GNSO gTLD Registries Stakeholder Group Statement

Issue: Consideration of GAC Safeguard Advice

Date: 22 May 2013

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This statement on the issue noted above is submitted on behalf of the gTLD Registries Stakeholder Group (RySG). The statement that follows represents a consensus position of the RySG as further detailed at the end of the document. The RySG statement was arrived at through a combination of RySG email list discussion and RySG meetings (including teleconference meetings).

a. Introduction

The RySG sincerely appreciates the significant time and effort invested by both individual governments and the GAC as a whole over the continuing course of ICANN's new gTLD application evaluation process. In particular, we are conscious of and grateful for the GAC's hard work over many long days in Beijing.

This statement contains the RySG response to portions of the GAC's Beijing Communiqué posted for public comment on 23 April 2013, i.e., safeguards applicable to broad categories of new gTLD strings as found in section IV.1.b and Annex I of the GAC Beijing Communiqué.

The RySG recognizes that the new gTLD evaluation process contains many "firsts" for the entire ICANN community, not the least of which is the very active role of the GAC in providing formal advice regarding applied-for strings. This has been, and likely will continue to be a learning experience for all. The RySG has questions and concerns about some aspects of the GAC's Advice, the process and timing of providing the Advice, implementation of the Advice and other ramifications. We believe, however, that all of us have a common goal, which is to make the multi-stakeholder model and the new gTLD process a success. Our comments are offered against that backdrop, and with the goal of engaging in a constructive community dialogue about the way forward in the current new gTLD round.

b. General observations about the GAC Advice

The New gTLD Policy and the associated implementation plans, developed by the ICANN community in a bottom up process over several years, was significantly shaped by GAC input – which included more than twenty (20) separate written documents beginning with the GAC Principles for New gTLDs in March of 2007, several meetings between the GAC and the ICANN Board, and even a "score card" to assess the extent to which the GAC Advice was reflected in implementation documentation. Throughout this process, the community and Board worked extremely hard to accommodate GAC requests, suggestions, and recommendations.

It would be inappropriate now for the GAC to use the GAC Advice process to suggest that ICANN make material changes in registry operations and contractual obligations.

The mission of the Governmental Advisory Committee, like all official organizations within the ICANN community, does not have an unlimited scope. According to the ICANN Bylaws, the purpose of the GAC is "to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues." (ICANN Bylaws, Article XI: Advisory Committees, Section 2: Specific Advisory Committees). Similarly, ICANN has a defined, limited mission to serve as technical coordinator of the DNS. ICANN, the GAC, and all groups within the multi-stakeholder model serve the community best as they fulfill their role as well as respect the roles and expertise that other stakeholder groups provide.

The role of the GAC in the new gTLD evaluation process is to advise ICANN on applications "that potentially violate national law or raise sensitivities." (New Applicant Guidebook, "GAC Advice on New gTLDs" Module 3, Section 3.1) Specifically, the new gTLD Applicant Guidebook (Guidebook) includes a process for governments to issue an "Early Warning" on any application identified as being problematic, e.g., that potentially violates national law or raises sensitivities. (http://newgtlds.icann.org/en/applicants/gac-early-warning) ICANN also agreed at the request of the GAC that individual governments could file one formal Objection to any application on one of four enumerated grounds (Community, Legal Rights, Limited Public Interests, or String Similarity) that ICANN would fund up to 50,000 (15 April 2011 ICANN announcement at http://www.icann.org/en/news/announcements/announcement-2-15apr11-en.htm, specifically #3, Exemptions to Objections Fees for Governments). Similarly, the Guidebook provides a mechanism for the GAC to provide advice on a "particular application." (New Applicant Guidebook, "GAC Advice on New gTLDs" Module 3, Section 3.1) The expectation created by the Guidebook was that specific applications would receive advice for issues "that potentially violate national law or raise sensitivities." Instead, the GAC advice (in the GAC's Beijing Communiqué) has (1) advised ICANN to impose new obligations on all applicants and (2) created categories of strings—with the potential to add to its "non-exhaustive list"—rather than advising on specific applications. Further, the rationale and scope of much of the advice extends well beyond concerns about national law or cultural, religious or language-related sensitivities. The GAC, as its Chair stated (http://www.icann.org/en/news/press/kits/video-gac-advice-10may13-en.htm), is offering broad policy advice for a well-established program in which it already had substantial input and which is in contrast to the string specific advice that the Guidebook describes and that the community expected .

While the GAC may not consider itself to be bound by the Guidebook, it is important to keep in mind the extent to which applicants reasonably relied on the processes, procedures, and safeguards it contained when (i) deciding whether or not to apply for a new gTLD and (ii) developing their business plan for a particular TLD, and (iii) submitting their application. Such reliance is, of course, perfectly reasonable and specifically consistent with the GAC's own principles for new gTLDs, which provide that:

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. 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. Normally, therefore, no subsequent additional criteria should be used in the selection process. (*P*ublic policy principle 2.5 in the GAC Principles Regarding New gTLDs dated 28 March 2007*)*

Accordingly, the RySG is extremely concerned about the GAC's decision to use the GAC Advice process to call for significant, across-the-board changes applicable to all applicants. Many of the recommendations may involve material changes to envisaged registry operations, and their introduction at this point in the process is inconsistent with the GAC's Operating Principles (not to mention the Guidebook itself), which call for the provision of findings and recommendations in a timely manner, and the GAC New gTLD Principles, which call on ICANN to avoid material changes in registry operations or contractual obligations that are not developed in an open and transparent manner. While the Guidebook contemplated GAC Advice with respect to specific strings that created concerns with respect to national law or specified sensitivities, it did not contemplate changes of the scope and application the GAC seeks, including some policy changes.

As another example, where the GAC makes a broad statement that safeguards "*be implemented in a manner that is fully respectful of human rights and fundamental freedoms as enshrined in international and, as appropriate, regional declarations, conventions, treaties and other legal instruments – including, but not limited to, the UN Universal Declaration of Human Rights*" it is unclear how the GAC intends for its implementation. We further understand that the Declaration of human rights "is not, in itself, a legally binding instrument. However, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding", and those international instruments include ten core international human rights treaties[1]. Without more specific GAC Advice on which, how they relate to specific strings and what beyond national laws the GAC has concerns with, it is difficult for ICANN, new gTLD registries and registrars to understand what to implement.

We also note that the draft new gTLD Registry Agreement itself contains various mechanisms that would be more appropriate vehicles for considering these kinds of changes.

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[1] There are ten core international human rights treaties
(http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx):
International Convention on the Elimination of All Forms of Racial Discrimination
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Convention on the Elimination of All Forms of Discrimination against Women
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Convention on the Rights of the Child
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
International Convention for the Protection of All Persons from Enforced Disappearance
Convention on the Rights of Persons with Disabilities
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Furthermore, we are concerned that the GAC's Advice would alter the Registry-Registrar-Registrant Relationship in generic TLDs. The GAC has advised ICANN to require all new gTLD registry operators to include inter alia specific terms and conditions in the registry-registrar agreement related to WHOIS accuracy and end-user conduct. Traditionally, these obligations have been contained in the Registrar Accreditation Agreement between ICANN and its accredited registrars and are already addressed through that direct relationship. The GAC's intent is somewhat unclear. If the GAC seeks to obligate registries to enforce registrar and registrant compliance with ICANN policies, this raises significant concerns.

In 1999, in order to facilitate the creation of a competitive market for registrar services and to lessen ICANN's dependence on the largest registries, ICANN expressly rejected a "registrar-as-registry's-sales-rep" model and affirmatively placed itself between registries and registrars. Whether or not this was the GAC's intent, significant elements of their recent Advice would reverse that structure by making registries directly responsible for enforcing registrar and registrant compliance with ICANN policy. This has important consequences for "traditional open" TLDs in particular. While a significant number of applicants have voluntarily proposed to lend themselves to greater registry control of domain name registration, applications for "open" TLDs, i.e., those without registration restrictions, generally do not. In cases where registry operators intend to play a more hands-on role, the applicants have structured their business model accordingly. For many others, this change is likely to have significant unforeseen policy and business implications. If registry operators are expected to enforce ICANN policies – and even national law – across their distribution channel, – it also has implications for ICANN itself and requires broader community consideration via the appropriate ICANN Policy Development Process because it imposes new responsibilities on contracted parties that have implications on the full community.

Finally, the GAC Advice also appears to attempt to impose new requirements on registrants to be enforced by registries. For example, requiring individuals and organizations to adopt security measures that are industry-standard in addition to those already defined by law in exchange for permission to register a domain name has even broader implications for ICANN and the community. As another example, the regulation of registrant conduct as it relates to health and financial information falls outside the core competency of a registry operator as it has been defined through the Policy Development Process, and may further be beyond the scope of ICANN's limited technical coordination mission. The entire ICANN community, through a bottom-up process and with sufficient community input, should have the opportunity to consider potentially far-reaching effects of these types of changes to the Registry-Registrar-Registrant relationship.

c. **Analysis of GAC "General" Recommendations Applicable to all New gTLDs**

The GAC Advice contains specific, prescriptive registry requirements related to WHOIS verification and checking, abuse mitigation, pro-active security checks, complaint handling, and end-user accountability. In addition, the GAC Advice requires registries to document compliance with these obligations and to make such documentation available to ICANN.

Our analysis begins with the previously referenced public policy principle 2.5 in the GAC Principles Regarding New gTLDs dated 28 March 2007:

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. 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. Normally, therefore, no subsequent additional criteria should be used in the selection process.

We appreciated this principle in 2007 and it is still applicable today as the new gTLD selection process heads into its final months. Because of the large investments that applicants have had to make to simply apply for new gTLDs along with the significant costs they will incur in operating a registry, clear and predicable criteria are essential for sustained business investment.

In evaluating GAC Advice, the RySG considered the following factors and came to the conclusions shown:

- Does the advice relate to GNSO policy or implementation of that policy?

  We do not believe that any of the six safeguards recommended for all new gTLDs falls within the GNSO new gTLD policy recommendations or any other policy recommendations of the GNSO; we note however that many of them have been the subject of lengthy negotiations between ICANN staff and registrars and were included in the 2013 RAA that is currently posted for public comment.

- Are new policy issues introduced?

  In our opinion, there are several instances of new policy being proposed and/or the implementation goes beyond what the GNSO intended. (Refer to our analysis below.)

- Is the advice in line with ICANN's mission as a technical coordinator of DNS identifiers?

  We believe that most of the six safeguards are likely within ICANN's limited technical coordination mission with the exception of some of the advice related to abuse, which involves getting into the content area that is beyond ICANN's mission.

- Are the contents of the advice consistent with the role of the GAC as provided for in the implementation plans for new gTLDs?

  As discussed in Section 2 above, we believe that some of the advice goes beyond what was contemplated in the Guidebook.

- Is the advice transparent so that applicants are given clear direction in terms of what steps they need to take to be responsive?

In the analysis that follows, we point out cases where GAC advice needs significant clarity to give applicants the direction they need.

- Does the advice add new criteria to the evaluation process?

Unless the GAC advice relates directly to what is already in evaluation question #28, Abuse Prevention and Mitigation, for which much of the six safeguards pertain, and in which case the Guidebook and the evaluation process already take them into consideration, if an applied-for gTLD string was denied because a registry did not fulfill any of the six safeguards, it would definitely be a case where a new criterion was added to the evaluation process after submission of applications. This would have an impact on cost projections and operational requirements that have already been proposed. Most of the requirements relate to registrants and therefore should be considered for registrar action instead of registries because registrars have the contractual authority to enforce them on registrants.

The RySG respects and acknowledges the concerns addressed in the GAC Advice. In fact, many new gTLD applicants voluntarily proposed similar or otherwise responsive measures. With respect to unrestricted TLDs, however, we believe that these concerns will tend to be more appropriately addressed in the draft 2013 Registrar Accreditation Agreement (the "RAA"), which is now posted for public comment. To the extent that the Advice proposes to create material obligations not reflected in the Guidebook this could materially affect an applicant's cost projections and operational requirements or put registries in a position of having to enforce requirements for which they have no direct control. For many applicants, this would unfairly change the evaluation criteria adopted for the new gTLD program, and cannot be reconciled with the predictability called for in the GAC's New gTLD Principles (namely 2.5).

The specific recommendations are addressed in turn below.

1. *WHOIS Verification and Checks.* The goal of improved WHOIS accuracy in the new gTLD context has been the subject of intensive discussions and negotiations among registrars, the GAC, law enforcement, and the community for several years. The draft RAA, which is now posted for public comment, addresses a long list of LEA and GAC requests and creates significant new registrar auditable obligations related to verification and validation of WHOIS data, complaint handling, and termination or suspension of offending registrations. The New gTLD Policy contains a variety of new, mandatory rights protection mechanisms for trademark owners. In addition, in December of 2012 ICANN created an Expert Working Group on gTLD Directory Services, the output of which will feed into a Board-initiated GNSO policy development process to serve as a foundation for the GNSO's creation of new consensus policy, and requisite contract changes, as appropriate. The GAC's Advice does not seem to take into account or reflect the changes made to date in this area or the ongoing work of the Experts Group and the eventual PDP. This part of the advice seems to stand contradictory to item 3, WHOIS, in the Beijing Communiqué where the GAC acknowledged that the GAC principles on the matter should be "duly taken into account by the recently established Directory Services Expert Working Group."

2. *Mitigating abusive activity - Prohibiting Malicious, Infringing, or Otherwise Illegal Registrant Conduct.* The RySG agrees that registrants should not use domain name registrations to engage in illegal activity. That is why we have supported and agreed to specific obligations related to cooperating with law enforcement in the new gTLD Registry Agreement. We are concerned, however, that the GAC Advice may go beyond this and seek to require registries – which do not have direct relationships with registrants in most cases – to determine (i) what law applies with respect to any particular conduct and (ii) whether or not a registrant is in compliance with that law. This creates significant new obligations and dramatically increases the legal liability of registry operators to registrars and registrants as well as compliance costs. Moreover, given different national approaches to legal requirements, it may well prove to be either not implementable in practice, or worse, would require application of legal norms that may be completely contradictory to those of other jurisdictions, i.e., this recommendation could have significant unintended consequences. The difficulties of this approach were discussed in detail in the context of the Registrar Accreditation Agreement, and it was rejected in favor of clear obligations related to cooperation, data collection and retention, etc.

3. *Security checks - Technical Scans to Detect Pharming, Phishing, Malware and Botnets.* While some applicants have proposed to undertake the kinds of technical analysis called for in this recommendation, and others may elect to do so, the obligation could impose material, unanticipated costs and associated legal liability on many new gTLD operators that is not contemplated in the Guidebook. Furthermore, these issues had been examined by the GNSO Registration Abuse Working Group and further work is ongoing in the Joint DNS Security and Stability Analysis Working Group (DSSA), where the question whether certain issues are within or beyond ICANN's technical coordination role is being examined.

4. *Documentation.* This section of the GAC Advice covers both inaccurate Whois records and security threats. With regard to documentation of Whois records, this is more appropriately directed at registrars, who have direct contractual relationships with registrants, rather than registry operators, who often have no relationship with registrants. Registries would have to act as a third party and rely on registrars to fulfill this obligation. Also, we believe that this advice will be fulfilled with the implementation of the 2013 RAA when it is approved, thereby creating duplicative effort without adding any new value except costs. Regarding documentation of security threats, the advice appears to pertain to the malicious use of domain names within a TLD rather than the assessment of the registry applicant/operator, which was not addressed in the GNSO policy. The RySG has concerns about sharing reports about security threats because they often involve sensitive information, andmisinterpretation and misuse of such data might further compromise security; this part of this safeguard advice needs further examination.

5. *Complaint Receipt and Investigation.* While some applicants have voluntarily proposed to process complaints of this sort, it is not clear how such an obligation

would scale in an unrestricted registration environment. The GAC Advice appears to ignore the existence of ICANN's web-based process for complaints about non-responsive registrars. While it is reasonable to ask registries to provide a link to that system, it makes little sense to create an entirely separate registry-run system for each TLD/registry operator, particularly as ICANN and registrars continue to grapple with problems associated with frivolous and/or harassing complaints. Also, we want to note that community developed rights protection mechanisms are being implemented that provide means for complaints and investigation so this advice would likely be a duplication of already approved processes.

6. *Registrant Consequences*. The draft 2013 Registrar Accreditation Agreement specifically obligates registrars to investigate reports of registrant abuse, verify Whois information upon receipt of information that suggests it is inaccurate, and to suspend or terminate registrations in appropriate circumstances. It would make more sense to ask registries to provide a link to the ICANN-operated system rather than duplicating ICANN's existing system for handling complaints about non-responsive registrars.

d. Analysis of GAC Advice Not to Proceed Beyond Initial Evaluation

The issue of geographic names has been the subject of extensive discussion and policy development as part of the new gTLD process, which has involved significant GAC participation. The GAC has contributed to and participated in these discussions, and GAC concerns have been addressed in the Guidebook. Specifically, country and territory names are not permitted in this new gTLD round. In addition, the Guidebook requires specified levels of governmental support for applications for strings that correspond to (1) capital city names; (2) city names used for purposes associated with the city; (3) an exact match for a country province or state listed in the ISO 3166-2 standard; (4) a string listed as a UNESCO region or appearing on the UN's list of macro geographical, sub regions, and selected economic and other groupings list. On 26 May 2011, the GAC formally accepted the definition of geographic names in the Guidebook, saying:

> *Given ICANN's clarifications on "Early Warning" and "GAC Advice" that allow the GAC to require governmental support/non-objection for strings it considers to be geographical names, **the GAC accepts ICANN's interpretation with regard to the definition of geographic names**. The GAC appreciates the language that has been added to the Applicant Guidebook augmenting the definition of geographic names such that: "A string shall be considered to be a country or territory name if: … it is a name by which a country is commonly known, as demonstrated by evidence that the country is recognized by that name by an intergovernmental or treaty organization.* (GAC Scorecard.)

The GAC Advice in this category appears to include several strings that fall outside of the GAC-accepted Guidebook definition of geographic names. Objections based on undefined, unexplained "national sensitivities" raise significant questions about fundamental fairness, transparency, and predictability, particularly where the very governments that complain themselves permit and even grant trademark protection for non-confusing commercial use of

identical strings. The issue of place names is the subject of ongoing debate in specialized
international treaty organizations. The debate belongs in those expert bodies.

e. Analysis of GAC Recommended Safeguards Applicable to Strings Likely to Involve a Level of Implied Trust

The GAC Advice Lacks a Reasonable Implementation Standard. The GAC Advice does not
provide the kind of objective, principled basis that is fundamental to equitable
implementation. Whether a particular string is "likely to involve a level of implied trust" and
simultaneously create a relatively higher risk of consumer harm cannot be evaluated in a
vacuum. Most of the "categories" identified by the GAC are both broad and subjective. For
example, why does the GAC Advice distinguish between lawyers and plumbers, both of
which are subject to licensing requirements? And what about all of those other professions
with licensing requirements such as *.realty, .plumbing, .builders, .contractors* and many,
many others? In addition, the GAC Advice does not provide an objective basis to explain
why some strings are included in a category, and others are not. We list below only a handful
of the many examples of this problem:

- The "Children" category includes *.school* BUT NOT *.camp*; it also includes *.kinder*, a
  closed branded TLD; includes ".kid(s)" and not ".дети" (which means "kids,
  children" in Russian).
- The "IP" List includes: *.fashion* BUT NOT *.style* or *.clothing*; *.author* BUT NOT
  .actor; .rip BUT NOT *.bio; .discount* BUT NOT *.cheap* or *.bargain*; *.show* BUT NOT
  .production or *.event*; and *.hiphop* BUT NOT *.dance*
- The "Education" list includes *.degree, .mba*, and *.university*, BUT NOT *.college,
  .education, .phd, or .training*
- The "Health and Fitness" category includes *.fit* BUT NOT *.yoga*
- The "Financial" category includes: *.lease* BUT NOT *.rent*; *.investments* BUT NOT
  .gold; and *.financialaid* BUT NOT *.scholarships*
- The "Charity" category includes *.charity* BUT NOT *.foundation*
- The "Professional Services" category includes *.accountant* and *.associates* BUT NOT
  .consulting or *.marketing*

Specific Advice for Category 1 Strings. The RySG leaves it to those applicants who may fit
into the various categories to reply to the specific safeguards recommended by the GAC for
their particular category but we provide the following general comments for the first five
safeguards in the GAC Advice, which are copied below in *italic font* followed by our
comments.

> *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.
> Registry operators will require registrars at the time of registration to notify
> registrants of this requirement.*

The RySG does not dispute the concept that a registrant should comply with applicable laws relating to privacy, data collection, consumer protection, fair lending, debt collection, etc., nor does it object to communicating this requirement to end-users. The intent of the GAC Advice, however, is somewhat unclear. To the extent it reflects the GAC's expectation that registries will identify the law applicable to any particular registrant, evaluate the conduct of a registrant against such law, take action based on that evaluation, and be accountable both to the registrant and ICANN with respect to any action it takes or does not take, it is quite problematic. Registry operators lack the factual background and requisite legal expertise needed to perform this role, and are exposed to significant liability for doing so. While registries and registrars are obligated to cooperate with and assist appropriate law enforcement agencies in accordance with applicable due process requirements, "outsourcing" law enforcement to the private sector, particularly in a multi-jurisdictional global environment raises significant policy, due process, and business concerns that must be addressed.

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.

It is entirely reasonable to expect registry operators to handle data they collect and maintain to comply with applicable data privacy and security laws. Accordingly, both the proposed registry and registrar agreements have requirements for maintaining the Personally Identifiable Information. The RySG agrees that registrants who collect sensitive personal data should comply with applicable law and standards. We note, however, that privacy and data security requirements are established by national and local law, and vary dramatically from country to country. We strongly encourage both the GAC and the ICANN Board to recognize that registry operators are simply not in a position to pass judgment on what law applies to a particular registrant's conduct and determine whether or not that conduct is consistent with applicable law. The extent for which registry operators could reasonably act would be to respond diligently to judgments from courts or authoritative tribunals.

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.

Because this advice varies by the string and industry involved, the RySG suggests that this safeguard be implemented on a case-by-case basis. We believe, however, that many applicants participate in self-regulatory organizations and have established relationships with appropriate regulators. Moreover, it is not always clear, even within one jurisdiction, which body is the competent regulatory agency, let alone on a global basis.

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.

Particularly for unrestricted TLD's, registry operators do not have any direct relationship with registrants. As a result, they generally lack any mechanism for implementing this Advice. While some applicants proposing to restrict registrations may have some way to implement, that is not the case with respect to unrestricted TLDs whose business models rely upon no direct contractual relationship to the registrant. In those cases, the appropriate way to implement this safeguard would be via registrars and the RAA, which ICANN would then enforce. We also note that the Advice assumes that registrants are businesses, ignores the purpose of the Whois contact information and does not acknowledge the existing standards, such as RFC 2142 that mandates abuse@domain as the standard point of contact for 'inappropriate public behavior'.

Further Safeguards for Unspecified Category 1 Names. In this section of Annex I, the GAC goes on to say ". . *some of the above strings may require further targeted safeguards, to address specific risks, and to bring registry policies in line with arrangements in place offline.*"

For each of safeguards 6, 7 & 8, the GAC seems to assume that all registry operators have a contractual relationship with registrants. As already pointed out, that is not the case based on the registry-registrar model, especially for unrestricted TLDs whose business models rely upon unhindered access to registration. Registrants have a contract with registrars (via the Registration Agreement) so it is registrars who would normally have the authority to implement these three safeguards. To do as the GAC has asked would either require, preferably, community policy consultation, or special RAA addendums or Registry/Registrar addendums for applicable strings. Another serious concern with these three safeguards is that not all strings are identified (i.e. "non-exhaustive" list) so it is not clear exactly which applicants are impacted by this advice.

In any case, the requirement imposed on registrants within these TLDs that they "conduct their activities in the interests of the consumers they serve" remains a potential concern. Where appropriate, registries do at least some of this today for Sponsored TLDs; for example, where there are special registrant qualifications for a TLD, the registries implement 'further targeted safeguards.' In the New gTLD application process, applicants were permitted to voluntarily propose similar registrant qualifications for registration. For example, applicants for community-oriented TLDs have incorporated processes into their applications related to the activities of registrants, and members of these communities have had extensive opportunities to comment on or object to these safeguards. Other restricted TLD applicants where these safeguards would be appropriate may have submitted relevant Public Interest Specifications.

f. Category 2: Restricted Registration Policies

The GAC Advice for this category is quoted in *italic font* followed by the RySG comments.

> *As an exception to the general rule that the gTLD domain name space is operated in an open manner registration may be restricted, in particular for strings mentioned under category 1 above. In these cases, the registration restrictions should be appropriate for the types of risks associated with the TLD. The registry operator should administer access in these kinds of registries in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage.*

The RySG is not aware of any "*general rule that the gTLD domain name space is operated in an open manner.*" Restricted TLDs have been in existence from the beginning of the DNS. Originally, .net and .org were restricted. Some TLDs were initially restricted and are still restricted today: .mil, .edu, .gov, .int, .aero, .coop, etc. This advice is also difficult to reconcile with previous GAC statements regarding community-oriented TLDs. The only "unrestricted" aspect of the new gTLD program that we are aware of is the general requirement that TLD operators allow unrestricted access to all ICANN-accredited registrars except when an exception to Specification 9 (Registry Code of Conduct) is obtained, a process that has yet to be defined by ICANN. Much of the "open" vs "closed" debate has in fact been driven by this issue.

The RySG generally agrees that "*the registration restrictions should be appropriate for the types of risks associated with the TLDs.*" Likewise, registries are all subject to equivalent access requirements in the Registry Agreement. Without more explicit GAC Advice on this point, however, who will define and measure what types of risks are appropriate for given TLDs? Applicants need much more clarity on this advice. Note that registration restrictions are not typically risk-based but defined based on the purpose and objectives of the TLD.

> *For strings representing generic terms, exclusive registry access should serve a public interest goal.*

The ICANN community – with significant and ongoing input from the GAC – spent many years developing the policy to govern the allocation of new top-level domains. That policy clearly does not forbid applications for closed use of so-called "closed generic" strings. In fact, participants in the new gTLD policy development process deliberately avoided prescriptive rules on gTLD types, choosing instead to promote innovation and to let market forces determine the variety of new TLDs. The policy includes a "Community Preference" procedure to address the kinds of public policy concerns related to regulated and or otherwise cohesive community, and to address concerns related, for example, to piracy and intellectual property rights abuses. The policy also contained built-in competitive safeguards, including the right for competitors to object to applications on a variety of grounds. Over the course of this policy development process, ICANN and other interested stakeholders undertook various economic studies, none of which raised concerns of anti-competitive exclusionary conduct by new gTLD registry operators.

The Department of Broadband, Communications and the Digital Economy (DBCDE), on behalf of the Australian Government, issued numerous Early Warnings to applicants for so-called "closed generics," citing the potential for such names to have a "negative impact on competition." As responding applicants pointed out, however, neither competition law nor economic theory supports government intervention on this basis. Perhaps as a result, the GAC Advice does not refer to concerns about competition, but posits a "general rule" that the gTLD domain name space should be "operated in an open manner," and then concludes, without explanation, that exclusive registry use of generic TLDs violates this "general rule." As discussed above, the RySG is unaware of any such "general rule," and the existing structure of the DNS does not support its existence.

We note that applicants for new gTLDs were required to provide a mission statement for their TLD applications, and to explain how the TLD would benefit registrants, Internet users, and others. (*Application Sections 18.a and 18.b*) Those questions and answers reflect established ICANN policy regarding requirements that new gTLDs must "serve a public interest goal." Requiring applicants to demonstrate some additional public interest goal in this context would reverse the deliberate choices made by the ICANN community through its bottom-up process and impose new evaluation criteria in violation of the GAC's New gTLD principle that requires ICANN to evaluate applicants "*against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process.*"

Finally, we want to state that all restricted gTLD applicants proposed plans for enforcing registration restrictions as well as other requirements unique to their offering. So it seems to us that a one size fits all approach does not make sense.

g. Essential Issues Related to GAC Advice regarding the Multi-Stakeholder Model

From the initiation of the GNSO New gTLD PDP at the end of 2005 until now, the process has been a learning experience for all of us and will continue to be so as we move forward. It is in that context that the RySG communicates the observations in this section. We do not pretend to have all the answers but we do commit to the ICANN community the willingness to work together to improve both policy development and implementation efforts in the future.

We strongly support the ICANN bottom-up multi-stakeholder model where all impacted parties are able to participate and contribute on a relatively level playing field and we strongly believe that one of the community's highest goals should be to cooperate together to continuously improve that model. This applies to the introduction of new gTLDs as well as the many other policy efforts in which all of us are involved every day, such as WHOIS.

With regard to the new gTLD process including but not limited to the GAC Advice that these comments address, the RySG puts forward the following two principles:

(i) It is essential that policy be developed and implemented in a multi-stakeholder manner to ensure that the concerns of all stakeholders' views are fully considered.

(ii) If material changes are recommended to approved policy by one stakeholder group or some subset of the community, then it is essential that those changes be vetted with the full community, via the appropriate processes.

In light of the above principles, whenever any group in the ICANN community proposes changes to already approved policy and implementation plans, there are at least three questions that need to be considered:

- Does any element of that advice suggest material changes to the already approved policy and/or implementation plans?
- Under what conditions should material changes be considered to approved policy and implementation plans?
- In such cases, how could the proposed changes be vetted with the full community, via the appropriate processes without causing unreasonable delays?

Because some of the GAC input into the new gTLD process came very late in the process, in particular the GAC Advice in Annex 1 of the Beijing Communique, we believe that these three questions should be asked relative to that advice. With these questions in mind, what we tried to do in this comment paper is to point out that much of the GAC Advice is already being addressed by ongoing processes or has been addressed in previous considerations and suggest the appropriate avenue for fulfillment of it while at the same time avoiding material changes and thereby avoiding the possible complexities of dealing with major changes. We think that we were able to do that in a lot of cases but there were some cases where that was a much more challenging task. Regardless, we hope that our comments are accepted in the constructive way they are intended.

h. Conclusion

We observe that much of the GAC advice relates to Applicant Guidebook Evaluation Question #28, Abuse Prevention and Mitigation, and that public portions of applicant responses are already subject to evaluation.

Furthermore, as we attempted to show in our analysis in this document, much of the GAC advice relates to the activities of domain name registrants and their chosen registrars. In that regard we believe that:
- The appropriate legal agreement for evaluating registrant and registrar activities is the ICANN Registrar Accreditation Agreement (RAA), with due consideration given to the "picket fence" boundary within.
- There does not seem to be any reasonable justification to impose these requirements on registries. Registries would be held responsible for requirements to which they would be totally dependent on registrars to fulfill.
- The RAA is a contract between ICANN & registrars and registries have no say as to what registrars are approved; moreover, it is ICANN's responsibility to enforce its own agreements so registries should not be asked to enforce ICANN agreements for which they are not a party.

For many elements of the GAC Advice, the 2013 RAA effectively provides the safeguards requested. In those cases, the RySG recommends that the GAC advice be fulfilled through registrars via the now completed 2013 RAA and be enforced by ICANN according to the long standing registry/registrar/registrant model. As noted in our analysis, extensive efforts were devoted in the negotiation of the 2013 RAA that resulted in mechanisms that provide for fulfillment of much of the Advice without having to make major changes to registry, registrar and registrant agreements and without having to significantly modify the relationships of contracted parties, both of which would require full PDPs to adequately address.

With due consideration for the recent conclusion of the 18-month RAA negotiations, and of the issues raised in this document's analysis, and recognizing that in actuality much of what constituted GAC Advice was in fact already accommodated in the RAA, we recommend handling, on a case-by-case basis, issues regarding specific strings that raise legal and sensitive issues. In doing this, it is important to keep in mind that some of the Advice, if implemented as suggested by the GAC, may significantly increase operating costs and require applicants to reassess financial forecasts and overall business plans, i.e., requiring material changes in applications after they have already been submitted.

The RySG trusts that our comments are helpful to the Board, the GAC and the community as a whole. We are ready and willing to answer any questions that might arise.

RySG Level of Support

Level of Support of Active Members: Supermajority
    # of Members in Favor: 11
    # of Members Opposed: 0
    # of Members that Abstained: 1
    # of Members that did not vote: 2

Minority Position(s): None

General RySG Information
    (i) Total # of eligible RySG Members[2]: 14
    (ii) Total # of RySG Members: 14
    (iii)Total # of Active RySG Members[3]: 14

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[2] All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the "effective date" set forth in the operator's or sponsor's agreement (RySG Charter, Article II, RySG Membership, Sec. A). The RySG Charter can be found at http://www.gtldregistries.org/sites/gtldregistries.org/files/Charter_for_RySG_6_July_2011_FINAL.pdf

[3] Per the RySG Charter, Article II, RySG Membership, Sec.D: Members shall be classified as "Active" or "Inactive". An active member must meet eligibility requirements, must be current on dues, and must be a regular

(iv) Minimum requirement for supermajority of Active Members: 10
(v) Minimum requirement for majority of Active Members: 8
(vi) # of Members that participated in this process: 12
(vii)   Names of Members that participated in this process:

Afilias (.info, .mobi & .pro)
DotAsia Organisation (.asia)
DotCooperation (.coop)
Employ Media (.jobs)
ICM Registry LLC (.xxx)
Museum Domain Management Association – MuseDoma (.museum)
NeuStar (.biz)
Public Interest Registry (.org)
Telnic (.tel)
Tralliance Registry Management Company (TRMC) (.travel)
Universal Postal Union (UPU) (.post)
VeriSign (.com, .name, & .net)

Names & email addresses for points of contact
        Chair: Keith Drazek, kdrazek@verisign.com
        Alternate Chair: Paul Diaz, pdiaz@pir.org
        Secretariat: Cherie Stubbs, Cherstubbs@aol.com
        RySG representative for this statement: Chuck Gomes, cgomes@verisign.com

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participant in RySG activities. A member shall be classified as Active unless it is classified as Inactive pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in three consecutively scheduled RySG meetings or voting processes or both. An Inactive member shall continue to have membership rights and duties except being counted as present or absent in the determination of a quorum. An Inactive member immediately resumes Active status at any time by participating in a RySG meeting or by voting.