



# New gTLD Applicant Freedom of Expression

New gTLD SubPro PDP WG | Sub Team 3 | 2 May 2017

# Background

The 2007 Final Report for GTLD policy provided protection for the freedom of expression rights of applicants, as noted in Principle G and in Recommendation 3. [Approved by GNSO Council and ICANN Board]

## Principle G:

*The string evaluation process **must not infringe the applicant's freedom of expression rights** that are protected under internationally recognized principles of law.*

## Recommendation 3:

*Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (**in particular freedom of expression rights**).*

## INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS (ICCPR)

### Article 19.

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.

## UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

### Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

## What Does GAC Advice Mean?

GAC Advice is advice from the Governmental Advisory Committee (GAC) to the ICANN Board regarding an application identified as being problematic, e.g., that potentially violates national law or raises sensitivities.

- If GAC Advice is based on a **consensus** of the GAC, it will create a **strong presumption that the application should not be approved**. If the ICANN Board does not act in accordance with this type of advice, it must provide **rationale** for doing so.
- If the GAC advises that there are **concerns** about a particular application, the ICANN Board is expected to enter into **dialogue with the GAC** to understand the scope of concerns and provide **rationale** for its decision.
- If the GAC advises that an application **should not proceed unless remediated**, this will create a strong presumption that the application should not proceed unless there is a remediation method available in the Applicant Guidebook (such as securing the approval of one or more governments) that is implemented by the applicant. If the issue identified by the GAC is not remediated, the ICANN Board is expected to provide a rationale for its decision if it does not follow GAC advice.

## In 2013 GAC Issued Formal Advice against Strings Considered “Sensitive”, “Problematic”, and in “Regulated Markets”

- **Beijing - ICANN #46**
  - "strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws." The GAC proposed specific safeguards that would apply to a broad category of strings related to "consumer protection, sensitive strings, and regulated markets."
  - "For strings representing generic terms, exclusive registry access should serve a public interest goal."
- **Durban - ICANN #47**

GAC Advice against "problematic," strings, e.g., that potentially violate national law or raise sensitivities.
- **Buenos Aires - ICANN #48**

GAC Advice against "problematic," strings, e.g., that potentially violate national law or raise sensitivities.

## ICANN Board Response to GAC Advice

**RE: strings considered sensitive, problematic, in regulated markets**

### **“Category 1” Strings**

Feb. 2014 – ICANN Board NGPC adopted implementation framework for treatment of “Category 1” strings

Strings in regulated markets or that potentially violate national law or raise sensitivities

The implementation framework classifies Category 1 strings as requiring one of three levels of safeguards:

- Regulated Sectors / Open Entry Requirements in Multiple Jurisdictions
- Highly Regulated Sectors / Closed Entry Requirements in Multiple Jurisdictions
- Special Safeguards Required

Safeguards consistent with the implementation framework are added to Specification 11 of the Registry Agreement as public interest commitments for applications subject to GAC Category 1 Safeguard Advice.

## ICANN Board Response to GAC Advice

**RE: strings considered sensitive, problematic, in regulated markets**

### **“Category 2” Strings : “Generics”**

June 2015 - Board adopted resolution for treatment of “Category 2” strings – may not impose eligibility criteria for registering names in the TLD – no exclusivity in registration of a word considered “generic”.

A "Generic String" means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others.

# Questions for Discussion:

- Does the New GTLD Policy give adequate consideration to the protection of the applicants' to freedom of expression rights given the restrictions for "Category 1 and 2" strings?
- Does the policy implemented in Final Guidebook comport with GNSO and Board approved policy for protecting applicant's free expression rights (Principle G and Recommendation 3)?
- Should applicants' use of words considered "sensitive", "problematic", or "generic" be exempt from freedom of expression rights?
- How do ICANN bylaws require handling of competing policy preferences between GAC and GNSO on GTLD policy?
- Is legitimate speech being chilled by ICANN policy on Category 1 & 2 strings?