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May 13, 2011

Mr. Rod Beckstrom
President and CEO
ICANN
6 Rond Point Schuman, Bt. 5
B-1040 Brussels
Belgium

Re: Comments of the City of New York on gTLD Proposed Final Applicant
Guidebook, Released April 15, 2011

Dear Mr. Beckstrom:

The City of New York (the "City") has reviewed the "Proposed Final Applicant Guidebook" (the "Guidebook") released by the Internet Corporation for Assigned Names and Numbers ("ICANN") on April 15, 2011, as well as the accompanying New gTLD Program Explanatory Memoranda.

The City again wishes to express its appreciation to ICANN for its diligence in considering the comments submitted in response to prior iterations of the Guidebook and the detailed analyses and explanations provided by ICANN in connection with its preparation of the current version.

For purposes of commenting on the Guidebook, the City will focus on the applicant review process as applied to governmental entities; the continued operations instrument requirement embodied in Specification 8 of the draft New gTLD Registry Agreement; and contractual matters that present special issues for governmental entities, such as Registry-Registrar Agreements ("RRAs").

Applicant Review Process as Applied to Governmental Entities:

In the most recent Guidebook, ICANN indicates that applying entities that are publicly traded corporations listed and in good standing on any of the world's largest 25 stock exchanges (as listed by the World Federation of Exchanges) will be deemed to have passed the general business

diligence and criminal screening required of applicants. Guidebook, section 2.1.1 at 2-2 (General business diligence and criminal history). The City of New York respectfully submits that governmental entities should be treated likewise.

New York City is required to meet stringent budgeting processes, to maintain a balanced budget, to comply with generally accepted auditing practices (“GAAP”) and are subject to audit both by outside auditors and independently elected officials annually. The City’s elected officials and employees are subject to public election and/or background examination as conditions of their public service. Further, they are subject to specific and well-developed laws concerning the integrity of public officials which are enforced by a variety of authorities.

(a) The City’s Budgeting is Subject to a Variety of Checks and Balances and to Independent Audit

The City is required to maintain an expense budget that is balanced when measured in accordance with generally accepted accounting principles (“GAAP”) applicable to state and local governments in the United States. City Charter (“Charter”) § 258. The City’s Mayor is responsible under the Charter for preparing annual expense and capital budgets which are submitted to the City’s legislative body, the New York City Council, for review and adoption. Charter, Chapter 6. The budget is further subject to review by the City Comptroller, the City’s independently elected chief financial officer, who is responsible under the Charter for reviewing and commenting on the City’s budget and its financial plans, including all methodologies and assumptions used in the preparation of the budget. Charter § 93. The Comptroller establishes the City’s accounting and financial reporting practices and internal control policies and prepares the City’s annual financial statements which, since 1978, have been required to be reported in accordance with GAAP and independently audited by a certified public accountant firm. Charter §§ 93(m), 95. The Comptroller annually prepares a comprehensive financial report (the “CAFR”), which includes the City’s financial statements for the fiscal year ending on June 30th. Charter § 93(n). Pursuant to the City Charter, the City engages independent certified public accountants, currently the firm of Deloitte & Touche, LLP, to audit the City’s financial statements and to issue an independent report. Charter § 95. The report of the City’s independent auditor is included in the CAFR.

As a condition of receiving funding from the U.S. government, New York City is required to undergo an annual Federal Funds Single Audit under the Single Audit Amendments Act of 1996 and the United States Office of Management and Budget Circular A-133, “Audits of States, Local Governments and Non-Profit Organizations.”

Information concerning the City’s budget and the Comptroller’s records concerning the City’s overall finances are publicly available at the following websites: http://www.nyc.gov/html/omb/html/publications/finplan02_11.shtml (2011 Executive Budget Publications); <http://www.comptroller.nyc.gov/bureaus/acc/cafr-pdf/cafr2010.pdf> (2010 CAFR which includes the report of the City’s independent auditor, Deloitte & Touche); http://www.comptroller.nyc.gov/bureaus/audit/annual_FY10.shtm (2010 Annual Audit Report).

New York City is subject to business and financial controls comparable to publicly traded corporations listed on international stock exchanges. Governmental entities that comply with GAAP in connection with their financial statements and are subject to independent audit may be similarly situated in terms of their overall business competence and accounting practices. Compliance with GAAP sets a very high standard for governments in their accounting and business practice.

(b) City Officials and Employees are Bound by a Variety of Laws and Controls to Ensure Integrity and are Subject to Department of Investigation Background Check

The chief executive of New York City is the Mayor who is elected every four years. Charter §§ 3, 4. The City's chief financial officer, the Comptroller, is likewise elected every four years. Charter §§ 91, 93. Elected officials, agency heads and all other City officers and employees are subject to variety of public integrity laws and controls.

The City Charter contains a code of ethics that prescribes standards of conduct for public officials and employees. Charter, Chapter 68. Among other things, Chapter 68 regulates the conduct of City officials and employees in such areas as acceptance of gifts; holding of outside employment; volunteer activities; post-employment restrictions; uses of confidential information; political activity; use of City position for personal gain; ownership interests in firms doing business with the City; and relationships between employees and supervisors. The City's Conflicts of Interest Board ("COIB") consists of five independent members who serve staggered six year terms and are appointed by the Mayor with the City Council's advice and consent. The COIB is charged with interpretation and enforcement of Chapter 68 and has the authority to impose severe penalties for violations of Chapter 68, including suspension or loss of employment, fines of up to \$10,000 per violation and reference to relevant authorities for criminal prosecution. Additional information about the City's ethics laws and enforcement can be found at <http://www.nyc.gov/html/conflicts/html/home/home.shtml>.

All officers and employees of the City are covered by specific laws prohibiting the improper use of City property, fraudulent conduct or gross negligence with respect to the exercise of public duties. Charter § 1116. Officers or employees who have possession or control over any funds of the City are required to post fidelity bonds in amounts determined by the Comptroller. Charter § 1122.

In addition, the New York City Department of Investigation ("DOI") has investigative powers over all City agencies, officers, employees as well as certain persons or entities doing business with New York City and certain persons or entities who are paid or receive money through the City or any of its agencies. Charter, Chapter 34. The Commissioner of DOI is required to be a licensed attorney in good standing with at least five years of law enforcement experience. Charter § 801. DOI's powers include the ability to compel the attendance of witnesses, administer oaths and examine witnesses publicly or in private hearing and to receive evidence. Charter § 803. All City employees and certain contract vendors are subject to DOI background review prior to hiring and to continued oversight by the Department of Investigation. Further information concerning DOI is available at <http://www.nyc.gov/html/doi/html/home/home.shtml>.

City officials and employees are subject to a range of controls concerning their integrity comparable to managers of publicly traded corporations. Accordingly, the City seeks to be treated the same as publicly traded corporations in the ICANN applicant review process. Indicating that governmental entities subject to independent audit, GAAP compliance and public integrity controls will be treated similarly to private entities would encourage responsible governments to proceed with applications for gTLDs directly to ICANN. This would provide a degree of diversity and local representation to the Internet framework, which is one of the articulated goals of the new gTLD program. Guidebook Preamble, ¶ 1.

Continued Operations Instrument Requirement:

Module 5 and Specification 8 of the draft Registry Agreement requiring that registry operators provide a continued operations instrument (“COI”) to ensure the continued operation of the basic registry function related to the TLD set will be particularly onerous for local governments in light of our budgeting processes. Guidebook, Module 5, New gTLD Agreement (April 2011 Discussion Draft). Module 5 states at 5-13 that “[a] registry operator must, at the time of the agreement, have in place a continued operations instrument sufficient to fund basic registry operations for a period of three (3) years. This requirement remains in place for five (5) years after delegation of the TLD, after which time the registry operator is no longer required to maintain the continued operations instrument.”

ICANN has elsewhere recognized in the draft Registry Agreement that TLDs operated by governmental entities should be treated somewhat differently than other TLDs. For example, in Article 4, section 4.5 of the proposed Registry Agreement, ICANN provides an alternative provision for transition of registry upon termination of agreement that states that ICANN and the registry operator will consult and cooperate to facilitate any transition. The section 4.5 alternative language for intergovernmental or governmental entities does not make specific reference to a COI. The City respectfully submits that this is the correct approach since governmental entities are not subject to disappearing after registry launch and work under particular statutory requirements inconsistent with a COI requirement. In addition, GAAP accounting principles do not permit the City to carry balances between fiscal years, so maintenance of a COI over a five-year period would violate annual accounting requirements intended to ensure compliance with state and local law as well as GAAP.

In its most recent Statement of Net Assets at the close of its last fiscal year (ending June 30, 2010), the City of New York listed total assets of over \$74 billion. CAFR at p. 34. As described above, the City’s budgeting process and assets are subject to audit in accordance with GAAP pursuant to law. The City has sufficient assets to maintain registry operations at a level that should provide the requisite assurances ICANN seeks to address through a COI.

To the extent that the COI requirement is based on a concern about the ongoing viability of a registry operator, the City notes that it has been in existence for well over 300 years. Unlike a private company, the City of New York provides essential municipal services and is not subject to sudden disappearance or dissolution.

Governmental Entities and Registry-Registrar Agreements:

Another area of concern to the City not anticipated by the Guidebook is the assumption that a registry operator will enter into direct contracts with registrars. In Module 5 Guidebook, Module 5 at 5-12 and 5-13, ICANN indicates that “[a] registry operator creates a Registry-Registrar Agreement (RRA) to define requirements for its registrars. This must include certain terms that are specified in the Registry Agreement, and may include additional terms specific to the TLD.”

As with budgeting and fiscal matters, governmental entities operate under a wide range of constraints in their contracting processes. The City, for example, has detailed laws concerning its procurement and contracting processes. See Charter, Chapter 13. In order to participate in the ICANN application process while complying with Charter-mandated contracting procedures, the City commenced a solicitation process on October 5, 2009 to seek a responsible and experienced registry operator to assist it with the ICANN application process and to provide background and back office support for any City TLD. The City expects to announce a selected vendor prior to opening of the gTLD application period. All relevant solicitation documents concerning the City’s plans and the City’s detailed specifications mandating compliance by any vendor with all applicable ICANN requirements can be found at the following link: <http://www.nyc.gov/html/doitt/html/miscs/tldadmindownload.shtml>.

Given the contracting processes of the City, it is unrealistic for the City to enter directly into contracts with ICANN-approved registrars, particularly since registrars will not provide goods or services directly to the City. A contract with the City requires formalized process including detailed review of the vendor and registration by certain vendors in the City’s VENDEX database. Charter §§ 328, 1064; Administrative Code § 6-116.2(b); 9 Rules of the City of New York §§ 1-04 *et seq.* Requiring all registrars who wish to market or sell domain names in any City TLD to complete these processes in order to enter into a standard ICANN registrar agreement is likely to substantially limit the pool of registrars required to make any .nyc TLD a success. Further, the process is time consuming and could need to commence well prior to any actual delegation of a .nyc TLD. The City anticipated having its selected vendor (who will be named in any TLD application and subject to the review and approval of ICANN) directly enter into registrar agreements. This would enable the City to comply with standard ICANN Registry-Registrar practices while maintaining a level-playing field for registrars (one of ICANN’s stated rationales for RRAs). See Module 5 at 5-12, 5-13; New gTLD Registry Agreement, Article 2, section 2.9.

Accordingly, the City respectfully suggests that permitting an applicant to act through a responsible agent in entering into RRAs that are compliant with ICANN policies ought to be permitted in compliance with Module 5 and the gTLD Registry Agreement. Failure to take into account the strictures of governmental contracting in allowing flexibility in this regard could substantially limit the applicant pool for government-sponsored TLDs and the ultimate success of any TLDs delegated to applicants that include a governmental entity.

In summary, the City again wishes to express to ICANN its thanks for being given the opportunity to weigh in on the Guidebook. Should further information about the City's comments be required, ICANN is encouraged to contact the undersigned.

Sincerely,

A handwritten signature in blue ink, appearing to read 'KW', with a long horizontal flourish extending to the right.

Katherine Winningham
Senior Counsel