COMMENTS OF BANK OF AMERICA CORPORATION
TO DRAFT APPLICANT GUIDEBOOK

INTRODUCTION

Bank of America Corporation is pleased to comment on the Draft Applicant Guidebook published October 24, 2008 by ICANN (the "Guidebook") and its associated documents. Bank of America Corporation operates one of the largest and most diverse banking networks in the world with offices in 33 states and the District of Columbia. The Corporation, through several different subsidiaries, also provides a diverse range of non-banking financial services and products in the United States and in more than 30 other countries. Although a consumer services rather than a consumer products company, Bank of America owns more than 630 active, registered trademarks in the United States and approximately 700 trademark registrations in other jurisdictions.

In addition, the Corporation owns more than 11,500 domain name registrations. However, only http://www.bankofamerica.com provides access to Bank of America N.A.'s award-winning online banking services. Three other domains are authorized portals to other lines of business. All other domain names are defensively registered or were acquired through successful UDRP actions to prevent fraud, phishing attacks, and attempts to divert some of the enormous goodwill attached to the Bank of America name or the names of its products to the private gain of unrelated third parties.

According to third party studies, we are routinely one of the top 15 to 20 US web sites for attention (time spent on site), and bankofamerica.com is routinely one of the top 40 to 50 most visited domains in the US (unique visitors/month). We often beat sites like amazon.com in some of these rankings. Our subscriber base of approximately 26 million users suggests that a significant portion of US households have an online relationship with us.

Our comments follow the numbering system of the Guidebook unless we expressly indicate we are using a different numbering or reference system. As a preliminary matter, however, we would like to comment on the underlying premise of the Guidebook and on the rule-making process that ICANN is following.

OBJECTIONS TO CONCEPT

We strongly believe that ICANN is proceeding too hastily to enable the unlimited expansion of new generic Top Level Domain names ("GTLDs") into the root zone, particularly with respect to what ICANN has dubbed "open" gTLDs, but also "community-based" gTLDs, where the community in question is primarily defined by economic or commercial interests. Although there may be a case for continuing the process with respect to community-based gTLDS, where the community in question is primarily defined by and restricted to groups possessing linguistic, ethnic, historical or cultural affinities, we do not believe ICANN has remotely demonstrated that the benefits of gTLD expansion for the primary purpose of hosting commercial web sites outweigh the substantial and real risks and costs to the public, the owners of economically important brands and the owners of lesser-known brands.

We do not believe there is significant demand from businesses or consumers for additional gTLDs to host commercial sites. The dot com gTLD is the preeminent top level domain in the world. No other commercially-oriented domain comes close to dot com in popularity, whether measured by the number of registered domain names or by the amount of user traffic. Some of the newer registries have failed to attract significant numbers of active web sites or user hits.

Thus the realities of the marketplace demonstrate that there is no significant public demand for additional top level domains to offer alternatives for commercial enterprises to host their content.

Additional top level domains, will, however, offer unprecedented opportunities for the registration of new second level domain names that are deliberately confusingly similar to existing second level registrations or to legally protected brand names, without offering any countervailing benefits. Experience shows that the vast majority of new registrations of second level domains in the existing "commercial" registries already are made by cybersquatters, phishers, fraudsters of varying stripes and similar abusers of the Internet. These registrations serve no public interest, yet ICANN has been extremely slow to recognize the existing legal rights of brand owners. This lack of action has created massive brand abuse in the existing gTLDs. This abuse not only damages brand owners with established legal rights, it also confuses the public and decreases the quality of the public's Internet experience.

Virtually every business uses a brand or trademark to identify itself, its products or both. Brands serve a vital consumer protection function in an efficient marketplace. They provide consumers with the information necessary to make informed purchasing decision by assuring consumers that all products and services offered under the genuine brand originate from or are sponsored by the same source and meet the same quality standards. Brand abuse and fraud undermine market efficiency by misleading consumer on these critical pieces of information. Courts and legislatures throughout the world have recognized legal rights in brands in order to protect consumers from confusion caused by imposters and to allow consumers to make informed choices based on the known reputation of a recognized brand.

Brand owners have found it necessary to "defensively" register their brands, common misspellings and variations of their brands in existing gTLDs in order to prevent consumer confusion between sites legitimately associated with their products and services and those that are not. As pointed out in our introduction, we currently own a portfolio of over 11,500 essentially useless domain names. For the most part, their existence benefits only the registrars that maintain them and the registries that host them.

If Brand owners attempt to protect their brands and consumers by also defensively registering across the new gTLDs, it is difficult to see how the public benefits or how any of ICANN's stated reasons for expansion are served. However, we doubt this will occur. We believe few, if any, businesses have the financial and human resources needed to register, monitor and manage all of their brands across all gTLDs. Instead, we predict that brand owners likely will be forced to abandon or strictly limit defensive registrations. The public will then suffer the mass confusion of multiple registrations by malicious persons of dot "brand" and variations of dot "brand" across hundreds of gTLDs. This will result in the continued erosion of confidence in the integrity of the Internet, ICANN and the whole registration system.

Existing mechanisms for protecting intellectual property rights in second level domain registrations are not effective. They place the burden of preventing consumer deception and brand abuse entirely on the brand owner. Brand owners cannot and should not be expected to shoulder this burden as ICANN expands the gTLD system, especially since it is ICANN, the new registries and registrars that will tap the resulting revenue stream. They should be the parties responsible for preventing brand abuse.

The Uniform Dispute Resolution Policy ("UDRP') process is expensive and operates one domain name registration at a time. It imposes no penalty on the abusive registrant. As soon as a brand owner has reclaimed one abusive registration, the domainer has registered a dozen more. In some

jurisdictions, the court system readily entertains the filing of and then delays the adjudication of a frivolous lawsuit to prevent the transfer directed by the UDRP panel. The UDRP process is helpless against mass domain name abuse.

Likewise, the "sunrise" registration period employed by some registries is nothing more than an extremely expensive method of defensively registering brand names. Where a brand owner owns dozens of brands or more and there are hundreds of new gTLDs, sunrise registrations will be too expensive to even contemplate.

The Guidebook is more protective of a community's "rights" to a string than it is of the rights of consumers and brand owners, even though the concept of a community is a novel and amorphous one, unrecognized in international law; whereas brand protection is a well-established, universally recognized legal concept. The Guidebook gives more weight to community objections made by an "established institution" than it does to the legal rights objection of a brand owner, and permits the auctioning off of a brand owner's property, while reserving the process of comparative evaluation for community-based applications. The importance of brands and the economic cost of brand abuse must be addressed effectively by the adoption of new policies and procedures before additional gTLDs are launched.

What are needed are preventive measures, not reactive objection proceedings... One possible tool that ICANN should study would be the creation of a master IP registry or "blacklist" of brand names, common letter transpositions and other common derivations of such brands that may not be used as gTLDs or second level domains by anyone except their owner. This would mirror the protection ICANN has reserved for itself at Section 2.1.1.2. If there is a dispute between owners of the same or confusingly similar brand strings on this registry, the dispute could be settled privately, by a DRSP, or perhaps neither owner would be allowed to use the contested string. This suggestion will require study and an opportunity for public comment.

We predict that if ICANN continues to ignore the confusion to consumers and unfair competition to brand owners that will result if it does not make protection these established legal rights a priority, some consumers and brand owners will be motivated to pursue redress in the U.S. Congress, the U.S. Department of Commerce and the courts.

We therefore urge ICANN to delay any implementation of a new process for applying for and registering new, commercially oriented gTLDs until the consequences of and the genuine market demand for such an expansion can be evaluated and debated.

RULE-MAKING PROCESS

We also believe that the rule-making procedure, as ICANN has publicly described it, is flawed. These flaws, however, can be corrected by adhering more closely to the procedures followed by governmental agencies when engaged in formal rule making. ICANN's timeline indicates that the comment period for the (English language) Guidebook will close on December 15, 2008, that ICANN will evaluate the comments and then publish a final Guidebook sometime in the first quarter of 2009. However, ICANN repeatedly advises commenters that the Guidebook is a draft and that applicants should not rely on any of the proposed details of the new gTLD program published in the Guidebook.

This warning is inconsistent with the concept of formal and transparent rule-making that we believe should undergird the creation and implementation off the Guidebook. If the current Guidelines may not be relied upon, then all of the comments submitted run the risk of being

irrelevant to ICANN's final draft. Therefore, ICANN should declare and commit itself that the next iteration of the Guidebook will be intended to be final, except for changes made in reasoned, publicly articulated response to a second round of public comments and that it will be bound by its final Guidebook. This version should also incorporate the results of new, broader, global studies into ICANN's assertions that significant economic demand exists for the expansion of commercial gTLDs. It must also be complete; with no more statements that ICANN is still studying how it will implement a particular section. Thus, there should be the current draft Guidebook, followed by the current round of public comments; a second, proposed final Guidebook, to be followed by a second round of public comments; and only then a third, Final Guidebook that would govern the first round of applications. ICANN should accept that following this procedure will inevitably stretch out its projected timeline for implementation. If such a delay improves the process and safeguards the rights of brand owners, it will be well worth it.

After a waiting period of at least one year, ICANN could declare that it is considering a new round of applications and publish proposed changes to the Final Guidebook based on publicly articulated reasons gained from its experiences in the first round. These proposed changes would again be open to public comment; ICANN would again publish a Final, Revised Guidebook for the Second Round, which would be conducted accordingly.

COMMENTS ON INDIVIDUAL MODULES AND SECTIONS

Without wavering in its position that the public interest is best served by a delay in the implementation of the process described in the Guidebook, at least as it applies to all open and economically-defined community-based gTLDS, Bank of America recommends the following revisions to the Guidebook:

MODULE 1

1.1.1 The application submission period should be long enough to allow would-be applicants ample time to decide whether to file an application and to prepare the application if a decision to proceed is made. This is a new process and many applicants will be quite unfamiliar with it. We suggest 4 months as a minimum. An applicant should be given a reasonable opportunity to supply missing documentation or to more fully answer questions if the application is substantially complete and the application fee paid. The steep application fee should not be lost merely because of an oversight or a difference of opinion as to whether certain questions have been completely answered or all necessary documentation supplied. Further, this list and all non-confidential information concerning or contained in an application, should be accessible by any member of the public and not just other applicants.

1.1.2.2 The Guidebook does not make clear whether initially a mere "list of applications considered complete" will be posted, to be followed by the actual, complete application (subject to confidentiality protections as discussed at Module 6) or whether the complete application will be posted from the beginning. We recommend the latter. If only the former, the list must, at a minimum, contain complete and accurate identifying and contact information for the applicant, the applied-for string, whether the application and domain are designated open or community-based and a brief statement of the purpose and registration restrictions (if any) of the domain. Regardless of whether ICANN posts a list or entire applications, the posting should be accessible by all members of the public.

1.1.2.3 This section provides for a second posting of applications, this time of those that have passed the Initial Evaluation. We argue even more strongly than in section 1.1.2.2 that this posting should consist of the entire application. It should also contain the complete report of the evaluators and all questions and answers between the applicant and evaluators, all subject to confidentiality protection. If not, it should contain at least the same level of information requested at section 1.1.2.2 above.

1.1.2.4 As will be elaborated in our comments to Section 1.2.1 and Module 3, we believe there should be a fifth ground for objection, namely that the applicant is not qualified under section 1.2.1. The period for filing an objection needs to extend beyond the last date for conclusion of both the Initial and the Extended Evaluation Periods, so that all preliminarily approved applications are subject to a meaningful opportunity for objection.

1.1.2.7 The interplay between a formal objection and string contention seems confusing in those situations where the person filing a formal objection based on legal rights or string confusion is also an applicant for an identical or confusingly similar string. In those cases, it seems as if ICANN proposes that the issue of string similarity be resolved at least twice, once at the DRSP level and again at the string contention level. There may even be a third level of review, since ICANN states at section 3.4.6 that the decision of the DRSP will only be considered an "expert determination" that ICANN will consider in making a final decision. We strongly object to allowing ICANN discretion to accept or reject a DRSP panel decision. If ICANN wants to act as a court of appeals, it should spell out its procedures, fees and criteria for considering such appeals. We do not oppose a second level of review, provided the procedures and standards for reversal are transparent and fair, although we question its value. In any event, brand owners must be allowed to seek redress of their legal rights in court, notwithstanding an adverse DRSP or ICANN decision. Thus we oppose the waiver of rights set out in section 3.1 and again at section 6 of Module 6.

1.1.2.8 The Guidebook seems to contemplate a non-stop transition from application to evaluation to transition to delegation. There is no reason why ICANN should oppose and many reasons to allow an applicant to apply for and receive the award of a gTLD but then deliberately delay proceeding to delegation. For example, the applicant may not be ready to open its registry. Particularly if it has succeeded in an open application where the domain is to be dedicated exclusively to its own use, it may have an existing dot com portal that it is not ready to discontinue; it may need to educate its existing users to the coming transition to the new domain; or it may only have wanted to "defensively" own the new gTLD. There is currently no requirement that the owner of a domain name in an existing gTLD provided active content for the domain, and there likewise should be no requirement, express or implied, that the successful applicant proceed to delegation in any particular time.

However, to prevent the complete preclusion of a string by an applicant, we suggest that an applicant be required, within three years after award of the extension, to delegation and to register at least one second level domain within the gTLD, which second level domain must either itself contain legitimate content or point to a second level domain in another gTLD that contains legitimate content. By legitimate content, we mean content that is not criminal, fraudulent, and malicious or brand abusive and is not a mere "click farm."

1.1.3 We urge that more thought be given to the role of public comments. The relationship between formal objections filed pursuant to section 1.1.2.4 and public comment on applications allowed by section 1.1.3 is not clear. It appears that formal objectors to an application will be required to pay a substantial fee to ICANN, to the DRSP and to its lawyers to prepare and file a

formal objection, while other objectors will be allowed to post perhaps anonymous "public" comments containing "relevant information" or issues that should be brought to the attention" of ICANN on the ICANN bulletin board. These comments will be provided to the evaluators and may or may not be considered by them in their unfettered discretion. There apparently will be no limits on the scope of "relevant information." Whether or not the evaluators consider them, the comments will be provided to the DRSPs, who will have discretion to consider them.

Although there is value in allowing unfettered public commentary on the entire process as it plays out and also to influence ICANN's evaluation of an application on the grounds that the applicant should be disqualified under section 1.2.1 (if revised pursuant to our comments), we think it unfair and improper for a formal application to be derailed by informal "sniping" from bloggers. In order to be taken seriously, an opposition must be considered only if made by a person with standing under section 3.1.2 who has gone to the expense of paying the necessary fees and who has raised a recognized ground for objection. Allowing any person to post a public objection makes a mockery of the standing requirements. If ICANN believes it has defined standing too narrowly, then ICANN should broaden its rule using explicit categories. If ICANN believes its own procedures for objection may forestall inquiry into relevant areas of concern, it should broaden the grounds of objection. If ICANN believes that persons with limited financial means will not be able to raise their legitimate concerns, ICANN should consider waiving or reducing the fee to file an objection upon an application showing good cause.

1.2.1 This section states that only an "established corporation, organization or institution in good standing" may apply for a new gTLD. We believe more should be required of an applicant. Applicants that have a history of participation in or tolerance of Internet abuse, either directly as registrars or registrants or through their officers, directors or shareholders, should not be eligible to have their application approved. There are already many, well-funded registrars and registrants on the Internet who persistently engage in fraudulent or criminal activity or provide a cover for fraudulent or criminal activity. We believe that the participation by any of these entities in an application or in an applicant should be grounds for ineligibility.

Although this might pose a challenge to administer, we recommend that the applicant certify that it is free from such participation and that if, should it be awarded the domain, at any time during the term of its registry contract with ICANN, that certification is shown to be untrue, then ICANN should be required to terminate the contract and revoke the award. Likewise, any interested person with evidence of such participation should be able to bring it to ICANN's attention, and ICANN should commit itself to investigate all credible accusations and disqualify applicants who cannot overcome these accusations. This is one area where the public commentary encouraged by section 1.1.3 could be useful in uncovering wolves in sheep's clothing

The section is also somewhat at odds with other guidance received from ICANN. The GNSO Final Report states that an "established institution" is one that is at least five years old. Yet a telephone conversation with ICANN staff has revealed that ICANN expects that most persons and entities will find it convenient to form a "shell" corporation especially for the purpose of owning the applicant. We agree that such a corporation or other limited liability entity makes good sense from a corporate planning point of view.

Allowing a shell corporation to file an application seems to make pointless the requirement that the entity filing the application be "established" or that it furnish financial information covering a significant period of time before the application is submitted, as required by paragraphs 4 and 5 of section 1.2.3. A shell corporation will not have neither history nor such financial statements We suggest that ICANN correct the GNSO Final Report on this issue and make clear that by

"established", it only means that the applicant be legally constituted and in good standing under the laws of its jurisdiction.

To inhibit the use of shell corporations by applicants intending to commit or allow abusive use of their registry, the applicant should be required to reveal its owners, directors and officers and all of its institutional owners in turn should be required to show that they have been in existence and actively conducting business for a period of several years. They should also be required at section 1.2.3 to provide financial data covering that same period. The applicant should demonstrate that it has adequate capitalization (unless the application states that it is for a defensive, not to be activated string), either in the form of fully-paid-up stock of a specified minimum, or binding pledges backed by bonds or other surety allowed for by the laws of the jurisdiction of formation to provide such capital on call.

1.2.2 This section begins the process of dividing all applications and GTLDs into either "open" or "community-based". We think the distinction is going to be difficult if not arbitrary to observe and seems based on dubious notions on the identity and the solidarity of a "community." Is a community to be defined only by geographic, linguistic ethnic or other cultural affinities, or may it also be defined by financial or business similarities? If the latter, the task of defining a community becomes quite difficult. To take an example from the financial world, should the community that Bank of America belongs to be defined as consisting only of "banks" as defined by applicable law anywhere in the world, only those banks in the G7, or only those banks in the United States? What about bank holding companies and their non-regulated subsidiaries that are not banks under applicable law? (Bank of America Corporation is a bank holding company under applicable law. Our subsidiary Bank of America, N.A. is a federally chartered bank. The Corporation has many other subsidiaries providing a variety of financial services. Besides federally chartered banks, in the U.S.A. there are also State-chartered banks, credit unions, thrifts and savings and loan institutions, to give a non-exhaustive list of allowed financial entities. Other countries have their own systems of regulation of financial services companies.) In the case of objections, what "community" will ICANN look to for an established institution either to endorse or oppose a community application involving a financial institution?

The Guidebook allows an open application to define and limit is purposes and to employ eligibility criteria and use restrictions. An open application using such criteria will be difficult if not impossible to distinguish from a community-based application. Again, using the financial services world as an example, what if a bank holding company submitted an open application for its self-defined group of similar bank holding companies and their subsidiaries? Would it be deemed susceptible to a "community-based" objection in the string contention stage? What if the applicant had defined its set of members to be much narrower than the set to which the objector belonged? For example, if four leading bank holding companies in the United States applied for a particular string such as "dot bank" to identify a domain explicitly directed only to very large bank holding companies and their subsidiaries in the United States, would the World Bank, the EU Central Bank or even the U.S. Federal Reserve be allowed to lodge a community-based objection?

These questions all stem from our belief that a "community" is not a clearly defined group of persons, with clearly delineated boundaries and well-established institutions to represent it; instead, a community is composed of layer upon fuzzy layer of related persons and institutions that rarely all share the same views or have the same interests. Some communities may be entitled to the special, paternalistic protection ICANN has devised. Others are not. We believe that, until these issues are resolved, at least for the purposes of an application, "community" be a category restricted to groups defined primarily by linguistic, ethnic, geographic or other cultural

affinities and not by financial interests. Should ICANN allow a community-based application for a gTLD, the registry operator must have rules restricting registration to members of that community. It may be necessary to allow a modified form of community objection to any application (whether designated open or community-based) that, appears to establish a commercially defined community.

We foresee that strings may fall into several categories of meaning, each of which poses different challenges. There may be arbitrary strings or strings with obscure meanings; there may be strings descriptive of the intended users or registrants, there be strings that are generic for the activities of members; there may be strings that are brands or variants of brands. ICANN has provided a limited mechanism for protecting "legal rights" in brand strings. We are also concerned about the private appropriation of a generic or descriptive string for an economic or commercial activity that falsely or misleadingly implies that the registrants in the domain are "best of breed", "certified" or all inclusive of businesses that engage in the activity implied by the string. There are huge issues of fairness, neutrality and consumer confusion in the creation of gTLDs of this sort. We recommend that ICANN not allow applications from any entity or group for these strings. We particularly recommend that ICANN announce it will deny all applications for dot bank and similar generic or descriptive designations for financial institutions until the very difficult issues of what are the proper membership rules and scope of community for such a significant gTLD are resolved by consensus and further analysis.

1.2.3 The documents required to establish eligibility should be consistent with ICANN's decision on how to handle newly formed "shell" entities. In any event, mere proof of legal establishment and good standing should not be enough. The applicant must establish in some fashion as well that neither it nor its owners/members have a history of abusing the Internet or participating in or providing cover for brand abusive, fraudulent or criminal activities. Publicly traded companies should be allowed to submit the same financial statements that applicable law requires them to file on an annual and quarterly basis.

1.5.1. The gTLD Evaluation fee should be higher, at least for non-community-based applicants, in order to discourage frivolous applications. We suggest a few of at least $500,000. Any surplus received over ICANN's actual costs can be used to reduce the Dispute Resolution Filing Fee.

The difference between the Dispute Resolution Filing Fee and the Dispute Resolution Adjudication Fee is unclear. It also unclear why the estimated amounts of these fees per proceeding greatly exceed the fees charged to conduct a UDRP arbitration, which seems roughly equivalent in complexity. Although the fee to file an application should be high, the barriers to raising a legitimate formal objection to an application should be low. ICANN should consider allowing applicants claiming to have limited financial resources to demonstrate their need and receive a reduction or even a waiver of the objection fees.

1.5.2 We do not believe a six figure Evaluation Fee should be payable by credit card. A serious applicant will have the funds on hand to make this payment.

1.5.5 We agree that applicants should be allowed to withdraw their applications at certain stages and receive a full or partial refund. ICANN has stated that it wants to encourage informal resolution of disputes and string contention. One method suggested is that one or more of contending parties withdraw their applications. It would be counter-productive to this strategy to require the withdrawing applicant to forfeit what we now propose to be a substantial application fee.

MODULE 2

2.1.1.1 The Guidebook should explicitly state that the String Similarity Examiners will use additional methods for evaluating string similarity than the algorithmic score for visual similarity and then identify what they will be. Aural and touch (for Braille inputs) should also be considered. Similarity of meaning should also be considered, since users are more likely to confuse strings that have similar meanings. No mathematical algorithm should have the last say in adjudicating similarity.

2.1.2.1 The application should provide identifying information on the shareholders and members the Board of Directors (or equivalent governing body) and officers of the applicant sufficient for interested third parties and ICANN to conduct background checks if they so desire.

Bank of America agrees that applicants should not be required to have deployed an actual registry to complete the requirements for a successful application. However, applicants should be required to demonstrate that they have either acquired internal competencies sufficient to operate the registry or have retained the services of a third party capable of providing such services and have the financial capitalization to continue to engage those services for a period of 3-5 years. It should be possible to demonstrate the requisite financial stability either through a variety of means such as paid-in capital, stand-by letters of credit, bank guarantees and surety bonds.

2.1.3 There are few requirements for Whois information within the Guidelines. There are current studies being conducted within the GNSO regarding the availability and accuracy of such information which need to be resolved prior to implementation of new gTLDs. We believe that applicants and Registry Owners should be required to maintain and provide complete, accurate and up to date contact information for the purposes of resolving issues associated with their domains such as fraud, errors, and omissions that affect the rights of brand owners, legitimate business concerns and users of the Internet. Such information should be readily available to address issues associated with the domain and entities within that domain. Requirements and processes for maintenance of such information should be created and enforced once implemented. Anonymous or proxy second level domain name registrations should not be allowed. All applicants should be required to provide "thick" Whois services and adhere to ICANN's current Add Grace Period Limits policies (budget announcement), even though those policies are not yet even "temporary" policies.

Technology updates that provide additional security and integrity of the DNS environment, such as DNSSEC, should be strongly considered as a requirement for expanding the gTLD structure. The current technology is inadequate and daily affects the integrity of the Internet. Such a large expansion of the gTLD provides an opportune for improvement. Improvements of this sort will become increasingly difficult to implement the more gTLDs are created.

MODULE 3

3.1 Bank of America objects to any rule that would prohibit a losing party in a formal legal rights objection to forfeit its rights to seek judicial redress. Thus we object to the provision that in filing an application for a gTLD, the applicant agrees to accept the gTLD dispute resolution process, if that "acceptance" means that the applicant forfeits his right to protect his legal rights in the courts. Even today, a losing party to a UDRP decision may seek the protection of the courts. Although this right is sometimes abused, the abuse is not sufficient reason to prohibit all judicial recourse. The provisions of Module 4 governing the adjudication of legal rights objections by a single WIPO arbitrator who may be overruled by ICANN are insufficient to form the basis of a

fair and final adjudication of trademark rights in all cases. Language providing that an objector must accept the gTLD dispute resolution process if it files an objection may have the unintended consequence of forcing objectors to file a lawsuit in lieu of an objection. If ICANN has reason to be concerned about frivolous litigation in obscure jurisdictions over non-existent legal rights, ICANN could consider limiting the acceptable judicial forums to those with established legal traditions of adjudicating intellectual property rights.

3.1.1 We believe there should be a fifth ground for objection, namely that the applicant is ineligible under section 1.2.1, as amended pursuant to our comments. Every possible opportunity should be given to weed out persons and entities known to be Internet abusers.

3.1.2.4 We believe the description of an established institution associated with a defined community needs much more amplification. Is a private, for-profit corporation or other entity an "established institution?" Bank of America would seem to qualify as an established institution in the financial community, but we are not confident that is what ICANN intends. If we are such an institution, then so too are thousands of banks and financial institutions.

This section states that, to have standing to bring a community objection, an "established institution" "must not have been established solely in conjunction with the gTLD application process." This requirement seems contrary to the concept that an applicant may be, indeed is expected to be, established solely in conjunction with the application. We can understand a desire not to allow sham community institutions to spring up overnight in order to file a community objection to a legitimate application. But the prohibition is too inflexible. An applicant itself may want to file a community objection to another applicant. Does the quoted language mean that such an applicant, even if a consortium of existing institutions, can not file a community objection? What if the community has never had established institutions representing its interests? Does this mean it cannot organize itself to object to a newly formed applicant claiming to represent the community?

3.4.3 This section states that parties to a dispute are encouraged to resolve their differences outside of the adjudication process. We applaud this philosophy. But elsewhere, the Guidebook throws up obstacles to such resolution by, for example, prohibiting disputants from forming a joint venture to own the disputed string. Disputants ought to be able to settle their dispute by making changes in the sought-after string for one or both applicants, by forming a joint venture or by other cooperative efforts without having to start all over again in the application process. Creative solutions should be encouraged, not discouraged. Unless ICANN proposes to restrict the transferability of ownership interests in domain owners after award of the domain string, the prohibition against the formation of a joint venture prior to award while turning a blind eye to equivalent transactions after the award makes no sense.

3.4.4 A DRSP panel should not be empowered to decide arbitrarily whether to publish its decisions. All decisions should be published unless there are compelling reasons that fit established, public criteria for not publishing. The DRSP should be required to have a process for quality control in the decisions of its panels, perhaps by allowing an appeal process, perhaps by regular internal review of decisions and certainly by allowing judicial review. ICANN should study whether panel decisions should have precedential value. It makes no sense for a brand owner to be f aced with inconsistent decisions with respect to its rights in a particular string.

The immunity from liability granted to ICANN, the DRSPs and their agents is too broad. Much will be at stake in these disputes, and a person or institution that acts fraudulently or corruptly should not be immune from liability.

3.4.6 The language in the final paragraph that a panel decision will be considered by ICANN in making final decision is at best confusing. Does this mean that the panel decision is advisory only? On what grounds will ICANN make its final decision? Will parties be allowed to petition ICANN and present additional arguments or evidence to ICANN? It seems as if ICANN is setting itself up as the final arbiter of all disputes, but an arbiter that is not bound by any of the grounds that restrict the decision-making authority of the expert dispute resolution panels. If ICANN intends to be a court of appeals, it must define its policies, standards and procedures for such appeals.

3.5.2 Item 4 suggests that ICANN is sensitive, at least in the context of a legal rights objection, to the fact that some persons and entities have engaged in a pattern of conduct whereby they have applied for or operated registries in existing TLDs which are identical or confusingly similar to the marks of others. A pattern of behavior such as this should not just be a factor in adjudicating a legal rights objection. As previously argued, it should also be grounds for ineligibility to apply in the first place.

3.5.4 We have previously expressed serious concerns about the meaning of a community. Without surrendering these reservations, we believe it is unfair for a community-based applicant to lose on the basis of a "community objection" that establishes that there is indeed "substantial opposition" to the applicant's ownership of the string if the applicant can counter that evidence with evidence that there is also "substantial support" within the community for its application. Because communities are so poorly defined, there could be many contending established institutions arrayed on both sides of a community-based application. Moreover, the community opposition to the community-based application should not only be "substantial", it should be relevant to the purposes and criteria that define the community.

MODULE 4

4.1.2 This section states that if two applicants engage in a string confusion objection proceeding, that proceeding will not settle the matter. Instead, both parties will proceed into a string contention set to be resolved by string contention proceedings. What is the point in this first formal objection procedure? There ought to be administrative finality to string confusion and legal rights confusion objections. At most, ICANN could establish an administrative review of the DRSP decision using fair, open and published criteria and processes. We believe that the better solution, however, is that after the administrative proceedings have been exhausted, the next step should be judicial determination, not another, *de novo* administrative trial.

4.1.3 As previously argued, there does not seem to be a sound reason for forbidding the selection of a new TLD string or creating a joint venture as a means to resolve a contention case. Certainly the new string or the new applicant must be evaluated in terms of their differences from the original application, but every reasonable opportunity ought to be given to resolve a dispute among the parties, without starting all over.

4.2.1 It should not be the case that only community-based applicants may elect a comparative evaluation, at least not so long as it is possible for a self-designated open application to be objected to on community grounds. If a community-based applicant objects to an open application on community grounds, then both applications should be treated as community and both should have the opportunity to choose comparative evaluation. This would include giving the open applicant the opportunity to buttress its application with documentation of the sort required for a community-applicant. Otherwise, a well-put together open application could be

defeated by an inferior application filed by an entity which had chosen to wrap itself in the flag of a community designation. Communities, as a concept on the Internet, should not be receive such paternalistic deference.

4.3 ICANN must commit itself to clearly, completely and finally describing the nature of the "efficient mechanism for contention resolution" in the next round of the proposed Guidebook. This cannot be left open while the application process proceeds. Assuming that the method will be an auction, we believe that where string contention involves at least one applicant with *bona fide* legal rights, that applicant should not be required to defend its rights at auction. Legal rights should not be vulnerable to conversion by the highest bidder. In fact, we doubt an auction is appropriate for any string contention resolution. Again, if applicants are encouraged to settle their differences by withdrawing their applications, they should be allowed to apply for a new string. Any other resolution is a severe disincentive to withdrawal.

MODULE 5

5.1 There should be one or at most two (one for open and another for community) standard contracts between ICANN and registry owners. The standard contract should not be subject to modification. The contract term must be finalized in the rule-making process and not left open for further negotiation or modification by the ICANN Board of Directors. The contract should allow the applicant to choose its own timetable for entering into the root zone. We recommend that the contract require the new domain to adopt the best available security measures, such as DNSSEC, a robust Whois (see section 2.1.3) and the current Add Grace Period Limits Policy which currently does not have even "temporary policy" status).

MODULE 6

The terms and conditions are binding only on applicants. Perhaps they should be binding on objectors as well. However, neither applicant nor objector should be required to waive any right to challenge ICANN's behavior in court. If ICANN acts contrary to law or to its own rules and procedures, it must be judicially accountable.

Paragraph 3 states that ICANN has the right to reject any and all applications and that the decision to proceed with review and consideration of an application is entirely at ICANN's discretion. We object to this statement and the view of ICANN's role and the binding effect of the Guidebook that it reflects. ICANN must commit itself to follow the rules and procedures of the Guidebook once it has finally and formally adopted them. It may not act arbitrarily in defiance of its own rules. We are very concerned by suggestions from ICANN that it is not bound to follow its own rules or that it is not the moral, if not the legal equivalent of a quasi-public enterprise. In our view, The Guidebook has more significance than simply a notice of ICANN's position as a private party on the terms under which it intends to enter into various private contracts. Since ICANN enjoys its rights, responsibilities and privileges with respect to assigning Internet names and numbers as a result of a delegation of governmental authority under a U.S. Department of Commerce contract and since it purports to act in the public interest, it is acting in a quasi-governmental capacity, and its Guidebook should be regarded as akin to an administrative rule. We believe ICANN should not and cannot act arbitrarily in areas where it has circumscribed its discretion by adoption of the Guidebook.

The indemnity at paragraph 5 is unfair. Why should the applicant defend and indemnify ICANN if a disappointed objector or other applicant sues ICANN over the same string as that awarded to the applicant? One could foresee ICANN rejecting an application, awarding the string to another

party, and being sued by the disappointed applicant. And Under paragraph 5, the successful applicant would have to indemnify ICANN for ICANN's decision.

It is only at paragraph 7 that ICANN establishes confidentiality provisions and obligations. The earlier sections of the Guidebook dealing with the posting of applications should incorporate and be consistent with these terms and conditions. We recommend that applicants submit their applications in duplicate—a public version and a confidential version that contains redactions from the public version, together with an explanation to ICANN as to why the redacted information should be kept confidential. If ICANN disagrees, it can negotiate with the applicant and, if necessary, force the applicant ultimately either to reveal portions of the redacted material or have the application evaluated only on the basis of the redacted and not the confidential version. A similar process is followed by U.S. government agencies in evaluating confidential material submitted by companies when making filings susceptible to public disclosure under the Freedom of Information Act.

The permission to use an applicant's name and logo granted by paragraph 9 will need to be limited on a case by case basis. Most applicants probably will want this permission limited to a press release or similar informational posting that they may approve or reasonably disapprove.

SUMMARY

Bank of America and its millions of customers have a substantial stake in the stability, security and ease of use of the Internet. We think the DNS is critical to these interests. Changes to the DNS, therefore, should be incremental and carefully thought-out. The addition of unlimited new top-levels domains, as proposed and governed by the Guidebook, threatens the stability, security and user satisfaction of the Internet by creating an opportunity for uncontrollable brand abuse through a massive proliferation of abusive websites. Throughout these comments we have also raised numerous questions and concerns about the division of applications and objections into open and community categories. There are too many unresolved issued surrounding this division, particularly as applied to commercial or economic groups, to implement the many rules based on the community concept at this time. We therefore urge that the unlimited expansion of commercial gTLDs be slowed or suspended until greater security, consumer and brand protection mechanisms have been developed, the true economic demand for this expansion has been demonstrated by independent studies, and the concept of community has been .more thoroughly analyzed in the field of economic groups.

ENDORSEMENT OF OTHER COMMENTS

We have not read all of the many comments submitted to ICANN. Without in any way indicating we disagree with comments not specifically called out here, Bank of America endorses the comments submitted by the **Association of National Advertisers, BITS, the Financial Services Roundtable, the Financial Services Technical Consortium, MarkMonitor, Inc., the Securities Industry and Financial Markets Association, and the Software & Information Industry Association.**

Respectfully submitted,

Bank of America Corporation
By: E. Thomas Watson
Assistant General Counsel