The Coalition for Responsible Internet Domain Oversight (CRIDO) and the Association of National Advertisers (ANA) thank ICANN for the opportunity to provide these reply comments on the current need for defensive top-level domain registrations (TLDs) and on our proposal for a "Do Not Sell" List to address that need. CRIDO's and ANA's concerns regarding the need for defensive registrations on the top-level are shared by many internationally respected organizations, including the International Monetary Fund, the International Telecommunications Union, the United Nations, the World Bank Group, the World Intellectual Property Organization, at least 20 other public international intergovernmental organizations, as well as many other for- and not-for-profit organizations.[1] It is critical that these concerns be addressed now before it is too late.

Before discussing the specifics of the CRIDO and ANA plan, it is worth noting that, in the initial comment round, there was broad support for some variant of a "Do Not Sell List,"[2] "Do Not Register List,"[3] name "Blocking List,"[4] or a "White List."[5] To the best of our knowledge, the few comments opposing implementation of one of these remedies were related solely to the challenge of creating a new option at this point in the process and not to the substance or merits of the solution.

While ANA and CRIDO are well aware of the imminent closure of the application window, we believe that a mutually-agreeable alternative to costly and worthless defensive registrations can still be reached. Moreover, in addition to eliminating the need for defensive registrations, such an alternative could also potentially (1) provide a solution to the much discussed "batching" problem, and (2) greatly facilitate the review to be conducted at the conclusion of the first

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[1] Letter from IGO Counsel to Rod Beckstrom, Steve Crocker and Kurt Pritz, dated January 4, 2012, available at: http://www.icann.org/en/correspondence/igo-counsels-to-beckstrom-crocker-pritz-04jan12-en.pdf.

[2] Comments of the ANA and CRIDO in the ICANN Defensive Registration Docket, submitted on February 27, 2012, available at: http://forum.icann.org/lists/newgtlds-defensive-applications/msg00030.html; Comments of AIPLA in the ICANN Defensive Registration Docket, submitted on February 27, 2012 available at: http://forum.icann.org/lists/newgtlds-defensive-applications/msg00020.html.

[3] Comments of Verizon Communications, Inc. in the ICANN Defensive Registration Docket, submitted on February 27, 2012, available at: http://forum.icann.org/lists/newgtlds-defensive-applications/msg00028.html; Comments of the ICANN Business Constituency in the ICANN Defensive Registration Docket, submitted on February 27, 2012, available at: http://forum.icann.org/lists/newgtlds-defensive-applications/msg00019.html; Comments of AT&T in the ICANN Defensive Registration Docket, submitted on February 27, 2012, available at: http://forum.icann.org/lists/newgtlds-defensive-applications/msg00026.html.

[4] AIPLA Comments; Comments of the GAP in the ICANN Defensive Registration Docket, submitted on February 27, 2012, available at: http://forum.icann.org/lists/newgtlds-defensive-applications/msg00027.html.

[5] Comments of the NCTA in the ICANN Defensive Registration Docket, submitted on February 27, 2012, available at: http://forum.icann.org/lists/newgtlds-defensive-applications/msg00017.html.

application round and expedite the commencement of a second round of applications, in which so many stakeholders have expressed an interest.[6]

At ICANN's meeting in Costa Rica this month, stakeholders devoted considerable time to discussing how, and in what order, ICANN should batch applications for processing if ICANN were to receive applications for more than 500 new TLDs. A "Do Not Sell" List would lower the number of TLD applications by removing some defensive registrations from the applicant pool and possibly eliminating the need for *any* batching. This would be especially true if existing applicants could withdraw their application(s) and, instead, register for the List, as we propose.

One of the criteria that the Department of Commerce (DOC) will use when it ultimately reviews the success of the TLD program is the percentage of applications that were defensive and how those defensive registrations impact the costs of the program as compared to its benefits. It is unclear how, under the process as currently structured, either ICANN or the DOC will be able to measure accurately the number of defensive registrations that are applied for (and awarded). If a robust "Do Not Sell" List were to be adopted, it would effectively eliminate (or at least significantly reduce) purely defensive applications at the top-level and enable ICANN to report that *none* of the new TLDs were for defensive purposes.

To accomplish the foregoing goals and in the spirit of moving forward, we provide details below regarding ANA's and CRIDO's vision as to how a "Do Not Sell" List could be implemented at the top level even at this stage of the application window.[7]

CREATION OF A "DO NOT SELL" LIST

ANA and CRIDO urge the immediate adoption of a "Do Not Sell" List on which any entity can enter a name to which that entity has a lawful entitlement, thereby making that name ineligible for delegation into the authoritative root until such time as either (1) all entities with competing legitimate claims agree that selling the name would not cause confusion or harm legitimate business interests and that the benefits of creating a new TLD using the name outweigh the costs of doing so, or (2) any claims of the entity which has enrolled on the "Do Not Sell" List are addressed through the existing rights protections mechanisms.

Enrollment: Under our proposal, any entity would be permitted to enroll on the "Do Not Sell" List any names, including that entity's trademarks, wordmarks and other names and identifiers used in connection with the entity, to which that entity has a legal right (Names). At the time of enrollment, enrollees would only need to provide valid contact information and the Names that they do not want sold, based on their claim to a legal right to the use of those Names.

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[6] We also strongly agree with the comments of Verizon and the AIPLA, and have often publicly advocated, that a limited pilot project should be conducted to beta test the entire TLD process, including any "Do Not Sell" or "Do Not Register" process.

[7] While we understand that this comment period is focused on top-level domains, we believe it is critical that a variant of the "Do Not Sell" List concept also be developed for the second-level domains.

Existing Applicants: Because the opening of ICANN's TLD application window was not delayed and, indeed, will very soon be closing, we understand that there may be many applications already on file that are, in fact, defensive in nature. We suggest that, within 30 days of a public announcement of the availability of a "Do Not Sell" List, all those entities which have already filed applications be given the opportunity (1) to withdraw their applications and, instead, enroll on the "Do Not Sell" List the Names for which they have defensively applied, and (2) have their registration fees refunded, minus perhaps 5 – 10% of the originally submitted amount, or $9,250 to $18,500, to defray the administrative costs already incurred by ICANN.

Conflicts:

Among Entities Enrolling Names on the "Do Not Sell" List - One of the biggest advantages to the "Do Not Sell" List is that there would be no need to resolve conflicts among enrollees claiming rights to the same or confusingly similar Names as those entities would clearly all be doing so for defensive registration purposes only. This would be distinguishable from the current situation in which not only do those entities filing defensive registrations have to pay the high application fee, but also if there are conflicting applications for the same Name, they likely would participate in an auction, with all those attendant expenses.

Among Entities Applying for TLDs and Entities Enrolling Names on the "Do Not Sell" List - Naming conflicts will, however, inevitably arise among those laying claim to Names on the "Do Not Sell" List and those applying for TLDs using the same, or confusingly similar, Names. In the event of such conflicts, we recommend the following procedure:

"Do Not Sell" Enrollee Burden - The "Do Not Sell" List enrollee would bear the burden, within 30 days of (simultaneously) making the "Do Not Sell" and TLD Applicant Lists, of demonstrating that (1) naming conflicts exist and (2) the "Do Not Sell" List applicant has a legal right to use of the name in question. Specifically, the entity would have to offer proof that the Name in dispute was a trademark, wordmark or a brand identifier already in use by the entity, on the Internet, in any of the existing TLDs. Failure to meet this burden would result in dismissal of the "Do Not Sell" List enrollment and the TLD application would proceed. However, if the "Do Not Sell" List enrollee did meet its burden, then the burden would switch to the TLD applicant.

TLD Applicant Burden of "Use" and a "Non-speculative Purpose" - ICANN would then review the relevant TLD application to determine if the applicant had adequately shown that the Name at issue would be used, by the applicant itself, in an open or closed registry and for a non-speculative purpose. ICANN would have the power to request from the applicant information beyond what was contained in the original TLD application and the applicant might be required to provide sworn certification of its plans for use of the TLD. Failure to meet this burden would result in dismissal of the TLD application. If this were implemented immediately, the possibility of having to meet this burden would have the desirable ancillary effect of reducing speculation in TLDs by discouraging speculators from submitting applications.

Legal Rights and String Confusion Objections / Negotiations - Entities which met their respective burdens would have a 60-90 day period to attempt to resolve the naming conflict

by mutual agreement. The entities could negotiate to (1) withdraw the TLD application at issue, (2) permit the TLD application to proceed unedited, or (3) permit the TLD applications to proceed with revisions. Unless and until the entities reached agreement that the new TLD would not cause confusion or harm legitimate business interests and that the benefits of the new TLD would exceed its costs, the new TLD could not be sold. Otherwise, brand owners will be forced to spend money to defensively register for TLDs that they do not want or need, just to prevent consumer confusion and the risk of traffic being directed away from their sites.

An alternative to the negotiation process that ICANN might prefer would simply be to allow any entity that enrolled a Name on the "Do Not Sell" List and then, in the case of conflict, met its burden of demonstrating a legal right to use of the name in question, to have full access to *all* the rights protection mechanisms created by ICANN for the top level, regardless of whether the entity had applied to run a TLD. Currently, the string confusion objection process, according to the most recent version of the ICANN Applicant Guidebook, is limited to "[e]xisting TLD operator[s] or TLD applicant[s] in the current round."[8] The outcome of those processes would determine whether the new TLD would be blocked or awarded to the applicant (or go to auction in the case of more than one prevailing applicant).

> **Costs** - There would likely need to be a nominal fee (perhaps $200 for the first listing and $100 for any additional listing by the same entity) to defray the cost of operating the "Do Not Sell" List. However, if the process worked through the use of an interactive database, we expect that the costs connected with the enrollment process (as compared to any dispute resolution process that might come later) would be nominal.

> **Timing** - Obviously, if ANA's and CRIDO's proposal is to be effective in eliminating unnecessary defensive registrations at the top level, it must be adopted, a public announcement made, and a publicity campaign undertaken almost immediately.[9]

Of course, we are anxious to have our suggestion fully and immediately vetted by the ICANN Board, now that it has been discussed at the multi-stakeholder process in Costa Rica. ANA and CRIDO stand ready – and eager – to work with the Board and with stakeholders to ensure that, through adoption of a "Do Not Sell" List or similar types of solutions, there are minimal, if any, defensive registrations as a result of ICANN's expansion of the domain name space.

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[8] ICANN gTLD Applicant Guidebook, Module 3, p. 5 *available at:* http://newgtlds.icann.org/en/applicants/agb/objection-procedures-11jan12-en.pdf.

[9] It is not too late to make changes to the ICANN Applicant Guidebook. *See* ICANN gTLD Applicant Guidebook at Section 1.2.11 ("ICANN reserves the right to make reasonable updates and changes to the Applicant Guidebook *at any time*, *including* as the possible result of new technical standards, reference documents, or *policies that might be adopted during the course of the application process*." (*emphasis added*).