Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 936 7329
http://www.microsoft.com/

Microsoft

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VIA EMAIL

Mr. Peter Dengate Thrush
Chairman of the Board of Directors
Dr. Paul Twomey
President and CEO
ICANN
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292

Re: Comments of Microsoft Corporation on the new gTLD Draft Application Guidebook

Dear Mr. Dengate Thrush and Dr. Twomey:

Microsoft Corporation ("Microsoft") welcomes this opportunity to provide its comments to ICANN on the new gTLD Draft Application Guidebook ("DAG"). Microsoft intends to submit separately comments to ICANN on the technical considerations related to the introduction of new gTLDs.

Microsoft is a worldwide leader in the IT industry, with a mission to enable people and businesses throughout the world to realize their full potential. Since the company was founded in 1975, it has worked to achieve this mission by creating technology that transforms the way people work, play, and communicate. Microsoft is also an owner and champion of intellectual property rights. It maintains sizable trademark and domain name portfolios and takes pride in the worldwide recognition of multiple of its trademarks. Further, Microsoft's businesses rely heavily on the Internet and the current system of top level domains, and Microsoft is an ICANN-accredited registrar. As such, Microsoft is well positioned to provide meaningful comments to ICANN on the DAG.

As an initial matter, Microsoft objects to the introduction of new ASCII gTLDs for several reasons.[1] History suggests that introduction of new ASCII gTLDs will not result in

[1] Microsoft wishes to make clear that its basic objection to the introduction of new gTLDs does not apply to the introduction of IDN gTLDs.

true competition among ASCII gTLDs. For example, notwithstanding the introduction of 14 ASCII gTLDs, .com, .net, and .org accounted for over 91% of all gTLD registrations as of June 2008 (.com alone accounted for 74% percent) whereas .biz, .info, and .mobi accounted for 7%. Further, the introduction of potentially hundreds of new ASCII gTLDs is far more likely to threaten the security and stability of the Internet as a commercial platform than to ensure it. This introduction will expand the environment and opportunities for online fraud, an environment and opportunities that will most certainly be seized upon by criminals and their enterprises. Finally, the practical implications of the DAG will be to impose tremendous financial burdens and resource allocation requirements on any business that must object to a third-party application or secure defensive second-level registrations to avoid consumer confusion. The scope and imposition of such monetary and resource requirements in light of current economic conditions is remarkable. ICANN itself, however, is poised to take in almost USD $100 million in connection with new gTLD application fees.

Microsoft recognizes that ICANN likely intends to proceed with the introduction of new gTLDs regardless of widespread opposition from the non-contracting party business community. Comments submitted by the National Association of Manufactures, the International Trademark Association, Time Warner, MarkMonitor, and many others demonstrate the breadth and depth of this opposition. If ICANN does proceed, Microsoft encourages ICANN to resist the obvious pressure from those entities that will benefit financially from the introduction of new gTLDs to complete the implementation evaluation process with unjustified and unnecessary haste. Instead, ICANN should take the time necessary to consider the issues and questions raised by the community (some of which ICANN staff acknowledge have not previously been considered) about the intended implementation plan. It is essential that ICANN "get it right." The current timetable is simply too compressed to allow full and complete consideration and evaluation of the complex implementation plan.

Executive Summary. The dispute resolution procedures and provision for rights protection mechanisms are of principle interest to Microsoft as we anticipate using these processes extensively. Although Microsoft commends ICANN's recognition of the importance of rights protection mechanisms and its inclusion of a rights protection mechanism requirement for new gTLD applicants, ICANN must do more. ICANN should take additional steps to provide scaleable, cost-effective, and efficient rights protection mechanisms to minimize the ICANN-imposed burden of having to secure defensive registrations and combat cybersquatting in as many as 500 new gTLDs. To provide potential objectors and applicants alike with the required certainty about the objection procedures, processes, standards, and requirements, ICANN must complete its agreements with the Dispute Resolution Service Providers (DRSPs) and the DRSPs must finalize all aspects of the respective objection processes.

Microsoft endorses the concept of post-delegation dispute resolution procedures and encourages ICANN to develop soon a balanced and effective procedure. With regard to cost considerations, Microsoft has a number of concerns relating to several cost/fee aspects of the new gTLD program including the components of the estimated $185,000 application fee, the use

of excess funds collected as new gTLD application fees, and the amount of the estimated annual registry fee. Finally, ICANN should change the standard for string confusion, revise the string examination protocol, and exclude the String Similarity Algorithm from consideration by String Similarity Examiners.

We provide our comments below.

Rights Protection Mechanisms

Microsoft has grave concerns about the enforcement burdens that ICANN, through the introduction of new gTLDs, will impose on rights owners. Under the current DAG, the scale on which owners of famous marks such as Microsoft will have to secure defensive registrations and pursue cybersquatters is staggering. Although Microsoft is pleased that ICANN recognizes the importance of Rights Protection Mechanisms (RPMs) and will require each new gTLD applicant to select and describe its proposed RPM to prevent and discourage abusive second-level registrations at launch, ICANN must do more. ICANN should take additional steps to provide scaleable, cost-effective, and efficient rights protection mechanisms to minimize the ICANN-imposed burden on rights owners of having to secure defensive registrations and combat cybersquatting in as many as 500 new gTLDs.

Possible steps include (1) designing the framework for a robust and stringent "reserved list" to which rights owners could apply, subject to challenge, to have their marks excluded from the second level; (2) developing two to four standardized RPMs so that potential applicants could select from among them; (3) facilitating the creation of a centralized repository for documentation of legal rights on which rights holders may wish to rely in pre-launch RPMs and requiring successful new gTLD applicants to utilize the repository in their respective RPMs; and (4) creating an online, cross-TLD interface through which rights holders can designate the gTLD RPMs in which they wish to participate and gTLD operators may access the requisite data for the participating rights holders.

An announcement by ICANN of the intention to pursue these potential mechanisms would inevitably generate significant interest and support (including volunteers from Microsoft Corporation to do the work) from the rights owner community. It bears mention that new gTLD applicants and registrars should also benefit from implementation of these proposals as the proposals decrease the costs and dedicated technology resources traditionally associated with gTLD operator design and implementation of RPMs and registrar participation (on behalf of their registrants) in them.

Finally, ICANN should discourage new gTLD registry operators from using RPMs as revenue generating opportunities.

Dispute Resolution Procedures

The first application round is projected to open in six months, yet ICANN has not yet entered into contracts with the three DRSPs identified in Module 3 of the DAG and the DRSPs have not yet finalized their respective procedures. Potential applicants and objectors need the certainty of final procedures, processes, standards, and requirements. In particular, rights owners that may use the objection process extensively must be able to assess and predict now their likelihood of success. The absence of finalized procedures makes it impossible to possible to provide exhaustive comments. Nonetheless, a number of points merit clarification in the next version of the DAG.

Opportunity for Judicial Review. It is not clear if an objector's "accept[ance] of the gTLD dispute resolution process by filing its objection" means that objectors waive their ability to seek judicial review of the DRP decision. ICANN should not deny judicial review to objectors.

Combining Multiple Objections. An objector that seeks to assert multiple bases against a single application should not be required to file separate documents with separate DRSPs. Instead, the objector should be permitted to file a single objection document that includes the basis and statement requirements for all grounds. Similarly, an applicant should be permitted to file a single response document that responds to multiple based objections filed by the same objector. The DRSPs should each issue a decision based on the portion relevant to it.

Procedurally Noncompliant Objections. Instead of dismissing procedurally noncompliant objections, the DRSPs should allow the objector to amend the objection within a defined period of time. If procedurally noncompliant objections must be dismissed and re-filed, the objector should receive a refund of most of its initial objection filing fee.

Consolidation. Both the objector and the applicant should be permitted to refuse consolidation of objections proposed by the DRSP.

Panelists. Either party in proceedings involving string contention, legal rights, or community objections should have the opportunity to request a three-panelist panel. The requesting party should bear the additional costs associated with two additional panelists.

Adjudication. ICANN or the DRSPs should provide more detail about what type of documents can and cannot be required by the panel. Because of the potentially high costs of retaining experts, it is not acceptable to allow a DRSP panelist to appoint an expert that will be paid for the parties without the parties having some check on the process. Panelists should be permitted to appoint experts and request live testimony only under very limited circumstances and the parties should bear the costs of experts and live testimony only if both parties agree or one party agrees (and, in that event, that party bears the costs).

Decision. ICANN should clarify what is meant by "[a dispute resolution panel decision] will be considered by ICANN in making a final decision regarding the success of any application." Does the statement mean that under certain circumstances an application will proceed notwithstanding a DRSP decision in favor of an objector to that application? If so, under what circumstances?

Legal Rights Objection Standard. Greater certainty as to the likely application of the listed factors would be very helpful to both rights owners and potential applicants. For example, it is not clear from the listed factors how a DRSP would resolve an objection where both the objector and applicant have legal rights in the same mark, but the geographic scope of the objector's rights far exceeds those of the applicant's or the objector's mark is more well-known than the applicant's.

String Confusion Objection Standard. ICANN should confirm that the "string confusion objection" will consider the similarity of the strings in sight, sound and meaning.

Post-Delegation

Microsoft notes with interest the specific references to post-delegation obligations and procedures in Section 1.2.2.2 of the DAG and page four of the Protecting Rights of Others Explanatory Memorandum, respectively.

It is both necessary and appropriate to impose on a successful applicant for a community-based gTLD the contractual obligation to operate the gTLD in a manner consistent with the restrictions of the community-based designation. ICANN should clarify in the next draft of the DAG several aspects of this obligation including (a) if the scope of referenced restrictions is limited to the four general community-based application criteria identified in Section 1.2.2.1 and, if not, the scope of the restrictions; (b) if ICANN would consider changes to the restrictions of the community-based designation to be "material changes to the community-based nature of the gTLD" and, if so, under what circumstances ICANN would approve such material changes; and (c) if ICANN intends to make an assignee's adherence to these contractual obligations a prerequisite for ICANN's approval of an applicant's intended assignment of the contract.

The existence of post-delegation dispute resolution processes to address post-launch infringement by a gTLD registry could benefit both Internet users and trademark owners. It is not clear, however, if the "placeholder in the new gTLD registry agreements" will be specific language pertaining to a concrete, developed dispute resolution procedure or a vague reference to the future possibility that such processes would be developed and, if so, that the registry would be bound by them (such as the current provisions in the Registry Agreements and the RAA that identify prohibitions on warehousing of or speculation in domain names by registries or registrars as within the scope of Consensus Policies). Only the former will be of utility and ICANN should draft specific language and consult with an appropriate Dispute Resolution Provider ("DRSP") for the development of such processes. Any post-delegation

dispute resolution processes must be properly balanced to provide for an effective and useful DRP mechanism and to avoid creating undue uncertainty for registry operators.

Secondary Market

The possibility of an active secondary market in gTLDs raises significant concerns. ICANN should take action to minimize the likelihood that such a market will come to fruition and, to the extent it does, that participants do not successfully evade the examination and objection processes.

Four possible measures are immediately identifiable. First, ICANN should revise Section 8.4 of the Registry Agreement to prohibit assignment of the Registry Agreement within a defined period (12-18 months) after delegation. Prohibiting assignments within this time period should decrease significantly the possibility of "gTLD flipping." Second, ICANN should ensure that post-delegation dispute resolution procedures apply to assignees of the Registry Agreement. This measure would mitigate considerably the risk that the assignee of the Registry Agreement ("gTLD Assignee") itself or its intended use of the gTLD would essentially elude the objections that could have been levied had the gTLD Assignee been the original applicant. Third, ICANN should develop "Assignment Guidelines" that set forth the conditions and criteria that a proposed gTLD Assignee must satisfy to obtain ICANN's approval of the proposed assignment. To be effective in ensuring that gTLD Assignees are qualified to be Registry Operators, these conditions and criteria must – at a minimum – be the substantive equivalent of the full range of evaluation criteria for new gTLD applicants. Finally, ICANN should revise Section 8.4 of the Registry Agreement to require that ICANN must provide its prior written approval of a change of control. The value of having prior notice of a change of control is low if ICANN can take no action to prevent the change. Further, guidelines comparable (if not identical) to the Assignment Guidelines should be developed to ensure that a change of control is not used as a mechanism to evade substantive evaluation of the new controlling entity or person.

Cost Considerations of the New gTLD Program

Microsoft has a number of concerns relating to several cost considerations of the new gTLD program including the components of the estimated $185,000 application fee, the use of excess funds collected as new gTLD application fees, and the amount of the estimated annual registry fee.

Components of Estimated Application Fee. ICANN should not retroactively seek to recover from new gTLD applicants the reported $12.8 MM in new gTLD program development costs. ICANN has already incurred these costs and did so without the transparency that would have been appropriate if they were to be subject to recovery. Moreover, the discrepancy between the reported $12.8 MM incurred since the end of 2007 and the reported $2MM in the preceding two years of policy development is striking.

The $60,000 of the estimated application fee that is based on "risk/hard-to-estimate costs" should be separately deposited into an escrow account that is drawn against in appropriate increments if and when costs warrant. As discussed below, such a separation would facilitate a per applicant refund under the appropriate circumstances.

Use of Excess Funds. As a general principle, ICANN should refund to applicants excess funds collected as new gTLD application fees. Applying this principle to the per-application $60,000 in "risk/hard to estimate costs" would entitle each applicant to a refund of an equal amount if such "risks/hard to estimate costs" do not equal the escrowed amount. Similarly, instead of "engaging the community" as to how ICANN should use excess funds collected as application fees, applicants should receive a refund of a proportionate share. Such a refund is not only fair and equitable, but should also avoid the conflict and controversy both within the community and between ICANN and the community that such engagement is likely to generate.

Annual Registry Fees. ICANN has failed to provide sufficient justification for an annual registry fee of not less than $75,000 where current annual registry fees are as low as $500 and it is conceivable that a number of successful new gTLD applicants could operate registries with a relatively low number of registrations. There is no justification for the proposition that new gTLD registries should, through the annual registry fee mechanism, bear the costs of registrar-related compliance and "possible increased registrar activity."

String Confusion Review

ICANN should change the standard for string confusion, revise the string examination protocol, and exclude the String Similarity Algorithm from consideration by String Similarity Examiners.

String Confusion Standard. ICANN should change the standard for string confusion to include phonetic and conceptual similarity, which would conform with the specific intent of the GNSO Council policy recommendations and the triumvirate of similarity in sight, sound, and meaning that is applied in many likelihood of confusion tests. The PDP participants debated extensively whether to limit the type of similarity referenced in Policy Recommendation 2 and the GNSO Council intentionally decided against limiting it.

String Examination. Requiring the failure of an application that fails the string confusion review grants ICANN and TLD operators advantages unrivalled in the examination process. No other category of interested party is provided with an opportunity to by-pass the objection process – legal rights owners are not, communities are not, and parties with standing to assert morality and public order objections are not. ICANN and TLD operators should not have such an opportunity. If, however, ICANN persists in granting itself and its principal revenue sources "most favored party" status, it is only equitable that mark owners be provided with a commensurate opportunity. This opportunity should take the form of a "Reserved Rights" list to which mark owners could apply.

Eligibility criteria for the Reserved Rights List should be stringent – such as ownership of a certain number (not less than 25, for example) of national registrations in four of the five ICANN geographic regions, and inclusion on the list should be subject to third-party challenge. Once the Reserved Rights List is developed, the string examination process should consider if an applied-for gTLD string is confusingly similar to a mark on the Reserved Rights List. If it is, such a determination should – as with the assessment against TLDs and Reserved Names – cause the application to fail.

ICANN should publish the names, affiliations, and qualifications of the String Similarity Examiners (SSEs), require the SSEs to abide by a strict conflict of interest policy, and allow applicants to submit to ICANN written objections to having a particular SSE assigned to its application if the applicant has reason to believe the SSE may have a conflict of interest.

String Similarity Algorithm. ICANN should exclude the String Similarity Algorithm from consideration by SSEs because the algorithm results in high percentages of visual similarity between strings that are not confusingly similar and low percentages of visual similarity between strings that are confusingly similar. The table below supports this characterization.

Tested TLD	Existing TLD or Reserved Name	Result
TRIP	IRTF	86%
elf	tel	75%
trip	irtf	66%
mail	mil	64%
trip	ripe	61%
cocoa	coop	51%
santa	asia	50%
asean	asia	49%
nom	name	45%
television	invalid (tv not disclosed)	32%

Identified below are a number of additional issues and concerns that, although of lesser importance than the issues and concerns described above, warrant consideration by ICANN.

Module 1

Public Comments. ICANN should (a) make available on its website all comments (including the identity of the submitter) submitted through the public comment process; (b) provide Evaluators with all relevant public comments in their entirety, not merely summaries generated by ICANN; and (c) include in the next draft of the DAG examples of the type of matters for which the public comment process is intended.

Open or Community gTLD. Based on the criteria for "community-based gTLD," a "branded" gTLD for which the brand owner is the applicant, that the brand owner will operate for its own benefit, and for which the brand owner will restrict the population (which could range from merely the applicant itself to its divisions and personnel to its manufacturing and distribution channels) would be considered a "community-based gTLD". If ICANN does not intend to allow the "community-based gTLD" designation to apply to corporate, branded gTLDs, it should so state and provide a detailed explanation as to why not. In some instances, such as branded gTLD, it is conceivable that the applicant may be the only established institution representing the community and the requirement for written endorsement of the application should reflect that possibility.

Required Documents. A number of new gTLD applications may be filed by entities that, for liability purposes, have been newly formed for the purpose of applying for the new gTLD. Some of these entities may be related to existing companies; some may not. ICANN should clarify how newly formed applicant entities may comply with the financial statements requirement. ICANN should also clarify how an applicant can provide documentary evidence of its ability to fund ongoing registry operations "for then-existing registrants" at time when many applicants won't yet have any registrants.

Module 2

Probity and Conflicts of Interest. This provision is both too narrow and too broad. It is too narrow because it omits any reference to a conflicts of interest policy for evaluators/examiners, which is absolutely essential. There must be a robust, published conflicts of interest policy. ICANN must publish the names and affiliations of the examiners/evaluators and provide applicants with an opportunity to object to examiners/evaluators on grounds that may not otherwise be covered. The provision is too broad because, as written, it prohibits contact by applicants or their representatives that may be entirely unrelated to their applications (e.g., if applicant is a contracted party, the current language would prevent communications with ICANN staff on topics wholly unrelated to the application).

Evaluation Criteria. ICANN should use a larger scale for scoring evaluation criteria. The current 0-1-2 scale does not have enough latitude to allow for accurate distinctions among applications. A 10-point scale would address this issue.

Financial Crimes, Fraud, and Breach of Fiduciary Duty Inquiry. The Applicant Information Form contains no questions intended to ascertain if the applicant or any of its officers, directors or managers has been convicted of financial-related crimes, found to have committed fraud or breach of fiduciary duty, disciplined by government for such offenses, or is currently involved in pending matters relating to such offenses or conduct. The omission is startling – especially in light of the potential use of a TLD to perpetrate fraud and because ICANN's Registrar Accreditation Application already contains such a question. ICANN should include in the Applicant Information Form questions necessary to ascertain such information.

Continuity. Operators of closed, branded gTLDs should have the flexibility to decide to stop operating the gTLD if they so choose. In such a circumstance, it would be inappropriate for a third party with no rights in the brand to operate the gTLD.

Module 5

Publication of Registration Data (Section 2.4 of the Base Agreement). Specification 4 should require publication of "thick" Whois. It is essential to our efforts to combat online fraud that full Whois information be available at the Registry Operator level.

Termination by Registry Operator. If the Registry Operator operates a closed, branded gTLD or a gTLD with fewer than a set number of registrants, the Registry Operator should have the right to terminate the Agreement and cease operating the registry. The Registry Operator right to terminate should be added to Section 4. Section 4.4 would require appropriate revision.

Module 6

Paragraph 6. The covenant not to challenge and waiver contained in Paragraph 6 is overly broad, unreasonable, and should be revised in its entirety.

Paragraph 7. ICANN should identify the circumstances under which it will ignore an applicant's confidentiality designation and publish information that the applicant had designated as confidential.

Paragraph 9. An Applicant's permission to ICANN should be limited to use of the Applicant's name in ICANN public announcements relating solely to that Applicant. ICANN must obtain specific permission from an Applicant to use its logo.

Paragraph 10. This paragraph should be revised to distinguish, in the case of branded gTLDs, an Applicant's pre-existing rights in the brand reflected in the applied-for gTLD.

* * *

In conclusion, Microsoft objects to ICANN's planned introduction of new ASCII gTLDs. The introduction will not result in true competition among them, but will introduce unparalleled opportunities for fraud and abuse, is likely to destabilize the Internet as a commercial platform, and will impose tremendous financial burdens and resource allocation requirements on virtually the entire non-contracting party, non-gTLD applicant business community. Microsoft shares the concerns articulated by the National Association of Manufacturers and MarkMonitor and has either endorsed or is a signatory to their comments to ICANN.

If ICANN nonetheless proceeds with the introduction of new ASCII gTLDs in the face of such widespread opposition and in spite of the current economic downturn, Microsoft encourages ICANN to take the time necessary to consider and address the issues and questions raised by the community about the intended implementation plan. It is essential that ICANN "get it right" and the current, compressed timetable effectively ensures that it will not.

Thank you for your consideration. If you have questions or wish to discuss any of the points raised herein, please contact Russell Pangborn (russpang@microsoft.com) or Peter Becker (peterbe@microsoft.com).

Respectfully submitted,

Microsoft Corporation

Russell Pangborn
Associate General Counsel – Trademarks

Peter Becker
Senior Attorney - Trademarks