

2013-04-05 NGPC Notice.docx

Directors and Liaisons,

Attached below please find the Notice of the following New gTLD committee meeting:

5 April 2013 – NGPC Meeting at 12:00 UTC – This Committee meeting is estimated to last 90 minutes. Location: Function 5BC, 1st Floor of Convention

<http://www.timeanddate.com/worldclock/fixedtime.html?msg=New+gTLD+Meeting&iso=20130405T12&ah=1&am=30>

Some other time zones:

5 April 2013 - 5:00 AM PDT Los Angeles

5 April 2013 – 2:00 PM CEST Brussels

5 April 2013 – 8:00 AM EDT Washington, D.C.

**Agenda: 1) Approval of Minutes of Feb 1 & 2, 2013
2) Review Staff Paper on Closed Generics
3) Functional audit of the New gTLD program and process
4) Time and frequency of New gTLD Program Committee mtgs.**

Note: Agenda items 3 & 4 will be discussed pending if the Committee has time. Priority will be given to Closed Generics.

MATERIALS -- All Materials are available on

**, if
you have trouble with access, please let us know and we will work with you to assure that you can use the BoardVantage Portal for this meeting.**

If you have any questions, or we can be of assistance to you, please let us know.

If call information is required, it will be distributed separately

If you have any questions, or we can be of assistance to you, please let us know.

John Jeffrey

General Counsel & Secretary, ICANN

John.Jeffrey@icann.org <John.Jeffrey@icann.org>

<<mailto:John.Jeffrey@icann.org> <<mailto:John.Jeffrey@icann.org>> >

2013-04-05-01-NGPC-Board Paper-Closed Generics.docx

New gTLD Program Committee Submission 2013-04-05-01

TO: New gTLD Program Committee
TITLE: “Closed Generic” gTLD Applications
PROPOSED ACTION: For Review and Discussion

At its meeting on 2 February 2013, the New gTLD Program Committee passed a resolution on the topic of “closed generic” applications, including directing certain research and analysis and the initiation of a 30-day public comment period. At its meeting on 18 March, the Committee briefly reviewed the input received and considered the next steps. A small group of Committee members agreed to develop a proposed approach with the aim for a full discussion by the Committee early in the ICANN meeting in Beijing. A review of this possible approach is included in this paper.

Objectives

The current proposed approach aims to make a clear distinction between:

- (1) TLDs that are proposed to be restricted or limited as to registrars (“registrar-limited”), and
- (2) TLDs that are proposed to be restricted or limited as to registrants, by virtue of registry policies for accepting domain name registrations (“registrant-limited”).

Based on previous discussions, the Committee has taken the view that adopting a position on the latter cannot be done without making substantial changes to the overall program.

However, the “registrar-limited” case could be addressed according to a broad interpretation of the Code of Conduct requirements in Specification 9 to the registry agreement. In this scenario, ICANN would issue an advisory to all applicants that (1) any proposed “registrar-limited” TLD must request an exemption from the Code of Conduct, and (2) where the applied-for TLD is determined to be a generic string, the exemption will not be approved.

The attached flowchart depicts the process that could be undertaken for these applications.

As a result of this approach, certain applications (as identified in the above process) would be required to be open to all registrars, and would thus potentially be encouraged to adopt more open registration policies.

Optionally, a statement can also be included that ICANN is not a competition authority, stressing the importance of competition in the marketplace and the primary role of the national competition authorities in assuring a competitive industry. The statement could note recognition that once gTLDs are operational, competition authorities may have concerns about the way a gTLD is being operated based on misuse of market dominance, misuse of consumer trust, or other well established principles.

Current Requirements relating to Registrars

Section 2.9 of the registry agreement provides that:

Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator must 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; provided, that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD.

The types of “non-discriminatory criteria” that can be used to qualify registrars for a TLD have not been articulated in detail. This is intended to provide flexibility for registry business models, particularly in regard to standards for business and security practices with accredited registrars to help mitigate malicious conduct. However, this can be interpreted narrowly or broadly, and ICANN has not taken a position in the past on how this may apply to certain scenarios.

The Code of Conduct in Specification 9 to the registry agreement provides that registries will 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, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions.*

As above, ICANN has not taken a position on how this text is to be interpreted in regard to particular situations. Adopting the proposed approach to “closed generic” applications would require ICANN to issue guidance on both provisions, applying the Code of Conduct to require a TLD to be open to any interested registrar (unless it has received an exemption as described below), and to provide guidelines for how registrars may be “limited” according to registrar qualifications as above.

Handling Exemption Requests

To obtain the Code of Conduct exemption, three conditions must be satisfied, as described within the Code of Conduct:

“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.”

As currently drafted, and provided to the committee on 29 January 2013, the process for considering exemption requests foresees that a request may be submitted to ICANN at any time once the applicant has been notified that it is eligible for entry into a registry agreement with ICANN. This process is currently envisioned as a straightforward process that is handled by staff based on the applicant’s commitments in the request, i.e., the request is submitted in a specified form including the registry’s complete registration policy for the TLD. The registry must explicitly commit to maintaining the conditions specified if the exemption request is approved, and to notifying ICANN of any changes in circumstances which would affect its demonstration of the criteria.

As currently foreseen, criterion (iii) would be assessed based primarily on the statements provided in the request. In most cases, it is anticipated that where criteria (i) and (ii) are met, there will be no public interest need to apply the Code of Conduct (i.e., compliance with the Code of Conduct would only serve to protect the registry from

itself). In circumstances that raise particular issues, an exemption request could be posted for public comment, and ICANN would then consider whether comments submitted provide a basis for determining that application of the Code of Conduct in the TLD is necessary to protect the public interest.

Adoption of the proposed approach would require integration of some additional steps and criteria to ensure that exemption requests are handled consistently, as described below.

Identifying “Registrar-Limited” Applications

One key requirement to implement this approach to addressing “closed generics” is criteria for identifying applications as “registrar-limited.” As noted above, per section 2.9 of the registry agreement, any registry has the ability to establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. The case where a TLD is vertically integrated and plans to use only an affiliated registrar (i.e., is “registrar-limited”) may be difficult to distinguish in practice from a TLD which has established qualifications for registrars.

For example, the following types of registrar limitations are possible: (a) Registry will require that all registrations are made through its affiliated Registrar; (b) Registry has a requirement that all registrars for the TLD must provide support in, e.g., Russian language; (c) Registry specifies that all registrars must pass a security certification to be able to sell names in its TLD; (d) Registry specifies that all registrars must provide a deposit of a specified amount. Additional work would be required to distinguish the cases that would be considered acceptable forms of “registrar-limited” TLDs.

Identifying “Generic” Applications

A second key requirement to implement this approach to addressing “closed generics” is criteria for identifying which of the “registrar-limited” applications are for generic strings. The challenge will be to do this as objectively as possible, as the criteria should take into account language considerations and the fact that strings have multiple meanings.

To minimize subjective judgment being applied by ICANN, the criteria for identifying generic strings could either: a) refer to established references (such as industry classification standards), or b) be referred by ICANN to a venue of qualified expertise, such as trademark experts or linguists. Both suggestions had some support in the public comments.

An alternative approach would be to create an inverse definition, and to build ICANN's position around a definition of the limited cases where a Code of Conduct exemption would be granted. For example, to limit the exemption to the "brand" case, requirements could include evidence of a trademark registration, or a threshold of trademark registrations in a number of regions or jurisdictions. This might also require some consideration of exceptions or corner cases, for example, strings that are trademarks that could be considered generic in another context, such as BOOTS or SALON.

Next Steps

This topic is expected to be discussed during the ICANN meeting in Beijing, including feedback during the Public Forum. The Committee will then consider the feedback and determine the next steps after this meeting.

Confidential and Business Proprietary

Draft and Confidential Business Information