GNSO gTLD Registries Stakeholder Group Comments

Issue: New Generic Top-Level Domains (gTLDs) Applicant Guidebook – April 2011 Discussion Draft

Date: 15 May 2011

April 2011 Discussion Draft URL:
http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf

Regarding the issue noted above, the following comments represent the views of the ICANN GNSO gTLD Registries Stakeholder Group (RySG) as indicated. Unless stated otherwise, the RySG comments were arrived at through a combination of RySG email list discussion and RySG meetings (including teleconference meetings).

The comments below are organized by guidebook section. Note that text in quotation marks is taken verbatim from the April 2011 Discussion Draft, including tracked changes as applicable.

The following abbreviations are used in this document:
- AG = Applicant Guidebook
- AGv6 = New Generic Top-Level Domains (gTLDs) Applicant Guidebook – April 2011 Discussion Draft
- AGv5 = Proposed Final Applicant Guidebook released 10 November 2010
- RySG = The gTLD Registries Stakeholder Group

The RySG wants to thank and compliment all of the many people and organizations that have contributed to the development of the AG and especially the ICANN Staff members who have worked extremely long hours over several years to get us to this point.

Module 1 – Introduction to the Application Process

<u>1.1</u>

Regarding the Application Life Cycle and Timelines, the RySG suggests that ICANN take into consideration events that are currently scheduled to coincide directly with key dates in the Application Program timeline? For example, there are two ICANN meetings scheduled to take place during the initial application round; as it currently stands, the application window covers several major international holidays such as Diwali, Thanksgiving, Hanukkah, Christmas, Boxing Day, New Years, Chinese New Year, etc.; and, as it currently stands, the final days of the public comment period on applications will likely land during Holy Week/Easter. The final timelines should be adjusted accordingly.

1.1.2.3

Regarding the Comment Period, item 4 says: "*In cases where consideration of the comments has impacted the scoring of the application, the evaluators will seek clarification from the applicant*." It is unclear how this clarification will be recorded or made public. How will clarification sought by evaluators and the clarification provided by applicants be recorded and made public? This should be explained.

1.1.2.4

With regard to the GAC Early Warning System, item 4 says: "*GAC consensus is not required for a GAC Early Warning to be issued. Minimally, the GAC Early Warning must be provided in writing to the ICANN Board, and be clearly labeled as a GAC Early Warning. This may take the form of an email from the GAC Chair to the ICANN Board. For GAC Early Warnings to be most effective, the notice should be accompanied by the reason for the warning and identify the objecting countries.*" It is very important that the Early Warning Notice to the applicant be accompanied by the reason for the warning and that it identify the objecting countries with applicable points of contact; otherwise it will be difficult for the applicant to try to mitigate the concerns and/or make a timely decision about withdrawing the application.

1.1.2.5

Regarding Initial Evaluation, AGv5 mentioned a process for establishing batch processing priority but the latest version still does not explain what that will be. This is of concern. Will it be first to file, lottery, etc.? A description of the factors that will determine the batch in which applications will be processed and the process for batch processing must be provided in the AG. What will be the impact to the overall timeline and what are the advantages and disadvantages of being in one batch over the other?

1.2.8

This section is titled Voluntary Designation for High Security Zones. Considering the final report of the High Security Zone TLD Advisory Group, shouldn't this section be deleted?

Module 2 – Evaluation Procedures

2.2.1.3.2

We note the following:
- No change was made to this requirement: "Applied-for gTLD strings in IDN scripts must be composed of two or more visually distinct characters in the script, as appropriate."

- But a footnote was added: *"Note that the Joint ccNSO-GNSO IDN Working Group (JIG) has made recommendations that this section be revised to allow for single-character IDN gTLD labels. See the JIG Final Report at http://ccnso.icann.org/node/15245 . Implementation models for these recommendations are being developed for community discussion."*

Consistent with the original New gTLD Recommendations approved by the GNSO Council and the Board with regard to Reserved Names and with the recent GNSO Council recommendation, the RySG strongly supports the JIG recommendation that single character IDN gTLDs be allowed as proposed by the JIG.

2.2.1.4.2 #4

The RySG believes that a one-size-fits-all arbitrary percentile (60%) for regional TLD initiatives is inappropriate and should be removed. The new gTLD process should respect the diversity and different cultural, geopolitical and Internet community conditions for each regional initiative. Commitment from the applicant to continue (beyond the application stage) to respond to governments in the region is more important.

Module 2: Evaluation Criteria

Question 39 says: "The response should include, but is not limited to, the following elements of the business continuity plan: ... Definitions of Recovery Point Objectives and Recovery Time Objective..."

We did not find the terms "Recovery Point Objectives" and "Recovery Time Objective" defined or explained in AGv6 and it unclear what applicants are being asked to do here. The terms should be explained somewhere in the AG.

On Page A-46 Attachment to Module 2 – "Evaluation Questions and Criteria", there is a reference to a Continuing Operations Instrument (COI). The only guidance in the latest version of the AGv6 is the following:

"The Continued Operations Instrument (COI) is invoked by ICANN if necessary to pay for an Emergency Back End Registry Operator (EBERO) to maintain the five critical registry functions for a period of three to five years. Thus, the cost estimates are tied to the cost for a third party to provide the functions, not to the applicant's actual in-house or subcontracting costs for provision of these functions. Note that ICANN is building a model for these costs in conjunction with potential EBERO service providers. Thus, guidelines for determining the appropriate amount for the COI will be available to the applicant."

In the opinion of the RySG, this description is not sufficiently clear and has been a significant impediment to new applicants in their ability to raise funds or to engage in the appropriate business planning required for submitting an application. With the current

proposal ICANN is asking people to "double down" on their domain which will lock out a number of potentially viable applicants who may not qualify for special assistance if they are not a "disadvantaged" group but still might not have yet another pot of money to draw from. In addition, the ability for companies to secure a letter of credit from a reputable financial institution following the recent crash of the financial markets has been difficult at best. Securing an LOC with a financial institution is essentially the same as putting that amount of money aside in a cash escrow. The cash escrow, as a reminder, is money that is put aside that cannot be touched by the applicant. Rather than using that money to make its own TLD more secure or successful in the marketplace, the money instead remains unavailable. We are also very concerned that this requirement could significantly disadvantage new entrants to the marketplace, particularly those who have relatively fewer financial resources.

Therefore, the RySG recommends the following proposal replace the existing COI language:

The RySG supports the creation of a pseudo-insurance fund paid for by each of the new gTLD Registry Operators for the first five years following launch of the new gTLD.   As an example, we believe that requiring each registry operator to pay an additional $5,000 in Registry Fees per year to ICANN (or its designee) for the specific purpose of funding two or three Emergency Back End Registry Operators should be sufficient. At the low estimate of 200 approved new gTLDs, that would be approximately $1 million per year to fund the EBEROs ("EBERO Fund"). Although $5,000 per year may seem like a high amount, the estimated amount of an LOC or cash escrow to fund three years of critical registry functions could amount to anywhere from 10 to 100 times that amount. It is also recommended that the EBERO Fund should be capped at a certain amount such that if the cap has been reached, no further fees from the new gTLD operators shall be due until a certain amount of the funds have been used. At that point new gTLD operators shall pay a proportionate amount to replenish the fund. That amount can be shared equally by the new gTLD registries or can use a formula derived by the amount of domain names under management.

The RySG also believes the function of the COI could take the form of an insurance policy written by a highly rated reputable insurer. If private insurance is not available, then the captive insurance fund described above could be created. The $5,000 per registry per year figure should be viewed as a straw-man until proper underwriting of the risk is done to determine an appropriate contribution. ICANN could hire the appropriate expert to calculate the appropriate contribution and pool size, and the cost of the expert could be reimbursed from the pool.

Module 3 – Objection Procedures

3.1

Here are the key elements of '**GAC Advice on New gTLDs**':

1. *"GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities."*
2. *". . . The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors"*
3. *"The GAC can provide advice on any application."*
4. *". . . the GAC advice would have to be submitted by the close of the Objection Filing Period."*
5. *". . . GAC Advice on New gTLDs should identify objecting countries, the public policy basis for the objection, and the process by which consensus was reached."*
6. *"If the GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed . . ."* and the *"Board determines to approve an application despite the consensus advice of the GAC, the GAC and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. In the event the Board determines not to accept the GAC Advice, the Board will provide a rationale for its decision."*
7. If there is not GAC consensus on the advice or the GAC does not recommend that the string should not be delegated, then *"such advice will be passed on to the applicant"* and no further steps are required even though the Board will take the GAC advice seriously.
8. *"If the GAC advises ICANN that GAC consensus is that an application should not proceed unless remediated, . . . and if there is a remediation method available in the Guidebook (such as securing government approval), that action may be taken. However, material amendments to applications are generally prohibited and if there is no remediation method available, the application will not go forward and the applicant can re-apply in the second round."*
9. *"Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will endeavor to notify the relevant applicant(s) promptly and the applicant will have a period of 21 calendar days in which to submit a response to the ICANN Board."*
10. *". . . The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures."*
11. *"The receipt of GAC advice will not toll the processing of any application."*

The RySG submits the following regarding the above:

- We support the fact that the process of considering GAC advice is planned to happen without causing delays to the evaluation process.

- What happens if the GAC reaches consensus to oppose a string without a sound global public policy basis? (item 5)
- Is it correct to conclude that, if GAC consensus opposes a string and there is no remediation of the opposition, then a string will be denied automatically? (item 8)
- What does "*The receipt of GAC advice will not toll the processing of any application.*" mean? Does it mean that the GAC will not be charged a fee for objecting?
- The RySG is concerned that the GAC's definition of consensus could lead to a single country having de facto veto power over new TLDs. If GAC consensus is defined, at a minimum, as only one country opposing where no other country objects to that opposition, it appear it could, in practice, be a unilateral veto.

3.2

It is stated that the independent dispute resolution process defined in this section does not apply in cases of GAC advice. Does this mean that the GAC may submit advice on any topic and is not restricted to the four enumerated grounds in Section 3.2 (i.e., string confusion, rights protection, limited public interest, community)? Or does it mean that the GAC does not have to follow the procedures for dispute processes for any of the four areas? We assume the former but think this should be clarified.

3.2.5

Note the following regarding the Independent Objector: "The IO will have access to *application comments received during the comment period.*" This appears to limit consideration by the IO of comments received during the public comment period. Are we correct in that regard, that is, the IO may not consider comments received after the public comment period?

3.4.4

With regard to Selection of Expert Panels this section says: "There will be one expert in proceedings involving a string confusion objection." It at least one of the parties to a dispute is willing to pay for a 3-member panel, they should be given that option.

3.4.6

Note the following about Expert Determination: "Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website." This statement leaves one important question unanswered: if the decision is not posted in full, will the parties to the dispute be given the full documentation of the decision? [See also Attachment to Module 3, New gTLD Dispute Resolution Procedures, Article 21 (g).]

Module 4 – String Contention Procedures

4.4

No change was made to the following from AGv5: "If a winner of the contention resolution procedure has not executed a contract within 90 days of the decision, ICANN has the right to deny that application and extend an offer to the runner-up applicant, if any, to proceed with its application. For example, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time." Why shouldn't the runner-up applicant have the right to proceed and why should it be at ICANN's option? Without reasonable justification, these provisions seem to be unsatisfactory.

Module 5: Transition to Delegation

5.1 says: "Generally, the process will include formal approval of the agreement without requiring additional Board review, so long as: the application passed all evaluation criteria; there are no material changes in circumstances; and there are no material changes to the base agreement."

The RySG asks that ICANN clarify what it considers "material changes to the base agreement," and generally under what circumstances ICANN plans to negotiate changes to the base agreement. The RySG thinks that the imposition of new obligations or risks upon registry operators, or reduced indemnification for registry operators, could constitute "material changes."

In 1.2.1.2.6 (Cross-Ownership and Referral to Competition Authority), the current proposal contains a critical ambiguity that may cause any request for vertical integration to remain unresolved for an indefinite amount of time upon referral to the government. Under the proposal, the request of a registry would remain in "pending status" until the government provides a "substantive response." However, because it is unclear whether the government to which the matter has been referred has any obligation to provide any response to such referrals or would do so and, if it chose to provide a response, when the response might be provided, the requesting registry should be permitted to proceed after a reasonable time.

The proposal should be revised to allow a request for vertical integration to proceed absent a substantive response following a reasonable waiting period of perhaps either 90 or 120 days for a substantive response from the government. This would resolve the ambiguity created by the current proposal and provide important clarity to the ICANN process. In addition, ICANN should clarify that the tolling or waiver of any waiting periods designed to allow for an antitrust or competition authority to initiate a review

(such as under the US Hart Scott Rodino Act) should be sufficient to allow a registry's request to proceed.

Module 5, Base Registry Agreement

2.8

This clause was changed as follows:

> **"2.8 Protection of Legal Rights of Third Parties.** Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth in the specification at [*see specification 7*]* ("Specification 7"). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all ~~determinations and decisions made~~remedies imposed by ICANN pursuant to Section 3 of Specification 7, subject to Registry Operator's right to challenge such ~~determinations~~remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to investigate and respond to any reports (including reports from law enforcement and governmental and quasi-governmental agencies) of illegal conduct in connection with the use of the TLD."

Section 2.8 of the April 2011 Discussion Draft of the registry agreement contains <u>new</u> language, which has not appeared in any earlier draft, that could impose onerous and uncertain duties on the registry by creating an undefined obligation to "investigate and respond to any reports . . . of illegal conduct in connection with the use of the TLD." The language as drafted can be interpreted to require a Registry Operator to investigate and take some form of affirmative action in response to **"any"** complaint raised, either from a government agency or a private party. Additionally, what constitutes "illegal conduct" can vary from country to country and may include activities such as dissenting speech that would be legally protected forms of conduct in other countries.

Registry Operators are more than willing to work with law enforcement agencies and appropriate governmental authorities in their investigation of illegal activities. However, Registry Operators should not be mandated to comply with or take some form of affirmative action in response to any such request, particularly where such requests are in contravention of the Registry Operator's internal policies or the laws of the country in which the Registry Operator is located.

Registry Operators should not be required to respond in any fashion to an inquiry from a private party. To do so would: (i) potentially disrupt existing and on-going law enforcement activities; (ii) provide an avenue for third parties to harass and disrupt the activities of registrants with whom they compete or disagree by filing false or vindictive complaints; (iii) overwhelm the resources of every Registry Operator.

Moreover, Registry Operators do not have the expertise or resources to investigate any and all "illegal" activities, a function that is best left to law enforcement agencies and governmental authorities.

The use of the term "governmental and quasi-governmental agencies" is overbroad – it goes far beyond law enforcement, and opens up queries from literally any kind of government office, anywhere in the world, and at any level.

Accordingly, the Registry Stakeholder Group proposes that Section 2.8 be revised to read as follows:

> **"2.8 Protection of Legal Rights of Third Parties.** Registry Operator must specify, and comply with, a process and procedures for launch of the TLD and initial registration-related and ongoing protection of the legal rights of third parties as set forth in the specification at [*see specification 7*]* ("Specification 7"). Registry Operator may, at its election, implement additional protections of the legal rights of third parties. Any changes or modifications to the process and procedures required by Specification 7 following the Effective Date must be approved in advance by ICANN in writing. Registry Operator must comply with all remedies imposed by ICANN pursuant to Section 2 of Specification 7, subject to Registry Operator's right to challenge such remedies as set forth in the applicable procedure described therein. Registry Operator shall take reasonable steps to respond in a timely manner, to an inquiry from a governmental or agency that is investigating reports of illegal conduct in connection with the use of the TLD. In responding to such an inquiry, a Registry Operator is not obligated to take any action that would affect in any way a domain name registration or that would be contrary to the Registry Operator's internal policies or the laws of the country in which the Registry Operator is located.

The Registry Stakeholder Group believes that the proposed language as modified satisfies the GAC request under Section 6.4 of the "GAC comments on the ICANN Board's response to the GAC Scorecard" dated April 12, 2011.

2.9

What will be the process and timing for approving the initial form of the registry-registrar agreement (RRA) for each registry, and what criteria will ICANN use in approving the initial form of registry-registrar agreement and any revision thereof? It is the RySG's assumption that generally, an RRA will be satisfactory to ICANN if the RAA satisfies the terms of the Registry Agreement and does not contravene any ICANN policy. Does ICANN agree with this assumption?

The RySG has two areas of concern. One: that approval of new TLD RRAs may get bogged down and inhibit launches. Two: that ICANN may introduce new obligations on registries and/or registrars via the RRA approval process.

In Section 2.9(b), the current language states that if a registry subcontracts provisioning of a registry service to an ICANN-accredited registrar, it has to disclose such

arrangement to ICANN. What if the registry's subcontractor is not an ICANN-accredited registrar initially, but obtains registrar accreditation at some later point? Or starts operating as a reseller? Or its own affiliate does so? Is the registry supposed to somehow find that out and inform ICANN? This may be not an insignificant obligation; especially given the definition of Affiliate is quite broad. The RySG recommends further clarification of this issue, specifically as it relates to the actions of third parties after the fact.

2.10

The revised clause in AGv6 is an improvement over what was in AGv5, but some of the same ambiguity remains. The provision states that all renewal prices shall be the same except that a lower price may be offered as part of a newly defined "Qualified Marketing Program." However, the definition does not have the same scope as allowable promotional programs elsewhere under the agreement or in the Code of Conduct. Thus, there may be uncertainty in whether a registry could offer discounted renewal pricing, even when the renewal price would correspond to the price of the original registration, where that registration was discounted.

This ambiguity could be removed if ICANN changed the exception above to encompass discounts or incentives that formed a part of a promotional program authorized by the registry agreement, deleting this new definition of "Qualified Marketing Programs." In addition, we recommend adding: "For the avoidance of doubt, nothing herein shall be deemed to prohibit the renewal of a registration at a price equal to the price currently being paid for such registration where renewal at such price is pursuant to an agreement entered into at the time of either the original registration or a prior renewal."

The RySG recommends the following language for 2.10(c):

> c) Registry Operator shall offer registrars the option to obtain domain name registration renewals at the current price (i.e. the price in place prior to any noticed increase) for periods of one to ten years at the discretion of the registrar, but no greater than ten years. Registry Operator must have uniform pricing for registration renewals ("Renewal Pricing"). For the purposes of determining Renewal Pricing, the price for each domain registration renewal must be identical to the price of all other domain name registration renewals, and such price must take into account universal application of any refunds, rebates, discounts, product tying or other programs; provided, that Registry Operator may offer discounted Renewal Pricing pursuant to a Qualified Marketing Program (as defined below). The foregoing sentence shall not apply for purposes of determining Renewal Pricing if the registrar has provided Registry Operator with documentation that demonstrates that the applicable registrant expressly agreed in its registration agreement with registrar to a higher renewal price at the time of the initial registration of the domain name following clear and conspicuous disclosure of such renewal price to such registrant. The parties acknowledge that the purpose of this Section 2.10(c) is to prohibit abusive and/or discriminatory Renewal Pricing

practices (including but not limited to practices that have the effect of causing a particular class of registrations to pay a materially higher renewal price than is customarily and currently paid by registrars for a standard registration) and this Section 2.10(c) will be interpreted broadly to prohibit such practices. For purposes of this Section 2.10(c), a "Qualified Marketing Program" is a marketing program pursuant to which Registry Operator offers discounted Renewal Pricing, provided that each of the following criteria is satisfied: (i) the program and related discounts are offered for a period of time not to exceed 1890 calendar days ; and (ii) all registrars are provided the same opportunity to qualify for such discounted Renewal Pricing, (ii) the programs are made available to all registrars and registrations; and (iii) the intent or effect of the program is not to exclude any particular class(es) of registrations (e.g., registrations held by large corporations) or increase the renewal price of any particular class(es) of registrations." For the avoidance of doubt, nothing herein shall be deemed to prohibit the renewal of a registration at a price equal to the price currently being paid for such registration where renewal at the such price is pursuant to an agreement entered into at the time of either the original registration or a prior renewal.

2.15

Section 2.15 of the April 2011 Discussion Draft of the registry agreement contains a new requirement that was not present in earlier drafts, in which a Registry Operator must cooperate with ICANN in its preparation of an economic study on the impact of new generic top-level domains. As part of this cooperation, a Registry Operator is required to provide "all data (including confidential data of Registry Operator) requested by ICANN or its designee." Moreover, although ICANN must "aggregate and anonymize" any data it receives prior to public disclosure, the requirement is silent as to what steps ICANN must take to protect access to the data that is provided by a Registry Operator. Registry Operators are happy to cooperate with ICANN in its preparation of economic studies. As drafted, however, this provision would grant ICANN unfettered access to confidential and proprietary information, including internal reports and analyses, maintained by the Registry Operator. Therefore, the data that is required to be provided should be limited to raw operational data maintained by the Registry Operator, which should be sufficient for any economic studies being performed. Additionally, the provision should require ICANN to seek written consent from a Registry Operator before it provides, as a result of legal process (i.e., subpoena, civil discovery request, etc.) or otherwise, any data collected from a Registry Operator to a private party or a government agency.

Accordingly, the Registry Stakeholder Group proposes that Section 2.15 be revised to read as follows:

2.15   **Cooperation with Economic Studies.** If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall

reasonably cooperate with such study, including by delivering to ICANN or its designee conducting such study all data regarding the Registry's operation data (including confidential data of Registry Operator) requested by ICANN or its designee. Such data shall be limited to raw data relating to the Registry's operation and shall not include any analyses or evaluations of the data performed by the Registry Operator. Absent written consent by the Registry Operator, all data provided by the Registry Operator to ICANN or its designee shall not be disclosed to third parties or governmental agencies. The Registry Operator is not obligated to provide any raw data unless and until provided that ICANN or its designee provide reasonable and documented assurances that the raw data to be provided by the Registry Operator will be fully shall aggregated and anonymized such data prior to any public use or dissemination of the datadisclosure of such data.

3.5

This clause now says: "**Authoritative Root Database.** To the extent that ICANN is authorized to set policy with regard to an authoritative root server system, ICANN shall use commercially reasonable efforts to (a) ensure that the authoritative root will point to the top-level domain nameservers designated by Registry Operator for the TLD, (b) maintain a stable, secure, and authoritative publicly available database of relevant information about the TLD, in accordance with ICANN publicly available policies and procedures, and (c) coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner; provided, that ICANN shall not be in breach of this Agreement and ICANN shall have no liability in the event that any third party (including any governmental entity or internet service provider) blocks or restricts access to the TLD in any jurisdiction."

It is not appropriate for ICANN to disclaim all responsibility of blocking or restricting access to a TLD regardless of whether or not they may have contributed to the event or could have taken steps to prevent such event (including where it failed to exercise or enforce a contractual right). We recommend that the new language be deleted.

4.3

Part (d) of this section of the agreement on Termination by ICANN was changed as follows: "ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator makes an assignment for the benefit of creditors or similar act, (ii) attachment, garnishment or similar proceedings are commenced against Registry Operator, which proceedings are a material threat to Registry Operator's ability to operate the registry for the TLD, and are not dismissed within thirtysixty (3060) days of their commencement, (iii) a trustee, receiver, liquidator or equivalent is appointed in place of Registry Operator or maintains control over any of Registry Operator's property, (iv) execution is levied upon any property of Registry Operator, (v) proceedings are instituted by or against Registry Operator under any bankruptcy, insolvency, reorganization or other laws relating to the relief of debtors and such proceedings are not

dismissed within thirty (30) days of their commencement, or (vi) Registry Operator files for protection under the United States Bankruptcy Code, 11 U.S.C. Section."

Although this timing is better than the original 30 days, the new version continues the exception for proceedings that are not dismissed in 60 days. An extension of this period to 120 days might make it more meaningful. In addition, adding the term "imminent" before "material" would be helpful.

SPECIFICATION 4 – Specification for Registration Data Directory Services

The RySG recommends that ICANN re-insert language requiring the submission of IP address and host name from all parties requesting zone file access. This information is critical to enable the registry operator to prevent abuse.

SPECIFICATION 9 – Registry Code of Conduct

The RySG believes that the spirit of Para. 1a of the Code of Conduct requires registry operators to provide equal level of **operational** access to the registry's systems and support services. This would be in line with the provisions existing in the current Sponsored TLD agreements. The current language would appear to prohibit a broad array of arrangements that would be common practice between affiliated companies. For example, it would appear to prohibit a registry from providing an initial capital contribution to an affiliated registrar, or from providing shared services or facilities to such a registrar. Prohibiting a registry from providing these kinds of assistance to an affiliated registrar would render it impracticable for a registry to establish such a registrar, which would be inconsistent with the Board's directive to permit such arrangements. It could also put the registrar at a competitive disadvantage with other registrars that may enjoy such support from their affiliated companies.

In addition, as only registrars have access to a registry's systems and support services, we do not believe it is necessary to prohibit registries from providing a preference or special consideration to **resellers**.

In light of the foregoing, the RySG suggests amending Specification 9, Para. 1a as follows:

> In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a "Registry Related Party"), to:
>
> a. directly or indirectly shows any preference or provide any special consideration to any registrar~~, or reseller~~ with respect to ~~the TLD~~ operational access to registry systems and related registry support services, unless comparable

opportunities to qualify for such preferences or considerations are made available to all registrars ~~and resellers~~ on substantially similar terms and subject to substantially similar conditions;

Paragraph 3 of Specification 9 says: "Registry Operator will conduct internal reviews at least once per calendar year to ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification." The RySG notes that publication of the results may deter discussion of confidential matters, which may be an unwanted result.

Further, the RySG recommends the following changes to Section 1(e) of Spec 9:

> <u>Fail to adopt, implement and enforce policies and procedures reasonably designed to prevent   the</u> disclosure <u>of</u> confidential registry data or confidential information about its Registry Services or operations to any employee of any DNS services provider, except <u>(i)</u> as necessary for the management and operations of the TLD, <u>and (ii) to the extent</u> ~~unless~~ all unrelated third parties (including other registry operators) are given equivalent access to such confidential registry data or confidential information on substantially similar terms and subject to substantially similar conditions.

Paragraph 6 of Specification 9 says: "Notwithstanding anything set forth in the foregoing, this Code of Conduct shall not apply to Registry Operator if (i) Registry Operator maintains all registrations in the TLD for its own use and (ii) Registry Operator does not sell, distribute or otherwise make available to any unaffiliated third party any registrations in the TLD. *[*Note: This draft Section 6 of the Registry Operator Code of Conduct has been added in response to comments received that suggested that the Code was not necessary for registries in which a single registrant uses the TLD solely for its own operations and does not sell registrations to third parties (e.g. a dot-BRAND)" The* definition of unaffiliated third party needs to be clarified in this context – Need to limit use with respect to customers, subscribers, employees? Etc.

The RySG also notes that Specification 9, Section 1b does not provide a carve-out for registration of names in order to preserve security and stability of the DNS (i.e.; conficker). This omission could negatively impact the capability of registries to operationally protect the security and stability of TLDs.

Specification 10 - Registry Performance Specifications

ICANN is proposing a system by which ICANN will monitor registry response times over the Internet. The RySG has pointed out to ICANN that this monitoring method will

yield variable results depending upon Internet traffic and transit issues beyond every registry operator's control.   The RySG would like confirmation that ICANN does not plan on publishing the monitoring results, which might for example be prejudicial to registry operators in certain parts of the world.

Sections 7.1 through 7.3: There should be an obligation for ICANN to publish to all Registry Operators the e-mail address and phone number for ICANN's emergency operations department.

Attachment to Specification 7, Trademark Clearinghouse

3.6

This section says: "Data supporting entry into the Clearinghouse of marks that constitute intellectual property of types other than those set forth in sections 3.2.1-3.2.3 above shall be determined by the registry operator and the Clearinghouse based on the services any given registry operator chooses to provide." How this will work given that all registries will be using the same clearinghouse?

4.2

We note that a restriction was added to this section that licensing of the database to competitors can only occur if a trademark holder agrees. We are concerned that this change would effectively prevent competition for ancillary services. The language should at a minimum be clarified that the Clearinghouse cannot provide ancillary services with respect to a mark for which consent has not been provided.

Attachment to Specification 7, URS

1.2.6

Note Section 1.2.6:

> "1.2.6 A ~~description~~statement of the grounds upon which the Complaint is based setting forth facts showing that the Complaining Party is entitled to relief, namely:

> 1.2.6.1. that the registered domain name is identical or confusingly similar to a word mark: (i) ~~in~~for which the Complainant holds a valid registration ~~issued by a jurisdiction that conducts a substantive examination1 of trademark applications prior to registration~~and that is in current use; or (ii) that has been validated through court proceedings ~~or the Trademark Clearinghouse~~; or (iii) that is specifically protected by a statute or treaty currently in effect ~~and that~~ at the time the URS complaint is filed.

> a. Use can be shown by demonstrating that evidence of use – which can be a declaration and one specimen of current use in commerce - was ~~in effect on or before 26 June 2008; and~~ submitted to, and validated by, the Trademark Clearinghouse)

b. Proof of use may also be submitted directly with the URS Complaint."

We believe that use should be documented to be prior to the date of registration of the domain names that form the basis of the complaint as well as current use.

<u>5.6</u>

This section states that the URS provider is expected to confirm that the Response is compliant on the same day that it is received. This may be unrealistic if the Response is received at the end of the business day, especially when different time zones are considered.

<u>6.4</u>

In this section, the two year time period for a de novo review has been reduced from two years to 6 months with a 6 month extension if filed before the end of the first 6 month period." The requirement that the request for an additional 6 months be made before the original period expired seems unnecessarily restrictive. Why not a single 12 month period?

<u>8.1.2</u>

In this section, the requirement that the trademark be registered in a jurisdiction that conducts a substantive examination has been replaced with a requirement that the mark is in "current use". We believe that the Complainant should show both use and that the trademark registration pre-dated registration of the domain name.

Attachment to Specification 7, PDDRP

<u>18.6</u>

Note the following new language: "*Imposition of remedies shall be at the discretion of ICANN, but absent extraordinary circumstances, those remedies will be in line with the remedies recommended by the Expert Panel.*" While we think this is an improvement, we recommend replacing "but absent extraordinary circumstances" with "Under normal circumstances" It should be noted that nowhere in the PDDRP is any standard established for the qualifications of a PDDRP "Expert Panel member". For example, given the role WIPO has played advocating a willful blindness standard, it would be inappropriate for them to be selected as a PDDRP provider.

Attachment to Specification 7, RRDRP

<u>2.2</u>

The words "community-based" have been added such that the RRDRP only applies to community-based gTLDs. We recommend that 'community-based' be capitalized ('Community-Based') to indicate that it refers to a defined term in the AG.

Summary of RySG Support

1. Level of Support of Active Members: Supermajority

    1.1. # of Members in Favor: 11

    1.2. # of Members Opposed: 0

    1.3. # of Members that Abstained: 0

    1.4. # of Members that did not vote: 2

2. Minority Position(s): None

General RySG Information

- Total # of eligible RySG Members[1]: 15

- Total # of RySG Members: 13

- Total # of Active RySG Members[2]: 13

- Minimum requirement for supermajority of Active Members: 9

- Minimum requirement for majority of Active Members: 7

- # of Members that participated in this process: 13

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[1] All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the "effective date" set forth in the operator's or sponsor's agreement (RySG Articles of Operation, Article III, Membership, ¶ 1). The RySG Articles of Operation can be found at <http://gnso.icann.org/files/gnso/en/improvements/registries-sg-proposed-charter-30jul09-en.pdf>. The Universal Postal Union and ICM, Inc. have concluded registry agreements with ICANN, but as of this writing have not applied for RySG membership.

[2] Per the RySG Articles of Operation, Article III, Membership, ¶ 6: Members shall be classified as "Active" or "Inactive". A member shall be classified as "Active" unless it is classified as "Inactive" pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a RySG meeting or voting process for a total of three consecutive meetings or voting processes or both. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a RySG meeting or by voting.

- Names of Members that participated in this process:
    1. Afilias (.info & .mobi)
    2. DotAsia Organisation (.asia)
    3. DotCooperation (.coop)
    4. Employ Media (.jobs)
    5. Fundació puntCAT (.cat)
    6. Museum Domain Management Association – MuseDoma (.museum)
    7. NeuStar (.biz)
    8. Public Interest Registry - PIR (.org)
    9. RegistryPro (.pro)
    10. Societe Internationale de Telecommunication Aeronautiques – SITA (.aero)
    11. Telnic (.tel)
    12. Tralliance Registry Management Company (TRMC) (.travel)
    13. VeriSign (.com, .name, & .net)
- Names & email addresses for points of contact
    - Chair: David Maher, dmaher@pir.org
    - Alternate Chair: Keith Drazek, kdrazek@verisign.com
    - Secretariat: Cherie Stubbs, Cherstubbs@aol.com
    - RySG representative for this statement: Keith Drazek, kdrazek@verisign.com