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September 25, 2012

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**Re: An Open Letter to the ICANN Board and CEO, GAC Members, Evaluators, the Independent Objector and Members of the ICANN Community**

Dear Dr. Crocker, Mr. Chehadé, Ms. Dryden, Mr. Chalaby, Governmental Advisory Committee Members, Independent Objector, gTLD Application Evaluators and the ICANN Community:

The new gTLD program is underway and applications have commenced the comprehensive evaluation process. Yet several applicants have misinterpreted the rules and propose to operate “generic word” strings in a completely closed and vertically integrated fashion, simultaneously serving as registry, registrar and registrant – even though this gTLD model was intended to be reserved solely for brand strings. Such a monopolistic framework will, if implemented, radically disrupt competition and consumer choice on a global scale, and more importantly, threaten the very existence of the free, open and competitive Internet that has flourished under ICANN’s steadfast governance since 1999.

These applications, if approved, will grant the registry exclusive authority and market power within the Internet ecosystem to (i) deny entry to current and future competitors who operate within the same business landscape; (ii) dictate products or services that consumers must purchase in order to participate within the new gTLD string, or face being completely excluded; (iii) create private DNS-enabled networks beyond the oversight of any government or governing body, which could raise law enforcement and national security concerns worldwide.

To address this, ICANN should issue an Advisory (i) affirming its commitment to the principles of competition and consumer choice, as reinforced by the New gTLD Registry Operator Code of Conduct (“Code”); (ii) stating that exemptions to the Code will only be granted to branded strings in narrowly-tailored circumstances; and (iii) notifying applicants requesting an exemption that they must clearly demonstrate satisfaction of its narrowly-defined parameters. ICANN should quickly issue its Advisory, allowing affected applicants the opportunity to amend their string, demonstrate compliance with the Code, or withdraw applications. This should not delay the evaluation of unaffected applications.

## I. Introduction

Since the new gTLD program was announced in 2008, ICANN has proclaimed that its goals are to “enhance competition and consumer choice and enable the benefits of innovation via the introduction of new gTLDs”.<sup>1</sup> Further, ICANN’s former CEO advised Congress in February 2012 that, “In the end, the new gTLD program is intended to benefit the billions of Internet users (and not just the hundreds of potential applicants) by providing business opportunity, language and cultural diversity, protections for consumers and property, and choice for Internet users.”<sup>2</sup>

Now, three months after the application period closed and the proposed strings were published by ICANN, the new gTLD program is at a critical procedural juncture. Submitted applications for new gTLD strings are being reviewed by ICANN evaluators, which will result in their approval, rejection, or reopening for further amendment by the applicant. Many of these applications seek an exemption from the New gTLD Registry Operator Code of Conduct (“Code” or “Code of Conduct”).

Yet any contemplated granting of the requested exemptions will be contrary to the Code of Conduct’s guiding principles of non-discrimination and equal access, and undermine the new gTLD program’s goals of promoting competition and consumer choice. Indeed, the precepts of non-discrimination, equal access, competition, and consumer choice have promoted the exponential growth of a free and open Internet. To ensure that these crucial principles are preserved, ICANN should reaffirm its intention to enforce its Code of Conduct. Because this reaffirmation should be made prior to the deployment of any new gTLD, this letter is addressed to the ICANN Board and CEO, Government Advisory Committee Members, the Independent Objector, gTLD Application Evaluators, and members of the ICANN community.

## II. Equal access and non-discrimination are the hallmarks of the new gTLD program.

ICANN has promulgated both a New gTLD Registry Agreement and Code of Conduct with which all approved new gTLD applicants (i.e., Registry Operators) must comply. Notably, Section 2.9 of the New gTLD Registry Agreement requires all registries to “...*provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD.*”<sup>3</sup> Further, Section 1 of the Code of Conduct unequivocally states that new gTLD registries shall **not**:

- directly or indirectly show any preference or *provide any special consideration to any registrar* with respect to operational access to registry systems and related registry services;
- *register domain names in its own right*, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD;

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<sup>1</sup> ICANN New gTLD Micro-Site (<http://newgtlds.icann.org/en/about/program>); Other ICANN publications have echoed the program’s hallmarks: “New gTLDs help achieve that commitment by paving the way for increased consumer choice by facilitating competition...” (<http://archive.icann.org/en/topics/new-gtlds/faqs-21oct11-en.pdf>)

<sup>2</sup> <http://www.icann.org/en/news/correspondence/beckstrom-to-leahy-02feb12-en.pdf>

<sup>3</sup> *Applicant Guidebook, Draft New gTLD Registry Agreement* (<http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-04jun12-en.pdf>)

- register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution request by consumers.<sup>4</sup>

Yet despite ICANN's core precepts of equal access and non-discrimination, several generic word new gTLD applications seek an exemption from these very obligations and commitments. The result would be Registry Operators that simultaneously function as a registry, registrar, and registrant within the new gTLD that they seek to operate. Their proposed model is a "completely closed" and vertically integrated framework that undermines competition and consumer choice – the very goals of the new gTLD process -- in numerous ways:

- First, a Registry Operator's exclusive use of a generic term that refers to an entire industry could readily limit or deny access to competitors who also operate within the industry landscape. For example, granting a completely closed category string such as ".TRUCK" to a single manufacturer could lead to other manufacturers being barred from using the string to promote their own business on an equal and fair footing.
- Second, a Registry Operator could directly (or indirectly) compel the purchase or use of other products/services in conjunction with the string, thereby eliminating the consumer's choice to use competing products and services available in the marketplace. This could then negatively impact innovation, as entrepreneurs and inventors might be inhibited from bringing new products to market for fear that a large segment of the marketplace will be closed to them.
- Third, allowing Registry Operators to segregate and limit access to common words for which they do not possess legally recognized intellectual property rights, allows them to circumvent the legal process for securing those rights. That is, they could obtain intellectual property rights in a generic term that they would not otherwise obtain via established trademark protection processes.
- Fourth, consumer confusion will increase exponentially as they try to ascertain which strings are operated on a free and open Internet vs. those that operate as "walled gardens" controlled by one entity and encumbered by restrictions. This consumer confusion will be exacerbated by the fact that consumers today associate many of these proposed generic word "closed gTLDs" with entire industries, but if granted to one corporation, these generic words could be used in the future by one specific company for their specific corporate goals.
- Fifth, consumers with moral, personal, or other objections to conducting business with a Registry Operator that has secured "exclusive use" rights to a generic word string, will be compelled to use that Registry Operator or not participate in the Internet ecosystem. Freedom of choice in the Internet marketplace will be eliminated.
- Sixth, allowing vertical integration between registrars, registries and registrants in generic word TLDs not only represents competitive and consumer harm, but also threatens the single, open and competitive Internet. A vertically integrated Registry Operator with unchecked power to restrict who can register a domain and who can access the generic word gTLD, could create a private DNS-enabled network that is beyond the oversight and reach of existing Internet governance. This could raise law enforcement and national security concerns, as a closed network would be subject to arbitrary terms of service and not open and public policy.

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<sup>4</sup> *Ibid.*, Specification 9, Section 1.

### III. The Exemption to the Registry Code of Conduct is Narrowly Tailored and Intended to Apply Only in Limited Circumstances.

Those new generic word gTLD applications that have indicated a desire to be released from the Code of Conduct's equal access and non-discrimination provisions would do so in reliance on Section 6:

Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own *exclusive use*; (ii) Registry Operator does not *sell, distribute or transfer control* or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator; and (iii) application of this Code of Conduct to the TLD is not necessary to *protect the public interest*.<sup>5</sup>

Such reliance is misplaced. As discussed below, this exemption was never intended to eclipse or eliminate the Code of Conduct, but rather, to allow companies with a legally recognized intellectual property right and corporate need, to manage a small set of domains names for their exclusive use.

#### A. "Exclusive use"

The exemption's initial prong requires that, "all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own *exclusive use*." For those familiar with the vertical integration debates that took place within the ICANN community in anticipation of the launch of the new gTLD program, the intent of the "exclusive use" provision is unambiguous. This section is clearly limited to those new gTLDs that incorporate a legally recognized brand name, trademark, or other intellectual property right (e.g., .APPLE, .NIKE) -- in other words, "Brand Registries" -- and who wish to register a small number of domain names for their affiliates, employees and franchisees.<sup>6</sup>

#### B. "Sell, distribute or transfer control"

The exemption's second prong mandates that, "Registry Operator [shall] not *sell, distribute or transfer control* or use of any registrations in the TLD to any third party that is not an *Affiliate of Registry Operator*." Notably, the prior ICANN definition of "affiliate," refers to relationships solidly grounded in joint management, joint ownership and employees.<sup>7</sup> It follows then, that there must be legal control/ownership between the Brand Registry Operator and the entities or persons that are registrants in the TLD.

More importantly, it excludes relationships with third party registrants, who must use ICANN-accredited registrars. Thus, the second prong of the exemption dictates that it applies only to brand word

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<sup>5</sup> *Ibid.*, Specification 9, Section 6.

<sup>6</sup> As such entities are clearly bound to the Brand Registry, the Brand Registry would maintain "exclusive use" of domain names and the uses to which they are put. Moreover, discussions at the time readily observed that it was unfair to require a company possessing intellectual property rights to use commercial 3<sup>rd</sup> party registrars for domain name registrations solely for its own use.

<sup>7</sup> See *New Registry Agreement*, Section 2.9 (c): '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, and (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 an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise. ([http://newgtlds.icann.org/en/applicants/ agb/base-agreement-specs-04jun12-en.pdf](http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-04jun12-en.pdf))

TLDs and **not** generic word TLDs. Further, it would enable the wholesale discrimination of access to domain names in certain generic-word TLD Registries by competitors or others they choose to discriminate against for reasons having nothing to do with the operation of the gTLD.

### C. **“Protect the public interest”**

The exemption’s final prong dictates that requestors clearly demonstrate “application of this Code of Conduct to the TLD is not necessary to protect the public interest.” This may be the highest standard of all, in large part because ICANN has since 1999, consistently defined the “public interest” in terms of non-discrimination, equal access, competition, and consumer choice. These public interests have served the Internet community exceedingly well. Accordingly, and other than the case of Brand Registry gTLDs, it is difficult to imagine a set of circumstances where the granting of the exemption outweighs the overarching public interests that ICANN has already adopted and consistently heralded.

## IV. **Conclusion**

During the past several years, the ICANN community established the rules of the New gTLD process: the community shaped them, debated them and negotiated each word. All parties and applicants agreed to abide by the rules contained within the Applicant Guidebook, as well as the new gTLD Registry Agreement and Code of Conduct. Current and future stakeholders then disbursed to formulate business plans and strategies around new gTLDs, confident in the knowledge that ICANN was committed to continuing its long-established level playing field for registries, registrars and registrants alike.

Should ICANN now relax its interpretation of vertical separation, or liberally grant exceptions to the Code it will be changing the rules of the game midstream, and threatening the free, open and competitive Internet that has flourished under its able stewardship since 1999. Now is not the time to do so.

Instead, it is imperative for ICANN to issue a clear and timely Advisory (i) publicly reaffirming its commitment to competition and consumer choice, and thus, strict enforcement of the Code of Conduct; (ii) reiterating the narrow and limited scope of the exemption to the Code of Conduct; and (iii) notifying applicants seeking exemptions (either overtly or impliedly) that they must clearly demonstrate satisfaction of the exemption’s narrowly-defined criterion. This work should be done now, even as applicant Evaluators review the applications, so that applicants may consider whether to withdraw or amend their applications. This work should not delay the New gTLD process, but promote clarity and certainty to its outcomes. *Clear, fair and consistent application and enforcement of ICANN’s guiding principles and established program rules is critically important at this time.*

*Respectfully,*

*Kathryn Kleiman*

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