

27 January 2014

Mr. Cherine Chalaby

Chair, New gTLD Program Committee

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

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VIA EMAIL

Dear Chairman Chalaby:

As ICANN moves ahead with the implementation of the new gTLD program, the GAC has continued to express concern regarding implementation of Category 1 and Category 2 Safeguard Advice. On November 20, 2013, ICANN's Governmental Advisory Committee (GAC) issued its latest Communique identifying continued areas where the GAC is seeking clarification, and awaiting further ICANN response and action to address its Beijing Advice on "Restricted Access" registries.

This letter asks the New gTLD Program Committee of the ICANN Board to take the specific action of posting the proposal for establishment of a Policy Advisory Board approach by new gTLD registry applicants and soon-to-be operators to effectively address key concerns specific to Restricted Access registries, especially those linked to highly regulated industries requiring consumer protection and harm mitigation, for public comment.

The GAC's Buenos Aires Communique Request on Safeguard Advice is Best Addressed by the Policy Advisory Board Concept

In Section II of the GAC's November 20, 2013 Buenos Aires Communiqueⁱ, while welcoming the Board's response to its Beijing Communique advice on Category 1 and 2 safeguards, the GAC highlighted the importance of its Beijing advice on "Restricted Access" registries – particularly with regard to the need to avoid undue preference and/or undue disadvantage – and specifically requested a briefing on whether the Board considers the existing PIC specifications (including 3c) fully implements its advice.

Specification 11 of the Updated Registry Agreementⁱⁱ, "Public Interest Commitments", sets forth a series of binding contractual requirements on a new gTLD registry operator that collectively aim to ensure that it will conduct its activities in a manner consistent

with the public interest; with the registry operator's written obligations enforceable by ICANN as well as a Public Interest Commitment Dispute Resolution Process (PICDRP). Section 3(c) obliges the registry operator to "operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies".

While Section 11 is a useful start, it fails to adequately address the GAC concerns framed in the Beijing Communiquéⁱⁱⁱ because it leaves it to the registry operator to propose its own Public Interest Commitments Specifications (PICS), without accountability or safeguards from the full range of stakeholders affected by said registry. Indeed, some of the PICS proposed in current applications include wording that enables the registry operator to arbitrarily change or eliminate PIC components without consequence or recourse, post-delegation. For example, the PICS proposed by the largest gTLD applicant^{iv} in regard to thirty-nine separate gTLDs implicating such regulated/restricted access sectors as the practice of law and accounting, provision of medical and dental services, and lending and investment services fails to address basic safeguards requested by the GAC in its Beijing Communiqué, including the establishment of working relationships with relevant regulatory and industry self-regulatory bodies in order to mitigate the threats of fraud and other illegal activities. That applicant's bid for the .CHARITY gTLD is particularly demonstrative of the need for verifiable registrant qualification criteria that protects Internet users, given well-documented and numerous infringements of legitimate charities as well as the fraudulent "charity" solicitations that proliferate after natural disasters and other human calamities. Further, that applicant's PICS proposal rejects being subject to any future form of the Registrar Accreditation Agreement (RAA) and reserves the right to modify or discontinue any and all of the applicant's PICS commitments as of January 2016. This is hardly the formula for enforceable long-term commitments that PICS were intended to serve. That such components of proposed PICS have not been acknowledged by ICANN, let alone challenged, offers little confidence to registrants or end-users that the current PIC regime serves their continuing interests and needs or is truly enforceable.

This weakness of the PIC regime is most damaging in the realm of strings associated – by industry and the public – with regulated sectors. A quick review of proposed PICS for strings that are **clearly** associated with regulated sectors reveals that many are inadequate on their face. Without a requirement for the involvement of appropriate third parties to establish strong and appropriate registry policies, including registrant qualifications criteria, there is a substantial danger that an operator will propose PICS that fail to adequately protect the public and maintain trust in the associated industry sector(s). This deficiency is at odds with the goals of assuring transparency and avoiding **opaquely developed, arbitrary criteria for inclusion/exclusion that causes undue and unjustified bias for or against prospective registrants**. In

short, the current situation still leaves a registry operator free to adopt inadequate PICS that fail to protect the public and also enables arbitrary anti-competitive intent and effect as regards prospective registrants. This has the potential to cause widespread end-user confusion and severe harm to the public interest, as well as to trust in affected industries and the DNS itself.

It is useful to recall that Annex I of the Beijing Communique proposed six safeguards applicable to all new gTLDs and subject to contractual oversight. In addition, it proposed additional safeguards for “strings that are linked to regulated or professional sectors” (Category 1 strings) which included the establishment of working relationships with relevant regulatory or industry self-regulatory bodies. A non-exhaustive list of strings from a dozen separate subject categories was provided by the GAC as requiring such additional safeguards. Additional safeguards were proposed for strings associated with market sectors which have clear and/or regulated entry requirements in multiple jurisdictions.

Category 2 strings are categorized in the Beijing Communique as those regulated market segments for which restricted registrant access would be appropriate. For this category, the GAC wanted assurance that the registry operator would administer access in a transparent way that did not give undue preference to any registrars or registrant, and that likewise did not subject any registrars or registrants to undue disadvantage. To protect the public interest, it requested mechanisms to ensure these gTLDs would not be populated by registrations that could mislead the public and thereby damage the reputation of the business sector identified by the TLD string. Indeed, one of the overarching purposes of the new gTLD program was to utilize gTLDs as a means for more specifically indexing the DNS and to assure the public that second level domains at a particular string associated with a regulated sector were bona fide and trustworthy.

The Durban GAC Communique^v stated that the GAC would continue its dialogue with the NGPC in regard to appropriate actions to implement the safeguards. This concern is repeated in the Buenos Aires GAC Communique and requests a briefing on whether the existing PICS specifications (including 3c) fully implements this advice.

The Policy Advisory Board (PAB) will provide a practical means to implement Section 3(c) of Specification 11, along with its other proposed safeguards. This proposal would simply require that certain new gTLD strings – and particularly those having restricted registrant access – establish a PAB composed of a balanced and inclusive membership that can transparently develop appropriate registrant eligibility criteria and registry policies, with those policies then being incorporated within enforceable PICS for the registry. PABs reinforce PICS, and vice versa, creating a virtuous circle that furthers the public interest; PABs can support and collaborate with the ICANN Compliance

Department and substantially reduce its direct burden of overseeing more than one thousand new gTLDs.

The PAB approach recognizes that some flexibility in establishing the specific and appropriate safeguards for each string will be needed, reflecting the characteristics of that industry sector, such as financial services, health care related terms, professional services, or charities. Registrant criteria, registry policies, and other relevant decisions relating to that implementation would be made by each string-specific PAB based upon the specific sector, relevant regulations, data collection needs, and other considerations for the specific string and/or sector. Certain costs associated with PAB implementation and operation would be imposed on the applicant/registry operator in the understanding that such strings carry certain public interest responsibilities and that these costs are best recouped from regulated sector registrants rather than from end-user consumers. The PAB approach permits protection of the legitimate public interest through adoption of the general PAB structure by the NGPC without requiring it to in any way get into specific details of the proper implementation of safeguards at any particular string encompassed by this GAC advice.

During the recent meeting of the GAC during the Buenos Aires meeting, the PAB model was the subject of brief discussion. As some NGPC members will recall, some GAC members expressed further interest in having the PAB proposal put out for public comment. No objection to that suggestion was voiced by any GAC member.

The PAB provides a flexible, pragmatic, and effective means of implementing GAC safeguard advice for strings associated with regulated industry/profession gTLDs for which very different public protection issues and industry practices pertain. It offers flexibility to the registry applicant to design an inclusive and representative group of experts, consumer interests, and engagement with appropriate regulatory representatives. Its adoption would provide the NGPC with an effective response that does not require it or ICANN to get into the issue of appropriate policies for each differing gTLD. The establishment of PABs also would substantially reduce further compliance burdens upon ICANN by providing a broad pathway for bringing regulators, self-regulatory groups, and appropriate members of civil society within the policymaking and activity monitoring structure of a gTLD, and doing so in a standardized framework, thus reducing compliance monitoring as the PAB's members will be actively engaging with the Registry Operator. Such models for such a form of inclusion of consumer advocates; civil society, and consultation with regulatory bodies are well developed in many industry sectors.

Comments on the PAB proposal could further refine such issues as whether separate PABs must be established for each gTLD associated with a specific regulated/restricted access sector (e.g., health care or financial services) or whether the goals could be

better served by establishing one overarching PAB interacting with all implicated strings. They could also help delineate the degree to which registry operators would interact with the PAB and thereby shape registry policies. Finally, comments could address whether the PAB approach is relevant for all sensitive strings or whether other protective measures would be more suitable for some.

The undersigned therefore ask that the proposal for Policy Advisory Boards to advise and represent the interests of the general public and affected registrants, and to address broader stakeholder concerns, be put out for public comment by the NGPC. We believe that this request for public comment should be made expeditiously so that feedback can be obtained to provide near-term guidance to the NGPC and to inform further discussion of this issue at the upcoming ICANN meeting in Singapore.

Respectfully submitted by:

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https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2

ii <http://newgtlds.icann.org/en/applicants/agb/agreement-approved-20nov13-en.pdf>

iii

https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2

iv <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/734?t:ac=734>

v

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