

July 17, 2018

Honorable David J. Redl
Assistant Secretary for Communications and Information and
Administrator, National Telecommunications and Information Administration
U.S. Department of Commerce
Washington, DC 20230

via email to: iipp2018@ntia.doc.gov

RE: [International Internet Policy Priorities \[Docket No. 180124068–8068–01\]](#)

II. Multistakeholder Approach to Internet Governance

A. Does the multistakeholder approach continue to support an environment for the internet to grow and thrive? If so, why? If not, why not?

B. Are there public policy areas in which the multistakeholder approach works best? If yes, what are those areas and why? Are there areas in which the multistakeholder approach does not work effectively? If there are, what are those areas and why?

C. Are the existing accountability structures within multistakeholder internet governance sufficient? If not, why not? What improvements can be made?

D. Should the IANA Stewardship Transition be unwound? If yes, why and how? If not, why not?

E. What should be NTIA's priorities within ICANN and the GAC?

F. Are there any other DNS related activities NTIA should pursue? If yes, please describe.

....

J. What role should multilateral organizations play in internet governance?

My statement of interest: I am a U.S. citizen, a registrant of domain names (mostly .COM domains), and editor of DomainMondo.com.

Dear Assistant Secretary Redl:

Thank you for inviting public comments per your **Notice of Inquiry** referenced above. My comment primarily addresses the items I listed above from your Notice of Inquiry, particularly **D.** and **F.**

It is indeed unfortunate that your predecessor, Larry Strickling, never invited public comment via a notice of inquiry, or otherwise, before making NTIA's **announcement of March 14, 2014**, of NTIA's intent to "[Transition Key Internet Domain Name Functions](#)" (hereinafter "IANA transition").

Had NTIA invited public comment prior to that announcement, there is no doubt that public opinion would have overwhelmingly opposed the IANA transition as was also indicated in the outpouring of opposing published comments to *then* [ICANN Chairman Crocker's op-ed p the](#)

[Wall Street Journal](#) April 19, 2016, here are a few of those comments published by the Wall Street Journal:

This is a typical political sales pitch; it tells us nothing about the features that supposedly will produce the claimed benefits, ignores legitimate concerns and glosses over all problem areas. Mr. Crocker missed his calling as a telemarketer ...

This is a totally misguided transformation. Mr. Crocker's last sentence to "assure that the Internet of tomorrow is as free, open and resilient as the Internet of today" should give us all pause about even contemplating the changes he and others propose. His proposal reminds me of a mentally ill patient, who, after using medication to restore his mental health, goes off his meds because "he is cured". As soon as the Commerce Department steps away, it will be open season on that openness and freedom by some of the darkest elements around the world, both corporate and governmental. The only reason the internet is free, open and resilient is that the US Government stands behind it.

This article does not include a single supported assertion. Speaking on behalf of "the Internet community—along with businesses, civil society and other interest groups," I voice my dissent.

Mr. Crocker's column is a nice example of a buffoon using all the right words (diverse, accountable, community) to blow smoke up our 4th point of contact. When you want a technical activity managed properly, you don't care about diversity - that is for non-technical people looking to grab control of something. Then there are the questions Mr. Crocker doesn't answer: Example: accountable to whom? He never says specifically, just yada yada yada about an international community. Been there; done that. It's called the UN. Letting Russia, China or the UN anywhere near controlling anything about the internet guarantees only censorship. Even the Europe Union, with its silly "right to be forgotten" can't be trusted ...

... I have to ask who elects people to the Board of ICANN? This guy [Crocker] is really an embarrassment, and should be removed forthwith ...

Just two years before the **NTIA announcement of March 14, 2014**, the New York Times published a news article-- **Ethics Fight Over Domain Names Intensifies** (link below)—in which it was disclosed that **NTIA withheld** renewing the IANA functions contract with ICANN because NTIA considered ICANN “unsuitable”--

PARIS — A boardroom dispute over ethics has broken out at the organization that maintains the Internet address system after its most important supporter, the United States government, reproached the group for governance standards said to fall short of “requirements requested by the global community.”

The Commerce Department said this month that while it was temporarily extending a contract with the Internet Corporation for Assigned Names and Numbers to manage the allocation of computers' Internet protocol addresses — and the .com and .net names of Web sites associated with them — it warned the organization that it needed to tighten its rules against conflicts of interest or risk losing a central role.

*ICANN, as the company is known, has filled that role since 1998. The Commerce Department said it had received **no suitable bids** for the contract, and was **temporarily** extending ICANN's services for six months.*

....

*ICANN has come under heightened scrutiny because of an initiative to increase vastly the number and variety of available Internet addresses. Under the plan, which ICANN is putting into effect, **hundreds of new “top-level domains”** — the letters like “com” that follow the “dot” in addresses — are set to be created.*

....

*Yet **the United States government is also dissatisfied with ICANN**. The Commerce Department said it had canceled a request for proposals to run the so-called Internet Assigned Numbers Authority because **none of the bids met its requirements**: “the need for structural separation of policy-making from implementation, a robust companywide conflict of interest policy, provisions reflecting heightened respect for local country laws and a series of consultation and reporting requirements to increase transparency and accountability to the international community.”*

Eyebrows were raised last year when Peter Dengate Thrush, former chairman of Icann and a fan of the domain name expansion, joined a company that invests in domain names.--[The New York Times](#) March 18, 2012 (emphasis added).

What happened between March, 2012, and March, 2014, to cause NTIA to abandon the U.S. government's historical stewardship role over the internet? The [Snowden revelations](#)? Or was it **China** advocating national sovereignty over the internet and reform of global internet governance to a “government-led multi-party framework”?

NTIA never said, but it was certainly not a natural progression from NTIA's position in March, 2012, to the **March 2014 announcement**. It appears NTIA not only failed to solicit public comment before making that announcement, but failed in many other ways to do its own “due diligence” and make sure ICANN was “ready.”

Even the so-called “ICANN community,” a dysfunctional group of self-selected stakeholders dominated by “special interests”-- (lawyers, lobbyists, contracted parties, *i.e.*, registrars and registry operators--it costs [upwards of \\$30,000 per year per person](#) to fully participate in ICANN meetings held all over the world and most people have neither the time nor monetary resources to self-fund travel costs and other expenses to attend these ICANN meetings)--was taken aback by NTIA's IANA transition announcement of March, 2014. The ICANN community said ICANN was deficient **in transparency and accountability to the global internet**

community and demanded “accountability enhancements” be part of the IANA transition process, something which NTIA had not even considered nor mentioned in its March 2014 announcement.

Fast forward, to October 1, 2016, and the IANA transition is “completed” and the U.S. government is no longer exercising “stewardship” via an “IANA functions contract,” which leads to the **core questions** in your **Notice of Inquiry**:

D. Should the IANA Stewardship Transition be unwound? **Response: Yes.** If yes, why? **Response: see below;** and how? **Response: see below.**

Frankly Mr. Redl, you, and all of us in the global internet community, have a serious problem. ICANN is incompetent, corrupt, and unfit for the role it was [given by the U.S. government in 1998](#) and then unleashed in 2016 by NTIA’s ill-advised, ill-conceived IANA transition. The IANA transition was a mistake and a fraud upon the American people and the global internet community. That’s the **why** and **how** the IANA transition can and should be “unwound.” As for the **legal** and **political** mechanics of doing so, I would suggest you confer with **1) Esther Dyson**, the original founding Chair of IANN’s Board of Directors, who opposed the IANA transition and new gTLDs program—see [News Review | Esther Dyson Interview, ICANN Founding Board Chair](#) and the resources therein; **2) members of the US Senate and US Congress**, including but not limited to US Senator Ted Cruz; **3) your peers in the international community**, particularly France, Brazil, India, and China.

After 20 years, it is self-evident that no one (or group) within ICANN is capable of reforming the ICANN organization or its culture. The so-called “ICANN community” is in reality a small self-perpetuating group of people with “vested special interests” who care nothing about the **global public interest**, and are not **representative** of the **global internet community**. The ICANN Board is an inept entity incapable of governing in the global public interest.

Most domain name registrants are excluded, by design, from the structures within ICANN—there is no Registrants Stakeholder Group—large corporations control the “business constituency” and the Non-commercial Stakeholder Group (NCSG) only represents non-commercial registrants, a very small percentage of all registrants in the U.S. and worldwide, most of whom are small business entrepreneurs and have no voice in ICANN policy-making, much less the time and resources to attend ICANN meetings in far-flung corners of the world. The ALAC (at-large) purportedly represents the billions of end users (*e.g.*, the teenager in the U.S., India, or elsewhere, watching a YouTube video on her smartphone) not registrants (and ALAC leadership has admitted that). Even if I were to show up at an ICANN meeting, I have no stakeholder group to participate in—I would probably try to caucus with the NCSG since they have started advocating for registrants (albeit noncommercial registrants).

The **new gTLDs program** is a consumer (registrant) fraud, a .BRAND extortion racket, and even worse—no wonder it is failing: see [News Review | Is ICANN Trying To Hijack The Global Internet DNS Root? | DomainMondo.com](#) excerpt:

“Apparently the Internet Corporation for Assigned Names and Numbers, the California "non-profit" corporation known as [ICANN](#), is not content in having:

1. **wrecked the global DNS by delegating into the global internet root [hundreds of new gTLDs that "fail to work as expected on the internet"](#) (see last week's [News Review 2\)c. SSAC2](#));**
2. **designed and implemented an ill-conceived new gTLDs program founded upon [consumer fraud, a .BRAND extortion racket, exploitative pricing power and greed, and ICANN incompetence](#) (pdf);**
3. **expropriated for itself and its "contracted" third parties, potentially [every geographic term and reference in the world](#)--cities, regions, states, *etc.*--for privatized monetary gain and exploitation (in perpetuity);**
4. **completely [bungled its response](#) to the European Union's data protection law ([GDPR](#)).**

Now, ICANN, together with its dysfunctional, codependent and captive "ICANN community" dominated by "special interests" (lawyers, lobbyists, contracted parties), apparently wants more--the world's DNS root zone itself configured as 13 named authorities”

The ICANN WHOIS GDPR Crisis:

Today, the **Internet Corporation for Assigned Names and Numbers (ICANN)** is an organization **in crisis**. Among the many mistakes of the IANA transition was the failure to conduct proper “due diligence” prior to completion of the IANA transition, including the complete failure of **ICANN** and **NTIA** to reveal in 2016 the forthcoming impact of the European Union’s General Data Protection Regulation (**GDPR**) on the [ICANN’s Public WHOIS](#) directory of information about domain name registrants:

See [News Review | ICANN's GDPR Train Wreck 25 May 2018 & Beyond | DomainMondo.com](#):

“... **Editor's note:** I would be remiss if I did not note that one irony of this whole situation is that all of this could have been avoided had **ICANN** and the **Obama administration** (US gov) not been in such a **hurry** to finish the [IANA transition](#) by October 1, 2016 (implementing a [US gov decision made in 2014](#) in response to the global reaction to the "[Snowden revelations](#)") or had allowed an intergovernmental successor to the U.S. government's stewardship of the internet and oversight of ICANN and the "IANA functions" via the [IANA functions contract](#). The **EU's GDPR was already known and published in May, 2016**, and ICANN CEO Goran Marby said ([in answer to my question at a Quarterly stakeholder call](#)) that he became aware of the "*ramifications of the GDPR for ICANN*" shortly after he came aboard as ICANN President and CEO (in **May 2016**). But **neither Larry Strickling**, then NTIA administrator, **nor ICANN**, nor any of the "experts" retained then by the U.S. government or ICANN, raised the **GDPR** as a concern before the IANA transition was completed October 1, 2016. **But for the IANA transition, the U.S.**

government could simply assert its sovereign authority, and immunity, to collect, process, and publish all of the gTLD domain names WHOIS data it wished, to whomever it thought was an appropriate recipient, at internic.net or elsewhere. Now we, **the global internet community**, are left watching a dysfunctional "ICANN community," dominated by special interests (it costs about [\\$20,000-30,000 a year, per person](#), just in travel costs and related expenses, to fully participate in ICANN meetings), trying to hammer out a complete GDPR-compliant WHOIS policy over the next twelve months ...”

But beyond the immediate GDPR-WHOIS crisis, the problems of ICANN are much deeper and broader, here a just a few examples:

Financial irregularities and malfeasance--ICANN has never been audited by the IRS—read [News Review | ICANN Pays Senior VP Sally Costerton Secret Contract \\$\\$\\$ | DomainMondo.com](#), excerpt:

“... **Should ICANN** be run like a “*chummy private club*” or a [nonprofit public benefit corporation](#) with international scope and responsibilities, including duties to be **accountable** and **transparent** to the **global internet community**, meeting at least the baseline minimums required of **all nonprofits** jurisdictionally situated in California (US), and preferably far more than those minimums, since “*Public-benefit nonprofit corporations are ... organized for the general public benefit, rather than for the interest of its members.*”

“**In pursuit of answers to those questions and more**, as most readers know, [I first questioned](#) on May 28, 2017, [ICANN's Form 990](#) filing (FY16 ending June 30, 2016) [published](#) by ICANN on May 15, 2017, for review by the **global internet community** as [required](#) by the U.S. Department of Treasury's [IRS](#) (ICANN has [IRC 501\(c\)\(3\)](#) tax status).

“My May 28th inquiry generated a [partial answer from ICANN](#) on July 13, 2017, disclosing a total of **\$114,203.24** paid in FY16 to **ICANN Chairman Steve Crocker's** personal corporation, **Shinkuro, Inc.**, not disclosed on ICANN's filed **FY16 Form 990**.

“I [responded on July 17, 2017](#), asking again for **full disclosure** of all amounts paid to all ICANN directors and officers, directly and indirectly, noting specifically:

“... **completely missing** from ICANN's [Form 990] list of 39 “Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees,” is **Sally Costerton**, Sr. Advisor To President & Senior Vice President, Global Stakeholder Engagement, who is also an “Executive Team Member” according to ICANN's [organization management](#)

[chart](#) (pdf) and has been employed as a “Vice President” of ICANN since 2012 according to her profile at icannwiki.org."”

[ICANN Lobbying, Conflicts, Ethics, Transparency, Accountability, Disclosure | DomainMondo.com](#) excerpt: “... Rick Lane, Sr. Vice President Government Affairs at 21st Century Fox, and member of the ICANN Business Constituency, who spoke in response to Fadi's [Fadi Chehade] "*give and take about lobbying*" referenced above [Lane starts @03:34:46 on the *livestream video* [here](#)] (*emphasis added*): ‘Thank you. My name is Rick Lane I’m with 21st Century Fox. I wanted to respond to Fadi's *give and take about lobbying* ICANN has told us over and over **they are about the world**. And we like that. So if you're only filing about what you're doing in the U.S., **what about meetings in China, Brazil, Argentina?** Anyplace else in the **world that doesn't have by their federal laws the requirements to register lobbyists** or require those expenditures.

So I think what we're asking and the B.C. asked this in its recent filing [timer sounds] that we want to add an additional bylaw that requires ICANN or any individual acting on ICANN's behalf to make periodic public disclosures of their contacts with any government official as well as activities, receipts, and disbursements in support of those activities. Disclosure of those would enable the entire community to evaluate the statements and activities of such persons in their role as representing ICANN and in fact the ICANN community. So the answers were very narrow that Fadi gave about U.S. lobbying law, which I'm in charge of our lobbying ethics and lobbying filings so I know them very well. But we're talking very broad.”

How much has ICANN paid to foreign governments or foreign government officials, directly or indirectly, for influence-peddling or other purposes, some of which may be in violation of the Foreign Corrupt Practices Act of 1977 (FCPA) (15 U.S.C. § 78dd-1, et seq.) or otherwise. **We don't know, ICANN has never been audited by the IRS.**

More Corruption and Incompetence:

See [Holding ICANN Accountable, A Personal Sojourn Into ICANN Dysfunction | DomainMondo.com](#)

See [News Review | The State of the Domain Name Industry Q1 2018 | DomainMondo.com](#) Editor's note: rather than acknowledge the [new gTLDs disaster](#) of its own making, ICANN is in an apparent 'state of **denial** and **delusion**' ([la-la land](#)). Also note new gTLDs have no price controls, a [new gTLD domain name](#) that costs you \$20 to register today could cost you \$20,000 next year to renew the registration for just one year (in the absolute sole discretion of the registry operator), **ICANN couldn't care less** about domain name registrants being "ripped off." In fact, that's the way **ICANN** intentionally designed and implemented the **new gTLDs program** against the advice of the **U.S. Department of Justice Antitrust Division and FTC** (U.S. Federal Trade Commission):

The Division makes two specific recommendations. First, ICANN's general approach to new gTLDs should be revised to give greater consideration to consumer interests. ICANN should more carefully weigh potential consumer harms against potential consumer benefits before adding new gTLDs and renewing new gTLD registry agreements. Second, the RFP process and proposed registry agreement should include provisions that would enable ICANN to constrain new registry operators from exercising market power. In particular, ICANN should establish competitive mechanisms for authorizing new gTLDs and renewals of gTLD registry agreements whereby prospective gTLD operators would compete for gTLDs by proposing registry terms – including maximum fee schedules – that would provide consumer benefits.

Background:

Introducing New gTLDs Likely Would Enable the Exercise of Market Power by gTLD Operators and Likely Would Not Constrain the Exercise of Market Power by .com and Other Existing TLDs

[US Dept of Justice Antitrust Division recommendations via NTIA to ICANN \(Dec 3, 2008\)](#)

"... the [IRP] review panel findings cast heavy doubts on ICANN's competence to manage without oversight."--[ICANN can't: independent review finds group incompetent | TheStack.com](#). The [Dot Registry IRP Declaration](#) posted by ICANN on August 2, 2016, received critical commentary this past week, see [ICANN IRP, Dot Registry New gTLDs INC LLC LLP, Tempest in a Teapot?](#) The [declaration](#) (pdf) was a split decision (2-1), but included severe criticism of **ICANN staff** and the **ICANN Board of Directors**, including its Board Governance Committee (BGC).

Re: **ICANN new gTLDs consumer fraud** and **.BRAND extortion racket**

Excerpts from **my comment** submitted to ICANN March 8, 2018

https://mm.icann.org/pipermail/comments-fy19-budget-19jan18/attachments/20180308/9805f018/Comment_re_ICANNFY19Budget.pdf



figure 1 above , source: ntldstats.com

News Review | [ICANN Copes With Failing New gTLDs' Impact On Income](#) |

[DomainMondo.com](#): "... it is now obvious to everyone (except 'deniers') that ICANN grossly mismanaged its ill-conceived and misbegotten expansion of gTLDs (from just 22 to over 1200). Among the multitude of mistakes, probably the most egregious were rejecting the advice of the [Federal Trade Commission \(FTC\)](#) (pdf) and [U.S. Department of Justice Antitrust Division](#) (pdf) with regard to competition, pricing power, and consumer (registrant) benefits and protections. The above referenced letter from the US DOJ Antitrust Division was [attached to a letter to ICANN from NTIA in Dec 2008](#) (pdf)."

....

“... ICANN--the ICANN Board of Directors, the ICANN organization, and the “ICANN community” dominated by special interests (lawyers, lobbyists, and contracted parties *i.e.*, registry operators and registrars)--made enormous and serious mistakes with its new gTLDs program. Not everybody, particularly consumers (registrants), “bought the hype” and “drank the Kool-Aid” nor is every corporation amenable to ICANN’s “**extortion racket**” of .BRAND gTLDs (“*apply to make your brand name (trademark) your very own ‘gTLD’* (a corruption of the principles of [RFC1591](#)) *or we may give (sell) it to someone else*”). The narratives [ICANN pushed](#) in connection with the new gTLDs program have been proven false. Making matters worse, ICANN engaged in **consumer fraud** by essentially ignoring the known (since at least 2003) problems of **new gTLDs** “[failing to work as expected on the internet](#)”—ICANN’s euphemistic term is “Universal Acceptance”—until after it collected the new gTLD application fees and began delegating the new gTLDs, without any warnings to consumers (registrants). [Note: re ICANN's "**extortion racket**" .BRAND new gTLDs --[see testimony of Dawn Grove](#) (pdf), Corporate Counsel for Karsten Manufacturing (.PING), [September 14, 2016 hearing](#) before the US Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts.]

My comment re: [SSAC2 Review: Assessment Report](#) via email to: mssi-secretariat@icann.org July 1, 2018: “I request that the **Analysis Group** address **SSAC's** inexplicable **failures** in regard to **new gTLDs**--failures subsequently acknowledged, implicitly, by SSAC's ICANN Board liaison--read: [More Problems Crop Up With Universal Acceptance of Top Level Domains](#) by Ram Mohan, Feb 07, 2014, particularly in view of [ICANN's contract provision](#) with **new gTLDs registry operators**:

"1.2 Technical Feasibility of String. While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, **certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications.** Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement." (emphasis added)

“And further, SSAC failing to demand or even recommend that either ICANN or the new gTLDs' registry operators and registrars **warn** prospective registrants of **new gTLDs' domain names** “*failing to work as expected on the internet.*”

“*How could a group of otherwise competent professionals be so irresponsible and negligent?* I can only speculate, but I attribute it to “**conflicts of interest**”--for example, [Ram Mohan, a member of the SSAC and ICANN Board \(2008-present\)](#) is employed by **Afilias**, a new gTLDs applicant and TLD registry operator, including providing new gTLDs' backend registry services.

“**What we now know** is that apparently **no one** tested for “**technical feasibility**” before hundreds of [new gTLDs](#) were negligently and irresponsibly delegated by ICANN into the global internet root:



[UASGo17](#): Evaluation of Websites for Acceptance of a Variety of Email Addresses

“[UASGo17](#) (pdf): **Conclusion:** There is much work to be done to get many of the world’s websites UA and EAI-ready. Where we thought we could address just a few applications and code repositories, that does not appear to be the case.”

“But **domain name registrants** still are not warned that their **new gTLDs' domain names** may *“fail to work as expected on the internet.”* Occasionally they show up at an ICANN meeting to complain, but **no one of consequence at ICANN cares about domain name registrants--“it's all about the money.”**”

See [News Review | Should the IANA Stewardship Transition Be Unwound? | DomainMondo.com](#) excerpt:

“... A few days before **NTIA** published its "notice of inquiry" above, **former ICANN staff member [Kieren McCarthy](#) wrote** about **ICANN**, the **IANA transition** and its aftermath (edits and emphasis added): "... the global internet [**ICANN**] **community did a lousy job**, giving ICANN a new-found autonomy in return for a series of **worthless accountability measures**. Since that handover [**IANA transition**] on September 30, 2016, two things have become clear:

- **ICANN continues to make terrible decisions**, and
- **European governments** have decided that they will use their collective power as the **EU** [European Union] to force changes on how the internet functions.

"The [ICANN] organization has repeatedly been taken to task for its actions through the mechanism that was designed to keep it accountable: an "independent review panel" or IRP. Yet despite several striking decisions made against ICANN by that panel little or nothing has changed. Among the things that have come out in recent years are: that its own staff repeatedly interfered in independent processes; that it broke its own rules and bylaws to reach a pre-decided conclusion; that it secretly rewrote reports and then lied about it; that staff misled its own board and then claimed otherwise; that its board members lied about looking into allegations; that it hid millions of dollars of payment to Washington lobbyists; and many, many more. For those that have heard of it, the [ICANN] organization has become a shorthand for **dysfunction** and **unaccountable power**. It is the internet's **FIFA scandal ... what will become of Whois, ICANN and the US-led internet? We should know in the next year ...**"

[News Review | ICANN GNSO Struggles to Draft EPDP Charter re GDPR | DomainMondo.com](#):
“... **2)d. RSSAC Review:** Interisle Consulting Group, LLC, the independent examiner performing the second Root Server System Advisory Committee (RSSAC) Review, published its final [report](#) [PDF, 2.58 MB] Quotes from the [report](#)—

*"Root ops [root server operators] are concerned that **ICANN does not have the best interests of everyone at heart**. Having root servers independent is critical—**ICANN is corrupt and can't be trusted**." (page 22 of 79)(emphasis added)*

"Our research did, however, reveal a **high-level concern about oversight**:
*"The **NTIA** contribution to the RSSAC was not just oversight. NTIA didn't represent "governments", but they were aware of the issues that concern governments, and that perspective is **no longer** at the table."*

*"No single entity now has complete oversight of the root server system. NTIA had that role (nominally) before the transition; no one has it now. The **ICANN Board** should not be expected to take on that responsibility." (p. 26 of 79) (emphasis added)...*

[News Review | IANA Transition Unwind? ICANN Nightmare or Fantasy?](#) excerpt:
“**ICANN** may have already sown the seeds of its own destruction with its hundreds of [gTLD contracts in perpetuity](#), against the advice and counsel of the [U.S. Department of Justice Antitrust Division](#) (pdf) delivered to ICANN by [NTIA in 2008](#) (pdf). **If so**, the **good news** is that what comes *after* ICANN could be a lot better for the **global internet community** and restore the principles of Jon Postel's [RFC 1591](#) to the governance of the global DNS and root. The **bad news** is that what comes *after* ICANN could be as bad, or even worse.”

This leads to my **final issue--F. Are there any other DNS related activities NTIA should pursue? If yes, please describe--**addressed below.

If you do nothing else, you (NTIA) must renew the [Verisign Cooperative Agreement](#) which controls .COM pricing (see [Amendment 32](#)), before November 30, 2018.

See the [U.S. Department of Justice Antitrust Division letter](#) attached to this comment.

ICANN is not to be trusted and is not competent to manage the .COM top-level domain, particularly pricing, just look at ICANN's mismanagement of .NET:

[News Review: ICANN59 Report; .NET Greed: ICANN + Verisign \\$VRSN](#)

2) **.NET Greed: ICANN + VeriSign \$VRSN**

.NET Greed: ICANN + VERISIGN

"As is its usual practice and custom, the ICANN Board met in a closed meeting to approve the renewal of the .NET registry agreement with Verisign--reporting days later the dastardly deal--[Adopted Board Resolutions | Regular Meeting of the ICANN Board June 24, 2017 | ICANN.org](#): "... Resolved (2017.06.24.22), the proposed [.NET Renewal Registry Agreement](#) is **approved** and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to finalize and execute the Agreement ..." [including \$0.75 fee to ICANN (vs. \$0.25 for most other gTLDs) & 10% annual increases (10% compounded annually) in fees to Verisign]--see [my comment and objections](#) and the other comments and objections [here](#). **ICANN's Unmistakeable Message to Registrants:**

"If you don't like ICANN's *monopolistic crony capitalism*, the "presumptive right of renewal" and *sweetheart deal* the ICANN organization gave away to [Verisign](#) re: .NET (doubling Verisign's fees every 7 years into perpetuity), as well as imposing ICANN fees that are 3x other gTLDs), too bad! **Dump ALL your .NET domain names!**

"The **.NET tragedy** is symptomatic of all that is so wrong with ICANN--corrupt, inept, or dysfunctional. And the deal **ICANN gave away** to the [new gTLDs registry operators](#) is **even worse!** (for registrants). **Consumer** (registrant) **protection** is almost completely disregarded in the entire ICANN ecosystem, something the [U.S. Department of Justice Antitrust Division noted in 2008](#). ICANN operates almost **completely counter** to the ideals and values promulgated in [RFC 1591](#) by Jon Postel in 1994.

Thank you.

Respectfully submitted,
John Poole

U.S. citizen, domain name registrant, and *editor*, [DomainMondo.com](#) (contact via email)
[PDF attachments follow]



DEPARTMENT OF JUSTICE
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December 3, 2008

Meredith A. Baker
Acting Assistant Secretary for Communications
and Information
National Telecommunications and
Information Administration
United States Department of Commerce
Washington, D.C. 20230

Re: ICANN's Draft RFP for New gTLDs

Dear Ms. Baker:

This letter responds to the United States Department of Commerce's ("DOC") request for advice regarding competition issues raised by the draft request for proposal ("RFP") that would govern the issuance of new generic top level domains ("gTLDs") published by the Internet Corporation for Assigned Names and Numbers ("ICANN"). The Antitrust Division has reviewed the RFP and related materials published on ICANN's website, including a proposed registry agreement that ICANN will require successful applicants to execute. Our analysis of the issues raised by these materials is informed by our extensive experience with competition matters as well as the analysis we conducted in connection with our 2006 review of the revised .com registry agreement.¹

As we explain below, some new gTLDs envisioned by the RFP likely would have market power, the exercise of which is not adequately addressed by the RFP or other constraints. Moreover, the creation of additional gTLDs is unlikely to constrain the exercise of market power by existing TLDs, especially the .com registry operated by VeriSign. Contrary to ICANN's apparent assumption, competition from existing TLDs – or from new gTLDs created pursuant to the RFP – is not likely to prevent the exercise of market power by new or existing TLD registries.

¹ See Letter from Thomas O. Barnett to John M. R. Kneuer, dated September 6, 2006.

As a result, although new gTLDs may generate some consumer benefits, ICANN should take additional steps to ensure that the process of creating new gTLDs incorporates to the maximum extent possible competition-based mechanisms and also imposes other constraints on the exercise of market power by gTLD operators.

The Division makes two specific recommendations. First, ICANN's general approach to new gTLDs should be revised to give greater consideration to consumer interests. ICANN should more carefully weigh potential consumer harms against potential consumer benefits before adding new gTLDs and renewing new gTLD registry agreements. Second, the RFP process and proposed registry agreement should include provisions that would enable ICANN to constrain new registry operators from exercising market power. In particular, ICANN should establish competitive mechanisms for authorizing new gTLDs and renewals of gTLD registry agreements whereby prospective gTLD operators would compete for gTLDs by proposing registry terms – including maximum fee schedules – that would provide consumer benefits.

Background:

Introducing New gTLDs Likely Would Enable the Exercise of Market Power by gTLD Operators and Likely Would Not Constrain the Exercise of Market Power by .com and Other Existing TLDs

Our investigation of the proposed .com agreement generated several findings that bear on the likely effect of creating new gTLDs. First, we found that VeriSign possesses significant market power as the operator of the .com registry because many registrants do not perceive .com and other gTLDs (such as .biz and .info) and country code TLDs (“ccTLDs,” such as .uk and .de) to be substitutes. Instead, registrants frequently purchase domains in TLDs other than .com as *complements* to .com domains, not as substitutes for them. In other words, registrants of a particular .com domain (e.g., google.com) will frequently also perceive a need to register the same domain in all or most available TLDs (e.g., google.info and google.biz) because of a desire to expand their presence on the Internet and to protect their brands from being exploited by others.²

We also concluded that existing gTLDs likely would not become a competitive threat to .com registrations because the network effects that make .com registrations so valuable to consumers will be difficult for other TLDs to overcome. Due to a first-mover advantage and high brand awareness, .com registrations account for the overwhelming majority of gTLD registrations. As a result, when users do not know the TLD in which a domain is registered, they most often simply append “.com” to a product or company name when attempting to find the

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desired website. This phenomenon creates a strong preference for .com.³ Accordingly, there will continue to be a need for Section 7.3 of the .com registry agreement to replace the discipline that market competition does not provide in this setting, as well as continuing DOC oversight of the .com registry under the Cooperative Agreement, which precludes VeriSign from amending or renewing the .com agreement without DOC approval.

Finally, our investigation of the .com agreement found evidence that other gTLD registry operators may possess a degree of market power. The market power inherent in the other gTLDs is less than the market power in .com, but is still material. The need of many registrants to purchase domains in many or most gTLDs allows each gTLD registry operator to impose costs on registrants that purchase domains simply because a gTLD exists. With respect to existing gTLDs, this power is constrained to some extent by the registry agreements applicable to the other gTLDs. Without those constraints, the gTLD operators likely could profitably charge even higher fees that reflect their market power as to registrants that are willing to pay a premium for their domains, since it appears that the operators may be able to identify those customers and charge discriminatorily high domain registration prices.⁴ The fact that some registrants might view different gTLDs as substitutes would not necessarily constrain the gTLD operators from selectively exercising market power vis-a-vis those that are willing to pay a premium.

In light of these findings, we believe that the introduction of new gTLDs under the RFP could impose substantial additional domain registration costs on many consumers and that many new gTLD registry operators may have market power over registrants. Further, the introduction of new gTLDs is not likely to constrain the exercise of market power by existing gTLDs or ameliorate the continuing need for restraints to prevent VeriSign from exercising market power in the sale of .com domains.

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Recommendations

1. ***ICANN Should Give Greater Consideration to Consumer Interests before Creating New gTLDs and Renewing Registry Agreements***

ICANN is obligated to manage gTLDs in the interests of registrants and to protect the public interest in competition.⁵ ICANN appears to have assumed that the introduction of new gTLDs necessarily will enhance competition and promote choice and innovation, without offering any evidence to support that assumption. To our knowledge, ICANN has neither studied competition among gTLDs at the registry level, nor commissioned such a study, despite the ICANN Board of Director's specific direction to do so.⁶ On October 18, 2006, the ICANN Board directed ICANN's President to commission an economic study to address questions such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
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- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by whom?⁷

⁵ See Articles of Incorporation of ICANN, 4, as revised November 21, 1998 (<http://www.icann.org/en/general/articles.htm>); Joint Project Agreement Between the U.S. Department of Commerce and ICANN, Section II.C., dated Sept. 29, 2006 (<http://www.icann.org/en/general/JPA-29sep06.pdf>).

⁶ ICANN has periodically referenced an OECD report published in 2004 as support for its position that introducing new gTLDs may enhance competition at the registry level. The OECD authors relied on data showing a decline in .com, .net, and .org registrations combined with a significant number of registrations in the new .info, .biz, and .name gTLDs during the six-month period immediately following the introduction of the new gTLDs in 2002. S. Paltridge and M. Matsui, OECD's Directorate for Science, Technology and Industry, *Generic Top Level Domains: Market Development and Allocation Issues*, 4, 22 (July 13, 2004). However, the authors acknowledge that the reduction in .com, .net, and .org registrations was at the end of the "internet bubble," and that registrations in those three gTLDs resumed growth during the succeeding six-month period, while registrations in the new gTLDs tailed off and actually declined in .info during the last six months of 2003, the last period for which registration data was available. *Id.* Indeed, with the benefit of additional, more recent information in our investigation of the new .com agreement, we found no indication that the other gTLDs impose a competitive constraint on sales of .com domains or on VeriSign's ability to charge the maximum .com registry price.

⁷ ICANN, Special Meeting of the Board Minutes (Oct. 18, 2006) (<http://www.icann.org/en/minutes/minutes-18oct06.htm>) (last visited Nov. 17, 2008).

The Board recognized that such a study could help in future negotiations with TLD registry operators.⁸ Now, more than two years later, ICANN has proposed to introduce a new gTLD approval process, complete with a new gTLD registry operator agreement, apparently without having even begun the requested study.

ICANN should revise its general approach to give greater consideration to potential consumer harms and benefits. The creation of new gTLDs could generate consumer harm. First, approval of new gTLDs would proliferate the number of TLDs in which registrants feel that they must purchase registrations to protect their domain names, increasing their costs.⁹ Second, new gTLD operators may be able to exercise market power vis-a-vis some group of customers (e.g., because of a desire to register for defensive purposes or because of investments they make in a domain name).

At the same time, new gTLDs could generate benefits. It is possible, for example, that they would intensify competition among gTLDs other than .com for customers that do not feel compelled to register their domain names in multiple gTLDs. Whether this is likely would require further analysis. In addition, new gTLDs may benefit unique registrant populations that might value a domain in a particular gTLD. An example of this could be a new gTLD that represents a particular community of people, a type of application that ICANN anticipates receiving in response to the RFP. However, we are unaware of any effort by ICANN to quantify this consumer benefit. ICANN has not attempted to distinguish the registrants that might value having a domain in a gTLD other than .com, including a new gTLD, from those registrants that would feel compelled to purchase one or more domains in the new gTLD only because the gTLD was created.

The RFP neither provides for any evaluation of what effect, if any, the new gTLDs will have on competition at the registry level nor allows for objections based on the likely adverse competitive effects of the gTLD. The RFP also does not establish any mechanisms or processes that would minimize the potential for harm from new gTLDs while enabling the potential benefits to be realized. For example, the proposed registry agreement (unlike the .com agreement and other existing gTLD registry agreements) does not include any price caps that would limit the ability of new gTLD registry operators to charge the highest possible prices for domains in the new gTLDs. Similarly, the proposed agreement does not include any restrictions against price discrimination, bundling, and tying. It also does not require registry operators to offer domains pursuant to long term contracts, meaning that registry operators would be free to raise

⁸ *Id.*

⁹ The circumstances under which registry operators may impose additional costs on registrants willing to pay a premium for a domain name depends on the registry operator's ability to price discriminate as well as their pricing strategy. The magnitude of the overall increase in costs will likely to some extent depend on the number of new gTLDs introduced as a result of the RFP process.

prices to registrants willing to pay a premium for specific domain names. The proposed registry agreement also allows for the perpetual renewal of every new gTLD registry agreement without regard to competitive effects or consumer-based objections.

ICANN should recognize that new gTLDs, while providing a desired choice for some registrants, are unlikely to restrain the exercise of market power by the .com registry operator and may impose significant costs on registrants, particularly those that will feel compelled to register their domains in the new gTLDs. ICANN should explicitly include this type of analysis as part of its evaluation of each new gTLD application, and should proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD.¹⁰ If ICANN is not prepared to act now to address the competition-related issues identified in this letter, it should at a minimum postpone the introduction of new gTLDs and the adoption of additional perpetually renewing gTLD agreements until it receives and reviews the study that the ICANN Board requested over two years ago.

2. *ICANN Should Revise the RFP Process and the Proposed Registry Agreement to Protect Consumers from the Exercise of Market Power*

ICANN should take steps to protect consumers from the exercise of market power by gTLD operators. First, the new gTLD approval and management process should be amended to reduce the potential adverse results of new gTLDs. The RFP process should require ICANN to consider, allow objections for, and retain authority to address any adverse consumer welfare effects that may arise during the new gTLD approval process and registry agreement renewal process. For example, ICANN should be sensitive to complaints that consumers may feel compelled to register domains in a new gTLD for defensive purposes, without expectation of receiving meaningful value from the new registration other than avoidance of even higher costs that would be incurred to combat third parties' improper use of the registrant's trade name in the new gTLD.

Second, once it has decided to authorize a new gTLD, ICANN should implement a process by which prospective gTLD operators compete for the privilege of operating a particular gTLD by offering terms that benefit consumers. Effectively implementing such a process would require

¹⁰ ICANN has consistently told us that its primary concern is with DNS management from a technical perspective and that it does not have the expertise or inclination to protect or preserve the public interest in competition and low domain costs, preferring instead to allow government competition authorities to take whatever action might be necessary to address issues of competitive abuse. The problem with ICANN's preferred approach is that the antitrust laws generally do not proscribe a registry operator's unilateral decisions made under the processes established by ICANN – such as, for instance, pricing decisions. *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not . . . unlawful . . .”). Accordingly, ICANN should create rules fostering a competitive environment to the greatest extent possible.

that ICANN evaluate bids from the perspective of the benefits they provide consumers, not merely the amount bidders are willing to pay to ICANN for the right to operate the gTLD. ICANN's requests for bids should expressly call for bids to specify an initial maximum price that would be charged by the operator for domain registrations, as well as limitations on price increases over time. ICANN should also encourage improved performance by asking bidders to propose any operating specifications that exceed the minimum standards established by ICANN. ICANN's requests for bids should also solicit other proposals for providing consumer benefit, such as commitments not to discriminate in price across registrants (in order to avoid the ability to "hold up" registrants that have made investments in a domain name) and not to require the purchase of other services from the registry operator as a condition of registration (to limit price cap evasion). All such terms should be incorporated in the registry agreement so that ICANN can enforce them.

Third, although a competitive bidding mechanism likely is the best mechanism for simulating a competitive outcome in most circumstances, it may not be effective in all cases. Because ICANN's proposed registry agreement lacks any of the kinds of safeguards included in Section 7.3 of the new .com agreement or other gTLD agreements, ICANN should consider revising the proposed registry agreement, at least for instances where there is not competitive bidding to operate a new gTLD, to include provisions designed to limit the ability of the registry operator to exercise market power, i.e., price caps and commitments against price discrimination and tying. In addition, it may be preferable to require long-term agreements (the .com agreement, for example, requires that the operator offer domains for terms of up to 10 years). If a competitive bidding mechanism is infeasible, protections of this sort would prevent the exercise of market power by the operators of many of the contemplated gTLDs. Even if a competitive bidding mechanism is implemented, moreover, it might still be appropriate to incorporate some protections into the standard registry agreement, to anticipate the possibility that there is not effective competition for a particular gTLD.

Finally, ICANN should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition. Such a mechanism would both assist in disciplining the conduct of the incumbent during the initial term insofar as the incumbent would want to maximize the likelihood of renewal, and ensure the benefits of competition when potential operators bid for the right to operate the gTLD in the renewal term. Instead, ICANN has conformed the proposed registry agreement to the existing gTLD agreements, effectively granting perpetual renewal rights to registry operators without the prospect of periodic rebidding, and without regard to potential adverse competitive effect. Experience with the .net TLD and other gTLDs has shown that competitive bidding in the award of gTLD registry agreements, and periodic rebidding, has served as an effective tool for managing the interests of registrants in gTLDs. Indeed, competitive bidding has resulted in lower domain prices and higher operating specifications than what ICANN has achieved through non-competitive negotiations. In particular, competitive

Ms. Meredith A. Baker
December 3, 2008
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bidding prompts bidders to propose and accept registry improvements, higher operating standards, and lower registration fees to win the contract.

Opponents of competitive bidding on renewals have contended that ICANN needs to grant perpetual registry contracts in order to motivate registry operators to invest in their registries. However, incumbent registry operators have an incentive to make investments in order to maintain their competitive advantage in a rebid situation.¹¹ Thus, the effect on innovation of potential termination of a registry agreement is at worst inconclusive. Further, experience demonstrates that any concern about the risk of transferring a new gTLD registry after a rebid is misplaced. Management and operation of many gTLDs and ccTLDs have been successfully transferred without imposing undue burdens on DNS stability or security. For example, VeriSign successfully transferred the .org registry to the Public Interest Registry in January 2003.

* * *

ICANN's approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition at the registry level. We respectfully suggest that the DOC refrain from expressing satisfaction with ICANN's progress toward the goal of promoting competition among TLDs unless and until ICANN develops a credible and effective policy that compels it to employ tools such as competitive bidding to manage TLDs in a manner that safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices. To date, we believe that ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD registry operations.

Sincerely,


Deborah A. Garza

cc: Kathy D. Smith, Esq.

¹¹ We have identified no registry operator that reduced investment because of potential termination.



DEC 18 2008

Mr. Peter Dengate-Thrush
Chairman of the Board of Directors
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

Dear Chairman Dengate-Thrush:

On October 23, 2008, the Internet Corporation for Assigned Names and Numbers (ICANN) posted for public comment a series of interrelated documents, including a draft applicant guidebook, related to ICANN's efforts to introduce new generic top level domains (gTLDs). The Department of Commerce (Department) appreciates this opportunity to offer the views of the United States government on such an important topic.

Understanding that the introduction of new gTLDs has been a long standing goal of the DNS Project, we believe it is critical to keep in mind the foundational Memorandum of Understanding between the Department and ICANN stipulating as a core principle the need to manage the Internet domain name and addressing system (DNS) in a manner that permits market mechanisms to support competition and consumer choice so that lower costs are realized, innovation is promoted, and user choice and satisfaction are enhanced. While we acknowledge the effort and hard work involved in producing the documents currently out for comment, it is unclear that the threshold question of whether the potential consumer benefits outweigh the potential costs has been adequately addressed and determined. In that regard, we would like to call to your attention a decision of the ICANN Board in October 18, 2006, that called for an economic study to address questions such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
- what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,
- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by who[sic]?¹

ICANN needs to complete this economic study and the results should be considered by the community before new gTLDs are introduced.

¹ ICANN, Special Meeting of the Board Minutes (Oct, 18, 2006) (<http://www.icann.org/en/minutes/minutes-18oct06.htm>) (last visited Dec. 11, 2008).

The United States government recognizes that it is ICANN's intention to carefully consider the comments received in this process and initiate further consultations, including a revised applicant guidebook, before introducing new gTLDs. With that in mind, below is a specific list of initial items we believe need to be resolved in the current documents:

- Ensure that the introduction of a potentially large number of new gTLDs, including internationalized top level domains, will not jeopardize the stability and security of DNS;
- Revise the gTLD approval process, the applicant guidebook and the proposed registry agreement to: (1) consider, allow objections for, and retain authority to address any adverse competitive welfare effects that may arise during the approval of new gTLDs applications or the renewal of subsequent contracts; (2) employ mechanisms such as competitive bidding whereby prospective gTLD operators would compete by proposing registry terms, including price and quality commitments, that provide consumer benefit; and (3) impose maximum price caps or other terms that would redound to the benefit of consumers in those cases where competitive bidding mechanisms will not adequately limit the ability of registry operators to exercise market power;²
- Demonstrate that ICANN has sufficient capacity to enforce contract compliance with an as-yet-unknown number of new contracting parties, especially in light of outstanding questions regarding existing contracts (such as the proposed amendments to the Registrar Accreditation Agreements and problems with the WHOIS data accuracy reporting system);
- State how ICANN will conduct legal reviews of applications, consider legal objections from third parties, and discharge its responsibility to ensure that the process of introducing new gTLDs respects all relevant national and international law, including intellectual property rights;
- Focus on coordinating technical functions related to the management of the DNS and not on matters more appropriately addressed by governments, such as adjudication of morality, public order and community objections in accordance with international human rights law. The proposed mechanisms to address these topics are inappropriate;
- Create a mechanism that provides for the expansion of the gTLD reserved names list, as appropriate, for technical or infrastructure-related names; and,

² See attached letter from Acting Assistant Attorney General Deborah A. Garza, U.S. Department of Justice, Antitrust Division to Acting Assistant Secretary for Communications and Information Meredith A. Baker, NTIA (dated Dec. 3, 2008).

- Articulate a clear rationale for the proposed fee structure as well as a transparent mechanism, that includes community agreement, for the disposition of excess revenues, should there be any, given ICANN's status as a non-profit entity.

The United States government shares ICANN's commitment to promote competition in the domain name marketplace while ensuring Internet stability and security and looks forward to continuing to participate in this process so that the collective concerns of the community are addressed prior to ICANN moving forward with the introductions of new gTLDs.

Sincerely,

A handwritten signature in black ink that reads "MABaker" with a long horizontal flourish extending to the right.

Meredith A. Baker
Acting Assistant Secretary
for Communications and Information

cc: Dr. Paul Twomey, President and CEO, ICANN



DEPARTMENT OF JUSTICE
Antitrust Division

Deborah A. Garza
Acting Assistant Attorney General

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December 3, 2008

Meredith A. Baker
Acting Assistant Secretary for Communications
and Information
National Telecommunications and
Information Administration
United States Department of Commerce
Washington, D.C. 20230

Re: ICANN's Draft RFP for New gTLDs

Dear Ms. Baker:

This letter responds to the United States Department of Commerce's ("DOC") request for advice regarding competition issues raised by the draft request for proposal ("RFP") that would govern the issuance of new generic top level domains ("gTLDs") published by the Internet Corporation for Assigned Names and Numbers ("ICANN"). The Antitrust Division has reviewed the RFP and related materials published on ICANN's website, including a proposed registry agreement that ICANN will require successful applicants to execute. Our analysis of the issues raised by these materials is informed by our extensive experience with competition matters as well as the analysis we conducted in connection with our 2006 review of the revised .com registry agreement.¹

As we explain below, some new gTLDs envisioned by the RFP likely would have market power, the exercise of which is not adequately addressed by the RFP or other constraints. Moreover, the creation of additional gTLDs is unlikely to constrain the exercise of market power by existing TLDs, especially the .com registry operated by VeriSign. Contrary to ICANN's apparent assumption, competition from existing TLDs – or from new gTLDs created pursuant to the RFP – is not likely to prevent the exercise of market power by new or existing TLD registries.

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The Division makes two specific recommendations. First, ICANN's general approach to new gTLDs should be revised to give greater consideration to consumer interests. ICANN should more carefully weigh potential consumer harms against potential consumer benefits before adding new gTLDs and renewing new gTLD registry agreements. Second, the RFP process and proposed registry agreement should include provisions that would enable ICANN to constrain new registry operators from exercising market power. In particular, ICANN should establish competitive mechanisms for authorizing new gTLDs and renewals of gTLD registry agreements whereby prospective gTLD operators would compete for gTLDs by proposing registry terms – including maximum fee schedules – that would provide consumer benefits.

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- whether there are other markets with similar issues, and if so how are these issues addressed and by whom?⁷

⁵ See Articles of Incorporation of ICANN, 4, as revised November 21, 1998 (<http://www.icann.org/en/general/articles.htm>); Joint Project Agreement Between the U.S. Department of Commerce and ICANN, Section II.C., dated Sept. 29, 2006 (<http://www.icann.org/en/general/JPA-29sep06.pdf>).

⁶ ICANN has periodically referenced an OECD report published in 2004 as support for its position that introducing new gTLDs may enhance competition at the registry level. The OECD authors relied on data showing a decline in .com, .net, and .org registrations combined with a significant number of registrations in the new .info, .biz, and .name gTLDs during the six-month period immediately following the introduction of the new gTLDs in 2002. S. Paltridge and M. Matsui, OECD's Directorate for Science, Technology and Industry, *Generic Top Level Domains: Market Development and Allocation Issues*, 4, 22 (July 13, 2004). However, the authors acknowledge that the reduction in .com, .net, and .org registrations was at the end of the "internet bubble," and that registrations in those three gTLDs resumed growth during the succeeding six-month period, while registrations in the new gTLDs tailed off and actually declined in .info during the last six months of 2003, the last period for which registration data was available. *Id.* Indeed, with the benefit of additional, more recent information in our investigation of the new .com agreement, we found no indication that the other gTLDs impose a competitive constraint on sales of .com domains or on VeriSign's ability to charge the maximum .com registry price.

⁷ ICANN, Special Meeting of the Board Minutes (Oct. 18, 2006) (<http://www.icann.org/en/minutes/minutes-18oct06.htm>) (last visited Nov. 17, 2008).

The Board recognized that such a study could help in future negotiations with TLD registry operators.⁸ Now, more than two years later, ICANN has proposed to introduce a new gTLD approval process, complete with a new gTLD registry operator agreement, apparently without having even begun the requested study.

ICANN should revise its general approach to give greater consideration to potential consumer harms and benefits. The creation of new gTLDs could generate consumer harm. First, approval of new gTLDs would proliferate the number of TLDs in which registrants feel that they must purchase registrations to protect their domain names, increasing their costs.⁹ Second, new gTLD operators may be able to exercise market power vis-a-vis some group of customers (e.g., because of a desire to register for defensive purposes or because of investments they make in a domain name).

At the same time, new gTLDs could generate benefits. It is possible, for example, that they would intensify competition among gTLDs other than .com for customers that do not feel compelled to register their domain names in multiple gTLDs. Whether this is likely would require further analysis. In addition, new gTLDs may benefit unique registrant populations that might value a domain in a particular gTLD. An example of this could be a new gTLD that represents a particular community of people, a type of application that ICANN anticipates receiving in response to the RFP. However, we are unaware of any effort by ICANN to quantify this consumer benefit. ICANN has not attempted to distinguish the registrants that might value having a domain in a gTLD other than .com, including a new gTLD, from those registrants that would feel compelled to purchase one or more domains in the new gTLD only because the gTLD was created.

The RFP neither provides for any evaluation of what effect, if any, the new gTLDs will have on competition at the registry level nor allows for objections based on the likely adverse competitive effects of the gTLD. The RFP also does not establish any mechanisms or processes that would minimize the potential for harm from new gTLDs while enabling the potential benefits to be realized. For example, the proposed registry agreement (unlike the .com agreement and other existing gTLD registry agreements) does not include any price caps that would limit the ability of new gTLD registry operators to charge the highest possible prices for domains in the new gTLDs. Similarly, the proposed agreement does not include any restrictions against price discrimination, bundling, and tying. It also does not require registry operators to offer domains pursuant to long term contracts, meaning that registry operators would be free to raise

⁸ *Id.*

⁹ The circumstances under which registry operators may impose additional costs on registrants willing to pay a premium for a domain name depends on the registry operator's ability to price discriminate as well as their pricing strategy. The magnitude of the overall increase in costs will likely to some extent depend on the number of new gTLDs introduced as a result of the RFP process.

prices to registrants willing to pay a premium for specific domain names. The proposed registry agreement also allows for the perpetual renewal of every new gTLD registry agreement without regard to competitive effects or consumer-based objections.

ICANN should recognize that new gTLDs, while providing a desired choice for some registrants, are unlikely to restrain the exercise of market power by the .com registry operator and may impose significant costs on registrants, particularly those that will feel compelled to register their domains in the new gTLDs. ICANN should explicitly include this type of analysis as part of its evaluation of each new gTLD application, and should proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD.¹⁰ If ICANN is not prepared to act now to address the competition-related issues identified in this letter, it should at a minimum postpone the introduction of new gTLDs and the adoption of additional perpetually renewing gTLD agreements until it receives and reviews the study that the ICANN Board requested over two years ago.

2. *ICANN Should Revise the RFP Process and the Proposed Registry Agreement to Protect Consumers from the Exercise of Market Power*

ICANN should take steps to protect consumers from the exercise of market power by gTLD operators. First, the new gTLD approval and management process should be amended to reduce the potential adverse results of new gTLDs. The RFP process should require ICANN to consider, allow objections for, and retain authority to address any adverse consumer welfare effects that may arise during the new gTLD approval process and registry agreement renewal process. For example, ICANN should be sensitive to complaints that consumers may feel compelled to register domains in a new gTLD for defensive purposes, without expectation of receiving meaningful value from the new registration other than avoidance of even higher costs that would be incurred to combat third parties' improper use of the registrant's trade name in the new gTLD.

Second, once it has decided to authorize a new gTLD, ICANN should implement a process by which prospective gTLD operators compete for the privilege of operating a particular gTLD by offering terms that benefit consumers. Effectively implementing such a process would require

¹⁰ ICANN has consistently told us that its primary concern is with DNS management from a technical perspective and that it does not have the expertise or inclination to protect or preserve the public interest in competition and low domain costs, preferring instead to allow government competition authorities to take whatever action might be necessary to address issues of competitive abuse. The problem with ICANN's preferred approach is that the antitrust laws generally do not proscribe a registry operator's unilateral decisions made under the processes established by ICANN – such as, for instance, pricing decisions. *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not . . . unlawful . . .”). Accordingly, ICANN should create rules fostering a competitive environment to the greatest extent possible.

that ICANN evaluate bids from the perspective of the benefits they provide consumers, not merely the amount bidders are willing to pay to ICANN for the right to operate the gTLD. ICANN's requests for bids should expressly call for bids to specify an initial maximum price that would be charged by the operator for domain registrations, as well as limitations on price increases over time. ICANN should also encourage improved performance by asking bidders to propose any operating specifications that exceed the minimum standards established by ICANN. ICANN's requests for bids should also solicit other proposals for providing consumer benefit, such as commitments not to discriminate in price across registrants (in order to avoid the ability to "hold up" registrants that have made investments in a domain name) and not to require the purchase of other services from the registry operator as a condition of registration (to limit price cap evasion). All such terms should be incorporated in the registry agreement so that ICANN can enforce them.

Third, although a competitive bidding mechanism likely is the best mechanism for simulating a competitive outcome in most circumstances, it may not be effective in all cases. Because ICANN's proposed registry agreement lacks any of the kinds of safeguards included in Section 7.3 of the new .com agreement or other gTLD agreements, ICANN should consider revising the proposed registry agreement, at least for instances where there is not competitive bidding to operate a new gTLD, to include provisions designed to limit the ability of the registry operator to exercise market power, i.e., price caps and commitments against price discrimination and tying. In addition, it may be preferable to require long-term agreements (the .com agreement, for example, requires that the operator offer domains for terms of up to 10 years). If a competitive bidding mechanism is infeasible, protections of this sort would prevent the exercise of market power by the operators of many of the contemplated gTLDs. Even if a competitive bidding mechanism is implemented, moreover, it might still be appropriate to incorporate some protections into the standard registry agreement, to anticipate the possibility that there is not effective competition for a particular gTLD.

Finally, ICANN should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition. Such a mechanism would both assist in disciplining the conduct of the incumbent during the initial term insofar as the incumbent would want to maximize the likelihood of renewal, and ensure the benefits of competition when potential operators bid for the right to operate the gTLD in the renewal term. Instead, ICANN has conformed the proposed registry agreement to the existing gTLD agreements, effectively granting perpetual renewal rights to registry operators without the prospect of periodic rebidding, and without regard to potential adverse competitive effect. Experience with the .net TLD and other gTLDs has shown that competitive bidding in the award of gTLD registry agreements, and periodic rebidding, has served as an effective tool for managing the interests of registrants in gTLDs. Indeed, competitive bidding has resulted in lower domain prices and higher operating specifications than what ICANN has achieved through non-competitive negotiations. In particular, competitive

Ms. Meredith A. Baker
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bidding prompts bidders to propose and accept registry improvements, higher operating standards, and lower registration fees to win the contract.

Opponents of competitive bidding on renewals have contended that ICANN needs to grant perpetual registry contracts in order to motivate registry operators to invest in their registries. However, incumbent registry operators have an incentive to make investments in order to maintain their competitive advantage in a rebid situation.¹¹ Thus, the effect on innovation of potential termination of a registry agreement is at worst inconclusive. Further, experience demonstrates that any concern about the risk of transferring a new gTLD registry after a rebid is misplaced. Management and operation of many gTLDs and ccTLDs have been successfully transferred without imposing undue burdens on DNS stability or security. For example, VeriSign successfully transferred the .org registry to the Public Interest Registry in January 2003.

* * *

ICANN's approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition at the registry level. We respectfully suggest that the DOC refrain from expressing satisfaction with ICANN's progress toward the goal of promoting competition among TLDs unless and until ICANN develops a credible and effective policy that compels it to employ tools such as competitive bidding to manage TLDs in a manner that safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices. To date, we believe that ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD registry operations.

Sincerely,


Deborah A. Garza

cc: Kathy D. Smith, Esq.

¹¹ We have identified no registry operator that reduced investment because of potential termination.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 16, 2011

Dr. Stephen D. Crocker
Chairman of the Board of Directors
Internet Corporation for Assigned Names and Numbers
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Suite 930
Washington, D.C. 20005

Rod Beckstrom
President and CEO
Internet Corporation for Assigned Names and Numbers
325 Lytton Avenue, Suite 300
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Re: Consumer Protection Concerns Regarding New gTLDs

Dear Dr. Crocker and Mr. Beckstrom:

We write in reference to the Internet Corporation for Assigned Names and Numbers' (ICANN) plan to open the application period for new generic top-level domains (new gTLDs) on January 12, 2012. As you know, the Federal Trade Commission ("FTC" or "Commission") expressed concerns about the need for more consumer protection safeguards during the Board's consideration of the gTLD program's expansion. The FTC has also long urged for the improvement of ICANN policies that affect consumers engaged in e-commerce or that frustrate law enforcement efforts to identify and locate bad actors.

We write now to highlight again the potential for significant consumer harm resulting from the unprecedented increase in new gTLDs. Before approving any new gTLD applications, we urge ICANN to take the steps described below to mitigate the risk of serious consumer injury and to improve the accuracy of Whois data.

We also urge ICANN to take immediate steps to address the FTC's and the Governmental Advisory Committee's (GAC) longstanding concerns with various ICANN policies and procedures. The exponential expansion of the number of gTLDs will only increase the challenge of developing and implementing solutions to the problems the FTC and the GAC have previously brought to ICANN's attention. In the Affirmation of Commitments, ICANN pledged to ensure that various issues involved in the expansion of the gTLD space—including consumer protection and malicious abuse issues—would "be adequately addressed prior to

implementation.”¹ We look forward to working with ICANN as it honors these commitments to ensure that the new gTLD program benefits both consumers and businesses alike.

1. Federal Trade Commission

The FTC is an independent agency of the United States government that enforces competition and consumer protection laws.² The FTC fulfills its consumer protection mission in a variety of ways—through civil enforcement actions, policy development, rulemaking, and consumer and business education.

The principal consumer protection statute that the FTC enforces is the FTC Act, which prohibits “unfair or deceptive acts or practices.”³ The FTC has used its authority to take action against a wide variety of Internet-related threats, including bringing a substantial number of cases involving online consumer fraud and almost 100 spam and spyware cases.⁴ In addition, the FTC has made a high priority of protecting consumers’ privacy and improving the security of their sensitive personal information, both online and offline.⁵

¹ See Affirmation of Commitments, at 9.3, available at <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

² The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. The President chooses one Commissioner to act as Chairman. No more than three Commissioners can be of the same political party.

³ See 15 U.S.C. § 45. The FTC also enforces several other consumer protection statutes. See, e.g., Restore Online Shopper’s Confidence Act, Pub. L. 111-345, 124 Stat. 3618 (2010); Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506; CAN-SPAM Act, 15 U.S.C. § 7701-7713; Truth in Lending Act, 15 U.S.C. §§ 1601-1667f; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u; Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o; Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108.

⁴ See, e.g., *FTC v. Flora*, No. SACV11-00299-AG-(JEMx) (C.D. Cal., filed Feb. 22, 2011), press release available at <http://www.ftc.gov/opa/2011/02/loan.shtm>; *FTC v. Johnson*, No. 2:10-cv-02203 (D. Nev., filed Dec. 21, 2010), press release available at <http://www.ftc.gov/opa/2011/01/iworks.shtm>; *FTC v. Infusion Media, Inc.*, No. 09-CV-01112 (D. Nev., filed June 22, 2009), press release available at <http://www.ftc.gov/opa/2010/10/googlemoney.shtm>; *FTC v. Pricewert LLC*, No. 09-CV-2407 (N.D. Cal., filed June 1, 2009), press release available at <http://www.ftc.gov/opa/2010/05/perm.shtm>; *FTC v. Innovative Mktg., Inc.*, No. 08-CV-3233-RDB (D. Md., filed Dec. 2, 2008), press release available at <http://www.ftc.gov/opa/2011/01/winsoftware.shtm>; *FTC v. CyberSpy Software, LLC*, No. 08-CV-0187 (M.D. Fla., filed Nov. 5, 2008), press release available at <http://www.ftc.gov/opa/2008/11/cyberspy.shtm>; *FTC v. Spear Sys., Inc.*, No. 07C-5597 (N.D. Ill., filed Oct. 3, 2007), press release available at <http://www.ftc.gov/opa/2009/07/spear.shtm>; *FTC v. ERG Ventures, LLC*, No. 3:06-CV-00578-LRH-VPC (D. Nev., filed Oct. 30, 2006), press release available at <http://www.ftc.gov/opa/2006/11/mediamotor.shtm>; *FTC v. Enternet Media*, No. CV 05-7777 CAS (C.D. Cal., filed Nov. 1, 2005), press release available at <http://www.ftc.gov/opa/2006/09/enternet.shtm>; *FTC v. Cleverlink Trading Ltd*, No. 05C 2889 (N.D. Ill., filed May 16, 2005), press release available at <http://www.ftc.gov/opa/2006/09/spammers.shtm>.

2. Federal Trade Commission Investigations

Our ability to protect consumers in cases involving unfair or deceptive practices online often depends on navigating an environment in which scam artists easily manipulate the domain name system to evade detection. We routinely consult Whois services in Internet investigations to identify website operators. However, the Whois information often contains incomplete or inaccurate data or, increasingly, proxy registrations, which shield the contact information for the underlying domain name registrant. To give just one example, in a case against illegal spammers promoting pornography websites, false Whois data slowed down our ability to identify and locate the individuals behind the operation,⁶ requiring the FTC investigators to spend additional time consulting multiple other sources. In other instances, we have encountered Whois information with facially false address and contact information, including websites registered to “God,” “Bill Clinton,” and “Mickey Mouse.”⁷ In Internet investigations, identifying domain name registrants immediately is especially important, as fraudsters often change sites frequently to evade detection.

The FTC has highlighted these concerns about Whois with ICANN and other stakeholders for more than a decade.⁸ In particular, we have testified before Congress on Whois

⁵ See, e.g., *In the Matter of Facebook, Inc.*, FTC File No. 092-3184 (proposed settlement posted for public comment on Nov. 29, 2011), *press release available at* <http://www.ftc.gov/opa/2011/11/privacysettlement.shtm>; *In the Matter of ScanScout, Inc.*, FTC File No. 102-3185 (proposed settlement posted for public comment on Nov. 8, 2011), *press release available at* <http://www.ftc.gov/opa/2011/11/scanscout.shtm>; *In the Matter of Google, Inc.*, FTC Docket No. C-4336 (Oct. 13, 2011), *press release available at* <http://www.ftc.gov/opa/2011/10/buzz.shtm>; *U.S. v. W3 Innovations, LLC*, No. CV-11-03958-PSG (N.D. Cal., filed Aug. 12, 2011), *press release available at* <http://www.ftc.gov/opa/2011/08/w3mobileapps.shtm>; *U.S. v. Teletrack, Inc.*, No. 1:11-CV-2060 (filed June 24, 2011), *press release available at* <http://www.ftc.gov/opa/2011/06/teletrack.shtm>; *In the Matter of Lookout Servs., Inc.*, FTC Docket NO. C-4326 (June 15, 2011), *press release available at* <http://www.ftc.gov/opa/2011/05/ceridianlookout.shtm>; *In the Matter of Ceridian Corp.*, FTC Docket No. C-4325 (June 8, 2011), *press release available at* <http://www.ftc.gov/opa/2011/05/ceridianlookout.shtm>; *In the Matter of Twitter, Inc.*, FTC Docket NO. C-4316 (Mar. 2, 2011), *press release available at* <http://www.ftc.gov/opa/2011/03/twitter.shtm>.

⁶ See *FTC v. Global Net Solutions, Inc.*, No. CV-S-05-0002-PMP (LRL) (D. Nev., filed Jan. 3, 2005), *press release available at* <http://www.ftc.gov/opa/2005/11/globalnet.shtm>.

⁷ See *Hearing on the Accuracy and Integrity of the Whois Database Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2002) (Prepared Statement of the Federal Trade Commission, presented by Howard Beales).

⁸ See Letter from Comm’r Jon Leibowitz to Peter Dengate Thrush, (former) Chairman, ICANN Board of Directors, Dr. Paul Twomey, (former) President and CEO, ICANN, and Jonathan Nevett, (former) Chair, Registrar Constituency (Feb. 8, 2008) [hereinafter “Whois and RAA Letter”]; *Hearing on Internet Governance: The Future of ICANN Before the Subcomm. on Trade, Tourism, and Econ. Dev. of the Senate Committee on Commerce, Science, and Transp.*, 109th Cong. (2006) (Prepared Statement of the Federal Trade Commission, presented by Comm’r Leibowitz), *available at* <http://www.ftc.gov/os/testimony/P035302igovernancefutureicanncommissiontestsenate09202006.pdf>; *Hearing on ICANN and the Whois Database: Providing Access to Protect Consumers from Phishing*

information several times, issued a Commission statement on Whois services, delivered presentations to the GAC, participated as a panelist in joint sessions organized by the GAC and the Generic Names Supporting Organization (GNSO), provided briefings to the ICANN Board, and worked directly with a wide range of stakeholders to develop pragmatic solutions to this difficult problem.

The FTC has not been alone in highlighting the importance of this issue or in its effort to urge ICANN to develop effective solutions to Whois problems. In 2003, the Organization for Economic Co-operation and Development's Committee on Consumer Policy issued a policy paper unequivocally stating that for commercial registrants, all contact data "should be accurate and publicly available via Whois."⁹ In 2007, the GAC issued policy principles urging ICANN stakeholders to "improve the accuracy of Whois data, and in particular, to reduce the incidence of deliberately false Whois data."¹⁰ In 2009, global law enforcement agencies, led by the U.S. Federal Bureau of Investigation and the UK Serious Organized Crime Agency, issued a set of law enforcement recommendations to improve a wide range of ICANN policies, including the accuracy of Whois data. In October 2011, the GAC reiterated its previous requests for the Board to address the law enforcement recommendations.¹¹ Last week, ICANN's own Whois Review Team issued its draft report, acknowledging the "very real truth that the current system is broken

Before the Subcomm. on Fin. Institutions and Consumer Credit of the House Comm. on Fin. Servs., 109th Cong. (2006) (Prepared Statement of the Federal Trade Commission, presented by Eileen Harrington), available at <http://www.ftc.gov/os/2006/07/P035302PublicAccessstoWHOISDatabasesTestimonyHouse.pdf>; FTC, Prepared Statement of the Federal Trade Commission before the ICANN Meeting Concerning Whois Databases (June 2006); Letter from Comm'r Jon Leibowitz to Dr. Paul Twomey, (former) President and CEO, ICANN (Feb. 9, 2005); *Hearing on the Accuracy and Integrity of the Whois Database Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2002) (Prepared Statement of the Federal Trade Commission, presented by Howard Beales); and Comment of the Staff of the FTC Bureau of Consumer Protection before the ICANN Public Comment Forum, In the Matter of Tentative Agreements among ICANN, U.S. Dep't of Commerce, and Network Solutions, Inc. (Oct. 29, 1999).

⁹ OECD, *Consumer Policy Considerations on the Importance of Accurate and Available Whois Data*, at 8 (June 2, 2003), available at [http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=dsti/cp\(2003\)1/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=dsti/cp(2003)1/final&doclanguage=en).

¹⁰ Governmental Advisory Committee, GAC Principles Regarding gTLD Whois Services, at 4.1 (Mar. 28, 2007), available at https://gacweb.icann.org/download/attachments/1540132/WHOIS_principles.pdf?version=1&modificationDate=1312460331000.

¹¹ See Governmental Advisory Committee, GAC Communiqué-Dakar, at III (Oct. 27, 2011), available at <https://gacweb.icann.org/download/attachments/4816912/Communique+Dakar+-+27+October+2011.pdf?version=1&modificationDate=1319796551000>.

and needs to be repaired.”¹² ICANN has failed to adequately address this problem for over a decade.

A rapid, exponential expansion of gTLDs has the potential to magnify both the abuse of the domain name system and the corresponding challenges we encounter in tracking down Internet fraudsters. In particular, the proliferation of existing scams, such as phishing, is likely to become a serious challenge given the infinite opportunities that scam artists will now have at their fingertips. Fraudsters will be able to register misspellings of businesses, including financial institutions, in each of the new gTLDs, create copycat websites, and obtain sensitive consumer data with relative ease before shutting down the site and launching a new one. The potential for consumer confusion in other variations of these types of scams is significant. As an example, “ABC bank” could be registered in .com, but another entity could register “ABC” in a new .bank gTLD, and a different entity could register “ABC” in a new .finance gTLD. Scam artists could easily take advantage of this potential for confusion to defraud consumers.

In addition, the number of individuals with access to the Internet infrastructure will substantially increase. This creates an increased possibility that malefactors, or others who lack the interest or capacity to comply with contractual obligations, will operate registries. It is inevitable that malefactors may still pass a background screening due to inadequate or incomplete records. Or, malefactors could use straw men to assist them and be the party “on record” with ICANN. Either way, a registry operated by a bad actor would be a haven for malicious conduct. As discussed below, ICANN’s contractual compliance office has encountered tremendous challenges trying to secure compliance under the current framework, and the unprecedented increase in domain registries only increases the risk of a lawless frontier in which bad actors violate contractual provisions with impunity, resulting in practices that ultimately harm consumers. The gTLD expansion will also increase the number of entities in foreign jurisdictions with relevant data on registrants. This will likely cause further delays in obtaining registrant data in investigations of global fraud schemes. In short, the potential for consumer harm is great, and ICANN has the responsibility both to assess and mitigate these risks.¹³

¹² See Whois Review Team, Final Report (Draft), at 5 (Dec. 5, 2011), *available at* <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf>.

¹³ As the U.S. government, the GAC, and several other stakeholders have urged, ICANN should conduct a more thorough economic study to assess the costs and benefits of introducing a significant number of new gTLDs. See Letter from Assistant Secretary Strickling to Rod Beckstrom, President and CEO, ICANN (Dec. 2, 2010), *available at* <http://forum.icann.org/lists/5gtld-guide/pdf3Ep9MhQVGO.pdf>; Governmental Advisory Committee, GAC Communiqué—Cartagena, at 5 (Dec. 9, 2010), *available at* https://gacweb.icann.org/download/attachments/1540144/GAC_39_Cartagena_Communique.pdf?version=1&modificationDate=1312225168000; Letter from Janis Karklins, (former) Chairman, Governmental Advisory Committee to Peter Dengate Thrush, (former) Chairman, ICANN Board of Directors (Aug. 18, 2009), *available at* <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf> (“The GAC remains concerned that the threshold question has not been answered whether the introduction of new gTLDs provides potential benefits to consumers that will not be outweighed by the potential harms.”).

3. Recommended Changes to the New gTLD Program

In light of the dramatically increased opportunity for consumer fraud, distribution of malware, and proliferation of other malicious activity, it is critical that ICANN take immediate steps to ensure that consumer protection is not compromised by the introduction of new gTLDs. Accordingly, we urge ICANN to: (1) implement the new gTLD program as a pilot program and substantially reduce the number of gTLDs that are introduced in the first application round, (2) strengthen ICANN's contractual compliance program, in particular by hiring additional compliance staff, (3) develop a new ongoing program to monitor consumer issues that arise during the first round of implementing the new gTLD program, (4) conduct an assessment of each new proposed gTLD's risk of consumer harm as part of the evaluation and approval process, and (5) improve the accuracy of Whois data, including by imposing a registrant verification requirement. We strongly believe that ICANN should address these issues before it approves any new gTLD applications. If ICANN fails to address these issues responsibly, the introduction of new gTLDs could pose a significant threat to consumers and undermine consumer confidence in the Internet.¹⁴

As you know, the GAC and several other stakeholders in the ICANN Community urged the Board to revise the gTLD applicant guidebook, which sets forth the new gTLD evaluation and approval process. Stakeholders urged ICANN to address the potential for malicious conduct and implement certain consumer protection safeguards before authorizing the launch of the new gTLD program.¹⁵ Although changes were made to the guidebook to include some safeguards,

¹⁴ We are aware that a wide range of stakeholders has expressed concern about potential conflicts of interest on the ICANN Board. *See, e.g.,* Eric Engleman, *ICANN Departures After Web Suffix Vote Draw Criticism*, Wash. Post, August 20, 2011, available at http://www.washingtonpost.com/business/icann-departures-draw-criticism/2011/08/19/gIQAzpeDTJ_story_1.html. According to these critics, several members of the Board have affiliations with entities that have a financial stake in the expansion of new gTLDs. *See* Esther Dyson, *What's in a Domain Name?* (Aug. 25, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/08/25/whats-in-a-domain-name/>.

In light of the potential for the appearance of impropriety to exist, we believe that ICANN should promote transparency, accountability, and confidence in its decision-making processes by developing a more comprehensive conflict of interest and ethics policy that prevents individuals with actual and potential conflicts of interest from participating in the deliberations and decisions for which the conflict exists or which raise an appearance of impropriety. We are aware of the Board's ongoing effort to review and revise its current conflict of interest policies. *See* Board Member Rules on Conflicts of Interest for New gTLDs (Dec. 8, 2011), <http://www.icann.org/en/minutes/resolutions-08dec11-en.htm#4>. The implementation of a more robust and comprehensive conflict of interest policy is especially important in light of the public interests that ICANN is charged with protecting, and the substantial impact the Board's decisions has on consumers operating in the online world. Accordingly, we encourage ICANN to complete the ongoing reviews of its conflict of interest and ethics practices and implement a revised Board conflict of interest policy before approving any new gTLD applications.

¹⁵ These safeguards included imposing an obligation on new gTLD registry operators to respond to law enforcement requests; maintaining a requirement that new gTLD registry operators maintain a "thick" Whois service; expanding the categories of criminal offenses screened during the vetting process, which could serve as a basis for disqualifying new gTLD applicants; adding civil consumer protection decisions

ICANN failed to respond effectively to all of the concerns that were raised, did not implement some of its commitments to improve the new gTLD program, and did not provide adequate solutions to widely documented problems in the existing gTLD marketplace. Indeed, despite offering some protections, the safeguards now in place do not provide comprehensive solutions to the problems likely to arise as a result of the introduction of new gTLDs. For example, while registries will be required to maintain “thick” Whois services, the lack of meaningful obligations to ensure Whois accuracy, such as registrant verification, still hampers the ability of law enforcement agencies to track down Internet fraudsters quickly. We recognize that ICANN has taken some of the GAC’s concerns into account, but we urge ICANN to do more to protect consumers and adequately address law enforcement concerns.

A. Implement New gTLDs as a Pilot Program

Despite the modest improvements to the new gTLD program, overarching consumer protection concerns persist. As an initial matter, the potential number of expected new gTLDs is itself a serious challenge. The initial estimate for expected applications was 500, but recent estimates have suggested that there could be more than 1500 applications. If the number of approved new gTLDs reaches even the minimum estimate, the Internet landscape will change dramatically. Indeed, an increase from 22 existing gTLDs to 500 gTLDs would be an unprecedented expansion of the domain name system. Among other things, the number of registered websites is likely to increase exponentially, the number of registry operators and other actors with an operational role in the Internet ecosystem will expand, and the ability to locate and identify bad actors will be frustrated significantly due to a likely increase in the number of registries located in different countries and limited ability to obtain relevant data maintained abroad.

We understand that ICANN is currently considering batching applications in the event that the number of new gTLD applications exceeds initial expectations, and that it has set a maximum of 1,000 gTLDs to be introduced per year. We strongly believe that ICANN should substantially reduce the maximum number of new gTLDs that could be introduced in the initial round to a much smaller number. Indeed, doubling the number of existing gTLDs in one year would be an aggressive increase. The imposition of a more reasonable limit is necessary to curb

to the background screening process; publicly disclosing the names of the principal officers associated with the new gTLD application; and adding an extra point in the scoring criteria for applicants that include measures to promote Whois accuracy.

The U.S. Department of Commerce’s National Telecommunications and Information Administration, which serves as the U.S. representative to the GAC, contributed significantly to the GAC’s efforts to enhance protections for consumers and implement recommendations from law enforcement agencies. FTC staff provided input on these issues both as part of the U.S. delegation to the GAC and directly to ICANN. The Department of Commerce has worked extensively to enhance ICANN’s accountability and ensure that ICANN develops consensus-based policies in a fair, open, and transparent manner. We believe that ICANN represents an important multi-stakeholder model for Internet governance, which has been critical to keeping the Internet open and innovative, and we encourage ICANN to enhance its efficacy by implementing comprehensive solutions to these consumer protection issues.

the risks inherent in expanding the number of gTLDs, including the proliferation of malicious conduct. We recommend that ICANN use this round as a limited pilot program, as it has done in previous rounds, assess the organization's ability to evaluate, introduce, and manage additional gTLDs, conduct an assessment of the increased risks posed by the program, and then consider whether a more significant expansion would be appropriate.

B. Strengthen ICANN's Contractual Compliance Program

Currently, ICANN is ill-equipped to handle the contract enforcement for the 22 existing gTLDs and several hundred accredited registrars. In particular, ICANN lacks an adequate number of compliance staff, has failed to close contractual loopholes that limit the existing compliance staff's ability to take action against registrars and registries, and needs to implement a more rigorous enforcement program.¹⁶ The likely effect of introducing large numbers of new gTLDs is that it will significantly increase the number of entities that operate pursuant to registry contracts with ICANN. In addition, the number of registered domain names will increase as Internet users begin to register domains in new gTLDs. This will likely increase the number of complaints the compliance office receives, including those related to Whois data accuracy. Thus, the expansion of the gTLD space will require a substantial increase in resources devoted to contract enforcement and improvement of policies that hold both registries and registrars accountable.

During the GAC-Board consultations earlier this year, the Board announced its commitment to augment ICANN's contractual compliance function with additional resources. The GAC, in unambiguous terms, emphasized that a "strengthened contract compliance function must be in place prior to the launch of new gTLDs."¹⁷ Specifically, the GAC highlighted the

¹⁶ In the registrar context, despite its knowledge of proposed law enforcement recommendations to amend the Registrar Accreditation Agreement that were presented in October 2009, the Board only recently took action to ensure that these concerns would be addressed in contractual negotiations between the Board and the registrars. See <http://www.icann.org/en/minutes/resolutions-28oct11-en.htm#7>.

¹⁷ See GAC comments on the ICANN Board's response to the GAC Scorecard, at 9 (Apr. 12, 2011), available at <http://www.icann.org/en/topics/new-gtlds/gac-comments-board-response-gac-scorecard-12apr11-en.pdf>. The GAC stated:

The GAC appreciates the Board's agreement to strengthen ICANN's contractual compliance function. The GAC respectfully requests ICANN, in the coming weeks, to identify the amount of personnel it intends to hire to support the compliance function and the timeline for hiring. In particular, the GAC would like to know how many staff ICANN intends to have in place prior to the expected launch of new gTLDs. As ICANN adds new resources to its compliance program, the GAC encourages ICANN to ensure that it is staffed globally, perhaps using regional compliance officers consistent with the five RIR regions. The GAC believes that a robust compliance program is necessary to enforce registry and registrar contracts and that a strengthened contract compliance function must be in place prior to the launch of new gTLDs.

Id. (emphasis added).

need to hire enough staff to address contractual compliance issues for hundreds of new registry contracts. However, contrary to the Board’s commitment, ICANN has not yet hired additional compliance staff to support the registry contract support program. It is also unclear whether ICANN has taken any other steps to improve its contract enforcement program, and whether those steps are adequate to handle the myriad issues that will arise with such a dramatic increase in the number of registries. In FY12, ICANN budgeted only a 25 percent increase for all contractual compliance resources, despite the likelihood that the number of new gTLD contracts could increase in 2013 by over 2000 percent.¹⁸ Further, the total expected staffing level for contractual compliance in FY12 is equal to the staffing level in FY10,¹⁹ lacking the substantial increase necessary to respond to additional compliance issues resulting from the introduction of new gTLDs. Notably, ICANN’s own Whois Review Team has highlighted the lack of compliance resources available to address existing gTLD contractual concerns, recommending that ICANN should allocate “sufficient resources, through the budget process, to ensure that ICANN compliance staff is fully resourced to take a proactive regulatory role and encourage a culture of compliance.”²⁰

In addition to adequately staffing its contractual compliance program, ICANN should strengthen its contracts to ensure that registries and registrars are obligated to adhere to stringent policies that promote consumer trust and enhance security. In particular, these contracts should require verification of domain name registrants, impose further obligations on registrars for maintaining accurate Whois data, and hold domain name resellers accountable. ICANN should also ensure that the contracts provide adequate sanctions for noncompliance. In 2008, then-FTC Commissioner Leibowitz highlighted in his letter to ICANN that: “The FTC frequently has observed that transparent enforcement mechanisms are an essential element of effective private sector self-regulation and that there must be *meaningful consequences* for noncompliance.”²¹ ICANN’s Whois Review Team recently advocated for a similar approach, recommending in its draft final report that “ICANN should ensure that clear, enforceable and graduated sanctions apply to registries, registrars and registrants that do not comply with its Whois policies.”²² Significantly, ICANN must also ensure that its compliance team vigorously enforces these contracts.

¹⁸ See ICANN FY12 Operating Plan and Budget Fiscal Year Ending 30 June 2012, at 14, available at <http://www.icann.org/en/financials/adopted-opplan-budget-fy12-09sep11-en.pdf>.

¹⁹ *Id.* at 45.

²⁰ See Whois Review Team, Final Report (Draft), at 9 (Dec. 5, 2011), available at <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf>.

²¹ See Whois and RAA Letter, *supra* note 5, at 5 (emphasis in original). The letter addressed issues relating to registrar contracts, which were amended in 2009 to provide some intermediate sanctions, but the principle applies equally to registry contracts.

²² See Whois Review Team, Final Report (Draft), at 9 (Dec. 5, 2011), available at <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf>.

As the GAC and other stakeholders have emphasized, ICANN must adequately strengthen its contractual compliance program before it approves any new gTLD applications to ensure that consumers' interests are protected and the commitments made by gTLD registries are enforced.

C. Develop Program to Monitor Consumer Issues During New gTLD Implementation

Further, in light of the substantial impact the introduction of new gTLDs will likely have on consumers, the investment of additional resources into the contractual compliance program is really just the first step in developing an overall more effective approach. To address the issue in a comprehensive manner, we recommend that ICANN create a new program under its compliance framework that monitors consumer issues arising during the implementation of the new gTLD program, reviews the feasibility of existing mechanisms for addressing consumer issues, applies current contractual enforcement tools to resolve these issues, identifies areas where new policies may be needed, and outlines a plan for working with ICANN's supporting organizations on policy development processes that address these issues. We are aware that the compliance office has operated a C-Ticket System that captures and tracks complaints, many of which relate to consumer issues, and that ICANN follows up on complaints that fall within its purview. However, we believe that ICANN should supplement this work, and that the Board should provide more direction by approaching consumer issues more systematically and developing a dedicated program that is well resourced and that proactively addresses these issues.

ICANN should act now to ensure that consumer interests are protected in the gTLD implementation process. We understand that, pursuant to the Affirmation of Commitments, ICANN will conduct a review of the new gTLD program one year after it has been in operation, followed by subsequent reviews, and that the issue of consumer trust and consumer choice will be a key focus of that review.²³ We intend to participate actively in this review process.²⁴

²³ See Affirmation of Commitments, available at <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>. The Affirmation of Commitments states, in relevant part:

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years.

Id.

However, in advance of the competition, consumer trust, and consumer choice review, ICANN should create a program that monitors and addresses consumer issues on an ongoing basis to ensure that the potential for consumer harm resulting from the introduction of new gTLDs is addressed effectively and timely.

D. Evaluate Proposed gTLDs' Potential Harm to Consumers

Attention to consumer issues should not be relegated to an external review process but rather function as an integral part of the new gTLD evaluation process. During the GAC-Board new gTLD consultations, the GAC recommended that proposed gTLDs implicating regulated industries or gTLDs that were otherwise particularly susceptible to abuse (e.g., .kids, .bank) should receive additional vetting and scrutiny. The Board rejected this proposal and did not provide an alternative that adequately addresses this concern.²⁵ ICANN should conduct its own evaluation of the potential consumer risks associated with each proposed new gTLD, especially those that will inherently raise heightened concern among stakeholders. Accordingly, we urge ICANN to reconsider its decision not to apply additional vetting or scrutiny to proposed gTLDs associated with regulated industries or gTLDs that are particularly susceptible to abuse and pose an increased risk of consumer fraud, or to otherwise incorporate the risk of consumer harm into the evaluation process for each proposed gTLD.

E. Improve Whois Accuracy

As we have advocated for more than a decade, and as discussed earlier in this letter, ICANN should improve the accuracy of Whois data.²⁶ A wide range of stakeholders has strongly urged ICANN to address this problem, including the GAC, which noted in its 2007

²⁴ We are aware that a cross-constituency working group has been formed to address preliminary matters related to this review. We are also aware that ICANN will be reviewing aspects of new gTLD implementation as a result of concerns raised by the GAC.

²⁵ The Board supplemented the evaluation and approval process with a GAC early warning mechanism, which allows individual governments to notify applicants via the GAC that they have concerns about a proposed gTLD, as well as preserving the ability of the GAC to provide consensus advice on a particular application. Certainly, these mechanisms allow governments an important opportunity to communicate their views about proposed gTLDs, but they do not obviate the need for ICANN to conduct its own assessment of potential consumer harm during the evaluation process.

²⁶ *See supra* note 8. We recognize, as we have done in the past, that ICANN's Whois policies should protect the privacy of individual registrants. *See* FTC, Prepared Statement of the Federal Trade Commission before the ICANN Meeting Concerning Whois Databases, at 9 (June 2006) ("The FTC, as the primary enforcement agency for U.S. consumer privacy and data security laws, is very concerned about protecting consumers' privacy. Thus, the Commission has always recognized that non-commercial registrants may require some privacy protection from *public* access to their contact information, without compromising appropriate real-time access by law enforcement agencies.").

Whois principles, that “stakeholders should work to improve the accuracy of Whois data, and in particular, to reduce the incidence of deliberately false Whois data.”²⁷

The violations of Whois data accuracy requirements are pervasive, and ICANN’s response to this persistent problem has been woefully inadequate. As ICANN’s own Whois Review Team recognized,

Cyber security and cybercrime experts make extensive use of WHOIS to thwart and respond to a varied set of threats. Information contained within WHOIS is invaluable in these efforts and practitioners have conveyed to us their frustration at the continuing high levels of inaccuracy of WHOIS data. **We find that ICANN has neglected to respond to the needs of this community both in the accuracy of WHOIS data and in response times for access and action.**²⁸

We believe, as law enforcement agencies from around the world have advocated, that registrars should be required to implement verification procedures when registering domain names. Such efforts could significantly reduce the incidence of completely inaccurate data. In addition to imposing verification requirements, ICANN should adopt any other appropriate measures to reduce the amount of inaccurate Whois data.²⁹ We urge ICANN to develop and to implement a plan to address the problem of Whois inaccuracy before new gTLDs are introduced, which will likely exacerbate these problems.

In sum, the dramatic introduction of new gTLDs poses significant risks to consumers, and ICANN should take the steps described above to reduce the potential for consumer injury before approving any new gTLD applications. We look forward to working with ICANN to ensure that adequate consumer protection safeguards are implemented in the new—and existing—gTLD marketplace.

²⁷ See Governmental Advisory Committee, GAC Principles Regarding gTLD Whois Services, at 4.1 (Mar. 28, 2007), *available at* https://gacweb.icann.org/download/attachments/1540132/WHOIS_principles.pdf?version=1&modificationDate=1312460331000.

²⁸ See Whois Review Team, Final Report (Draft), at 7 (Dec. 5, 2011), *available at* <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf> (emphasis added). In March, an Interpol representative delivered a blistering critique of the Whois system during ICANN’s Forum on DNS Abuse, noting that “Accurate WHOIS is a joke. It just doesn't happen. We don't see it. We never get it. Even if we do see something within it that might give us indications, it's -- it's always a dead end and it's a waste of time even trying. And for me, what's the point in having a WHOIS database if it can't be accurate? Somebody has to be responsible for having that accurate. Somebody has to be. I'm sorry. And whoever that “somebody” is, can you please step up to the plate and do your work?” See Transcript: Forum on DNS Abuse (Mar. 14, 2011), *available at* <http://svsf40.icann.org/node/22219>.

²⁹ See also Whois Review Team, Final Report (Draft), at 9 (Dec. 5, 2011), *available at* <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf> (recommending that ICANN take appropriate measures to reduce the number of unreachable Whois registrations).

Sincerely,



Jon Leibowitz
Chairman



J. Thomas Rosch
Commissioner



Edith Ramirez
Commissioner



Julie Brill
Commissioner

cc: The Honorable John D. Rockefeller IV
Chairman, Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Kay Bailey Hutchison
Ranking Member, Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Fred Upton
Chairman, Committee on Energy and Commerce
United States House of Representatives

The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
United States House of Representatives

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives

The Honorable Bob Goodlatte
Chairman
Subcommittee on Intellectual Property, Competition, and the Internet
Committee on the Judiciary
United States House of Representatives

The Honorable Melvin Watt
Ranking Member
Subcommittee on Intellectual Property, Competition, and the Internet
Committee on the Judiciary
United States House of Representatives

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
United States House of Representatives

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications and Technology
Committee on Energy and Commerce
United States House of Representatives

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
United States House of Representatives

The Honorable G.K. Butterfield
Ranking Member
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
United States House of Representatives

The Honorable John Bryson
Secretary
United States Department of Commerce

The Honorable Lawrence E. Strickling
Assistant Secretary for Communications and Information and Administrator
National Telecommunications and Information Administration
United States Department of Commerce



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More Problems Crop Up With Universal Acceptance of Top Level Domains

Feb 07, 2014 11:26 AM PDT | Comments: 3 | Views: 25,026

By [Ram Mohan](#)



I've often found truth in the famous [George Santayana quote](#), "Those that cannot remember the past are doomed to repeat it." That's an apt warning for what is currently happening — again — with the hundreds of new generic Top Level Domains (gTLDs) that are launching ... and failing to work as expected on the Internet.

First, a quick refresher: As most *CircleID* readers know, in the early 2000s, seven new gTLDs were launched: .AERO, .BIZ, .COOP, .INFO, .MUSEUM, .NAME and .PRO. Aside from Country Code TLDs (ccTLDs), these were the first top-level changes to the DNS since the early days of the Internet.

Any TLDs that were more than three characters long promptly ran into usability issues. I know this from first-hand experience with .INFO, for which my company, Afilias, is the registry operator. With .INFO's position as the most popular of all new gTLDs, I spent a good part of my time, in the first five years after .INFO launched, working with vendors to get their systems to accept .INFO email addresses and .INFO domain names as valid. Now, 13 years later, it's still possible to find systems that reject .INFO addresses. From that experience, I developed my three rules of TLD acceptance.

Mohan's Three Rules of TLD Acceptance:

- 1. An old TLD will be accepted more often than a new TLD.**
- 2. An ASCII-only TLD will be accepted more than an IDN TLD.**
- 3. A two or three letter TLD will be accepted more often than a longer ccTLD or gTLD.**

Web browsers use different algorithms to improve security and certificate processing. They also have varying rules for how to deal with a website address in a top-level domain that the browser does not recognize (including the use of a technique called search-list processing, which sometimes exacerbates the problem). The use of different algorithms combined with search-list

processing can pierce the boundary between private and public administration of namespaces. In addition, many applications and apps that use the Internet still refer to a locally held (and quickly outdated) list of "valid" TLD names, rather than using the DNS to determine domain name validity, despite being warned away from this approach in the IETF's [RFC 3696](#).

While the issue of universal acceptance never really got solved, the topic takes on heightened importance due to the creation of hundreds of new top-level domains on the Internet. In the earlier set of new TLDs, the primary problem occurred for TLD strings with a length of more than three characters. However, in the current crop of new TLDs, even three character strings get caught in the mix. What was previously considered primarily an infrastructure-level issue is now poised to become a major user-level issue, with negative impact on both the regular Internet user and inside corporations.

In 2003 ICANN's [Security and Stability Advisory Committee](#) (SSAC), of which I am a member, studied problems with the support of new top-level domains by infrastructure and software providers and made several [recommendations](#), including:

- Internet infrastructure providers that have their own customised software for Internet service provision should test the capability of the software to support new TLDs, and correct problems quickly where they are found.
- Internet software application developers should be encouraged to review their software for support of new TLDs. Where problems are found, application developers should upgrade their software, and provide these updates to their user base.
- A central repository of known, commonly used software that has compatibility problems (e.g., DNS resolver software used by common operating systems) with new TLDs, and instructions for how to upgrade the software should be created. This repository would facilitate Internet infrastructure providers and software application developers to provide necessary software updates to users of the Internet to resolve known compatibility issues.

That was over a decade ago! It's somewhat astonishing that these recommendations are as valid today as they were then, and that readiness is still not measurable.

For example, try to resolve a new TLD such as .email or .onl using a mobile Android device. On my Android phone, typing in www.nic.onl is rejected by the browser and handed off to be treated as a search query, not a DNS query. However, if you typed in the same web addresses on a browser — Chrome, Internet Explorer, Firefox or Safari — in a desktop environment, they go to the right destination. The experience varies even further if you try to resolve a multilingual (Internationalized Domain Name or IDN) top level domain on your browser or email system — and over 100 internationalized top level domains are being activated on the Internet this year. For instance, typing in www.nic.移动 or www.nic.xn--6frz82g, the newly delegated .MOBI TLD in Chinese, Safari shows the ASCII string only in the address bar, while Chrome and Firefox show

the Chinese string; Internet Explorer dumps it to a search result screen, Users deserve to be taken to the correct destination when they type in an address in their browsers, regardless of the type of device they use or language they type the address in.

The problem isn't technical in nature; we know how to address the technical issues. What's needed is coordination and collaboration between far removed actors in the Internet world, so that the software and systems they create can act in a standard way and return a predictable experience to users. The era of hundreds of new TLDs requires new energy, focus and cooperation. New gTLD owners, software developers, network providers and infrastructure companies must work together to ensure their software, browsers, forms, apps, email and other systems are compliant and can handle all delegated new TLDs.

The stakes are even higher than they were in 2001, when I first encountered serious problems with the universal acceptance of .INFO, followed thereafter by .AERO and .MOBI. The need for a coordinated response and clearly visible results to the universal acceptance challenge has never been greater; not doing so could deal a devastating blow to the utility, relevance and legitimacy of all new top level domains. Ensuring universal acceptance should become one of the foremost priorities of all entities engaged in the Domain Name System and using the Internet.

By [Ram Mohan](#), Executive Vice President & CTO, Afilias. Mr. Mohan brings over 20 years of technology leadership experience to [Afilias](#) and the industry.

Related topics: [Cybersecurity](#), [DNS](#), [Domain Names](#), [ICANN](#), [New TLDs](#)

Comments

Ram,I agree that we need coordination and

[Alex Tajirian](#) – Feb 07, 2014 1:11 PM PDT

Ram,

I agree that we need coordination and collaboration, but it must also encompass additional parties to fight a new flood of signal confusions, cybersquatting, phishing, and security breaches. It must involve registries, webhosting companies, parking/monetization companies, and ICANN.

I am also not sure about your third rule, “A three-letter gTLD will be accepted more often than a longer ccTLD or gTLD.” I don’t understand what you mean by “accepted” and “a longer ccTLD.”

Hi Alex,I'm glad you agree that more

[Ram Mohan](#) – Feb 07, 2014 3:03 PM PDT

Hi Alex,

I'm glad you agree that more collaboration is needed. You're spot on about the wide range

of parties who need to be actively engaged, as well as the need for an organization to coordinate this - perhaps ICANN, perhaps the W3C, perhaps others?

Regarding my third rule - new IDN ccTLDs are more than 3 characters long. They will run into the same problem of software and systems that discriminate against TLDs that are more than 3 characters long. Therefore a 3 letter gTLD will be accepted more than a longer gTLD or ccTLD.

Many email systems, web applications, forms and applications on the Internet, and systems and hardware have at best obsolete rules about what constitutes a valid TLD and at worst have completely wrong rules about what constitutes a valid TLD (see RFC 3696 reference above). This ecosystem should be able to handle the introduction of new TLD's without requiring a full scale revamp each time. The DNS itself handles this well - new names can be introduced and nameservers are updated within minutes.

The big change is that universal acceptance has now moved from "infrastructure" to mainstream, and the impact could be significant.

-Ram

Ram, Thanks for the clarification.

Alex Tajirian – Feb 07, 2014 4:34 PM PDT

Ram, Thanks for the clarification.

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TESTIMONY
OF
DAWN GROVE
CORPORATE COUNSEL
KARSTEN MANUFACTURING CORPORATION
PROTECTING INTERNET FREEDOM: IMPLICATIONS OF ENDING U.S. OVERSIGHT
OF THE INTERNET.
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL
COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 14, 2016

Executive Summary

Dawn Grove, who serves as Corporate Counsel, is appearing on behalf of Karsten Manufacturing Corporation (Karsten). Karsten is the parent company of PING, a U.S. manufacturer of premium custom-fit golf equipment, and PING REGISTRY PROVIDER, INC. (PING REGISTRY), the ICANN contracted party that operates the .PING branded top level domain name.

While many have diligently worked on the IANA transition for several years, ICANN's structure remains seriously flawed, and rushing the transition through now in its current state will endanger manufacturers' rights to their trademarked brand names, severely disadvantage states' rights, jeopardize national security, and prevent the safeguarding of the Internet freedoms we have come to depend on.

* * * * *

Good morning, Chairman Cruz, Ranking Member Coons and members of the Subcommittee,

I thank you for this opportunity to share the view of a U.S. manufacturer and its subsidiary's experience as an ICANN contracted party regarding the proposed IANA transition. Many thanks to you for caring about these most important and time-sensitive issues.

I. Introduction

My name is Dawn Grove, Corporate Counsel for Karsten Manufacturing Corporation. I also chair the Arizona Manufacturers Council and serve on the board of directors of the Arizona Chamber of Commerce & Industry, both of which oppose the current IANA transition. (See attached portions of the Arizona Chamber of Commerce & Industry 2016 Business Agenda.) Karsten Manufacturing Corporation is the parent company of both PING and PING REGISTRY. PING is one of the top three golf equipment brands in the U.S. and provides over 800 jobs in Arizona that people want to hang onto—nearly 60% of our workforce has worked with us for over 10 years, and nearly 30% of our workforce has worked with us for over 20 years. I have worked at Karsten for only 18 years, so I am relatively new. We are a closely held, private family business started by my grandfather in his garage, and we have been passionately designing and manufacturing custom-fit premium golf equipment in Arizona for the past 57 years.

PING has built a reputation for innovation, design, quality, and service and we actively protect our brand name in many ways including with trademarks throughout the world. While golf clubs are our bread and butter, we make and license a wide variety of products—apparel, hats, gloves, backpacks, towels, software, cradles to use iPhones to analyze a golfer's putting strokes; Apple even once licensed our PING trademark for its social media for a number of years. We have vigilantly protected our brand name in many categories, including for domain name registry services. Our name is our lifeblood, and we aim to ensure that the PING name reflects the innovation and perfection we put into every one of our custom-built golf clubs.

II. Our Experiences With ICANN's Monopoly

Despite the extremely high cost of applying for a gTLD—the application fee unilaterally set by ICANN is \$185,000—Karsten, through its affiliated company, PING REGISTRY, paid the \$185,000 application fee for .ping. In our application, we informed ICANN of our well-known rights to our famous PING marks. We also paid legal experts to help us navigate the application process, and we set aside hundreds of thousands of dollars for startup costs for the registry, all to satisfy ICANN's extremely unpredictable application process. We understood then, as we do now, that the Internet is also a place to lead as innovators and wanted to ensure a secure way of communicating with our customers and protecting them from counterfeit products in the future. More importantly, we did not want to risk having someone else obtain the exclusive right to use our PING mark as a registry term via a contract with ICANN. It ended up being the right decision, because a wealthy ICANN insider based in India that had never made or sold a PING product, had not trademarked the name throughout the world or otherwise had any respectable claim to our name, filed a competing application with ICANN for .ping. The fact that one of the other applicant's affiliated companies had a number of Uniform Dispute Resolution Policy decisions against it did not deter the applicant. It should have, since the Applicant Guidebook makes it clear that parties with a history of adverse domain name decisions should not apply to run registries.

At first, we felt hopeful that ICANN would do its job, as any company would that takes due diligence seriously, and vet proposed registries against known trademark registrations. ICANN is not above the trademark laws of the United States and should not offer registry contracts in violation of well-established trademark rights. We also expected ICANN to follow its own charter, bylaws, and the Applicant Guidebook, and disqualify the competing applicant based on our trademark rights and the other applicant's history of adverse domain name decisions against its affiliate. To be sure that ICANN's applicant background review did not miss these prior adverse decisions, we made ICANN directly aware through the filing of public comments, which is the method of communicating to ICANN about such concerns. Despite ICANN's actual knowledge of the India company's problematic history and actual knowledge of our rights in our global brand, it became clear that ICANN had no intent to vet the other applicant or deter its desire to run a registry consisting of our PING mark. We realized there was no structural incentive for ICANN to follow its bylaws and rules (which would have prevented ICANN from awarding our name to the other applicant), and there was no process and no one willing to actively hold ICANN's new gTLD staff accountable. You see, when there are competing applications for the same term, ICANN simply forces all applicants into an auction. When we asked ICANN to postpone the auction and provided it, again, with actual notice of our trademark rights, ICANN's counsel threatened to terminate our application for .PING if we went to the courts to seek relief. If ICANN terminated our application for seeking to enforce our trademark rights, it would have ensured that the company from India would obtain the operating contract to run a registry consisting of our brand. We had no choice but to pay ICANN's auction price. I cannot begin to tell you how scary it was for my family to go into that auction not knowing whether we would be able to keep our PING name after all these years. We ended up paying ICANN \$1.5 million at the auction to reclaim our name from ICANN. If ICANN is prepared to sell a domain name consisting of our brand to a third party with full knowledge of our trademark rights unless we paid an enormous sum, all the while under the close watch of the Department of Commerce, you can imagine how this experience has left us very wary of how a monopoly, such

as ICANN, will act if the Department of Commerce completely abdicates its historic oversight role.

III. Our Experience is Early, But Not Unique

ICANN benefits to the tune of potentially millions of dollars every time there's an auction and, indeed, has taken over \$230 million from businesses in auction proceeds alone since it rolled out its top level domain name program. ICANN also accepted an extra million dollars in a side deal with the .sucks registry, which company turned the Trademark Clearinghouse on its head and instead of using it for its purpose of allowing trademark owners a central place to detail their registered trademarks, allows the unscrupulous to pressure brands into purchasing .sucks domain registrations at unusually high prices to avoid having people post defaming comments on brandname.sucks websites. Of course, twisting brand owners' arms for high payments based on their trademark rights should never be the intended purpose of any registry, but ICANN's financial structure derives its revenue from selling more and more top and second level gTLD's to the business community; holding more auctions increases its resources and power to influence others. Its revenue has no tie to whether it follows its own charter and rules.

Commerce says ICANN made all the changes multistakeholders wanted and that Commerce cannot influence the process. However, there were fundamental changes requested by the global multistakeholders which the ICANN Board rejected at the Dublin meeting last year. For example, the global multistakeholders requested a very common Single Member Model of governance where the stakeholders would be empowered as the Single Member to address issues on an ongoing basis. The ICANN Board rejected this in favor of an untested Sole Designator Model of governance that only allows the multistakeholders to come together as an "Empowered Community" to address crises on occasion, rather than day-to-day oversight, assuming the whole world of global stakeholders can agree on what constitutes such a crisis. It was highly rumored that the Board's position was that it would rather there be no transition than a transition with the Single Member Model in place. Predictably, the members of the multistakeholder community within the Cross Community Working Group for Accountability caved under the pressure rather than stand up to the ICANN Board and the transition plan now anticipates the Sole Designator experiment in Internet governance. Instead of implementing the change to the bylaws this spring so that they could be tested for a few months prior to the proposed transition, the ICANN Board made the accountability reforms contingent on the transition, signaling that the ICANN Board may not really believe that it should improve its accountability to the community.

IV. This Handoff Is More Than a Technical Matter

ICANN is currently accountable to NTIA for both policy and technical functions until a transition is made away from NTIA oversight. NTIA has announced that it is now ready to transition its stewardship of the Internet policy and technical functions to ICANN and its global stakeholders. Following the transition, ICANN will be a stand-alone monopoly accountable only to its stakeholders, including 162 foreign government members and 35 "observers" (the "Governmental Advisory Committee" or "GAC"). Under recent accountability reforms, which are set to become effective only upon transition, GAC "consensus advice" must be taken unless overridden by a supermajority of the ICANN Board. If the policy functions were to remain under the oversight of the Department of Commerce, perhaps the transition would not be as

troubling. However, the transition is not merely just about who performs technical functions, no matter how many times proponents of the transition make that claim or call it just a spreadsheet. If there were nothing at stake here, none of us would be here and none of the advocates who are pushing hard for this transition to occur would be pushing as hard as they are.

V. No Role for State Governments

State governments are excluded from participating as voting members of the GAC. The only way for a State government to have its concern reach a vote within the GAC is if the NTIA decides to champion the State's cause. Even assuming the NTIA were to decide to champion such causes, the NTIA's voice will be lessened in the GAC following transition. The United States will be a mere equal with other governments, such as Iran, Russia, or even tiny countries like Grenada. States, such as California, Texas, and New York, whose GDP and populations dwarf many GAC members, will have no voting seat at the table. With the U.S. Government giving up its oversight role, U.S.-based law enforcement agencies will be on the same footing as agencies from other countries. With foreign interests leading the charge to move ICANN out of the U.S., registries and registrars may be less likely to respond to information requests from various State Attorneys General. This will make it harder for federal law enforcement and State Attorneys General to determine where threats are originating from that impact its citizens. If the ICANN model is so inclusive, where are the seats at the GAC table for the 50 sovereign States?

VI. Expanded Role for Foreign Governments

The transition plan that ICANN sent to the NTIA lacked a promised provision in the bylaws making it clear that GAC "consensus advice" would not trigger a mandatory, supermajority ICANN board vote. Stakeholders who voted in Marrakech for the transition plan voted for the proposal based upon that promised provision ensuring that the GAC would remain in its advisory role and not dictate policy to the ICANN Board and community. Instead, as feared, governments now possess essentially unlimited power to "advise" the ICANN Board to take or not take actions. There are no guardrails around what subject matter GAC advice can cover or when that advice needs to be provided. Importantly, "consensus advice" does not require unanimous agreement of all countries on the GAC, only that there is "general agreement in the absence of any formal objection." In other words, the United States' GAC representative need not vote yes for "consensus advice" to be binding on the ICANN Board, only not object to what others are doing. Unless the ICANN Board has the political will to stand up against inappropriate GAC advice, and it has shown in the past that it does not, ICANN will be vulnerable to capture.

During its stewardship, the U.S. has strived to create an environment where the entire world community had free and open access to the Internet. It is essential to U.S. manufacturers that such an environment continues, and in order to accomplish that goal, the transition must ensure that checks and balances are in place to resist and prevent capture by governments which could act to restrict this access.

VII. Lack of NTIA Authority

The NTIA's involvement with ICANN has been via the Executive Branch and not with Congressional authority. The NTIA itself acknowledges that it never had authority to regulate ICANN:

“Throughout the various iterations of NTIA's relationship with ICANN, NTIA has never had the legal authority to exercise traditional regulatory oversight over ICANN”
https://www.ntia.doc.gov/files/ntia/publications/iana_stewardship_transition_assessment_report.pdf at 4 (accessed 8-21-2016).

Conversely, the NTIA also states that while it has contracted with ICANN, it has the authority to discontinue contracting with ICANN for the IANA services:

“Just as federal agencies can enter into contracts they need to fulfill their missions without specific legislative authority, federal agencies can discontinue obtaining such services when they no longer need them.” *Id.* at 6.

What is missing from the NTIA analysis is clarity on what happens to a federal contractor when the government ceases contracting with it for services. It appears that both the NTIA and ICANN are operating under the assumption that a former federal contractor “inherits” the right to continue performing services absent a contract. Applying that conclusion to various government services, such as defense contracting, would lead to chaos. The Internet is no less important to national security. In order for any transition to be legitimate, and for ICANN to retain its policymaking and technical functions legitimacy after transition, Congress must act, but should act promptly to delay the transition, repair ICANN's faulty structure, and test the repaired structure for some period of years prior to any potential transition.

VIII. Unsolved Problems

NTIA reviewed this proposal and found not even one item amiss despite ICANN drafting whole new provisions not vetted previously by the multistakeholder community in contravention of its own rules. Clearly, NTIA rushed the final decision in order to meet an artificial deadline. There is no time to implement the accountability changes prior to the deadline and to test them in advance. There are a number of changes included in the proposal that are not fully developed or will require proof testing before it is clear that they achieve the objectives stated. As mentioned before, the ICANN Board has made **all** of the accountability changes **contingent** on the transition occurring, providing no time to “test drive” them.

In ICANN's rush to meet the NTIA's deadline, important work was left undone. This is what ICANN means when they refer to “Workstream 2.” However, some of the most important issues were pushed off into Workstream 2, such as the permanent jurisdiction of ICANN and the protection of human rights, including free speech. Make no mistake, there are participants involved in the Workstream 2 work who desire to see ICANN leave California and be reconstituted in another jurisdiction outside of the easy reach of the federal courts. Likewise, there are participants within the Workstream 2 process who wish to cherry-pick which human rights are observed by ICANN and which are not. Where ICANN is formed and whether or not ICANN respects the longstanding human rights enjoyed by every American, such as free speech,

are not minor considerations. The transition should not occur until these issues are firmly and finally resolved and Congress consents to the outcomes.

IX. Conclusion

Right now, ICANN is under contract with the NTIA, which contracts provide guardrails to what ICANN can and cannot do. While the NTIA's governance might have been a "light touch," particularly over the most recent years, that does not undo the benefits of NTIA's stewardship. If NTIA's stewardship had no real effect, there would be no clamoring for the transition to occur. The so-called "Empowered Community," a convoluted structure of stakeholders that will only be activated in times of crisis, is not suitable to provide day-to-day oversight of ICANN's Board. Instead, after the transition, which will result in a power vacuum, the stage is set for an enhanced GAC to step into the role previously held by the NTIA. Not every GAC member values free speech, predictable markets, and intellectual property protections for consumers. Replacing the NTIA with the enhanced GAC whose "consensus advice" is binding absent a supermajority pushback from the ICANN Board flunks the NTIA's own test of what a suitable transition plan should entail.

Congress, at a minimum, should require the NTIA to renew the IANA contract prior to September 30, 2016, and to ensure that all community-approved accountability changes in the bylaws and procedures of ICANN be implemented and be operational for a reasonable time period, protocols rightfully followed, and risks to manufacturers and other trademark rights holders addressed prior to any transition. An orderly, legitimate transition, if desired, then can be considered by Congress in cooperation with the NTIA.

My hope is that Congress will intervene to safeguard the free and open Internet for the use of the world, and hold Commerce to actively oversee ICANN's activity and help repair its faulty structure in the waning hours when it still has time and authority to do so. No country is better suited than the United States to safeguard the Internet for the use of the world, because more than many of the nations around us, we protect intellectual property, value free speech, safeguard the free exercise of religion even for those who believe differently than we may, and champion the rights of minorities.

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Karsten, as an ICANN contracted party, manufacturer, and Arizona employer, thanks the subcommittee for its continued action in this matter and urges Congress to take steps to ensure that any transition of the oversight of the policy and technical functions to ICANN be prevented from occurring at least until ICANN's faulty structure is repaired and ICANN has completed all the necessary work and has evidenced for a significant period of time that it is truly accountable and ready to fulfill its commitments globally.

Thank you.