

September 26, 2018

To: comments-gtld-subsequent-procedures-initial-03jul18@icann.org

Comment re: [Initial Report on the New gTLD Subsequent Procedures Policy Development Process \(Overarching Issues & Work Tracks 1-4\)](#)

## Introduction:

“[Annex C](#) provides a summary of items on which the Working Group is seeking feedback from the community. Please see the Preamble of this report for context about the items included in this table. **It is not necessary to respond to every item in this table. Please respond to the items that you find important. In addition, you are welcome to provide feedback about items included in this paper that are not included in the table below.**”

“As noted in the Preamble, this **Initial Report** does not contain a “Statement of level of consensus for the recommendations presented in the Initial Report. In addition, in some circumstances, **the Working Group and/or Work Tracks did not reach agreement on preliminary recommendations ...**”—[Initial Report](#)

“2.2.1.c.1: The Working Group recommends no changes to the existing policy calling for subsequent application rounds introduced in an ongoing, orderly, timely and predictable manner.”-- Summary of Preliminary Recommendations, Options and Questions for Community Input

## Response and Feedback:

**I respectfully disagree with your threshold recommendation that there be “no changes to the existing policy”—the existing policy is the product of an incompetent, conflicted, and/or corrupt ICANN Board of Directors, ICANN organization, and “ICANN community”, and has been an unmitigated disaster for the global internet community, including registrants worldwide—and should be replaced in its entirety.**

- The ill-conceived existing **new gTLD policy** is a corruption of the historic principles underlying generic top-level domains set forth by Jon Postel in [RFC 1591](#).
- **New gTLDs** are known to “break stuff,” cause “collisions,” and otherwise “fail to work as expected on the internet,” with no warnings to consumers (registrants) by ICANN or its “contracted parties,” i.e., consumer fraud. ICANN went so far as to try to absolve itself of all responsibility for “**technical feasibility**” of **new gTLDs** (new generic top-level domains) [thereby violating ICANN’s own bylaws and its ‘public interest’ commitments] by inserting into the [Base Registry Agreement §1.2](#): “*Technical Feasibility of String. While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and webhosters and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.*” As a result, no one tested for **technical feasibility** thereby **defrauding registrants worldwide**.
- A [SIDN Labs](#) and [Delft University of Technology](#)’s [report](#) (pdf), characterizes **new gTLDs** as “*phishing and malware domains*.”
- The **Electronic Frontier Foundation (EFF)** has [warned registrants](#) to **avoid new gTLDs** due to ICANN’s new gTLDs’ [flawed and overreaching RPMs](#).

- **Absolute unlimited monopolistic pricing powers** granted to **new gTLD registry operators**, including the right to **unlimited increases in domain name registration and renewal fees**--ICANN and its "**ICANN community**" ignored and never effectively addressed the [recommendation and advice of the U.S. Department of Justice Antitrust Division](#) (delivered to ICANN by [NTIA](#)) to protect consumers (registrants) and provide benefits to registrants through the new gTLDs program. New gTLD Registry Operators are free to "*rape and pillage*" the global domain names marketplace and consumers (registrants) worldwide, **thanks to ICANN's corrupt new gTLDs policy** developed solely for the benefit of "contracted parties" and back end registry service providers, not registrants.

*"... we are not running out of domains. This is a "way for registries and registrars to make money"*—ICANN founding Chair Esther Dyson.  
[see: [Esther Dyson Told ICANN new gTLDs were a mistake in 2011](#)(video)].

- [ICANN Insiders On New gTLDs: Mistakes, Fiascos, Horrible Implementation.](#)
- ICANN's **.BRAND new gTLDs** are not only a corruption of the principles of aforesaid [RFC 1591](#), but, in effect, constitute a ".BRAND extortion racket" for the benefit of ICANN and back end registry service providers—see [ICANN's Extortionate .BRAND Scam Failing](#) and the [U.S. Senate testimony](#) (pdf) of Dawn Grove, corporate counsel for the parent of the manufacturer of PING golf equipment.

Attached hereto and incorporated herein by reference as if fully set forth herein:

- a. New York Times article [Ethics Fight Over Domain Names Intensifies](#) March 18, 2012;
- b. NTIA letter to ICANN Dec 18, 2008, with attached Dec 3, 2008 US Dept. of Justice Antitrust Division Letter;
- c. Article by Ram Mohan: [More Problems Crop Up With Universal Acceptance of Top Level Domains](#);
- d. U.S. Senate testimony of Dawn Grove, corporate counsel for the parent of the manufacturer of PING golf equipment.

Respectfully submitted,

John Poole, gTLD domain names registrant, and *editor*, DomainMondo.com

cc: NTIA (David Redl);  
US Department of Justice Antitrust Division;  
EU Directorate-General for Competition.

**The New York Times**

## TECHNOLOGY

# Ethics Fight Over Domain Names Intensifies

By ERIC PFANNER MARCH 18, 2012

PARIS — A boardroom dispute over ethics has broken out at the organization that maintains the Internet address system after its most important supporter, the United States government, reproached the group for governance standards said to fall short of “requirements requested by the global community.”

The Commerce Department said this month that while it was temporarily extending a contract with the Internet Corporation for Assigned Names and Numbers to manage the allocation of computers’ Internet protocol addresses — and the .com and .net names of Web sites associated with them — it warned the organization that it needed to tighten its rules against conflicts of interest or risk losing a central role.

Icann, as the company is known, has filled that role since 1998. The Commerce Department said it had received no suitable bids for the contract, and was temporarily extending Icann’s services for six months.

After the department’s announcement, the soon-to-depart chief of Icann, Rod Beckstrom, went on the offensive, taking an unusual public swipe at his own organization’s 21-member board.

“I believe it is time to further tighten up the rules that have allowed perceived

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responsive to the growing chorus of criticism about Icann's ethics environment, but to ensure that absolute dedication to the public good supersedes all other priorities."

Icann has come under heightened scrutiny because of an initiative to increase vastly the number and variety of available Internet addresses. Under the plan, which Icann is putting into effect, hundreds of new "top-level domains" — the letters like "com" that follow the "dot" in addresses — are set to be created.

Some business groups say the expansion of domains will cause a rise in trademark violations and cybersquatting, while some governments object to Icann's move to create address suffixes like .xxx, for pornography.

But the initiative has been cheered by companies that register and maintain Internet addresses. A number of current and former members of the Icann board have close ties to such registrars or to concerns involved in other areas that stand to benefit from the expansion.

"Icann must place commercial and financial interests in their appropriate context," said Mr. Beckstrom, who is scheduled to step down from his post in July. "How can it do this if all top leadership is from the very domain-name industry it is supposed to coordinate independently?"

"A more subtle but related risk is the tangle of conflicting agendas within the board that would make it more difficult for any C.E.O. to meet the requirements of this deeply rewarding and sometimes frustrating job."

Icann directors were taken aback by Mr. Beckstrom's comments. Stephen D. Crocker, chairman of the board, said the chief executive had merely been expressing his "personal views."

"The board has been spending a lot of time on ensuring that we are as clean and straightforward as we can be," Mr. Crocker said. A review of conflict-of-interest policies is under way, he said, and directors already abide by strict guidelines, including a requirement that they file annual statements on potential conflicts.

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maintaining the Internet.

Those countries are said to be lobbying to gain greater influence over the Internet at the global level by bringing more functions under the auspices of the United Nations. The matter could come to a head in November, at a meeting in Dubai of the International Telecommunication Union, a United Nations body.

This campaign has raised alarms among supporters of an open Internet, who fear that transferring authority to international bodies could politicize governance and lead to restrictions on the flow of information.

Eric E. Schmidt, the executive chairman of Google, said recently that giving the United Nations such oversight would be a “disaster.”

“Be very, very careful about moves which seem logical but have the effect of balkanizing the Internet,” Mr. Schmidt said at a conference in Barcelona. “If the current governance is working pretty well — and I think it is — I wouldn’t move it, or if I did, I would do it very, very carefully.”

Yet the United States government is also dissatisfied with Ican. The Commerce Department said it had canceled a request for proposals to run the so-called Internet Assigned Numbers Authority because none of the bids met its requirements: “the need for structural separation of policy-making from implementation, a robust companywide conflict of interest policy, provisions reflecting heightened respect for local country laws and a series of consultation and reporting requirements to increase transparency and accountability to the international community.”

Eyebrows were raised last year when Peter Dengate Thrush, former chairman of Ican and a fan of the domain name expansion, joined a company that invests in domain names.

A version of this article appears in print on March 19, 2012, on Page B6 of the New York edition with the headline: Ethics Fight Over Domain Names Intensifies.

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**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Telecommunications and**  
**Information Administration**  
Washington, D.C. 20230

DEC 18 2008

Mr. Peter Dengate-Thrush  
Chairman of the Board of Directors  
Internet Corporation for Assigned Names and Numbers  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601

Dear Chairman Dengate-Thrush:

On October 23, 2008, the Internet Corporation for Assigned Names and Numbers (ICANN) posted for public comment a series of interrelated documents, including a draft applicant guidebook, related to ICANN's efforts to introduce new generic top level domains (gTLDs). The Department of Commerce (Department) appreciates this opportunity to offer the views of the United States government on such an important topic.

Understanding that the introduction of new gTLDs has been a long standing goal of the DNS Project, we believe it is critical to keep in mind the foundational Memorandum of Understanding between the Department and ICANN stipulating as a core principle the need to manage the Internet domain name and addressing system (DNS) in a manner that permits market mechanisms to support competition and consumer choice so that lower costs are realized, innovation is promoted, and user choice and satisfaction are enhanced. While we acknowledge the effort and hard work involved in producing the documents currently out for comment, it is unclear that the threshold question of whether the potential consumer benefits outweigh the potential costs has been adequately addressed and determined. In that regard, we would like to call to your attention a decision of the ICANN Board in October 18, 2006, that called for an economic study to address questions such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
- what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,
- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by who[sic]?<sup>1</sup>

ICANN needs to complete this economic study and the results should be considered by the community before new gTLDs are introduced.

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<sup>1</sup> ICANN, Special Meeting of the Board Minutes (Oct, 18, 2006)  
(<http://www.icann.org/en/minutes/minutes-18oct06.htm>) (last visited Dec. 11, 2008).

The United States government recognizes that it is ICANN's intention to carefully consider the comments received in this process and initiate further consultations, including a revised applicant guidebook, before introducing new gTLDs. With that in mind, below is a specific list of initial items we believe need to be resolved in the current documents:

- Ensure that the introduction of a potentially large number of new gTLDs, including internationalized top level domains, will not jeopardize the stability and security of DNS;
- Revise the gTLD approval process, the applicant guidebook and the proposed registry agreement to: (1) consider, allow objections for, and retain authority to address any adverse competitive welfare effects that may arise during the approval of new gTLDs applications or the renewal of subsequent contracts; (2) employ mechanisms such as competitive bidding whereby prospective gTLD operators would compete by proposing registry terms, including price and quality commitments, that provide consumer benefit; and (3) impose maximum price caps or other terms that would redound to the benefit of consumers in those cases where competitive bidding mechanisms will not adequately limit the ability of registry operators to exercise market power;<sup>2</sup>
- Demonstrate that ICANN has sufficient capacity to enforce contract compliance with an as-yet-unknown number of new contracting parties, especially in light of outstanding questions regarding existing contracts (such as the proposed amendments to the Registrar Accreditation Agreements and problems with the WHOIS data accuracy reporting system);
- State how ICANN will conduct legal reviews of applications, consider legal objections from third parties, and discharge its responsibility to ensure that the process of introducing new gTLDs respects all relevant national and international law, including intellectual property rights;
- Focus on coordinating technical functions related to the management of the DNS and not on matters more appropriately addressed by governments, such as adjudication of morality, public order and community objections in accordance with international human rights law. The proposed mechanisms to address these topics are inappropriate;
- Create a mechanism that provides for the expansion of the gTLD reserved names list, as appropriate, for technical or infrastructure-related names; and,

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<sup>2</sup> See attached letter from Acting Assistant Attorney General Deborah A. Garza, U.S. Department of Justice, Antitrust Division to Acting Assistant Secretary for Communications and Information Meredith A. Baker, NTIA (dated Dec. 3, 2008).

- Articulate a clear rationale for the proposed fee structure as well as a transparent mechanism, that includes community agreement, for the disposition of excess revenues, should there be any, given ICANN's status as a non-profit entity.

The United States government shares ICANN's commitment to promote competition in the domain name marketplace while ensuring Internet stability and security and looks forward to continuing to participate in this process so that the collective concerns of the community are addressed prior to ICANN moving forward with the introductions of new gTLDs.

Sincerely,

A handwritten signature in black ink, appearing to read "MABaker", followed by a horizontal line.

Meredith A. Baker  
Acting Assistant Secretary  
for Communications and Information

cc: Dr. Paul Twomey, President and CEO, ICANN





**DEPARTMENT OF JUSTICE**  
Antitrust Division

**Deborah A. Garza**  
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December 3, 2008

Meredith A. Baker  
Acting Assistant Secretary for Communications  
and Information  
National Telecommunications and  
Information Administration  
United States Department of Commerce  
Washington, D.C. 20230

Re: ICANN's Draft RFP for New gTLDs

Dear Ms. Baker:

This letter responds to the United States Department of Commerce's ("DOC") request for advice regarding competition issues raised by the draft request for proposal ("RFP") that would govern the issuance of new generic top level domains ("gTLDs") published by the Internet Corporation for Assigned Names and Numbers ("ICANN"). The Antitrust Division has reviewed the RFP and related materials published on ICANN's website, including a proposed registry agreement that ICANN will require successful applicants to execute. Our analysis of the issues raised by these materials is informed by our extensive experience with competition matters as well as the analysis we conducted in connection with our 2006 review of the revised .com registry agreement.<sup>1</sup>

As we explain below, some new gTLDs envisioned by the RFP likely would have market power, the exercise of which is not adequately addressed by the RFP or other constraints. Moreover, the creation of additional gTLDs is unlikely to constrain the exercise of market power by existing TLDs, especially the .com registry operated by VeriSign. Contrary to ICANN's apparent assumption, competition from existing TLDs – or from new gTLDs created pursuant to the RFP – is not likely to prevent the exercise of market power by new or existing TLD registries.

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<sup>1</sup> See Letter from Thomas O. Barnett to John M. R. Kneuer, dated September 6, 2006.

As a result, although new gTLDs may generate some consumer benefits, ICANN should take additional steps to ensure that the process of creating new gTLDs incorporates to the maximum extent possible competition-based mechanisms and also imposes other constraints on the exercise of market power by gTLD operators.

The Division makes two specific recommendations. First, ICANN's general approach to new gTLDs should be revised to give greater consideration to consumer interests. ICANN should more carefully weigh potential consumer harms against potential consumer benefits before adding new gTLDs and renewing new gTLD registry agreements. Second, the RFP process and proposed registry agreement should include provisions that would enable ICANN to constrain new registry operators from exercising market power. In particular, ICANN should establish competitive mechanisms for authorizing new gTLDs and renewals of gTLD registry agreements whereby prospective gTLD operators would compete for gTLDs by proposing registry terms – including maximum fee schedules – that would provide consumer benefits.

***Background:***

***Introducing New gTLDs Likely Would Enable the Exercise of  
Market Power by gTLD Operators and Likely Would Not Constrain the  
Exercise of Market Power by .com and Other Existing TLDs***

Our investigation of the proposed .com agreement generated several findings that bear on the likely effect of creating new gTLDs. First, we found that VeriSign possesses significant market power as the operator of the .com registry because many registrants do not perceive .com and other gTLDs (such as .biz and .info) and country code TLDs ("ccTLDs," such as .uk and .de) to be substitutes. Instead, registrants frequently purchase domains in TLDs other than .com as *complements* to .com domains, not as substitutes for them. In other words, registrants of a particular .com domain (e.g., google.com) will frequently also perceive a need to register the same domain in all or most available TLDs (e.g., google.info and google.biz) because of a desire to expand their presence on the Internet and to protect their brands from being exploited by others.<sup>2</sup>

We also concluded that existing gTLDs likely would not become a competitive threat to .com registrations because the network effects that make .com registrations so valuable to consumers will be difficult for other TLDs to overcome. Due to a first-mover advantage and high brand awareness, .com registrations account for the overwhelming majority of gTLD registrations. As a result, when users do not know the TLD in which a domain is registered, they most often simply append ".com" to a product or company name when attempting to find the

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<sup>2</sup> In this regard, we discovered that .info often seems to have little value as a stand alone gTLD. Many of the increased domain registrations in .info while those registrations were offered for free were simply bundled with purchases of the same domain in other TLDs or registered to existing users of the same domain in .com.

desired website. This phenomenon creates a strong preference for .com.<sup>3</sup> Accordingly, there will continue to be a need for Section 7.3 of the .com registry agreement to replace the discipline that market competition does not provide in this setting, as well as continuing DOC oversight of the .com registry under the Cooperative Agreement, which precludes VeriSign from amending or renewing the .com agreement without DOC approval.

Finally, our investigation of the .com agreement found evidence that other gTLD registry operators may possess a degree of market power. The market power inherent in the other gTLDs is less than the market power in .com, but is still material. The need of many registrants to purchase domains in many or most gTLDs allows each gTLD registry operator to impose costs on registrants that purchase domains simply because a gTLD exists. With respect to existing gTLDs, this power is constrained to some extent by the registry agreements applicable to the other gTLDs. Without those constraints, the gTLD operators likely could profitably charge even higher fees that reflect their market power as to registrants that are willing to pay a premium for their domains, since it appears that the operators may be able to identify those customers and charge discriminatorily high domain registration prices.<sup>4</sup> The fact that some registrants might view different gTLDs as substitutes would not necessarily constrain the gTLD operators from selectively exercising market power vis-a-vis those that are willing to pay a premium.

In light of these findings, we believe that the introduction of new gTLDs under the RFP could impose substantial additional domain registration costs on many consumers and that many new gTLD registry operators may have market power over registrants. Further, the introduction of new gTLDs is not likely to constrain the exercise of market power by existing gTLDs or ameliorate the continuing need for restraints to prevent VeriSign from exercising market power in the sale of .com domains.

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<sup>3</sup> VeriSign has argued that the increasing use of search engines will cause the importance of .com to diminish, but "direct navigation" continues to be a common practice. Computer users who type Internet destinations into their browser bars often assume that a domain is in the .com TLD whenever they are uncertain, due to the greater prevalence of .com names relative to other TLDs. As a result, new registrants often search for alternative domains in .com when their preferred .com domain is unavailable, rather than selecting their preferred domain in another TLD because investment in developing the domain in the new gTLD would likely benefit the owner of the domain in .com.

<sup>4</sup> Registrants that are willing to pay a premium would include those that engage in defensive registrations to protect their trademark or trade name and registrants that make significant investments in their domain names. A registry operator's ability to impose increased prices on registrants willing to pay a premium for domain names in a new gTLD assumes that the registry operator can identify these registrants. The antitrust laws likely would not constrain the unilateral pricing decisions of a gTLD operator whose market power derived from the creation of a new gTLD by ICANN.

### *Recommendations*

1. ***ICANN Should Give Greater Consideration to Consumer Interests before Creating New gTLDs and Renewing Registry Agreements***

ICANN is obligated to manage gTLDs in the interests of registrants and to protect the public interest in competition.<sup>5</sup> ICANN appears to have assumed that the introduction of new gTLDs necessarily will enhance competition and promote choice and innovation, without offering any evidence to support that assumption. To our knowledge, ICANN has neither studied competition among gTLDs at the registry level, nor commissioned such a study, despite the ICANN Board of Director's specific direction to do so.<sup>6</sup> On October 18, 2006, the ICANN Board directed ICANN's President to commission an economic study to address questions such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
- what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,
- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by whom?<sup>7</sup>

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<sup>5</sup> See Articles of Incorporation of ICANN, 4, as revised November 21, 1998 (<http://www.icann.org/en/general/articles.htm>); Joint Project Agreement Between the U.S. Department of Commerce and ICANN, Section II.C., dated Sept. 29, 2006 ( <http://www.icann.org/en/general/JPA-29sep06.pdf>).

<sup>6</sup> ICANN has periodically referenced an OECD report published in 2004 as support for its position that introducing new gTLDs may enhance competition at the registry level. The OECD authors relied on data showing a decline in .com, .net, and .org registrations combined with a significant number of registrations in the new .info, .biz, and .name gTLDs during the six-month period immediately following the introduction of the new gTLDs in 2002. S. Paltridge and M. Matsui, OECD's Directorate for Science, Technology and Industry, *Generic Top Level Domains: Market Development and Allocation Issues*, 4, 22 (July 13, 2004). However, the authors acknowledge that the reduction in .com, .net, and .org registrations was at the end of the "internet bubble," and that registrations in those three gTLDs resumed growth during the succeeding six-month period, while registrations in the new gTLDs tailed off and actually declined in .info during the last six months of 2003, the last period for which registration data was available. *Id.* Indeed, with the benefit of additional, more recent information in our investigation of the new .com agreement, we found no indication that the other gTLDs impose a competitive constraint on sales of .com domains or on VeriSign's ability to charge the maximum .com registry price.

<sup>7</sup> ICANN, Special Meeting of the Board Minutes (Oct. 18, 2006) (<http://www.icann.org/en/minutes/minutes-18oct06.htm>) (last visited Nov. 17, 2008).

The Board recognized that such a study could help in future negotiations with TLD registry operators.<sup>8</sup> Now, more than two years later, ICANN has proposed to introduce a new gTLD approval process, complete with a new gTLD registry operator agreement, apparently without having even begun the requested study.

ICANN should revise its general approach to give greater consideration to potential consumer harms and benefits. The creation of new gTLDs could generate consumer harm. First, approval of new gTLDs would proliferate the number of TLDs in which registrants feel that they must purchase registrations to protect their domain names, increasing their costs.<sup>9</sup> Second, new gTLD operators may be able to exercise market power vis-a-vis some group of customers (e.g., because of a desire to register for defensive purposes or because of investments they make in a domain name).

At the same time, new gTLDs could generate benefits. It is possible, for example, that they would intensify competition among gTLDs other than .com for customers that do not feel compelled to register their domain names in multiple gTLDs. Whether this is likely would require further analysis. In addition, new gTLDs may benefit unique registrant populations that might value a domain in a particular gTLD. An example of this could be a new gTLD that represents a particular community of people, a type of application that ICANN anticipates receiving in response to the RFP. However, we are unaware of any effort by ICANN to quantify this consumer benefit. ICANN has not attempted to distinguish the registrants that might value having a domain in a gTLD other than .com, including a new gTLD, from those registrants that would feel compelled to purchase one or more domains in the new gTLD only because the gTLD was created.

The RFP neither provides for any evaluation of what effect, if any, the new gTLDs will have on competition at the registry level nor allows for objections based on the likely adverse competitive effects of the gTLD. The RFP also does not establish any mechanisms or processes that would minimize the potential for harm from new gTLDs while enabling the potential benefits to be realized. For example, the proposed registry agreement (unlike the .com agreement and other existing gTLD registry agreements) does not include any price caps that would limit the ability of new gTLD registry operators to charge the highest possible prices for domains in the new gTLDs. Similarly, the proposed agreement does not include any restrictions against price discrimination, bundling, and tying. It also does not require registry operators to offer domains pursuant to long term contracts, meaning that registry operators would be free to raise

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<sup>8</sup> *Id.*

<sup>9</sup> The circumstances under which registry operators may impose additional costs on registrants willing to pay a premium for a domain name depends on the registry operator's ability to price discriminate as well as their pricing strategy. The magnitude of the overall increase in costs will likely to some extent depend on the number of new gTLDs introduced as a result of the RFP process.

Ms. Meredith A. Baker

December 3, 2008

Page 6

prices to registrants willing to pay a premium for specific domain names. The proposed registry agreement also allows for the perpetual renewal of every new gTLD registry agreement without regard to competitive effects or consumer-based objections.

ICANN should recognize that new gTLDs, while providing a desired choice for some registrants, are unlikely to restrain the exercise of market power by the .com registry operator and may impose significant costs on registrants, particularly those that will feel compelled to register their domains in the new gTLDs. ICANN should explicitly include this type of analysis as part of its evaluation of each new gTLD application, and should proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD.<sup>10</sup> If ICANN is not prepared to act now to address the competition-related issues identified in this letter, it should at a minimum postpone the introduction of new gTLDs and the adoption of additional perpetually renewing gTLD agreements until it receives and reviews the study that the ICANN Board requested over two years ago.

**2. *ICANN Should Revise the RFP Process and the Proposed Registry Agreement to Protect Consumers from the Exercise of Market Power***

ICANN should take steps to protect consumers from the exercise of market power by gTLD operators. First, the new gTLD approval and management process should be amended to reduce the potential adverse results of new gTLDs. The RFP process should require ICANN to consider, allow objections for, and retain authority to address any adverse consumer welfare effects that may arise during the new gTLD approval process and registry agreement renewal process. For example, ICANN should be sensitive to complaints that consumers may feel compelled to register domains in a new gTLD for defensive purposes, without expectation of receiving meaningful value from the new registration other than avoidance of even higher costs that would be incurred to combat third parties' improper use of the registrant's trade name in the new gTLD.

Second, once it has decided to authorize a new gTLD, ICANN should implement a process by which prospective gTLD operators compete for the privilege of operating a particular gTLD by offering terms that benefit consumers. Effectively implementing such a process would require

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<sup>10</sup> ICANN has consistently told us that its primary concern is with DNS management from a technical perspective and that it does not have the expertise or inclination to protect or preserve the public interest in competition and low domain costs, preferring instead to allow government competition authorities to take whatever action might be necessary to address issues of competitive abuse. The problem with ICANN's preferred approach is that the antitrust laws generally do not proscribe a registry operator's unilateral decisions made under the processes established by ICANN – such as, for instance, pricing decisions. See, e.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not . . . unlawful . . .”). Accordingly, ICANN should create rules fostering a competitive environment to the greatest extent possible.

that ICANN evaluate bids from the perspective of the benefits they provide consumers, not merely the amount bidders are willing to pay to ICANN for the right to operate the gTLD. ICANN's requests for bids should expressly call for bids to specify an initial maximum price that would be charged by the operator for domain registrations, as well as limitations on price increases over time. ICANN should also encourage improved performance by asking bidders to propose any operating specifications that exceed the minimum standards established by ICANN. ICANN's requests for bids should also solicit other proposals for providing consumer benefit, such as commitments not to discriminate in price across registrants (in order to avoid the ability to "hold up" registrants that have made investments in a domain name) and not to require the purchase of other services from the registry operator as a condition of registration (to limit price cap evasion). All such terms should be incorporated in the registry agreement so that ICANN can enforce them.

Third, although a competitive bidding mechanism likely is the best mechanism for simulating a competitive outcome in most circumstances, it may not be effective in all cases. Because ICANN's proposed registry agreement lacks any of the kinds of safeguards included in Section 7.3 of the new .com agreement or other gTLD agreements, ICANN should consider revising the proposed registry agreement, at least for instances where there is not competitive bidding to operate a new gTLD, to include provisions designed to limit the ability of the registry operator to exercise market power, i.e., price caps and commitments against price discrimination and tying. In addition, it may be preferable to require long-term agreements (the .com agreement, for example, requires that the operator offer domains for terms of up to 10 years). If a competitive bidding mechanism is infeasible, protections of this sort would prevent the exercise of market power by the operators of many of the contemplated gTLDs. Even if a competitive bidding mechanism is implemented, moreover, it might still be appropriate to incorporate some protections into the standard registry agreement, to anticipate the possibility that there is not effective competition for a particular gTLD.

Finally, ICANN should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition. Such a mechanism would both assist in disciplining the conduct of the incumbent during the initial term insofar as the incumbent would want to maximize the likelihood of renewal, and ensure the benefits of competition when potential operators bid for the right to operate the gTLD in the renewal term. Instead, ICANN has conformed the proposed registry agreement to the existing gTLD agreements, effectively granting perpetual renewal rights to registry operators without the prospect of periodic rebidding, and without regard to potential adverse competitive effect. Experience with the .net TLD and other gTLDs has shown that competitive bidding in the award of gTLD registry agreements, and periodic rebidding, has served as an effective tool for managing the interests of registrants in gTLDs. Indeed, competitive bidding has resulted in lower domain prices and higher operating specifications than what ICANN has achieved through non-competitive negotiations. In particular, competitive

Ms. Meredith A. Baker  
December 3, 2008  
Page 8


bidding prompts bidders to propose and accept registry improvements, higher operating standards, and lower registration fees to win the contract.

Opponents of competitive bidding on renewals have contended that ICANN needs to grant perpetual registry contracts in order to motivate registry operators to invest in their registries. However, incumbent registry operators have an incentive to make investments in order to maintain their competitive advantage in a rebid situation.<sup>11</sup> Thus, the effect on innovation of potential termination of a registry agreement is at worst inconclusive. Further, experience demonstrates that any concern about the risk of transferring a new gTLD registry after a rebid is misplaced. Management and operation of many gTLDs and ccTLDs have been successfully transferred without imposing undue burdens on DNS stability or security. For example, VeriSign successfully transferred the .org registry to the Public Interest Registry in January 2003.

\* \* \*

ICANN's approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition at the registry level. We respectfully suggest that the DOC refrain from expressing satisfaction with ICANN's progress toward the goal of promoting competition among TLDs unless and until ICANN develops a credible and effective policy that compels it to employ tools such as competitive bidding to manage TLDs in a manner that safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices. To date, we believe that ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD registry operations.

Sincerely,

  
Deborah A. Garza

cc: Kathy D. Smith, Esq.

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<sup>11</sup> We have identified no registry operator that reduced investment because of potential termination.





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# More Problems Crop Up With Universal Acceptance of Top Level Domains

Feb 07, 2014 11:26 AM PDT | Comments: 3 | Views: 25,026

By [Ram Mohan](#)



I've often found truth in the famous [George Santayana quote](#), "Those that cannot remember the past are doomed to repeat it." That's an apt warning for what is currently happening — again — with the hundreds of new generic Top Level Domains (gTLDs) that are launching ... and failing to work as expected on the Internet.

First, a quick refresher: As most *CircleID* readers know, in the early 2000s, seven new gTLDs were launched: .AERO, .BIZ, .COOP, .INFO, .MUSEUM, .NAME and .PRO. Aside from Country Code TLDs (ccTLDs), these were the first top-level changes to the DNS since the early days of the Internet.

Any TLDs that were more than three characters long promptly ran into usability issues. I know this from first-hand experience with .INFO, for which my company, Afilias, is the registry operator. With .INFO's position as the most popular of all new gTLDs, I spent a good part of my time, in the first five years after .INFO launched, working with vendors to get their systems to accept .INFO email addresses and .INFO domain names as valid. Now, 13 years later, it's still possible to find systems that reject .INFO addresses. From that experience, I developed my three rules of TLD acceptance.

Mohan's Three Rules of TLD Acceptance:

1. **An old TLD will be accepted more often than a new TLD.**
2. **An ASCII-only TLD will be accepted more than an IDN TLD.**
3. **A two or three letter TLD will be accepted more often than a longer ccTLD or gTLD.**

Web browsers use different algorithms to improve security and certificate processing. They also have varying rules for how to deal with a website address in a top-level domain that the browser does not recognize (including the use of a technique called search-list processing, which sometimes exacerbates the problem). The use of different algorithms combined with search-list

processing can pierce the boundary between private and public administration of namespaces. In addition, many applications and apps that use the Internet still refer to a locally held (and quickly outdated) list of "valid" TLD names, rather than using the DNS to determine domain name validity, despite being warned away from this approach in the IETF's [RFC 3696](#).

While the issue of universal acceptance never really got solved, the topic takes on heightened importance due to the creation of hundreds of new top-level domains on the Internet. In the earlier set of new TLDs, the primary problem occurred for TLD strings with a length of more than three characters. However, in the current crop of new TLDs, even three character strings get caught in the mix. What was previously considered primarily an infrastructure-level issue is now poised to become a major user-level issue, with negative impact on both the regular Internet user and inside corporations.

In 2003 ICANN's [Security and Stability Advisory Committee](#) (SSAC), of which I am a member, studied problems with the support of new top-level domains by infrastructure and software providers and made several [recommendations](#), including:

- Internet infrastructure providers that have their own customised software for Internet service provision should test the capability of the software to support new TLDs, and correct problems quickly where they are found.
- Internet software application developers should be encouraged to review their software for support of new TLDs. Where problems are found, application developers should upgrade their software, and provide these updates to their user base.
- A central repository of known, commonly used software that has compatibility problems (e.g., DNS resolver software used by common operating systems) with new TLDs, and instructions for how to upgrade the software should be created. This repository would facilitate Internet infrastructure providers and software application developers to provide necessary software updates to users of the Internet to resolve known compatibility issues.

That was over a decade ago! It's somewhat astonishing that these recommendations are as valid today as they were then, and that readiness is still not measurable.

For example, try to resolve a new TLD such as .email or .onl using a mobile Android device. On my Android phone, typing in www.nic.onl is rejected by the browser and handed off to be treated as a search query, not a DNS query. However, if you typed in the same web addresses on a browser — Chrome, Internet Explorer, Firefox or Safari — in a desktop environment, they go to the right destination. The experience varies even further if you try to resolve a multilingual (Internationalized Domain Name or IDN) top level domain on your browser or email system — and over 100 internationalized top level domains are being activated on the Internet this year. For instance, typing in www.nic.移动 or www.nic.xn--6frz82g, the newly delegated .MOBI TLD in Chinese, Safari shows the ASCII string only in the address bar, while Chrome and Firefox show

the Chinese string; Internet Explorer dumps it to a search result screen, Users deserve to be taken to the correct destination when they type in an address in their browsers, regardless of the type of device they use or language they type the address in.

The problem isn't technical in nature; we know how to address the technical issues. What's needed is coordination and collaboration between far removed actors in the Internet world, so that the software and systems they create can act in a standard way and return a predictable experience to users. The era of hundreds of new TLDs requires new energy, focus and cooperation. New gTLD owners, software developers, network providers and infrastructure companies must work together to ensure their software, browsers, forms, apps, email and other systems are compliant and can handle all delegated new TLDs.

The stakes are even higher than they were in 2001, when I first encountered serious problems with the universal acceptance of .INFO, followed thereafter by .AERO and .MOBI. The need for a coordinated response and clearly visible results to the universal acceptance challenge has never been greater; not doing so could deal a devastating blow to the utility, relevance and legitimacy of all new top level domains. Ensuring universal acceptance should become one of the foremost priorities of all entities engaged in the Domain Name System and using the Internet.

By [Ram Mohan](#), Executive Vice President & CTO, Afiliast. Mr. Mohan brings over 20 years of technology leadership experience to [Afiliast](#) and the industry.

**Related topics:** [Cybersecurity](#), [DNS](#), [Domain Names](#), [ICANN](#), [New TLDs](#)

## Comments

**Ram,I agree that we need coordination and**

[Alex Tajirian](#) – Feb 07, 2014 1:11 PM PDT

Ram,

I agree that we need coordination and collaboration, but it must also encompass additional parties to fight a new flood of signal confusions, cybersquatting, phishing, and security breaches. It must involve registries, webhosting companies, parking/monetization companies, and ICANN.

I am also not sure about your third rule, “A three-letter gTLD will be accepted more often than a longer ccTLD or gTLD.” I don’t understand what you mean by “accepted” and “a longer ccTLD.”

**Hi Alex,I'm glad you agree that more**

[Ram Mohan](#) – Feb 07, 2014 3:03 PM PDT

Hi Alex,

I'm glad you agree that more collaboration is needed. You're spot on about the wide range

of parties who need to be actively engaged, as well as the need for an organization to coordinate this - perhaps ICANN, perhaps the W3C, perhaps others?

Regarding my third rule - new IDN ccTLDs are more than 3 characters long. They will run into the same problem of software and systems that discriminate against TLDs that are more than 3 characters long. Therefore a 3 letter gTLD will be accepted more than a longer gTLD or ccTLD.

Many email systems, web applications, forms and applications on the Internet, and systems and hardware have at best obsolete rules about what constitutes a valid TLD and at worst have completely wrong rules about what constitutes a valid TLD (see RFC 3696 reference above). This ecosystem should be able to handle the introduction of new TLD's without requiring a full scale revamp each time. The DNS itself handles this well - new names can be introduced and nameservers are updated within minutes.

The big change is that universal acceptance has now moved from "infrastructure" to mainstream, and the impact could be significant.

-Ram

**Ram, Thanks for the clarification.**

**Alex Tajirian** – Feb 07, 2014 4:34 PM PDT

Ram, Thanks for the clarification.

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**TESTIMONY**  
**OF**  
**DAWN GROVE**  
**CORPORATE COUNSEL**  
**KARSTEN MANUFACTURING CORPORATION**  
***PROTECTING INTERNET FREEDOM: IMPLICATIONS OF ENDING U.S. OVERSIGHT***  
***OF THE INTERNET.***  
**BEFORE THE**  
***SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL***  
***COURTS***  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**

**SEPTEMBER 14, 2016**

## **Executive Summary**

Dawn Grove, who serves as Corporate Counsel, is appearing on behalf of Karsten Manufacturing Corporation (Karsten). Karsten is the parent company of PING, a U.S. manufacturer of premium custom-fit golf equipment, and PING REGISTRY PROVIDER, INC. (PING REGISTRY), the ICANN contracted party that operates the .PING branded top level domain name.

While many have diligently worked on the IANA transition for several years, ICANN's structure remains seriously flawed, and rushing the transition through now in its current state will endanger manufacturers' rights to their trademarked brand names, severely disadvantage states' rights, jeopardize national security, and prevent the safeguarding of the Internet freedoms we have come to depend on.

\* \* \* \* \*

Good morning, Chairman Cruz, Ranking Member Coons and members of the Subcommittee,

I thank you for this opportunity to share the view of a U.S. manufacturer and its subsidiary's experience as an ICANN contracted party regarding the proposed IANA transition. Many thanks to you for caring about these most important and time-sensitive issues.

### **I. Introduction**

My name is Dawn Grove, Corporate Counsel for Karsten Manufacturing Corporation. I also chair the Arizona Manufacturers Council and serve on the board of directors of the Arizona Chamber of Commerce & Industry, both of which oppose the current IANA transition. (See attached portions of the Arizona Chamber of Commerce & Industry 2016 Business Agenda.) Karsten Manufacturing Corporation is the parent company of both PING and PING REGISTRY. PING is one of the top three golf equipment brands in the U.S. and provides over 800 jobs in Arizona that people want to hang onto—nearly 60% of our workforce has worked with us for over 10 years, and nearly 30% of our workforce has worked with us for over 20 years. I have worked at Karsten for only 18 years, so I am relatively new. We are a closely held, private family business started by my grandfather in his garage, and we have been passionately designing and manufacturing custom-fit premium golf equipment in Arizona for the past 57 years.

PING has built a reputation for innovation, design, quality, and service and we actively protect our brand name in many ways including with trademarks throughout the world. While golf clubs are our bread and butter, we make and license a wide variety of products—apparel, hats, gloves, backpacks, towels, software, cradles to use iPhones to analyze a golfer's putting strokes; Apple even once licensed our PING trademark for its social media for a number of years. We have vigilantly protected our brand name in many categories, including for domain name registry services. Our name is our lifeblood, and we aim to ensure that the PING name reflects the innovation and perfection we put into every one of our custom-built golf clubs.

## **II. Our Experiences With ICANN's Monopoly**

Despite the extremely high cost of applying for a gTLD—the application fee unilaterally set by ICANN is \$185,000—Karsten, through its affiliated company, PING REGISTRY, paid the \$185,000 application fee for .ping. In our application, we informed ICANN of our well-known rights to our famous PING marks. We also paid legal experts to help us navigate the application process, and we set aside hundreds of thousands of dollars for startup costs for the registry, all to satisfy ICANN's extremely unpredictable application process. We understood then, as we do now, that the Internet is also a place to lead as innovators and wanted to ensure a secure way of communicating with our customers and protecting them from counterfeit products in the future. More importantly, we did not want to risk having someone else obtain the exclusive right to use our PING mark as a registry term via a contract with ICANN. It ended up being the right decision, because a wealthy ICANN insider based in India that had never made or sold a PING product, had not trademarked the name throughout the world or otherwise had any respectable claim to our name, filed a competing application with ICANN for .ping. The fact that one of the other applicant's affiliated companies had a number of Uniform Dispute Resolution Policy decisions against it did not deter the applicant. It should have, since the Applicant Guidebook makes it clear that parties with a history of adverse domain name decisions should not apply to run registries.

At first, we felt hopeful that ICANN would do its job, as any company would that takes due diligence seriously, and vet proposed registries against known trademark registrations. ICANN is not above the trademark laws of the United States and should not offer registry contracts in violation of well-established trademark rights. We also expected ICANN to follow its own charter, bylaws, and the Applicant Guidebook, and disqualify the competing applicant based on our trademark rights and the other applicant's history of adverse domain name decisions against its affiliate. To be sure that ICANN's applicant background review did not miss these prior adverse decisions, we made ICANN directly aware through the filing of public comments, which is the method of communicating to ICANN about such concerns. Despite ICANN's actual knowledge of the India company's problematic history and actual knowledge of our rights in our global brand, it became clear that ICANN had no intent to vet the other applicant or deter its desire to run a registry consisting of our PING mark. We realized there was no structural incentive for ICANN to follow its bylaws and rules (which would have prevented ICANN from awarding our name to the other applicant), and there was no process and no one willing to actively hold ICANN's new gTLD staff accountable. You see, when there are competing applications for the same term, ICANN simply forces all applicants into an auction. When we asked ICANN to postpone the auction and provided it, again, with actual notice of our trademark rights, ICANN's counsel threatened to terminate our application for .PING if we went to the courts to seek relief. If ICANN terminated our application for seeking to enforce our trademark rights, it would have ensured that the company from India would obtain the operating contract to run a registry consisting of our brand. We had no choice but to pay ICANN's auction price. I cannot begin to tell you how scary it was for my family to go into that auction not knowing whether we would be able to keep our PING name after all these years. We ended up paying ICANN \$1.5 million at the auction to reclaim our name from ICANN. If ICANN is prepared to sell a domain name consisting of our brand to a third party with full knowledge of our trademark rights unless we paid an enormous sum, all the while under the close watch of the Department of Commerce, you can imagine how this experience has left us very wary of how a monopoly, such

as ICANN, will act if the Department of Commerce completely abdicates its historic oversight role.

### **III. Our Experience is Early, But Not Unique**

ICANN benefits to the tune of potentially millions of dollars every time there's an auction and, indeed, has taken over \$230 million from businesses in auction proceeds alone since it rolled out its top level domain name program. ICANN also accepted an extra million dollars in a side deal with the .sucks registry, which company turned the Trademark Clearinghouse on its head and instead of using it for its purpose of allowing trademark owners a central place to detail their registered trademarks, allows the unscrupulous to pressure brands into purchasing .sucks domain registrations at unusually high prices to avoid having people post defaming comments on brandname.sucks websites. Of course, twisting brand owners' arms for high payments based on their trademark rights should never be the intended purpose of any registry, but ICANN's financial structure derives its revenue from selling more and more top and second level gTLD's to the business community; holding more auctions increases its resources and power to influence others. Its revenue has no tie to whether it follows its own charter and rules.

Commerce says ICANN made all the changes multistakeholders wanted and that Commerce cannot influence the process. However, there were fundamental changes requested by the global multistakeholders which the ICANN Board rejected at the Dublin meeting last year. For example, the global multistakeholders requested a very common Single Member Model of governance where the stakeholders would be empowered as the Single Member to address issues on an ongoing basis. The ICANN Board rejected this in favor of an untested Sole Designator Model of governance that only allows the multistakeholders to come together as an "Empowered Community" to address crises on occasion, rather than day-to-day oversight, assuming the whole world of global stakeholders can agree on what constitutes such a crisis. It was highly rumored that the Board's position was that it would rather there be no transition than a transition with the Single Member Model in place. Predictably, the members of the multistakeholder community within the Cross Community Working Group for Accountability caved under the pressure rather than stand up to the ICANN Board and the transition plan now anticipates the Sole Designator experiment in Internet governance. Instead of implementing the change to the bylaws this spring so that they could be tested for a few months prior to the proposed transition, the ICANN Board made the accountability reforms contingent on the transition, signaling that the ICANN Board may not really believe that it should improve its accountability to the community.

### **IV. This Handoff Is More Than a Technical Matter**

ICANN is currently accountable to NTIA for both policy and technical functions until a transition is made away from NTIA oversight. NTIA has announced that it is now ready to transition its stewardship of the Internet policy and technical functions to ICANN and its global stakeholders. Following the transition, ICANN will be a stand-alone monopoly accountable only to its stakeholders, including 162 foreign government members and 35 "observers" (the "Governmental Advisory Committee" or "GAC"). Under recent accountability reforms, which are set to become effective only upon transition, GAC "consensus advice" must be taken unless overridden by a supermajority of the ICANN Board. If the policy functions were to remain under the oversight of the Department of Commerce, perhaps the transition would not be as



troubling. However, the transition is not merely just about who performs technical functions, no matter how many times proponents of the transition make that claim or call it just a spreadsheet. If there were nothing at stake here, none of us would be here and none of the advocates who are pushing hard for this transition to occur would be pushing as hard as they are.

## **V. No Role for State Governments**

State governments are excluded from participating as voting members of the GAC. The only way for a State government to have its concern reach a vote within the GAC is if the NTIA decides to champion the State's cause. Even assuming the NTIA were to decide to champion such causes, the NTIA's voice will be lessened in the GAC following transition. The United States will be a mere equal with other governments, such as Iran, Russia, or even tiny countries like Grenada. States, such as California, Texas, and New York, whose GDP and populations dwarf many GAC members, will have no voting seat at the table. With the U.S. Government giving up its oversight role, U.S.-based law enforcement agencies will be on the same footing as agencies from other countries. With foreign interests leading the charge to move ICANN out of the U.S., registries and registrars may be less likely to respond to information requests from various State Attorneys General. This will make it harder for federal law enforcement and State Attorneys General to determine where threats are originating from that impact its citizens. If the ICANN model is so inclusive, where are the seats at the GAC table for the 50 sovereign States?

## **VI. Expanded Role for Foreign Governments**

The transition plan that ICANN sent to the NTIA lacked a promised provision in the bylaws making it clear that GAC "consensus advice" would not trigger a mandatory, supermajority ICANN board vote. Stakeholders who voted in Marrakech for the transition plan voted for the proposal based upon that promised provision ensuring that the GAC would remain in its advisory role and not dictate policy to the ICANN Board and community. Instead, as feared, governments now possess essentially unlimited power to "advise" the ICANN Board to take or not take actions. There are no guardrails around what subject matter GAC advice can cover or when that advice needs to be provided. Importantly, "consensus advice" does not require unanimous agreement of all countries on the GAC, only that there is "general agreement in the absence of any formal objection." In other words, the United States' GAC representative need not vote yes for "consensus advice" to be binding on the ICANN Board, only not object to what others are doing. Unless the ICANN Board has the political will to stand up against inappropriate GAC advice, and it has shown in the past that it does not, ICANN will be vulnerable to capture.

During its stewardship, the U.S. has strived to create an environment where the entire world community had free and open access to the Internet. It is essential to U.S. manufacturers that such an environment continues, and in order to accomplish that goal, the transition must ensure that checks and balances are in place to resist and prevent capture by governments which could act to restrict this access.

## VII. Lack of NTIA Authority

The NTIA's involvement with ICANN has been via the Executive Branch and not with Congressional authority. The NTIA itself acknowledges that it never had authority to regulate ICANN:

“Throughout the various iterations of NTIA's relationship with ICANN, NTIA has never had the legal authority to exercise traditional regulatory oversight over ICANN . . . .”  
[https://www.ntia.doc.gov/files/ntia/publications/iana\\_stewardship\\_transition\\_assessment\\_report.pdf](https://www.ntia.doc.gov/files/ntia/publications/iana_stewardship_transition_assessment_report.pdf) at 4 (accessed 8-21-2016).

Conversely, the NTIA also states that while it has contracted with ICANN, it has the authority to discontinue contracting with ICANN for the IANA services:

“Just as federal agencies can enter into contracts they need to fulfill their missions without specific legislative authority, federal agencies can discontinue obtaining such services when they no longer need them.” *Id.* at 6.

What is missing from the NTIA analysis is clarity on what happens to a federal contractor when the government ceases contracting with it for services. It appears that both the NTIA and ICANN are operating under the assumption that a former federal contractor “inherits” the right to continue performing services absent a contract. Applying that conclusion to various government services, such as defense contracting, would lead to chaos. The Internet is no less important to national security. In order for any transition to be legitimate, and for ICANN to retain its policymaking and technical functions legitimacy after transition, Congress must act, but should act promptly to delay the transition, repair ICANN's faulty structure, and test the repaired structure for some period of years prior to any potential transition.

## VIII. Unsolved Problems

NTIA reviewed this proposal and found not even one item amiss despite ICANN drafting whole new provisions not vetted previously by the multistakeholder community in contravention of its own rules. Clearly, NTIA rushed the final decision in order to meet an artificial deadline. There is no time to implement the accountability changes prior to the deadline and to test them in advance. There are a number of changes included in the proposal that are not fully developed or will require proof testing before it is clear that they achieve the objectives stated. As mentioned before, the ICANN Board has made all of the accountability changes contingent on the transition occurring, providing no time to “test drive” them.

In ICANN's rush to meet the NTIA's deadline, important work was left undone. This is what ICANN means when they refer to “Workstream 2.” However, some of the most important issues were pushed off into Workstream 2, such as the permanent jurisdiction of ICANN and the protection of human rights, including free speech. Make no mistake, there are participants involved in the Workstream 2 work who desire to see ICANN leave California and be reconstituted in another jurisdiction outside of the easy reach of the federal courts. Likewise, there are participants within the Workstream 2 process who wish to cherry-pick which human rights are observed by ICANN and which are not. Where ICANN is formed and whether or not ICANN respects the longstanding human rights enjoyed by every American, such as free speech,

are not minor considerations. The transition should not occur until these issues are firmly and finally resolved and Congress consents to the outcomes.

## **IX. Conclusion**

Right now, ICANN is under contract with the NTIA, which contracts provide guardrails to what ICANN can and cannot do. While the NTIA's governance might have been a "light touch," particularly over the most recent years, that does not undo the benefits of NTIA's stewardship. If NTIA's stewardship had no real effect, there would be no clamoring for the transition to occur. The so-called "Empowered Community," a convoluted structure of stakeholders that will only be activated in times of crisis, is not suitable to provide day-to-day oversight of ICANN's Board. Instead, after the transition, which will result in a power vacuum, the stage is set for an enhanced GAC to step into the role previously held by the NTIA. Not every GAC member values free speech, predictable markets, and intellectual property protections for consumers. Replacing the NTIA with the enhanced GAC whose "consensus advice" is binding absent a supermajority pushback from the ICANN Board flunks the NTIA's own test of what a suitable transition plan should entail.

Congress, at a minimum, should require the NTIA to renew the IANA contract prior to September 30, 2016, and to ensure that all community-approved accountability changes in the bylaws and procedures of ICANN be implemented and be operational for a reasonable time period, protocols rightfully followed, and risks to manufacturers and other trademark rights holders addressed prior to any transition. An orderly, legitimate transition, if desired, then can be considered by Congress in cooperation with the NTIA.

My hope is that Congress will intervene to safeguard the free and open Internet for the use of the world, and hold Commerce to actively oversee ICANN's activity and help repair its faulty structure in the waning hours when it still has time and authority to do so. No country is better suited than the United States to safeguard the Internet for the use of the world, because more than many of the nations around us, we protect intellectual property, value free speech, safeguard the free exercise of religion even for those who believe differently than we may, and champion the rights of minorities.

\* \* \* \* \*

Karsten, as an ICANN contracted party, manufacturer, and Arizona employer, thanks the subcommittee for its continued action in this matter and urges Congress to take steps to ensure that any transition of the oversight of the policy and technical functions to ICANN be prevented from occurring at least until ICANN's faulty structure is repaired and ICANN has completed all the necessary work and has evidenced for a significant period of time that it is truly accountable and ready to fulfill its commitments globally.

Thank you.