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4   # Initial Report on

5   # Vertical Integration Between

6   # Registrars and Registries

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11   ## STATUS OF THIS DOCUMENT

12   This Initial Report prepared by ICANN Staff is delivered to the GNSO Council on [__ July 2010] as part of the

13   Vertical Integration Policy Development Process (PDP). A Final Report will be prepared following public comment.

14   This is a "snapshot" of a living document that will be revised several times during the public comment period.

15   Reviewers are strongly encouraged to check on the working-group wiki for the latest version of this Initial Report.

16   Follow this link to the archive of Initial Report snapshots – https://st.icann.org/vert-integration-

17   pdp/index.cgi?initial_report_snapshots .

18

19

20   ## SUMMARY

21   This report is submitted to the GNSO Council and posted for public comment as a required step in the GNSO PDP

22   on Vertical Integration Between Registrars and Registries. This Initial Report describes various proposed solutions

23   for restrictions on vertical integration between registrars and registries for adoption in the New gTLD Program.

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1.   Executive Summary

This Initial Report on the Vertical Integration PDP is prepared as required by the GNSO Policy Development Process as stated in the ICANN Bylaws, Annex A (see http://www.icann.org/general/bylaws.htm#AnnexA). The Initial Report will be posted for public comment for 20 days. The comments received will be analyzed and used for redrafting of the Initial Report into a Final Report to be considered by the GNSO Council for further action.

This Initial Report describes the current status of the work undertaken by the Vertical Integration PDP Working Group (referred to as the VI Working Group) to assist ICANN in developing its implementation processes for the New gTLD Program.

As described more fully below, the VI Working Group has developed a number of proposals to address vertical integration for the new gTLD program but has not reached consensus as to which one to recommend. However, several principles are emerging which, when drafting is complete, may be supported by the VI Working Group members.

One such principle is that compliance, and enforcement thereof, plays a pivotal role in the New gTLD Program and the policy framework that surrounds it. As a result, a detailed compliance program should be defined, and appropriate resources should be allocated by ICANN, as it finalizes its implementation details for the New gTLD Program.

Another principle that is moving toward a [consensus] of the VI Working Group support is the principle that in the event ICANN adopts a requirement of strict separation standard between registrars and registries, an exceptions procedure should be incorporated into the New GTLD Program.

71   The last principle that is moving toward a [consensus] is the possibility that there be a

72   specific exception for a category of applicants known as the single registry, single user (SRSU)

73   TLDs. These principles are described more fully in Section 4 of this Initial Report.

74

75   This Initial Report also describes several proposals regarding vertical integration that have

76   been developed and analyzed by the VI Working Group. No proposal has achieved consensus

77   support within the VI Working Group. These proposals are included for the purpose of seeking

78   public comment, and will be subject to further analysis and debate as the VI Working Group

79   continues to strive to develop a consensus position to recommend to the GNSO Council.

80

81   It is important to note that although a [consensus] for the general principles described in

82   Section 4 may be achieved, the details of these principles are still being actively developed and

83   debated within the VI Working Group. This Initial Report is unique in that it does not include

84   any recommendations from the VI Working Group, but instead reflects draft positions and

85   initial observations that are expected to be refined during the weeks ahead. Due to the

86   expedited nature of the task at hand, the purpose of this Initial Report is to inform the ICANN

87   Community of the progress made to date, and to invite public comment on the principles and

88   substantive proposals described herein.

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89 ## 2.   Background and Objectives

90 **2.1 Background on the Vertical Integration PDP Activities.**

91 On 3 September 2009, Councillor Mary Wong on behalf of the Non-Commercial Users
92 Constituency (NCUC) requested an Issues Report on the topic of Vertical Integration between
93 Registries and Registrars. This request was approved by the Generic Names Supporting
94 Organization (GNSO) on 26 September 2009.[1] In approving this request, the GNSO Council
95 recognized that opening up the market to many new TLD operators may call into question some
96 of the assumptions on which the separation of registry and registrar functions is based. The
97 GNSO Council noted that the new gTLD policies passed by the Council did not provide any
98 guidance regarding the proper approach to cross ownership and vertical integration, but
99 instead implicitly suggest that the status quo be left in place. As a result, the Issues Report was
100 requested to assist the GNSO in determining whether a PDP should be initiated regarding what
101 policies would best serve to promote competition and to protect users and registrants.

102 On 11 December 2009, Staff delivered the Issues Report on vertical integration between
103 registries and registrars to the GNSO Council. The Issues Report included recommendations
104 that, although policy potentially could be developed in this area, given the status of
105 implementation of the GNSO's new gTLD policy, this issue would be more effectively addressed
106 through GNSO participation in the new gTLD implementation planning process. As a result,
107 Staff recommended that consideration of launching a PDP on vertical integration be delayed
108 until after the launch of new gTLDs to gather data on the impact of the initial distribution
109 model, and to determine whether there has been competitive harm in the domain name
110 market.

---

[1] The GNSO Council resolution approving the Request for an Issues Report is posted at:
http://gnso.icann.org/resolutions/#200909

111   Notwithstanding the recommendations in the Issues Report, on 28 January 2010, the GNSO

112   Council decided to initiate a PDP on vertical integration between registries and registrars on an

113   expedited basis. The GNSO Resolution calls for the PDP to evaluate which policy

114   recommendations, if any, should be developed on the topic of vertical integration between

115   registrars and registries affecting both new gTLDs and existing gTLDs, as may be possible under

116   existing contracts and as allowed under the ICANN Bylaws. The GNSO Council instructed the

117   Working Group to deliver its Final Report to the GNSO Council on an expedited timeframe. The

118   GNSO Resolutions approving the PDP and the charter for the VI Working Group (Charter) are

119   described in **Annex A** of this Report.

120   Upon approval of the Charter on 10 March 2010, the GNSO Council formed a working group

121   and solicited volunteers from the ICANN community to participate in the PDP on vertical

122   integration. Over sixty-five members joined the working group, the largest GNSO working

123   group of recent times, reflecting the significant interest in this issue in the ICANN community. A

124   list of the members of the VI Working Group is included in **Annex B** of this Report.

125   A public comment forum on the initiation of the Vertical Integration PDP ran from 29

126   March- 18 April 2010.[2] This public comment forum provided an opportunity for the public to

127   comment on any aspect related to the topic of vertical integration between registries and

128   registrars that should be taken into account by the VI Working Group as part of its

129   deliberations. A summary of the comments submitted during this period is presented on

130   **Annex C** of this Report. The VI-WG also solicited and received Stakeholder Group and

131   Constituency Statements on the topic of vertical integration. These statements are included in

132   **Annex D** of this Report.

133   **2.2. Background on the New gTLD Implementation Activities Affecting Vertical**

134   **Integration.**

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[2] For more information on the Public Comment Forum for Vertical Integration, please refer to:
http://www.icann.org/en/public-comment/public-comment-201004-en.htm#vi

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135   The issue of revisiting vertical integration of registries arose as a result of concerns

136   expressed by members of the ICANN Community in 2007 when it became clear that the GNSO

137   policy recommendations on the New gTLD process were going to be unable to address the issue

138   of the economic, business and/or legal relationships between registries and registrars in

139   developing the implementation details for the New gTLD Program. In response to the concerns

140   expressed by the ICANN Community, and at the request of the ICANN Community, ICANN

141   retained the research firm CRA International who delivered a report on 23 October 2008,

142   commonly referred to as the CRA Report[3], The CRA Report recommended that "ICANN…re-

143   examine the economic case for the separation requirement, and in particular to consider

144   whether it might be possible to relax the requirement, initially only in limited cases.

145   Recognizing that it is difficult to reverse the decision once regulations have been removed, we

146   would encourage ICANN to move slowly, but deliberately and in consultation with the industry,

147   towards permitting integration of registry and registrar services under many, but not all,

148   circumstances."[4]

149   After the publication of the CRA Report, ICANN Staff initiated a series of consultations with

150   the Community on the issue of vertical integration. In response, Staff published a proposed

151   model in the Draft Applicant Guidebook- Version 2 that included minimal restrictions. Because

152   the proposal included in the Draft Applicant Guidebook-v2 solicited substantial discussion and

153   debate among the ICANN Community, Staff revised the Draft Applicant Guidebook- v3 to

154   remove the proposed model, and instead sought further guidance and suggestions from the

155   Community on the appropriate model for the launch of new gTLDs.

156   In addition, ICANN Staff retained the services of two economists, Steven Salop and Joshua

157   Wright, to assist in advising ICANN staff and the community on economic issues related to the

158   effects of vertical integration between registries and registrars on registrants. A report, entitled

[3] The CRA Report is posted at http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf
[4] Id at 29

159 "Registry-Registrar Separation: Vertical Integration Options" [5] was presented to the ICANN

160 Board of Directors at their meeting on February 4, 2010 and subsequently made available to

161 the ICANN community on March 8, 2010.[6] In that report, which was also presented to the VI

162 Working Group and discussed on April 29, 2010[7], Professors Salop and Wright explained that

163 vertical integration and vertical contracts between registries and registrars can create both

164 competitive harms and competitive benefits. In their opinion, the most important factor in

165 predicting whether vertical integration is capable of generating competitive harms is the

166 presence of market power. Professors Salop and Wright encouraged the adoption of a case-by-

167 case approach with referral to a government competition authority for evaluation and action, if

168 deemed necessary.

169

170   Resolution of these issues is currently being managed under Board guidance by Staff

171 through its implementation process for the New gTLD Program. In Nairobi, the ICANN Board

172 adopted several resolutions related to the New gTLD Program. One of these resolutions

173 provided guidance to ICANN Staff on the topic of vertical integration between registrars and

174 registries[8]. The Board resolution noted the GNSO's active policy development process on the

175 issue of Vertical Integration. The Board did not want to create an environment in which it

176 would be difficult to later harmonize the new gTLD marketplace with the GNSO policy result,

177 but recognized the importance of establishing a baseline approach to registry-registrar

178 separation for the new gTLD process to move ahead. As a result, within the context of the new

179 gTLD process, the Board resolved that there will be strict separation of entities offering registry

180 services and those acting as registrars. No co-ownership will be allowed. The Board

181 recognized, however, that if a policy becomes available from the GNSO, and approved by the

[5] http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf.
[6] See http://blog.icann.org/2010/03/vertical-integration-options-report-available-to-community/.
[7] To review a transcript of the VI Working Group's discussions with Professors Salop and Wright, please refer to http://gnso.icann.org/meetings/transcript-vertical-integration-economists-29apr10-en.pdf.
[8] The Nairobi Board resolution pertaining to the issue of vertical integration between registrars and registries in the New gTLD Program is posted at: http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5

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182   Board prior to the launch of the New gTLD program, that policy will be considered by the Board

183   for adoption as part of the New gTLD Program.

184   In advance of the ICANN Brussels meeting, ICANN Staff published the Draft Applicant

185   Guidebook Version 4 (DAGv4), which includes proposed implementation details to address the

186   Board's Nairobi resolutions concerning the topic of vertical integration. Excerpts of the DAGv4

187   related to the topic of vertical integration between Registrars and Registries are provided in

188   **Annex E** of this Report.

189   **2.3 Objectives of the VI PDP Working Group.**

190   The objectives of the VI Working Group are included in the Charter described in **Annex F** of

191   this Report. The Preamble to the Charter notes that the working group expects to define the

192   range of restrictions on vertical separation that are currently in effect, to serve as a baseline to

193   evaluate future proposals. The Charter also included five separate objectives to guide the VI

194   Working Group in its deliberations, and timelines for milestones for the Working Group to

195   complete its work and produce any recommendations supported by a consensus on an

196   expedited basis.

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3. Approach Taken by the VI Working Group

Mike O'Connor and Roberto Gaetano were selected to serve as Co-Chairs of the VI Working Group. The VI Working Group consisted of approximately sixty-eight individuals, (the largest working group of recent memory) representing a broad range of stakeholders, and reflecting the significant interest in the ICANN Community in this issue. **Annex B** identifies the members of the VI Working Group and includes additional information on their participation in the conference calls scheduled in an effort to produce consensus recommendations in a short period of time.

After its initial meetings, the VI Working Group realized that it was not possible to work on all of the Charter objectives in the expedited timeframe requested by the GNSO Council. As a result, the Co-Chairs decided to divide the work into two phases, with the first phase dedicated to determining whether a consensus recommendation can be developed in time to affect the Final Applicant Guidebook. The second phase of work is expected to focus on developing long term recommendations that could apply to both new gTLD registries and existing gTLD registries, and would also address any remaining Charter Objectives.

As specified in the Charter, Staff produced an initial set of definitions to assist the VI Working Group in its deliberations. These proposed definitions are attached as **Annex I** to this Report.

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4.   Key Principles Developed by the VI Working Group

It is impossible to know or completely understand all potential business models that may be represented by new gTLD applicants. That fact has been an obstacle to finding consensus on policy that defines clear, bright line rules for allowing vertical integration and a compliance framework to support it while ensuring that such policy is practical and beneficial in the public interest. However, there is general acceptance within the Working Group for the following principles:

1. Certain new gTLDs likely to be applied for in the first round will be unnecessarily impacted by restrictions on cross-ownership or control between registrar and registry.

2. The need for a process that would allow applicants to request exceptions and be considered on a case-by-case basis. The reasons for exceptions, and the conditions under which exceptions would be allowed, vary widely in the group.

3. The concept of Single Registrant Single User should be explored further.

4. The need for enhanced compliance efforts and the need for a detailed compliance plan in relation to the new gTLD program in general.

The Working Group came to this understanding relatively recently. Several sub-groups have developed preliminary drafts around these topics and those drafts are included in Annex A – Preliminary Drafts of Principles. The Working Group intends to continue discussion of these drafts during the public-comment period and is very interested in suggestions from the broader community.

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As part of the analysis performed by the VI Working Group, economists Steven Salop and Joshua Wright were invited to assist the VI Working Group in understanding their work undertaken for ICANN in evaluating the effects of vertical integration between registries and registrars on registrants. 9 Professors Salop and Wright explained that vertical integration and vertical contracts between registries and registrars can create both competitive harms and competitive benefits. A vertically integrated owner of a registry would have the incentive to charge a lower registration fee. Vertical integration also might help jump start a struggling registry and enable the creation of a superior registry product. Vertical promotional deals between registrars and registries are also capable of driving a significant increase in registrations. Professors Salop and Wright also noted that vertical integration can lead to competitive harms such as higher prices, lower quality, or slower innovation.
The most important factor in predicting whether vertical integration is capable of generating competitive harms is the presence of market ... [2]

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5.   Major Proposals debated within the VI Working Group

The VI Working Group solicited proposals addressing vertical integration models for adoption in the New gTLD program. The proponents of these proposals presented their models and debated the relative merits of each.

Despite many hours of face-to-face meetings, telephone conference calls, and over 2600 emails generated in a five month period, no consensus has been reached on a proposed model on vertical integration and cross-ownership.

A the proposals submitted to the VI Working Group that have garnered minimal levels of support and are actively under consideration are summarized here and included in on **Annex B** to this Report. These proposals are included in this Initial Report to reflect the current status of the efforts of the VI Working Group and to invite public comment on these various proposals. Comments submitted early in the public comment forum will be reviewed by the VI Working Group as it continues its deliberations and attempts to identify one or more proposed solutions to be included in its Final Report to the GNSO Council.

The Working Group conducted several polls on the proposals (sometimes referred to as "molecules" by the Co-Chairs), and their component features (or "atoms") to identify levels of consensus among the members of the WG. Listed below are the results of the latest poll taken before the release of this Initial Report.

Proposal Name	In Favor	Could Live With	Opposed	No Opinion	Did not vote
JN2	12	11	16	2	26
Free Trade	16	4	20	1	26
RACK+	12	3	23	2	27
CAM3	2	12	24	2	27
DAGv4	0	11	27	2	27
IPC	1	5	29	5	27

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JN2 Proposal Summary

The JN2 Proposal is intended to permit cross ownership between registries and registrars, as long as cross-owned entities are not in a position of controlling the other or possessing a greater than 15% ownership interest in the other. The JN2 proposal contains definitions of affiliation, which include both ownership (> 15%) and control (direct or indirect) and allows exceptions for single registrant TLDs, community TLDs and Orphan TLDs.

- It restricts Registry Operators and their affiliates from distributing names within the TLD for which Registry Operator or its affiliate serves as the Registry Operator.
- It allows registrars (and their affiliates) to be Registry Operators provided they agree to not distribute names within a TLD for which they or their affiliates serve as the Registry Operator.
- Restrictions do not apply to back-end registry service providers (RSPs) that do not control the policies, pricing or selection of registrars.
- After 18 months, any restricted RSP may petition ICANN for a relaxation of those restrictions depending on a number of factors.
- Cross ownership limitations extend to registrar resellers for 18 months. After that, market protections mechanisms must be in place.
- Registry Operators may select registrars based on objective criteria and may not discriminate among the ones they select.

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Free Trade Proposal Summary

The Free Trade Model proposes that limits on cross ownership (CO) and Vertical Integration (VI) are discarded.

Highlights of the Free Trade Proposal are as follows:

- No CO or VI restrictions on Registrars, Registries, or Registry Service Providers (RSPs).
- Equivalent access for Registrars is required with Registries allowed to self distribute so long as they are bound by the RAA and pay required registration fees.
- RSPs shall be required to be accredited by ICANN for technical sufficiency. RSPs shall also be bound by the similar terms, conditions, and restrictions imposed on Registry Operators through their contractual agreement with each Registry Operator.
- This model removes the need for exceptions like Single Registrant – Single User (SRSU), Single Registrant – Multiple Users (SRMU), & Orphan TLDs.
- This proposal assumes ICANN's funding of contractual compliance resources will match the demands of the new gTLD expansion. Requirements to monitor, enforce and ultimately prevent malicious or abusive conduct will be directed at the conduct at issue rather than through cross ownership limitations.

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312

313   **RACK+ Proposal Summary**

314   **This proposal recommends the continuation of ICANN's current policy of separation**

315   **between registries and registrars.**

316

317   **Cross Ownership**

318   - ICANN should permit cross ownership, both by a registry operator in a registrar and

319   by a registrar in a registry operator, up to 15%. This cross ownership approach

320   allows both registry operators and registrars to invest in domain name wholesale

321   and retail businesses. The rationale is to avoid creating ownership positions that

322   provide access to registry data for registrars.

323   - ICANN should permit cross ownership, both by a registry backend service provider in

324   a registrar and by a registrar in a registry backend service provider, up to 15%. This

325   group does not recommend that a new contract regime be established between

326   ICANN and registry backend services providers. Rather, ICANN could enforce this

327   cross ownership rule through the registry operator contract.

328

329   **Affiliate and Control**

330   Cross ownership caps should be supported by appropriate provisions addressing "affiliate"

331   and "control" to prevent gaming against the caps.

332

333   **GNSO Recommendation 19**

334   Registries must use only ICANN accredited registrars in registering domain names and may

335   not discriminate among such accredited registrars.

336

337   **Equivalent Access and Non-Discrimination**

338   Equivalent access and non-discrimination principles should apply to all TLD distribution.

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339 **Competition Authority Model (CAMv3) Proposal Summary**

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341 The Competition Authority Model CAMv3 allows referral to national competition authorities

342 to resolve questions about market power and consumer protection. It prohibits cross

343 ownership between registry and registrar as originally set forth in the ICANN Board Nairobi

344 resolution, but allows up to 100% cross ownership and full vertical integration under the rules

345 of a waver/exemption process.

346

347 • Those entities that wish may request an exemption/waiver. These would be forwarded

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348 to a standing panel entitled the Competition/Consumer Evaluation Standing Panel

349 (CESP). This panel would be given a set of guidelines for evaluating the applications. If

350 the CESP "quick look" or initial analysis raised no competition or consumer protection

351 concerns, the exemption/waiver would be granted.

352 If the CESP initial analysis raises competition or consumer protection concerns or

353 indicates a need for a more detailed or extended then ICANN shall refer the matter to

354 the appropriate national competition and/or consumer protection agencies.

355 • For those entities that are granted a waiver/exemption, a suitable set or pre-determined

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356 restrictions/safeguards will be placed into the registration authority agreement to

357 prevent self dealing or harm to third parties such as registrants and Internet users.

358 • The CAM proposal proposes a three tiered approach toward contractual compliance.

359 The first being ICANN's normal compliance efforts. The second being an annual audit.

360 The third being an expanded Post Delegation Dispute Resolution Procedure (PDDRP) for

361 third parties to initiate their own administrative remedy against a registration

362 authorities non-compliance, coupled with a strict three strikes rule for repeat offenders.

363

364

364   **DAGv4 Summary**

365

366   The following represents the Working Group's best interpretation of the DAG4 language. Its

367   interpretation has not been vetted through ICANN staff or the ICANN Board and therefore does

368   not represent an authoritative interpretation of what was intended by ICANN staff or the

369   ICANN Board and should not be relied upon by any potential new gTLD applicant. All questions

370   and comments related to the DAG4 language should be directed to ICANN staff and not the

371   Working Group.

372

373   •   A registrar entity or their Affiliate (another company with whom the registrar has

374   common Control) may not directly hold a registry contract. This applies regardless of

375   the TLD(s) in which the registrar is accredited.

376

377   •   A registrar entity or their Affiliate may have Beneficial Ownership of up to 2% of the

378   shares in a registry company. Beneficial Ownership is a form of ownership in which

379   shares have (a) voting power, which includes the power to vote, or to direct the voting

380   of the shares; and/or (B) investment power which includes the power to dispose, or to

381   direct the disposition of the shares.

382

383   •   In no circumstance may a registry entity Control a registrar or its Affiliates, or vice versa.

384

385   •   Affiliates of the registry entity may not distribute names in any TLD -- as either a

386   registrar, reseller or other form of domain distributor

387

388   •   No registrar, reseller or other form of domain distributer (or their Affiliates) may provide

389   Registry Services to a registry entity. Registry Services are defined in Specification 6 to

390   the registry contract.

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- Names can only be registered through registrars

- Registries can set accreditation criteria for registrars that are reasonably related to the purpose of the TLD (e.g. a Polish language TLD could require registrars to offer the domain via a Polish language interface).

- Participating registrars must be treated on a non-discriminatory basis

- Registries can register names to themselves through an ICANN-Accredited Registrar

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IPC Proposal Summary

The IPC proposed three models of .brand exceptions. Under the .brand SRSU, the .brand Registry Operator ("bRO") is the registrant and user of all second-level domain names. Wholly-owned subsidiaries and otherwise affiliated companies could register and use second-level names. Under the .brand SRMU, the bRO is the registrant for all second-level names and may license them to third parties that have a pre-existing relationship with the brand owner (e.g., suppliers) for other goods/services. Under the .brand MRMU, the bRO and its trademark licensees are the registrants and users of all second-level names.

Seven additional criteria for these .brand exceptions apply including, inter alia, (1) the trademark must be identical to the .brand string and the subject of registrations of national effect in at least three countries in three ICANN regions; (2) trademark owners whose principal business is to operate a domain name registry, register domain names, or resell domain names are ineligible; (3) under MRMU, the bRO delegates second-level names subject to trademark license agreement quality control provisions that allow at-will termination of registrations; and (4) .brand TLDs with second-level names registered to unrelated third parties are ineligible.

A new gTLD registry that satisfied a model and criteria (a) could control an ICANN-accredited registrar solely for registrations in that TLD; (b) did not need to use an ICANN-accredited registrar for registrations within the TLD; and/or (c) could enter into arrangements with a limited number of ICANN-accredited registrars for registrations in that TLD.

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Conclusions and Next Steps

While the VI Working Group is unable to identify a consensus recommendation at this time, many members believe that a consensus is still achievable, and that the bottom-up policy development process should continue to proceed. The principles described in Section 4 and the proposals described in Section 5 are included in this Initial Report to reflect the current status of the efforts of the VI Working Group and to invite public comment on these ideas. Comments submitted early in the public comment forum will be reviewed by the VI Working Group as it continues its deliberations and attempts to identify one or more proposed solutions to be included in its Final Report to the GNSO Council.

Under its expedited deliverables schedule, the VI Working Group proposes to produce a Final Report to the GNSO Council by   August, 2010, to enable the GNSO Council to evaluate its conclusions and recommendations at its   2010 meeting.

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ANNEX A - Preliminary Drafts of Principles

Compliance and Enforcement

(Preliminary Draft – for discussion purposes only)

The VI Working Group is deeply divided on a number of issues with regard to the issues surrounding vertical Integration and cross-ownership, including the role of ICANN's activities in the areas of compliance and enforcement with regard to the eventual policy that may be adopted by ICANN. Some members feel that loosening vertical integration/ownership controls may let the proverbial "genie out of the bottle that can't be put back" should competitive harms result in the marketplace. Others believe that adopting restrictions on vertical integration or cross ownership is the wrong approach altogether, and that the focus should be on protecting against harms, and providing sanctions where harms take place. Where there seems to be agreement is in the notion that an effective Compliance function is needed -- to increase confidence that harmful behavior will be quickly identified and stopped, and to provide better information upon which to base policy in the future. Described below is a preliminary draft of what might be needed in order to reduce those fears and provide the facts necessary for an effective Compliance function.

Introduction

The Vertical Integration Working Group (VIWG) created a Compliance and Enforcement sub team to draft an outline about compliance and enforcement issues that may be germane to the newTLD round. Since there is no consensus position on vertical integration, a specific compliance and enforcement regime cannot be articulated at this time. However, elements of a compliance and enforcement regime can be identified to assist the ICANN Board in assessing risk and resource allocation depending on the final recommendation regarding vertical integration in the newTLD round.

Regardless of the respective points-of-view concerning vertical integration, a significant number of VIWG members have expressed their belief that Compliance and Enforcement is a high priority. Some also noted that ICANN's Board and executive staff may not be giving the compliance function an appropriate level of strategic attention, resources or authority. This in turn raises serious concerns about ICANN's ability capability to develop, staff and make operationally effective an enforcement bureau function that would be necessary to monitor and enforce against harms or violations of rules developed by the VIWG.

While it is recognized that the level of compliance and enforcement could vary depending on the VI regime adopted (e.g. ownership caps and structural separation v. no ownership caps and full integration), it is recognized that ICANN is at the starting point of developing the necessary resources and functions. Writing rules, creating the necessary plans, obtaining the necessary resources, hiring qualified employees, training, establishing operational systems and having an effective program at the time newTLDs launch is not a trivial task. Moreover, the timeliness of detection and intervention is critical to preventing consumer and competitive harms identified in the VIWG. ICANN has taken a "reactive" approach to compliance and enforcement in the past – an inclination that is worrisome to advocates of a strong and effective compliance and enforcement program. A firm corporate commitment to compliance combined with the establishment of a genuine "culture of compliance" across all stakeholders in the community is absolutely necessary if ICANN is to devise and operate an effective enforcement bureau.

Outline of a Possible Compliance and Enforcement Program

The starting point in developing a compliance and enforcement regime is to identify the rules that are to be enforced. The rules can take a variety of forms including, among others:

1) mandates;

2) prohibitions or restrictions;

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488   3) permitted, yet circumscribed behavior;

489   4) permitted behavior, if threshold requirements have been met.

490   It should be noted that, unlike a governmental agency, ICANN is a not-for-profit

491   California corporation whose relationship with registries and registrars is based on contract.

492   ICANN does not have certain governmental powers (e.g. subpoena power) to utilize in a

493   compliance and enforcement program.

494   A critical element in building a compliance and enforcement program is timing. An

495   enforcement and compliance program that targets specific behaviors or acts must be properly

496   resourced and operationally effective at the time such behaviors or acts are likely to manifest

497   themselves in the market. In the case of newTLDs potentially anti-competitive or consumer

498   abuse behaviors (in fact a significant percentage) can be anticipated during the launch phase of

499   newTLDs. An Enforcement Bureau and compliance program that relies only on third party

500   surveillance or competitors reporting instances of abusive practices may not be timely for

501   purposes of enforcement.

502   Among the elements of an effective compliance and enforcement program are the

503   following:

504   **Compliance**

505   •   Risk analysis - a risk analysis of anti-competitive practices and consumer abuse practices

506   must be undertaken

507   •   Geographic scope – given the global nature of the DNS, compliance and enforcement

508   would be expected to be global in scope and reach. The same rules must apply for all

509   applicants independent of location.

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510 • Formal written compliance program – a compliance program must be formalized in
511   writing; for a compliance program to be effective it must be: clear; communicated;
512   corrective; and compelling (will be followed)
513 • Companies (or actors) subject to the compliance and enforcement program must make
514   a clear designation of responsible officers
515 • Senior Management Involvement/Commitment to Compliance – Senior Management
516   must be accountable and responsible for violations; compliance should be a corporate
517   value
518 • Bottom-up compliance – training of employees is critical to establishing bottom-up
519   compliance
520 • Screening – active screening/sampling for potential problems
521 • Recordkeeping requirements – covering data handling and transactions
522 • Internal reporting systems – opens a dialogue between management and employees
523 • Chinese walls – effective Chinese walls designed to prevent sharing of sensitive registry
524   data with ongoing verification tools
525 • Documented Training along pre-established Training outlines
526 • Random Audits
527 • Remedial actions – corrective action; internal disciplinary action
528 • Advice line – resource for companies/actors attempting to institute and maintain
529   compliance

530 **Enforcement**

531 • Monitoring and Detection
532 • use of data and information systems to identify trends
533 • random compliance audit checks (sampling)
534 • prioritizing investigations and promote efficient use of resources
535 • system for "public assistance" in monitoring and detection

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536   •   voluntary disclosures – opportunity and process to self-report violations to mitigate

537   penalties

538   •   Investigation and Collection of Evidence

539   •   Standards of Proof

540   •   Penalties

541   •   Mitigating and Aggravating Factors

542   •   Deterrence: Penalty system that encourages compliance and removes incentives for

543   non-compliance.

544   •   Resources – human (e.g. investigators; attorneys; auditors); data systems; document

545   collection and handling

546   In developing a compliance and enforcement program, ICANN's past history and present

547   structure and resources must be taken into account. A uniquely "reactive" approach to

548   compliance and enforcement will not sufficiently serve the purposes of a new compliance and

549   enforcement regime for the newTLD round. Based on public skepticism of historic enforcement

550   challenges, a new compliance and enforcement program should be in place, properly financed

551   and staffed and operationally effective prior to changes that would open the door to potential

552   anti-competitive conduct and abusive practices. ICANN's staffing requirements, internal

553   structure, reporting lines (senior management responsibility; report to the CEO) and oversight

554   (who will watch the "watchers") are important issues that would need to be addressed and

555   formalized to create a new, proactive as well as reactive "culture" of compliance and

556   enforcement.

557   Concerns have been raised that a Compliance and Enforcement program not inhibit

558   competition by smaller providers or place "big company" compliance requirements that may be

559   unworkable for smaller providers. Concerns have also been noted that rules not be unduly

560   complex or place too significant on ICANN's staff and resources so that ICANN always "playing

561   catch up." Finally, some members of the working-group note that the VIWG need not have a

562   consensus position on VI to address current state or future state innovative proposals. Also that

563 gaming and harms can occur outside of cross ownership but that, in any event, stricter

564 compliance should be required.

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<p style="text-align: center;">**Exceptions Procedure**</p>

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It is impossible to know or completely understand all potential business models that may be represented by new gTLD applicants. That fact has been an obstacle to finding consensus on policy that defines clear, bright line rules for allowing vertical integration and a compliance framework to support it while ensuring that such policy is practical and beneficial in the public interest.

575

However, it is recognized that certain new gTLDs likely to be applied for in the first round will be unnecessarily impacted by restrictions on cross-ownership or control between registrar and registry in the event ICANN adopts a requirement of strict separation between registrars and registries[14].

580

During discussions there seemed to be general acceptance of the need for a process that would allow applicants to request exceptions and be considered on a case by case basis. The reasons for exceptions and the conditions under which exceptions would be allowed, varied widely in the group, but there did seem to be a general acceptance of the need for the following:

- Possible exceptions based on certain public interest needs where those needs would not otherwise be addressed (certain language groups, developing countries, certain communities due to size or economic conditions, etc.).

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[14] Note: this proposal does not presuppose any specific control or cross-ownership thresholds but rather deals with the case of exceptions to that threshold policy. The issue of specific control or cross-ownership thresholds are is dealt with elsewhere in the VIWG reporting.

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- In cases where the facts of competitive disadvantage cannot be established until after operations are begun (e.g., "orphan" registries), the exception may be requested and granted, but only exercised when defined circumstances are met (e.g. insufficient registrar support).
- That there needed to be an agreed upon list of circumstances defining the cases where the granting of an exception would be allowed.
- That an external review panel would be responsible for reviewing applications for exception.
- That the Vertical Integration Policy Development Process should provide a set of guidelines for an external review panel.
- There should be no additional cost to the applicant for requesting the exception or for being evaluated for it. The evaluation would take place at an appropriate point following the Initial Evaluation. If the request is denied, the applicant may withdraw and receive the appropriate pro-rated refund.

It was also accepted that if there is consensus on these five bullets then they could be recommended to the GNSO council and that the VIWG would continue to discuss the elements on the exception list, the nature of the review panel, and the guidelines that would be provided to that external review panel while the public comment period and other PDP follow-up processes were ongoing. The public comment could specifically request comments on the elements of the exceptions lists and other elements related to an exceptions policy. These comments would then be considered by the VIWG and, if appropriate, folded into the recommendation on the details of the exception policy and sent to the council for review and approval. A specific VIWG charter extension for this work would be recommended to the GNSO Council.

Examples of the kind of criteria for exception that will be discussed as the VIWG continues its work include but are not limited to:

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- Where the registry cannot find unaffiliated registrars to offer its gTLD to the public.
- Where the gTLD caters primarily to a specific language group, and where the registry cannot find unaffiliated registrars who will offer its gTLD in an order process in that language.
- The applicant may define criteria reasonably related to the purpose of its gTLD as conditions for Accredited Registrar participation, but may not otherwise discriminate or restrict Accredited Registrar access.

Special Consideration for a Single Registrant, Single User (SRSU) Exception.

(Preliminary Draft – for discussion purposes only)

As highlighted above, the VI Working Group discussed several specific exceptions to prohibitions on vertical integration and cross-ownership. One such proposed exception is for single-registrant, single-user registries (SRSU). Under the proposed SRSU exception, the registry itself is both the only registrant and the only user of second-level names.[15] Within the VI Working Group, there was a general endorsement of the idea of an SRSU exception. However, support of specific types of SRSUs varies depending on the type of SRSU and how the exception would be sought and granted.

Types of SRSU exceptions. As discussed further below, several types of SRSUs were proposed in the public comments by constituencies and stakeholder groups, as well as WG members. The Intellectual Property Constituency (IPC) proposed an SRSU and SRMU exception for a registry for which the gTLD string is an identical match to the registry's trademark/service mark (a ".brand" registry) and that satisfied additional criteria intended to limit the applicability of the exceptions and to discourage abuse and gaming of the exceptions. Other WG participants proposed an SRSU exception for non-governmental organization registries (NGOs) (referred to as .ngo registry) in cases where a specific membership organization could be identified and the string corresponded to the NGO's name. An SRSU exception for cultural, linguistic or non profit organizations was also proposed. And still others proposed an SRSU exception for any entity that could meet strict use requirements where the only user of the second-level names is the registry itself.

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[15] Although the Working Group also initially discussed a single-registrant, multiple-user (SRMU) subcategory, the Working Group focused most of the time that it spent on a Single Registrant Exception discussing the SRSU subcategory. Accordingly, only SRSU is identified in the main body of the report.

649   The discussion to date has centered on an SRSU where second level names can only be
650   registered to the registry (i.e. the registry is the registrant for all names). Some members of the
651   Working Group feel that with more time to work on this type of exception the Working Group
652   may find consensus. Very little, if any, time was devoted to discussion about any other type of
653   single registrant exception as noted above.

654   **[Placeholder for other SRSU text – from Richard, anyone else?]**

655   **[BRU1 text insert starts]**

656   The BRU1 sub-group defined a Single Registrant Single User (SRSU) TLD as one where the
657   registry sets a policy where second level names can only be registered to the registry (i.e. the
658   registry is the registrant for all names). Also, the use of those names in terms of website
659   content, email control, or any other application associated with the domains is exercised only
660   by the registry. As a practical matter this means the registry entity is not providing second level
661   names to other parties (who would have control over website content, email use, etc).

662   Under the BRU1 approach any registry may operate as an SRSU - it is not limited to 'brand'
663   TLDs. BRU1 believe the current registry contract (Section 2.6 'Reserved Names') may already
664   satisfy the needs of the SRSU model, however, BRU1 recommends an amendment to Section
665   2.6 such that the SRSU model is explicitly addressed (the amendment would also allow
666   registries to add to their schedule of reserved names in a timely manner). If Section 2.6 cannot
667   be amended BRU1 supports an exception that allows an SRSU registry to have: (1) 100%
668   ownership/ control of a registrar in their TLD; and (ii) no obligation to provide equal access to
669   other registrars. **[BRU1 insert concludes]**

670   According to some proponents of the SRSU exception, the principle rationale of the SRSU
671   exception is to facilitate the participation in the introduction of new gTLDs (a) by entities whose
672   principal business or activity (commercial or not) is not the operation or control of a domain
673   name registry, domain name registrar, or domain name reseller; (b) where the operation of the

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registry and the provision of domain names is ancillary to the registry operator's principal line

of business and/or the provision of domain names is subordinate to and intended to enhance

the registry operator's provision of goods or services; and (c) by entities whose participation

could be impaired if prohibitions on vertical integration or cross ownership applied. These

proponents of the SRSU structure contend that it, along with the type-specific restrictions, will

preclude the harms attributed to vertical integration and cross ownership for these types of

entities. The registry controls the use of all second-level names the SRSU structure, and cannot

transfer second level names to third-parties independent of any transfer or sale of the TLD

itself.

    [placeholder for criticisms of SRSU exception].

ANNEX B - Major Proposals

The following proposals emerged as the "finalists" reviewed by the VI Working Group during its deliberations.

Proposal Name	In Favor	Could Live With	Opposed	No Opinion	Did not vote
JN2	12	11	16	2	26
Free Trade	16	4	20	1	26
RACK+	12	3	23	2	27
CAM3	2	12	24	2	27
DAGv4	0	11	27	2	27
IPC	1	5	29	5	27

JN2 Proposal

1.   Definitions

    i.   "Affiliate" shall mean a specified person or entity that directly or indirectly
          through one or more intermediaries, controls or is controlled by, or is under
          common control with, the person or entity specified.

    ii.   "Control" (including the terms "controlling", "controlled by" and "under
          common control with") shall mean the possession, direct or indirect, of the
          power to direct or cause the direction of the management and policies of a
          person or entity, whether through the ownership of voting or debt securities, by
          contract, or otherwise. As used in this definition, the term "control" means the
          possession of beneficial ownership of more than fifteen percent (15%) of the
          equity interests or more than fifteen (15%) of the interests entitled to vote for
          the election of, or serve as, the board of directors or similar managing authority
          of the entity.

2.   Registry Operator or its Affiliate may serve as an ICANN-Accredited Registrar in any top-
      level domain other than the TLD for which Registry Operator or its Affiliate serves as the
      Registry Operator.

3.   Except as set forth in Section 4 below, Registry Operator may not be Affiliates with an
      ICANN-Accredited Registrar distributing names in the TLD.

4.   For the first 18 months of the New TLD program, ICANN only may approve a greater
      than 15% interest (or control) in three cases:

720   i.   Single Registrant TLD -- use must be limited to registrant entity, its employees,

721   and its agents -- no other third parties

722

723   ii.   Community Applicant – Registry Operator or its Affiliates must only maintain up

724   to 30,000 domain name registrations in the TLD.

725

726   iii.   Orphan Registry Operator -- Registry Operator must make good faith showing

727   that it attempted and failed to get traction in registrar marketplace, and Registry

728   Operator or its Affiliates must only maintain up to 30,000 names without

729   demonstration that it again made good faith efforts to attempt -- and failed -- to

730   get traction in the registrar marketplace. In order to maintain this exception, the

731   Orphan Registry Operator must demonstrate on an annual basis that it made

732   good faith efforts to attempt – and failed – to get traction in the registrar

733   marketplace. No change of control shall be allowed of an Orphan TLD absent

734   ICANN approval. In the event ICANN approves change of control by an ICANN-

735   Accredited Registrar, they lose orphan TLD status.

736

737   ICANN may consult with relevant competition authority at its discretion when reviewing

738   any of these requests for approval. In so doing, ICANN should use a "public interest"

739   standard.

740

741   5.   After the first 18 months, ICANN may amend the criteria for its approval of a greater

742   interest only with consensus approval of the community. ICANN also may consult with

743   relevant competition authorities at its discretion or at the request of the applicant when

744   reviewing a specific request for approval.

745

746   6.   Use of Registrars/Discrimination -- Registry Operator must use only ICANN-accredited

747   registrars in registering domain names, provided that Registry Operator shall have the

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flexibility to determine eligibility criteria for Registrars in its TLD; such criteria shall be applied equally to all ICANN-Accredited Registrars; such criteria are reasonably related to the purpose of the TLD; and the Registry Operator may not discriminate among the registrars it selects.

7. Back-end Registry Operators -- these requirements to be added to the Registry Operator Agreement

    i. Back-end registry service providers are bound by the same rules as the Registry Operators if they (a) are Affiliates with Registry Operator, or (b) otherwise control the pricing, policies, or selection of registrars for that TLD.

    ii. Back-end registry service providers that are not Affiliates with Registry Operator or don't otherwise control the pricing, policies, or registrar selection may be affiliated with an ICANN-Accredited Registrar only if the affiliated registrar operations are kept separate from the operations of the registry service provider; the affiliated registrar does not receive preferential treatment in pricing or any other way; strict controls are in place to prevent registry data and other confidential information from being shared with affiliated registrar; annual independent audits are required; and a sanctions program is established.

8. Registrar Resellers -- these requirements to be added to the Registry Operator Agreement:

    i. Restriction on Registry Operators or its Affiliates from serving as or controlling an ICANN-accredited registrar extends to registrar resellers for the first 18 months of a Registry Operator's existence. If an exception has been granted under Section 3, then those exceptions shall equally apply to this restriction.

776

777   ii.   After 18 months, Registry Operators may distribute domains as a registrar

778   "reseller" as long as the ICANN-Accredited registrar that it distributes through is

779   not affiliated with Registry Operator; the operations of the affiliated registrar

780   reseller are kept separate from the operations of the Registry Operator; the

781   affiliated registrar reseller does not receive preferential treatment in pricing or

782   any other way; strict controls are in place to prevent registry data and other

783   confidential information from being shared with affiliated registrar reseller;

784   annual independent audits are required; and a sanctions program is established.

785

786

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786

787 **Free Trade Proposal**

788

789 **1. LIMITS DO NOT APPLY ACROSS TLDS**

790 In the Free Trade model for the coming round, there are no limits to Cross Ownership (CO) &

791 Functional Control for new TLDs that distribute domains with equivalent access. The issues

792 discussed around this concept have very little to do with percent ownership and more to do

793 with the abuse and harms of having integrated control of data. Setting random percent

794 ownership limits does nothing to mitigate harms and abuse. Such abuse examples are

795 Discrimination, Insider trading, Domain registration abuse, Domain tasting, Front-running,

796 Predatory pricing, Account lock-ins, Transfer-out pricing, reduced product variety. No harms

797 have been shown to have occurred unmanageably to date, in any namespace, due to lack of

798 VI/CO restrictions. Any alleged harms, if any, occur roughly equally across DNS, regardless of

799 any such restrictions, if any. Whether the Registry (Ry) operates in self distribution model or a

800 co-distribution model with "equal access" to all ICANN- accredited registrars, the concept of

801 market power is essential when conducting the risk analysis and policy development of

802 allowable models.

803

804 In the new TLD space, and indeed the existing gTLDs (perhaps other than .com/net/org), there

805 is no justification for any restrictions on vertical integration, cross-ownership, or the

806 requirement of any or equal access to registrars. On the other hand, there is much likely benefit

807 from avoiding or eliminating those restrictions. All other models foster the demand for

808 exceptions in addition to the issue of harms and abuse. Therefore no such restrictions or

809 requirements should be imposed upon new TLD registry operators. Of course, registrars will

810 continue to be widely used by consumers to register new gTLD domains, to that extent the

811 registrars must be ICANN-accredited to offer gTLD names. Registries who sell direct must also

812 agree to the RAA and pay registrar fees to ICANN.

813

814 Registrars will still be able sell most new gTLDs and charge fees based on their business model,

815 but the ability to buy direct from a registry is certainly in consumer best interests to keep

816 registration fees lower. ICANN assumes that the new TLD launch is in consumers' best interest,

817 in order to expand consumer choice among domain names and in order to encourage DNS

818 innovation, so it is logical that ICANN should enable new entrants to the gTLD market as much

819 as possible. Thus the ability for new registries to sell direct, and to control their own

820 distribution channel outside of ICANN's traditional model, is certainly in consumer's best

821 interests.

822

823 **2. CONTROL/OWNERSHIP**

824 No ownership limits. 100% Cross Ownership and complete Vertical integration is allowed.

825

826 **3. OWNERSHIP LIMITS**

827 No ownership limits. 100% Cross Ownership and complete Vertical integration is allowed.

828

829 **4. EXCEPTIONS**

830 The Free Trade model removes the need for exceptions like Single Registrant – Single User

831 (SRSU), Single Registrant – Multiple Users (SRMU), & Orphan TLDs.

832

833 **5. REGISTRY SERVICE PROVIDERS**

834 New gTLD Registry Operators should be free to contract with Registry Service Providers (RSP)

835 regardless of ownership, so long as the obligations of the Registry contract are fulfilled.

836

837 **6. COMPLIANCE AND ENFORCEMENT**

838 To the extent that any harms are actually caused by violation of CO or VI restrictions today, it is

839 because existing rules have not been clear enough and/or have not been enforced fully enough.

840 Clarity in the rules would greatly benefit new TLD operators, Regardless of the rules that are

841 devised, if any, ICANN's funding of contractual compliance resources and expertise must match

842   the demands of the new gTLD expansion.

843

844   **Questions:**

845   **What is the best way to prevent gaming in a cross-owned entity -- percentage ownership**

846   **caps, restrictions on control, both or something else?**

847

848   Percentage ownership caps become irrelevant with respect to gaming if Functional

849   Control is allowed and compliance to address violations is established. Gaming is primarily

850   a function of the Vertical Integration debate rather than the concept of Cross Ownership.

851   Therefore to mitigate gaming of new TLDs, the community must identify the ways these

852   forms of abuse stemming from Functional Control can affect the market and establish a

853   compliance framework that defines the thresholds, monitors for breach, and enforces

854   penalties for violations.

855

856   **Do the benefits of increased competition (registrars becoming registries or back-end service**

857   **providers) outweigh the potential risks of gaming from a cross-owned entity, or vice-versa?**

858

859   Yes. The potential risks of gaming, if any, can be addressed by compliance, monitoring,

860   and enforcement mechanisms.

861

862   **Common ownership Should a registry be able to own a registrar, and vice versa, provided it**

863   **doesn't distribute its own TLD?**

864

865   Yes, and should be able to distribute its own TLD.

866   **What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is permitted?**

867   0–100%

868   **What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is prohibited?**

869   0–100%

870 **Should a registry be able to control a registrar, and vice versa, provided it doesn't distribute**

871 **its own TLD?**

872   Yes, and should be able to distribute its own TLD with the equivalent access model

873 Absent an arbitrary restriction on percentage of cross-ownership, what constitutes control?

874   The functional control of Registrar data and operations of the TLDs in which they operate.

875 **What restrictions should be put in place to prevent control? Do these vary if self-distribution**

876 **is prohibited?**

877   Functional control should not be prevented, but any abuses and gaming that are alleged

878   as likely to result from control should be researched and contractually defined in a

879   manner that removes the incentive or contains consequence.

880 **Enforcement and Compliance**

881 **Is ICANN capable of enforcing contract compliance to prevent gaming in a cross-owned**

882 **entity?**

883   To the extent we understand the alleged harms, and how the marketplace has adequately

884   addressed those harms to date in TLDs that have no VI/CO restrictions, the answer is yes.

885   Any rules can be "gamed" by someone's definition of gaming. Eliminating CO/VI rules will

886   result in less need for compliance as to corporate formalities, which are generally

887   irrelevant to issues of abuse. Thus elimination of CO/VI rules will allow more compliance

888   resources to focus on combating actual DNS abuses that affect internet users.

889

890 **Scope**

891 **Should the scope of ICANN contracts be increased?**

892   No, Back-end Registry Service Providers (RSPs) shall be required to be accredited by

893   ICANN for technical sufficiency. It is expected that RSPs shall also be bound by the similar

894   terms, conditions, and restrictions imposed on Registry Operators through their

895   contractual agreement with each Registry Operator.

896   Existing ICANN contracts may require a few adjustments based on implementation.

897 **Specifically, should Registry Service Providers be required to enter into contracts with ICANN?**

898   No, Back-end Registry Service Providers (RSPs) shall be required to be accredited by

899   ICANN for technical sufficiency. It is expected that RSPs shall also be bound by the similar

900   terms, conditions, and restrictions imposed on Registry Operators through their

901   contractual agreement with each Registry Operator.

902   **Should other entities (eg Resellers) also be required to enter into contracts with ICANN?**

903   No, not at this time.

904   **Exceptions to cross-ownership and self-distribution restrictions Permitted for Single-**

905   **Registrant, Single-User (SRSU) TLDs?**

906   Not applicable with the Free Trade model

907   **Permitted for "orphaned" TLDs that can't get registrar distribution?**

908   Not applicable with the Free Trade model

909   **Permitted for "community" TLDs?**

910   Not applicable with the Free Trade model

911   **Should there be numeric caps for any or all of these?**

912   Not applicable with the Free Trade model

913   **Interim solution**

914   **Should the results of this first-phase VI-WG PDP be limited to the first round of new TLDs**

915   **only?**

916   No. This PDP will either create a Policy and or the ICANN Board will make decision with

917   respect to the Vertical Integration and Cross Ownership model. Said model will evolve up

918   through to any subsequent TLD round only modified or terminated by subsequent PDPs.

919

920

921

922

923

923   **Vertical Integration Proposal – RACK+**

924

925   The undersigned support the following proposal for vertical integration rules in the newTLD

926 round. Having participated in the Vertical Integration PDP Working Group, the undersigned

927 note the complexity of the issues concerning proposed vertical integration and underscore the

928 good faith efforts by the participants in the PDP Working Group to deliver a consensus based

929 proposal for consideration by the GNSO Council and, ultimately, the Board.

930   This proposal is designed to preserve the separation of registries and registrars which

931 protects registrants with more robust competition and a system in which all registrars, small

932 and large, from all regions of the world, benefit from equivalent access and non discrimination

933 for domain name registrations. An overarching concern that informs this proposal is the

934 prospect of gaming and the negative impact for registrants arising from the potential misuse of

935 registry data. The proposal is intended to minimize the possibility of abuse of registry data

936 through structural separation and to provide a framework that does not strain ICANN's

937 enforcement resources or capabilities. Abuse of registry data will result in higher prices and

938 unavailability of higher value domain names. Prevention of registry data abuse would be easier

939 under this proposal than under proposals that rely on purported behavioral safeguards to

940 prevent such abuse.

941   We acknowledge that the Working Group will continue to examine issues around vertical

942 integration beyond the Brussels ICANN meeting until the mandate of the VI WG has been fully

943 discharged.

944   We also take note of the levels of support the following items have garnered as reflected in

945 the Vertical Integration Working Group proposal grid. In that spirit, the following vertical

946 integration proposal has our full support:

947   **PROPOSAL**

948

949 **Cross Ownership**

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1. ICANN should permit cross ownership, both by a registry operator in a registrar and by a registrar in a registry operator, up to 15%. This cross ownership approach allows both registry operators and registrars to invest in domain name wholesale and retail businesses thus stimulating growth in the industry. At the same time, the 15% ownership cap avoids creating ownership positions that provide incentives for registries and registrars alike to discriminate against unaffiliated competitors.

2. ICANN should permit cross ownership, both by a registry backend service provider in a registrar and by a registrar in a registry backend service provider, up to 15%. This cross ownership approach is recommended for the reasons stated in paragraph 1 above and to create an even playing field for all actors in the market. This group does not recommend that a new contract regime be established between ICANN and registry backend services providers. Rather, ICANN could enforce this cross ownership rule through the registry operator contract.

For these ownership caps to be meaningful and effective, rules concerning corporate control through other means and use of affiliates to subvert the ownership caps should be part of the new TLD contracts. See definitions of "Affilate" and "Control." Structural separation of registries and registrars, as set out above, will be easily and readily verifiable, and completely auditable. It will achieve the goal of separation of control so that registries and registrars are run separately, notwithstanding the very limited cross-ownership.

GNSO Recommendation 19

Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.

Equivalent Access and Non-Discrimination

Equivalent access and non-discrimination principles should apply to all TLD distribution.

Definitions

978 Affiliate shall mean a specified person or entity that directly or indirectly through one or more

979 intermediaries, controls or is controlled by, or is under common control with, the person or

980 entity specified.

981

982 Control (including the terms "controlling", "controlled by" and "under common control with")

983 shall mean the possession, direct or indirect, of the power to direct or cause the direction of

984 the management and policies of a person or entity, whether through the ownership of voting or

985 debt securities, by contract, contracts including debt and liquidity instruments or otherwise. As

986 used in this definition, the term "control" means the possession of beneficial ownership of

987 more than fifteen percent (15%) of the equity interests or more than fifteen (15%) of the

988 interests entitled to vote for the election of, or serve as, the board of directors or similar

989 managing authority of the entity.

990 Registry Operator is the entity that is a contracting party to the Registry Operator agreement

991 with ICANN for the TLD in question.

992 Registrar is the entity that is a contracting party to the Registrar Accreditation Agreement (RAA)

993 with ICANN that is authorized to register domain names.

994 Backend Registry Services Provider shall mean any entity performing any material registry

995 services on behalf of the Registry Operator, including but not limited to shared-registrations-

996 services, DNS, WHOIS or any other material Registry Services defined by the Registry Operator.

997

998 Registrar Reseller - restrictions on Registry Operators, Backend Registry Service Providers or

999 their Affiliates from serving as or controlling an ICANN-accredited registrar extends to registrar

1000 resellers.

1001

1002   **SUPPORTERS**

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1004   Afilias
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1006   Ken Stubbs
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1009   Ron Andruff
1010   RNA Partners, Inc.
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1012   Tim Ruiz
1013   GoDaddy
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1015   Sébastien Bachollet
1016   In his individual capacity
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1018   Olga Cavalli
1019   In her individual capacity
1020
1021   Kathy Kleiman
1022   PIR
1023
1024   David Maher
1025   PIR
1026
1027   Anthony Harris
1028   Latin America and Caribbean Federation of Internet and Electronic Commerce –
1029   eCOM-LAC
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1031   Alan Greenberg
1032   In his individual capacity
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1034   Cheryl Langdon-Orr
1035   In her individual capacity
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1037   Jothan Frakes
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Joint Vertical Integration/Co-Ownership Proposal:

Competition Authority Model (CAM)16

1045

Problem Statement: ICANN is, we hope, on the verge of the greatest expanse of the domain name space since its creation in 1985. However, ICANN's current legal framework was developed to open up a legacy monopoly that existed over a decade ago. That framework lacks the flexibility to promote increased innovation and choice in an increasingly competitive and fluid marketplace while still safeguarding consumers' interests.

Objective: To break away from ICANN's current one-size fits all contracting model, and to provide a framework that can both scale going forward and provide room for "innovative new business models that are very different from those of existing TLDs' registry operators.[17]"

Proposed Solution

Registry Operator/Registrar Co-Ownership: Any request by a Registration Authority (Registry or Registrar), whether in the initial application or post delegation, seeking to acquire any ownership interest in a different type of Registration Authority[18] would be subject to the following multi-step process. This process would apply to new gTLD applicants as well as existing Registration Authorities seeking an ownership interest in a

---

[16] This proposal is based on the original MMA proposal, which represented a compromise between the professional opinions and viewpoints of the three original co-authors, Michael Palage, Milton Mueller and Avri Doria. That original compromise has been amended to reflect comments offered by the other members of the Vertical Integration WG.

[17] See "An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names" Katz, Rosston, and Sullivan, Page 6.

[18] "Different type of Registration Authority" is intended to be defined as a Registry seeking an ownership interest in a Registrar, or vice versa, It is not intended to encompass a Registration Authority acquiring an ownership interest in a similarly situated Registration Authority, e.g. this process is not intended to apply to a Registrar acquiring an interest in another Registrar, or a Registry in another Registry. It should also be noted that discussion of registration services in affiliated Registration authorities covered in the next section of this proposal

1061   different type of Registration Authority. For new gTLD application this process would be

1062   part of the initial and extended review process. For gTLDs that have already been delegated,

1063   the process would resemble the current Registry Service Technical Evaluation Panel (RSTEP)

1064   process.

1065   Step #1

1066   All applicants would be required to answer a series of pre-determined questions regarding

1067   the proposed interaction within the marketplace of the Registration Authorities, and series

1068   of other questions designed to reveal the market share and any potential market power or

1069   consumer harm of those Registration Authorities, either individually or combined, could

1070   exert on consumers (registrants and Internet users of domain names).[19]

1071   Step #2

1072   All applications would then be referred to an ICANN standing committee of international

1073   competition and consumer experts for a "quick look analysis." This standing panel could be

1074   modeled after ICANN's existing Registry Service Technical Evaluation Panel (RSTEP).

1075   However, this Competition/Consumer Evaluation Standing Panel (CESP) would include

1076   economics, law, consumer protection and policy experts from each of the five ICANN

1077   geographical regions.[20] The analysis by the CESP would be based upon the applicant's

1078   responses to the agreed upon questions.

1079   If the CESP "quick look" or initial analysis raised no competition or consumer protection

1080   concerns, the processing on the new gTLD application would continue. In the case of an

1081   existing delegation, ICANN would approve the request.

---

[19] These questions could initially be drafted by experts in competition law, and then shared with the broader Internet community as part of a normal ICANN consultation period. These questions would then be forwarded by ICANN to the Government Advisory Committee (GAC) for referral to the appropriate competition authority within each country. Following standing international protocols, these national competition authorities would have six weeks to provide any feedback to ICANN.

[20] Although the economic Panelists would be required to be internationally recognized experts in their field, the CESP could include non-economic experts with detailed market knowledge of the domain name marketplace to assist in the Panelists' evaluation. This option is designed to provide the economic experts with timely access to marketplace information that would otherwise have to be provided by ICANN staff.

Step #3

If the CESP initial analysis raises competition or consumer protection concerns or indicates a need for a more detailed or extended analysis to properly evaluate the proposal, then ICANN shall refer the matter to the appropriate national competition and/or consumer protection agencies. The accompanying CESP report would describe the concerns and identify the appropriate competition and/or consumer protection authorities to which the case should be referred. This referral process is modeled after the process currently set forth in the Registry Services Evaluation Process (RESP). Unlike the RESP, however, which relies upon ICANN staff to make these referrals, the CESP is a much more qualified external review body to make these complex determinations.

Step #4

The appropriate national competition and/or consumer protection authorities would then have 45 days to review the referral to determine if it gives rise to any potential enforcement action. If the agency or agencies notify ICANN and the applicant during that 45 day period that the application may violate its competitions or consumer protection laws, ICANN will place the application on hold for another period not to exceed 60 days following the deadline that agency or agencies have established for the applicant to respond to any information requests for its investigation. At the end of this period, or sooner if notified by the agency or agencies that all issues have been resolved and unless concerns have been flagged for further review or action, ICANN will forward a new gTLD application for further processing, or approve the request for an existing delegation.

This process corresponds to a modified implementation of the Salop/Wright Option 2[21].

The hold period should have no negative impact on the processing of the application by ICANN during the Initial Evaluation. The hold would only come into play prior to contention set resolution in the case of multiple applicants for a single string, or prior to contractual

---

[21] See http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf

1107 approval if the string is not part of a contention set. Given that ICANN has scheduled five

1108 months for the Initial Evaluation of all gTLD applications, this should provide for more than

1109 sufficient time for the CESP and the competition agency or agencies to complete their

1110 respective reviews.

1111 **Registration by cross-owned Registry-Registrar**: Registries and Registry Service Providers

1112 (RSP) would be permitted to provide domain name registration services for their TLD

1113 through an affiliated Registrar. This applies all forms of affiliation including cross-ownership

1114 or some other form of affiliation.

1115 In order to mitigate against possible harm, the following rules would apply to all instances

1116 of a Registry or RSP providing domain name registration through an affiliated Registrar:

1117   a) In the event the Registry Operator/RSP controls[22] pricing, policy or the selection

1118   of registrars for the TLD, then the restrictions applicable to the Registry

1119   Operator/RSP shall also be applicable to any of its Affiliates.

1120

1121   b) In addition, in the event that Registry/RSP or any of its Affiliates is a Registrar for

1122   the TLD, the following restrictions shall apply:

1123

1124   1. Affiliated Registrar may not receive directly or indirectly preferential

1125   pricing from Registry Operator (i.e., direct pricing, rebates, discounts,

1126   marketing contracts, etc.).

1127

1128   2. RSP must have strict controls on use of data for any purpose other than

1129   acting as the RSP and must have information "firewall" between data in

1130   the registry and its Registrar Affiliate.

---

[22] "Control" (including the terms "controlling", "controlled by" and "under common control with") shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

3. No confidential information of the Registry Operator obtained by the RSP may be shared with registrar Affiliate of RSP except as necessary to perform the Registry Services and only for such purpose.

4. RSP shall not provide any access to any Registry Data to its Registrar Affiliate, and RSP itself will not use confidential user data or proprietary information of an-ICANN-accredited registrar served by Registry Operator, received by RSP in the course of providing Registry Services, except as necessary for registry management and operations.

5. In the case where an RSP has a Registrar Affiliate providing Registrar services in the TLD, such RSP will conduct internal neutrality reviews on a regular basis. In addition, it will agree to cooperate with an independent third party ("Auditor") performing Annual Independent Neutrality Audits ("AIN Audits"), to be conducted each calendar year. All costs of the AIN Audits will be borne by RSP. The AIN Audit is intended to determine whether Back-end Operator has been in compliance, and will utilize such tests and techniques, as the auditor deems appropriate to determine that compliance. The ICANN compliance department will be responsible for insuring that the proper audits are done each year, that their results are reviewed and that any corrective actions will be taken. The ICANN compliance department will publish a yearly report on the status of the ongoing audits.

6. Strict Penalties/Sanctions will be applied to any entity violating these policies, including monetary as well as temporary and potential

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1158   permanent prohibition of Affiliate Registrar providing domain name

1159   registrations services in the TLD, e.g. Three Strikes Program[23]

1160

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1161 **Vertical Integration and the use of ICANN Accredited Registrars**: There shall continue to

1162 remain a presumption in favor of using ICANN accredited registrars in connection with

1163 domain name registration services. However, it is recognized that true innovation and

1164 choice within the domain name marketplace can sometimes only be achieved by permitting

1165 the Registry Operator to provide domain name registration services for its new gTLD,

1166 without the inefficiencies of that entity having to seek separate ICANN Accreditation as a

1167 Registrar.

1168 This flexibility is most appropriate in connection with those gTLD business models without

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1169 domain name portability, e.g. the domain names are assigned by the Registry Operator to

1170 the registrant in which registrants are prohibited from transferring their domain name to

1171 any other third party, i.e. to another registrant. This type of business model is highly likely in

1172 connection with certain brand-type gTLDs or membership organizations where the Registry

1173 Operator would be assigning names based upon an account number (.BANK) or

1174 membership name (.NGO). This corresponds to a Single Registrant Single User model where

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1175 special criteria would be defined to identify organizations that would qualify for such

1176 services and would be exempt from the requirement on using ICANN accredited registrars.

1177 While this flexibility is most likely appropriate in connection with single registrant TLDs,

1178 there may also be the need for flexibility in connection with community TLDs, especially

1179 those that are cultural or linguistic based. Therefore, Registry Operators shall be permitted

1180 to provide domain name registration services in their new gTLDs if they agree to be legally

1181 provide registrants the safeguards set forth in the Registrar Accreditation Agreement

---

[23] It is proposed that the first material violation would result in the Vertically Integrated / Co-Owned Registrar being prohibited for three months from "adding" any new domain names within the TLD; The second material violation would result in the Vertically Integrated / Co-Owned Registrar being prohibited for six months from "adding" or "renewing" any domain names within the TLD; a third material violation would result in a prohibition in that registrar providing any domain name registration services within that TLD.

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(RAA)[24]. In this model, the presumption in favor of using ICANN accredited registrars in connection with domain name registration services would be suspended for the first 50,000 domain name registrations at the second level, after which time, domain names at the second level could be registered or transferred to any ICANN accredited registrar. Criteria for Registrars as described below would pertain in this case.

Registry Operators shall also have the ability to set up criteria (access requirements) for Registrars in the TLD at its sole discretion; provided that such requirements are reasonably related to the purpose of the TLD and that Registry Operator shall additionally provide equivalent access requirements to all Registrars that meet the access requirements. Potential criteria that ICANN's Vertical Integration Working Group may wish to consider in implementing this policy include:

For Single Registrant TLDs, the primary considerations in allowing vertical integration would be a) the domain names are assigned to employees, departments, and/or members of that organization, and b) the non-transferability of the domains.

For Community TLDs, especially cultural and linguistic, names would be available to a wider registrant base, and would be transferable. In this case, finding agreement on potential implementation criteria may be more complex. While the transferability of these names creates a strong presumption in favor of the traditional use of ICANN accredited registrars, a Registry Operator should still be permitted the opportunity to provide direct domain name registrations (in addition to ICANN accredited registrars) when such supply does not create excessive switching costs for users or create significant market power for the registry.

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[24] This may be done initially by agreeing to the RAA, though it would be preferable for there to be a limited rider that could be appended to the registry agreement. Suggestions for creating a Registration Authority framework are discussed in the Legal Framework section of this proposal.

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1207 **Enhanced Compliance Mechanisms:** Concerns within the broader ICANN community about

1208 ICANN having the necessary resources to ensure Registration Authority compliance has

1209 been an ongoing concern for years. Unfortunately these concerns are only going to be

1210 further heightened with the likely addition of several hundred new gTLDs and the potential

1211 relaxation of vertical integration restrictions between registries and registrars.

1212 There has been almost universal agreement within the Working Group about ICANN's

1213 compliance department receiving increased funding to do its job properly. Other proposals

1214 (including CAM) have provided for enhanced compliance fail safe measures by requiring

1215 integrated Registration Authorities to undergo a self financed audit to ensure compliance.

1216 However, the CAM proposal is unique in its proposal to expand use of the Post Delegation

1217 Dispute Resolution Procedure (PDDRP) to empower third parties to use this administrative

1218 dispute procedure for vertical integration violations.

1219 Historically ICANN has included a provision in all Registration Authority agreements

1220 specifically prohibiting any third party beneficiaries in connection with the agreements. The

1221 PDDRP, however, for the first recognizes that third parties have a right to bring an

1222 administrative challenge against a registry for a violation of the representations set forth in

1223 the application and or registry agreement. While the PDDRP is currently limited to only

1224 disputes involving violations of "community" applications it is proposed that the scope of

1225 PDDRP be expanded to handle violations of any vertical separation safeguards.

1226 The focus of this concept is to empower third parties that may be negatively impacted by a

1227 Registration Authorities violation of vertical integration safeguards to proactively address

1228 such violations instead of relying upon ICANN's over worked compliance department or a

1229 third party audit.

1230

1231 **Legal Framework**: ICANN should rename/restructure the existing proposed Registry

1232 Agreement as currently found in the Draft Applicant Guidebook (DAG) into more modular

1233 agreement. The title of the document should also be renamed Registration Authority

1234 Master Agreement (RAMA) to reflect the continued blurring between resellers, registrars,

1235 registry owners and registry service providers in the existing marketplace.[25] The chapeau of

1236 this agreement would broadly define the relationship between the parties (ICANN and the

1237 Registration Authority) and would be modelled in large part after the current accountability

1238 framework that ccTLD administrators have entered into with ICANN. This base agreement

1239 would then be supplemented through a series of standard addendums/annexes that could

1240 reflect a number of business models, e.g. standard Registrar, standard Registry Operator;

1241 Sponsor; Registry Operator seeking to provide domain name registrations services to

1242 registrants; Intergovernmental and Public Sector Applicants; and restrictions imposed on

1243 Registration Authorities (Registries/Registrars) by national competition authorities.

1244 It is understood that this provision may need to be brought into consideration at a later

1245 time in order to not delay the introduction of new gTLDs.

1246

1247 **Additional Policy Considerations**: While the above referenced issues need to be

1248 satisfactorily resolved prior to the finalization of the Applicant Guidebook, there are a

1249 number of other additional policy considerations that need to be properly addressed if the

1250 full range of potential new gTLD business models is to have a chance of being successful.

1251 One issue that requires a broader discussion within the ICANN community is the fees that

1252 ICANN charges in connection with domain name registrations. As set forth in the GAC advice

1253 to the ICANN Board in its Brussels communiqué, "the new gTLD process should meet the

1254 global public interest consistent with the Affirmation of Commitments," so that the "cost

1255 considerations" are "at a reasonable and proportionate level in order not to exclude

1256 developing country stakeholders."[26] Unfortunately, ICANN has yet to explain in any

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[25] The concept of a Master Agreement is commonly used in business to provide an overarching legal framework between the parties.

[26] See GAC Brussels' Communiqué (23 June 2010) [insert HTML link]

1257   documentation why they are increasing the ICANN registry fee costs by 500% over similar

1258   registry agreements recently executed.[27]

1259   ICANN's current funding model is largely based on a per transaction charge imposed on

1260   both gTLD registries and registrars. While this model mostly works in the current

1261   marketplace, this funding model does not scale regarding business models in which the

1262   registry may wish to give away domain names for free or in a vertically integrated single

1263   registrant/brand TLD. Therefore, there is a need for a forum in which ICANN reviews and

1264   perhaps revises its pricing models.[28]

1265   While intellectual property protection and access to accurate Whois information are two

1266   issues within the ICANN community that usually evoke strong responses from different

1267   stakeholders groups, some single registrant/brand/registrant verified TLDs may require a re-

1268   evaluation as to the appropriateness of these mechanisms or the manner in which they are

1269   utilized.

1270   These additional policy considerations are not intended to interject new over-arching issues

1271   into the new gTLD process. However, they are intended to serve as clear reminder as to

1272   some of the issues that ICANN may not have fully accounted for in the unlimited and

1273   diverse business models that may be submitted through ICANN's new gTLD process.

1274

1275

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[27] The current draft template registry agreement proposes a $25,000 annual fee for up to 50,000 domain names registered within the TLD, this is a 500% increase over the $5,000 fee incorporated into the .COOP and .AERO agreements that ICANN has recently executed.

[28] See http://forum.icann.org/lists/op-budget-fy2011/msg00011.html

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IPC Proposal

The GNSO Council has formed a Working Group of interested Stakeholder Group /
Constituency representatives and community participants, to collaborate broadly with
knowledgeable individuals and organizations, in order to consider recommendations on
Vertical Integration (VI).

Part of the working group's effort will be to incorporate ideas and suggestions gathered
from Stakeholder Groups and Constituencies through this Stakeholder Group / Constituency
Statement. Inserting your Stakeholder Group / Constituency's response in this form will
make it much easier for the Working Group to summarize the responses. This information is
helpful to the community in understanding the points of view of various stakeholders.
However, you should feel free to add any information you deem important to inform the
working group's deliberations, even if this does not fit into any of the questions listed
below.

Process

- Please identify the members of your constituency who participated in developing the
  perspective(s) set forth below.
- *The description of the category of new gTLDs for which an exception should be
  recognized with regard to vertical integration (or alternatively, with respect to registrar
  non-discrimination requirements) was originally proposed by J. Scott Evans, refined
  during an extensive online discussion on the mailing list of all IPC members, and
  summarized in an earlier draft of this document for review by all IPC members, and
  finalized for approval by the IPC Officers. Other elements of responses to this template
  were drafted by Steve Metalitz and circulated for comment on the full IPC list on May 2,*

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2010. Those contributing to the discussion at some phase of this process included: Paul McGrady, Fred Felman, Fabricio Vayra, Ellen Shankman, Adam Scoville, Hector Manoff, Claudio Digangi, David-Irving Tayer, Martin Schwimmer, Nick Wood, David Taylor, Marc Trachtenberg, Kristina Rosette and others.

- Please describe the process by which your constituency arrived at the perspective(s) set forth below.

- *See preceding question.*

Questions

Please provide your stakeholder group / constituency's input on the following charter objectives:

Objective 1: To make policy recommendations that provide clear direction to ICANN staff and new gTLD applicants on whether, and if so under what conditions, contracts for new gTLD registries can permit vertical integration or otherwise deviate from current forms of registry-registrar separation, and equivalent access and non-discriminatory access.

IPC generally supports the strict separation approach approved by the ICANN Board on March 12. However, appropriate exceptions to this approach should be recognized. In particular, IPC believes that a new gTLD registry meeting one or more of the following models should (a) be allowed to control an ICANN-accredited registrar solely for the purpose of sponsoring registrations in that gTLD; (b) not be required to use an ICANN-accredited registrar for registration of second-level domain names within the gTLD; or (c) be permitted to enter into exclusive arrangements with one or a limited number of ICANN-accredited registrars for the purpose of sponsoring registrations in that gTLD,.
These models pertain only to branded gTLDs. Though there may be other exceptions to VI/CO rules, the IPC comments are limited to those gTLDs where the string is an identical match to the registry's trademark/service mark, which we will heretofore refer to as

1330 *".brands." We are of the view that it is preferable to have a specific .brand category, clearly*

1331 *defined, than seek to have brand owners try to seek to dress their application as a*

1332 *Community application for instance.*

1333

1334 ***Models and Discussion:***

1335 1. Branded Single Registrant, Single User - .brand where the brand holder is the Registered

1336   Name Holder and user of all second-level domain names in the TLD)

1337

1338 *This case is clear and simple. The trademark owner/holder owns and operates the registry*

1339 *either directly or indirectly, is the Registered Name Holder for all second-level names in the*

1340 *TLD, and is the user of all second-level names in the TLD. No second-level names are*

1341 *registered or delegated to any third party with the exception of wholly owned subsidiaries*

1342 *and otherwise affiliated companies. An example of this sort of VI/CO regulatory exception*

1343 *would be a direct-to-consumer retailer – "Buy Stuff", which would be the registry, sole*

1344 *Registered Name Holder, and sole user of second level domain names, e.g.*

1345 *<locations.buystuff> <clothes.buystuff> or <housewares.buystuff>.*

1346

1347 2. Branded Single Registrant, Multiple Related Users - .brand where the trademark owner

1348   is the Registered Name Holder of all second-level domains but licenses those second-

1349   level domains to third parties that have a relationship with the brand owner (e.g.,

1350   customers, suppliers, authorized dealers, etc.) whereby the registration agreement is

1351   part and parcel of and ancillary to a primary agreement for goods or services.

1352

1353 *This model permits trademark owners to engage more fully and embrace in new gTLD*

1354 *innovation by bundling non-registry related services with domains. Such a model could be*

1355 *popular with ISPs, technology, and media companies.*

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3. Branded Trademark Licensed Multiple Registrant Multiple Users - .brand where the trademark owner and its trademark licensees are the Registered Name Holders and users of all second- level domains in the TLD. An example of this sort of exception would be trademark owners that operate a franchise system (<.fastburger>), distributors, real estate agents, and cooperative members (e.g. <.truevalue>). Using the Fast Burger example: Fast Burger would be the registry and a Registered Name Holder (e.g. <headquarters.fastburger> or <humanresources.fastburger>), and would allow third parties operating under a trademark license to be Registered Name Holders (e.g. <Chicago.fastburger> or <BobSmith.fastburger>).

This model is important for trademark owners that wish to maintain strict control over registration of second-level domain names, but need some flexibility related to ownership and local control.

Further Conditions for Exceptions:

.Brand gTLDs must adhere to the following conditions in order to be exempt from VI/CO restrictions (The IPC recognizes that any threshold naturally creates a problem for those who may not meet it and some IPC members have expressed concern at where the threshold is set. It is always a balance of fairness and seeking to ensure that there is no gaming. The level suggested is thus one which is hopefully sufficiently low to allow many brand owners who wish to participate to be able to, yet dissuade third parties who may seek to game or abuse the exception by registering a trade mark solely to be able to apply for a .brand to be rightly excluded. To nevertheless ensure a safeguard to this we suggest that applicants who do not meet the criteria can make their case to ICANN as to why they should be considered and ICANN has the discretion (or can delegate the discretion) to allow in certain cases)*:*

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1384 *(a) The trademark to which the .brand is an identical match must be the subject of*

1385 *trademark registrations of national effect in at least three countries in each of at least three*

1386 *of the five ICANN regions.*

1387 *(b) For first-round applicants, the registrations of national effect referenced in (a) above*

1388 *must have issued on before June 27, 2008.*

1389 *(c) The .brand exemption is inapplicable to trademark owners whose principal business is*

1390 *the operation of a domain name registry, domain name registrar, or domain name reseller.*

1391 *(d) The relationship between the .brand TLD and its customer/Registered Name Holder is*

1392 *defined by terms of service that encompasses a registration agreement and governs*

1393 *content, the bundling of services or the purchase of a product; membership in an*

1394 *organization or cooperative; maintenance of the terms of a contract, trademark license; or*

1395 *an appropriate combination of these factors.*

1396 *(e) Second-level .brand domain name registrations in models 2 and 3 are held in trust by the*

1397 *TLD operator and are not delegated to a third-party user*

1398 *(f) Second-level .brand domain name registrations in model 3 are delegated to the user, but*

1399 *under the quality control provisions of a trademark license agreement that allows the*

1400 *registry to terminate the registration at will*

1401 *(g) Mixed-use gTLDs, where some names are held by the registry and other names registered*

1402 *to external parties are not exempt from CO/VI regulations.*

1403

1404 ***IPC Objectives for suggestions:***

1405 *These objectives have been included to facilitate discussion of possible solutions that may be*

1406 *different from what is prescribed above. These objectives have been included so the*

1407 *community may understand the "spirit" of what is being proposed and understand what*

1408 *many brand owners have identified as helpful in the new gTLD process.. This proposal*

1409 *prescribes a delegation and distribution model for .brand gTLDs that:*

1410 *- global trade and trust by adapting to various business models of trademark holders*

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1411 - *guards consumers from potential harm through the reduction of phishing and fraud*

1412 - *protects and honors intellectual property that conforms to international standards while*

1413   *not expanding any intellectual property right beyond that granted by the national*

1414   *governments issuing such rights*

1415 - *encourages innovation within the new gTLD namespace*

1416 - *allows rights holders (for profit and non-profit) to provide maximum value and choice to*

1417   *their customers and constituencies while maintaining strict quality control standards*

1418   *applicable to maintaining trademarks*

1419 - *facilitates a cost effective and low-priced domain name alternative*

1420 - *eliminates gaming through geographic and time restrictions on qualifying trademarks*

1421 - *permits trademark owners to reap the benefits of .brand TLDs*

1422

1423 *The IPC is proposing very narrow use cases that should have no, or very limited, impact on*

1424 *existing contracted parties. These cases only describe branded single registrant gTLDs and*

1425 *are limited to this context.*

1426

1427 *IPC looks forward to discussion of other clearly defined situations in which relaxation of*

1428 *strict separation (or non-discrimination) requirements may be appropriate and welcomes*

1429 *discussion and feedback on the above.*

1430

1431 Objective 2: To review current and previous ICANN gTLD registry contracts and policies to

1432 identify the current and previous restrictions and practices concerning registry-registrar

1433 separation, and equivalent access and non-discriminatory access in place.

1434 *Objectives 2-4 describe work to be undertaken by the WG. IPC looks forward to commenting*

1435 *on this work once it is completed.*

1436

1437 Objective 3: To identify and clearly articulate the changes to current cross-ownership

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arrangements contemplated by the options described in the most recent version of the DAG and supporting documents and considered by ICANN staff in connection with the planned introduction of new gTLDs.

Objective 4: To identify and clearly articulate the differences between the current restrictions and practices concerning registry-registrar separation and equal equivalent access, on the one hand, and the options described in the most recent version of the DAG and supporting documents1 and changes considered by staff, on the other hand.

In addition, comments on any aspect related to the topic of vertical integration between registries and registrars that you think should be taken into account by the Working Group as part of its deliberations are welcome. For example, comments may be submitted on: (i) recommended models for the New gTLD Program, (ii) the economic analysis conducted by economists retained by ICANN, including the CRA Report [PDF, 512 KB] as well as the one recently submitted by Salop and Wright [PDF, 42 KB], (iii) the Board approved model proposed by the Board at the ICANN Meeting in Nairobi on 12 March 2010, or (iv) whether the restrictions currently applicable to existing gTLD registries should be changed, or (v) additional work that should be performed by the Working Group to recommend models for the New gTLD Program.

Background Information
- Review the Issues Report on Vertical Integration Between Registries and Registrars, please refer to http://gnso.icann.org/issues/vertical-integration/report-04dec09-en.pdf [PDF, 254 KB].
- The ICANN Board resolution on Vertical Integration is posted at http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5.

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1464   ▪   To review the charter describing the policy work to be undertaken by the Vertical
1465   Integration Working Group, please refer to: http://gnso.icann.org/issues/vertical-
1466   integration/vi-chartered-objectives-10mar10-en.pdf [PDF, 41 KB].
1467   ▪   For information on the details of the implementation planning activities for new gTLDs,
1468   please refer to the documents posted at http://icann.org/en/topics/new-gtld-
1469   program.htm.
1470   ▪   For additional resources on the topic of vertical integration between registries and
1471   registrars, please refer to the documents posted at: https://st.icann.org/vert-
1472   integration-
1473   pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index_cgi_vi_resources.

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Annex C - GNSO Council Resolutions on Vertical Integration

- **20100128-1**
- Motion to commence a Policy Development Process on Vertical Integration between registries and registrars.
- Whereas, on 24 September 2009, the GNSO Council requested ICANN Staff to prepare an Issues Report on the topic of vertical integration between registries and registrars;
- Whereas, on 11 December 2009, the Issues Report on vertical integration between registries and registrars was delivered to the GNSO Council;
- Whereas, the Issues Report includes recommendations that the GNSO Council delay the initiation of a Policy Development Process (PDP) on the issue for a period of 1-2 years;
- Whereas, notwithstanding the recommendations in the Issues Report, the GNSO Council has decided to initiate a PDP on vertical integration between registries and registrars; and
- Whereas, the GNSO Council has decided against initiating a Task Force as defined in the ICANN Bylaws;
- Now therefore, be it:
- RESOLVED, that the GNSO Council has reviewed the recommendations contained in the Issues Report, and nonetheless approves the initiation of a PDP on the topic of vertical integration between registries and registrars;
- FURTHER RESOLVED, that the PDP shall evaluate which policy recommendations, if any, should be developed on the topic of vertical integration between registrars and registries affecting both new gTLDs and existing gTLDs, as may be possible under existing contracts and as allowed under the ICANN Bylaws;

1500 • FURTHER RESOLVED, that the GNSO Council shall convene a Working Group to fulfil

1501 the requirements of the PDP, including a review of ICANN Staff's prior work with

1502 respect to vertical integration, and develop recommendations accordingly; and

1503 • FURTHER RESOLVED, that the Working Group shall deliver its Final Report to the

1504 GNSO Council no later than sixteen weeks from the date of this resolution.

1505 The motion carried by a roll call vote.

1506 Contracted Party House - Seven Votes against.

1507 6 votes against + one Absentee ballot - Adrian Kinderis against.

1508 Non Contracted Party House - Eleven (11) Votes in favour - two (2) votes against

1509 11 Votes in favour:

1510 Zahid Jamil, Mike Rodenbaugh (CBUC); Kristina Rosette, David Taylor (IPC); Rafik

1511 Dammak, William Drake, Mary Wong, Rosemary Sinclair, Debra Hughes, Wendy

1512 Seltzer (NCSG) + one absentee ballot - Olga Cavalli in favour.

1513 2 Votes against: Jaime Wagner, Wolf-Ulrich Knoben (ISPCP)

1514

1515 **10 March 2010 GNSO Council Resolution**

1516 **20100310-1**

1517 **Motion to Approve Vertical Integration (VI) Charter:**

Whereas, on 28 January 2010, the GNSO Council approved a policy development process

(PDP) on the topic of vertical integration between registries and registrars;

Whereas, the GNSO Council created a drafting team for the purposes of drafting a charter

to fulfill the requirements of the PDP; and,

Whereas the drafting team completed its work and presented its charter proposal to the

GNSO Council on Friday Feb 26, 2010.

Whereas, the GNSO Council has reviewed the proposed charter to guide the working group

in its PDP activities;

NOW THEREFORE, BE IT:

Resolved, that the GNSO Council approves the following charter:

http://gnso.icann.org/issues/vertical-integration/vi-chartered-objectives-10mar10-en.pdf

Resolved further, that the GNSO Council appoints Stephane van Gelder to be the GNSO Council Liaison to the Vertical Integration Working group (VI WG).

Resolved further, that the GNSO Council directs that a working group be formed to perform the work of the VI WG, and that the VI WG shall initiate its activities within 14 days after the approval of this motion. Until such time as the WG can select a chair and that chair can be confirmed by the GNSO Council, the GNSO Council Liaison shall act as interim chair.

Resolved further, that the WG is directed to develop a version of objective 5 and to recommend it to the Council within three weeks for either (a) Council approval of the WG-recommended Objective 5 or (b) Council vote on which version of Objective 5 (as reflected in the draft Charter of March 10, 2010) should apply.

1518

Annex D - MEMBERS OF THE VI WORKING GROUP

Contracted Parties House

Registrars Stakeholder Group	Meetings Attended
Stephane van Gelder (GNSO Council Vice Chair)	
Ashe-lee Jegathesan	
Statton Hammock	
Michele Neylon	
Frederick Felman	
Jothan Frakes	
Ruslan Sattarov	
Jeff Eckhaus	
Jean Christophe Vignes	
Ben Anderson	
Krista Papac	
Tim Ruiz	
Thomas Barrett	
Graham Chynoweth	
Faisal Shah	
Jacob Williams	
Paul Diaz	
Eric Brunner Williams	
Amadeu Abril I Abril	

gTLD Registries Stakeholder Group	Meetings Attended
Chuck Gomes (GNSO Chair)	
Nacho Amadoz	
Ken Stubbs	
Brian Cute	
Ching Chiao	
Vladimir Shadrunov	
Jeff Neuman	
Keith Drazek	
Kathy Kleiman	
David Maher	

Non Contracted Parties House

Commercial and Business Constituency	Meetings Attended
Berry Cobb	
Mike Rodenbaugh	
Jon Nevett	
Jarkko Ruuska	
Mikey O'Connor	
Michael Palage	
Ron Andruff	

Internet Service Providers and Connectivity Providers Constituency	Meetings Attended
Tony Harris	
Olivier Murron	

Intellectual Property Interests Constituency	Meetings Attended
Victoria Carrington	
Kristina Rosette	
J. Scott Evans	
Scott Austin	

Non Commercial Stakeholder Group	Meetings Attended
Avri Doria	
Milton Mueller	
Mark Bannon	

NomCom Appointee	Meetings Attended
Olga Cavalli (GNSO Council Vice Chair)	

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At Large	Meetings Attended
Alan Greenberg (ALAC Vice-Chair)	
Sivasumbramanian Muthusamy	
Baudouin Schombé	
Cheryl Langdon-Orr (ALAC Chair)	
Sebastien Bachollet (ALAC Vice-Chair)	

Individuals	Meetings Attended
Phil Buckingham	
Roberto Gaetano	
Jahangir Hossain	
Modi Konark	
Vika Mpisane	
Tero Mustala	
George Sadowsky	
Jannik Skou / Alternate Dan Trampedach	
Kristian Ormen	
Steve Pinkos	
Mike Silber	
Richard Tindal	
Liam Drew	
Rahman Khan	
Anthony van Couvering	
Katrin Ohlmer	
Liz Williams	

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The statements of interest of the Drafting Team members can be found at: <insert link>.

The attendance sheet can be found at <insert link>.

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The email archives can be found at http://forum.icann.org/lists/gnso-vi-feb10/

A detailed attendance sheet can be found at [provide link]

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Annex E - Summary of Public Comment Period

SUMMARY OF PUBLIC COMMENT
ON INITIATION OF THE GNSO POLICY DEVELOPMENT PROCESS
ON VERTICAL INTEGRATION BETWEEN REGISTRARS AND REGISTRIES

The GNSO Council opened a public comment forum on the commencement of a policy development process on the topic of vertical integration between registries and registrars. A summary of the comments submitted during the public comment forum from the period 29 March 2010 – 18 April 2010 is provided below.

Background

The GNSO Council commenced a policy development process (PDP) on the topic of vertical integration between registrars and registries. The GNSO Council has formed a working group to evaluate whether policy recommendations, if any, should be developed on the topic of vertical integration between registrars and registries affecting both new gTLDs and existing gTLDs.

The public comment forum sought comment on any aspect related to the topic of vertical integration between registries and registrars that should be taken into account by the Working Group as part of its deliberations. Comments were suggested on the following topics: (i) the recommended models for the New gTLD Program, (ii) the economic analysis conducted by economists retained by ICANN, including the CRA Report [PDF, 512 KB] as well as the one recently submitted by Salop and Wright [PDF, 42 KB], (iii) the Board approved model proposed by the Board at the ICANN Meeting in Nairobi on 12 March 2010, or (iv) whether the restrictions currently applicable to existing gTLD registries should be changed, or (v) additional work that should be performed by the Working Group to recommend models for the New gTLD Program.

Summary

Six comments were received from five commentators during the public comment period. Two comments were erroneously submitted for a separate public comment period (on the options for the ICM application for .xxx) and are not summarized below.

Stakeholder Group /Constituency Statements.

As part of the GNSO Council's policy development process, the working group has requested constituency and stakeholder group statements on the topic of vertical integration between registries and registrars. These statements are due on 6 May 2010.

The Registrar Stakeholder Group (RGG) reaffirmed the prior Registry Constituency position on Registry-Registrar separation. That position is described in its entirety in **Annex A.**

Need for Definitions of Industry Roles.

Melbourne IT noted the need to clearly identify three industry roles: gTLD manager, gTLD registry operator, and gTLD registrar. The following definitions were recommended:

gTLD Manager- contracts with ICANN to manage a gTLD. The gTLD manager does not own the TLD, but is licensed to use the TLD for a fixed period of time. The licence can be renewed for further terms provided the conditions of the contract with ICANN continue to be met.

gTLD Registry Operator operates three key components of the gTLD infrastructure: shared registration system (SRS), gTLD DNS nameservers, gTLD WHOIS servers. The core role is that of an infrastructure manager.

gTLD Registrar is responsible for creating, changing and cancelling records in the gTLD registry. The core role is that of a records manager. A gTLD registrar has a contract with the registrants of domain names within a gTLD to perform registrar services. The gTLD registrar has a contract with the gTLD registry operator that governs their roles and responsibilities.

Ashe-lee Jegathesan, Melbourne IT

Mandatory Use of ICANN Accredited Registrars.

Two commentators recommended that ICANN maintain its policy recommendation that a gTLD must use ICANN accredited registrars. *Ashe-lee Jegathesan; Melbourne IT, Registrar Stakeholder Group Statement*

Equivalent Access Requirements.

ICANN should maintain the current requirement that registry operators not discriminate amongst registrars. *Registrar Stakeholder Group Statement*

Melbourne IT recommends that an ICANN accredited registrar that meets the policy requirements of a gTLD, must be able to operate within that gTLD under the same contractual

conditions as other gTLD registrars. *Ashe-lee Jegathesan, Melbourne IT*

ICANN's decision to expand the Internet will increase competition and provide consumers with more options. Brand TLDs and community-based TLDs must be vertically-integrated. Why would these types of TLDs be forced to use a registrar? *Constantine Roussos, music.us*

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Structural Separation Requirements.

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Melbourne IT and the Registrar Stakeholder Group recommend that ICANN continue to maintain structural separation between the role of gTLD registry operator and gTLD registrar. *Ashe-lee Jegathesan, Melbourne IT; Registrar Stakeholder Group Statement*

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Cross Ownership Among Industry Players should be permitted.

ICANN should not prohibit affiliates of ICANN-accredited registrars to apply to be a New TLD registry operator. *Registrar Stakeholder Group Statement*

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ICANN should not prohibit affiliates of ICANN-accredited registrars to provide any types of services to registry operators. *Registrar Stakeholder Group Statement*

ICANN should not strictly prohibit registrars from selling registrations for TLDs of an affiliated registry operator. *Registrar Stakeholder Group Statement*

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Keeping the registry-registrar separation makes sense for dominant extensions such as the .com, .net and .org but it makes no sense for upcoming new gTLDs, who will be attempting to set themselves apart from the Big gTLD 3 (.com, net, .org) and provide better services to benefit consumers. This holds especially true for the cases of brand owners with trademarks and community applicants. Why would these types of applicants engage in lobbying activities to get shelf space on registrars such as Godaddy? In the end what ICANN is assuring is the dominance of the other Big Registry 3. How does ICANN expect to have any competition in the registry industry if it adopts anti-competitive and anti-innovative measures such as registry-registrar separation, when the reality of the matter is that new

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TLDs are not expected to become as large as .com but are expected to differentiate themselves from the old regime and market leaders. *Constantine Roussos, music.us*

Melbourne IT asserts that a gTLD manager should be able to own and perform the function of gTLD registry operator for the gTLD being managed. Examples (VeriSign for com/net, Afilias for .info, and Neustar for .biz). *Ashe-lee Jegathesan, Melbourne IT*

Melbourne IT asserts that a gTLD manager or gTLD registry operator (or their parent company), may own up to 15% of an ICANN accredited gTLD registrar. If a gTLD manager or gTLD registry operator wished to own more than 15% of an ICANN accredited gTLD registrar, separate ICANN Board approval would be required, and additional contractual provisions to avoid anti-competitive behavior. *Ashe-lee Jegathesan, Melbourne IT*

Melbourne IT also asserts that gTLD accredited registrar (or their parent company), should be able to own up to 15% of a gTLD manager or gTLD registry operator. If a gTLD accredited registrar wished to own more than 15% of a gTLD manager or gTLD registry, this would require separate ICANN Board approval, and additional contractual provisions to avoid anti-competitive behavior. *Ashe-lee Jegathesan, Melbourne IT*

Melbourne IT states that a gTLD manager should be permitted to own and perform the function of gTLD registrar for a small gTLD that has less than 100,000 total registrations. *Ashe-lee Jegathesan, Melbourne IT*

The GNSO should do the right thing: introduce vertical integration. Ask consumers what they want. Pessimism and protecting the status quo or do they want the possibility of better

services and innovation in the domain space. This is a no brainer for brand gTLDs and community gTLDs. *Constantine Roussos, music.us*

Vertical Integration restrictions must be removed because it is problematic for the upcoming gTLD open application process.

Case 1

For example, if someone with a long-standing trademark wants to create a new top level domain for their trademark, and wants to allow certain, approved entities to purchase domains with the trademarked extension, how will this be done without the Registry in effect acting as a Registrar.

Case 2

My second example involves someone who is approved to run a new top level domain Registry, but is not able to get any Registrar to list their domain.

While you may keep the restriction in place for .com, given their dominance, the Registry/Registrar ownership restriction should be completely eliminated for all other top level domains. *Mary Iqbal*

Use of Registration Data where there is cross ownership.

Any requirements intended to protect registrants from malicious or abusive conduct, including data issues, should go to the conduct at issue and not serve as an excuse to exclude an entire potential class of competitors along with the attendant public benefits of such competition. *Registrar Stakeholder Group Statement*

Melbourne IT notes that neither a gTLD manager nor gTLD registry operator, should use any of the registration data collected as part of managing/operating the gTLD, for the purposes of marketing registrar services for any other gTLD. *Ashe-lee Jegathesan, Melbourne IT*

Certain Cross Ownership Among Industry Players should not be permitted.

Melbourne IT notes that where a gTLD manager owns a gTLD registrar, that registrar should not perform the role of ICANN accredited registrar for any other gTLD. *Ashe-lee Jegathesan, Melbourne IT*

Observations on Current Market Conditions.

There is a rich history of registrars selling TLDs of affiliated registry operators in the gTLD and ccTLD spaces without any allegations of wrongdoing. *Registrar Stakeholder Group Statement*

Afilias has indicated in their post on CircleId on April 8th, 2010 that in 2010 the domain industry has grown to over 190 million domain names. The .com, .net and .org grew to over 80 million names and ccTLDs like .de (Germany) and .cn (China) have grown to about 45 million names. However, new gTLDs total less than 15 million names or only 7% of domain market share. New gTLDs are under-represented and competition generated from the existing new gTLDs (any gTLD other than .com, .net and org) is minor, as highlighted by the existing 7% market share. *Constantine Roussos, music.us*

How does ICANN believe that the oligopoly market power of the Big 3 registries can be addressed to increase competition in the registry industry and lower prices. How is preventing competition in this space good for the Internet? This is the year 2010 and the

very concept of not allowing vertical integration based on historic reasons and the lobbying power of current registries certainly defies the purpose of leveling the playing field in the domain marketplace. *Constantine Roussos, music.us*

Melbourne IT made the following observations regarding current competition between gTLD managers:

- There is some level of competition between gTLDs at the time a registrant makes a decision to register a domain name.
- Once a registrant chooses a particular gTLD for a registration and begins to actively use the domain name, the switching costs are very high to move to another gTLD.
- Over time, most registrations within a particular gTLD will be from existing registrants, and only a small percentage of new registrants will be added every year. Thus a gTLD manager will have market power with respect to most of their registrations in the longer term.

Melbourne IT made the following observations regarding competition amongst registry operators:

- There is active competition amongst registry operators.
- A gTLD manager can contract with a particular registry operator, but can also change registry operators or even bring the services back in-house.
- Several registry operators today provide services across multiple TLDs.
- In the new gTLD environment additional companies will enter the market as registry operators, and gTLD managers will gain the benefits from a wide range of choices.

Melbourne IT made the following observations regarding competition amongst registrars:

- There is very active competition amongst registrars for the major gTLDs such as com/net/org/biz/info.
- Registrants can choose from a range of business models, and registrars often bundle services such as email and hosting with domain name registration.
- The registry/registrar separation model is now the dominant model used across both gTLDs and major ccTLDs.
- Many ICANN accredited gTLD registrars, are also registrars across many ccTLDs, with some being significant ccTLD registrars as well as gTLD registrars.

Melbourne IT believes that the market power that a gTLD manager can exert through their operation of a major gTLD (with more than 100,000 registrations), would allow them to have an unfair advantage as a gTLD registrar in other gTLDs. The gTLD manager could cross-subsidize the operations of a gTLD registrar to gain customers in other gTLD spaces, and attempt to up sell their own gTLD to those customers (which in turn would give them an unfair advantage over other gTLD managers). Thus Melbourne IT supports the separation of gTLD managers and registry operators from registrars, and also notes that a small gTLD Manager that owns a registrar for its gTLD should not provide registrar services for other gTLDs.

Ashe-lee Jegathesan, Melbourne IT

The ICANN Board should consider the enormous difference between the trajectory of the successful .cat registry, profitable in its second month of operation, and the range of exception from Recommendation 19 sought by the Vertical Integration working group "on

behalf of linguistic and cultural or from developing country", 25% to 125% larger than .cat's registration base after four years of successful, profitable operation. *Eric Brunner-Williams*

Regarding the CRA International Report.

Melbourne IT notes that the CRA International report supported a relaxation of the vertical separation requirements where the competitive concerns are not strong. Melbourne IT agrees that supporting some level of integration for small TLDs allows innovation in the creation of new gTLDs, and allows a gTLD manager to have some control over the whole process of launching and marketing a new gTLD to new registrants. *Ashe-lee Jegathesan, Melbourne IT*

Comments on the Board Resolution.

If the available choices are limited strictly to the Board's Resolution #5 at the Nairobi meeting, and imprudent exploits which put at risk consensus among stake holders, retention of the Board's Resolution #5 is probably the better of those two choices. *Eric Brunner-Williams*

Single Registrant TLDs.

Melbourne IT expects that single registrant TLDs will emerge in the gTLD round. The registration policy for such as TLD could be that all registrations in the gTLD must be licensed to the gTLD manager. For a small such TLD it would make sense that the gTLD manager could also own and operate a registrar function. However it would be necessary to ensure that a single-registrant TLD is not circumvented by ensuing all the registrations are in the name of the gTLD manager, but that the gTLD manager then rents out websites

etc associated with those domain names – which in effect could be third party registrations.
Ashe-lee Jegathesan, Melbourne IT

One participant expressed concern that should the GNSO makes a recommendation for some "single registrant" type of application, the Board should consider whether capture has taken place by parties previously not participatory in the new gTLD process development.
Eric Brunner-Williams

Comments on the Salop and Wright Paper.

Melbourne IT points out that Salop and Wright notes that while vertical integration can facilitate innovation, in some circumstances vertical integration can harm competition through higher prices, lower quality levels, too little product variety, or less innovation.
Ashe-lee Jegathesan, Melbourne IT

Perceived Benefits of Vertical Integration.

The Registrar Stakeholder Group agrees with ICANN's expert economists that vertical integration of registries and registrars will enhance consumer benefits and provide consumers with lower prices, better service, and new innovation. *Registrar Stakeholder Group Statement*

The risks of malicious and abusive conduct that certain parties have raised as a concern would not be prevented by restricting the ability of a registrar to sell names of an affiliated registry operator. *Registrar Stakeholder Group Statement*

Vertical Integration, especially for closed community gTLDs, will benefit consumers by allowing the creation of service/product bundling as well as offering consumers differentiated pricing options given an increased product variety. Vertical integration will allow new gTLDs to be innovative by introducing new distribution and marketing channels in regards to product placement. *Constantine Roussos, music.us*

Vertical integration will allow new gTLDs to differentiate themselves from competitors such as .com. It will allow them to offer a higher quality product with a competitive advantage that is attached to the opportunity to incorporate new, innovative services that extend beyond mere domain name registrations. Vertical integration will help increase consumer willingness to pay given the value creation opportunity that it brings. These are some benefits:

- Economies of scale
- Economies of scope and strategic similarity between vertically-related activities
- Cost reduction
- Competitiveness
- Reduce threat from powerful suppliers and/or customers
- Higher degree of control over the entire value chain
- Leads to expansion to core competencies

Constantine Roussos, music.us

General Observations on the Proposals Discussed in the Working Group

A participant in the GNSO Working Group summarized the two broad areas of policy choices advocated in the Working Group as follows:

One set of proposals restores caps on registry ownership (or control) of registrars. Some treat the question of registrar ownership of registries, uncapped prior to Nairobi. In general, these proposals find minority ownership (or control) at the current level without harm, and more beneficial than no mechanism for registries to ensure competent access to registrants.

The other set of proposals generally propose to substantially increase, or remove, the cap on registry ownership (or control) of registrars. In general, these proposals find near-majority, even total ownership (or control) without harm, and more beneficial than the lower limits in the other set of proposals, and also more beneficial than no mechanism for registries to ensure competent access to registrants.

Eric Brunner-Williams

The Board should consider whether the GNSO's working group is addressing the issue of vertical integration at all, or the allocation of profits for applications of a type anticipated by a significant plurality of those who engage in advocacy. *Eric Brunner-Williams*

Recommended Models for Vertical Integration:

Model Submitted by Melbourne IT:

Melbourne IT recommends that an allowance of 15% be made for a gTLD manager or gTLD registry operator to own a proportion of a gTLD registrar, or vice-versa. This means that ICANN would not be burdened with having to approve minor changes in ownership.

Melbourne IT also supports vertical integration for small gTLDs with less than 100,000 registrations, provided that the gTLD registrar owned by the gTLD manager is not able to offer registrar services for other gTLDs.

Where a gTLD manager, gTLD registry operator, or registrar seeks a greater than 15% ownership structure, Melbourne IT believes that the parties would need to show:

- the benefits to registrants of the new ownership structure, and show that these benefits would not be available through the current competitive registrar model
- that the gTLD manager does not have more than 100,000 registrations
- that the gTLD registrar does not have more than 40% of the total registrations in any gTLD with more than 100,000 names

Ashe-lee Jegathesan, Melbourne IT

Annex D - STAKEHOLDER GROUP/CONSTITUENCY STATEMENTS

REGISTRAR STAKEHOLDER GROUP (RSG) POSITION STATEMENT

After consideration of the public interest benefits, the RSG supports the following principles regarding Registry-Registrar separation for New TLDs:

1. The RSG continues to support the GNSO recommendation that domain names be registered only through ICANN accredited registrars. This ensures that the public interest is protected by having all registrations governed by the rights and responsibilities found in the Registrar Accreditation Agreement;

2. ICANN should maintain the current structural separation requirements between the registry and registrar functions (i.e. the functions are handled separately);

3. ICANN should maintain the current requirement that registry operators not discriminate amongst registrars;

4. We agree with ICANN's expert economists that vertical integration of registries and registrars will enhance consumer benefits and provide consumers with lower prices, better service, and new innovation;

5. The risks of malicious and abusive conduct that certain parties have raised as a concern would not be prevented by restricting the ability of a registrar to sell names of an affiliated registry operator;

6. There is a rich history of registrars selling TLDs of affiliated registry operators in the gTLD and ccTLD spaces without any allegations of wrongdoing;

7. Any requirements intended to protect registrants from malicious or abusive conduct , including data issues, should go to the conduct at issue and not serve as an excuse to exclude an entire potential class of competitors along with the attendant public benefits of such competition;

8. ICANN should not prohibit affiliates of ICANN-accredited registrars to apply to be a New TLD registry operator;

9. ICANN should not prohibit affiliates of ICANN-accredited registrars to provide any types of services to registry operators; and

10. ICANN should not strictly prohibit registrars from selling registrations for TLDs of an affiliated registry operator.

CONCLUSION

ICANN should move forward positively and firmly to permit the integration of registry operators and registrars for New TLDs without sales restrictions, as such would inure to the benefit of consumers and the public interest.

The opinions expressed by the RSG in this Position Paper should not be interpreted to reflect the individual opinion of any particular RSG Member.

ISPCP COMMENTS ON VERTICAL INTEGRATION

The ISPCP Constituency has been following the discussions concerning Vertical Integration with keen interest, and would like to submit the following comments.

Whereas the ISPCP is supportive of initiatives that will help foster the growth and development of the Internet and it's resources, we are somewhat concerned that the prospect of modifying the existing Registry/Registrar structural separation, will not be benefit the public interest, or assist in preserving the security and stability of the Internet. The introduction of competition into the Registrar level of the domain namespace, has produced a proven environment that serves registrants all over the world, and indeed resulted in significant cost reductions for these millions of domain name buyers.

It is true that the projected introduction of numerous new gTLDs, presents some new issues that need to be considered:

- Single-registrant TLDs, such as corporations who apply for a new gTLD with intent to limit use of the domain, for their own internal corporate use, may not warrant the support of all ICANN accredited registrars.

- Community TLDs, which are applied for in order to serve small and narrowly defined populations, might not be of interest to the top tiered Registrars, due to the reduced potential number of registrants involved.

- New GTLD registries that have limited market appeal, and are not corporate brand TLDs (single-registrant) which are restricted for internal registration, nor Community

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TLDs which have a defined target population however large or small, may find that none of the principal Registrars (those with significant market share), are interested in distributing their TLD to the public.

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The above are examples where further consideration could be warranted on the question of exceptions, but the mainstream open TLDs including those currently in operation, particularly those with significant market dominance such as '.com', should continue to be subject to the existing separation arrangements.

Rather than make specific recommendations herein, on the possible ways to go about exceptions, we prefer at this time to await the outcome of the deliberations currently being held in the context of the Vertical Integration Working Group, which we are part of.

As undoubtedly ICANN is aware, numerous ISPs and Connectivity Providers worldwide are routinely involved in the domain name registration market, in many cases acting as resellers to the ICANN accredited Registrars. Thus it is essential that the stability and transparency of this market place, continue to be guaranteed in order to avoid any unnecessary turmoil.

In closing, the ISPCP Constituency is in favour of Full Structural Separation of Registries and Registrars as an overall policy, with the premise that further discussion over the possibility of some exceptions may be undertaken. However prior to accepting the need for any exceptions, the emphasis must remain on the need to define strong safeguards that will guarantee a competitive, secure and stable internet.

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BC Position on Registry-Registrar vertical separation September 2009

Background

The principle of the vertical separation of Registry and Registrar was established 11 years ago as a pro-competitive action at the time of the monopoly of one entity (Network Solutions now VeriSign) owning the registry and acting as registrar for .com .org and .net. ICANN created the system we have today, where registrants place orders with ICANN-accredited registrars, who in turn place the orders with ICANN-contracted TLD registries.

In essence there were three pro-competitive benefits:

a) the splitting of a dominant market player thus avoiding the potential for the exercise of dominance;

b) the subsequent development of a competitive market with multiple registrars offering consumers a variety of services connected with the purchase of domain names;

c) the subsequent development of competition at the registry level as ICANN moved to open up the registry market.

The BC supported this principle.

To ensure this structure held, ICANN restricted registries from acquiring a substantial percentage of any registrar, so VeriSign (the .com and .net registry) cannot buy a controlling interest in registrar GoDaddy, for example.

Judged by price alone (as an indicator of a competitive market) the pro-competitive benefits have proved to be real. Today the price of a .com domain name has dropped and there are multiple registrars competing for business with varied offerings.

Developments

In the subsequent 11 years, the BC has continued to support a cautious expansion of gTLD registries (in pursuit of the competitive benefits) and the continuation of Registry Registrar separation. Some of the largest registrars have become registry operators which also register those TLD names to the public. For example GoDaddy provides the registry for country-code .me (so Montenegro makes the rules, not ICANN). Also certain registries have been affiliated with domain registration companies for some time e.g. HostWay and .PRO, Poptel and .COOP, CORE and .CAT, Verisign and DBMS, GoDaddy and .ME, Afilias and .INFO.

Some registrars, such as eNom, are pressing ICANN to eliminate the restrictions on Registry-Registrar cross-ownership, so that those registrars can compete as registry businesses, sell new gTLD domains directly to the public, and sell them to all other ICANN accredited registrars as well. Other registrars, such as Network Solutions, has called for a continuation of the structural separation requirements between registries and registrars, but some liberalization in the cross-ownership requirements.

ICANN has reacted positively to the proposals to change in a limited fashion by proposing a continuation of the <u>principle</u> of separation BUT with a <u>waiver</u> for the first 100,000 names (described as a *limited lifting* of the requirement):

"With a limited exception, a registrar should not sell domain services of an affiliated registry. This limit is set to a certain threshold, in this model, 100,000 domain names".

http://www.icann.org/en/topics/new-gtlds/regy-regr-separation-18feb09-en.pdf

The questions are thus:

a) 11 years on, do the pro-competitive benefits outlined above continue to exist?

b) Does the 100,000 waiver effectively remove the principle of separation in that it will apply to the most market-significant names?

The position of the existing market players

In favour of the status quo of continued separation

Certain existing registries, such as NeuStar (.biz) and Public Interest Registry (.org) are in support of any entity becoming a registry or registry operator, so long as that entity does not distribute domain names in the same TLD that they operate as a registry. They oppose the proposal to discontinue separation on the basis that registrars have a substantial head start in marketing domain names to the public.

In favour of change and the ending of separation

Certain existing large registrars argue that only entities with market power which can be exercised for anti-competitive purposes (such as Verisign with .com and .net), should be subject to cross-ownership restrictions. These registrars claim it is in consumers' interests to allow cross-ownership because it would enhance competition and allow for the passing on of operational efficiencies in the form of lower prices.

BC Position (general market)

Given the uncertainty of the merits of the arguments either way the BC believes that the burden of proof must lie with the proponents of change. Those who favour change must demonstrate:

a) that the competitive benefits outlined above no longer apply and

b) that there will be new competitive benefits and no significant adverse effects as a result of such change.

The decision is of course not in the hands of registrars or registries but in the hands of the ICANN Board. The question for the Board is simple: "Will removing the vertical separation

safeguards either INCREASE or DECREASE the likelihood of the exercise of dominance within the domain name marketplace?"

Recommendation 1:

The BC believes that removing the existing vertical separation safeguards between registries and registrars may increase the likelihood of the exercise of dominance within the domain name marketplace.

The BC believes that the proponents of change have not satisfactorily demonstrated the likelihood of market place benefits to users.

The BC believes that the proposed 100,000 waiver is likely to effectively remove the principle of separation in that it will apply to the most market-significant names.

The BC thus opposes any change to the status quo for all TLDs intended for sale to third parties (i.e. those unconnected with the Registry).

BC position (closed markets)

It is possible that in the forthcoming expansion of domain names there will be proprietary domain names not for sale to the general public eg dot *brand*. In this unique case the BC would accept that it makes no sense for a company owning its own name or trademark in the form of a domain name to be obliged to go to a third party to register its own second-level domain names. Thus an opt-out for this special case of internal use seems appropriate.

Recommendation 2:

The BC believes that uniquely for domain names intended for internal use, the principle of registry-registrar vertical separation should be waived.

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Stakeholder Group / Constituency Input Template

Vertical Integration Policy Development Process

PLEASE SUBMIT YOUR RESPONSE AT THE LATEST BY 6-MAY, 2010 TO THE GNSO SECRETARIAT
(gnso.secretariat@gnso.icann.org) which will forward your statement to the Vertical Integration
Working Group.

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Field Code Changed

The GNSO Council has formed a Working Group of interested Stakeholder Group / Constituency
representatives and community participants, to collaborate broadly with knowledgeable individuals
and organizations, in order to consider recommendations on Vertical Integration (VI).

Part of the working group's effort will be to incorporate ideas and suggestions gathered from
Stakeholder Groups and Constituencies through this Stakeholder Group / Constituency Statement.
Inserting your Stakeholder Group / Constituency's response in this form will make it much easier for
the Working Group to summarize the responses. This information is helpful to the community in
understanding the points of view of various stakeholders. However, you should feel free to add any
information you deem important to inform the working group's deliberations, even if this does not
fit into any of the questions listed below.

Process

- Please identify the members of your constituency who participated in developing the
  perspective(s) set forth below.
- *The description of the category of new gTLDs for which an exception should be recognized with
  regard to vertical integration (or alternatively, with respect to registrar non-discrimination
  requirements) was originally proposed by J. Scott Evans, refined during an extensive online
  discussion on the mailing list of all IPC members, and summarized in an earlier draft of this
  document for review by all IPC members, and finalized for approval by the IPC Officers. Other
  elements of responses to this template were drafted by Steve Metalitz and circulated for
  comment on the full IPC list on May 2, 2010. Those contributing to the discussion at some phase*

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of this process included: Paul McGrady, Fred Felman, Fabricio Vayra, Ellen Shankman, Adam Scoville, Hector Manoff, Claudio Digangi, David-Irving Tayer, Martin Schwimmer, Nick Wood, David Taylor, Marc Trachtenberg, Kristina Rosette and others.

- Please describe the process by which your constituency arrived at the perspective(s) set forth below.

- *See preceding question.*

Questions

Please provide your stakeholder group / constituency's input on the following charter objectives:

Objective 1: To make policy recommendations that provide clear direction to ICANN staff and new gTLD applicants on whether, and if so under what conditions, contracts for new gTLD registries can permit vertical integration or otherwise deviate from current forms of registry-registrar separation, and equivalent access and non-discriminatory access.

IPC generally supports the strict separation approach approved by the ICANN Board on March 12. However, appropriate exceptions to this approach should be recognized. In particular, IPC believes that a new gTLD registry meeting one or more of the following models should (a) be allowed to control an ICANN-accredited registrar solely for the purpose of sponsoring registrations in that gTLD; (b) not be required to use an ICANN-accredited registrar for registration of second-level domain names within the gTLD; or (c) be permitted to enter into exclusive arrangements with one or a limited number of ICANN-accredited registrars for the purpose of sponsoring registrations in that gTLD,.

These models pertain only to branded gTLDs. Though there may be other exceptions to VI/CO rules, the IPC comments are limited to those gTLDs where the string is an identical match to the registry's trademark/service mark, which we will heretofore refer to as ".brands." We are of the view that it is preferable to have a specific .brand category, clearly defined, than seek to have brand owners try to seek to dress their application as a Community application for instance.

Models and Discussion:

2. Branded Single Registrant, Single User - .brand where the brand holder is the Registered Name Holder and user of all second-level domain names in the TLD)

This case is clear and simple. The trademark owner/holder owns and operates the registry either directly or indirectly, is the Registered Name Holder for all second-level names in the TLD, and is the user of all second-level names in the TLD. No second-level names are registered or delegated to any third party with the exception of wholly owned subsidiaries and otherwise affiliated companies. An example of this sort of VI/CO regulatory exception would be a direct-to-consumer retailer – "Buy Stuff", which would be the registry, sole Registered Name Holder, and sole user of second level domain names, e.g. <locations.buystuff> <clothes.buystuff> or <housewares.buystuff>.

4. Branded Single Registrant, Multiple Related Users - .brand where the trademark owner is the Registered Name Holder of all second-level domains but licenses those second- level domains to third parties that have a relationship with the brand owner (e.g., customers, suppliers, authorized dealers, etc.) whereby the registration agreement is part and parcel of and ancillary to a primary agreement for goods or services.

This model permits trademark owners to engage more fully and embrace in new gTLD innovation by bundling non-registry related services with domains. Such a model could be popular with ISPs, technology, and media companies.

5. Branded Trademark Licensed Multiple Registrant Multiple Users - .brand where the trademark owner and its trademark licensees are the Registered Name Holders and users of all second-level domains in the TLD. An example of this sort of exception would be trademark owners that operate a franchise system (<.fastburger>), distributors, real estate agents, and cooperative members (e.g. <.truevalue>). Using the Fast Burger example: Fast Burger would be the registry and a Registered Name Holder (e.g. <headquarters.fastburger> or <humanresources.fastburger>), and would allow third parties operating under a trademark license to be Registered Name Holders (e.g. <Chicago.fastburger> or <BobSmith.fastburger>).

This model is important for trademark owners that wish to maintain strict control over registration of second-level domain names, but need some flexibility related to ownership and local control.

Further Conditions for Exceptions:

.Brand gTLDs must adhere to the following conditions in order to be exempt from VI/CO restrictions (The IPC recognizes that any threshold naturally creates a problem for those who may not meet it and some IPC members have expressed concern at where the threshold is set. It is always a balance of fairness and seeking to ensure that there is no gaming. The level suggested is thus one which is hopefully sufficiently low to allow many brand owners who wish to participate to be able to, yet dissuade third parties who may seek to game or abuse the exception by registering a trade mark solely to be able to apply for a .brand to be rightly excluded. To nevertheless ensure a safeguard to this we suggest that applicants who do not meet the criteria can make their case to ICANN as to why they should be considered and ICANN has the discretion (or can delegate the discretion) to allow in certain cases):

(a) The trademark to which the .brand is an identical match must be the subject of trademark registrations of national effect in at least three countries in each of at least three of the five ICANN regions.

(b) For first-round applicants, the registrations of national effect referenced in (a) above must have issued on before June 27, 2008.

(c) The .brand exemption is inapplicable to trademark owners whose principal business is the operation of a domain name registry, domain name registrar, or domain name reseller.

(d) The relationship between the .brand TLD and its customer/Registered Name Holder is defined by terms of service that encompasses a registration agreement and governs content, the bundling of services or the purchase of a product; membership in an organization or cooperative; maintenance of the terms of a contract, trademark license; or an appropriate combination of these factors.

(e) Second-level .brand domain name registrations in models 2 and 3 are held in trust by the TLD operator and are not delegated to a third-party user

(f) Second-level .brand domain name registrations in model 3 are delegated to the user, but under the quality control provisions of a trademark license agreement that allows the registry to terminate the registration at will

(g) Mixed-use gTLDs, where some names are held by the registry and other names registered to external parties are not exempt from CO/VI regulations.

IPC Objectives for suggestions:

These objectives have been included to facilitate discussion of possible solutions that may be different from what is prescribed above. These objectives have been included so the community may understand the "spirit" of what is being proposed and understand what many brand owners have identified as helpful in the new gTLD process.. This proposal prescribes a delegation and distribution model for .brand gTLDs that:

- *global trade and trust by adapting to various business models of trademark holders*
- *guards consumers from potential harm through the reduction of phishing and fraud*
- *protects and honors intellectual property that conforms to international standards while not expanding any intellectual property right beyond that granted by the national governments issuing such rights*
- *encourages innovation within the new gTLD namespace*
- *allows rights holders (for profit and non-profit) to provide maximum value and choice to their customers and constituencies while maintaining strict quality control standards applicable to maintaining trademarks*
- *facilitates a cost effective and low-priced domain name alternative*
- *eliminates gaming through geographic and time restrictions on qualifying trademarks*
- *permits trademark owners to reap the benefits of .brand TLDs*

The IPC is proposing very narrow use cases that should have no, or very limited, impact on existing contracted parties. These cases only describe branded single registrant gTLDs and are limited to this context.

IPC looks forward to discussion of other clearly defined situations in which relaxation of strict separation (or non-discrimination) requirements may be appropriate and welcomes discussion and feedback on the above.

Objective 2: To review current and previous ICANN gTLD registry contracts and policies to identify the current and previous restrictions and practices concerning registry-registrar separation, and equivalent access and non-discriminatory access in place.

Objectives 2-4 describe work to be undertaken by the WG. IPC looks forward to commenting on this work once it is completed.

Objective 3: To identify and clearly articulate the changes to current cross-ownership arrangements contemplated by the options described in the most recent version of the DAG and supporting documents and considered by ICANN staff in connection with the planned introduction of new gTLDs.

Objective 4: To identify and clearly articulate the differences between the current restrictions and practices concerning registry-registrar separation and equal equivalent access, on the one hand, and the options described in the most recent version of the DAG and supporting documents1 and changes considered by staff, on the other hand.

In addition, comments on any aspect related to the topic of vertical integration between registries and registrars that you think should be taken into account by the Working Group as part of its deliberations are welcome. For example, comments may be submitted on: (i) recommended models for the New gTLD Program, (ii) the economic analysis conducted by economists retained by ICANN, including the CRA Report [PDF, 512 KB] as well as the one recently submitted by Salop and Wright [PDF, 42 KB], (iii) the Board approved model proposed by the Board at the ICANN Meeting in Nairobi on 12 March 2010, or (iv) whether the restrictions currently applicable to existing gTLD registries should be changed, or (v) additional work that should be performed by the Working Group to recommend models for the New gTLD Program.

Background Information

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- Review the Issues Report on Vertical Integration Between Registries and Registrars, please refer to http://gnso.icann.org/issues/vertical-integration/report-04dec09-en.pdf [PDF, 254 KB].

- The ICANN Board resolution on Vertical Integration is posted at http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5.

- To review the charter describing the policy work to be undertaken by the Vertical Integration Working Group, please refer to: http://gnso.icann.org/issues/vertical-integration/vi-chartered-objectives-10mar10-en.pdf [PDF, 41 KB].

- For information on the details of the implementation planning activities for new gTLDs, please refer to the documents posted at http://icann.org/en/topics/new-gtld-program.htm.

- For additional resources on the topic of vertical integration between registries and registrars, please refer to the documents posted at: https://st.icann.org/vert-integration-pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index_cgi_vi_resources.

New gTLD Draft Guidebook v.2 Comments on Registry-Registrar Separation and Section 2.8 of the New gTLD Agreement v. 2 13 April 2009

The comments below are submitted on behalf of the gTLD Registries Constituency regarding Registry-Registrar Separation as well as Section 2.8 of the New gTLD Agreement contained within the Draft Applicant Guidebook Version 2 dated 18 February 2009. They begin with some general comments followed by definitions and a new Section 2.8. A minority position is stated at the end.

I. INITIAL COMMENTS

Drawing on its review of the economic principles and the history of the gTLDs, the authors of the CRAI Report1 encouraged ICANN to re-examine the economic case for the separation requirement, and in particular to consider whether it might be possible to relax the once regulations have been pulled back," CRAI encouraged ICANN to move slowly, but deliberately and in consultation with the industry, towards permitting integration of registry and registrar services under many, but not all, circumstances. In order to assist ICANN in determining how to slowly and deliberately introduce vertical integration, the CRAI Report recommended two possible test cases: The Hybrid TLD and the Single Registrant TLD. However, it cautioned that "ICANN may want to consider taking steps towards relaxing one or both of these requirements under certain, limited, conditions." Further it argued that:

If ICANN should decide to go ahead with these test cases, it should be ready actively to monitor the performance of these new TLDs. If, after a reasonable period of time, ICANN is satisfied that competition is not being harmed – or, better, if it concludes that competition has been enhanced by their introductions, it may then want to consider relaxing one or both

of the vertical separation and equal access requirements for a somewhat broader pool of TLDs.

Despite the plea by the CRAI Report to move slowly and deliberately only with the two test cases identified in the report, the ICANN staff, swayed by a few registrars seeking to enter the gTLD Registry market, ignored the authors of the CRAI Report and recommended an approach to the registry/registrar issue that is not only inconsistent with the CRAI Report, but is rife with so many loopholes that the solution is certain to be gamed by new registry operators, registrars, resellers and their technical back-end providers.

1 http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf 2

The gTLD Registries Constituency, however, submits that its proposal below is not only consistent with the limited exceptions set forth in the CRAI Report, but also believes that it has significantly reduced the potential loopholes existing in the current gTLD Agreements as well as the proposed language contained in Section 2.8 of the new gTLD Agreement contained within the Second Version of the Draft Applicant Guidebook.

II. SPECIFIC CONTRACTUAL PROVISIONS

A. Definitions

"*Affiliate*" shall mean a specified person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

"*control*" (including the terms "controlling", "controlled by" and "under common control with") shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

"*Community-based TLD*" shall mean a gTLD that (a) is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community and (b) applied for the TLD on behalf of the existing community and was awarded the TLD on such basis. For purposes of Section 2.8, the following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities and (iii) a country or other region that is represented by a ccTLD, or (iv) a language except in cases where the TLD directly relates to a UNESCO recognized language.

"*single registrant*" TLD shall mean a TLD in which (i) all domain name registrations are registered to a single person, business or other entity and not to any party other than the single person, business or other entity, and (ii) proxy and anonymous domain name registrations are not offered.

B. New Section 2.8

2.8 Use of Registrars. Registry Operator must use only ICANN accredited registrars in registering domain names. Affiliates of Registry Operator or of any entity providing Registry Services for the TLD may be ICANN-accredited registrars, provided that such Affiliates or entities providing Registry Services for the TLD may not distribute domain names in the TLD unless (i) the TLD is a "single registrant" TLD, or (ii) the TLD is "community-based", provided however that in such event (a) the Affiliates or entities providing Registry Services for the Community-based TLD together may act as a distributor for no more than 50,000 names registered in the TLD and (b) neither Registry Operator nor any entity providing Registry

Services for the Community-based TLD may themselves act as an authorized registrar, reseller or distributor of domain names within the TLD through the same entity that provides Registry Services for the TLD. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with Registry 3

Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN.

C. Notes on Section 2.8

Note 1: The RyC believes that for true Single Registrant TLDs, as stated in the provision above, we do not necessarily believe that 50,000 names restriction must apply. However, until we can be sure that this cannot be gamed, we would recommend the ICANN setting the 50,000 name threshold, but allow the Single Registrant TLD to present to the ICANN Board any information why they believe the 50,000 name threshold may need to be exceeded (i.e., the TLD will be used by employees of a company with more than 50,000 employees). We would like input from the rest of the ICANN community to figure out other ways to stop the potential gaming of these restrictions.

Note 2: The restrictions we have placed in Section 2.8 are not limited to the official registry or registry operator that signs an Agreement with ICANN. Rather, the restrictions are towards ANY entity (or affiliate of any entity) providing Registry Services for the TLD. This would include back-end registry operators. It is only this type of restriction that will effectively put a stop to the gaming and prevent an argument from existing registrars (or

affiliates of registrars) that since they are not the entity signing an agreement with ICANN. The RyC will submit in a separate paper its rationale for this.

Note 3: In addition, the restrictions above do not just apply to being a "registrar" in the TLD, but rather distributing domain names in the TLD as either a registrar, reseller or any other form of distributor. This too would close a "loop hole" that has existing in the Agreements to date. Note 4: The registries in support of this proposal have indicated that they would imposing these restrictions on themselves if the RyC proposal is adopted by the ICANN Board for future TLDs; provided that existing sponsored TLDs are considered "Community-based TLDs" under the language above.

GNSO gTLD Registry Constituency Statement of Support Issue: Registry-Registrar Separation Date: April 13, 2009 General RyC Information

§ Total # of eligible RyC Members2: 14

2 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 (Article III, Membership, ¶ 1). The RyC Articles of Operations can be found at http://www.gtldregistries.org/about_us/articles .

Total # of RyC Members: 14

§ Total # of Active RyC Members: 14

§ Minimum requirement for supermajority of Active Members: 10

§ Minimum requirement for majority of Active Members: 8

§ # of Members that participated in this process: 13

§ Names of Members that participated in this process:

1. Afilias (.info)

2. DotAsia Organisation (.asia)

3. DotCooperation (.coop)

4. Employ Media (.jobs)

5. Fundació puntCAT (.cat)

6. mTLD Top Level Domain (.mobi)

7. Museum Domain Management Association – MuseDoma (.museum)

8. NeuStar (.biz)

9. Public Interest Registry (.org)

10. RegistryPro (.pro)

11. SITA (.aero)

12. Telnic (.tel)

13. The Travel Partnership Corporation – TTPC (.travel)

14. VeriSign (.com, .name & .net)

§ Names & email addresses for points of contact:

o Chair: David Maher, dmaher@pir.org

o Alternate Chair: Jeff Neuman, Jeff.Neuman@Neustar.us

o Secretariat: Cherie Stubbs, Cherstubbs@aol.com

3 Per the RyC Articles of Operations, Article III, Membership, ¶ 4: 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 Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present

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or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

Regarding the issue noted above, the level of support in the RyC is summarized below.

1. **Level of Support of Active Members**: Supermajority

1.1. # of Members in Favor: 11

1.2. # of Members Opposed: 2

1.3. # of Members that Abstained: 1

1.4. # of Members that did not vote: 0

2. **Minority Position**(s):

During the course of our deliberations, VeriSign, who voted against the gTLD Registries Constituency Statement had put forth the following as a new Section 2.8 (including definitions). This view, however, was not adopted by a Supermajority of the gTLD Registries Constituency. RegistryPro joins VeriSign in submitting this minority position, with additional comments added by RegistryPro at the end to clarify intent.

Comment on Section 2.8, Use of Registrars

We believe that in order to promote a competitive marketplace between TLDs, the Registry/Registrar Cross-Ownership rule must be applied in a uniform manner. This requires that the current rules be refined to eliminate existing loopholes by (i) adopting a clear definition of "affiliates"; and (ii) imposing consistency in the ownership restrictions faced by registries in owning registrars by applying the same restriction to registrars owning registries. Limiting Registry/Registrar cross-ownership promotes a level playing field. We believe that there should be no exceptions to the cross-ownership restrictions but would

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allow smaller registries (less than 50K names, e.g.) which are intended to serve smaller communities or a single business, and which would otherwise have a hard time attracting registrar support to work with either a single or a few unaffiliated ICANN-accredited registrars. We believe that at some size, even defined communities and single company TLDs should become a market option and should be treated as a non-restricted gTLD. Accordingly, we would recommend that Section 2.8 be revised as follows:

2.8 Use of Registrars. (a) Registry Operator must use only ICANN-accredited registrars that are not Affiliates of the Registry Operator, in registering domain names within the TLD. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN-accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN. As long as the number of names registered in the TLD is no more than 50,000 and either (i) the TLD is a "single registrant" TLD, or (ii) the TLD is a "community-based" TLD, the Registry Operator may limit the number of ICANN accredited registrars with whom it enters into a registry-registrar agreement.

(b) "Affiliate" shall mean a specified person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

(c) The term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

(d) The term "single registrant" TLD shall mean a TLD in which (i) all domain name registrations are registered to a single person, business or other entity and not to any party other than the single person, business or other entity, and (ii) proxy and anonymous domain

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name registrations are not offered and (iii) no person, business or entity who is not an Affiliate is granted rights to use any of the domain names.

(e) The term "community-based" TLD shall mean a TLD that is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community. The following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD directly refers to a UNESCO-recognized language."

RegistryPro additional comment:

In the event that ICANN's resolution to this issue includes restricting the services that registries can provide, by ownership of registrars or otherwise, an exception for early stage, small, community based and single owner registries ought to be considered so that these registries are not unduly constrained in their ability to distribute names.

ANNEX F - Excerpts from the Draft Applicant Guidebook v. 4

MODULE 1 Excerpt:

Restrictions on Registrar Cross-Ownership1—Applications will not be considered from any of the following:

1.   ICANN-accredited registrars or their Affiliates;

2.   Entities controlling or Beneficially Owning more than 2% of any class of securities of an ICANN accredited
registrar or any of its Affiliates; or

3.   Entities where 2% or more of voting securities are beneficially owned by an ICANN-accredited registrar or any of its Affiliates.

Further, applications where the applicant has engaged an ICANN-accredited registrar, reseller, or any other form of distributor or any of their Affiliates (or any person or entity acting on their behalf) to provide any registry services for the TLD will not be approved.

 "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified.

 "Control" (including as used in the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as
trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

A person or entity that possesses "Beneficial Ownership" of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares (A) voting power which includes the power to vote, or to direct the voting of, such security; and/or (B) investment power which includes the power to dispose, or to direct the disposition of, such security.

_____

1 Note: The text in this section is possible implementation language resulting from the resolutions of the ICANN Board (adopted at the ICANN Meeting in Nairobi) with respect to the separation of registry and registrar functions and ownership http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5. During the recent Board Retreat in Dublin during May 2010, the Board reviewed possible issues that might result from a strict interpretation of the Board's resolutions. It was the sense of the Board that: 1) the draft proposed stricter limitations on cross ownership represents a "default position" and they continue to encourage the GNSO to develop a stakeholder-based policy on these issues; 2) a very strict interpretation of the resolutions might create unintended consequences; 3) staff should produce language in the agreement matching a "de minimus" acceptable approach (2% language) while remaining generally consistent with the resolutions; 4) the Board encourages community input and comment on the correct approach to these issues in the absence of GNSO policy; and 5) the Board will review this issue again if no GNSO policy results on these topics.

_____

EXCERPT FROM THE REGISTRY AGREEMENT:

2.9 Use of Registrars* (see note below).

(a) *Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator and its Affiliates (or any person or entity acting on their behalf) shall not act as a registrar, reseller or any other form of distributor with respect to the TLD or any other top-level domain. Registry Operator must provide non-discriminatory access to registry services to all ICANN accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD, provided that such agreement may set forth non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Such agreement may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN. This Section 2.9 shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar. [Registry Operator shall not engage or otherwise permit any registrar, reseller or any other form of distributor, or any of their Affiliates (or any person or entity acting on their behalf) to provide Registry Services for the TLD.]*

(b) *Registry Operator and its Affiliates shall not, directly or indirectly: (i) control any ICANN-accredited registrar or its Affiliates, (ii) control or acquire greater than 2% Beneficial Ownership of any class of securities of any ICANN-accredited registrar or its Affiliates, (iii) be controlled by, or be under common control with, any ICANN-accredited registrar or its Affiliates, or (iv) except as set forth below in this sub-clause (b), sell or otherwise transfer any interest in any security of Registry Operator or its*

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Affiliates to any ICANN-accredited registrar or its Affiliates. Nothing withstanding sub-clause (b)(iv) above, Registry Operator may sell voting securities to any ICANN-accredited registrar or its Affiliates, provided that any such sale will not result in such registrar or its Affiliates owning greater than 2% of Registry Operator's outstanding voting securities.

(c) *For the purposes of this Section 2.9: (i) "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise, and (iii) a person or entity that possesses "Beneficial Ownership" of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares (A) voting power which includes the power to vote, or to direct the voting of, such security; and/or (B) investment power which includes the power to dispose, or to direct the disposition of, such security.]*

4 *MAY 2010 DRAFT NEW GTLD AGREEMENT SPECIFICATIONS SUBJECT TO PUBLIC COMMENT*

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* Final text will be posted on ICANN website; agreement reference to be replaced by hyperlink.

* *Note: The text in this section is possible implementation language resulting from the resolutions of the ICANN Board (adopted at the ICANN Meeting in Nairobi) with respect to the separation of registry and registrar functions and ownership <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5>. During the recent Board Retreat in Dublin during May 2010, the board reviewed possible issues that might result from a strict interpretation of the Board's resolutions. It was the sense of the Board that: 1) the draft proposed stricter limitations on cross ownership represents a "default*

position" and they continue to encourage the GNSO to develop a stakeholder based policy on these issues; 2) a very strict interpretation of the resolutions might create unintended consequences; 3) staff should produce language in the agreement matching a "de minimus" acceptable approach (2% language) while remaining generally consistent with the resolutions; 4) the Board encourages community input and comment on the correct approach to these issues in the absence of GNSO policy; and 5) the Board will review this issue again if no GNSO policy results on these topics.

Annex G - Charter of the Vertical Integration Working Group

Chartered objectives for the Working Group:

Preamble: The working group on vertical integration shall evaluate and propose policy recommendations for new gTLDs and existing gTLDs. The working group expects to define the range of restrictions on vertical separation that are currently in effect, to serve as a baseline to evaluate future proposals.

Objective 1: To make policy recommendations that provide clear direction to ICANN staff and new gTLD applicants on whether, and if so under what conditions, contracts for new gTLD registries can permit vertical integration or otherwise deviate from current forms of registry-registrar separation, and equivalent access and non-discriminatory access.

Objective 2: To review current and previous ICANN gTLD registry contracts and policies to identify the current and previous restrictions and practices concerning registry-registrar separation, and equivalent access and non-discriminatory access in place.

Objective 3: To identify and clearly articulate the changes to current cross-ownership arrangements contemplated by the options described in the most recent version of the DAG and supporting documents and considered by ICANN staff in connection with the planned introduction of new gTLDs.

Objective 4: To identify and clearly articulate the differences between the current restrictions and practices concerning registry-registrar separation and equal equivalent access, on the one hand, and the options described in the most recent version of the DAG and supporting documents1 and changes considered by staff, on the other hand.

Objective 5: Determine as best as possible, to the extent reasonable in the time given, the potential impacts of any recommendations on any affected parties.

Objective 6: To perform the PDP activities in a manner that does not delay the launch of the New GTLD Program.

Objective 7: WG shall examine relationship, if any, between VI and CO.

Working Definitions to be used by the Working Group2

"Vertical Integration" (VI) is defined as a business structure in which there is no separation between the Registry Operator and the registrar in relation to a particular gTLD. They are

either owned or controlled by the same company or have another contractual affiliation that controls the specific gTLD, and the Registry Operator is not required to provide equivalent access and non-discriminatory access to non-affiliated registrars to sell names under its gTLD.

"Cross ownership" (CO) is defined as the controlling ownership of a share of a registry by a registrar, or vice-versa.

"Minority Interest" is defined as the minority ownership of a share of a registry by a registrar, or vice-versa.

1 The working group understands that the DAG is a fluid document. As a result, the working group will conduct its activities based upon the version of the document available.

[1]   The working definitions included in this charter are subject to further development and refinement but are included in the interests of time in order to allow the remainder of the charter to be finalized and approved by the GNSO Council.

Operating procedures for the Working Group

The Working Group will operate according to the guidelines set out in the Draft Working guidelines of 5 Feb 2010

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Milestones From Charter Approval Date 2

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Week	Dates	Tasks/Goals
1-2	26 Mar	Original recruitment for group members will go out to the constituencies and the ICANN community.
1-3	2 Apr	Staff begins documentation on existing approaches and practices, differentiating among Vertical Integration, Joint Marketing approaches.
2	22 Mar	Group begins work.
3-5	16 April	Collect Constituency/SG statements and community comments.
5-7	30 April	Review of existing documents and commentary.
16 April		Publish Staff document on existing approaches and practices.
6-8	7 May	Review staff document and constituency and public comments.
9-11	28 May	Discuss conditions under which various practices are appropriate.
9-12	4 Jun	Discuss and document policy recommendations.
16	30 Jun	Final Report to Council and out for public review.

2   Assuming Council Approval on 10 Mar

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ANNEX H- Results of Brussels Face-to-face Meetings

Results of Brussels Face-to-Face Meetings

The Working Group held two face-to-face meetings during the 2010 ICANN Meetings held in Brussels. The sessions involved breaking the Working Group into three sub-groups that reflected diverse opinions on the issues (based on prior polling of the Working Group). The sub-groups described (and ranked) the most important elements of a proposal (known in the group as "atoms") and were then asked to assemble those elements into new combinations ("molecules") as a means of discovering areas of agreement that might lead to a new consensus view.

The Working Group produced two such "molecules" that eventually became known as Brussels 1 (BRU1) and Brussels 2 (BRU2) and are presented below. While the effort did not lead to a breakthrough on consensus, it did spark considerable discussion.
It should be noted that these reflect the opinions of a subset of the Working Group. There were two barriers to participation. First, remote participation was impossible due to the nature and structure of the activity. That ruled out WG members who could not attend the ICANN meeting. Second, the meetings were scheduled at times that conflicted with other GNSO Council meetings, making it impossible for some members to participate in the sessions even though they were in Brussels at the time.

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BRUSSELS OPTION #1

(BRU1)

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1. **LIMITS SHOULD APPLY ACROSS ALL TLDS.**

There was strong consensus that rules and limits should apply across all TLDs, regardless of the TLD offered by the registry or registrar in question. For example, BRU1 does not believe the .COM registry operator should be allowed to own more than 15% of, or control, a registrar offering TLDs other than .COM. BRU1 opposes any exception that would allow a registrar to own >15% of a registry if that registrar promised not to offer its registry's TLD (or vice versa). In this respect, BRU1 supports the Nairobi Board/ DAG 4 provision that places restrictions across all TLDs.

The basis for this position is the strong belief that making such an exception would be close to allowing 100% cross-ownership in the same TLD. Also, it reflects a belief that ICANN staff are not resourced or trained to properly control the many and varied gaming scenarios affiliated registrars could employ to promote or sell the names in their registry's TLD (or attempt to damage the names of another registry's TLD). In BRU1's view it would not just be a matter of trying to identify and monitor all the varied registrar and reseller operations owned by the registrar's parent company. There would also be myriad bundling, cross-marketing and promotional methods by which the affiliated registrar could circumvent the safeguard.   BRU1 believes this is why existing contracts effectively limit cross ownership of registries and registrars at 15% -- regardless of the TLDs they offer.

2. **NO CONTROL REGARDLESS OF OWNERSHIP PERCENTAGE.** There can be no control (as defined by DAG 4 – essentially the ability to direct policy) between a registrar and a registry, or between a registry and a registrar, regardless of cross ownership percentages.

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3. **15% OWNERSHIP LIMIT.** In addition to 2. (above), there can be no more than 15% ownership of a registry by a registrar, or a registrar by a registry. This limit recognizes that, even absent control, a registry may be incented to favor a registrar with whom they have significant cross-ownership (BRU1 defined significant as 15%). This limit applies regardless of the TLDs offered by the registry/ registrar combination in question.

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4. **SINGLE REGISTRANT/ SINGLE USER TLD EXCEPTION.** A Single Registrant Single User (SRSU) TLD is one where the registry sets a policy where second level names can only be registered to the registry (i.e. the registry is the registrant for all names). Also, the use of those names in terms of website content, email control, or any other application associated with the domains, is exercised only by the registry. As a practical matter this means the registry is not providing second level names to other parties (who would have control over website content, email use, etc). We believe the registry contract in the current DAG already provides for this type of registry via the schedule of registry reserved names (which could be added to as the registry and ICANN agree). If there is perceived ambiguity about the applicability of this contract provision we believe the contract should be amended to explicitly allow for this type of SRSU TLD. If the DAG cannot be amended in this way, we believe there should be an exception to rules 1. to 3. (above) that allows the SRSU registry to have: (1) 100% ownership/ control of a registrar in their TLD; and (ii) no obligation to provide equal access to other registrars.

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5. **Registry Service Providers (RSPs – also known as back-end technical providers).** BRU1 did not have consensus about the applicability of rules 1. to 3. to RSPs. A proposal was made that if RSPs undertook a form of RSP accreditation with ICANN, and agreed to a set of significant sanctions directly with ICANN (should they be in breach of their obligations for such things as data integrity) that BRU1 might recommend an exception for 100% control of RSPs by registrars (or vice versa). Such an 'amendment' is not yet agreed by BRU1 - but

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there is considerable interest in it.

QUESTIONS:

What is the best way to prevent gaming in a cross-owned entity -- percentage ownership caps, restrictions on control, both or something else?

- The most effective way to reduce gaming and prevent harms is to have clearly defined and easily understood 'bright-line' rules regarding ownership and control. BRU1 does not believe, in the context of a very largely expanded universe of TLDs/registries/ registrars/ new issues, that ICANN have the resources or capabilities to properly manage compliance unless ownership and control rules are extremely clear-cut. Exceptions should be minimal and only when justified by strong evidence in support of **registrant** interests. In particular, BRU1 does not believe ICANN has the ability to properly manage an exception based on registrars not offering the TLD of their affiliated registry.

Do the benefits of increased competition (registrars becoming registries or back-end service providers) outweigh the potential risks of gaming from a cross-owned entity, or vice-versa?

- BRU1 believes there will be significantly increased competition (as compared to the current marketplace) regardless of the ownership restrictions applied to new TLDs. For example, BRU1 believes that even with very restrictive rules, such as the DAG 4 language, there will be significantly improved competition over the current marketplace. Given this, and the absence of precise studies regarding harms, BRU1

favors a continuation of the current, 15% convention in cross-ownership across all TLDs.

Should a registry be able to own a registrar, and vice versa, provided it doesn't distribute its own TLD?

- No. As detailed above, BRU1 strongly believes that limits should apply regardless of the TLDs offered by the registry or registrar. The basis for this position is the strong belief that making such an exception would be equivalent to allowing 100% cross-ownership within the TLD, and a belief that ICANN staff are not resourced or trained to properly control the many and varied gaming scenarios affiliated registrars could employ to promote or sell the names in their registry's TLD (or attempt to damage the names of competing registry's TLDs).

- In BRU1's view it would not just be a matter of trying to identify and monitor all the varied registrar and reseller operations owned by the registrar's parent company. There would also be myriad bundling, cross-marketing and promotional methods by which the affiliated registrar could circumvent the safeguard. BRU1 believes this is why existing contracts effectively limit cross ownership of registries and registrars at 15% -- regardless of the TLDs they offer.

What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is permitted?

- 15%, which is consistent with the majority of existing contracts. For the reasons detailed in the preceding paragraphs we do not view rules limiting self-distribution as enforceable. In addition, there are potential harms from such cross-ownership unrelated to whether or not the affiliated registrar distributes its

own registry's TLD.

What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is prohibited?

- .   15%, which is consistent with the majority of existing contracts. For the reasons detailed in the preceding paragraphs we do not view rules limiting self-distribution as enforceable. In addition, there are potential harms from such cross-ownership unrelated to whether or not the affiliated registrar distributes its own registry's TLD.

Should a registry be able to control a registrar, and vice versa, provided it doesn't distribute its own TLD?

- No, for the all reasons detailed in responses to the questions above, BRU1 believes any exception for *'doesn't distribute in its own TLD'* is both unwise and unworkable.

Absent an arbitrary restriction on percentage of cross-ownership, what constitutes control?

- BRU1 did not discuss this in detail, but there is a sense that the DAG4 definition of control is workable (i.e. – the ability to set policies or direct management).

What restrictions should be put in place to prevent control? Do these vary if self-distribution is prohibited?

- Establishing a 15% baseline maximum for cross ownership across all TLDs will prevent the overwhelming majority of likely control situations. Although it is

possible to have control below 15%, in practice this limit is likely to prevent the majority of control situations.

Is ICANN capable of enforcing contract compliance to prevent gaming in a cross-owned entity?

- BRU1 believes that in the greatly expanded universe of TLDs/registries/ registrars/ new issues, ICANN will not have the resources or capabilities to properly manage compliance unless ownership and control rules are extremely clear-cut. Exceptions should be minimal and only when justified

- by strong evidence in support of **registrant** interests. In particular, BRU1 does not believe ICANN has the ability to properly manage an exception based on registrars not offering the TLD of their affiliated registry.

Specifically, should Registry Service Providers be required to enter into contracts with ICANN?

- BRU1 considered, and has some support for, an exception under which RSPs could become accredited. If this exception was granted, and we recognize there is work to be done on this, BRU1 might endorse an exception that allowed >15% cross ownership between RSPs and registrars. I should also note that there were some members of BRU1 who were strongly opposed to such an exception.

Should other entities (eg Resellers) also be required to enter into contracts with ICANN?

- BRU1 did not consider or recommend reseller contracts with ICANN.

Permitted for Single-Registrant, Single-User (SRSU) TLDs?

· Yes, per Section 4. of BRU1 proposal

Permitted for "orphaned" TLDs that can't get registrar distribution?

· Not discussed in detail, but some support for this exception.

Permitted for "community" TLDs?

· Not discussed in detail, but some support for this exception.

Should there be numeric caps for any or all of these?

· Not discussed.

Should the results of this first-phase VI-WG PDP be limited to the first round of new TLDs only?

· Yes, lessons will be learned and applied to the second round.

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Brussels Option #2

(BRU2)

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1. LIMITS DO NOT APPLY ACROSS TLDS

A registry operator or registry services provider that does not distribute its own TLD should not be restricted from acting as a registrar in other TLDs. An existing registrar should not be prohibited from becoming a new TLD registry just because it sells other TLDs. The potential harms of registry sharing data with an affiliated reseller or friendly registrar can be addressed via contract and ICANN compliance and enforcement mechanisms, provided resources and commitment are present. The benefit of new entrants, including existing registrars, outweighs the potential harms from cross-ownership if no self-distribution is permitted.

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2. CONTROL/OWNERSHIP

Cross-ownership up to 100% is permitted provided there is no distribution of own TLD. An existing registrar should be permitted to become a new TLD registry and own up to 100% provided they don't act as their own registrar. Separation of functionality and no self-distribution make restrictions on cross-ownership unnecessary provided ICANN enforces contracts.

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3. OWNERSHIP LIMITS

No ownership limit if cross-owned entity doesn't distribute its own TLD. De minimus limit (5%) if cross-owned entity distributes own TLD.

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4. EXCEPTIONS

Exceptions should be allowed for single-registrant/single user, orphaned TLDs, and possibly

others TBD. A procedure should be established for applicants to request exceptions based on business model and to ensure ability to take TLD to market if no other registrars agree to offer and/or market the TLD.

5. REGISTRY SERVICE PROVIDERS

Registry Service Providers should have the same restrictions as Registry Operators.

6. COMPLIANCE AND ENFORCEMENT

We spent a significant portion of our time discussing compliance, audit, and enforcement procedures. Our group felt that a "serious" structure would be required, but would be capable of deterring bad actors with significant but tiered penalties.

Questions:

What is the best way to prevent gaming in a cross-owned entity -- percentage ownership caps, restrictions on control, both or something else?

- BRU2 maintains and strictly enforces functional separation of registries and registrars and equal access requirements.
- BRU2 prevents cross-owned entities from selling registrations in their own TLD, except in SRSU and orphaned TLD cases.
- BRU2 prohibits a registry from owning or controlling more than a de minimus share (5%) of a registrar distributing its own TLD.
- BRU2 allows 100% cross-ownership provided there is no self-distribution.
- BRU2 recognizes the need for an effective compliance and enforcement regime, including severe penalties for violators.

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Do the benefits of increased competition (registrars becoming registries or back-end service providers) outweigh the potential risks of gaming from a cross-owned entity, or vice-versa?

- BRU2 considers the benefits of increased competition, specifically allowing registrars to become registries, as more valuable than the potential risks of gaming from a cross-owned entity if that cross-owned entity was also prohibited from self-distribution.

- BRU2 recognizes the need for an effective compliance and enforcement regime, including severe penalties for violators, and that such a regime would adequately address the risks of gaming and data-sharing.

Common ownership

Should a registry be able to own a registrar, and vice versa, provided it doesn't distribute its own TLD?

- Yes, BRU2 says 100% cross-ownership is allowable if self-distribution is prohibited..

What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is permitted?

- BRU2 says de minimus (5%) is allowable when self-distribution is permitted.

What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is prohibited?

- BRU2 says 100% cross-ownership is allowable if self-distribution is prohibited.

Control

Should a registry be able to control a registrar, and vice versa, provided it doesn't distribute its own TLD?

· BRU2 says yes, 100% cross-ownership and control is allowed with no self-distribution.

Absent an arbitrary restriction on percentage of cross-ownership, what constitutes control?

· BRU2 did not address the definition of control.

What restrictions should be put in place to prevent control? Do these vary if self-distribution is prohibited?

· BRU2 did not address restrictions on control.

Enforcement and compliance

Is ICANN capable of enforcing contract compliance to prevent gaming in a cross-owned entity?

· BRU2 assumes that ICANN is capable of enforcing contract compliance, provided the rules and restrictions are clearly defined.

Scope

Should the scope of ICANN contracts be increased?

·   BRU2 identified the need for expanded/enhanced contractual language to prevent gaming and data-sharing.

Specifically, should Registry Service Providers be required to enter into contracts with ICANN?

·   BRU2 said cross-ownership and self-distribution restrictions should be extended to Registry Service Providers, but did not recommend new contracts with ICANN for those entities.

Should other entities (eg Resellers) also be required to enter into contracts with ICANN?

·   BRU2 did not consider or recommend reseller contracts with ICANN.

Exceptions to cross-ownership and self-distribution restrictions

Permitted for Single-Registrant, Single-User (SRSU) TLDs?

·   BRU2 allows an exception for SRSU TLDs.

Permitted for "orphaned" TLDs that can't get registrar distribution?

·   BRU2 allows an exception for orphaned TLDs.

Permitted for "community" TLDs?

·   BRU did not address a specific exception for "community" TLDs.

Should there be numeric caps for any or all of these?

·   BRU2 did not address specific numerical caps for exceptions.

Interim solution

Should the results of this first-phase VI-WG PDP be limited to the first round of new TLDs only?

·   BRU considers the first phase of the VI-WG PDP as applying only to the first round of new TLDs.

ANNEX I - VI Proposed Definitions

Draft: Definitions for GNSO Vertical Integration Working Group

1 June 2010

Affiliate: a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified

Beneficial Ownership: a person or entity that possesses "Beneficial Ownership" of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares (A) voting power which includes the power to vote, or to direct the voting of, such security; and/or (B) investment power which includes the power to dispose, or to direct the disposition of, such security.

Control: the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

Criteria for Selection of Registrars: criteria a registry might be permitted to use to determine whether to qualify a registrar to serve as a registrar for the TLD.

Cross-ownership: a situation where one firm has a partial or complete ownership interest in another entity, whether or not the ownership interest enables the firm to control or influence the decisions of the other entity. See also Vertical Integration.

Exclusive Dealing: contracts by which a registrar agrees to act solely as registrar for a single registry, or a registry agrees to accept registrations solely from a single registrar.

ICANN-Accredited Registrar: a company that enters into a Registrar Accreditation Agreement with ICANN.

Minority Interest: a stock or investment interest in a company or venture that is neither a controlling interest nor a majority interest.

Minority Stockholders: those stockholders of a corporation with a minority interest who do not control the corporation.

Registered Name Holder: (also referred to as a registrant) the person or organization that enters a registration agreement with a registrar.

Registrar: a company that contracts with Registered Name Holders and with a Registry Operator and collects registration data about the Registered Name Holders and submits registration information for entry in the Registry.

Registrar Services: domain registration services provided by a registrar in connection with a TLD as to which it has an agreement with the TLD's Registry Operator, and includes contracting with Registered Name Holders, collecting registration data about the Registered Name Holders, and submitting registration information for entry in the Registry Database.

Registry: the database of all domain names registered in each top-level domain.

Registry Infrastructure Provider: (also referred to as Registry Back-End Operator) a term sometimes used to refer to an entity to which the Registry Operator has contracted some or all of its Registry Services functions.

Registry Operator: the entity entering the registry agreement with ICANN.

Registry Services: 1) Operations of the registry critical to the following tasks: (i) the receipt of data from registrars concerning registrations of domain names and name servers; (ii) provision to registrars of status information relating to the zone servers for the TLD; (iii) dissemination of TLD zone files; (iv) operation of the registry zone servers; and (v) dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement; and (2) other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and (3) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator.

Reseller: a person or entity that acts as an agent to, or a retailer for, a registrar or registrars to bring in customers or domain-name registrations, and in some cases to provide some registrar services.

Vertical Contract: an agreement between a registry and registrar (and/or potentially a third party or parties) concerning promotion, favored placement of a TLD or a registrar, or other services. Vertical contracts may lead to similar effects as vertical integration.

Vertical Integration: Cross-ownership or control by a firm of facilities or entities that operate at multiple levels of production and/or distribution in the chain from raw materials to the ultimate consumer. In the context of domain-name registration: cross-ownership involving a registry and a registrar of domain names or a registry infrastructure provider in one or more TLDs (whether or not the vertically integrated registrar competes with other registrars in that TLD). Note also: vertical contracts can have effects similar to vertical integration.

Vertical Integration with Exclusivity: A situation where a vertically integrated registry/registrar is the only registrar for the TLD.