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2025 E Street, NW  
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July 21, 2010

**Via Email:** [4gtld-guide@icann.org](mailto:4gtld-guide@icann.org)

**Re:** Comments Regarding ICANN's "New gTLD Program: gTLD Draft Applicant Guidebook, Version 4 ("DAGv4")

Dear Mr. Beckstrom, Mr. Dengate-Thrush, the ICANN Board of Directors and Staff:

Thank you for the opportunity to provide comments to the Internet Corporation for Assigned Names and Numbers ("ICANN") on the New gTLD Draft Applicant Guidebook, Version 4 ("DAGv4") on behalf of the American Red Cross. I am an employee of the American Red Cross ("Red Cross"), a not for profit philanthropic organization and one of approximately 180 member national societies of the International Federation of Red Cross and Red Crescent Societies.

**I. Introduction**

Since its founding in 1881 by visionary leader Clara Barton, Red Cross has been the premier emergency response organization in the United States, devoted to aiding victims of natural disasters and to other critical public services such as processing and distributing lifesaving blood and blood products and presenting educational programs that promote health and safety. As you know, not-for-profit organizations such as Red Cross rely upon the Internet to communicate with the public about their mission and services, to distribute educational, informational and lifesaving information to members of their communities, and to collect donations to support their operations. As such, Red Cross greatly depends upon the Internet offering a reliable, secure and safe DNS environment in which to conduct these mission-critical activities. Issues such as the security, stability and resiliency of the Internet, increasing social inclusion of non-governmental organizations with technology, and increasing public participation, communication and global outreach are especially important to Red Cross.

The critical humanitarian and lifesaving functions of Red Cross are recognized by the government of the United States, which, among other considerations, has protected the RED CROSS word mark against unauthorized use and infringement in the United States Criminal Code (18 U.S.C. §§ 706 and 917). This statute is designed to protect the goodwill of Red Cross, and thereby, the health and safety of the community. As such, Red Cross respectfully requests that ICANN grant careful consideration to the comments herein to ensure that the new gTLD process does not compromise Red Cross' ability to fulfill its mission.

Therefore, the below comments are presented with the goal of detailing concerns in the DAGv4 regarding the above vital aspects of Red Cross' use of the Internet, as well our broader policy concerns about the Internet. We strongly urge ICANN to review these comments carefully and consider the particular needs of not-for-profit organizations such as Red Cross when preparing the final version of the Applicant Guidebook.

Specifically, we urge ICANN to consider revisions to the Applicant Guidebook that We strongly urge ICANN to review these comments carefully and consider the particular needs of not-for-profit organizations such as Red Cross when preparing the final version of the Applicant Guidebook. In addition, we recommend that ICANN improve its communications about the new

gTLD program to target a wide variety of its stakeholders, particularly not-for-profit organizations (such as non-governmental organizations, like charities, community groups, not-for-profit associations, universities, religious organizations) but also for commercial enterprises in developing countries, to ensure they are adequately prepared for both the opportunities and challenges presented by the introduction of the new gTLDs to the landscape of the Internet.

We offer four major overarching concerns regarding Red Cross and its ability to fully participate in the new gTLD program with the current DAGv4:

- A. **Threats to the security and stability of the Internet.** These threats include DNS abuse, WHOIS concerns, and trademark issues.
- B. **ICANN community compliance.** These include concerns regarding the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) and Registry Restrictions Dispute Resolution Procedure (RRDRP).
- C. **Budgetary issues and concerns.** These include concerns regarding the various fees relating to the new gTLDs, including fees for the new gTLD application and other ICANN fees, such as dispute resolution fees, as well as other ongoing technical legal fees and costs.
- D. **Accessibility, awareness and participation.** These include concerns regarding the accessibility of ICANN information and processes, and the ability of all organizations, especially not-for-profit organizations such as Red Cross, to participate in these processes.

The following chart tracks each of our concerns to its corresponding module in DAGv4. A detailed explanation of each concern, organized by overarching category, follows the chart.

MODULE	TITLE	ISSUES OF CONCERN
1	Introduction to the gTLD Application Process	<ul style="list-style-type: none"> <li>• ICANN should reveal and detail its <u>actual</u> costs for reviewing each new gTLD application and should consider a pricing structure for not-for-profit organizations such as Red Cross that will allow ICANN to recover its actual costs without imposing additional overhead on the not-for-profit Applicants. This transparency and pricing consideration should also apply to extended evaluation fees, objection filing and proceeding fees.</li> <li>• Applicants for new gTLDs are not permitted to supplement their applications after submission, thus placing organizations such as Red Cross that may have a learning curve to understand the process at a disadvantage. Therefore, ICANN should allow supplements to applications after submission.</li> <li>• Rather than randomizing applications for batch processing, ICANN should consider prioritizing applications based on public interest need.</li> </ul>

MODULE	TITLE	ISSUES OF CONCERN
		<ul style="list-style-type: none"> <li>In order to meet the needs of not-for-profit organizations such as Red Cross that might register a new gTLD strictly to execute a public service mission and not for commercial purposes, ICANN should offer an exception to the limitations on vertical integration/cross ownership that provide for a Single Registrant TLD or Single Registrant/Single User TLD. In addition, not-for-profit organizations should not be prohibited from acquiring the services of an ICANN registrar to fulfill registry services, as this will unduly limit the pool of qualified registry service providers for consideration.</li> </ul>
2	Evaluation Procedures	<ul style="list-style-type: none"> <li>ICANN should provide greater detail and instruction regarding how to prepare for the technical requirements associated with the new gTLD application and process, and should provide education and training for organizations such as not-for-profit organizations that are new to ICANN and its activities.</li> <li>String Similarity Review should include aural (sound) and commercial impression (meaning) as well as visual similarity; an Extended Review should also be available following the String Similarity Review process, at the Applicant's request.</li> <li>"Average, reasonable Internet user" should be more clearly defined.</li> <li>Panelists reviewing for string similarity should include both trademark practitioners and personnel experienced in the workings of not-for-profit organizations.</li> </ul>
3	Dispute Resolution Procedures	<ul style="list-style-type: none"> <li>Participation in dispute resolution procedures during the new gTLD application process requires an allocation of human and financial resources that are particularly burdensome to not-for-profit organizations such as Red Cross, increasing the likelihood of these organizations being subject to DNS abuses by bad actors.</li> <li>When selecting the one Independent Objector (IO), ICANN should consider the candidates' experience with not-for-profit organizations such as Red Cross and have sensitivity related to the unique way these organizations use the Internet..</li> <li>Factors considered by panels deciding legal rights objections should be clarified, and should not provide a "how to" guide for formulating arguments against accusations of</li> </ul>

MODULE	TITLE	ISSUES OF CONCERN
		<p>infringement.</p> <ul style="list-style-type: none"> <li>• “Experts” appointed to dispute resolution panels should include individuals well versed in the operations and specific needs of not-for-profit organizations such as Red Cross and have sensitivity related to the unique way these organizations use the Internet..</li> <li>• Fees relating to the filing and adjudication of objections should be determined as soon as possible.</li> </ul>
4	String Contention	<ul style="list-style-type: none"> <li>• The auction procedure will likely place not-for-profit organizations with limited budgets, such as Red Cross, at a distinct disadvantage in acquiring new gTLDs that are desired by two or more parties.</li> </ul>
5	Transition to Delegation	<ul style="list-style-type: none"> <li>• Language preceding the draft Registry Agreement speaks to commercial purposes envisioned for new gTLDs and does not take into account the way in which some new registries may be used, such as to further a not-for-profit mission.</li> <li>• Participation in post-delegation dispute resolution procedures requires an allocation of human and financial that are particularly burdensome to not-for-profit organizations such as Red Cross, increasing the likelihood of Red Cross being subject to DNS abuses by bad actors.</li> <li>• Thick WHOIS, as recommended by the IRT, should be required by the Registry Agreement.</li> <li>• The URS procedure does not truly provide a rapid or efficient means of disabling infringing domain names, and should be shortened and simplified.</li> <li>• By requiring Complainants’ trademarks be registered in jurisdictions requiring “substantive review,” ICANN is making the eligibility requirements for the URS unreasonably high.</li> <li>• Marks included in the Trademark Clearinghouse should generally include the text elements of stylized marks and marks containing both text and design elements, rather than only word marks.</li> <li>• Requiring “substantive” review for marks belonging to Registrants participating in Sunrise services eliminates many rightsholders.</li> <li>• “Identical” match for the Trademark Clearinghouse should</li> </ul>

MODULE	TITLE	ISSUES OF CONCERN
		<p>be expanded slightly to avoid numerous potential instances of typosquatting.</p> <ul style="list-style-type: none"> <li>• Registries should be required to offer both a Sunrise service and a Trademark Claims service, not only one or the other.</li> <li>• Standards for filing a PDDRP should be more reasonable, and expected elements of a PDDRP Complaint should be described in greater detail.</li> <li>• Trademarks should not be required to have undergone “substantive review” to be eligible to be the subject of a PDDRP Complaint.</li> <li>• The Expert Panel adjudicating a PDDRP should have the discretion to delete domain name registrations in certain cases, and decisions provided by a PDDRP Expert Panel should be considered final in most cases.</li> <li>• The RRDRP should be available to any interested party to enforce the requirements agreed to in a community tld in its registry agreement.</li> <li>• Decisions provided by a RRDRP Expert Panel should be considered final in most cases, without ICANN setting aside the decision in favor of a different determination.</li> <li>• The discretion of ICANN to add experts to RRDRP proceedings, in addition to the already-appointed Expert Panel, should be eliminated or greatly curtailed to extraordinary cases.</li> <li>• The Expert Panel adjudicating an RRDRP should have the discretion to delete, transfer or suspend domain name registrations in certain cases.</li> <li>• ICANN should reveal and detail its <u>actual</u> annual costs for maintaining each registry and should consider a pricing structure for not-for-profit organizations such as Red Cross that will allow ICANN to recover its actual costs without imposing additional overhead on the not-for-profit registry operators.</li> <li>• Fees relating to the Trademark Clearinghouse and URS procedure should be determined as soon as possible so that organizations such as Red Cross that must prepare budgets far in advance will be able to budget adequately for the new gTLD process.</li> </ul>

MODULE	TITLE	ISSUES OF CONCERN
		<ul style="list-style-type: none"> <li>• ICANN should provide greater detail and instruction regarding the technical requirements associated with operating and maintaining a registry, and should provide education and training for not-for-profit organizations such as Red Cross to ensure that these organizations can participate fully in the new gTLD program.</li> <li>• Evaluation should take into account the different financial picture and sources of funding for not-for-profit organizations such as Red Cross when reviewing whether an organization has adequate funding for three years of registry operations.</li> </ul>
N/A	Glossary	<ul style="list-style-type: none"> <li>• Definitions are often circular and do not adequately describe technical terms for those new to ICANN processes.</li> </ul>

## II. Threats to the Security and Stability of the Internet

### A. **DNS Abuses (Modules 2, 3 and 5)**

Bad actors in the domain name space, such as cybersquatters and others registering domain names in bad faith, have existed for many years in the existing domain name space. The new gTLDs will present numerous and increased opportunities for these bad actors to continue and expand their bad faith behavior. This behavior will result in a great deal of confusion in the marketplace, as well as opportunities for fraud.

The possibility of such confusion and fraud is particularly devastating for not-for-profit organizations such as Red Cross. As indicated above, Red Cross relies on the Internet to distribute information that is educational and even potentially lifesaving. The existence of bad faith Registrants who may be committing fraud in their domain name registrations greatly increases the likelihood that Red Cross membership will be misled in a manner that is both financially devastating and dangerous. For example, the bad faith registration of a new gTLD or a domain in the second level that uses, incorporates, or is confusingly similar to the Red Cross mark, might result in donations being collected in a fraudulent manner, an unauthorized blood drive being conducted, or physically dangerous information being distributed. These bad faith uses might not only erode the public's trust in Red Cross, but would also threaten the health and safety of the public.

Commercial stakeholders, even large companies, have already expressed concerns that enforcement, both within the new gTLDs themselves and with the corresponding second-level domains, will require an inordinate and unmanageable level of resources. Given that not-for-profit organizations such as Red Cross have even more limited resources, and that their resources are largely earmarked for serving their membership or the public rather than for administrative overhead, these concerns are further heightened for Red Cross. Given the provisions for new gTLDs as currently detailed in DAGv4, it is likely that it will be extremely challenging, if not impossible, for Red Cross to

gather the resources necessary to monitor and address all of the examples of unauthorized use and infringement that would be potentially devastating to the Red Cross' ability to administer its critical mission.

In order to reduce the number of potential bad faith applications at the registry level that progress through the new gTLD application process, we recommend that the String Similarity Review, as discussed in Section 2.1.1.1 of **Module 2** of DAGv4, include aural (sound) and commercial impression (meaning), as well as visual similarity. This should deter potential applicants who wish to capitalize upon other organizations' names by altering only the visual element of a proposed string. We also recommend that panelists reviewing strings include trademark practitioners who can make the necessary distinctions regarding visual, aural, and commercial similarities, as well as personnel familiar with the specific needs of not-for-profit organizations such as Red Cross. In the event that a string is judged to be too similar to an existing or applied-for string, we recommend that an Extended Review be made available to applicants, similar to other extended review processes available during other aspects of the application review process. Finally, we request that further clarification be provided as to what comprises an "average, reasonable Internet User," as described in Section 2.1.1.2.

As described in **Module 3** of DAGv4, Red Cross appreciates the appointment of an Independent Objector ("IO") who can file Morality and Public Order objections. As there is only one IO who is appointed by ICANN, we urge ICANN to consider, among other criteria, the candidates' experience with not-for-profit organizations such as Red Cross, preferably on an international basis. In addition, we urge the IO to carefully consider comments submitted from not-for-profit organizations such as Red Cross who may not have the funding or means to submit formal objections to every new gTLD application of concern, thus needing to rely on the IO to lodge such objections.

ICANN is already anticipating that the application process for and existence of new gTLDs will increase users' needs for enforcement mechanisms, as detailed in **Module 3** of DAGv4, Dispute Resolution Procedures, and in the post-delegation processes described in the appendices to the draft Registry Agreement included in **Module 5**, Transition to Delegation. However, participation in these mechanisms requires a significant investment of both time and financial resources, both of which are at a premium for Red Cross, which needs to devote the vast majority of its resources to directly serving the public. Thus, we urge ICANN to consider including in the Applicant Guidebook mechanisms that allow not-for-profit organizations such as Red Cross to conduct enforcement activities in a more efficient and cost-effective manner.

Finally, we are concerned that, in **Module 5**, the Registry Agreement is set out in draft for review with goal of increased competition and choice for consumers in a stable, secure DNS. While Red Cross applauds ICANN's commitment to a stable, secure DNS, overall, this language highlights what appear to be solely commercial purposes envisioned for gTLDs, not taking into account the vital and important role played by not-for-profit organizations such as Red Cross and their non commercial public service missions. We respectfully request that ICANN consider the overall public importance of not-for-profit organizations when developing the next Applicant Guidebook.

## **B. WHOIS Concerns (Module 5)**

Red Cross strongly urges ICANN to reconsider implementing the recommended Thick WHOIS model, as detailed in the Final Report of the IRT. In **Module 5**, DAGv4 requires registry operators to provide a publicly available WHOIS service, but fails to emphasize the importance of providing accurate and accessible registry information. This seems counter to the mission of ICANN.

The broad accessibility of WHOIS information is critical to timely, efficiently, and cost-effectively addressing fraudulent or bad faith uses of the Internet domain. Without the accessibility of accurate and verifiable Registrant information, reporting and addressing domain name infringement is much more time-consuming and expensive. Once again, not-for-profit organizations such as Red Cross usually operate with limited administrative budgets, as well as limited human resources, and having to track down accurate Registrant information from multiple sources would create an undue burden on Red Cross. Thus, we recommend that registries operating new gTLDs be **required** to provide Thick WHOIS information, and that a Thick WHOIS should not merely be a “best practice.” In addition, we recommend that ICANN educate the registries regarding the importance of providing reliable Registrant contact information that is available to users in a fair manner.

### **C. Trademark Issues for New gTLDs**

First, Red Cross applauds the inclusion of some trademark rights protection mechanisms, including the pre-delegation Legal Rights Objections and the post-delegation Trademark Clearinghouse and URS, in DAGv4. However, we believe that ICANN should consider the specific trademark-related concerns of not-for-profit organizations such as Red Cross, as indicated below. The ability of Red Cross to protect its intellectual property rights in the new gTLD space is critical to ensuring that it is able to distribute its educational, lifesaving, and other beneficial information, as well as to conduct fundraising activities, in a reliable manner that is deemed trustworthy by the communities it serves.

#### **1. Legal Rights Objections (Module 3)**

Section 3.4.2 of DAGv4 presents the criteria by which Legal Rights Objections will be evaluated. We have some concerns about the factors laid out and how they will be applied.

In particular, the third factor discusses the “relevant sector of the public” and its recognition of the “sign”. What standards are to be used to make this determination, and how will the panelists determine who the “relevant sector of the public” is for a particular mark or application? Will the Applicant be required to submit evidence and arguments with regard to this factor or will the panel conduct its own research to try to ascertain these facts? We request that ICANN clarify these points with specificity, as they will affect the allocation of time, human, financial and other resources necessary to devote to participation in a Legal Rights proceeding.

Regarding factor four, how will “intent” be assessed? We request that ICANN clarify how this will be determined.



There are four factors laid out, namely five through eight, which appear to provide defenses regarding the potential use of a third party's mark by the Applicant. These factors seem to provide a "how to" guide for what Applicants need to do begin doing now, before the new gTLDs are opened for application, to argue they are not infringing a third party's mark. We urge ICANN to rephrase these factors, emphasizing the penalties associated with infringement and bad faith use.

Finally, we urge ICANN to ensure that the "experts" appointed to the dispute resolution panels include experts who have experience with and knowledge of the workings of not-for-profit organizations such as Red Cross. It is important that the panels not be biased, even unintentionally, against not-for-profit organizations due to their different organizational structures, budgetary needs, and the unique ways trademarks are used to further mission objectives.

## 2. Uniform Rapid Suspension System (URS) (**Module 5**)

The URS is, according to ICANN, designed to provide an expedited procedure to disable infringing domain names in instances of clear fraud and abuse. However, in its current form, as detailed in an appendix to the draft Registry Agreement included in Module 5 of DAGv4, the URS provides neither adequate expediency nor an adequate remedy. Indeed, according to the current timeline, a URS proceeding may take as long, or longer, than a UDRP proceeding.

Our first concern with the proposed URS procedure is that few would-be complainants will actually meet the eligibility requirements for filing a URS complaint. Namely, the requirements state that the complainant must hold a valid registration, for a mark that is identical or confusingly similar to the domain name at issue, issued by a jurisdiction that conducts a substantive review of trademark applications. Many jurisdictions do not conduct a substantive review before granting a trademark registration. This provision is especially troubling because the procedure does not allow for any other form of validation of a mark. For example, many not-for-profit organizations do not have the financial resources to obtain trademark registrations even though their trademarks are well known by the public and the validity of their rights have been established or confirmed by other means. We recommend that the eligibility requirements be broadened to make the URS a more broadly accessible remedy for rights holders who find instances of egregious trademark infringement.

The proposed length of a URS complaint, 5,000 words or 20 pages (plus exhibits), does not lend itself to any form of expediency. Drafting a complaint of this length would likely require the extensive use of legal counsel. From both a staffing and budgeting perspective, this prospect is challenging for Red Cross. Instead, we recommend that ICANN develop simple forms that can be used for the Complaint, as well as for the Answer and Decision, with a requirement that complaints that are too lengthy or complex to make use of such a form be instead filed as UDRP Complaints or that the complainant seek other remedies. In addition to reducing the administrative burden on the complainant, the use of forms would likely expedite the remainder of the URS process and perhaps impact the rationale for the filing fee.

Next, we recommend that time frames for elements of the process be shortened so as to further distinguish the URS from a UDRP. First, we recommend that the Registrant be granted 14, rather than 20, days to file an Answer. With the use of a form for the Answer, rather than a lengthy response with exhibits, this time frame should not place an undue burden on any Registrant and could in fact, assist and provide guidance for Registrants that are going to file an Answer. In addition, the examiner should be required to render a decision within seven (7) business days, rather than being allowed up to 14 days, with a goal and best practice of providing the Answer within three (3) days. Once again, the use of a form Decision should greatly increase the ability of examiners to provide their Decisions in a rapid manner.

Next, Red Cross offers that a two-year period for a defaulting Registrant to be allowed to reopen the proceeding is much too long, and greatly reduces the effectiveness of the remedy. Trademark rights holders who have pursued the URS should be entitled to a much more rapid final resolution to their infringement concerns. Instead, we recommend that the window be reduced to 90 days from the issuance of the Notice of Default.

Finally, we recommend that the window in which to file an appeal after the issuance of a Decision be reduced to 14 days, from the current 20 days. Again, this is to differentiate the URS from the UDRP and to ensure that it is truly useful as a rapid means of obtaining relief from egregious domain name infringement.

### 3. Trademark Clearinghouse (**Module 5**)

Red Cross hereby offer several concerns regarding the proposed adoption of a Trademark Clearinghouse, as detailed in an appendix to the draft Registry Agreement included in Module 5 of DAGv4.

Our next comment concerns the statement that only "text" marks are to be included in the Trademark Clearinghouse. We recommend that the text elements of marks consisting of stylized text, or designs plus text, also be included in the Clearinghouse, provided that the mark is not a generic term and that the text is presented in a prominent manner as compared with the design element. Most not-for-profit organizations, including Red Cross, have registered trademark portfolios that are smaller than their corporate counterparts, and often choose to register only a few marks for budgetary reasons, although many other marks may be in use. Registrations may include a stylized mark, or a mark that includes a design, rather than the word mark alone. Not-for-profit organizations, including Red Cross, should have the same opportunities to protect their intellectual property through participation in the Clearinghouse, and should not be penalized due to an economical filing strategy.

Next, we are concerned that the proposed Sunrise services are available only for marks that have been reviewed on "substantive" grounds. We recommend that ICANN provide further clarification regarding what constitutes "substantive" review and what validation processes will be required for marks registered in jurisdictions that do not require a "substantive" review. Without clarifying and potentially changing this requirement, many trademark Registrants, such as those who have registered marks only in the CTM, may be ineligible for

participation in the Sunrise services. If they are ineligible to participate, not-for-profit organizations will be placed at a significant disadvantage in terms of both the registration of domains in the new gTLDs and enforcement of their marks in this space. Although this is a greater concern for other not-for-profit organizations that operate outside the United States, Red Cross would like to ensure that these organizations are not disadvantaged during the Sunrise process, as a disadvantage during this process may potentially result in greater risk of infringement later.

Additionally, Red Cross would like to request at least a slight expansion of the "identical" match that currently applies to Trademark Claims service notices. At a minimum, we recommend that the match include the plural forms of domain names containing the mark, as well as domain names that contain the exact mark in its entirety. Without these inclusions, domains registered in the new gTLDs will be ripe for typosquatting, creating a particular burden on not-for-profit organizations such as Red Cross with limited resources to address unauthorized use and infringement.

Finally, Red Cross is concerned that registries will be required to offer either a Sunrise service or a Trademark Claims service, but not both. Our concern is that most or all registries are likely to pick the Sunrise service, which will probably result in a revenue stream for the registries. However, not-for-profit organizations such as Red Cross that do not have the financial resources to register numerous domains may not be able to take part in all (or any) of the Sunrise services offered by the registries. Thus, we recommend that registries be required to offer both a Sunrise service and a Trademark Claims service in order to provide some level of continuous trademark protection in each new gTLD. We also recommend that ICANN consider suggesting or requiring alternative domain name pricing for not-for-profit Registrants such as Red Cross.

### **III. ICANN Community Compliance**

#### **A. Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) (Module 5)**

Red Cross, like most not-for-profit organizations, is, in general, a strong advocate for alternative dispute resolution procedures that offer more affordable and expedient means to resolve conflicts. Often, because not-for-profit organizations such as Red Cross have limited financial resources, alternative dispute resolution mechanisms provide a realistic avenue for resolving disputes. Therefore, Red Cross, a stewards of funds donated by individuals, communities and corporations, highly values the opportunity for the PDDRP to ultimately resolve registry disputes without the expense and time investment required for civil litigation. However, Red Cross recommends several improvements to the current proposal, as detailed in an appendix to the draft Registry Agreement included in **Module 5** of DAGv4, to allow it to function effectively as an alternative to civil litigation.

##### **1. Standards**

As currently drafted, the PDDRP requires Complainants to prove its allegations by “clear and convincing evidence.” We believe this standard should instead be replaced with the “preponderance of the evidence” standard that is required in most civil actions in the United States. Again, in order for the PDDRP to be an effective alternative dispute resolution procedure, it should be more attractive to Complainants than civil litigation, and the standard required to obtain relief is a critical component for the potential Complainant when analyzing its options. In addition, we respectfully point out that the same standard we are recommending is used in the current draft of the Registry Restrictions Dispute Resolution Procedure (RRDRP), and therefore we see no reason why a higher standard should be required in the present procedure.

In addition, we recommend ICANN reconsider the current requirement that Complainants must prove that a registry have a bad faith “intent to profit” for disputes with regard to second-level domain names. Again, in order for the PDDRP to be successful, it must be a reasonable alternative to other procedures available to Complainants. This current standard is higher than the standard required in the ICANN UDRP, which requires proof of a Registrant's bad faith, but there is no similar requirement to show a specific “intent to profit.” Our main concern is that this standard will be extremely difficult for Complainants to meet in many cases, thereby undermining the efficacy of the PDDRP as currently drafted.

## 2. The Complaint

The DAGv4 currently provides only a limited description of the elements required for the complaint, as well as the evidence that would be required to support a complaint filed against a registry using the PDDRP. We respectfully request a more detailed description of both the elements required for the complaint, and the evidence required to support it.

Furthermore, in order to increase the effectiveness of the PDDRP, we recommend that a mechanism be added that will provide for Complainants who file similar complaints against the same registry to request the matters be joined into a single proceeding. This would prevent multiple Complainants from having to lodge nearly identical complaints against a registry, and proceed with separate proceedings. The creation of a joinder of Complainants would greatly increase the efficiency and effectiveness of the PDDRP.

## 3. Threshold Review

As stated previously, many not-for-profit organizations have limited budgets and resources to seek registration of all marks in its portfolio. Therefore, if an organization even has the resources to apply for a trademark registration, sometimes not-for-profit organizations take advantage of multi-jurisdictional filing systems that do not require “substantive examination.” We are therefore concerned about the current draft of the PDDRP, as it requires that the mark at issue be registered in a jurisdiction that administers a “substantive examination” before registration. For purposes of the PDDRP, a registration that is valid in the eyes of the sovereign nation that granted it should be a valid registration. In addition, under trademark law globally, there is no single standard for what

constitutes “substantive examination” – and we see no effort in the current draft to properly define “substantive examination.” We recommend the PDDRP be amended to accept trademark registrations from any valid sovereign nation as a basis for a PDDRP complaint. Again, while this is a greater concern for not-for-profit organizations operating outside the United States, Red Cross, strongly supports policies that generally protect the interests of not-for-profit organizations in the new gTLD program.

#### 4. Remedy

The current PDDRP prohibits the Expert Panel from recommending that an infringing domain name be deleted, transferred or suspended. While in general we support this position, we recommend where there is demonstrable connection between the registry and the Registrant of an infringing domain, the Expert Panel should be given discretion to delete the domain name registrations at issue. This would include cases where the Registrant of the domains is the registry, or where a relationship can be shown between the Registrant and the registry at issue. This would prevent the domains in these instances from remaining with the registrar, making the PDDRP more effective in these cases.

#### 5. Expert Panel Determination

We believe that the Panels Determination should be final in order to increase the predictability and reliability of the PDDRP as an alternative to civil litigation. The current PDDRP as drafted allows for ICANN to make its own determination of what remedies to impose, and thereby treating the Expert Panel’s conclusion as merely advisory. We recommend that ICANN’s discretion be limited to cases where the decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. Otherwise, we suggest that the Registry Agreement include a provision that parties must abide by the decision of an Expert Panel in the case of a PDDRP.

### **B. Registry Restrictions Dispute Resolution Procedure (RRDRP) (Module 5)**

As stated above, not-for-profit organizations such as Red Cross are generally in favor of alternative dispute resolution mechanisms that save time, money and resources to resolve disputes in a fair and effective manner. While we applaud the efforts to include such alternative dispute procedures in the DAGv4, similar to our comments on the PDDRP, the RRDRP, as detailed in an appendix to the draft Registry Agreement included in **Module 5** of DAGv4, also requires some revisions to obtain the goal of being an attractive alternative for potential Complainants to civil court actions.

#### 1. Standing

As not-for-profit organizations such as Red Cross generally have broad concerns about the safety and stability of the Internet, we believe that mechanisms such as the RRDRP should be available to any interested party to enforce the requirements agreed to in a community TLD in its registry agreement. The current draft of the RRDRP uses the standards of “defined communities” in Section 5 and “strong association” in Section 6. We believe both these

requirements may preclude legitimate RRDRP claimants from having standing who are outside these definitions.

## 2. Expert Panel Determination

As with the PDDRP, we believe that the Panels Determination should be final in order to increase the predictability and reliability of the RRDRP. The current RRDRP, similar to the PDDRP, allows for ICANN to make its own determination of what remedies to impose, and thereby treating the Expert Panel's conclusion as merely advisory. As recommended above for the PDDRP, we recommend that ICANN's discretion be limited to cases where the decision contradicts or falls outside the scope of the substantive terms of its Registry Agreements. Otherwise, the unfettered discretion of ICANN to go against the Expert Panel decision undermines the utility of the RRDRP, and goes against the ability of all organizations, including not-for-profit organizations such as Red Cross, to truly benefit for the RRDRP.

## 3. Experts

Furthermore, as currently presented, the RRDRP allows for the use of third-party experts at the sole discretion of the Expert Panel, with the cost being passed on to the parties. The need for such experts seems to be eradicated by the experts appointed to the Expert Panel, and adds potentially large unknown costs to the RRDRP. We believe the discretion to add experts should be eliminated or greatly curtailed to extraordinary cases.

## 4. Remedy

As with the PDDRP, we recommend that where the registry is the Registrant, or where there is a demonstrable relationship between the registry and the Registrant, then the Expert Panel should have the discretion to delete, transfer or suspend the domains at issue as a remedy.

# IV. **Budgetary Issues and Concerns (Modules 1, 3, 4, 5)**

Currently, out of every dollar that Red Cross spends, 92 cents is spent on its humanitarian services and programs. As previously stated, one of the particular concerns of not-for-profit organizations such as Red Cross is that costs relating to the new gTLD Program, including both application-related costs and costs relating to the enforcement efforts that Red Cross will need to implement, will be prohibitive. Red Cross is highly concerned that the high cost of the new gTLD program could impact Red Cross' ability to fund its mission-related activities. In addition, Red Cross needs to be able to continue to assure its donors that funds contributed to Red Cross are largely earmarked specifically for mission-related activities rather than for increased administrative overhead. Some of the cost issues of greatest concern are as follows. We strongly encourage ICANN to consider that not-for-profit organizations may use a proposed new gTLD for internal business purposes under a model that is different from a commercial, profit driven new gTLD.

First, Red Cross is concerned that the \$185,000 application fee, as listed in **Module 1**, places the registration of a new gTLD out of the reach of most not-for-profit

organizations. At a minimum, this fee represents resources that must be allocated from funds that Red Cross would otherwise spend on directly serving the public. We request that ICANN provide greater transparency regarding its actual costs relating to the application process, and then consider setting a lower cost for not-for-profit organizations such as Red Cross. We agree that it is fair for ICANN to be able to recover its actual costs relating to the new gTLD application process from all Applicants, including not-for-profit organizations; however, we emphasize that, for not-for-profit organizations, the fees should reflect ICANN's actual costs for direct administration of the application process and should not include overhead for other ICANN activities.

We note that, although the \$185,000 fee is, in itself, prohibitive for many not-for-profit organizations, there are many additional potential costs for which organizations need to budget when anticipating the registration of a new gTLD. First, the fees for an extended evaluation (also described in Module 1), if required for an Applicant to continue the application process, may add considerably to the application costs. Next, an Applicant will need to budget to defend against any objections that are filed, as briefly discussed in Module 1 and as discussed in greater detail in Module 3). We note that, in most cases, parties participating in an objection need to pay the entire anticipated fee for the objection proceeding up front. We recommend capping the fees required, especially for not-for-profit organizations such as Red Cross; if an overall fee cap is not possible due the variables that may influence the final cost of an objection proceeding, at a minimum, we recommend capping the initial fees that must be paid as a "deposit" on the proceeding.

Next, we are concerned with the \$25,000 annual registry fee that is to be paid to ICANN, as described in Module 5. As with the registration fee, we request that ICANN provide greater detail as to its costs relating to ongoing maintenance of a registry, and consider offering a reduced fee for not-for-profit organizations such as Red Cross that recovers ICANN's actual administrative costs without imposing additional overhead, especially considering when a new gTLD is used to further non-commercial mission objectives.

In addition, we have significant concerns regarding the auction procedure, as described in Module 4, which is currently the only alternative for standard applications that are involved in string contention when the parties cannot resolve the dispute amongst themselves. Due to budgetary restrictions, it is highly unlikely that a not-for-profit organization such as Red Cross would be the highest bidder in an auction that also includes parties with commercial interests. Without having any sense of what the winning bid might be in such an auction, budgeting for the possibility of an auction is nearly impossible. However, even if funds were available in an absolute sense, placing a high bid in such an auction could be inconsistent with furthering mission-related services. This process thus places not-for-profits that face string contention at a distinct disadvantage. One solution is for ICANN to offer a third application category for not-for-profit organizations, in addition to standard and community priority applications, with consideration given to the public importance of the not-for-profit's mission when the string is in contention.

Finally, we are especially concerned that many of the fees relating to the new gTLDs are yet to be determined. For example, exact fees relating to the filing and adjudication of objections (Module 3) are only estimated at this time, as are fees relating to the Trademark Clearinghouse and URS procedure (Module 5). Red Cross urges ICANN to keep in mind that the budgets of most not-for-profit organizations, including Red Cross

are approved well in advance of their effective dates, by their Boards of Directors. The current lack of concrete information regarding costs renders the budgeting process extremely difficult. Red Cross urges ICANN to finalize these costs well in advance of the opening of the application period for new gTLDs so that Red Cross will have the opportunity to budget appropriately. Please note that the budgeting needs for not-for-profit organizations such as Red Cross include not only application-related fees, but costs relating to potential objections and URS proceedings that may need to be filed against third parties, as well as registration in the Trademark Clearinghouse in order to protect intellectual property rights.

On a final note, in order to ensure security and stability, Red Cross applauds ICANN's requirement that Applicants provide documentation of their ability to fund registry operations for a period of three years, as described in **Module 5**. However, we also urge the evaluation to take into account the purpose of the proposed new registry (for example, a single user registry intended for internal business purposes) and the often different financial situations for not-for-profit organizations such as Red Cross compared to commercial enterprises when evaluating funding or sources of funding.

In summary, we request that, when evaluating the needs of different types of organizations, ICANN considers that "fair" does not always mean "equal" in terms of costs. We urge ICANN to consider a two-tiered cost structure in order to separate commercial uses of the new gTLDs from the charitable, humanitarian, informational, educational, and lifesaving missions executed by not-for-profit organizations using the Internet.

#### V. **Accessibility, Awareness, and Participation (Modules 1, 2, 5, and Glossary)**

As one of the organizations leading the initiative to increase accessibility, awareness, and participation of not-for-profit organizations in ICANN, we also submit these comments with the goal of communicating to ICANN that the processes and procedures relating to the new gTLD program are accessible to and available to not-for-profit organizations so that they are not excluded or negatively impacted from the process.

Overall, Red Cross is concerned that DAGv4 contains a great deal of technical jargon and terminology that is not carefully explained, thus making the information inaccessible to organizations that are new to ICANN processes. The **Glossary** provided at the conclusion of DAGv4 often defines terms in a circular manner. For example, the definition of a Community-based TLD is, "A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community." However, no specific explanation is provided as to what comprises a "community."

The application process as a whole will likely be difficult for not-for-profit organizations that are just now getting organized to engage as a constituency in ICANN. For example, **Module 1**, "Introduction to the New gTLD Application Process," states that Applicants are not allowed to supplement their applications after submission. This does not allow for the learning curve that may be necessary for not-for-profit organizations to learn the rules and procedures required in a timely manner for the application process.

Another concern of Red Cross is the provision in **Module 1** that if too many applications are made for new gTLDs, applications will be selected randomly for batch processing.



Red Cross urges ICANN to consider prioritizing applications based on public interest served by the new gTLD (i.e., prioritizing applications for organizations that will use its new gTLD to deliver non-commercial services for the benefit of the public good) rather than pure economic or commercial purposes.

In ***Module 1***, the Red Cross also has significant concerns with Section 1.2.1, "*Eligibility: Restrictions on Registrar Cross-Ownership*". Under DAGv4, "Applications will not be considered from any of the following: (1) ICANN-accredited registrars or their Affiliates; (2) Entities controlling or Beneficially Owning more than 2% of any class of securities of an ICANN- accredited registrar or any of its Affiliates; or (3) Entities where 2% or more of voting securities are beneficially owned by an ICANN accredited registrar or any of its Affiliates. Further, applications where the applicant has engaged an ICANN-accredited registrar, reseller, or any other form of distributor or any of their Affiliates (or any person or entity acting on their behalf) to provide any registry services for the TLD will not be approved."

Many non commercial entities are considering using a new gTLD, if at all, as a Single Registrant TLD or as a Single Registrant Single user TLD. The Single Registrant TLD or Single Registrant/Single User TLD model is very different from other proposed models for new gTLDs, where domains will be sold to the public similar to how domains are sold in the .com, .net, .org environment, etc. For some, owning a new gTLD could be an opportunity to create a safe, secure and controlled environment to conduct its operations and to execute its public service mission. Second-level domain names would be assigned to employees, volunteers, departments or agents of the organization. Registries under these models should be allowed to control an ICANN-accredited registrar solely for the purpose of sponsoring registrations in its new gTLD. These registries should not be required to use an ICANN-accredited registrar for registration of second-level domain names within the new gTLD, since this requirement is contrary to the purposes of the new gTLD under this model. We propose that ICANN offer an exception to the limitations on vertical integration/cross ownership that provide for a Single Registrant TLD or Single Registrant/Single User TLD.

Also, it is likely that many applicants for new gTLDs will be registry owners and will need the assistance of a qualified registry services provider. Many of these providers may also be an ICANN-accredited registrar, reseller, or distributor. Limiting a not-for-profit organization from acquiring the services of an ICANN registrar to fulfill registry services limits the pool of qualified registry service providers for consideration.

DAGv4 contains a fair amount of detail regarding the technical requirements for operating a new gTLD, especially in ***Modules 2 and 5***; these details are likely to be daunting for not-for-profit organizations, such as Red Cross, that have not previously operated a registry. ICANN states explicitly in its new gTLD application that it will answer questions relating to the application itself, but that it will not provide technical support, legal services, or any other advice that not-for-profits such as Red Cross might need. While we agree that it is not the responsibility of ICANN to provide legal advice to third parties, we would hope that ICANN would consider offering advice to the community about technical aspects related to registry operations. We recommend that ICANN consider improving its outreach and education services, especially to not-for-profit organizations such as Red Cross, to ensure that its user community is able to navigate the process effectively. In our view, such outreach should begin immediately, but should especially be increased once the final Applicant Guidebook is released so

that parties seeking guidance on the new gTLD process will have access to the final policy information and have the ability to timely ask questions so that they will not be disadvantaged in the process .


We would recommend that the information provided during these outreach efforts include both information on the application process, as well as information of interest to those not applying for new gTLDs, such as the objection procedures and rights protection mechanisms. We strongly recommend that ICANN conduct outreach in all of its five regions to ensure that the new gTLDs are truly accessible on a global scale, and that ICANN provide live, in-person seminars that are open to the public, rather than only posting educational information on the ICANN website or hosting webinars.

Overall, we believe that providing such outreach would likely benefit ICANN as well by increasing awareness of and interest in the new gTLD program.

## **VI. Conclusion**

Thank you for considering our comments on these important issues relating to Version 4 of the Draft Applicant Guidebook. We hope ICANN will consider these comments when preparing the final version of the Applicant Guidebook and the particular needs of not-for-profit organizations such as Red Cross, that use the Internet to deliver important services to members and the public and who may consider using a new gTLD to further non-commercial mission objectives for internal business purposes. We welcome further discussions about the above and are available should you have any questions regarding our submission.

Sincerely,



Debra Y. Hughes, Esq.  
Senior Counsel  
American Red Cross