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

Introduction

The Non-Commercial Stakeholders Group (NCSG) is pleased to submit these comments on the Draft Report of the Competition, Consumer Trust and Choice Review Team.

The NCSG is the most diverse body in the Generic Names Supporting Organisation (GNSO), with individual and organisational members from 128 countries. As a network of individual end-users and civil society actors representing the interests of non-commercial registrants, we represent a broad cross-section of the global Internet community.

The NCSG takes note of the main conclusion of the report: **"Initial indications are that the New gTLD Program has led to a dramatic increase in consumer choice, a modest increase in competition and minimal impact on consumer trust."** We concur with these conclusions, and believe that they are convincingly backed up with data and analysis.

Overview

We raise four sets of concerns about this Report and its fifty recommendations:

1) **Many data gathering recommendations are enormous and largely unwarranted**. Many of the report's proposals will delay the opening up of New gTLDs until systemic, costly, and potentially intrusive changes are made to data collection procedures. This is unwarranted.

2) **Many of the recommendations push ICANN far beyond its limited scope and into the content-regulation arena that the new Bylaws expressly bar**. These must be edited substantially or deleted fully.

3) **Many Consumer Choice recommendations favor one GNSO stakeholder group and one constituency at the expense of other stakeholder groups and constituencies.** In a situation where the Review Team finds that "new rights protection mechanisms have succeeded in minimizing the level of defensive registration… without a significant increase in the number of trademark complaints," why then do so many recommendations dive deep into our policy development processes and skew them in favor of the intellectual property interests at ICANN? We find these recommendations deeply harmful to ICANN's Policy Development Process and multistakeholder approach.

4) **Fifty recommendations are unduly burdensome to the Community and reflect a deep distrust of our multistakeholder processes.** These fifty recommendations impose a) an undue burden on the Community to review, b) an undue burden on the Community to implement and c) reflect a deep distrust of the New gTLDs not grounded in the largely positive evidence the Review Team has found (see Conclusion). We ask that they be pared back to a more reasonable number, aligned with ICANN's mission, consistent with ICANN's

multistakeholder model and fairly balancing the deep concerns of all stakeholders, not just a few.

We offer a more detailed review of our concerns and the draft recommendations we request be revised or eliminated for fairness, balance, scope, and necessity:

1. The data gathering recommendations are enormous and largely unwarranted:

Of course, the data is not perfect or comprehensive, but it never is. (Many of our members are academic scientists and are quite familiar with the issues and limitations surrounding data collection and analysis.) We therefore find the report's proposal to further delay additional market entry until systemic, costly, and potentially intrusive changes are made to data collection procedures to be unwarranted.

In particular, we would like to question the "prerequisite" status of Recommendations 6, 8, 9, 10, 13, 14, and 15. As we understand the report, prerequisite means that these recommendations must be implemented before any new round of TLD additions is conducted. Looking carefully at those recommendations and the substance of the report, we fail to see any logical or empirical justification for holding up market entry based on those recommendations. Specifically:

- **Recommendation 6** makes the collection of secondary market data a "prerequisite" for future rounds. While we understand the way in which secondary market prices can indicate the pricing power of incumbent TLD registries, we see no convincing explanation for how or why this should affect future rounds. Is the CCT-RT asserting that it needs to regulate the supply of new TLDs based on secondary market price movements? The NCSG sees no reason for this unless ICANN thinks of itself as a cartel manager that needs to regulate supply in order to maintain the profits of incumbents at a certain level. Aside from this, the secondary market consists of private transactions amongst domain registrants and such data will be inherently difficult to collect unless intrusive regulatory requirements are placed on all registrants.

- **Recommendation 8** calls for partnering with other entities that collect statistical data. While this may be a good idea, the NCSG fails to understand why all market entry should be frozen until this takes place. There is no justification for the "prerequisite" status of this recommendation in the report.

- **Recommendation 9** calls for a periodic survey of registrants. Here again, it seems that the CCT-RT is deeply confused about ICANN's role. The report wants to put ICANN in the position of doing market research for private businesses. The NCSG believes that commercial players in the registry industry can pay for their own market research. We also don't think that ICANN should be in a position to decide whether a new TLD offers sufficient "benefits" to justify market entry; its job is to coordinate entry, not to maintain a cartel or engage in ex ante regulation of entry.

- **Recommendation 10** proposes to hold up further rounds until we "study" whether the costs of defensive registrations can be reduced. The NCSG does not understand the justification for this. Page 55 of the report already contains a perfectly adequate factual and quantitative

analysis of the defensive registration problem. It shows that the cost "for most trademark holders related to defensive registrations appears to be lower than some had feared prior to the inception of the program." The report also describes the blocking services maintained by many new TLDs and states that "we expect to obtain more information [about the use of new blocking services] prior to the publication of our final report." There is no support in the data for halting new rounds. *Nevertheless, following its longstanding habit of bending over backwards for trademark interests while ignoring all other interests, the ICANN report goes on to say that "a small fraction of trademark holders are likely incurring significant costs." By our calculations, those significant direct costs cannot be much more than $200,000 for a small number of firms. In response, we would note that defensive registration across all TLDs is not forced upon trademark holders by the mere existence of new TLDs. The UDRP and other RPMs already (over)protect TM holders from actual misuse of domains. Widespread defensive registration is a pre-emptive choice that certain large and wealthy TM holders have made on their own. **The NCSG firmly rejects the idea that the entire domain name market needs to think of ways to lower the costs of this tiny special interest group before any new market entry is allowed**.*

- **Recommendation 13** is another inexplicable call for ICANN to perform market research about what TLDs are visited. Even if this data would be useful, we see justification in the report for domain name registrants to subsidize it via ICANN, and we see even less reason to hold up all new TLD applications until this kind of research is performed.

- **Recommendation 14** calls for ICANN to "create incentives to encourage gTLD registries to meet user expectations regarding the relationship of content of a gTLD to its name; restrictions as to who can register a domain name based on implied messages of trust... and 3) the safety and security and users personal and sensitive information..." The NCSG believes that the first two parts of this recommendation border on violating ICANN's mission and core values, as it starts pushing the organization over the line of domain name coordination and into content regulation. Furthermore, there are already sufficient legal and policy safeguards in place against misleading or fraudulent domains or privacy, such as data protection and data breach notification laws. The NCSG has always rejected the idea that ICANN should become an all-purpose regulator of the Internet; it can and should leave most consumer protection, competition policy, and content regulation problems to other more specialized agencies, and focus on its primary mission of coordinating the DNS.

Some of these prerequisite implications seem to imply that ICANN wants to set itself up as a central planner who will decide for the market which new TLDs are a needed and which is not. We don't believe that is ICANN's proper role. ICANN should provide a stable coordination and regulatory platform for suppliers and consumers and should not try to pick winners and losers. Nor should it try to dictate the kind of content that TLD registries provide, unless the registry makes specific contractual commitments as part of its RA. In sum, we reject the "prerequisite" status of all of the recommendations discussed above.

2. Many of the recommendations push ICANN far beyond its limited scope and into the content-regulation arena that the new Bylaws expressly bar. These must be edited substantially or deleted fully.

- **Recommendation 16** should be modified to be a question solely about whether registration restrictions are enforced by registries and registrars. To dig deeper into the term of "DNS abuse" – undefined in this question – could bring ICANN into an evaluation of copyright, trademark, hate speech, photographs of women without veils, and many other speech and content-oriented material. The purpose of the question is whether the restrictions are enforced; limiting the recommendation to that should be fine.

- **Question 17** is beyond the scope of this Review Team. The Whois Review Team will start again shortly; the GNSO Next Generation Registration Directory Service PDP Working Group is already hard at work. Adding another call for Whois Review and study is an undue burden on the ICANN Community. We urge this recommendation to be passed as informal input to the new Whois Review Team for their review, evaluation, and consideration within the larger context of Whois issues and research.

- **Recommendation 18** – As in Question 17.. We strongly recommend letting the new Whois Review Team decide what data they want and need. Recommend deletion of this recommendation.

- **Recommendation 19** – What is "abuse"? Throughout many Review Team recommendations, we find this word without definition and the meaning is not clear. Other review teams have struggled for days in their careful phrasing of recommendations to ensure they were clear to readers from many parts of the ICANN Community. Here, the term "abuse" continues to baffle us. If it is the abuse of the Internet system, then that should be clarified and the recommendations directed to the new Identifier Technology Health Indicators group – which is currently working hard to define "health" and "abuse" within the context of the scope and mission of ICANN.

  If "abuse" refers to content, and the use of the domain name, e.g. copyright, hate speech, advertising laws and other speech/expression/content illegalities, then this recommendation should be deleted as outside the scope of ICANN (which per 1.1(c) of the New Bylaws does not address content). In all events, the recommendation must be narrowed and clarified; otherwise there will be a lot of wasted effort and cost.

- **Recommendation 20**: The word "abuse" seems to be a systemic response to security threats. If so, we have no objection but this needs to be clarified.
- **Recommendation 21**: Here the term "abuse" appears to be used differently than in the prior recommendation. This "abuse" runs to content, speech and expression – "the volume of reports of illegal conduct in connection with the use of the TLD that registries receive from governmental and quasi-governmental agencies … and from the public." Certainly, registries should be working with law enforcement within their jurisdiction, and law enforcement should be working, as appropriate across jurisdictions.

  But this recommendation puts ICANN squarely in the "content seat" as a monitor of content and speech. China seeking registries to take down pro-democracy websites as a violation of their criminal laws is not a complaint area for ICANN to enter. The same limits apply to

complaints about websites involving hate speech laws which EU governments may want taken down and the US may expressly protect. ICANN is a technical policy organization; that is its expertise and the limits thereof. This recommendation highlights a perfect place for national governments to be involved, and international cooperation to be fostered. But for ICANN, this is an "abuse" recommendation outside the scope of ICANN and must be deleted.

- **Recommendation 23:** Ditto. How can the Review Team phrase this question to drive complaints to ICANN that are within the limited scope and mission of ICANN?

- **Recommendation 24:** As above, the question of what the Review Team seeks is key. Is the Review Team urging ICANN to investigate data and information gathered on individual websites, e.g., what information a doctor's office seeks from a patient submitting a medical question to her physician? Or how online retailers protect the credit card data they gather? Or how schools and universities protect the student data they make available to students and parents? If so, how does this recommendation fall within the scope and mission of ICANN which expressly is not involved in online content? If so, we strongly recommend deletion)? If not, how can this be clarified to remove doubt?

- **Group Recommendation 25 to 30** is confusing. It appears to be one long and ongoing recommendation which makes it very difficult to read, understand and implement – a problem in itself. Further, they appear to be hooking ICANN directly into work with government consumer bodies – many of which are members of the GAC – and industry bodies (undefined) that are themselves welcome to be members of the Supporting Organizations and their Stakeholder Groups. All of the recommendations – 25 to 30 – should not be done by ICANN directly. They are inputs, reports, processes of a) relevant bodies and b) relevant industry bodies that properly should be shared and processed through their appropriate Supporting Organization or Advisory Group – for *review by the entire ICANN Community* though the Multistakeholder Process. We strongly recommend considerable reworking and allowing existing ICANN processes - SOs and GAC - to provide their reports and inputs through the ICANN Multistakeholder process.

- **Recommendations 31 and 32**: These recommendations are beyond the scope and mission, limits, and competence of ICANN and the ICANN community. These recommendations must be deleted or modified to the scope and mission of ICANN.

3. Many Consumer Choice recommendations favor one GNSO stakeholder group and one constituency therein at the expense of other stakeholder groups and constituencies; several bypass and displace the GNSO's policy development processes and procedures.

- Comment on **recommendations 33 to 42**: With one exception, these recommendations demand action of Policy Development Process Working Groups. With few exceptions, these recommendations place a heavy hand on the scale of the multistakeholder process to favor one stakeholder group and one constituency. The NCSG submits that these recommendations, unintentionally we are sure, cause a deep gash in the multistakeholder process, erode confidence in the GNSO Council, and leave us with a deep injustice. We strongly call on the

Review Team to review, reconsider, narrow, and eliminate the recommendations as described below.

- **Recommendations 33 to 36**: The Review Team directs actions, studies, data collection, and review to GNSO PDP Working Groups that are already on very tight schedules, and may have already moved past the issues being considered by the time the final recommendations are issued in the final report. We ask the Review Team to clarify that the GNSO Council and its officers remain in charge of the PDP WG, and that the Review Team is not seeking to delay current WG schedules, direct WG work, handle, or manage the GNSO's Working Group process. (See e.,g. Recommendation 34 (studies), Recommendation 35 (data collection) and Recommendation 36 (public comments) that provide directions directly to GNSO PDP Working Groups bypassing the GNSO Council and the Multistakeholder process.) They should be deleted or rewritten as advisory, in case the WG has passed the topic, chosen to allocate its data gathering resources differently or received other input from its outreach and comment requests.

- **Recommendation 40** calls on ICANN to conduct, and regularly repeat, a "full impact study to ascertain the impact of the New gTLD Program on the cost and effort required to protect trademarks in the DNS - not once by regularly." If, as the Review Team reports:
    - "Early indications are that the new rights protection mechanisms have succeeded in minimizing the level of defensive registration;" and
    - "preliminary indications are that increases in defensive investment by trademark holders have been less than feared by some prior to the launch of the program,"
  how is this recommendation justified? Given the extensive work of the NCSG on the balance of trademark rights and fair use protections, free expression and legitimate parody, criticism and the rights of all to use basic dictionary words, geographic places and common names, how is such a limited study in favor of one part of the community even fair? If this Recommendation remains in the final report, we ask that ICANN also conduct, and regularly repeat, a full impact study on trademark owners' abuse of rights protection mechanisms in ICANN policies to restrict free expression rights, and another full impact study to quantify the costs of these measures on domain name suppliers and consumers.

We echo our response and concerns to Recommendation 10 above: *Nevertheless, following its longstanding habit of bending over backwards for trademark interests while ignoring all other interests, the ICANN report goes on to say that "a small fraction of trademark holders are likely incurring significant costs." By our calculations, those significant direct costs cannot be much more than $200,000 for a small number of firms. In response, we would note that defensive registration across all TLDs is not forced upon trademark holders by the mere existence of new TLDs. The UDRP and other RPMs already (over)protect TM holders from actual misuse of domains. Widespread defensive registration is a pre-emptive choice that certain large and wealthy TM holders have made on their own.*

The NCSG firmly rejects the idea that ICANN could engage in a "full impact study" of only one stakeholder's costs and efforts -- on a single or ongoing basis. This recommendation undermines the integrity of the multistakeholder process in which we and our members (as volunteers) labor

so diligently and in good faith. We thought it important to share with the Review Team the depth of our concern in this area and the need for deletion or significant revisions.

- **Recommendation 41** reads like the comment of a Intellectual Property Constituency or parts of the Commercial Stakeholder Group. This directs the Rights Protections Mechanisms PDP Working Group to seek a) a transfer option in the URS process, b) apply "Rights Protection Mechanisms" to legacy gTLDs as well as New gTLDs (extension expressly opposed by the NCSG and others repeatedly as unnecessary to the rationale and needs that gave rise to the rights protection mechanisms policies). It is extraordinary to the NCSG to see proposals long debated coming through the Review Team recommendations. Review teams have a long history of being independent and striving to be impartial. We look forward to the deletion of this recommendation in favor of clearer support for the GNSO, GNSO Council and the many stakeholders of the GNSO processes. We do not believe the Review Team seeks to discredit, demoralize, or undermine the multistakeholder process.

- **Recommendation 42:** Ditto for the deletion of Recommendation 42: it reads like many comments to the RPM Working Group from its intellectual property constituency members - calling hard on the Rights Protections Mechanisms Working Group to expand "beyond applying to only identical matches" and extend "to include 'mark+keyword.'" No Review Team in history has ever faced recommendations so completely serving the interests of one of its stakeholder communities, at the direct expense of others. Like recommendation 41 above, recommendation 42 undermine the grassroots multistakeholder model of ICANN. The NCSG trusts this is a mistake in wording, and that these two recommendations will be removed.

4. Fifty recommendations are unfair to the Community and reflect a deep distrust of our multistakeholder processes. Fifty (50!) recommendations impose an undue burden on the Community to review, an undue burden on the Community to implement, and many of the recommendations above, reflect a partisanship to one stakeholder group and a deep distrust of the Multistakeholder process. The number must be reduced to a much more manageable level, with much clearer definitions of ambiguous (and politically-loaded) terms within the recommendations and with a neutral wording that does not favor the long-held views of one stakeholder group.

We note that the Review Team will be reviewing a report shortly that it commissioned from the International Trademark Association, one very active and involved stakeholder in the multistakeholder process. It is incumbent on the Review Team to share any draft recommendations arising from this report, and this stakeholder, with the NCSG and other stakeholder groups before they become public. It is critical that the Review Team report be valued for its independence, expertise, and impartiality, and not a political report for a single group within the ICANN Community.

Conclusions

In conclusion, we applaud the good news from the Review team [in Section 1 of the full Review Team report:

- "new gTLDs currently account for about 9% of registrations in all gTLDs, which suggests that registrants are making use of a broader range of gTLDs"

- "in 92% of the cases in which a second-level domain was available in .com, the registrant nonetheless chose a second-level string in a new gTLD. For example, even if bigshotphotography.com was available, registrants often chose bigshots.photography instead, and in many cases were willing to spend more money to do so."

- "the availability of independent back-end service providers and retailers (registrars) decreases barriers to entry because new registries do not need to invest in supplying their own in-house back-end infrastructure or developing their own sales channels. Consequently, smaller niche registries have a higher likelihood of achieving minimum viable scale."

- "Early indications are that the new rights protection mechanisms have succeeded in minimizing the level of defensive registration (i.e. registering a domain simply to prevent others from doing so) by most trademark holders without a significant increase in the number of trademark complaints lodged in the form of either Uniform Domain-Name Dispute-Resolution Procedure (UDRP) or Uniform Rapid Suspension (URS) filings. Further analysis of the distribution of defensive costs (including blocking – agreement with the registry not to sell a domain), direct communication (such as cease and desist correspondence and URS) is currently underway, but preliminary indications are that increases in defensive investment by trademark holders have been less than feared by some prior to the launch of the program."

Why then impose more limits, research and requirements on the systems - particularly those that advance the agenda of only one segment of the ICANN Community?

Many of the recommendations, as pointed out above, complicate the real problem, which is simple. ICANN deliberately made it as expensive as possible to apply for a TLD. Additionally, ICANN's community, especially the GAC, trademark interests, ALAC, and law enforcement, added tons of complex and costly regulations and kept changing them from month to month. Adding to the cost, the process dragged on for nearly a decade. Who can afford this in a thin, less-developed market?

And yet, this report calls for adding additional burdens on registries and registrars to support "data collection", additional expansion of intellectual property rights and protections (at the cost of Free Expression, Fair Use and even future trademark use), undermines confidence in the GNSO Council and creates unprecedented incursions into the GNSO's Policy Development Process.

The NCSG shall be looking for deep and fair changes to the Final Report - and particularly action moving forward into our suggestions made on recommendations 6, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25-30, 31, 32, 33-42, as stated in our public comments above.

We would certainly be available to talk with the Review Team to answer questions and provide further input.