



Public Comment on GAC Safeguard Advice

Donuts thanks the ICANN Board of Directors (Board) for the opportunity to respond to advice issued by the Governmental Advisory Committee (GAC), as documented in its Beijing Communiqué of 11 April 2013.

Donuts appreciates the diligent effort of the GAC to contribute to the secure and reliable operation of the domain name system. However, the GAC's Beijing advice demonstrates that the GAC has overstepped its role under the Applicant Guidebook (AGB). Instead of Guidebook advice, the GAC has offered public policy advice and expects the whole New gTLD program to be halted until such advice is considered and adopted. As such, the GAC is acting in a top-down manner on its policy recommendations, and the Board must recognize and reaffirm the appropriate limit of the GAC's authority and role when considering its policy advice.

The AGB—the contract between applicants and the ICANN legal entity—provides that GAC advice will be on a string-by-string basis. While the GAC did advise on a limited number of strings (e.g., “These strings are problematic.”), its Beijing advice, on the whole, is instead *policy* advice (e.g., “This is how we think the strings should be used and managed.”) as the GAC Chair recently stated.¹

There is merit in many of the GAC's requests and Donuts supports many of the specific GAC safeguards. And while the Board should give due consideration to GAC advice, it should do so in a manner that recognizes the ICANN policy development process, the bottom-up model and the correctly defined remit of the GAC. The GAC is but one of many stakeholders in the new gTLD process. There are end-users, registrants, investors and applicants, to name a few—the latter having already invested hundreds of millions of dollars over the now more than seven-year new gTLD process and have been promised steady progress and predictability. New policy advice should not hold up the program.

Public discussion on this issue seems to state that the Board must either accept and agree to implement the GAC advice as written, or reject some part of the advice. Rejecting the advice, by ICANN processes, might seem to delay the new gTLD program in order to conduct the required GAC-Board consultation. However, implementing the advice as written is problematic because several sections either require significant implementation work or are inconsistent with prior Board decisions].²

But the Board, the community, applicants, and consumers need not be put in this position, and can so avoid by following predictable ICANN processes. The new gTLD program is the result of an approved and now fully implemented consensus policy. The GAC seeks to amend that policy through its advice. The Board cannot and should not believe it is forced to react to the proposed changes before existing policy is implemented. If we do that, no policy would ever be implemented.

¹ See interview with GAC Chair Heather Dryden: <http://www.icann.org/en/news/press/kits/video-gac-advice-10may13-en.htm> at 8:23.

² <http://domainincite.com/12944-this-is-how-stupid-the-gacs-new-gtlds-advice-is>;
<http://forum.icann.org/lists/comments-gac-safeguard-advice-23apr13/msg00019.html>

The Board should bring the relevant community members into the discussion in order to understand the net benefits of the GAC advice and develop implementation options. Because his will take longer than the time allotted in the current schedule, the Board in the meantime should not upset existing policy and execute on its new gTLD program obligations. As it did in formulation of the Guidebook, (should it consider GAC advice for implementation), the Board can rely on the knowledge of security experts and others in formulating value-added safeguards that should apply to **all** gTLDs, not just new ones.

The Board is asked to recall, as a similar example, when various stakeholder groups' effort to delay renewal of certain registry agreements because they wanted to debate presumptive renewal clause proposals. The Board welcomed the policy discussion but did not delay executing on its commitment. The GNSO formed a working group, and the Board followed existing policy while a policy discussion ensued.

The case is the same today. This policy and its implementation were fully discussed in the community and ICANN has made a set of commitments it now must fulfill.

GAC Advice was expected to be about "particular" strings and that they should not be delegated absent some remediation based on "**a remediation method available in the Guidebook.**" AGB 3.1 The GAC advice goes far beyond a remediation method available in the Guidebook, it is trying to **change** the actual Guidebook.

This expansion of the Guidebook advice on particular strings would result in the development of new policy for all new gTLDs and the creation of vague categories of TLDs on which are imposed even more onerous contractual conditions. This expansion was inappropriate and consideration of this GAC policy advice should not be placed in the critical path to delegating new TLDs. It should be treated as policy advice and not Guidebook advice.

Given its long history of participation in the new gTLD program, the GAC's attempt to push through, in many cases, untested ideas, is baffling. If these additional "safeguards" are so urgent and vital to the safe operation of the domain-name space:

- Why doesn't the GAC seek to improve safeguards in ccTLDs? They operate unfettered by contractual obligation to protect consumers. Most behave responsibly but some do not. GAC members should also focus on this unprotected area.
- Why doesn't the GAC seek to impose these requirements on existing gTLDs also? Through its advice, the GAC effectively seeks to halt domain name registrations in new gTLDs pending consideration of the new requirements. In a real sense, it would be just as logical to halt new domain name registrations in all gTLDs (letting existing registrations renew and continue to resolve). Both existing and new gTLDs are ongoing businesses and neither should be threatened by a new policy discussion.
- Why focus on new gTLDs exclusively, the smallest segment (among existing ccTLDs and gTLDs) and the one with the most safeguards?

With these points in mind, Donuts respectfully advises the Board as follows:

Accept advice, but discuss and implement correctly without tolling the new gTLD program

Donuts believes the Board should accept the GAC's advice, but make clear the full set won't be adopted verbatim—rather:

- Divide proposals by those which are relatively easy to implement, which will require community implementation planning and review, which deserves community-wide policy development and which should be rejected.

- Reject (and without wading through the red tape of additional consultation) any policy advice already proposed by the GAC that has been considered and rejected by the Board, absent new considerations. The results of this previous work have been relied upon by the community. If there are new considerations, refer policy to the policy development process.
- Under no circumstances delay the program further. Delay causes material harm to applicants, and the current delegation timeline must be maintained.

Donuts Comments on Safeguard Advice and its Implications for the Program

Donuts has invested more than \$57 million in application fees alone, and has participated extensively in development of the new gTLD program. Donuts, and other applicants, have met every deadline and requirement put forth by ICANN, while various ICANN entities have missed deadlines, made decisions without community consultation, issued multiple last-minute demands, and otherwise bowed to pressure from parties interested only in delay.

Had applicants known the GAC would attempt to amend the policy previously agreed to without Guidebook authorization, perhaps their participation in the program would have been different. The current program was approved after many years of discussion, taking into account the GAC principles, GAC Communiqués, and the effort known as the GAC Scorecard (where many of the issues raised in Beijing Advice were settled). Ultimately, however, fairness should prevail and applicants like Donuts (which relied on Board assurances that new gTLD policy was finalized at the time of application) can't be reasonably expected to make significant last-minute changes to business plans, if possible. Even the GAC Principles on new gTLDs state: "All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, **fully available to the applicants prior to the initiation of the process.**" (Emphasis added)

Advice pertaining to safeguards, in addition to those already negotiated with the GAC and included with the AGB, should be addressed by the Board after a community discussion, separate from the new gTLD program. (See discussion on specific safeguards below.)

Safeguard Applicable to All gTLDs

Donuts is amenable to certain of the new protections sought by the GAC (GAC Beijing Communiqué Sec. V.1.b. and Annex I—Safeguards Applicable to All New gTLDs). We are eager to work within the appropriate community frameworks to review and adopt new safeguards

Many of the proposed safeguards the subject of voluntary commitments from applicants, and many already are addressed in the Applicant Guidebook (AGB) and/or the registry contract. Further, a standard set of commitments inserted into the contract would create a level playing field for all applicants.

Additional protections sought by the GAC should have the benefit of review by community experts, which should occur outside the new gTLD program and not delay delegations.

With regard to specific recommendations:

Recommendation 1: Whois verification and checks

Donuts favors implementing.

Recommendation 2: Mitigating abusive activity

Donuts is in favor of its adoption. It should be remembered that ICANN convened a group of industry experts (including APWG and RISG members) to develop and

implement a set of mitigation measures that were included in the Guidebook and discussed during the GAC Scorecard.

Recommendation 3: Security checks

For sensitive strings, Donuts is in favor of heightened security attention.

Recommendation 4: Documentation

The Board should accept the GAC recommendation and forward it to the currently operating Whois working group for consideration.

Recommendation 5: Making and handling complaints

Registrant points of contact are listed in the Whois information and recommend that this new role for the point of contact be discussed in the Whois working group, which would review and evaluate operational considerations to be resolved.

Recommendation 6: Consequences

Donuts recommends the Board combine this community discussion with those of the Whois working group, keeping in mind that registrar that has the direct customer relationship, and further, that mandatory consequences carry the risk of being misapplied.

Category Safeguards

Categorization already has been rejected by the ICANN Board and the community as overbroad and unworkable. Categorical restrictions on some and not other gTLDs hobbles competition and creates an uneven playing field. Applying safeguards according to categories of gTLDs is problematic, was previously rejected in community work and by the Board, and would limit new gTLD benefit and utility.

As the Board stated in the final version of the GAC scorecard:

“It is true that the Board has rejected the idea that community name definitions be expanded to include other sectors and regulated business...Expansion of categories in a clear way is extremely difficult. This is reflected in the public comment received. Community definitions have been drawn narrowly in the Guidebook to prevent abuses. Even expansion of categories will probably not address GAC concerns in some way as even the expanded definition might leave some genuine area of sensitivity unaddressed.”³

Further, placing limitations on gTLDs before they’re launched, solely in anticipation of a possible type of abuse, will stifle innovation. As the Board said:

“Significant consideration has been given to the issue of introducing category-based TLDs in the new gTLD process. ICANN remains a strong proponent of innovative uses of new TLDs. This is especially so in cases where TLDs can be delegated to address the needs of specific communities such as intergovernmental organizations, socio-cultural groups and registered brands. Rather than having ICANN limit this type of innovation and identification with certain TLD models, more creativity might be spawned by

³ <http://archive.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf>

allowing different groups to self-identify the type of TLD they purport to be and promote that model among their community.”⁴

A useful example is the GAC’s advice on the term “architect,” whereby it proposes usage of such a gTLD be limited only to licensed structural architects. So limiting this gTLD, however, denies legitimate usage by software architects⁵, landscape architects, and others. Such a limitation would disenfranchise “minority” uses of the term.

Donuts’ input on specific recommendations (Beijing Communiqué, pp. 8-10, GAC advice in italics):

Absent the requirement for categorization, Donuts finds certain GAC recommendations workable.

Donuts believes all gTLDs must operate within applicable law. We do not believe, however, that registries should act as law enforcement.

Recommendation 1: Registry operators 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.

Registrants must operate within the law and that requirement can be passed down to them, but registries should not be put in investigative or law enforcement roles. It is very unlikely, for example, that registry operators know anything substantive about organic farming. This requirement should be considered for inclusion for all gTLDs.

Recommendation 2: Registry operators will require registrars at the time of registration to notify registrants of this requirement.

Donuts agrees with this recommendation. This requirement should be considered for inclusion in the recommendations for all gTLDs.

Recommendation 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.

After community discussion to determine the correct wording, a form of this requirement could be passed down. Note that handling of this data seems to occur effectively in .COM and other TLDs where there are less stringent requirements: those registering second-level names are successful at maintaining confidential data—or they fail.

Recommendation 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.

Donuts will maintain close working relationships with relevant authorities as necessary. However, we advise that creating such a requirement could be very

⁴ <http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf>

⁵ The Board itself enjoys the expertise of a liaison from the Internet **Architecture** Board: <http://www.iab.org/2013/04/11/iab-appoints-jonne-soininen-as-liaison-to-the-icann-board/>

impractical—how would one know, for example, which regulatory body oversees farming, retail sales, and quality control for registrants using .FLORIST? These bodies might not be responsive to collaboration. This recommendation should be appropriately scaled.

Recommendation 5: Registrants must be required by the registry operators to notify to them (sic) 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.

We think the registrants' points of contact are listed in the Whois information and recommend that this new role for the point of contact can be discussed in the Whois working group. Again, there would be operational considerations to be worked out.

The GAC goes on to state, “strings may require further targeted safeguards, to address specific risks. In particular, a limited subset of the above strings are associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling, professional services, environmental, health and fitness, corporate identifiers, and charity) in multiple jurisdictions, and the additional safeguards below should apply to some of the strings in those sectors.”

GAC use of language “may,” “should” and “some” implies that these are GAC recommendations to be considered.

Recommendations 6-8 are addressed together:

Recommendation 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.

Recommendation 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.

Recommendation 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.

We find this last set of recommendations to be highly problematic. They place material duties upon the registry that were contemplated and rejected in the AGB. They restrict registry operations in a way that might be unworkable in many circumstances.

TLDs can target different registrants other than licensed professionals. TLDs such as .CASH, .LEASE and .HEALTH can be safely operated without onerous conditions or restrictions. (Currently, health.com is operated by a U.S. based magazine and presumably provides very useful information to its readers.) Donuts has put safeguards in place (and as is evidenced above, willing to consider more) to ensure stable operation of the registry and protection of registrants and users, but restricting registrations to one subset of registrants would be a monumental shift in the program, previously rejected and relied upon by applicants.

Donuts advises the Board that these requests present significant operational difficulties:

- They significantly change the registration experience of the end-user, from the ability to register a name now to requesting a name and having it granted only after permission is secured from one of potentially thousands of bodies with interests in regulating speech and content.
- They may violate data protection and privacy laws in multiple jurisdictions.
- They would require the cooperation of governments and other authorities, as well as the above-mentioned thousands of various credentialing bodies, to secure private identity data and provide it to registrars.

Such restrictions are not a “remediation available in the Guidebook” and should not be adopted or considered by the Board absent consensus community support. Obviously, these GAC recommendations must be rejected at this time.

Summary

Donuts position is that the already-approved TLD process should not be held up based on new policy advice from the GAC. The Guidebook provides that GAC advice should be on a string-by-string level and based on remedies already existing in the Guidebook. The Board should not alter the current timeline as the community works through this new policy advice.