

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

Dear Fadi, Steve, and ICANN Directors:

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

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

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

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

Charity: .charity (and IDN Chinese equivalent)

Education: university

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

Relevant Prior Positions and Events:

In Feb-2012 the BC sent a comment letter² to ICANN noting, "fraud prevention has been a centerpiece of the new gTLD debate" and suggesting that ICANN enforce applicant commitments through their inclusion in Registry Agreements. We also noted that, "Governments and stakeholders who support ICANN's role will also hold ICANN to its promises to maximize global benefits and minimize harms to registrants and users." That consideration takes on added urgency now that a global debate has commenced on the future of Internet governance and ICANN's role within it.

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

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

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

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

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

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

In Jun-2013 the BC filed comments on GAC’s Beijing Advice, generally supporting the first 5 safeguards for new gTLD strings in Category 1.⁵

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

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

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

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

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

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

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

Specification 11: Public Interest Commitments

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

The BC has stated that it supports this previous change to the Registry Agreement, as helpful to add the capability for enforceable public interest commitments contained within various applications. However, the BC notes with disappointment that, despite numerous applicants being the subject of GAC Advice⁷, only 506 applicants added any commitments to their Specification 11.⁸

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

The BC encourages applicants to insert relevant commitments into Specification 11, and continues to encourage the GAC and ICANN to ensure that the community can hold registry operators to any relevant commitments that are important to protect consumer and business interests in these new gTLDs. The importance for applicants to heed this recommendation is evident in the recent GAC advice on safeguards for new gTLDs, as noted in the BC's comments on GAC advice¹⁰.

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

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

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

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

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

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

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

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

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

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

In response, the ICANN Board New gTLD Program Committee (NGPC) voted on 7-Nov-2014 to disregard the ALAC Statement on Public Interest Commitments, including the ALAC request for a freeze¹³:

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

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

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

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

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

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

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

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

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

Sincerely,

Elisa Cooper
Chair, ICANN Business Constituency