Statement of the Non-Commercial Stakeholders Group on the New Sections of the Draft Report of the Competition, Consumer Trust and Choice Review Team

The Non-Commercial Stakeholders Group (NCSG) has been pleased to work with the Competition, Consumer Trust, and Consumer Choice Review Team (CCT-RT) throughout the long duration of your work. We appreciate your hard work and numerous meetings with NCSG and the Community. Throughout your tenure, the NCSG has offered several contributions to your process, including:

1. Detailed comments in response to the Draft Report of Recommendations issues on 7 May 2017 (NCSG comments submitted 20 May 2017)
2. Comments to the Statistical Analysis of DNS Abuse in gTLDs (NCSG comments submitted on 4 October 2017)

We encourage you to take our previous remarks into account and to update the Safeguards sections accordingly.

We understand that the purpose of your second call for input is to gather community feedback on the new findings and recommendations pertaining to the new sections that have been added to the draft report. These include DNS abuse, costs to trademark holders, parking, and consumer choice-related sections. The NCSG has carefully reviewed these new sections and we have broken down our comments by section:

I. Comments pertaining to Section 2, *CCT Review Team Recommendations*

Specifically, Chapter 5. Safeguards - New Recommendations A, C and D

A. *Consider directing ICANN org, in its discussions with registries, to negotiate amendments to existing Registry Agreements, or in negotiations with new Registry Agreements, associated with subsequent rounds of new gTLDs to include provisions in the agreements providing incentives, including financial incentives for registries, especially open registries, to adopt proactive anti-abuse measures.*

We oppose this recommendation.

The NCSG does not support this recommendation and strongly calls for its rejection. As we commented in earlier materials, and as the RT has heard many times before: it is beyond dispute that ICANN has the narrow technical scope and mission "to ensure the stable and secure operation of the Internet's unique identifier systems." Article 1, Section 1.1 Mission. Further:

> (b) ICANN shall not act outside its Mission.
>
> (c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifies ***or the content that such services carry or provide*****, outside the express scope of Section 1.1.(a). [Article 1.1, emphasis added]**

It is emblazoned in our new bylaws and extraordinarily clear in our post-transition mission that we absolutely will not -- as an ICANN Community, ICANN Board of Directors and/or ICANN Staff -- do what this recommendation demands and seeks.

We cannot, must not, should not direct “ICANN org” to negotiate anti-abuse measures with new registries as such acts will bring ICANN directly into the heart of the very content issues we are mandated to avoid. ICANN is not a US Federal Trade Commission or an anti-fraud unit or regulatory unit of any government. Providing guidance, negotiation and worse yet, financial incentives to ICANN-contracted registries for anti-abuse measures is completely outside of our competence, goals and mandates. Such acts would bring ICANN straight into the very content issues that passionately divide countries -- including speech laws, competition laws, content laws of all types. It would invalidate ICANN commitments to ourselves and the global community. It would make ICANN the policemen of the Internet, not the guardians of the infrastructure. It is a role we have sworn not to undertake; a role beyond our technical expertise; and a recommendation we must not accept.

> *C. “Further study the relationship between specific registry operators, registrars and DNS abuse by continuing ongoing data collection, such as ICANN Domain Abuse Activity Reporting (DAAR) initiatives. This information should be regularly published for transparency purposes in order to identify registries and registrars that need to come under greater scrutiny and higher priority by ICANN Compliance. Upon identifying abuse phenomena, ICANN should put in place an action plan to respond to such studies, remediate problems identified, and define future ongoing data collection.”*

We are in agreement to formalize and promote ongoing data collection, which can allow for insightful analysis of DNS Abuse in the future. We think it is important to establish a limited period of time instead of “regularly published”.

> *D. A DNS Abuse Dispute Resolution Policy (“DADRP”) should be considered by the community to deal with registry operators and registrars that are identified as having excessive levels of abuse (to define, e.g., over 10% of their domain names are blacklisted domain names).*

We oppose this recommendation.
Blacklisting domains in a registry undermines the functionality and profitability of a TLD and gives a TLD a bad reputation, all of which punish the TLD strongly. Also, this idea appears to rely on sources of input that are not open nor transparent in their provision of services. We have known the spam blacklisting services to “blacklist” legitimate non-profit and noncommercial organizations — disrupting their email and their fundraising activities — merely because a number of patrons and supporters changed their email addresses over the course of the year, and too many “bounced” according to the private blocking services. We have also seen in the Next-Generation Registration Directory Service Policy Development Process Working Group that some private investigators have threatened to “blacklist” a domain name or entire new

gTLD simply because they have the power to do so, and have a petty grudge against a party asking them to support their arguments.

While we understand the desire to integrate a new service, we are not certain why:

a) ICANN does not have the power to act under its existing contracts and accreditation, and
b) Whether we should be formally instituting a new, required Dispute Resolution Policy that relies for its primary input and trigger on private, non-transparent services that both registrars and registrants have alleged to be unfair.

We trust the Registrars Stakeholder Group, with the most direct experience in this area, will be commenting on this question with its issues and concerns, and we strongly urge close consideration of their concerns. We are also reluctant to engage the ICANN Community, with its increasingly overburdened volunteers, into the difficult, lengthy and time-consuming process of defining another (unneeded) Dispute Resolution Policy. These take enormous amounts of time and complicate its implementation (see comments in the table below.)

Comments on the DNS Abuse Dispute Resolution Policy ("DADRP")			
Pros	Rationale	Cons	Rationale
		Abuse may not be within the registry's control	Abusers may latch onto a TLD because eg. it is cheap, not because the registry's policies are lax.
		ICANN empire building	The implications of another global adjudicatory body attached to ICANN, with its risks of capture, need to be thought out.
		Provides a locus for extending the definition of abuse	Special interest groups may seek to use the DADRP to stretch the definition of abuse.

Furthermore at page 19 of the CCT-RT draft report (cct-rt-draft-recs-new-sections-27nov17-en), it is stated that :

"For the fifth safeguard, Registry Agreements require new gTLD operators to create and maintain Thick WHOIS records for domain name registrations. This means that registrant contact information, along with administrative and technical contact information, is collected and displayed in addition to traditional Thin WHOIS data at the registry level. ICANN Compliance monitors adherence to the Thick WHOIS requirement on an active basis, for both reachability and format. Syntax and operability accuracy are evaluated by the ICANN WHOIS Accuracy Reporting System (ARS) project. The Impact of Safeguards chapter of this report further explains the ARS and related compliance issues."

However, as far as the next-generation RDS is concerned it is not clear yet what data will be collected (for both thick and thin WHOIS) and what data can be displayed. Therefore, it is recommended that this text be rephrased with a possibility verb rather than a certainty one.

II. Comments Pertaining to New Sections of the CCT Review Team Report

Generally speaking, we do not feel comfortable with the conclusions deduced through the statistical analysis. Most of the time, it was noted that not enough data was available so as to ensure that the analysis was conducted on statistically-significant samples. As the report is deemed to produce data-driven recommendations, basing all conclusions on a small number of respondents to surveys and on limited data sets makes us feel unconfident in their results.

A. Section 4, Consumer Choice, Page 13

As discussed in webinars and calls, we request clearer discussions, directly and clearly within the new sections **of the disclaimers and significant limitations of the INTA Survey**. While we appreciate INTA's work in this area, and their difficulties have served as a learning experience for the community, the Rights Protections Mechanisms Policy Development Process Working Group (RPM PDP WG) looked closely at this report and the deep problems with this statistical analysis. We suggest that the disclaimers of Nielsen, comments on the fundamentals of basic statistical practice, and the following discussion be included in the RT's final report:

1. The INTA Survey is not random. Its respondents are those members of INTA who chose to respond. The few companies that had the time and resources to fully answer the questions were overwhelmingly in the $5B or more of Total Annual Revenue category (52%). This is not the average member of INTA or the average trademark owner. This complete lack of randomness must be noted as it is a premise of statistical validity in these types of surveys.
2. Out of INTA's 6,600 members, only 33 completed the survey. **For the sake of transparency and full disclosure, in the final version of your report, in the introduction to the INTA Survey in clear text (not small footnotes), we strongly request that you include the Nielsen disclaimer, page 5 of the INTA Cost Impact Report revised 4-13-17 v2.1.pdf, that *"Analysis of sub-samples less than 30 are subject to high variability-- caution is advised when interpreting them."***

3. We also request that you include analysis of statistical validity problems of the survey based on the small response rate. In the RPM PDP WG, we learned that **standard survey calculators show us that for a body of 6,600 organizations, for a 5% margin of error, 364 INTA members (randomly selected) would have needed to respond**. Even with a very large 10% margin of error, 95 randomly selected INTA members would have needed to respond. We therefore must reject the INTA Survey results at both the 5% and 10% levels of significance. In the interest of transparency and accountability, we further strongly request that you include these basic basic statistical facts — and the limitations of the survey they disclose — in the main body of the final report prior to any analysis of this small, self-selected, and statistically-insignificant survey.
4. What might be fair to say is that the survey somewhat represents the responses of some of the largest businesses online, and it is largely anecdotal in nature.

B. Section 5.2 Rights Protection Mechanisms, Page 29

Our concerns for the use and over-interpretation of the INTA Impact Study grow and deepen in Section 5.2.3.2. There can be no "key takeaways from the Impact Study" because it is simply not statistically significant nor valid for lack of a) randomness, b) insufficient sample size and c) heavy response from a very, very narrow subset of the INTA membership and the world generally (corporations with more than $5 billion in total annual revenue).

The conclusions and "key takeaways" of page 35 are so broad, so definitive, and so sweeping, based on a survey that can at best be described at anecdotal, that we are taken back. Thus, we strongly request in the interest of accuracy, and to tie the key takeaways to evidence, that they be significantly qualified, with edits and explanations included in the express wording of these takeaways.

For accuracy and integrity of the final report, we offer suggested revisions (and others similar to them) [our requested edits are in brackets]:

Key Takeaways

1. While one of the goals of the new gTLD Program is to increase choice for brand owners, choice does not appear to be the prime consideration for [most of the 17 multi-billion dollar companies who chose to respond to the survey] elect to register in new gTLDs. Rather, the principle reasons why the overwhelming majority (90%) [of the self-selected 33 INTA members, representing 0.05% of INTA's membership base and consisting largely of billion-dollar companies] trademark owners are registering domain names in new gTLDs is for defensive purposes - to prevent someone else from registering.

2. Many of the 33 respondents of the survey reported that they are commonly parking new gTLDs and not creativing value other than preventing unauthorized use by others.

3. [For the world's largest companies…]

4. [Multi-billion dollar respondents to the survey] reported…
5. [Of the 33 respondents who actually engaged in domain name disputes (#?)}, more than 75%....
6. [For many of the 33 respondents]...
7. *[For many of the 33 respondents]...*

We note that the CCT-RT has powerfully and positively led the ICANN community to seek better, clearer data on an ongoing basis. To continue this positive direction, you need to provide an example of how we USE data — especially when it does not provide what we wanted it to provide. Again, INTA tried in good faith to gather data, but the results came up short. We urge you to look much more closely at this study and to expressly limit your conclusions and wording to clearly show what a small number of self-selected respondents shared.

Section 5.2 Rights Protection Mechanisms

We note that the RPMs being evaluated by the CCT-RT in this section rely on two studies: the flawed INTA Survey (noted above), and the CCT Metrics Reporting. Neither of these studies appear to examine the issue of consumer protection from the perspective of the consumer of domain names; namely, the purchaser of domain names — the Registrant.

In any other market discussion, we would consider the purchaser of the good or service in question to be a part of the discussion, e.g., are consumers able to buy fresh produce untainted by bacteria, is the manufacturer selling shoes to consumers that are falling apart? Similarly, one would think that a legitimate part of Consumer Trust and Consumer Choice is to consider whether the purchasers of domain names are comfortable with the new proceedings that can block their registration of domain names, and revoke their property (domain names) and speech/expression (content of webpages, emails, and listservs) associated with that domain name at an increasing rapid pace.

We would have hoped that you might ask some basic questions about whether the URS was understood by registrants, whether education had been provided to teach them the affirmative defenses that the URS provided, and explored why the default rate is so high. Clearly due process is a part of the evaluation, and yet the evidence for your analysis appears to be solely based on the needs of the trademark owner, not the needs of Registrant/Consumer.

We would ask that you include a new Recommendation calling for:

> *An Impact Study in order to ascertain the impact of the New gTLD Program on the cost and effort required to register new domain names in the DNS, and whether consumers, namely registrants, understand what remedies are available to them if the domain name they choose to register for their business, organization, or speech is not available to them, yet not registered in a gTLD, what their rights are when challenged by a Trademark Claims Notice and what responses and timing is available to them when their*

domain name is challenged by the URS and UDRP (both remedies not intended to require attorneys to draft responses as originally drafted, presented and accepted by ICANN).

III. Conclusion:

The NCSG is grateful to have the opportunity to comment on these new sections of your work. We are available at your disposal to answer any questions or clarifications that you may have, and will check in, in the coming months, to make sure our comments and recommendations are reflected in your final product. Thank you again for your hard work!