

## Public Interest Commitment ALAC Review – Followup

The New gTLD Working Group of the ICANN At-Large Advisory Committee (NGWG) has undergone a lengthy review process related to concerns within the community about the use of Public Interest Commitments (PICs) in new gTLDs.

Greatest amongst those concerns are the lack of public oversight, the temporary and arbitrary nature of the “optional” PICs, and an unsure and adversarial enforcement process that created significant obstacles for reporting of breaches.

To that end, the NGWG engaged in a lengthy consultation process with the community, which included a formal Public Comment Process. The results of this PCP were reviewed by the NGWG at the ICANN51 meeting along with other input.

The analysis from the review to date, combined with additional discussions during ICANN51, were as follows:

- Outside of the domain industry itself, there is absolutely no support for the PIC mechanisms in their current form;
- The primary defence of the PIC mechanisms, from within the domain industry, does not stem from satisfaction with the PIC regime itself, but rather that the process is too far along to change;
- The heightened protection measures announced by ICANN President and CEO Fadi Chehadé at the start of ICANN51 does not address the deficiencies with PICs, but only indicated additional staff resources to police the (insufficient) mechanisms;
- Almost all of the constituencies within ICANN involved with end-users and registrants -- governments, business and civil society -- shared the ALAC's concerns on this issue. Such support has taken many forms and degrees, from repeated GAC statements to Business Constituency letters of concern submitted to the Public Comment Process to numerous private comments of support;
- Representations from some members of the ICANN Board that the GAC was unconcerned on the matter, expressed at the ALAC-Board meeting during ICANN50, were explicitly contradicted by the GAC Communique issued at that meeting (and again at ICANN51);
- Within the At-Large Community, the timing issue - why revisit the issue now? - was met by a response that the need for remedial action is completely due to the lack of prior consultation. We are not aware of any multi-stakeholder input -- or any community input at all -- having been solicited in the creation of the PICs. We reject the notion that since the only remedy available is after-the-fact, it is beyond the control of the ICANN community; no opportunity was given to fix it while in development;

- The ALAC and others have been critical of the PIC mechanism from the moment it was released, but criticism has generally been ignored. Only the drastic action of formal ALAC Advice, calling for a freeze, has attracted attention;
- How ICANN handles public facing issues such as PICs is a significant factor in its ability (or inability) to generate public trust;
- During the WG consultation process we noted, however, that while there is widespread dissatisfaction with PICs as a way to safeguard the public interest, support for Policy Advisory Boards (PABs) as a remedy is far less common. Many concerns were expressed about the potential cost of PABs, the lack of registry participation, and enforcement. Thus, the thrust of the NGWG going forward, may be shifting to making the PICs more robust, permanent, accessible, and more easily enforceable, rather than advancing PABs as an alternative.

As a result of the above analysis, the NGWG prepared a statement which was endorsed unanimously by ALAC and read during the Public Forum at ICANN51, calling for a freeze on the most sensitive gTLDs (as defined by the GAC) pending a review of the methods to instill public trust in these especially-trust-sensitive TLDs.

Fadi Chehadé, CEO, ICANN  
Dr. Stephen Crocker, Chair, ICANN Board of Directors

Dear Fadi, Steve, and ICANN Directors:

The Business Constituency (BC) supports the ALAC's call for a freeze on contracting and delegation of any new gTLD in highly-regulated sectors that have failed to implement GAC safeguards. To be clear, we are using the term highly-regulated to refer to the GAC's Category 1 strings that are "linked to regulated or professional sectors" which are "likely to invoke a level of implied trust from consumers."<sup>1</sup> The strings at issue here include:

Health and Fitness: .pharmacy .surgery .dentist .dds .hospital .medical .doctor

Financial: .bank .banque .creditunion .creditcard .insurance .ira .lifeinsurance  
.mutualfunds .mutuelle .vermogensberater .versicherung .autoinsurance .carinsurance

Gambling: .bet .bingo .lotto .poker .spreadbetting .casino

Charity: .charity (and IDN Chinese equivalent)

Education: university

This position is consistent with prior BC comments in support of using Public Interest Commitments (PICs) in Registry Agreements to address GAC objections. Moreover, this position reflects our concern that ICANN's failure to require safeguards will signal avoidance of accountability to the global Internet community – at a time when ICANN's accountability is undergoing critical review.

#### **Relevant Prior Positions and Events:**

In Feb-2012 the BC sent a comment letter<sup>2</sup> to ICANN noting, "fraud prevention has been a centerpiece of the new gTLD debate" and suggesting that ICANN enforce applicant commitments through their inclusion in Registry Agreements. We also noted that, "Governments and stakeholders who support ICANN's role will also hold ICANN to its promises to maximize global benefits and minimize harms to registrants and users." That consideration takes on added urgency now that a global debate has commenced on the future of Internet governance and ICANN's role within it.

In its Apr-2013 Beijing Communiqué, the GAC gave formal advice requiring safeguards for Category 1 new gTLD strings that were "linked to regulated or professional sectors" which are "likely to invoke a level of implied trust from consumers."<sup>3</sup> In doing so, the GAC exercised its prerogative under section 1.1.2.7 of the New gTLD Applicant Guidebook, "The GAC may provide

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<sup>1</sup> GAC Communiqué – Beijing, People's Republic of China , April 11, 2013 at <https://gacweb.icann.org>.

<sup>2</sup> <http://www.bizconst.org/Positions-Statements/BC%20request%20for%20implementation%20improvements.pdf>

<sup>3</sup> GAC Communiqué – Beijing, People's Republic of China , April 11, 2013 at <https://gacweb.icann.org>.

public policy advice directly to the ICANN Board on any application.”<sup>4</sup> Such advice does not require ICANN’s acceptance, but the Guidebook states:

If the Board receives GAC Advice on New gTLDs stating that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved. If the Board does not act in accordance with this type of advice, it must provide rationale for doing so.

In Jun-2013 the BC filed comments on GAC’s Beijing Advice, generally supporting the first 5 safeguards for new gTLD strings in Category 1.<sup>5</sup>

- 1. Registry operator will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.*
- 2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.*
- 3. Registry operators will require that registrants who collect and maintain sensitive health and financial data implement reasonable and appropriate security measures commensurate with the offering of those services, as defined by applicable law and recognized industry standards.*
- 4. Establish a working relationship with the relevant regulatory, or industry self--regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.*
- 5. Registrants must be required by the registry operators to notify to them a single point of contact, which must be kept up-to-date, for the notification of complaints or reports of registration abuse, as well as the contact details of the relevant regulatory, or industry self--regulatory, bodies in their main place of business.*

The BC also supported GAC safeguards 6-8 for strings where the TLD creates a reasonable expectation in the mind of the average Internet user that registrants in that TLD are *bona fide* members of a regulated industry or profession. Safeguards 6-8 are:

- 6. At the time of registration, the registry operator must verify and validate the registrants’ authorisations, charters, licenses and/or other related credentials for participation in that sector.*
- 7. In case of doubt with regard to the authenticity of licenses or credentials, Registry Operators should consult with relevant national supervisory authorities, or their equivalents.*
- 8. The registry operator must conduct periodic post-registration checks to ensure registrants’ validity and compliance with the above requirements in order to ensure they continue to conform to appropriate regulations and licensing requirements and generally conduct their activities in the interests of the consumers they serve.*

In our Jun-2013 comments, the BC noted that working consultation with relevant regulatory and industry bodies, especially for the purpose of jointly developing harm mitigation strategies, will promote self-regulatory best practices that will improve consumer disclosure and protection.

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<sup>4</sup> ICANN gTLD Applicant Guidebook, section 1.1.2.7 on page 1-11, at <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

<sup>5</sup> Business Constituency comment on New gTLD Board Committee Consideration of GAC Safeguard Advice, 3-Jun-2013, at <http://www.bizconst.org/wp-content/uploads/2014/06/BC-Comment-on-GAC-Advice-for-new-gTLDs-FINAL41.pdf>

In Jun-2013, the BC filed comments on the Proposed Final New gTLD Registry Agreement, where we supported the use of Public Interest Commitments within the Registry Agreement, for consumer and business protection.<sup>6</sup> However, we were concerned that Sections 2 and 3 of Specification 11 remained voluntary and that only a small minority of applicants had at that time elected to make such commitments:

**Specification 11: Public Interest Commitments**

Sections 2 and 3 of Specification 11 provide a way for applicants to list commitments and statements of intent that would become part of the Registry Agreement and thereby enforceable by ICANN.

The BC has stated that it supports this previous change to the Registry Agreement, as helpful to add the capability for enforceable public interest commitments contained within various applications. However, the BC notes with disappointment that, despite numerous applicants being the subject of GAC Advice<sup>7</sup>, only 506 applicants added any commitments to their Specification 11.<sup>8</sup>

In addition, many applicants have included clauses which allow Registry Operator, in its sole discretion, to modify or discontinue Public Interest Commitments for any substantial or compelling business need.<sup>9</sup> The BC believes that such language defeats the purpose of Specification 11, which is meant to ensure that ICANN can enforce any relevant commitments made during the application process, as part of the new registry agreement. Accordingly, the BC recommends that ICANN develop a community participation process where Registry Operators may seek amendments or withdrawals to their Public Interest Commitments.

The BC encourages applicants to insert relevant commitments into Specification 11, and continues to encourage the GAC and ICANN to ensure that the community can hold registry operators to any relevant commitments that are important to protect consumer and business interests in these new gTLDs. The importance for applicants to heed this recommendation is evident in the recent GAC advice on safeguards for new gTLDs, as noted in the BC's comments on GAC advice<sup>10</sup>.

In May-2014, the BC expressed concern that the safeguards adopted to date for strings associated with regulated industries and professions was falling short, and that such strings remain susceptible to fraud and abuse by potential registrants who wish enrich themselves at the expense of the general public.<sup>11</sup> GAC and NTIA had raised concerns regarding NGPC's proposed implementation of Category 1 safeguards. It was therefore unclear how PICs could

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<sup>6</sup> BC Comments on Proposed Final New gTLD Registry Agreement, 11-Jun-2013, at <http://www.bizconst.org/wp-content/uploads/2014/06/BC-Comment-on-Proposed-new-gTLD-Registry-Agreement-FINAL-21.pdf>

<sup>7</sup> GAC Communiqué – Beijing, People's Republic of China , April 11, 2013 at <https://gacweb.icann.org>.

<sup>8</sup> As of May 30, 2013 at <http://newgtlds.icann.org/en/>.

<sup>9</sup> See e.g., 1-1336-51768\_Donuts PIC STD Final.pdf at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/896>.

<sup>10</sup> <http://www.bizconst.org/Positions-Statements/BC%20Comment%20on%20GAC%20Advice%20for%20new%20gTLDs%20FINAL%5B4%5D.pdf>

<sup>11</sup> BC comment on Proposal for the Use of Mandatory Policy Advisory Boards for Regulated Industry Sector and Consumer-Trust-Sensitive New gTLD Strings, at <http://www.bizconst.org/wp-content/uploads/2014/07/BC-Comment-on-Policy-Advisory-Board-proposal.pdf>

provide effective safeguards, given a registry's ability to amend or revoke its PICs and the lengthy, expensive, and adversarial process required to enforce PICs by the limited class of parties able to bring enforcement actions.

Nevertheless, during 2014 ICANN has continued to sign registry contracts with applicants for Category 1 strings, without requiring safeguards in registry PICs.

That led the ALAC to request a freeze at the ICANN51 Public Forum.<sup>12</sup> The ALAC resolution calls for freezing the 28 highly-sensitive, regulated Category 1 strings until a joint ALAC-GAC working group can determine that appropriate safeguards are indeed in place to protect the public interest.

In response, the ICANN Board New gTLD Program Committee (NGPC) voted on 7-Nov-2014 to disregard the ALAC Statement on Public Interest Commitments, including the ALAC request for a freeze<sup>13</sup>:

Staff provided the Committee with a briefing on the ALAC Statement on the Public Interest Commitments, which was delivered to the Board during ICANN 51. Staff noted that the ALAC Statement advised the Board to immediately cease contracting or delegating strings identified by the GAC as requiring enhanced safeguards pending further community review and changes to the Registry Agreement. Staff also provided program statistics on the category of strings identified in the ALAC Statement and reported on the number of strings that had been delegated, signed registry agreements, and invited to begin the contracting process.

Committee members shared a variety of views on the advice, and the Committee considered how it should move forward to address the concerns underlying the ALAC Statement. After discussion, the sense of the Committee was that it should continue to move forward with the contracting process for New gTLDs, and would provide a substantive response to the ALAC Statement to address how the Committee has considered and taken action to address the issues.

Also on 7-Nov-2014, the Registries Stakeholder Group wrote to ICANN, insisting that GAC Safeguards should require a new round of consensus policy development. However, we believe that Safeguard advice is more appropriately seen as the GAC exercising its prerogative to file objections to specific new gTLD applications, something the community agreed to as part of the new gTLD Applicant Guidebook. With its Safeguard Advice, the GAC is requesting these Category 1 new gTLD Applicants to add to their Public Interest Commitments within their Registry Agreements.

The BC remains concerned that safeguards adopted for strings associated with regulated industries and professions may fall short and that such strings remain susceptible to fraud and abuse by potential registrants who wish to enrich themselves at the expense of the general public.

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<sup>12</sup> ALAC statement at ICANN51 Public Forum, at <https://community.icann.org/download/attachments/49358478/AL-ALAC-ST-1014-01-00-EN.pdf?version=1&modificationDate=1413502148000&api=v2>

<sup>13</sup> Preliminary Report of Meeting of the New gTLD Program Committee, 7-Nov-2014, at <https://www.icann.org/resources/board-material/prelim-report-new-gtld-2014-11-07-en>

Unless ICANN's board and management respond appropriately, the continued delegation of new gTLDs serving highly-regulated sectors will demonstrate ICANN's lack of accountability to consumers and to consumer protection authorities around the globe.

Lack of action by ICANN's board on this matter will likely be cited as evidence to justify new independent review mechanisms to allow the Internet community to challenge decisions of ICANN board and management. The BC would be among those citing this case as justification for stronger accountability mechanisms for ICANN.

However, our preferred remedy is to have ICANN's board fulfill its obligation to address broadly held Internet community concerns before delegating additional new gTLDs in regulated sectors.

Sincerely,

Elisa Cooper  
Chair, ICANN Business Constituency



Governmental Advisory Committee

9 December 2014

Dr. Stephen Crocker  
Chair, ICANN Board Of Directors

Reference: gTLDs Safeguards

Dear Dr. Crocker,

This letter seeks to assist the NGPC in its future work regarding safeguards applicable to new gTLDs by providing further explanation and background about the GAC advice set forth in the October 2014 Los Angeles Communiqué. As you know, the GAC expressed strong concerns about the implementation of GAC advice regarding safeguards applicable to new gTLDs in not only its Los Angeles Communiqué, but also in its Singapore and London Communiqués.

The GAC highlighted in its most recent advice (the LA Communiqué of October 2014) its continuing concerns in light of the responses provided by the NGPC in its June and September 2014 correspondence to the GAC Chair. Our hope is to work with the NGPC to resolve these long-standing issues in a manner that sufficiently protects the public.

**The GAC advice issued in the Los Angeles Communiqué addressed the following:**

**A. Implementation of WHOIS Related-Safeguards**

**GAC advice adopted at the Los Angeles ICANN meeting:**

- provide the GAC with a comprehensive scorecard indicating steps and timelines regarding all streams of work related to the WHOIS accuracy safeguard;
- complete the Pilot study on WHOIS accuracy, including assessment of identity validation, and share the findings in a timely manner for review at the ICANN52; and
- initiate steps towards Phase 3 (identity verification) of WHOIS, including undertaking a cost-benefit analysis of implementation options; and
- commit to defining the process to address and resolve inaccurate WHOIS records and respond to non-compliance reports.

Explanatory statement

The GAC remains concerned about the following: 1) key issues related to WHOIS accuracy; and 2) the appropriate level of WHOIS identity verification.



The GAC is concerned that the NGPC has not provided sufficient detail regarding procedures to deal with WHOIS inaccuracy and responding to law enforcement complaints, and further, has not implemented interim procedures on these important issues. For example, the NGPC has not offered specific details of how it will notify registrars of inaccuracies. Instead of defining a specific process or identifying an adequate interim process, the NGPC indicates that ICANN “is consulting” with registrars and the broader ICANN community to define the process by which inaccurate records are forwarded to registrars, resolved, and re-checked by the reporting system. However, there is no indication of a timeframe for which this process will take place.

Read as a whole, the NGPC response seems more concerned with the burden upon Registrars than the public safety concerns raised by failing to create an appropriate system to verify and respond to WHOIS accuracy issues. As key details on these important issues are ultimately determined, the GAC urges ICANN to carefully weigh all considerations – not just those associated with costs potentially incurred by registrars. Because of the importance of accurate WHOIS information and responding to law enforcement complaints, the GAC recommends that interim procedures be put in place no later than January 1, 2015.

The GAC also urges the ICANN Board and Staff to ensure sufficient time is offered to all stakeholders as these consultations are undertaken and that any relevant materials associated with consultations are made available well in advance to enable constructive dialogue and contributions. The late release of the Pilot Report on the WHOIS Accuracy Reporting System immediately prior to the Los Angeles meeting did not provide sufficient time to analyze and confer regarding this report. The GAC also urges ICANN to consider a process for the GAC to have an opportunity to weigh in on draft recommendations, prior to the issuance of actual reports.

The GAC remains concerned that ICANN has not committed to progressing the identity validation phase (Phase 3) of WHOIS verification. The GAC would like assurance that ICANN remains committed to implementing Phase 3 (identity verification) of WHOIS validation and also remains committed to defining the process to address and resolve inaccurate WHOIS records.

## **B. Security Risks**

GAC advice adopted at the Los Angeles ICANN meeting:

- Inform the GAC and provide GAC members an opportunity to contribute inter-sessionally about the ongoing consultation on the framework for Registries to respond to security risks;
- inform the GAC of the findings of this consultation no later than three weeks before the ICANN52 meeting; and
- ensure an interim mechanism is in place to effectively respond to security risks

### Explanatory statement

The GAC remains concerned about delay in developing a framework to respond to identified security risks. In its Beijing Communiqué, the GAC advised that Registry Operators should take action to detect security threats (such as pharming, phishing, malware, and botnets) and

mitigate identified threats by 1) notifying the relevant Registry Operator, and 2) suspending the domain if the registrar does not take immediate action. While Registry Operators currently must assess whether domains are being used to perpetuate security threats, there is no requirement in the Registry Agreement to take further action to mitigate these threats. Further, the NGPC has deferred responding to the GAC's implementation questions about the mechanisms and timeframes for the conduct of security checks by Registries pending input from the ICANN community on this topic.

Given that these security risks are ongoing but the process for addressing them is yet to be developed, we advise ICANN to ensure that there is an interim mechanism in place to detect and respond to security threats, including where appropriate, suspension of a domain name. Moreover, the GAC requests that ICANN provide a briefing to the GAC inter-sessionally about the ongoing consultation on the framework for Registries to respond to security risks, and inform the GAC of the findings of this consultation, no later than three weeks before the ICANN52 meeting.

### **C. Verification and Validation of Credentials for Category 1 Strings Associated with Market Sectors with Clear and/or Regulated Entry Requirements**

GAC advice adopted at the Los Angeles ICANN meeting:

- Reconsider the NGPC's determination not to require the verification and validation of credentials of registrants for the highly regulated Category 1 new gTLDs. The GAC believes that for the limited number of strings in highly regulated market sectors, the potential burdens are justified by the benefits to consumers; reconsider the requirement to consult with relevant authorities in case of doubt about the authenticity of credentials; and reconsider the requirement to conduct periodic post-registration checks to ensure that Registrants' continue to possess valid credentials; and
- Ensure these issues (verification/validation; post-registration checks; consultation with authorities) are addressed in the review process for any subsequent rounds of new gTLDs.

#### Explanatory statement

We remain concerned that the NGPC's position undermines the GAC's efforts to minimize consumer harm, consumer confusion, and fraud through the actions of un-credentialed registrants in highly regulated or sensitive strings. We note that the NGPC has designated only a very limited number (less than 50) of the new gTLDs as falling within this highly regulated/sensitive category.

The GAC appreciates the NGPC's efforts to consider potential implementation challenges that registry operators might face in adopting the GAC's advice to verify and validate the credentials of registrants for strings representing highly regulated sectors. Nevertheless, the GAC advice required Registry Operators to proactively screen the highly regulated or sensitive Category 1 Registrants to ensure that they are what they purport to be before they do business with the public using the name of a regulated sector like a bank or pharmacy. The GAC believes that for these limited number of strings in highly regulated market sectors (less than 50); the potential

burdens are justified by the benefits to consumers. We view the looser requirement that registrants provide some “representation” that they possess the appropriate credentials (*e.g.*, as a .bank, .insurer, .pharmacy, etc.) as increasing the risk of consumer fraud and potential harm because bad actors will not hesitate to make false representations about their credentials.

The GAC believes that it is in the best interests of those Registries whose gTLDs represent such strings to demonstrate their commitment to best practices by engaging in the proactive verification and validation of credentials and the avoidance of consumer confusion, fraud and/or harm.

We have noted that the majority of new gTLD applicant responses to the GAC’s Singapore advice fully endorse the GAC’s advice regarding the importance of validation and verification of credentials, and that a significant number of actual and potential Registries associated with highly regulated sectors are willing to conduct the verification and validation of credentials. We believe their commitments should set an example that other Registries should endeavor to follow.

We also remain concerned with the NGPC’s elimination of the requirement to consult with relevant authorities (regulatory and quasi-regulatory bodies where applicable) in case of doubt about the authenticity of credentials, and the requirement to conduct periodic post-registration checks to ensure that Registrants’ continue to possess valid credentials and generally conduct their activities in the interests of the consumers they serve. The GAC advised these procedures to protect the public from falling prey to scammers and other criminals.

Finally, we believe these issues (verification/validation; post-registration checks; consultation with authorities) need to be addressed in the review process for any subsequent rounds of new gTLDs.

#### **D. Public Interest Commitment Dispute Resolution Process**

GAC advice adopted at the Los Angeles ICANN meeting:

- modify the dispute resolution process to ensure that non-compliance is effectively and promptly addressed, in particular for cases requiring urgent action.

NGPC’s response to the GAC’s questions related to the PICDRP addressed some of the GAC’s concerns, but left other issues unresolved. The GAC appreciates the need for the NGPC to construct a dispute resolution process, but we remain concerned that the proposed PICDRP process is complex, apparently lengthy, and as yet untested. It remains to be seen whether the PICDRP process will yield effective, fair and timely results.

In particular, the GAC remains concerned that the PICDRP will not provide a suitably nimble method of addressing serious threats, such as botnets and malware. In addition, the current version of the PICDRP lacks certainty as to when remedial measures are imposed and whether the process results in final resolution. For example, as currently drafted, the PICDRP suggests

that ICANN may decline to impose any remedial measure, even if the Registry Operator fails to comply with the compliance notice generated through the process, raising questions as to the effectiveness of this dispute process. Moreover, it is still not clear that the proposed process necessarily results in a final resolution of compliance issues. The PICDRP process does not necessarily resolve compliance issues because if the Registry Operator disagrees with the proposed remedial measure, they can invoke another alternate dispute resolution processes such as mediation and then arbitration (see B.4.4.6 and Article 5.1 and 5.2). These subsequent dispute resolution processes would occur after potentially more than 105 days has elapsed, an excessive time period in circumstances where time is of the essence, *i.e.*, botnets, public safety concerns.

Accordingly, the GAC urges the NGPC to modify the dispute resolution process to ensure that non-compliance is effectively and promptly addressed in accordance with the advice provided by the GAC.

As regards compliance updates, the GAC appreciates the NGPC's commitment to provide regular and consistent periodic updates regarding ICANN's Compliance Department's enforcement of new gTLD safeguards, and proposes that such updates occur, in writing, at a minimum, six weeks prior to each ICANN meeting. The GAC also proposes that the GAC be afforded opportunities to submit questions following these written updates, to be addressed by ICANN staff during each ICANN meeting.

#### **E. Category 2 Safeguards: Ensuring Non-Discriminatory Registration Policies**

GAC advice adopted at the Los Angeles ICANN meeting:

- Amend the PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress for discriminatory policies.

The GAC remains concerned about ensuring non-discriminatory registration policies because the NGPC's response to the GAC's questions related to Category 2 safeguards appears unchanged from previous responses. The GAC's explanation in its Singapore and London Communiqués that transparency alone is insufficient to deter discriminatory and preferential registration policies does not appear to have persuaded the NGPC to revisit its original position. Nevertheless, the fundamental problem created by the NGPC's response is the absence of any remedy for a registrant who encounters a discriminatory registration regime, as the discriminatory registration policy only needs to meet the requirement of transparency. It is imperative that registrants be afforded an avenue to seek redress in the event a Category 2 registry implements preferential or discriminatory registration policies. In failing to complement the transparency requirement with a requirement that registration policies should be non-discriminatory, the NGPC does not provide registrants with a process to seek a remedy when confronted by discriminatory, albeit transparent, registration policies.

Therefore, we strongly urge the NGPC to reconsider its position, particularly since the GAC has advised that it does not believe the current requirements in Specification 11 actually meet either the spirit or the intent of the GAC's advice. We also urge the NGPC to either amend the

PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress for discriminatory policies, or to provide clarification as to any other means by which a registrant could remedy potential harm caused by discriminatory registration policies.

### **Need for consistent application of safeguards**

In providing its continuing advice on these matters, the GAC is conscious that the new gTLD program continues to be implemented and a significant number of contracts are already in place. As a matter of urgency I therefore request views from the Board on what measures ICANN plans to take in the current and future rounds to correct the above shortcomings.

### **Next Steps**

As you are aware, there has been extensive correspondence between the GAC and the Board on these issues. If there is some way of addressing the issues more directly, and well before the Singapore meeting, then I suggest that should be explored. The Board has previously expressed its willingness to schedule a conference call, and the GAC is certainly willing and able to participate in such a call. It may assist if ICANN staff and the GAC Secretariat can undertake appropriate preparatory work to enable best use of the time available.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Th. Schneider', with a long horizontal flourish extending to the right.

Thomas Schneider  
Chair, Governmental Advisory Committee

5 December 2014

Dear Dr. Crocker and the ICANN Board:

We write in follow-up to our letter of 7 November regarding the GAC and ALAC's interest in safeguards in relation to strings that fall within Category 1 of the GAC's "safeguard" Advice. In our letter we noted the alarming potential impacts of regulation of speech, and urged the Board to recognize that policymaking for new gTLDs was concluded long ago, and many affected gTLDs have already executed their Registry Agreements with ICANN. It is unfortunate that we must once again appeal to the Board to prevent an apparent bypass of the GNSO Policy Development Process (PDP) by an Advisory Committee. We write now regarding the GAC Advice concerning Category 2 strings.

In response to this advice, the Board agreed to implement a Public Interest Commitment by all registries that they would not operate their registry as an "exclusive" access registry. This provision prevents any registry from using a generic term – used in its generic manner – from reserving all second level names for its or its defined affiliates' exclusive use. This provision allows registries to operate in a manner that still encourages innovation and diversity in registry models, while ensuring the relevant public has access to second level domains in that space.

In its Los Angeles Communique, however, the GAC now requests the Board:

Amend the PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress for discriminatory policies.

There are more questions raised by this advice, however, than it clarifies. For example, what is the scope of "Category 2 new gTLDs"? Does this advice refer only to those "exclusive access" generic strings listed under Category 2.2 of the GAC Beijing Advice? Does it extend to Category 1 strings (which are referenced in Category 2.1 of the Beijing Advice) or does it apply to all new gTLDs (the Beijing Advice's Category 1 and 2 listings are "non-exhaustive").

In addition, how would implementation of this GAC advice be achieved? Requiring an amendment to the PIC specification for any category of new gTLDs (or all new gTLDs) would entail an amendment to the RAs of all new gTLD Registry Operators (i.e., it would not be a requirement if only implemented as a voluntary PIC). To be effective, any amendment of the PICs would need to be either mutually agreed by ICANN and each Registry Operator (for each individual RA), or invoke the RA amendment procedures. How would this affect those registries that have already launched with restrictive rules around registration, such as .organic or .wed? To apply such additional restrictions only to those gTLDs which have not yet contracted would be untenable since it would result in discriminatory treatment across comparable registries.

ICANN's acceptance and implementation of this GAC advice - whether applied to a subset of new gTLDs or all new gTLDs - would have a detrimental impact for the following reasons:

- Specification 9 exempt TLDs that are not eligible for Specification 13 of the RA would be prevented from implementing the intended purpose of their TLD (this would affect a number of brand TLDs which did not strictly meet the criteria for Specification 13);

- It would pre-determine the result of outstanding work to define whether exclusive access TLDs can be in the global public interest. In its 12 October 2014 [meeting](#), the NGPC directed ICANN staff to prepare additional materials “to explore the option of consulting with the GNSO on exclusive registry access for generic strings”; and
- It would create uncertainty for a potentially large number of new gTLDs, who, like a number of legacy TLDs (e.g., .aero, .cat, .coop, .edu, and .museum), may wish to implement “discriminatory” registration policies in the sense that there are defined criteria for qualification. Discrimination exists in a legacy sponsored TLDs just as it does in new gTLDs. A non-discriminatory requirement, allowing a registrant to seek redress for discriminatory policies, is so wide in its potential scope as to cover almost all but completely open TLDs. Arguably, even in “open” TLDs, processes such as “premium” name and reserved name lists could be designated as discriminatory.

We believe the GAC’s proposal raises two overriding areas of concern.

### **1. This proposal will impede competition.**

ICANN and all gTLD applicants have previously agreed that no generic string would be “closed.” The Public Interest Commitments and Public Interest Commitments Dispute Resolution Procedure reinforce this. Registries may place rules and restrictions on who may register a SLD and how they may use it, as long as they are transparent and non-discriminatory. Establishing additional processes for complaints, on top of the existing Public Interest Commitments Dispute Resolution Procedure, is unnecessary and would subject registries to excessive complaints from any individual who does not like a particular registry’s business model.

Adopting the GAC’s proposal for Category 2 gTLDs would limit registries to a single business model, consisting of purely of open sales. Such a restrictive requirement would stifle competition and innovation among registries. This would directly contradict ICANN’s purposes in opening new gTLDs in the first place.

### **2. This proposal will have a negative impact on speech.**

The GAC’s proposal for Category 2 gTLDs raises problematic speech issues by putting ICANN and the GAC in the role of determining which strings are sensitive and must be restricted, and which strings are generic and should not be restricted (by rules, processes, or delegation of second level names except on a first come, first served equal price basis) and are thus subject to heightened or additional complaint processes. With the creation of a new complaint process for new gTLDs, there will likely be more complaints from individuals who dislike a certain registry’s models, and ICANN will be forced to make difficult decisions regarding content issues in new gTLDs.

For example, if this system had been in place already, would “.cat” have been open to a discrimination challenge from a website that seeks to host blogs about cats in English, but was excluded from registering? Would people who want to write a blog about their experiences with cancer be excluded from “.med” because governments believe “.med” should be highly regulated? These are difficult content determinations that ICANN should not be involved in.

Accepting the GAC Category 2 Advice allows the GAC to assign meaning over TLDs on an individual and arbitrary basis, determining not only which of these TLDs should have restrictions (something it continues to seek for highly regulated TLDs) but crucially, which TLDs should not adopt any registration policies imposing specific controls on qualification. Allowing the latter could be a permit for the GAC to pick and choose business models across the new gTLD landscape on an unprecedented scale.

We reiterate statements made in our previous correspondence regarding the ALAC and GAC interest in Category 1 strings. It is critical to recognize that policymaking for new gTLDs was concluded long ago, and many affected gTLDs have already executed their Registry Agreements with ICANN. Changing the rules in connection with how a registry may be used—specifically by regulating speech and content through either validation and verification of only a subsection of Internet users, to the exclusion of others, or by refusing a registry owner the right to reserve the space to a particular subsection of Internet users—would not only be prejudicial to registries but would be discriminatory to a broad swath of legitimate users. Policies have been finalized and other applications have been able to proceed; therefore, imposition of new rules today would result in disparate treatment of registry operators, which is both unfair on its face and a violation of ICANN’s bylaws, and would introduce inconsistencies across ICANN Registry Agreements.

Heeding the GAC’s requests, therefore, would be inappropriate at this stage of the program. If the GAC wishes to create for the future specific categories of gTLDs, including a subset of gTLDs, subject to differing standards, it can do so only through the GNSO Policy Development Process (PDP), which would appropriately involve consultation from all impacted parties. If the community, collectively, elects to more heavily regulate specific categories of strings, it is imperative to do so via this avenue. In any case, the Board must not implement policy that would lead to regulation of speech or undermine registry model innovation, whether permission-based or otherwise.

The RySG urges the ICANN Board to comply with ICANN’s Mission Statement and Core Values; to carefully consider the implications of the GAC’s recommendations both in terms of ICANN’s policy development process and end-user predictability; and to require that the GAC’s advice proceed through the PDP.