Mr. Akram Atallah
President, Generic Domains Division
Internet Corporation for Assigned Names & Numbers
12025 East Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

18 June 2014

RE: ICANN's First New gTLD Application Round

Dear Mr Atallah,

We represent applicants for over 120 registries, all of whom are owners of global brands. Our clients applied to protect their intellectual property, to benefit from the greater control and security that a new gTLD offers and, very importantly, to use their registries as a platform for innovation.

Our clients have valued the efforts made by the ICANN community, the Board and the staff to make the application process smooth. Naturally we expected some issues as this was the first round. However, our clients have been dismayed and had their plans disrupted by all too frequent failures in implementation and systems, missed deadlines and last-minute policy changes.

On the assumption that there will be future new gTLD rounds, once the impact and experiences of Round 1 have been assessed, we have set out below a non-exhaustive list of issues which reflect the perspective of brand registry applicants. These issues are presented at a high-level, with examples (and potential solutions) provided where appropriate. The purpose of this letter is not to attempt to summarise all of the issues faced but, rather, to engage in the emerging discussions surrounding the review of the first new gTLD round.

We hope that this contribution, together with the input from others representing different applicant interest groups, will help make the application process more efficient, predictable and stable in the future, and less frustrating for both applicants and ICANN staff.

1. Streamlining the new gTLD application process

    a. **Application streams v. "one size fits all"**

    We believe that the next new gTLD application process should be more clearly tailored for different types of applicants. This should be reflected throughout the process: application questions, Initial Evaluation, and contracting.

    The basis for this is already available in the application types that have now been recognised at one or more stages of the new gTLD application process. These include:

       i.   Geographic TLDs
      ii.   Community TLDs
    iii.   Hybrid (Geographic/Community) TLDs
    iv.   Generic TLDs
     v.   Brand TLDs

In addition, ICANN could explore whether a more manageable approach to a future round would involve placing a limit on the number of TLD registries any one organisational family can apply for in advance (e.g., a limit of 100).

b. Prioritisation system

A prioritisation system should be maintained for future rounds, based on randomly generated priority numbers assigned after the application window closes, rather than through a separately organised "Prioritisation Draw". The systems used to implement this should be robust, reliable, and not open to gaming.

c. Background checks

As stated in the current new gTLD Application Guidebook ("AGB"):

> "Applying entities that are publicly traded corporations listed and in good standing on any of the world's largest 25 stock exchanges (as listed by the World Federation of Exchanges) will be deemed to have passed the general business diligence and criminal history screening."

In future rounds, new gTLD applicants which satisfy this criteria should not be required to provide detailed information relating to the entity, its officers, directors, and major shareholders if this will not be subject to background screening. As the AGB correctly notes, entities listed on these exchanges are subject to rules which already "meet or exceed the screening ICANN will perform".

As an additional point of review, consideration should be given to whether such a listed entity should be subject to the same level of information disclosure as is required for private entities (relating to its subsidiary's officers and directors), if it chooses to apply for a new gTLD through one of its subsidiary companies.

Furthermore, there may be other classes of applicant which are not listed corporations, as described above, where there will nonetheless also have been adequate screening that would meet or exceed the screening that ICANN would perform. An example would be a quasi-public body where the senior officers are effectively public appointments.

Anyone who has been found guilty of cybersquatting, or lost more than two Uniform Dispute Resolution Policy (UDRP) cases, should not be allowed to participate as an officer of a registry.

d. Approved back-end Registry Services Providers

In order to make the evaluation process for the technical and operational portion of a TLD application more efficient, we propose that a mechanism is put in place to pre-evaluate "approved" back-end Registry Services Providers (RSPs), in a similar fashion to the list of "approved" data escrow agents in the current new gTLD round.

This would allow applicants contracted with such approved RSPs to simply indicate in their application (1) which of these approved RSPs will be supporting their TLD, and (2) whether the applicant intends to implement any additional registry services, that go beyond the scope of those services approved by ICANN. ICANN's evaluators would then only be required to evaluate any proposals for such additional back-end registry services. Streamlining along these lines would bring welcome efficiencies for applicants, RSPs and ICANN's evaluators.

e. Financial evaluation – Continued Operations Instrument

An evaluation of the purpose and options for providing a Continued Operations Instrument (COI) should be conducted ahead of a future round. The review should consider whether applicants could obtain insurance as an alternative mechanism to a Letter of Credit (LOC) or escrow deposit.

If the outcome of the review results in the LOC remaining as an acceptable COI, ICANN should ensure that a template for a compliant LOC is made available to the applicant community which takes account of local financial and legal requirements in different parts of the world.

2. System integrity and contingency planning

ICANN should ensure that all technical systems required for the next round are secure, robust and reliable. Application systems (such as TAS) should be capable of handling large numbers of applications and contingencies should be in place, in the event of failure, to ensure that service delivery, and application timelines, are adhered to. It is possible that the second round could attract 10,000 applications from businesses, as Round 1 advantages mature.

3. Timelines

The transparency and credibility of application timelines should be enhanced in future rounds.

Reliable timing estimates are an important element of the new gTLD program. For most, if not all, new gTLD applicants they serve as a key prerequisite for business planning, particularly budgeting.

ICANN should ensure that no future new gTLD round begins without a detailed, realistic, publicly available review of expected timelines for application processes. Since applicants do not have the luxury of missing deadlines and extending timelines then neither should ICANN save in the most exceptional of circumstances. Where timelines are missed during future rounds, ICANN should ensure prompt reporting to the community of (1) why the timeline was missed and (2) what measures have been taken to avoid a repeat occurrence.

Communication between ICANN and future applicants should be improved so that timeline changes are communicated promptly – a monthly webinar is not a very appropriate vehicle for announcing timeline changes which impact on business plans and budget cycles.

4. Fees

   ### a. Budgeting for 2nd round fees

   In the first new gTLD round, the application fee of $185,000 was set to "recover costs associated with the new gTLD program" – including all evaluation costs – to ensure that the program is "fully funded and revenue neutral".

   The new gTLD application fee should be reviewed ahead of the next round to align with the actual costs and revenues generated from this first application round.

   This review should address whether a purely "one size fits all" fee is appropriate in the next application phase. To be specific, an analysis of the risks associated to each type of application should be conducted: for example, does a community, not-for-profit TLD, intended for the use of a small number of charities, carry the same risk as an open TLD?

   ### b. Invoicing

   In the next round, ICANN should provide applicants with the option to receive an invoice for the purposes of application fee payment.

   Without the provision of invoices, it can be a painstaking process for many organisations – large and small – to gain the internal approvals for the submission of large sums of money to an unrelated entity. Indeed, the larger the company the more difficult it tends to be to obtain an exception to the required financial accounting procedures put in place to safeguard against fraud. This process could be automated through ICANN's application system.

5. The role of public comments

   ICANN should ensure that the application comment forum is not used in a future round as a means to repeatedly seek to disrupt legitimate business interests of public companies. The public comment forum should be designed in a way that enables structured comments only, and requires a declaration of any conflicts/interests.

   Whilst we understand and accept that public comment goes to the core of ICANN's role, subjecting applicants to a public comment period any time an application change is made is unnecessary and inappropriate.

   We note with interest the announcement on 12 June 2014 of Plans for Public Comment Improvements and look forward to actively engaging in the consultation on longer-term improvements which are currently under consideration and development.

6. New gTLD customer service

   The Customer Service Centre (CSC) is an area of the new gTLD program which went through improvements as the first round developed. In furtherance of this, we believe the following issues and potential solutions should be explored ahead of a future round.

   The provision of **dedicated customer service managers** for each new gTLD applicant would enhance customer service to new gTLD applicants in future rounds.

ICANN should **implement Service Level Agreements** for response times to tickets raised through the Customer Service Centre (CSC) (e.g. ticket confirmation within 24 hours and an update on status once a week). Where this is not met, reasons should be provided for tickets which are taking longer to resolve. In the first round, this was an area where there was a lack of transparency for applicants. More broadly, this helps towards meeting the important objective that every new gTLD applicant expects from the process when applying: predictability. Applicants should not be left in a position where an outstanding ticket has not been addressed, without any indication of how or why the issue has not been resolved.

ICANN should ensure that **adequate resources are committed to the CSC** to guarantee it has the appropriate tools and knowledge to answer questions. As was too often the case in the first round, CSC answers did not address the questions raised.

Communication of information relating to the application process can be improved. During the first round, applicants were faced with multiple sources of information relating to the same topic, each of which had to be cross-referenced, including: the AGB; the ad hoc advisories; and the vast number of FAQs. The latter were displayed in a manner that was very difficult to search or sort, so had to be reviewed daily for new information. Sensible amendments (such as the advisory setting out actual financial limits for the LOCs) were added to the guidelines, but the original question asking applicants to assess what their emergency cover would cost (which became redundant once the limits were published) were not removed.

The new gTLD application form needs to be improved. Data entry could be made much easier in future application forms: including larger windows for free text fields; clear notification when the end-of-field length has been reached; the ability to easily to see uploaded documentation; the ability to have more than one person working on an account at the same time (i.e., different applications, but the same applicant); a 'copy' facility for similar applications made by the same applicant; and a 'search' and 'replace' facility.

7. Change Request process

The Change Request process should be simplified in future rounds. Applicants should be able to make requested changes directly to their applications online, for review by ICANN. If approved, these changes can easily be approved by ICANN without inducing inefficient use of ICANN staff time on implementing changes to an application manually. This reduces cost, but also reduces the likelihood of mistakes occurring when approved change requests are implemented by ICANN. In addition, it would help to reduce the time taken for ICANN to implement Change Requests.

8. Dispute Resolution procedures

We realise that there needs to be a balance between subjecting Dispute Resolution Service Providers (DRSPs) to strict rules on the one hand, while giving them room for operational flexibility on the other hand. However, a number of applicants experienced shortcomings in the service provided by DRSPs which cannot be repeated in a future round. This applies in particular to the lack of transparency over the International Chamber of Commerce (ICC) timelines for releasing decisions. It also applies to the unfortunate number of administrative errors made in the International Centre of Dispute Resolution's (ICDR) handling of String Confusion cases.

In the future, Objections should be put through a compliance review that actually does ensure that the Objection has been timely filed (in its entirety) to both the DRSP <u>and</u> the applicant; and that the Objection is properly stated (so that at least the Objection ground, and the targeted new gTLD application, are both made clear).

In a future round, ICANN should seek to **appoint one, single DRSP agent** to manage Formal Objections and have contractual oversight over objection providers.

In addition, a review of the first round should consider the implementation of **an appeal mechanism** to address the substantive review of clearly inconsistent Expert decisions.

The **role of the Independent Objector** (IO) should be reviewed. This review should address how the IO should handle conflicts of interest, including the option of employing an additional IO, to minimise the risk of conflicts of interest.

The role of – and criteria for – each **Formal Objection ground** (Legal Rights, Community, String Confusion and Limited Public Interest) should be reviewed in light of the first round. Clearer criteria should be provided to guide Experts where required, in particular, for String Confusion and Community Objections. Thresholds for qualifying as a community should be more clearly defined, for the benefit of communities as both objectors, and as applicants (who may apply for Community Priority Evaluation).

9. Auctions

Following the end of the ongoing schedule for new gTLD ICANN auctions, a review should be conducted of the existing auction model and its appropriateness in resolving contention in future new gTLD rounds.

ICANN should explore the possibility of providing applicants – at an additional cost – with the option of naming an alternative string at the time of the application, which must be in a related sector to the primary applied-for string. If the primary applied-for string is in contention with another application, the applicant may elect to proceed with the alternative string. This would help to reduce cases of contention.

10. Rights Protection Mechanisms

The Trademark Clearinghouse (TMCH) fees (consisting of the "RPM Access Fee" and the "RPM Registration Fee") should be simplified and lowered for .brand registries.

Qualified Launch Programmes (QLPs) should also be simplified, so that trademark owners with eligible rights are not excluded from participating in a QLP at the second-level.

Rights protection should be enhanced in a future round in light of the lessons learnt from the first round. Donuts' DPML has demonstrated what can be achieved, and ICANN should seek to formalise a version of the DPML as part of a future application process, or provide applicants who commit to such a mechanism with additional evaluation points. In addition, rules should be set out to regulate the use of premium names: for example, only up to a certain number of such names (e.g., 1000) may be set aside, which must be stated in advance.

11. <u>Predictability</u>

Following a review of the 1st new gTLD round, including parallel reviews of related (and ongoing) GNSO work streams (including "GAC Early Engagement" and "Policy v. implementation"), ICANN should ensure that future new gTLD rounds provide much greater predictability and certainty for applicants.

Many of the new gTLD applicants who are not from the traditional ICANN community have found it inconceivable that ICANN should repeatedly change fundamental terms of the AGB after the process has commenced, seemingly without there being any ground for objection or sanction, when applicants have invested significant time and financial resources on their applications. Two such examples would be the issue of closed generics and the three terms identified as not to be delegated due to name collision. These issues should have been properly considered and addressed in advance, not half-way through the process. Whilst one might assume that Round 1 will now have flushed everything out, it is important that where issues have been identified as contentious there is a firm decision made on how to address this before pressing ahead with a future round.

The role of the GAC as an Advisory Committee requires better definition. The GAC's processes for filing formal advice – including objections to specific applications – and their reasoning need to become more transparent and accountable. If ICANN is to continue to have a presumption that it will accept that advice, this should not be done blindly, without first having reviewed that reasoning and sought clarification, or even challenging it, where necessary.

A Formal Government Objection process (currently available under the Formal Objection mechanism managed by ICANN's DRSPs) should be considered as the appropriate venue for individual GAC members to file objections to specific applications. Errors of fact made by GAC members should be open to challenge.

A clearer process should be applied to the identification of regulated and safeguard TLDs. Issues of definition and scope for such categories of TLDs, as well as whether terms identified by the GAC as falling under these lists are non-exhaustive or not, cannot be repeated in a future round, let alone under the unpredictable timelines that became a feature of the first round.

The determination of such lists by the GAC should be transparently reasoned and founded on clearly established guidelines for applicants. It is imperative that this area of new gTLD policy is settled in advance of a future round, dictated by existing laws related to TLD strings, rather than by who is applying for those strings. The GAC should not be used as a vehicle for applicants to gain a competitive advantage over others.

We thank you for your time and consideration of these comments.

Yours sincerely

Susan Payne
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cc. ICANN New gTLD Applicant Group (NTAG)