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Domain Names

ICANN's New gTLD Registration Now Open: Some Processes Updated, Others Unresolved

By AMY E. BIVINS

The Internet Corporation for Assigned Names and Numbers Jan. 12 opened the widely publicized application window for creating new generic top-level domain names, giving assurances to U.S. regulators that the program satisfies all relevant requirements under consumer protection and antitrust laws as well as ICANN's separate contractual obligations to the Department of Commerce.

ICANN posted an updated applicant guidebook—which contains the terms and conditions for the program—when the application window opened.

“While these changes are mostly minor, the timing of the updates adds another layer of potential challenges for applicants navigating an already complex process.”

BRIAN J. WINTERFELDT, STEPTOE & JOHNSON LLP

The new guidebook provides updates on what types of information must be included in the application, background screening processes, solidification of a significantly reduced amount required for the continued operations instrument—a change that may reduce barriers to entry in the new gTLD program—among other things.

Several close watchers of ICANN's policymaking processes, interviewed by Bloomberg BNA, said that the changes to the guidebook announced on the eve of launch are relatively minor, but important for potential applicants to be aware of.

Guidebook updates could increase administrative and documentation requirements associated with filing an application and give members of ICANN's government advisory committee more leeway to weigh in on applications they find troublesome, but they could also reduce financial barriers to applying for a new gTLD.

Other key changes to the guidebook include:

- added information about “batching” procedures if applications significantly exceed 500;

- clarification on the GAC's procedures and grounds for advising the ICANN board on objections to new gTLDs;

- mechanisms for needy applicants to seek financial assistance;

- identification of relevant evaluation panels for each of the four formal objection categories;

- a requirement that, if an applicant wants to act as a registrar, it must perform registrar services through a legal entity separate from the registry operator; and

- an acknowledgement that ICANN will handle applicants' personal information in accordance with its gTLD program privacy statement.

However, many details remain to be ironed out, including what the anticipated “secondary time stamp” batching procedure will look like, and who will perform the trademark claims services and what the specific processes for those rights protection mechanisms will be (17 ECLR 84, 1/11/12).

The deadline for users to sign up and begin their applications in the online system is March 29. Applications must be complete by April 12.

Government Views Could Be Decisive. The guidebook gives the GAC substantial leeway when weighing in on applications that one or more governments find troublesome.

“ICANN's latest guidebook makes it clear that governments can torpedo a TLD application that raises cultural sensitivities or fails to respect national laws,” Steve DelBianco, executive director of NetChoice, told Bloomberg BNA.

“Applicants for a TLD like .muslim or .bank should come to terms with relevant governments before venturing into those waters,” DelBianco cautioned.

The September version of the guidebook said that:

[The GAC has the option to provide] advice that indicates that some governments are concerned about a particular application. Such advice will be passed on to the applicant but will not create the presumption that the application should be denied, and such advice would not require the Board to undertake the process for attempting to find a mutually acceptable solution with the GAC should the application be approved. Note that in any case, that the Board will take seriously any other advice that GAC might provide and will consider entering into dialogue with the GAC to understand the scope of the concerns expressed.

The updated guidebook, by contrast, says that:

[The GAC may advise] ICANN that there are concerns about a particular application ‘dot-example.’ The ICANN Board is expected to enter into dialogue with the GAC to

understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

The change is slight, but could be interpreted to mean that any concerns—even if they are only concerns of one government—would require the ICANN board to go through the process of looking and deliberating the objection, Konstantinos Komaitis, chair of ICANN non-commercial users’ constituency, said.

“If this is the case, this provision changes the rules of the game substantially and creates a much more bureaucratic process[.]” Komaitis added.

“I find this rule, if I interpret it correctly, to operate contrary to the collectiveness that the GAC needs to demonstrate (and has so far demonstrated) as a body within ICANN and I think it provides room for individual politics to come into play, when so far the GAC has operated on the basis of ‘one voice’[.]” Komaitis remarked.

Reduced COI, Help for Needy Applicants. The updated guidebook solidifies a significantly reduced amount required for the Continued Operations Instrument. Winterfeldt said that update was the biggest change in this version of the guidebook.

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STEVE DELBIANCO, NETCHOICE

Previously, the amount was projected to be a cost equal to the amount to operate a registry for three years—which could be hundreds of thousands of dollars or more, Winterfeldt observed. Under the new guidelines, most entities operating a registry with 10,000 or fewer domains will only have to allot \$18,000 for the COI, through either a letter of credit or bank escrow account. The maximum amount required will be \$300,000.

“This development is important because it significantly reduces ‘barriers to entry’ in this program, a contentious issue on Capitol Hill last month, by potentially opening the door for additional entities to participate in the program who may have been deterred by the COI requirements as previously interpreted before ICANN provided the recent clarification[.]” Winterfeldt added.

The guidebook for the first time explains ICANN’s applicant support program, which drops the \$185,000 application fee to \$47,000 for certain qualified applicants.

“This is an important opportunity for applicants who would otherwise not be able to afford the full cost of the application process,” Winterfeldt said.

The guidebook’s added provisions for needy applicants are positive, DelBianco added. But given the substantial resources required to run a registry, the needs of applicants should not overshadow the reality that running a registry requires substantial resources, he said.

“Financial assistance is a good idea, but business users and registrants want ICANN to ensure that every TLD operator has the resources and technical skills to

maintain operations in the face of security threats and economic downturns,” DelBianco said.

GAC Objection Threshold ‘Significantly’ Lowered. National governments may express their views on a particular domain through ICANN’s Government Advisory Committee (GAC) or they may operate on their own as sovereign entities. They may express objections on moral, cultural, consumer protection, or intellectual property grounds, or based on a lack of support within the community supposedly represented by the domain name applicant. Or for any other reason. The grounds on which a government may object to a proposed domain appear to be limitless.

However, it is clear from the guidebook that a national government’s objection will have more weight if the government asserts its claim through ICANN’s GAC.

Pursuant to ICANN’s bylaws, the ICANN board shall take advice from the GAC “duly . . . into account.” If the board decides not to follow the GAC’s advice it must tell the GAC its rationale. The board and the GAC must then try, in good faith, to find a mutually acceptable solution.

The new gTLDs program has three options for “GAC Advice” on new gTLD applications, plus an “early warning” system that runs concurrently with the 60-day public comment period on new gTLD applications which will begin when they are publicly posted May 1. The warning would put an applicant on notice that a formal objection from the GAC may be coming.

The formal objection period will also open when ICANN posts the completed applications. It will last approximately five months. During that time, pursuant to a specially created procedure in the guidebook, the GAC can advise the ICANN board directly on any application.

In the updated guidebook, ICANN changed its explanations of the advice processes slightly. GAC Advice can take one of three forms:

- advice that it is a consensus of the GAC that a particular application should not proceed;
- advice that there are concerns about a particular application; and
- advice that an application should not proceed unless remediated, such as by securing the approval of one or more governments.

The updated guidebook makes clear that the GAC could, if it chooses, hinge its opposition to a given application on the disapproval of a single government entity.

Added Batching Clues: Application Timing Won’t Matter. In the months leading up to the application period launch, the GAC also raised concerns to the ICANN board that it might not be able to go through all of the applications during the opposition period, urging that they be divided into smaller, more manageable batches (16 ECLR 1950, 12/7/11).

The updated guidebook confirms that ICANN will use a “secondary time stamp” mechanism for batching if it gets “significantly” more than 500 applications.

The process will not be a random assignment, and will not be based on when an application was filed, the guidebook says. It will require applicants to take additional steps after the application window is closed.

ICANN will publish details of the program on its website, if it ends up being required.

If batching is required, the string similarity review will be completed on all applications first. Applications identified as part of a contention set will be considered in the same batch.

“Thus, there is still no benefit or detriment to completing and submitting an application earlier or later during the application window—an important point for applicants to know[.]” Winterfeldt observed.

Specifics on Registry/Registrar Separation. ICANN’s agreements with registries have, until recently, prohibited registry operators from also acting as registrars.

Cross-ownership of registries and registrars has been a contentious topic at ICANN. The board passed a resolution in 2010 that would have prohibited the practice, but at the same time encouraged the Generic Names Supporting Organization—ICANN’s policy-making body—to recommend policy on the topic. The GNSO did not advise the board on the matter because it could not reach a consensus on it.

The board then decided that it would not restrict cross-ownership in the new gTLDs (15 ECLR 1737, 11/17/10).

However, the updated application does contain conditions for registry operators that wish to act as registrars, too.

Registry operators, pursuant to the registry operator code of conduct, must ensure that such services are offered through separate legal entities, and maintain separate books of accounts.

“This provision changes the rules of the game substantially and creates a much more bureaucratic process.”

KONSTANTINOS KOMAITIS, CHAIR OF ICANN
NONCOMMERCIAL USERS’ CONSTITUENCY

In explaining the update, ICANN said a primary reason for requiring the registry and registrar to be separate legal entities is that the registry agreement contains numerous provisions that refer to mandatory provisions in a registry-registrar agreement. Since one entity cannot enter into a contract with itself, the entities need to be separated, the guidebook said.

Nonetheless, registry operators who wish to operate closed TLDs—in which they will operate and maintain all domain names for their own use—can apply for an exemption.

WIPO Rules, Fees Posted. The guidebook includes four grounds for objections to new gTLD applications: string confusion, legal rights, limited public interest, and community.

The World Intellectual Property Organization has been chosen to evaluate legal rights objections.

Although “legal rights,” generally, go far beyond trademarks, the guidebook takes a trademark-like approach to legal rights objections:

a DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-

for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector’s registered or unregistered trademark or service mark (“mark”) or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector’s mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD.

Under WIPO’s rules, objections may be consolidated—either multiple objections against the same application by multiple objectors, or one objector’s objections to multiple applications. WIPO may consolidate objections, and parties to an objection can request consolidation, too.

The objector must pay the filing fees directly to WIPO when filing. The objector and applicant may be responsible for added fees later in the process.

WIPO’s DSRP fee is \$2,000 for a single-expert panel, or \$3,000 for a three-expert panel.

Its base panel fees are as follows:

- single expert panel for a single objection to a single application: \$8,000
- three expert panel for single objection to single application: \$20,000
- single expert panel for multiple objections to a single application: \$4,800 per objection
- three expert panel for multiple objections to a single application: \$12,000 per objection
- single expert panel for multiple objections by same objector: \$6,400 per objection
- three expert panel for multiple objections by same objector: \$16,000 per objection

The fees could be higher, depending on the circumstances of the case.

URS, Clearinghouse Same as Earlier Guidebooks. The updated guidebook has no changes related to rights protection mechanisms that new gTLD registry operators will be required to adopt.

ICANN has not yet selected the entities that will provide trademark clearinghouse and uniform rapid suspension services.

A cross-functional team is continuing work on the implementation of the clearinghouse, which includes both selection of the provider and the development of processes and procedures for clearinghouse operators.

According to minutes published by the ICANN board Jan. 5, the team will produce a final set of requirements in March.

Eleventh-Hour Correspondence. The weeks preceding the opening of the application period featured a flurry of correspondence to ICANN from lobby groups, federal legislators, the Federal Trade Commission, and the DOC—all seeking answers to questions, and expressing concern, regarding what they saw as unfinished business in the ICANN new domains initiative (17 ECLR 36, 1/4/12). Lawrence Strickling, assistant secretary for communications and information at NTIA, and the author of at least one such letter, nevertheless gave a speech Jan. 11 at the Brookings Institution defending the multi-stakeholder, consensus-based process that created the new domains program (17 ECLR ???,

1/18/12). Strickling urged critics of the ICANN program to work within the ICANN policymaking process.

In correspondence to Strickling dated Jan. 11, Beckstrom committed ICANN to making improvements to the Whois registrant information database, strengthening the registrar accreditation agreement, and enhancing enforcement of current ICANN contractual obligations. Beckstrom made similar assurances to FTC Chair Jon Leibowitz, pointing out that the intellectual property and consumer protections in the proposed new top-level domains will be stronger than those in any current TLD, and adding that ICANN will monitor and modify,

if necessary, the new domains program beyond the application date.

Updated Applicant Guidebook at <http://newgtlds.icann.org/en/applicants/agb>.

ICANN's gTLD microsite at <http://newgtlds.icann.org/en>.

Beckstrom letter to NTIA's Strickling at <http://www.icann.org/en/correspondence/beckstrom-to-strickling-11jan12-en.pdf>.

Beckstrom letter to FTC Chair Leibowitz at <http://www.icann.org/en/correspondence/beckstrom-to-leibowitz-10jan12-en.pdf>.