features of project management is the conduct of Interim Project Reviews (IPR). While such reviews normally focus on the earned value of the project, I propose that we take the same discipline and schedule reviews so as to provide the committee with a routine oversight of the NGTLD Program. This review could consist of a Program Report that would include items such as:

- Program is on track;
- Budget is sufficient at this point;
- Risks are controlled and mitigated;
- Issues identified and resolved.

This list is an exemplar list to serve as a discussion point regarding this concept. I think that the committee should identify the items that it thinks that it needs to monitor in order to perform its oversight role. This list should be passed to the CEO so that he can develop a report structure. I would expect him to either agree to this list or to propose changes to the list as well as to add any items he thinks would be useful to the committee. I would also have the committee request that the CEO propose a schedule for the delivery of the reports as well as a schedule of an accompanying meeting of the committee. These meetings would be scheduled for this only. Issues identified from a review could generate work for the committee. The advantage of doing a routinely scheduled IPR will get the committee out of the mode of deciding that it hasn't heard anything in a while so we should

have a session to find out what is going on. The report could also be de-conflicted so that it could be shared with the entire board and in some form with the community as well. This would take some effort to establish, but the result would be an effective oversight tool for the committee as well as an effective tool to assist in managing the work of the committee. There is also the added value of generating information that keeps the management of the program transparent.

RECOMMENDATIONS AND RATIONALE

Having reviewed the proposal and supporting messages from other Committee members, staff makes the following recommendations.

1. **Program Activity Reporting** – Staff will provide a monthly status update to the New gTLD Program Committee on the key aspects of the program including key phases of activity such as: Background Screening, Initial Evaluation, Contracting, Pre-Delegation Testing and Delegation. Metrics of progress such as number/percentage of applications completed should be provided where applicable. Status reporting should identify key milestone dates for each phase of activity and identify whether dates are On Target, At Risk, or Delayed. This reporting is intended to ensure that the committee has a clear understanding of the planned schedule as well as adequate information regarding progress and ability to meet milestone dates.
2. **Key Projects** – In addition to key program activities, there are individual projects within the New gTLD program which merit tracking and reporting. Staff will provide a monthly status update to the New gTLD Program Committee on key projects such as: Trademark Clearinghouse, EBERO, URS, and Auctions. Program reporting for these projects should identify key milestone dates for each project as well as provide adequate information regarding progress and ability to meet milestone dates. Additional projects should be reported on an as needed basis, such as the Prioritization Draw.

3. **Customer Service Center** – Staff will provide a monthly status update to the New gTLD Program Committee on the activities of the New gTLD Customer Service Center (CSC). The CSC is a critical function of the New gTLD program which delivers ongoing support to applicants and other members of the ICANN community. Staff will develop and present a set of metrics for the CSC which not only depict activity and workload, but which are also aimed at guiding the team towards continuous improvement. Such metrics will include:

- # of new cases
- # of cases opened
- # of cases closed
- #/% of cases to Type/Category
- Average # of days open (Aging)

Over time, trend reporting will be developed and presented as part of the monthly status update.

4. **Issues** – Staff will identify and present issues to the New gTLD Program Committee as part of the monthly status update which may affect the delivery and progress of the program. These issues will be provided on an informational basis to the New gTLD Program Committee. If assistance from the New gTLD Program Committee is needed to resolve or address an issue, a paper outlining the issue and the requested action will be presented to the Committee.

5. **Risks** – Staff will analyze and identify potential program risks as part of their ongoing program governance duties. These risks should be documented and presented to the New gTLD Program Committee as part of the monthly status update. If assistance from the New gTLD Program Committee is needed to resolve or address an identified risk, a paper outlining the risk and the requested action will be presented to the Committee.

6. **Financial & Budget Reporting** – Staff will develop a New gTLD Program Committee monthly financial reporting package. Once such reporting is

available, it will be incorporated into the monthly status update report. The report will be redacted as necessary to make it available for public dissemination on a monthly basis.

7. **Publication of Reporting** – Staff will distribute the monthly status update report to the New gTLD Program Committee at least one day (24 hours) prior to the scheduled meeting. After the monthly status update is presented to the New gTLD Program Committee, staff will provide an update to the applicants and ICANN community, typically within one to three business days. These updates will typically be presented via webinar, with reporting published subsequently. While staff appreciates the desire of Committee members to have adequate time to review the monthly status report prior to the meeting, staff also intends to provide the most current information possible to the Committee as well as to applicants and the larger ICANN community. Based on the rationale that providing stale information is of low value, staff believes that the above mentioned status reporting should not be provided to the Committee with the generally preferred lead time of one week.

8. **De-Conflicting Status Update Meetings** – Staff supports the recommendation to de-conflict the monthly status update meetings, or portion thereof, to enable all ICANN Board members to participate. As outlined in items #4 and #5 above, any issues or risks requiring discussion or action by the New gTLD Program Committee, would be documented through a separate paper and scheduled for separate discussion.

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