

Interim Report on Vertical Integration Between Registrars and Registries (Phase I)

STATUS OF THIS DOCUMENT

This Interim Report prepared by the Vertical Integration PDP Working Group and ICANN Staff is delivered to the GNSO Council on 9 November 2010 at the conclusion of Phase I of the Vertical Integration Policy Development Process (PDP). A Final Report will be prepared following the conclusion of Phase II of the Working Group's deliberations.

SUMMARY

This report is submitted to the GNSO Council to inform the GNSO Council of the status of its deliberations in the GNSO PDP on Vertical Integration Between Registrars and Registries following the conclusion of Phase I of its activities. This Interim Report describes various proposed solutions for restrictions on vertical integration between registrars and registries for adoption in the New gTLD Program.

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1. Executive Summary

This Interim Report on the Vertical Integration PDP is prepared in accordance with the rules applicable to the GNSO Policy Development Process as stated in the ICANN Bylaws, Annex A (see <http://www.icann.org/general/bylaws.htm#AnnexA>) and follows the completion of Phase I of the PDP. Phase I refers to the PDP Working Group's efforts to produce a consensus recommendation to be considered by the GNSO Council for the first round of new gTLD applications. This Interim Report describes the results of the work undertaken by the Vertical Integration PDP Working Group (referred to as the VI Working Group) to assist ICANN in developing its implementation processes for the New gTLD Program.

As described more fully below, the VI Working Group has developed a number of proposals to address vertical integration for the new gTLD program but is unable to reach consensus as to which one to recommend for the first round of new gTLD applications. As a result, the VI Working Group has concluded its work for the first phase of its work ("Phase I"), and recommends that the GNSO Council evaluate whether the VI Working Group should proceed to the next phase of work focused on developing a long term solution ("Phase II") to the issue of vertical integration.

Several principles are emerging which, when Phase II is conducted, may be supported by the VI Working Group members.

One such principle is that compliance, and enforcement thereof, plays a pivotal role in the New gTLD Program and the policy framework that surrounds it. As a result, a detailed compliance program should be defined, and appropriate resources should be allocated by ICANN, as it finalizes its implementation details for the New gTLD Program.

Another principle that is moving toward support by the VI Working Group is that, in the event ICANN adopts a requirement of strict separation between registrars and registries, an exceptions procedure should be incorporated into the New gTLD Program.

The third principle that might see early support is the possibility that there be a specific exception for a category of applicants known as the single registry, single user (SRSU) TLDs. These principles are described more fully in Section 4 of this Interim Report.

This Interim Report also describes several proposals regarding vertical integration that have been developed and analyzed by the VI Working Group during Phase I. No proposal has achieved consensus support within the VI Working Group for the first round of new gTLD applications. These will be subject to further analysis and debate as the VI Working Group continues to strive to develop a consensus position to recommend to the GNSO Council during Phase II of its deliberations.

It is important to note that although a consensus for the general principles described in Section 4 were not achieved during Phase I, the details of these principles will likely be further developed and debated within the VI Working Group during Phase II. This Interim Report is unique in that it does not include any recommendations from the VI Working Group, but instead reflects draft positions and initial observations that are expected to be refined during Phase II of its deliberations. The purpose of this Interim Report is to inform the ICANN community of the lack of consensus within the VI Working Group on any recommendations for the first round of applications of new gTLDs, and to suggest next steps for the GNSO to consider with respect to the next phase of the PDP, which would focus on developing a long term recommendations to be adopted for subsequent rounds of new GTLDs and for existing gTLDs. As described in more detail below, there is also no consensus within the VI Working Group on the recommended next steps for conducting Phase II of the PDP. Some members believe that the PDP should be “reset” and given a fresh start, while others believe that the PDP should be terminated altogether. The GNSO Council, as the manager of the policy development process,

will need to determine the future of the PDP in the absence of guidance from the VI Working Group.

2. Background and Objectives

2.1 Background on the Vertical Integration PDP Activities.

On 3 September 2009, Councillor Mary Wong on behalf of the Non-Commercial Users Constituency (NCUC) requested an Issues Report on the topic of Vertical Integration between Registries and Registrars. This request was approved by the Generic Names Supporting Organization (GNSO) on 26 September 2009.¹¹ In approving this request, the GNSO Council recognized that opening up the market to many new TLD operators might call into question some of the assumptions on which the separation of registry and registrar functions is based. The GNSO Council noted that the new gTLD policies passed by the Council did not provide any guidance regarding the proper approach to cross ownership and vertical integration, but instead implicitly suggest that the status quo be left in place. As a result, the Issues Report was requested to assist the GNSO in determining whether a PDP should be initiated regarding what policies would best serve to promote competition and to protect users and registrants.

On 11 December 2009, Staff delivered the Issues Report on vertical integration between registries and registrars < <http://gns0.icann.org/issues/vertical-integration/report-04dec09-en.pdf> > to the GNSO Council. The Issues Report included recommendations that, although policy potentially could be developed in this area, given the status of implementation of the GNSO's new gTLD policy, this issue would be more effectively addressed through GNSO participation in the new gTLD implementation planning process. As a result, Staff recommended that consideration of launching a PDP on vertical integration be delayed until

¹¹ The GNSO Council resolution approving the Request for an Issues Report is posted at: <http://gns0.icann.org/resolutions/#200909>

after the launch of new gTLDs to gather data on the impact of the initial distribution model, and to determine whether there has been competitive harm in the domain name market.

On 28 January 2010, the GNSO Council decided to initiate a PDP on vertical integration between registries and registrars on an expedited basis. The GNSO resolution calls for the PDP to evaluate which policy recommendations, if any, should be developed on the topic of vertical integration between registrars and registries affecting both new gTLDs and existing gTLDs, as may be possible under existing contracts and as allowed under the ICANN Bylaws. The GNSO Council instructed the Working Group to deliver its Final Report to the GNSO Council on an expedited timeframe. The GNSO resolutions approving the PDP and the charter for the VI Working Group (Charter) are described in [Annex C](#) and [Annex G](#) of this Report.

Upon approval of the Charter on 10 March 2010, the GNSO Council formed a working group and solicited volunteers from the ICANN community to participate in the PDP on vertical integration. Approximately 75 members joined the working group, the largest GNSO working group of recent times, reflecting the significant interest in this issue in the ICANN community. A list of the members of the VI Working Group is included in [Annex D](#) of this Report.

A public comment forum on the initiation of the Vertical Integration PDP ran from 29 March to 18 April 2010.² This public comment forum provided an opportunity for the public to comment on any aspect related to the topic of vertical integration between registries and registrars that should be taken into account by the VI Working Group as part of its deliberations. A summary of the comments submitted during this period is presented on [Annex E](#) of this Report. The VI Working Group also solicited and received Stakeholder Group and Constituency Statements on the topic of vertical integration. These statements are included in [Annex F](#) of this Report.

² For more information on the Public Comment Forum for Vertical Integration, please refer to: <http://www.icann.org/en/public-comment/public-comment-201004-en.htm#vi>

The VI Working Group issued its [Initial Report](#) on 23 July 2010 to the GNSO Council and opened a 20 day public comment forum as a required step of the GNSO Council's policy development process as specified in the ICANN Bylaws, and its [Revised Initial Report](#) on 18 August 2010. A summary of the comments submitted during this period is presented on [Annex I](#) of this Interim Report. The VI Working Group has not yet fully considered and analyzed the comments received during the public comment forum, but recommends that such analysis be conducted in Phase II of the PDP as it continues to work towards developing consensus recommendations for the GNSO Council to consider.

2.2. Background on the New gTLD Implementation Activities Affecting Vertical Integration.

The issue of revisiting vertical integration of registries arose as a result of concerns expressed by members of the ICANN community in 2007 when it became clear that the GNSO policy recommendations on the New gTLD process were going to be unable to address the issue of the economic, business and/or legal relationships between registries and registrars in developing the implementation details for the New gTLD Program. In response to the concerns expressed by the ICANN community, and at the request of the ICANN community, ICANN retained the research firm CRA International who delivered a report on 23 October 2008, commonly referred to as the CRA Report³. The CRA Report recommended that "ICANN . . . re-examine the economic case for the separation requirement, and in particular to consider whether it might be possible to relax the requirement, initially only in limited cases. Recognizing that it is difficult to reverse the decision once regulations have been removed, we would encourage ICANN to move slowly, but deliberately and in consultation with the industry,

³ The CRA Report is posted at <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>

towards permitting integration of registry and registrar services under many, but not all, circumstances.”⁴

After the publication of the CRA Report, ICANN Staff initiated a series of consultations with the community on the issue of vertical integration. As a result, Staff published a proposed model in the Draft Applicant Guidebook- Version 2⁵ that included certain restrictions. Because the proposal included in the Draft Applicant Guidebook-v2 solicited substantial discussion and debate among the ICANN community, Staff revised the Draft Applicant Guidebook- v3 to remove the proposed model, and instead sought further guidance and suggestions from the community on the appropriate model for the launch of new gTLDs.

In addition, ICANN Staff retained the services of two economists, Steven Salop and Joshua Wright, to assist in advising ICANN on economic issues related to the effects of vertical integration between registries and registrars on registrants. A report, entitled “Registry-Registrar Separation: Vertical Integration Options”⁶ was presented to the ICANN Board of Directors at its meeting on February 4, 2010 and subsequently made available to the ICANN community on March 8, 2010.⁷ In that report, which was also presented to the VI Working Group and discussed on April 29, 2010⁸, Professors Salop and Wright explained that vertical integration and vertical contracts between registries and registrars could create both competitive harms and competitive benefits. In their opinion, the most important factor in predicting whether vertical integration is capable of generating competitive harms is the presence of market power. Professors Salop and Wright encouraged the adoption of a case-by-

⁴ Id. at 29

⁵ The Draft Applicant Guidebook-Version 2 is posted at <http://icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf>

⁶ <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf>

⁷ See <http://blog.icann.org/2010/03/vertical-integration-options-report-available-to-community/>.

⁸ To review a transcript of the VI Working Group’s discussions with Professors Salop and Wright, please refer to <http://gnso.icann.org/meetings/transcript-vertical-integration-economists-29apr10-en.pdf>.

case approach with referral to a government competition authority for evaluation and action, if deemed necessary.

Resolution of these issues is currently being managed under Board guidance by Staff through its implementation process for the New gTLD Program. In Nairobi, the ICANN Board adopted several resolutions related to the New gTLD Program. One of these resolutions provided guidance to ICANN Staff on the topic of vertical integration between registrars and registries.⁹ The Board resolution noted the GNSO's active policy development process on the issue of vertical integration. The Board did not want to create an environment in which it would be difficult to later harmonize the new gTLD marketplace with the GNSO policy result, but recognized the importance of establishing a baseline approach to registry-registrar separation for the new gTLD process to move ahead. As a result, within the context of the new gTLD process, the Board resolved that there will be strict separation of entities offering registry services and those acting as registrars. No co-ownership will be allowed. The Board acknowledged that if a policy becomes available from the GNSO, and approved by the Board prior to the launch of the New gTLD program, that policy will be considered by the Board for adoption as part of the New gTLD Program.

In advance of the ICANN Brussels meeting, ICANN Staff published the Draft Applicant Guidebook Version 4, which includes proposed implementation details to address the Board's Nairobi resolutions concerning the topic of vertical integration.

2.3 Objectives of the VI PDP Working Group.

The objectives of the VI Working Group are included in the Charter described in [Annex G](#) of this Report. The Preamble to the Charter notes that the working group expects to define the range of restrictions on vertical separation that are currently in effect, to serve as a baseline to

⁹ The Nairobi Board resolution pertaining to the issue of vertical integration between registrars and registries in the New gTLD Program is posted at: <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5>

evaluate future proposals. The Charter also included five separate objectives to guide the VI Working Group in its deliberations, and timelines for milestones for the Working Group to complete its work and produce any recommendations supported by a consensus on an expedited basis.

3. Approach Taken by the VI Working Group

Mike O'Connor and Roberto Gaetano were selected to serve as Co-Chairs of the VI Working Group. The VI Working Group consisted of approximately 75 individuals, (the largest working group of recent times) representing a broad range of stakeholders, and reflecting the significant interest in the ICANN Community in this issue. [Annex D](#) identifies the members of the VI Working Group and includes additional information on their participation in the conference calls scheduled in an effort to produce consensus recommendations in a short period of time.

After its initial meetings, the VI Working Group concluded that it was not possible to work on all of the Charter objectives in the expedited timeframe requested by the GNSO Council. As a result, the Co-Chairs divided the work into two phases, with the first phase dedicated to determining whether a consensus recommendation can be developed in time to affect the final Applicant Guidebook. The second phase of work is expected to focus on developing long term recommendations that could apply to both new gTLD registries and existing gTLD registries, and would also address any remaining Charter Objectives.

As specified in the Charter, Staff produced an initial set of definitions to assist the VI Working Group in its deliberations.¹⁰

After the VI Working Group published its [Revised Initial Report](#), it turned to the task of analyzing the public comments received on its Initial Report. The VI Working Group found it very difficult to evaluate the public comments. Each time the VI Working Group attempted to evaluate them, the conversation tended to replicate the underlying disagreements that prevented the VI Working Group from arriving at consensus in the first place.

¹⁰ The draft definitions are included as Annex J to the [Revised Initial Report](#).

In the end, the VI Working Group deferred final review of the comments received on the Initial Report, and will instead include them as inputs for Phase II, along with other inputs (such as the Board decisions with regard to vertical integration in the upcoming new-gTLD round).

4. Key Principles Developed by the VI Working Group

It is impossible to know or completely understand all potential business models that may be represented by new gTLD applicants. That fact has created a challenge to finding consensus on policy that defines clear, bright-line rules for allowing vertical integration and a compliance framework to support it, while ensuring that such policy is practical and beneficial in the public interest. However, there is general acceptance within the VI Working Group for the following principles:

1. Certain new gTLDs likely to be applied for in the first round may be unnecessarily impacted by restrictions on cross-ownership or control between registrar and registry.
2. There is need for a process that would allow applicants to request exceptions and have them considered on a case-by-case basis. The proposed reasons for exceptions, and the conditions under which exceptions would be allowed, vary widely in the group.
3. The concept of Single Registrant, Single User TLDs should be explored further.
4. There will exist need for enhanced compliance efforts and the need for a detailed compliance plan in relation to the new gTLD program in general.

The VI Working Group came to this understanding relatively recently. Several sub-groups have developed preliminary drafts around these topics and those drafts are included in [Annex A](#) – Preliminary Drafts of Principles. The Working Group intends to continue discussion of these drafts during Phase II of its deliberations.

5. Major Proposals debated within the VI Working Group

The VI Working Group solicited proposals addressing vertical integration models for adoption in the New gTLD program. The proponents of these proposals presented their models and debated the relative merits of each.

Despite many hours of face-to-face meetings, telephone conference calls, and over 3,700 emails generated in a seven month period, no consensus has been reached on a proposed model on vertical integration and cross-ownership.

The proposals submitted to the VI Working Group that have garnered minimal levels of support and were actively considered are summarized here and included in [Annex B](#) to this Interim Report. Comments submitted in the public comment forum will be reviewed by the VI Working Group as it continues its Phase II deliberations and attempts to identify one or more proposed solutions to be included in its Final Report to the GNSO Council.

The VI Working Group conducted several polls on the proposals (sometimes referred to as “molecules” by the Co-Chairs), and their component features (or “atoms”) to identify levels of consensus among the members of the VI Working Group. Listed below are the results of the latest poll taken before the release of the Initial Report, followed by brief summaries of each proposal, drafted by the working group members.

Proposal Name	In Favor	Could Live With	Opposed	No Opinion	Did not vote
JN2	12	11	16	2	26
Free Trade	16	4	20	1	26
RACK+	12	3	23	2	27
CAM3	2	12	24	2	27
DAGv4	0	11	27	2	27
IPC	1	5	29	5	27

JN2 Proposal Summary

The JN2 Proposal is intended to permit cross ownership between registries and registrars, as long as cross-owned entities are not in a position of controlling the other or possessing a greater than 15% ownership interest in the other. The JN2 proposal contains definitions of affiliation, which include both ownership (> 15%) and control (direct or indirect) and allows exceptions for single registrant TLDs, community TLDs and orphan TLDs.

- It restricts Registry Operators and their affiliates from distributing names within the TLD for which Registry Operator or its affiliate serves as the Registry Operator.
- It allows registrars (and their affiliates) to be Registry Operators provided they agree to not distribute names within a TLD for which they or their affiliates serve as the Registry Operator.
- Restrictions do not apply to back-end registry service providers (RSPs) that do not control the policies, pricing or selection of registrars.
- After 18 months, any restricted RSP may petition ICANN for a relaxation of those restrictions depending on a number of factors.
- Cross ownership limitations extend to registrar resellers for 18 months. After that, market protections mechanisms must be in place.
- Registry Operators may select registrars based on objective criteria and may not discriminate among the ones they select.

Free Trade Proposal Summary

The Free Trade Model proposes that limits on cross ownership (CO) and Vertical Integration (VI) are discarded.

Highlights of the Free Trade Proposal are as follows:

- No CO or VI restrictions on Registrars, Registries, or Registry Service Providers (RSPs).
- Equivalent access for Registrars is required with Registries allowed to self distribute so long as they are bound by the RAA and pay required registration fees.
- Registry Service Providers (RSPs) shall be required to be accredited by ICANN for technical sufficiency. RSPs shall also be bound by the similar terms, conditions, and restrictions imposed on Registry Operators through their contractual agreement with each Registry Operator.
- This model removes the need for exceptions like Single Registrant – Single User (SRSU), Single Registrant – Multiple Users (SRMU), & Orphan TLDs.
- This proposal assumes ICANN’s funding of contractual compliance resources will match the demands of the new gTLD expansion. Requirements to monitor, enforce and ultimately prevent malicious or abusive conduct will be directed at the conduct at issue rather than through cross ownership limitations.

RACK+ Proposal Summary

This proposal recommends the continuation of ICANN’s current policy of separation between registries and registrars.

Cross Ownership

- ICANN should permit cross ownership, both by a registry operator in a registrar and by a registrar in a registry operator, up to 15%. This cross ownership approach allows both registry operators and registrars to invest in domain name wholesale and retail businesses. The rationale is to avoid creating ownership positions that provide access to registry data for registrars.
- ICANN should permit cross ownership, both by a registry backend service provider in a registrar and by a registrar in a registry backend service provider, up to 15%. This group does not recommend that a new contract regime be established between ICANN and registry backend services providers. Rather, ICANN could enforce this cross ownership rule through the registry operator contract.

Affiliate and Control

Cross ownership caps should be supported by appropriate provisions addressing “affiliate” and “control” to prevent gaming against the caps.

GNSO Recommendation 19

Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.

Equivalent Access and Non-Discrimination

Equivalent access and non-discrimination principles should apply to all TLD distribution.

Competition Authority Model (CAMv3) Proposal Summary

The Competition Authority Model CAMv3 allows referral to national competition authorities to resolve questions about market power and consumer protection. It prohibits cross ownership between registry and registrar as originally set forth in the ICANN Board Nairobi resolution, but allows up to 100% cross ownership and full vertical integration under the rules of a waiver/exemption process.

- Those entities that wish may request an exemption/waiver. These would be forwarded to a standing panel entitled the Competition/Consumer Evaluation Standing Panel (CESP). This panel would be given a set of guidelines for evaluating the applications. If the CESP “quick look” or initial analysis raised no competition or consumer protection concerns, the exemption/waiver would be granted.

If the CESP initial analysis raises competition or consumer protection concerns or indicates a need for a more detailed or extended then ICANN shall refer the matter to the appropriate national competition and/or consumer protection agencies.

- For those entities that are granted a waiver/exemption, a suitable set or pre-determined restrictions/safeguards will be placed into the registration authority agreement to prevent self dealing or harm to third parties such as registrants and Internet users.
- The CAM proposal proposes a three tiered approach toward contractual compliance. The first being ICANN’s normal compliance efforts. The second being an annual audit. The third being an expanded Post Delegation Dispute Resolution Procedure (PDDRP) for third parties to initiate their own administrative remedy against a registration authorities non-compliance, coupled with a strict three strikes rule for repeat offenders.

DAGv4 Summary

The following represents the Working Group's best interpretation of the DAG4 language. Its interpretation has not been vetted through ICANN staff or the ICANN Board and therefore does not represent an authoritative interpretation of what was intended by ICANN staff or the ICANN Board and should not be relied upon by any potential new gTLD applicant. Nor do all individual members of the Working Group necessarily endorse this interpretation. All questions and comments related to the DAG4 language should be directed to ICANN staff and not the Working Group.

- A registrar entity or their Affiliate (another company with whom the registrar has common Control) may not directly hold a registry contract. This applies regardless of the TLD(s) in which the registrar is accredited.
- A registrar entity or their Affiliate may have Beneficial Ownership of up to 2% of the shares in a registry company. Beneficial Ownership is a form of ownership in which shares have (a) voting power, which includes the power to vote, or to direct the voting of the shares; and/or (B) investment power which includes the power to dispose, or to direct the disposition of the shares.
- In no circumstance may a registry entity Control a registrar or its Affiliates, or vice versa.
- Affiliates of the registry entity may not distribute names in any TLD -- as either a registrar, reseller or other form of domain distributor
- No registrar, reseller or other form of domain distributor (or their Affiliates) may provide Registry Services to a registry entity. Registry Services are defined in Specification 6 to the registry contract.
- Names can only be registered through registrars
- Registries can set accreditation criteria for registrars that are reasonably related to the purpose of the TLD (e.g. a Polish language TLD could require registrars to offer the domain via a Polish language interface).

- Participating registrars must be treated on a non-discriminatory basis
- Registries can register names to themselves through an ICANN-Accredited Registrar

IPC Proposal Summary

The IPC proposed three models of .brand exceptions. Under the .brand SRSU, the .brand Registry Operator (“bRO”) is the registrant and user of all second-level domain names. Wholly-owned subsidiaries and otherwise affiliated companies could register and use second-level names. Under the .brand SRMU, the bRO is the registrant for all second-level names and may license them to third parties that have a pre-existing relationship with the brand owner (e.g., suppliers) for other goods/services. Under the .brand MRMU, the bRO and its trademark licensees are the registrants and users of all second-level names.

Seven additional criteria for these .brand exceptions apply including, inter alia, (1) the trademark must be identical to the .brand string and the subject of registrations of national effect in at least three countries in three ICANN regions; (2) trademark owners whose principal business is to operate a domain name registry, register domain names, or resell domain names are ineligible; (3) under MRMU, the bRO delegates second-level names subject to trademark license agreement quality control provisions that allow at-will termination of registrations; and (4) .brand TLDs with second-level names registered to unrelated third parties are ineligible.

A new gTLD registry that satisfied a model and criteria (a) could control an ICANN-accredited registrar solely for registrations in that TLD; (b) did not need to use an ICANN-accredited registrar for registrations within the TLD; and/or (c) could enter into arrangements with a limited number of ICANN-accredited registrars for registrations in that TLD.

6. Conclusions and Next Steps

While the VI Working Group is unable to identify a consensus recommendation during Phase I to apply to the first round of new gTLD applications, some members believe that the bottom-up policy development process should now proceed to Phase II, and should focus on developing a long term solution.

Upon commencement of Phase II, the VI Working Group is encouraged to reevaluate the scope of its Charter to determine if the principles and objectives should be revised in light of recent events. In addition, comments submitted in the public comment forum should be reviewed by the VI Working Group in Phase II as it continues its deliberations and attempts to identify one or more proposed solutions to be included in its Final Report to the GNSO Council.

The VI Working Group discussed, but did not reach a consensus on, the next steps for the GNSO Council to consider for conducting Phase II of the PDP. One approach involves what is described as selecting the “reset button” for the PDP. Under this approach, Phase II could result in the relaunch of the PDP as a new effort, following the steps described in the text box below. Others believe that the PDP should be terminated altogether rather than proceed to Phase II. Upon publication of this Interim Report, the VI Working Group believes that its work under Phase I is complete, and intends to suspend its activities for Phase II pending further instructions from the GNSO Council.

PHASE II Reset Approach

- Acknowledge the Public Comments and declare Phase I complete with the publication of this Interim Report
- Communicate to GNSO Council that the Charter has not been met and the VI Working Group intends to “Reset”
 - All VI Working Group participants will be asked to resubmit their SOI & intent of participation with the VI Working Group and shed former Working Group members who no longer chose to participate
 - Provide the opportunity for Co-Chair changes
 - Review & perhaps update the charter & establish new objectives for the VI Working Group
 - Establish a new project plan & timeline that reflects normalized PDP process and pace
- Engage external economist and competition experts to work alongside the VI Working Group
- Create new poll methodology, beginning with high level concepts and drilldown capabilities, and built on a binary yes/no framework
 - Develop baseline, poll at set intervals, and establish poll trend methods to consistently document the position of the VI Working Group throughout the PDP
- Scope the Final Report deliverable
- Create Model & Harms documentation templates for standardized comparison
 - Establish a current state baseline model
 - Create proposed models & convert existing proposals to new standard template (i.e.. remove the personalization and complete model details via standard template)
 - Finalize terminology & definitions list
 - Create analysis methodology of Models (aka proposals) & Harms, Pros/Cons
- Analyze Models via economic, fair competition, cost benefit, market power, pro/con, and use case lenses.
- Conduct threat analysis of the Registry/Registrar technical data & integration relationships
- Analyze compliance and enforcement frameworks and requirements
- Analyze international jurisdictions and understand capabilities & relationships
- Establish desired state, consensus driven, vertical integration models and concepts for Final Report recommendations

ANNEX A - Preliminary Drafts of Principles

Compliance and Enforcement

(Preliminary Draft – for discussion purposes only)

The VI Working Group is deeply divided on a number of issues with regard to the issues surrounding vertical Integration and cross-ownership, including the role of ICANN’s activities in the areas of compliance and enforcement with regard to the eventual policy that may be adopted by ICANN. Some members feel that loosening vertical integration/ownership controls may let the proverbial “genie out of the bottle that can’t be put back” should competitive harms result in the marketplace. Others believe that adopting restrictions on vertical integration or cross ownership is the wrong approach altogether, and that the focus should be on protecting against harms, and providing sanctions where harms take place. Where there seems to be agreement is in the notion that an effective Compliance function is needed -- to increase confidence that harmful behavior will be quickly identified and stopped, and to provide better information upon which to base policy in the future. Described below is a preliminary draft of what might be needed in order to reduce those fears and provide the facts necessary for an effective Compliance function.

Introduction

The Vertical Integration Working Group (VIWG) created a Compliance and Enforcement sub team to draft an outline about compliance and enforcement issues that may be germane to the newTLD round. Since there is no consensus position on vertical integration, a specific compliance and enforcement regime cannot be articulated at this time. However, elements of a compliance and enforcement regime can be identified to assist the ICANN Board in assessing risk and resource allocation depending on the final recommendation regarding vertical integration in the newTLD round.

Regardless of the respective points-of-view concerning vertical integration, a significant number of VIWG members have expressed their belief that Compliance and Enforcement is a high priority. Some also noted that ICANN's Board and executive staff may not be giving the compliance function an appropriate level of strategic attention, resources or authority. This in turn raises serious concerns about ICANN's ability capability to develop, staff and make operationally effective an enforcement bureau function that would be necessary to monitor and enforce against harms or violations of rules developed by the VIWG.

While it is recognized that the level of compliance and enforcement could vary depending on the VI regime adopted (e.g. ownership caps and structural separation v. no ownership caps and full integration), it is recognized that ICANN is at the starting point of developing the necessary resources and functions. Writing rules, creating the necessary plans, obtaining the necessary resources, hiring qualified employees, training, establishing operational systems and having an effective program at the time newTLDs launch is not a trivial task. Moreover, the timeliness of detection and intervention is critical to preventing consumer and competitive harms identified in the VIWG. ICANN has taken a "reactive" approach to compliance and enforcement in the past – an inclination that is worrisome to advocates of a strong and effective compliance and enforcement program. A firm corporate commitment to compliance combined with the establishment of a genuine "culture of compliance" across all stakeholders in the community is absolutely necessary if ICANN is to devise and operate an effective enforcement bureau.

Outline of a Possible Compliance and Enforcement Program

The starting point in developing a compliance and enforcement regime is to identify the rules that are to be enforced. The rules can take a variety of forms including, among others:

- 1) mandates;

- 2) prohibitions or restrictions;
- 3) permitted, yet circumscribed behavior;
- 4) permitted behavior, if threshold requirements have been met.

It should be noted that, unlike a governmental agency, ICANN is a not-for-profit California corporation whose relationship with registries and registrars is based on contract. ICANN does not have certain governmental powers (e.g. subpoena power) to utilize in a compliance and enforcement program.

A critical element in building a compliance and enforcement program is timing. An enforcement and compliance program that targets specific behaviors or acts must be properly resourced and operationally effective at the time such behaviors or acts are likely to manifest themselves in the market. In the case of newTLDs potentially anti-competitive or consumer abuse behaviors (in fact a significant percentage) can be anticipated during the launch phase of newTLDs. An Enforcement Bureau and compliance program that relies only on third party surveillance or competitors reporting instances of abusive practices may not be timely for purposes of enforcement.

The Compliance drafting team has developed the following preliminary list of possible components of an effective compliance and enforcement program that will be considered during subsequent discussions by the full Working Group as it develops its final report.

Compliance

- Risk analysis - a risk analysis of anti-competitive practices and consumer abuse practices must be undertaken

- Geographic scope – given the global nature of the DNS, compliance and enforcement would be expected to be global in scope and reach. The same rules must apply for all applicants independent of location.
- Formal written compliance program – a compliance program must be formalized in writing; for a compliance program to be effective it must be: clear; communicated; corrective; and compelling (will be followed)
- Companies (or actors) subject to the compliance and enforcement program must make a clear designation of responsible officers
- Senior Management Involvement/Commitment to Compliance – Senior Management must be accountable and responsible for violations; compliance should be a corporate value
- Bottom-up compliance – training of employees is critical to establishing bottom-up compliance
- Screening – active screening/sampling for potential problems
- Recordkeeping requirements – covering data handling and transactions
- Internal reporting systems – opens a dialogue between management and employees
- Chinese walls – effective Chinese walls designed to prevent sharing of sensitive registry data with ongoing verification tools
- Documented Training along pre-established Training outlines
- Random Audits
- Remedial actions – corrective action; internal disciplinary action
- Advice line – resource for companies/actors attempting to institute and maintain compliance

Enforcement

- Monitoring and Detection
- use of data and information systems to identify trends

- random compliance audit checks (sampling)
- prioritizing investigations and promote efficient use of resources
- system for “public assistance” in monitoring and detection
- voluntary disclosures – opportunity and process to self-report violations to mitigate penalties
- Investigation and Collection of Evidence
- Standards of Proof
- Penalties
- Mitigating and Aggravating Factors
- Deterrence: penalty system that encourages compliance and removes incentives for non-compliance
- Resources – human (e.g. investigators; attorneys; auditors); data systems; document collection and handling

It should be noted that the Working Group will need to consider several framing topics during subsequent refinement of this list:

- Harms that will be addressed/prevented by the program
- Feasibility and cost-impact for both ICANN and new registries
- The appropriate role for ICANN in implementation and delivery

In developing a compliance and enforcement program, ICANN’s past history and present structure and resources must be taken into account. A uniquely “reactive” approach to compliance and enforcement will not sufficiently serve the purposes of a new compliance and enforcement regime for the newTLD round. Based on public skepticism of historic enforcement challenges, a new compliance and enforcement program should be in place, properly financed and staffed and operationally effective prior to changes that would open the door to potential anti-competitive conduct and abusive practices. ICANN’s staffing requirements, internal

structure, reporting lines (senior management responsibility; report to the CEO) and oversight (who will watch the “watchers”) are important issues that would need to be addressed and formalized to create a new, proactive as well as reactive “culture” of compliance and enforcement.

Concerns have been raised that a Compliance and Enforcement program not inhibit competition by smaller providers or place “big company” compliance requirements that may be unworkable for smaller providers. Concerns have also been noted that rules not be unduly complex or place too significant on ICANN’s staff and resources so that ICANN always “playing catch up.” Finally, some members of the working-group note that the VI Working Group need not have a consensus position on VI to address current state or future state innovative proposals. Also that gaming and harms can occur outside of cross ownership but that, in any event, stricter compliance should be required.

Exceptions Procedure

(Preliminary Draft – for discussion purposes only)

It is impossible to know or completely understand all potential business models that may be represented by new gTLD applicants. That fact has been an obstacle to finding consensus on policy that defines clear, bright line rules for allowing vertical integration and a compliance framework to support it while ensuring that such policy is practical and beneficial in the public interest.

However, it is recognized that certain new gTLDs likely to be applied for in the first round will be unnecessarily impacted by restrictions on cross-ownership or control between registrar and registry in the event ICANN adopts a requirement of strict separation between registrars and registries.¹¹

During discussions there seemed to be general acceptance of the need for a process that would allow applicants to request exceptions and be considered on a case by case basis. The reasons for exceptions and the conditions under which exceptions would be allowed, varied widely in the group, but there did seem to be a general acceptance of the need for the following:

- Possible exceptions based on certain public interest needs where those needs would not otherwise be addressed (certain language groups, developing countries, certain communities due to size or economic conditions, etc.).
- In cases where the facts of competitive disadvantage cannot be established until after operations are begun (e.g., “orphan” registries), the exception may be requested and

¹¹ Note: this proposal does not presuppose any specific control or cross-ownership thresholds but rather deals with the case of exceptions to that threshold policy. The issue of specific control or cross-ownership thresholds are is dealt with elsewhere in the VIWG reporting.

granted, but only exercised when defined circumstances are met (e.g. insufficient registrar support).

- That there needed to be an agreed upon list of circumstances defining the cases where the granting of an exception would be allowed.
- That an external review panel would be responsible for reviewing applications for exception.
- That the Vertical Integration Policy Development Process should provide a set of guidelines for an external review panel.
- There should be no additional cost to the applicant for requesting the exception or for being evaluated for it. The evaluation would take place at an appropriate point following the Initial Evaluation. If the request is denied, the applicant may withdraw and receive the appropriate pro-rated refund.

It was also accepted that if there is consensus on these five bullets then they could be recommended to the GNSO Council and that the VI Working Group would continue to discuss the elements on the exception list, the nature of the review panel, and the guidelines that would be provided to that external review panel while the public comment period and other PDP follow-up processes were ongoing. The public comment could specifically request comments on the elements of the exceptions lists and other elements related to an exceptions policy. These comments would then be considered by the VI Working Group and, if appropriate, folded into the recommendation on the details of the exception policy and sent to the council for review and approval. A specific VI Working Group charter extension for this work would be recommended to the GNSO Council.

Examples of the kind of criteria for exception that will be discussed as the VI Working Group continues its work include but are not limited to:

- Where the registry cannot find unaffiliated registrars to offer its gTLD to the public.

- Where the gTLD caters primarily to a specific language group, and where the registry cannot find unaffiliated registrars who will offer its gTLD in an order process in that language.
- The applicant may define criteria reasonably related to the purpose of its gTLD as conditions for Accredited Registrar participation, but may not otherwise discriminate or restrict Accredited Registrar access.

Special Consideration for a Single Registrant, Single User (SRSU) Exception.

(Preliminary Draft – for discussion purposes only)

The VI Working Group discussed several specific exceptions to prohibitions on vertical integration and cross-ownership. One such proposed exception is for single-registrant, single-user registries (SRSU). Under the proposed SRSU exception, the registry itself is both the only registrant and the only user of second-level names, and cannot transfer second-level names to third parties independent of any transfer or sale of the TLD itself. Within the VI Working Group, there was a general endorsement of the idea of an SRSU exception. However, support of specific types of SRSUs varies depending on the type of SRSU and how the exception would be sought and granted.

Types of SRSU exceptions. As discussed further below, several types of SRSUs were proposed in the public comments by constituencies and stakeholder groups (specifically the IPC and the NCSG), as well as WG members.

- Some proposed an SRSU and SRMU¹² exception for a registry for which the gTLD string is an identical match to the registry's trademark/service mark (a “.brand” registry) and that satisfied additional criteria that the constituency intended to limit the applicability of the exceptions and to discourage abuse and gaming of the exceptions.
- Several WG participants proposed a Single Registrant exception for non-governmental organization registries (NGOs) (referred to as .ngo registry) in cases where a specific membership organization could be identified and the string

¹² Although the Working Group also initially discussed a single-registrant, multiple-user (SRMU) subcategory, there was substantial opposition due to its complexity. Instead, the working group focused on a Single Registrant Single User Exception. Accordingly, only SRSU is identified in the main body of the report.

corresponded to the NGO's name, and also proposed a similar exception for cultural, linguistic or non profit organizations.

- Still other proposals proposed an SRSU exception where the only user of the second-level names is the registry itself, its employees, agents and subcontractors. The registry would exercise control over the use of the names in website content, email, or any other application associated with the domains, regardless of whether the registry is a .brand or .ngo.
- Some members believe that it may already possible to satisfy the needs of the SRSU model via the use of reserved names as defined in the current registry contract, although this could greatly reduce flexibility as it may require that the registry specify all of the names it wants in advance. One approach might be to explore a clarifying amendment to Section 2.6 of the current registry contract that could explicitly address the SR model and could also allow registries to add to their schedule of reserved names in a timely manner.

Proponents of the concept of an SRSU exception contend that the exception, along with relevant type-specific restrictions, will preclude any harms attributed to vertical integration and cross ownership for these types of entities and facilitate their participation in the introduction of new gTLDs.

Critics note that the SRSU exception, in its current form, has no consistency of interpretation and creates a danger of undermining the main registry-registrar structures being proposed by many in the VI WG. For example, critics are concerned that SRSU domain names (second level) might be handed out to third parties for widespread public use. Given that well-known names (both for-profit and not-for-profit) are likely to be given only to their trademark owners, and given the strong need to develop details and compliance/enforcement models, those concerned WG members felt that SRSU should not be part of the first round of new

gTLDs, but rather that the community should work for definition, consensus and introduction in a later round.

ANNEX B - Major Proposals

The following proposals emerged as the “finalists” reviewed by the VI Working Group during its deliberations.

Proposal Name	In Favor	Could Live With	Opposed	No Opinion	Did not vote
JN2	12	11	16	2	26
Free Trade	16	4	20	1	26
RACK+	12	3	23	2	27
CAM3	2	12	24	2	27
DAGv4	0	11	27	2	27
IPC	1	5	29	5	27

JN2 Proposal

1. Definitions

- i. “Affiliate” shall mean a specified person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.
 - ii. “Control” (including the terms “controlling”, “controlled by” and “under common control with”) shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise. As used in this definition, the term “control” means the possession of beneficial ownership of more than fifteen percent (15%) of the equity interests or more than fifteen (15%) of the interests entitled to vote for the election of, or serve as, the board of directors or similar managing authority of the entity.
2. Registry Operator or its Affiliate may serve as an ICANN-Accredited Registrar in any top-level domain other than the TLD for which Registry Operator or its Affiliate serves as the Registry Operator.
 3. Except as set forth in Section 4 below, Registry Operator may not be Affiliates with an ICANN-Accredited Registrar distributing names in the TLD.
 4. For the first 18 months of the New TLD program, ICANN only may approve a greater than 15% interest (or control) in three cases:

- i. Single Registrant TLD -- use must be limited to registrant entity, its employees, and its agents -- no other third parties
- ii. Community Applicant – Registry Operator or its Affiliates must only maintain up to 30,000 domain name registrations in the TLD.
- iii. Orphan Registry Operator -- Registry Operator must make good faith showing that it attempted and failed to get traction in registrar marketplace, and Registry Operator or its Affiliates must only maintain up to 30,000 names without demonstration that it again made good faith efforts to attempt -- and failed -- to get traction in the registrar marketplace. In order to maintain this exception, the Orphan Registry Operator must demonstrate on an annual basis that it made good faith efforts to attempt – and failed – to get traction in the registrar marketplace. No change of control shall be allowed of an Orphan TLD absent ICANN approval. In the event ICANN approves change of control by an ICANN-Accredited Registrar, they lose orphan TLD status.

ICANN may consult with relevant competition authority at its discretion when reviewing any of these requests for approval. In so doing, ICANN should use a "public interest" standard.

5. After the first 18 months, ICANN may amend the criteria for its approval of a greater interest only with consensus approval of the community. ICANN also may consult with relevant competition authorities at its discretion or at the request of the applicant when reviewing a specific request for approval.

6. Use of Registrars/Discrimination -- Registry Operator must use only ICANN-accredited registrars in registering domain names, provided that Registry Operator shall have the flexibility to determine eligibility criteria for Registrars in its TLD; such criteria shall be applied equally to all ICANN-Accredited Registrars; such criteria are reasonably related to the purpose of the TLD; and the Registry Operator may not discriminate among the registrars it selects.

7. Back-end Registry Operators -- these requirements to be added to the Registry Operator Agreement
 - i. Back-end registry service providers are bound by the same rules as the Registry Operators if they (a) are Affiliates with Registry Operator, or (b) otherwise control the pricing, policies, or selection of registrars for that TLD.

 - ii. Back-end registry service providers that are not Affiliates with Registry Operator or don't otherwise control the pricing, policies, or registrar selection may be affiliated with an ICANN-Accredited Registrar only if the affiliated registrar operations are kept separate from the operations of the registry service provider; the affiliated registrar does not receive preferential treatment in pricing or any other way; strict controls are in place to prevent registry data and other confidential information from being shared with affiliated registrar; annual independent audits are required; and a sanctions program is established.

8. Registrar Resellers -- these requirements to be added to the Registry Operator Agreement:

- i. Restriction on Registry Operators or its Affiliates from serving as or controlling an ICANN-accredited registrar extends to registrar resellers for the first 18 months of a Registry Operator's existence. If an exception has been granted under Section 3, then those exceptions shall equally apply to this restriction.

- ii. After 18 months, Registry Operators may distribute domains as a registrar "reseller" as long as the ICANN-Accredited registrar that it distributes through is not affiliated with Registry Operator; the operations of the affiliated registrar reseller are kept separate from the operations of the Registry Operator; the affiliated registrar reseller does not receive preferential treatment in pricing or any other way; strict controls are in place to prevent registry data and other confidential information from being shared with affiliated registrar reseller; annual independent audits are required; and a sanctions program is established.

Free Trade Proposal

1. LIMITS DO NOT APPLY ACROSS TLDS

In the Free Trade model for the coming round, there are no limits to Cross Ownership (CO) & Functional Control for new TLDS that distribute domains with equivalent access. The issues discussed around this concept have very little to do with percent ownership and more to do with the abuse and harms of having integrated control of data. Setting random percent ownership limits does nothing to mitigate harms and abuse. Such abuse examples are Discrimination, Insider trading, Domain registration abuse, Domain tasting, Front-running, Predatory pricing, Account lock-ins, Transfer-out pricing, reduced product variety. No harms have been shown to have occurred unmanageably to date, in any namespace, due to lack of VI/CO restrictions. Any alleged harms, if any, occur roughly equally across DNS, regardless of any such restrictions, if any. Whether the Registry (Ry) operates in self distribution model or a co-distribution model with “equal access” to all ICANN- accredited registrars, the concept of market power is essential when conducting the risk analysis and policy development of allowable models.

In the new TLD space, and indeed the existing gTLDs (perhaps other than .com/net/org), there is no justification for any restrictions on vertical integration, cross-ownership, or the requirement of any or equal access to registrars. On the other hand, there is much likely benefit from avoiding or eliminating those restrictions. All other models foster the demand for exceptions in addition to the issue of harms and abuse. Therefore no such restrictions or requirements should be imposed upon new TLD registry operators. Of course, registrars will continue to be widely used by consumers to register new gTLD domains, to that extent the registrars must be ICANN-accredited to offer gTLD names. Registries who sell direct must also agree to the RAA and pay registrar fees to ICANN.

Registrars will still be able sell most new gTLDs and charge fees based on their business model, but the ability to buy direct from a registry is certainly in consumer best interests to keep registration fees lower. ICANN assumes that the new TLD launch is in consumers' best interest, in order to expand consumer choice among domain names and in order to encourage DNS innovation, so it is logical that ICANN should enable new entrants to the gTLD market as much as possible. Thus the ability for new registries to sell direct, and to control their own distribution channel outside of ICANN's traditional model, is certainly in consumer's best interests.

2. CONTROL/OWNERSHIP

No ownership limits. 100% Cross Ownership and complete Vertical integration is allowed.

3. OWNERSHIP LIMITS

No ownership limits. 100% Cross Ownership and complete Vertical integration is allowed.

4. EXCEPTIONS

The Free Trade model removes the need for exceptions like Single Registrant – Single User (SRSU), Single Registrant – Multiple Users (SRMU), & Orphan TLDs.

5. REGISTRY SERVICE PROVIDERS

New gTLD Registry Operators should be free to contract with Registry Service Providers (RSP) regardless of ownership, so long as the obligations of the Registry contract are fulfilled.

6. COMPLIANCE AND ENFORCEMENT

To the extent that any harms are actually caused by violation of CO or VI restrictions today, it is because existing rules have not been clear enough and/or have not been enforced fully enough.

Clarity in the rules would greatly benefit new TLD operators, Regardless of the rules that are devised, if any, ICANN's funding of contractual compliance resources and expertise must match the demands of the new gTLD expansion.

Questions:

What is the best way to prevent gaming in a cross-owned entity -- percentage ownership caps, restrictions on control, both or something else?

Percentage ownership caps become irrelevant with respect to gaming if Functional Control is allowed and compliance to address violations is established. Gaming is primarily a function of the Vertical Integration debate rather than the concept of Cross Ownership. Therefore to mitigate gaming of new TLDs, the community must identify the ways these forms of abuse stemming from Functional Control can affect the market and establish a compliance framework that defines the thresholds, monitors for breach, and enforces penalties for violations.

Do the benefits of increased competition (registrars becoming registries or back-end service providers) outweigh the potential risks of gaming from a cross-owned entity, or vice-versa?

Yes. The potential risks of gaming, if any, can be addressed by compliance, monitoring, and enforcement mechanisms.

Common ownership Should a registry be able to own a registrar, and vice versa, provided it doesn't distribute its own TLD?

Yes, and should be able to distribute its own TLD.

What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is permitted?

0–100%

What is an acceptable level of cross-ownership (0 - 100%) if self-distribution is prohibited?

0–100%

Should a registry be able to control a registrar, and vice versa, provided it doesn't distribute its own TLD?

Yes, and should be able to distribute its own TLD with the equivalent access model

Absent an arbitrary restriction on percentage of cross-ownership, what constitutes control?

The functional control of Registrar data and operations of the TLDs in which they operate.

What restrictions should be put in place to prevent control? Do these vary if self-distribution is prohibited?

Functional control should not be prevented, but any abuses and gaming that are alleged as likely to result from control should be researched and contractually defined in a manner that removes the incentive or contains consequence.

Enforcement and Compliance

Is ICANN capable of enforcing contract compliance to prevent gaming in a cross-owned entity?

To the extent we understand the alleged harms, and how the marketplace has adequately addressed those harms to date in TLDs that have no VI/CO restrictions, the answer is yes. Any rules can be “gamed” by someone’s definition of gaming. Eliminating CO/VI rules will result in less need for compliance as to corporate formalities, which are generally irrelevant to issues of abuse. Thus elimination of CO/VI rules will allow more compliance resources to focus on combating actual DNS abuses that affect internet users.

Scope

Should the scope of ICANN contracts be increased?

No, Back-end Registry Service Providers (RSPs) shall be required to be accredited by ICANN for technical sufficiency. It is expected that RSPs shall also be bound by the similar

terms, conditions, and restrictions imposed on Registry Operators through their contractual agreement with each Registry Operator.

Existing ICANN contracts may require a few adjustments based on implementation.

Specifically, should Registry Service Providers be required to enter into contracts with ICANN?

No, Back-end Registry Service Providers (RSPs) shall be required to be accredited by ICANN for technical sufficiency. It is expected that RSPs shall also be bound by the similar terms, conditions, and restrictions imposed on Registry Operators through their contractual agreement with each Registry Operator.

Should other entities (e.g. Resellers) also be required to enter into contracts with ICANN?

No, not at this time.

Exceptions to cross-ownership and self-distribution restrictions Permitted for Single-Registrant, Single-User (SRSU) TLDs?

Not applicable with the Free Trade model

Permitted for "orphaned" TLDs that can't get registrar distribution?

Not applicable with the Free Trade model

Permitted for "community" TLDs?

Not applicable with the Free Trade model

Should there be numeric caps for any or all of these?

Not applicable with the Free Trade model

Interim solution

Should the results of this first-phase VI-WG PDP be limited to the first round of new TLDs only?

No. This PDP will either create a Policy and or the ICANN Board will make decision with respect to the Vertical Integration and Cross Ownership model. Said model will evolve up through to any subsequent TLD round only modified or terminated by subsequent PDPs.

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Vertical Integration Proposal – RACK+

The undersigned support the following proposal for vertical integration rules in the newTLD round. Having participated in the Vertical Integration PDP Working Group, the undersigned note the complexity of the issues concerning proposed vertical integration and underscore the good faith efforts by the participants in the PDP Working Group to deliver a consensus based proposal for consideration by the GNSO Council and, ultimately, the Board.

This proposal is designed to preserve the separation of registries and registrars which protects registrants with more robust competition and a system in which all registrars, small and large, from all regions of the world, benefit from equivalent access and non discrimination for domain name registrations. An overarching concern that informs this proposal is the prospect of gaming and the negative impact for registrants arising from the potential misuse of registry data. The proposal is intended to minimize the possibility of abuse of registry data through structural separation and to provide a framework that does not strain ICANN's enforcement resources or capabilities. Abuse of registry data will result in higher prices and unavailability of higher value domain names. Prevention of registry data abuse would be easier under this proposal than under proposals that rely on purported behavioral safeguards to prevent such abuse.

We acknowledge that the Working Group will continue to examine issues around vertical integration beyond the Brussels ICANN meeting until the mandate of the VI WG has been fully discharged.

We also take note of the levels of support the following items have garnered as reflected in the Vertical Integration Working Group proposal grid. In that spirit, the following vertical integration proposal has our full support:

PROPOSAL

Cross Ownership

1. ICANN should permit cross ownership, both by a registry operator in a registrar and by a registrar in a registry operator, up to 15%. This cross ownership approach allows both registry operators and registrars to invest in domain name wholesale and retail businesses thus stimulating growth in the industry. At the same time, the 15% ownership cap avoids creating ownership positions that provide incentives for registries and registrars alike to discriminate against unaffiliated competitors.
2. ICANN should permit cross ownership, both by a registry backend service provider in a registrar and by a registrar in a registry backend service provider, up to 15%. This cross ownership approach is recommended for the reasons stated in paragraph 1 above and to create an even playing field for all actors in the market. This group does not recommend that a new contract regime be established between ICANN and registry backend services providers. Rather, ICANN could enforce this cross ownership rule through the registry operator contract.

For these ownership caps to be meaningful and effective, rules concerning corporate control through other means and use of affiliates to subvert the ownership caps should be part of the new TLD contracts. See definitions of “Affiliate” and “Control.” Structural separation of registries and registrars, as set out above, will be easily and readily verifiable, and completely auditable. It will achieve the goal of separation of control so that registries and registrars are run separately, notwithstanding the very limited cross-ownership.

GNSO Recommendation 19

Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.

Equivalent Access and Non-Discrimination

Equivalent access and non-discrimination principles should apply to all TLD distribution.

Definitions

Affiliate shall mean a specified person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

Control (including the terms “controlling”, “controlled by” and “under common control with”) shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, contracts including debt and liquidity instruments or otherwise. As used in this definition, the term “control” means the possession of beneficial ownership of more than fifteen percent (15%) of the equity interests or more than fifteen (15%) of the interests entitled to vote for the election of, or serve as, the board of directors or similar managing authority of the entity.

Registry Operator is the entity that is a contracting party to the Registry Operator agreement with ICANN for the TLD in question.

Registrar is the entity that is a contracting party to the Registrar Accreditation Agreement (RAA) with ICANN that is authorized to register domain names.

Backend Registry Services Provider shall mean any entity performing any material registry services on behalf of the Registry Operator, including but not limited to shared-registrations-services, DNS, WHOIS or any other material Registry Services defined by the Registry Operator.

Registrar Reseller - restrictions on Registry Operators, Backend Registry Service Providers or their Affiliates from serving as or controlling an ICANN-accredited registrar extends to registrar resellers.

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**Joint Vertical Integration/Co-Ownership Proposal:
Competition Authority Model (CAM)¹³**

Problem Statement: ICANN is, we hope, on the verge of the greatest expanse of the domain name space since its creation in 1985. However, ICANN’s current legal framework was developed to open up a legacy monopoly that existed over a decade ago. That framework lacks the flexibility to promote increased innovation and choice in an increasingly competitive and fluid marketplace while still safeguarding consumers’ interests.

Objective: To break away from ICANN’s current one-size fits all contracting model, and to provide a framework that can both scale going forward and provide room for “innovative new business models that are very different from those of existing TLDs’ registry operators.¹⁴”

Proposed Solution

Registry Operator/Registrar Co-Ownership: Any request by a Registration Authority (Registry or Registrar), whether in the initial application or post delegation, seeking to acquire any ownership interest in a different type of Registration Authority¹⁵ would be subject to the following multi-step process. This process would apply to new gTLD applicants as well as existing Registration Authorities seeking an ownership interest in a

¹³ This proposal is based on the original MMA proposal, which represented a compromise between the professional opinions and viewpoints of the three original co-authors, Michael Palage, Milton Mueller and Avri Doria. That original compromise has been amended to reflect comments offered by the other members of the Vertical Integration WG.

¹⁴ See “An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names” Katz, Rosston, and Sullivan, Page 6.

¹⁵ “Different type of Registration Authority” is intended to be defined as a Registry seeking an ownership interest in a Registrar, or vice versa, It is not intended to encompass a Registration Authority acquiring an ownership interest in a similarly situated Registration Authority, e.g. this process is not intended to apply to a Registrar acquiring an interest in another Registrar, or a Registry in another Registry. It should also be noted that discussion of registration services in affiliated Registration authorities covered in the next section of this proposal

different type of Registration Authority. For new gTLD application this process would be part of the initial and extended review process. For gTLDs that have already been delegated, the process would resemble the current Registry Service Technical Evaluation Panel (RSTEP) process.

Step #1

All applicants would be required to answer a series of pre-determined questions regarding the proposed interaction within the marketplace of the Registration Authorities, and series of other questions designed to reveal the market share and any potential market power or consumer harm of those Registration Authorities, either individually or combined, could exert on consumers (registrants and Internet users of domain names).¹⁶

Step #2

All applications would then be referred to an ICANN standing committee of international competition and consumer experts for a “quick look analysis.” This standing panel could be modelled after ICANN's existing Registry Service Technical Evaluation Panel (RSTEP). However, this Competition/Consumer Evaluation Standing Panel (CESP) would include economics, law, consumer protection and policy experts from each of the five ICANN geographical regions.¹⁷ The analysis by the CESP would be based upon the applicant's responses to the agreed upon questions.

If the CESP “quick look” or initial analysis raised no competition or consumer protection concerns, the processing on the new gTLD application would continue. In the case of an existing delegation, ICANN would approve the request.

¹⁶ These questions could initially be drafted by experts in competition law, and then shared with the broader Internet community as part of a normal ICANN consultation period. These questions would then be forwarded by ICANN to the Government Advisory Committee (GAC) for referral to the appropriate competition authority within each country. Following standing international protocols, these national competition authorities would have six weeks to provide any feedback to ICANN.

¹⁷ Although the economic Panelists would be required to be internationally recognized experts in their field, the CESP could include non-economic experts with detailed market knowledge of the domain name marketplace to assist in the Panelists' evaluation. This option is designed to provide the economic experts with timely access to marketplace information that would otherwise have to be provided by ICANN staff.

Step #3

If the CESP initial analysis raises competition or consumer protection concerns or indicates a need for a more detailed or extended analysis to properly evaluate the proposal, then ICANN shall refer the matter to the appropriate national competition and/or consumer protection agencies. The accompanying CESP report would describe the concerns and identify the appropriate competition and/or consumer protection authorities to which the case should be referred. This referral process is modelled after the process currently set forth in the Registry Services Evaluation Process (RESP). Unlike the RESP, however, which relies upon ICANN staff to make these referrals, the CESP is a much more qualified external review body to make these complex determinations.

Step #4

The appropriate national competition and/or consumer protection authorities would then have 45 days to review the referral to determine if it gives rise to any potential enforcement action. If the agency or agencies notify ICANN and the applicant during that 45 day period that the application may violate its competitions or consumer protection laws, ICANN will place the application on hold for another period not to exceed 60 days following the deadline that agency or agencies have established for the applicant to respond to any information requests for its investigation. At the end of this period, or sooner if notified by the agency or agencies that all issues have been resolved and unless concerns have been flagged for further review or action, ICANN will forward a new gTLD application for further processing, or approve the request for an existing delegation.

This process corresponds to a modified implementation of the Salop/Wright Option 2¹⁸. The hold period should have no negative impact on the processing of the application by ICANN during the Initial Evaluation. The hold would only come into play prior to contention set resolution in the case of multiple applicants for a single string, or prior to contractual

¹⁸ See <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf>

approval if the string is not part of a contention set. Given that ICANN has scheduled five months for the Initial Evaluation of all gTLD applications, this should provide for more than sufficient time for the CESP and the competition agency or agencies to complete their respective reviews.

Registration by cross-owned Registry-Registrar: Registries and Registry Service Providers (RSP) would be permitted to provide domain name registration services for their TLD through an affiliated Registrar. This applies all forms of affiliation including cross-ownership or some other form of affiliation.

In order to mitigate against possible harm, the following rules would apply to all instances of a Registry or RSP providing domain name registration through an affiliated Registrar:

a) In the event the Registry Operator/RSP controls¹⁹ pricing, policy or the selection of registrars for the TLD, then the restrictions applicable to the Registry Operator/RSP shall also be applicable to any of its Affiliates.

b) In addition, in the event that Registry/RSP or any of its Affiliates is a Registrar for the TLD, the following restrictions shall apply:

1. Affiliated Registrar may not receive directly or indirectly preferential pricing from Registry Operator (i.e., direct pricing, rebates, discounts, marketing contracts, etc.).
2. RSP must have strict controls on use of data for any purpose other than acting as the RSP and must have information “firewall” between data in the registry and its Registrar Affiliate.

¹⁹ “Control” (including the terms “controlling”, “controlled by” and “under common control with”) shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

3. No confidential information of the Registry Operator obtained by the RSP may be shared with registrar Affiliate of RSP except as necessary to perform the Registry Services and only for such purpose.
4. RSP shall not provide any access to any Registry Data to its Registrar Affiliate, and RSP itself will not use confidential user data or proprietary information of an-ICANN-accredited registrar served by Registry Operator, received by RSP in the course of providing Registry Services, except as necessary for registry management and operations.
5. In the case where an RSP has a Registrar Affiliate providing Registrar services in the TLD, such RSP will conduct internal neutrality reviews on a regular basis. In addition, it will agree to cooperate with an independent third party ("Auditor") performing Annual Independent Neutrality Audits ("AIN Audits"), to be conducted each calendar year. All costs of the AIN Audits will be borne by RSP. The AIN Audit is intended to determine whether Back-end Operator has been in compliance, and will utilize such tests and techniques, as the auditor deems appropriate to determine that compliance. The ICANN compliance department will be responsible for insuring that the proper audits are done each year, that their results are reviewed and that any corrective actions will be taken. The ICANN compliance department will publish a yearly report on the status of the ongoing audits.
6. Strict Penalties/Sanctions will be applied to any entity violating these policies, including monetary as well as temporary and potential

permanent prohibition of Affiliate Registrar providing domain name registrations services in the TLD, e.g. Three Strikes Program²⁰

Vertical Integration and the use of ICANN Accredited Registrars: There shall continue to remain a presumption in favor of using ICANN accredited registrars in connection with domain name registration services. However, it is recognized that true innovation and choice within the domain name marketplace can sometimes only be achieved by permitting the Registry Operator to provide domain name registration services for its new gTLD, without the inefficiencies of that entity having to seek separate ICANN Accreditation as a Registrar.

This flexibility is most appropriate in connection with those gTLD business models without domain name portability, e.g. the domain names are assigned by the Registry Operator to the registrant in which registrants are prohibited from transferring their domain name to any other third party, i.e. to another registrant. This type of business model is highly likely in connection with certain brand-type gTLDs or membership organizations where the Registry Operator would be assigning names based upon an account number (.BANK) or membership name (.NGO). This corresponds to a Single Registrant Single User model where special criteria would be defined to identify organizations that would qualify for such services and would be exempt from the requirement on using ICANN accredited registrars. While this flexibility is most likely appropriate in connection with single registrant TLDs, there may also be the need for flexibility in connection with community TLDs, especially those that are cultural or linguistic based. Therefore, Registry Operators shall be permitted to provide domain name registration services in their new gTLDs if they agree to be legally provide registrants the safeguards set forth in the Registrar Accreditation Agreement

²⁰ It is proposed that the first material violation would result in the Vertically Integrated / Co-Owned Registrar being prohibited for three months from “adding” any new domain names within the TLD; The second material violation would result in the Vertically Integrated / Co-Owned Registrar being prohibited for six months from “adding” or “renewing” any domain names within the TLD; a third material violation would result in a prohibition in that registrar providing any domain name registration services within that TLD.

(RAA)²¹. In this model, the presumption in favor of using ICANN accredited registrars in connection with domain name registration services would be suspended for the first 50,000 domain name registrations at the second level, after which time, domain names at the second level could be registered or transferred to any ICANN accredited registrar. Criteria for Registrars as described below would pertain in this case.

Registry Operators shall also have the ability to set up criteria (access requirements) for Registrars in the TLD at its sole discretion; provided that such requirements are reasonably related to the purpose of the TLD and that Registry Operator shall additionally provide equivalent access requirements to all Registrars that meet the access requirements.

Potential criteria that ICANN's Vertical Integration Working Group may wish to consider in implementing this policy include:

For Single Registrant TLDs, the primary considerations in allowing vertical integration would be a) the domain names are assigned to employees, departments, and/or members of that organization, and b) the non-transferability of the domains.

For Community TLDs, especially cultural and linguistic, names would be available to a wider registrant base, and would be transferable. In this case, finding agreement on potential implementation criteria may be more complex. While the transferability of these names creates a strong presumption in favor of the traditional use of ICANN accredited registrars, a Registry Operator should still be permitted the opportunity to provide direct domain name registrations (in addition to ICANN accredited registrars) when such supply does not create excessive switching costs for users or create significant market power for the registry.

²¹ This may be done initially by agreeing to the RAA, though it would be preferable for there to be a limited rider that could be appended to the registry agreement. Suggestions for creating a Registration Authority framework are discussed in the Legal Framework section of this proposal.

Enhanced Compliance Mechanisms: Concerns within the broader ICANN community about ICANN having the necessary resources to ensure Registration Authority compliance has been an ongoing concern for years. Unfortunately these concerns are only going to be further heightened with the likely addition of several hundred new gTLDs and the potential relaxation of vertical integration restrictions between registries and registrars.

There has been almost universal agreement within the Working Group about ICANN's compliance department receiving increased funding to do its job properly. Other proposals (including CAM) have provided for enhanced compliance fail safe measures by requiring integrated Registration Authorities to undergo a self financed audit to ensure compliance. However, the CAM proposal is unique in its proposal to expand use of the Post Delegation Dispute Resolution Procedure (PDDRP) to empower third parties to use this administrative dispute procedure for vertical integration violations.

Historically ICANN has included a provision in all Registration Authority agreements specifically prohibiting any third party beneficiaries in connection with the agreements. The PDDRP, however, for the first recognizes that third parties have a right to bring an administrative challenge against a registry for a violation of the representations set forth in the application and or registry agreement. While the PDDRP is currently limited to only disputes involving violations of “community” applications it is proposed that the scope of PDDRP be expanded to handle violations of any vertical separation safeguards.

The focus of this concept is to empower third parties that may be negatively impacted by a Registration Authorities violation of vertical integration safeguards to proactively address such violations instead of relying upon ICANN's over worked compliance department or a third party audit.

Legal Framework: ICANN should rename/restructure the existing proposed Registry Agreement as currently found in the Draft Applicant Guidebook (DAG) into more modular

agreement. The title of the document should also be renamed Registration Authority Master Agreement (RAMA) to reflect the continued blurring between resellers, registrars, registry owners and registry service providers in the existing marketplace.²² The chapeau of this agreement would broadly define the relationship between the parties (ICANN and the Registration Authority) and would be modelled in large part after the current accountability framework that ccTLD administrators have entered into with ICANN. This base agreement would then be supplemented through a series of standard addendums/annexes that could reflect a number of business models, e.g. standard Registrar, standard Registry Operator; Sponsor; Registry Operator seeking to provide domain name registrations services to registrants; Intergovernmental and Public Sector Applicants; and restrictions imposed on Registration Authorities (Registries/Registrars) by national competition authorities. It is understood that this provision may need to be brought into consideration at a later time in order to not delay the introduction of new gTLDs.

Additional Policy Considerations: While the above referenced issues need to be satisfactorily resolved prior to the finalization of the Applicant Guidebook, there are a number of other additional policy considerations that need to be properly addressed if the full range of potential new gTLD business models is to have a chance of being successful. One issue that requires a broader discussion within the ICANN community is the fees that ICANN charges in connection with domain name registrations. As set forth in the GAC advice to the ICANN Board in its Brussels communiqué, “the new gTLD process should meet the global public interest consistent with the Affirmation of Commitments,” so that the “cost considerations” are “at a reasonable and proportionate level in order not to exclude developing country stakeholders.”²³ Unfortunately, ICANN has yet to explain in any

²² The concept of a Master Agreement is commonly used in business to provide an overarching legal framework between the parties.

²³ See GAC Brussels' Communiqué (23 June 2010) [insert HTML link]

documentation why they are increasing the ICANN registry fee costs by 500% over similar registry agreements recently executed.²⁴

ICANN's current funding model is largely based on a per transaction charge imposed on both gTLD registries and registrars. While this model mostly works in the current marketplace, this funding model does not scale regarding business models in which the registry may wish to give away domain names for free or in a vertically integrated single registrant/brand TLD. Therefore, there is a need for a forum in which ICANN reviews and perhaps revises its pricing models.²⁵

While intellectual property protection and access to accurate Whois information are two issues within the ICANN community that usually evoke strong responses from different stakeholders groups, some single registrant/brand/registrant verified TLDs may require a re-evaluation as to the appropriateness of these mechanisms or the manner in which they are utilized.

These additional policy considerations are not intended to interject new over-arching issues into the new gTLD process. However, they are intended to serve as clear reminder as to some of the issues that ICANN may not have fully accounted for in the unlimited and diverse business models that may be submitted through ICANN's new gTLD process.

²⁴ The current draft template registry agreement proposes a \$25,000 annual fee for up to 50,000 domain names registered within the TLD, this is a 500% increase over the \$5,000 fee incorporated into the .COOP and .AERO agreements that ICANN has recently executed.

²⁵ See <http://forum.icann.org/lists/op-budget-fy2011/msg00011.html>

IPC Proposal

The GNSO Council has formed a Working Group of interested Stakeholder Group / Constituency representatives and community participants, to collaborate broadly with knowledgeable individuals and organizations, in order to consider recommendations on Vertical Integration (VI).

Part of the working group's effort will be to incorporate ideas and suggestions gathered from Stakeholder Groups and Constituencies through this Stakeholder Group / Constituency Statement. Inserting your Stakeholder Group / Constituency's response in this form will make it much easier for the Working Group to summarize the responses. This information is helpful to the community in understanding the points of view of various stakeholders. However, you should feel free to add any information you deem important to inform the working group's deliberations, even if this does not fit into any of the questions listed below.

Process

- Please identify the members of your constituency who participated in developing the perspective(s) set forth below.
- *The description of the category of new gTLDs for which an exception should be recognized with regard to vertical integration (or alternatively, with respect to registrar non-discrimination requirements) was originally proposed by J. Scott Evans, refined during an extensive online discussion on the mailing list of all IPC members, and summarized in an earlier draft of this document for review by all IPC members, and finalized for approval by the IPC Officers. Other elements of responses to this template were drafted by Steve Metalitz and circulated for comment on the full IPC list on May 2,*

2010. Those contributing to the discussion at some phase of this process included: Paul McGrady, Fred Felman, Fabricio Vayra, Ellen Shankman, Adam Scoville, Hector Manoff, Claudio Digangi, David-Irving Tayer, Martin Schwimmer, Nick Wood, David Taylor, Marc Trachtenberg, Kristina Rosette and others.

- Please describe the process by which your constituency arrived at the perspective(s) set forth below.
- *See preceding question.*

Questions

Please provide your stakeholder group / constituency's input on the following charter objectives:

Objective 1: To make policy recommendations that provide clear direction to ICANN staff and new gTLD applicants on whether, and if so under what conditions, contracts for new gTLD registries can permit vertical integration or otherwise deviate from current forms of registry-registrar separation, and equivalent access and non-discriminatory access.

IPC generally supports the strict separation approach approved by the ICANN Board on March 12. However, appropriate exceptions to this approach should be recognized. In particular, IPC believes that a new gTLD registry meeting one or more of the following models should (a) be allowed to control an ICANN-accredited registrar solely for the purpose of sponsoring registrations in that gTLD; (b) not be required to use an ICANN-accredited registrar for registration of second-level domain names within the gTLD; or (c) be permitted to enter into exclusive arrangements with one or a limited number of ICANN-accredited registrars for the purpose of sponsoring registrations in that gTLD,.

These models pertain only to branded gTLDs. Though there may be other exceptions to VI/CO rules, the IPC comments are limited to those gTLDs where the string is an identical match to the registry's trademark/service mark, which we will heretofore refer to as

“.brands.” We are of the view that it is preferable to have a specific .brand category, clearly defined, than seek to have brand owners try to seek to dress their application as a Community application for instance.

Models and Discussion:

1. Branded Single Registrant, Single User - .brand where the brand holder is the Registered Name Holder and user of all second-level domain names in the TLD)

This case is clear and simple. The trademark owner/holder owns and operates the registry either directly or indirectly, is the Registered Name Holder for all second-level names in the TLD, and is the user of all second-level names in the TLD. No second-level names are registered or delegated to any third party with the exception of wholly owned subsidiaries and otherwise affiliated companies. An example of this sort of VI/CO regulatory exception would be a direct-to-consumer retailer – “Buy Stuff”, which would be the registry, sole Registered Name Holder, and sole user of second level domain names, e.g. <locations.buystuff> <clothes.buystuff> or <housewares.buystuff>.

1. Branded Single Registrant, Multiple Related Users - .brand where the trademark owner is the Registered Name Holder of all second-level domains but licenses those second-level domains to third parties that have a relationship with the brand owner (e.g., customers, suppliers, authorized dealers, etc.) whereby the registration agreement is part and parcel of and ancillary to a primary agreement for goods or services.

This model permits trademark owners to engage more fully and embrace in new gTLD innovation by bundling non-registry related services with domains. Such a model could be popular with ISPs, technology, and media companies.

2. Branded Trademark Licensed Multiple Registrant Multiple Users - .brand where the trademark owner and its trademark licensees are the Registered Name Holders and users of all second-level domains in the TLD. An example of this sort of exception would be trademark owners that operate a franchise system (<.fastburger>), distributors, real estate agents, and cooperative members (e.g. <.truevalue>). Using the Fast Burger example: Fast Burger would be the registry and a Registered Name Holder (e.g. <headquarters.fastburger> or <humanresources.fastburger>), and would allow third parties operating under a trademark license to be Registered Name Holders (e.g. <Chicago.fastburger> or <BobSmith.fastburger>).

This model is important for trademark owners that wish to maintain strict control over registration of second-level domain names, but need some flexibility related to ownership and local control.

Further Conditions for Exceptions:

.Brand gTLDs must adhere to the following conditions in order to be exempt from VI/CO restrictions (The IPC recognizes that any threshold naturally creates a problem for those who may not meet it and some IPC members have expressed concern at where the threshold is set. It is always a balance of fairness and seeking to ensure that there is no gaming. The level suggested is thus one which is hopefully sufficiently low to allow many brand owners who wish to participate to be able to, yet dissuade third parties who may seek to game or abuse the exception by registering a trade mark solely to be able to apply for a .brand to be rightly excluded. To nevertheless ensure a safeguard to this we suggest that applicants who do not meet the criteria can make their case to ICANN as to why they should be considered and ICANN has the discretion (or can delegate the discretion) to allow in certain cases):

- (a) The trademark to which the .brand is an identical match must be the subject of trademark registrations of national effect in at least three countries in each of at least three of the five ICANN regions.*
- (b) For first-round applicants, the registrations of national effect referenced in (a) above must have issued on before June 27, 2008.*
- (c) The .brand exemption is inapplicable to trademark owners whose principal business is the operation of a domain name registry, domain name registrar, or domain name reseller.*
- (d) The relationship between the .brand TLD and its customer/Registered Name Holder is defined by terms of service that encompasses a registration agreement and governs content, the bundling of services or the purchase of a product; membership in an organization or cooperative; maintenance of the terms of a contract, trademark license; or an appropriate combination of these factors.*
- (e) Second-level .brand domain name registrations in models 2 and 3 are held in trust by the TLD operator and are not delegated to a third-party user*
- (f) Second-level .brand domain name registrations in model 3 are delegated to the user, but under the quality control provisions of a trademark license agreement that allows the registry to terminate the registration at will*
- (g) Mixed-use gTLDs, where some names are held by the registry and other names registered to external parties are not exempt from CO/VI regulations.*

IPC Objectives for suggestions:

These objectives have been included to facilitate discussion of possible solutions that may be different from what is prescribed above. These objectives have been included so the community may understand the “spirit” of what is being proposed and understand what many brand owners have identified as helpful in the new gTLD process.. This proposal prescribes a delegation and distribution model for .brand gTLDs that:

- global trade and trust by adapting to various business models of trademark holders*

- *guards consumers from potential harm through the reduction of phishing and fraud*
- *protects and honors intellectual property that conforms to international standards while not expanding any intellectual property right beyond that granted by the national governments issuing such rights*
- *encourages innovation within the new gTLD namespace*
- *allows rights holders (for profit and non-profit) to provide maximum value and choice to their customers and constituencies while maintaining strict quality control standards applicable to maintaining trademarks*
- *facilitates a cost effective and low-priced domain name alternative*
- *eliminates gaming through geographic and time restrictions on qualifying trademarks*
- *permits trademark owners to reap the benefits of .brand TLDs*

The IPC is proposing very narrow use cases that should have no, or very limited, impact on existing contracted parties. These cases only describe branded single registrant gTLDs and are limited to this context.

IPC looks forward to discussion of other clearly defined situations in which relaxation of strict separation (or non-discrimination) requirements may be appropriate and welcomes discussion and feedback on the above.

Objective 2: To review current and previous ICANN gTLD registry contracts and policies to identify the current and previous restrictions and practices concerning registry-registrar separation, and equivalent access and non-discriminatory access in place.

Objectives 2-4 describe work to be undertaken by the WG. IPC looks forward to commenting on this work once it is completed.

Objective 3: To identify and clearly articulate the changes to current cross-ownership

arrangements contemplated by the options described in the most recent version of the DAG and supporting documents and considered by ICANN staff in connection with the planned introduction of new gTLDs.

Objective 4: To identify and clearly articulate the differences between the current restrictions and practices concerning registry-registrar separation and equal equivalent access, on the one hand, and the options described in the most recent version of the DAG and supporting documents¹ and changes considered by staff, on the other hand.

In addition, comments on any aspect related to the topic of vertical integration between registries and registrars that you think should be taken into account by the Working Group as part of its deliberations are welcome. For example, comments may be submitted on: (i) recommended models for the New gTLD Program, (ii) the economic analysis conducted by economists retained by ICANN, including the CRA Report < <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf> > as well as the one recently submitted by Salop and Wright < <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf> >, (iii) the Board approved model < <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5> > proposed by the Board at the ICANN Meeting in Nairobi on 12 March 2010, or (iv) whether the restrictions currently applicable to existing gTLD registries should be changed, or (v) additional work that should be performed by the Working Group to recommend models for the New gTLD Program.

Background Information

- Review the Issues Report on Vertical Integration Between Registries and Registrars, please refer to <http://gnso.icann.org/issues/vertical-integration/report-04dec09-en.pdf> [PDF, 254 KB].

- The ICANN Board resolution on Vertical Integration is posted at <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5>.
- To review the charter describing the policy work to be undertaken by the Vertical Integration Working Group, please refer to: <http://gnso.icann.org/issues/vertical-integration/vi-chartered-objectives-10mar10-en.pdf> [PDF, 41 KB].
- For information on the details of the implementation planning activities for new gTLDs, please refer to the documents posted at <http://icann.org/en/topics/new-gtld-program.htm>.
- For additional resources on the topic of vertical integration between registries and registrars, please refer to the documents posted at: https://st.icann.org/vert-integration-pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index_cgi_vi_resources.

ANNEX C - GNSO Council Resolutions on Vertical Integration

- **20100128-1**
- Motion to commence a Policy Development Process on Vertical Integration between registries and registrars.
- Whereas, on 24 September 2009, the GNSO Council requested ICANN Staff to prepare an Issues Report on the topic of vertical integration between registries and registrars;
- Whereas, on 11 December 2009, the Issues Report on vertical integration between registries and registrars < <http://gns0.icann.org/issues/vertical-integration/report-04dec09-en.pdf> > was delivered to the GNSO Council;
- Whereas, the Issues Report includes recommendations that the GNSO Council delay the initiation of a Policy Development Process (PDP) on the issue for a period of 1-2 years;
- Whereas, notwithstanding the recommendations in the Issues Report, the GNSO Council has decided to initiate a PDP on vertical integration between registries and registrars; and
- Whereas, the GNSO Council has decided against initiating a Task Force as defined in the ICANN Bylaws < <http://www.icann.org/en/general/bylaws.htm> >;
- Now therefore, be it:
- RESOLVED, that the GNSO Council has reviewed the recommendations contained in the Issues Report, and nonetheless approves the initiation of a PDP on the topic of vertical integration between registries and registrars;
- FURTHER RESOLVED, that the PDP shall evaluate which policy recommendations, if any, should be developed on the topic of vertical integration between registrars and

registries affecting both new gTLDs and existing gTLDs, as may be possible under existing contracts and as allowed under the ICANN Bylaws;

- FURTHER RESOLVED, that the GNSO Council shall convene a Working Group to fulfil the requirements of the PDP, including a review of ICANN Staff's prior work with respect to vertical integration, and develop recommendations accordingly; and
- FURTHER RESOLVED, that the Working Group shall deliver its Final Report to the GNSO Council no later than sixteen weeks from the date of this resolution.

The motion carried by a roll call vote.

Contracted Party House - Seven Votes against.

6 votes against + one Absentee ballot - Adrian Kinderis against.

Non Contracted Party House - Eleven (11) Votes in favour - two (2) votes against

11 Votes in favour:

Zahid Jamil, Mike Rodenbaugh (CBUC); Kristina Rosette, David Taylor (IPC); Rafik Dammak, William Drake, Mary Wong, Rosemary Sinclair, Debra Hughes, Wendy Seltzer (NCSG) + one absentee ballot - Olga Cavalli in favour.

2 Votes against: Jaime Wagner, Wolf-Ulrich Knoben (ISPCP)

10 March 2010 GNSO Council Resolution

20100310-1

Motion to Approve Vertical Integration (VI) Charter:

Whereas, on 28 January 2010, the GNSO Council approved a policy development process (PDP) on the topic of vertical integration between registries and registrars;

Whereas, the GNSO Council created a drafting team for the purposes of drafting a charter to fulfil the requirements of the PDP; and,

Whereas the drafting team completed its work and presented its charter proposal to the

GNSO Council on Friday Feb 26, 2010.

Whereas, the GNSO Council has reviewed the proposed charter to guide the working group in its PDP activities;

NOW THEREFORE, BE IT:

Resolved, that the GNSO Council approves the following charter:

<http://gns0.icann.org/issues/vertical-integration/vi-chartered-objectives-10mar10-en.pdf>

Resolved further, that the GNSO Council appoints Stephane van Gelder to be the GNSO Council Liaison to the Vertical Integration Working group (VI WG).

Resolved further, that the GNSO Council directs that a working group be formed to perform the work of the VI WG, and that the VI WG shall initiate its activities within 14 days after the approval of this motion. Until such time as the WG can select a chair and that chair can be confirmed by the GNSO Council, the GNSO Council Liaison shall act as interim chair.

Resolved further, that the WG is directed to develop a version of objective 5 and to recommend it to the Council within three weeks for either (a) Council approval of the WG-recommended Objective 5 or (b) Council vote on which version of Objective 5 (as reflected in the draft Charter of March 10, 2010) should apply.

ANNEX D - MEMBERS OF THE VI WORKING GROUP

Contracted Parties House

Registrars Stakeholder Group
Stephane van Gelder (GNSO Council Vice Chair)
Ashe-lee Jegathesan
Statton Hammock
Michele Neylon
Frederick Felman
Jothan Frakes
Ruslan Sattarov
Jeff Eckhaus
Jean Christophe Vignes
Ben Anderson
Krista Papac
Tim Ruiz
Thomas Barrett
Graham Chynoweth
Faisal Shah
Jacob Williams
Paul Diaz
Eric Brunner Williams
Amadeu Abril I Abril

gTLD Registries Stakeholder Group
Chuck Gomes (GNSO Chair)
Nacho Amadoz
Ken Stubbs
Brian Cute
Ching Chiao
Vladimir Shadrinov
Jeff Neuman
Keith Drazek
Kathy Kleiman
David Maher

Non Contracted Parties House

Commercial and Business Constituency
Berry Cobb
Mike Rodenbaugh
Jon Nevett
Jarkko Ruuska
Mikey O'Connor
Michael Palage
Ron Andruff

Internet Service Providers and Connectivity Providers Constituency
Tony Harris
Olivier Murrion

Intellectual Property Interests
Constituency
Victoria Carrington
Kristina Rosette
J. Scott Evans
Scott Austin

Non Commercial Stakeholder Group
Avri Doria
Milton Mueller
Mark Bannon

NomCom Appointee
Olga Cavalli (GNSO Council Vice Chair)

At Large
Alan Greenberg (ALAC Vice-Chair)
Sivasubramanian M
Baudouin Schombé
Cheryl Langdon-Orr (ALAC Chair)
Sebastien Bachollet (ALAC Vice-Chair)
Carlton Samuels

Individuals
Phil Buckingham
Roberto Gaetano
Jahangir Hossain
Modi Konark
Vika Mpisane
Tero Mustala
George Sadowsky
Jannik Skou / Alternate Dan Trampedach
Kristian Ormen
Steve Pinkos
Mike Silber
Richard Tindal
Liam Drew
Rahman Khan
Anthony van Couvering
Katrin Ohlmer
Liz Williams

The statements of interest of the Drafting Team members can be found at: <http://gnso.icann.org/issues/vertical-integration/soi-vi-pdp-wg-01apr10-en>.

The email archives can be found at <http://forum.icann.org/lists/gnso-vi-feb10/>

ANNEX E - Summary of Public Comment Period

Please refer to the document summarizing the public comment opened upon the initiation of the PDP on Vertical Integration posted on: <http://forum.icann.org/lists/pdp-vertical-integration/msg00008.html>

ANNEX F - STAKEHOLDER GROUP/CONSTITUENCY STATEMENTS

REGISTRAR STAKEHOLDER GROUP (RSG) POSITION STATEMENT

After consideration of the public interest benefits, the RSG supports the following principles regarding Registry-Registrar separation for New TLDs:

1. The RSG continues to support the GNSO recommendation that domain names be registered only through ICANN accredited registrars. This ensures that the public interest is protected by having all registrations governed by the rights and responsibilities found in the Registrar Accreditation Agreement;
2. ICANN should maintain the current structural separation requirements between the registry and registrar functions (i.e. the functions are handled separately);
3. ICANN should maintain the current requirement that registry operators not discriminate amongst registrars;
4. We agree with ICANN's expert economists that vertical integration of registries and registrars will enhance consumer benefits and provide consumers with lower prices, better service, and new innovation;
5. The risks of malicious and abusive conduct that certain parties have raised as a concern would not be prevented by restricting the ability of a registrar to sell names of an affiliated registry operator;

6. There is a rich history of registrars selling TLDs of affiliated registry operators in the gTLD and ccTLD spaces without any allegations of wrongdoing;
7. Any requirements intended to protect registrants from malicious or abusive conduct , including data issues, should go to the conduct at issue and not serve as an excuse to exclude an entire potential class of competitors along with the attendant public benefits of such competition;
8. ICANN should not prohibit affiliates of ICANN-accredited registrars to apply to be a New TLD registry operator;
9. ICANN should not prohibit affiliates of ICANN-accredited registrars to provide any types of services to registry operators; and
10. ICANN should not strictly prohibit registrars from selling registrations for TLDs of an affiliated registry operator.

CONCLUSION

ICANN should move forward positively and firmly to permit the integration of registry operators and registrars for New TLDs without sales restrictions, as such would inure to the benefit of consumers and the public interest.

The opinions expressed by the RSG in this Position Paper should not be interpreted to reflect the individual opinion of any particular RSG Member.

ISPCP COMMENTS ON VERTICAL INTEGRATION

The ISPCP Constituency has been following the discussions concerning Vertical Integration with keen interest, and would like to submit the following comments.

Whereas the ISPCP is supportive of initiatives that will help foster the growth and development of the Internet and its resources, we are somewhat concerned that the prospect of modifying the existing Registry/Registrar structural separation, will not benefit the public interest, or assist in preserving the security and stability of the Internet. The introduction of competition into the Registrar level of the domain namespace, has produced a proven environment that serves registrants all over the world, and indeed resulted in significant cost reductions for these millions of domain name buyers.

It is true that the projected introduction of numerous new gTLDs, presents some new issues that need to be considered:

- Single-registrant TLDs, such as corporations who apply for a new gTLD with intent to limit use of the domain, for their own internal corporate use, may not warrant the support of all ICANN accredited registrars.
- Community TLDs, which are applied for in order to serve small and narrowly defined populations, might not be of interest to the top tiered Registrars, due to the reduced potential number of registrants involved.
- New GTLD registries that have limited market appeal, and are not corporate brand TLDs (single-registrant) which are restricted for internal registration, nor Community

TLDs which have a defined target population however large or small, may find that none of the principal Registrars (those with significant market share), are interested in distributing their TLD to the public.

The above are examples where further consideration could be warranted on the question of exceptions, but the mainstream open TLDs including those currently in operation, particularly those with significant market dominance such as '.com', should continue to be subject to the existing separation arrangements.

Rather than make specific recommendations herein, on the possible ways to go about exceptions, we prefer at this time to await the outcome of the deliberations currently being held in the context of the Vertical Integration Working Group, which we are part of.

As undoubtedly ICANN is aware, numerous ISPs and Connectivity Providers worldwide are routinely involved in the domain name registration market, in many cases acting as resellers to the ICANN accredited Registrars. Thus it is essential that the stability and transparency of this market place, continue to be guaranteed in order to avoid any unnecessary turmoil.

In closing, the ISPCP Constituency is in favour of Full Structural Separation of Registries and Registrars as an overall policy, with the premise that further discussion over the possibility of some exceptions may be undertaken. However prior to accepting the need for any exceptions, the emphasis must remain on the need to define strong safeguards that will guarantee a competitive, secure and stable internet.

BC Position on Registry-Registrar vertical separation September 2009

Background

The principle of the vertical separation of Registry and Registrar was established 11 years ago as a pro-competitive action at the time of the monopoly of one entity (Network Solutions now VeriSign) owning the registry and acting as registrar for .com .org and .net. ICANN created the system we have today, where registrants place orders with ICANN-accredited registrars, who in turn place the orders with ICANN-contracted TLD registries.

In essence there were three pro-competitive benefits:

- a) the splitting of a dominant market player thus avoiding the potential for the exercise of dominance;
- b) the subsequent development of a competitive market with multiple registrars offering consumers a variety of services connected with the purchase of domain names;
- c) the subsequent development of competition at the registry level as ICANN moved to open up the registry market.

The BC supported this principle.

To ensure this structure held, ICANN restricted registries from acquiring a substantial percentage of any registrar, so VeriSign (the .com and .net registry) cannot buy a controlling interest in registrar GoDaddy, for example.

Judged by price alone (as an indicator of a competitive market) the pro-competitive benefits have proved to be real. Today the price of a .com domain name has dropped and there are multiple registrars competing for business with varied offerings.

Developments

In the subsequent 11 years, the BC has continued to support a cautious expansion of gTLD registries (in pursuit of the competitive benefits) and the continuation of Registry Registrar separation. Some of the largest registrars have become registry operators which also register those TLD names to the public. For example GoDaddy provides the registry for country-code .me (so Montenegro makes the rules, not ICANN). Also certain registries have been affiliated with domain registration companies for some time e.g. HostWay and .PRO, Poptel and .COOP, CORE and .CAT, Verisign and DBMS, GoDaddy and .ME, Afilias and .INFO.

Some registrars, such as eNom, are pressing ICANN to eliminate the restrictions on Registry-Registrar cross-ownership, so that those registrars can compete as registry businesses, sell new gTLD domains directly to the public, and sell them to all other ICANN accredited registrars as well. Other registrars, such as Network Solutions, has called for a continuation of the structural separation requirements between registries and registrars, but some liberalization in the cross-ownership requirements.

ICANN has reacted positively to the proposals to change in a limited fashion by proposing a continuation of the principle of separation BUT with a waiver for the first 100,000 names (described as a *limited lifting* of the requirement):

"With a limited exception, a registrar should not sell domain services of an affiliated registry. This limit is set to a certain threshold, in this model, 100,000 domain names".

<http://www.icann.org/en/topics/new-gtlds/rgy-regr-separation-18feb09-en.pdf>

The questions are thus:

- a) 11 years on, do the pro-competitive benefits outlined above continue to exist?
- b) Does the 100,000 waiver effectively remove the principle of separation in that it will apply to the most market-significant names?

The position of the existing market players

In favour of the status quo of continued separation

Certain existing registries, such as NeuStar (.biz) and Public Interest Registry (.org) are in support of any entity becoming a registry or registry operator, so long as that entity does not distribute domain names in the same TLD that they operate as a registry. They oppose the proposal to discontinue separation on the basis that registrars have a substantial head start in marketing domain names to the public.

In favour of change and the ending of separation

Certain existing large registrars argue that only entities with market power which can be exercised for anti-competitive purposes (such as Verisign with .com and .net), should be subject to cross-ownership restrictions. These registrars claim it is in consumers' interests to allow cross-ownership because it would enhance competition and allow for the passing on of operational efficiencies in the form of lower prices.

BC Position (general market)

Given the uncertainty of the merits of the arguments either way the BC believes that the burden of proof must lie with the proponents of change. Those who favour change must demonstrate:

- a) that the competitive benefits outlined above no longer apply and
- b) that there will be new competitive benefits and no significant adverse effects as a result of such change.

The decision is of course not in the hands of registrars or registries but in the hands of the ICANN Board. The question for the Board is simple: "Will removing the vertical separation

safeguards either INCREASE or DECREASE the likelihood of the exercise of dominance within the domain name marketplace?”

Recommendation 1:

The BC believes that removing the existing vertical separation safeguards between registries and registrars may increase the likelihood of the exercise of dominance within the domain name marketplace.

The BC believes that the proponents of change have not satisfactorily demonstrated the likelihood of market place benefits to users.

The BC believes that the proposed 100,000 waiver is likely to effectively remove the principle of separation in that it will apply to the most market-significant names.

The BC thus opposes any change to the status quo for all TLDs intended for sale to third parties (i.e. those unconnected with the Registry).

BC position (closed markets)

It is possible that in the forthcoming expansion of domain names there will be proprietary domain names not for sale to the general public eg dot *brand*. In this unique case the BC would accept that it makes no sense for a company owning its own name or trademark in the form of a domain name to be obliged to go to a third party to register its own second-level domain names. Thus an opt-out for this special case of internal use seems appropriate.

Recommendation 2:

The BC believes that uniquely for domain names intended for internal use, the principle of registry-registrar vertical separation should be waived.

Stakeholder Group / Constituency Input Template

Vertical Integration Policy Development Process

PLEASE SUBMIT YOUR RESPONSE AT THE LATEST BY 6-MAY, 2010 TO THE GNSO SECRETARIAT (gnso.secretariat@gnso.icann.org) which will forward your statement to the Vertical Integration Working Group.

The GNSO Council has formed a Working Group of interested Stakeholder Group / Constituency representatives and community participants, to collaborate broadly with knowledgeable individuals and organizations, in order to consider recommendations on Vertical Integration (VI).

Part of the working group's effort will be to incorporate ideas and suggestions gathered from Stakeholder Groups and Constituencies through this Stakeholder Group / Constituency Statement. Inserting your Stakeholder Group / Constituency's response in this form will make it much easier for the Working Group to summarize the responses. This information is helpful to the community in understanding the points of view of various stakeholders. However, you should feel free to add any information you deem important to inform the working group's deliberations, even if this does not fit into any of the questions listed below.

Process

- Please identify the members of your constituency who participated in developing the perspective(s) set forth below.
- *The description of the category of new gTLDs for which an exception should be recognized with regard to vertical integration (or alternatively, with respect to registrar non-discrimination requirements) was originally proposed by J. Scott Evans, refined during an extensive online discussion on the mailing list of all IPC members, and summarized in an earlier draft of this document for review by all IPC members, and finalized for approval by the IPC Officers. Other elements of responses to this template were drafted by Steve Metalitz and circulated for comment on the full IPC list on May 2, 2010. Those contributing to the discussion at some phase*

of this process included: Paul McGrady, Fred Felman, Fabricio Vayra, Ellen Shankman, Adam Scoville, Hector Manoff, Claudio Digangi, David-Irving Tayer, Martin Schwimmer, Nick Wood, David Taylor, Marc Trachtenberg, Kristina Rosette and others.

- Please describe the process by which your constituency arrived at the perspective(s) set forth below.
- *See preceding question.*

Questions

Please provide your stakeholder group / constituency's input on the following charter objectives:

Objective 1: To make policy recommendations that provide clear direction to ICANN staff and new gTLD applicants on whether, and if so under what conditions, contracts for new gTLD registries can permit vertical integration or otherwise deviate from current forms of registry-registrar separation, and equivalent access and non-discriminatory access.

IPC generally supports the strict separation approach approved by the ICANN Board on March 12. However, appropriate exceptions to this approach should be recognized. In particular, IPC believes that a new gTLD registry meeting one or more of the following models should (a) be allowed to control an ICANN-accredited registrar solely for the purpose of sponsoring registrations in that gTLD; (b) not be required to use an ICANN-accredited registrar for registration of second-level domain names within the gTLD; or (c) be permitted to enter into exclusive arrangements with one or a limited number of ICANN-accredited registrars for the purpose of sponsoring registrations in that gTLD,.

These models pertain only to branded gTLDs. Though there may be other exceptions to VI/CO rules, the IPC comments are limited to those gTLDs where the string is an identical match to the registry's trademark/service mark, which we will heretofore refer to as ".brands." We are of the view that it is preferable to have a specific .brand category, clearly defined, than seek to have brand owners try to seek to dress their application as a Community application for instance.

Models and Discussion:

2. Branded Single Registrant, Single User - .brand where the brand holder is the Registered Name Holder and user of all second-level domain names in the TLD)

This case is clear and simple. The trademark owner/holder owns and operates the registry either directly or indirectly, is the Registered Name Holder for all second-level names in the TLD, and is the user of all second-level names in the TLD. No second-level names are registered or delegated to any third party with the exception of wholly owned subsidiaries and otherwise affiliated companies. An example of this sort of VI/CO regulatory exception would be a direct-to-consumer retailer – “Buy Stuff”, which would be the registry, sole Registered Name Holder, and sole user of second level domain names, e.g. <locations.buystuff> <clothes.buystuff> or <housewares.buystuff>.

3. Branded Single Registrant, Multiple Related Users - .brand where the trademark owner is the Registered Name Holder of all second-level domains but licenses those second-level domains to third parties that have a relationship with the brand owner (e.g., customers, suppliers, authorized dealers, etc.) whereby the registration agreement is part and parcel of and ancillary to a primary agreement for goods or services.

This model permits trademark owners to engage more fully and embrace in new gTLD innovation by bundling non-registry related services with domains. Such a model could be popular with ISPs, technology, and media companies.

4. Branded Trademark Licensed Multiple Registrant Multiple Users - .brand where the trademark owner and its trademark licensees are the Registered Name Holders and users of all second-level domains in the TLD. An example of this sort of exception would be trademark owners that operate a franchise system (<.fastburger>), distributors, real estate agents, and cooperative members (e.g. <.truevalue>). Using the Fast Burger example: Fast Burger would be the registry and a Registered Name Holder (e.g. <headquarters.fastburger> or <humanresources.fastburger>), and would allow third parties operating under a trademark license to be Registered Name Holders (e.g. <Chicago.fastburger> or <BobSmith.fastburger>).

This model is important for trademark owners that wish to maintain strict control over registration of second-level domain names, but need some flexibility related to ownership and local control.

Further Conditions for Exceptions:

.Brand gTLDs must adhere to the following conditions in order to be exempt from VI/CO restrictions (The IPC recognizes that any threshold naturally creates a problem for those who may not meet it and some IPC members have expressed concern at where the threshold is set. It is always a balance of fairness and seeking to ensure that there is no gaming. The level suggested is thus one which is hopefully sufficiently low to allow many brand owners who wish to participate to be able to, yet dissuade third parties who may seek to game or abuse the exception by registering a trade mark solely to be able to apply for a .brand to be rightly excluded. To nevertheless ensure a safeguard to this we suggest that applicants who do not meet the criteria can make their case to ICANN as to why they should be considered and ICANN has the discretion (or can delegate the discretion) to allow in certain cases):

- (a) The trademark to which the .brand is an identical match must be the subject of trademark registrations of national effect in at least three countries in each of at least three of the five ICANN regions.*
- (b) For first-round applicants, the registrations of national effect referenced in (a) above must have issued on before June 27, 2008.*
- (c) The .brand exemption is inapplicable to trademark owners whose principal business is the operation of a domain name registry, domain name registrar, or domain name reseller.*
- (d) The relationship between the .brand TLD and its customer/Registered Name Holder is defined by terms of service that encompasses a registration agreement and governs content, the bundling of services or the purchase of a product; membership in an organization or cooperative; maintenance of the terms of a contract, trademark license; or an appropriate combination of these factors.*
- (e) Second-level .brand domain name registrations in models 2 and 3 are held in trust by the TLD operator and are not delegated to a third-party user*
- (f) Second-level .brand domain name registrations in model 3 are delegated to the user, but under the quality control provisions of a trademark license agreement that allows the registry to terminate the registration at will*
- (g) Mixed-use gTLDs, where some names are held by the registry and other names registered to external parties are not exempt from CO/VI regulations.*

IPC Objectives for suggestions:

These objectives have been included to facilitate discussion of possible solutions that may be different from what is prescribed above. These objectives have been included so the community may understand the “spirit” of what is being proposed and understand what many brand owners have identified as helpful in the new gTLD process.. This proposal prescribes a delegation and distribution model for .brand gTLDs that:

- *global trade and trust by adapting to various business models of trademark holders*
- *guards consumers from potential harm through the reduction of phishing and fraud*
- *protects and honors intellectual property that conforms to international standards while not expanding any intellectual property right beyond that granted by the national governments issuing such rights*
- *encourages innovation within the new gTLD namespace*
- *allows rights holders (for profit and non-profit) to provide maximum value and choice to their customers and constituencies while maintaining strict quality control standards applicable to maintaining trademarks*
- *facilitates a cost effective and low-priced domain name alternative*
- *eliminates gaming through geographic and time restrictions on qualifying trademarks*
- *permits trademark owners to reap the benefits of .brand TLDs*

The IPC is proposing very narrow use cases that should have no, or very limited, impact on existing contracted parties. These cases only describe branded single registrant gTLDs and are limited to this context.

IPC looks forward to discussion of other clearly defined situations in which relaxation of strict separation (or non-discrimination) requirements may be appropriate and welcomes discussion and feedback on the above.

Objective 2: To review current and previous ICANN gTLD registry contracts and policies to identify

the current and previous restrictions and practices concerning registry-registrar separation, and equivalent access and non-discriminatory access in place.

Objectives 2-4 describe work to be undertaken by the WG. IPC looks forward to commenting on this work once it is completed.

Objective 3: To identify and clearly articulate the changes to current cross-ownership arrangements contemplated by the options described in the most recent version of the DAG and supporting documents and considered by ICANN staff in connection with the planned introduction of new gTLDs.

Objective 4: To identify and clearly articulate the differences between the current restrictions and practices concerning registry-registrar separation and equal equivalent access, on the one hand, and the options described in the most recent version of the DAG and supporting documents¹ and changes considered by staff, on the other hand.

In addition, comments on any aspect related to the topic of vertical integration between registries and registrars that you think should be taken into account by the Working Group as part of its deliberations are welcome. For example, comments may be submitted on: (i) recommended models for the New gTLD Program, (ii) the economic analysis conducted by economists retained by ICANN, including the CRA Report as well as the one recently submitted by Salop and Wright, (iii) the Board approved model proposed by the Board at the ICANN Meeting in Nairobi on 12 March 2010, or (iv) whether the restrictions currently applicable to existing gTLD registries should be changed, or (v) additional work that should be performed by the Working Group to recommend models for the New gTLD Program.

Background Information

- Review the Issues Report on Vertical Integration Between Registries and Registrars, please refer to <http://gnso.icann.org/issues/vertical-integration/report-04dec09-en.pdf> [PDF, 254 KB].

- The ICANN Board resolution on Vertical Integration is posted at <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5>.
- To review the charter describing the policy work to be undertaken by the Vertical Integration Working Group, please refer to: <http://gnso.icann.org/issues/vertical-integration/vi-chartered-objectives-10mar10-en.pdf> [PDF, 41 KB].
- For information on the details of the implementation planning activities for new gTLDs, please refer to the documents posted at <http://icann.org/en/topics/new-gtld-program.htm>.
- For additional resources on the topic of vertical integration between registries and registrars, please refer to the documents posted at: https://st.icann.org/vert-integration-pdp/index.cgi?https_st_icann_org_vert_integration_pdp_index.cgi_vi_resources.

New gTLD Draft Guidebook v.2 Comments on Registry-Registrar Separation and Section 2.8 of the New gTLD Agreement v. 2 13 April 2009

The comments below are submitted on behalf of the gTLD Registries Constituency regarding Registry-Registrar Separation as well as Section 2.8 of the New gTLD Agreement contained within the Draft Applicant Guidebook Version 2 dated 18 February 2009. They begin with some general comments followed by definitions and a new Section 2.8. A minority position is stated at the end.

I. INITIAL COMMENTS

Drawing on its review of the economic principles and the history of the gTLDs, the authors of the CRAI Report¹ encouraged ICANN to re-examine the economic case for the separation requirement, and in particular to consider whether it might be possible to relax the once regulations have been pulled back,” CRAI encouraged ICANN to move slowly, but deliberately and in consultation with the industry, towards permitting integration of registry and registrar services under many, but not all, circumstances. In order to assist ICANN in determining how to slowly and deliberately introduce vertical integration, the CRAI Report recommended two possible test cases: The Hybrid TLD and the Single Registrant TLD. However, it cautioned that “ICANN may want to consider taking steps towards relaxing one or both of these requirements under certain, limited, conditions.” Further it argued that:

If ICANN should decide to go ahead with these test cases, it should be ready actively to monitor the performance of these new TLDs. If, after a reasonable period of time, ICANN is satisfied that competition is not being harmed – or, better, if it concludes that competition has been enhanced by their introductions, it may then want to consider relaxing one or both

of the vertical separation and equal access requirements for a somewhat broader pool of TLDs.

Despite the plea by the CRAI Report to move slowly and deliberately only with the two test cases identified in the report, the ICANN staff, swayed by a few registrars seeking to enter the gTLD Registry market, ignored the authors of the CRAI Report and recommended an approach to the registry/registrar issue that is not only inconsistent with the CRAI Report, but is rife with so many loopholes that the solution is certain to be gamed by new registry operators, registrars, resellers and their technical back-end providers.

1 <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf> 2

The gTLD Registries Constituency, however, submits that its proposal below is not only consistent with the limited exceptions set forth in the CRAI Report, but also believes that it has significantly reduced the potential loopholes existing in the current gTLD Agreements as well as the proposed language contained in Section 2.8 of the new gTLD Agreement contained within the Second Version of the Draft Applicant Guidebook.

II. SPECIFIC CONTRACTUAL PROVISIONS

A. Definitions

“Affiliate” shall mean a specified person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

“control” (including the terms *“controlling”*, *“controlled by”* and *“under common control with”*) shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

“Community-based TLD” shall mean a gTLD that (a) is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community and (b) applied for the TLD on behalf of the existing community and was awarded the TLD on such basis. For purposes of Section 2.8, the following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities and (iii) a country or other region that is represented by a ccTLD, or (iv) a language except in cases where the TLD directly relates to a UNESCO recognized language.

“single registrant” TLD shall mean a TLD in which (i) all domain name registrations are registered to a single person, business or other entity and not to any party other than the single person, business or other entity, and (ii) proxy and anonymous domain name registrations are not offered.

B. New Section 2.8

2.8 Use of Registrars. Registry Operator must use only ICANN accredited registrars in registering domain names. Affiliates of Registry Operator or of any entity providing Registry Services for the TLD may be ICANN-accredited registrars, provided that such Affiliates or entities providing Registry Services for the TLD may not distribute domain names in the TLD unless (i) the TLD is a *“single registrant”* TLD, or (ii) the TLD is *“community-based”*, provided however that in such event (a) the Affiliates or entities providing Registry Services for the Community-based TLD together may act as a distributor for no more than 50,000 names registered in the TLD and (b) neither Registry Operator nor any entity providing Registry

Services for the Community-based TLD may themselves act as an authorized registrar, reseller or distributor of domain names within the TLD through the same entity that provides Registry Services for the TLD. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN.

C. Notes on Section 2.8

Note 1: The RyC believes that for true Single Registrant TLDs, as stated in the provision above, we do not necessarily believe that 50,000 names restriction must apply. However, until we can be sure that this cannot be gamed, we would recommend the ICANN setting the 50,000 name threshold, but allow the Single Registrant TLD to present to the ICANN Board any information why they believe the 50,000 name threshold may need to be exceeded (i.e., the TLD will be used by employees of a company with more than 50,000 employees). We would like input from the rest of the ICANN community to figure out other ways to stop the potential gaming of these restrictions.

Note 2: The restrictions we have placed in Section 2.8 are not limited to the official registry or registry operator that signs an Agreement with ICANN. Rather, the restrictions are towards ANY entity (or affiliate of any entity) providing Registry Services for the TLD. This would include back-end registry operators. It is only this type of restriction that will effectively put a stop to the gaming and prevent an argument from existing registrars (or affiliates of registrars) that since they are not the entity signing an agreement with ICANN. The RyC will submit in a separate paper its rationale for this.

Note 3: In addition, the restrictions above do not just apply to being a “registrar” in the TLD, but rather distributing domain names in the TLD as either a registrar, reseller or any other form of distributor. This too would close a “loop hole” that has existing in the Agreements to date. Note 4: The registries in support of this proposal have indicated that they would imposing these restrictions on themselves if the RyC proposal is adopted by the ICANN Board for future TLDs; provided that existing sponsored TLDs are considered “Community-based TLDs” under the language above.

GNSO gTLD Registry Constituency Statement of Support Issue: Registry-Registrar

Separation Date: April 13, 2009 General RyC Information

§ Total # of eligible RyC Members²: 14

² All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the “effective date” set forth in the operator’s or sponsor’s agreement (Article III, Membership, ¶ 1). The RyC Articles of Operations can be found at http://www.gtldregistries.org/about_us/articles .

Total # of RyC Members: 14

§ Total # of Active RyC Members: 14

§ Minimum requirement for supermajority of Active Members: 10

§ Minimum requirement for majority of Active Members: 8

§ # of Members that participated in this process: 13

§ Names of Members that participated in this process:

1. Afiliias (.info)
2. DotAsia Organisation (.asia)
3. DotCooperation (.coop)

4. Employ Media (.jobs)
5. Fundació puntCAT (.cat)
6. mTLD Top Level Domain (.mobi)
7. Museum Domain Management Association – MuseDoma (.museum)
8. NeuStar (.biz)
9. Public Interest Registry (.org)
10. RegistryPro (.pro)
11. SITA (.aero)
12. Telnic (.tel)
13. The Travel Partnership Corporation – TTPC (.travel)
14. VeriSign (.com, .name & .net)

§ Names & email addresses for points of contact:

- o Chair: David Maher, dmaher@pir.org
- o Alternate Chair: Jeff Neuman, Jeff.Neuman@Neustar.us
- o Secretariat: Cherie Stubbs, Cherstubbs@aol.com

3 Per the RyC Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as “Active” or “Inactive”. A member shall be classified as “Active” unless it is classified as “Inactive” pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

Regarding the issue noted above, the level of support in the RyC is summarized below.

1. Level of Support of Active Members: Supermajority

1.1. # of Members in Favor: 11

1.2. # of Members Opposed: 2

1.3. # of Members that Abstained: 1

1.4. # of Members that did not vote: 0

2. Minority Position(s):

During the course of our deliberations, VeriSign, who voted against the gTLD Registries Constituency Statement had put forth the following as a new Section 2.8 (including definitions). This view, however, was not adopted by a Supermajority of the gTLD Registries Constituency. RegistryPro joins VeriSign in submitting this minority position, with additional comments added by RegistryPro at the end to clarify intent.

Comment on Section 2.8, Use of Registrars

We believe that in order to promote a competitive marketplace between TLDs, the Registry/Registrar Cross-Ownership rule must be applied in a uniform manner. This requires that the current rules be refined to eliminate existing loopholes by (i) adopting a clear definition of “affiliates”; and (ii) imposing consistency in the ownership restrictions faced by registries in owning registrars by applying the same restriction to registrars owning registries. Limiting Registry/Registrar cross-ownership promotes a level playing field. We believe that there should be no exceptions to the cross-ownership restrictions but would allow smaller registries (less than 50K names, e.g.) which are intended to serve smaller communities or a single business, and which would otherwise have a hard time attracting registrar support to work with either a single or a few unaffiliated ICANN-accredited registrars. We believe that at some size, even defined communities and single company

TLDs should become a market option and should be treated as a non-restricted gTLD.

Accordingly, we would recommend that Section 2.8 be revised as follows:

2.8 Use of Registrars. (a) Registry Operator must use only ICANN-accredited registrars that are not Affiliates of the Registry Operator, in registering domain names within the TLD.

Registry Operator must provide non-discriminatory access to Registry Services to all ICANN-accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN. As long as the number of names registered in the TLD is no more than 50,000 and either (i) the TLD is a "single registrant" TLD, or (ii) the TLD is a "community-based" TLD, the Registry Operator may limit the number of ICANN accredited registrars with whom it enters into a registry-registrar agreement.

(b) "Affiliate" shall mean a specified person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

(c) The term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

(d) The term "single registrant" TLD shall mean a TLD in which (i) all domain name registrations are registered to a single person, business or other entity and not to any party other than the single person, business or other entity, and (ii) proxy and anonymous domain name registrations are not offered and (iii) no person, business or entity who is not an Affiliate is granted rights to use any of the domain names.

(e) The term "community-based" TLD shall mean a TLD that is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as

members of the community. The following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD directly refers to a UNESCO-recognized language.”

RegistryPro additional comment:

In the event that ICANN's resolution to this issue includes restricting the services that registries can provide, by ownership of registrars or otherwise, an exception for early stage, small, community based and single owner registries ought to be considered so that these registries are not unduly constrained in their ability to distribute names.

ANNEX G - Charter of the Vertical Integration Working Group

Chartered objectives for the Working Group:

Preamble: The working group on vertical integration shall evaluate and propose policy recommendations for new gTLDs and existing gTLDs. The working group expects to define the range of restrictions on vertical separation that are currently in effect, to serve as a baseline to evaluate future proposals.

Objective 1: To make policy recommendations that provide clear direction to ICANN staff and new gTLD applicants on whether, and if so under what conditions, contracts for new gTLD registries can permit vertical integration or otherwise deviate from current forms of registry-registrar separation, and equivalent access and non-discriminatory access.

Objective 2: To review current and previous ICANN gTLD registry contracts and policies to identify the current and previous restrictions and practices concerning registry-registrar separation, and equivalent access and non-discriminatory access in place.

Objective 3: To identify and clearly articulate the changes to current cross-ownership arrangements contemplated by the options described in the most recent version of the DAG and supporting documents and considered by ICANN staff in connection with the planned introduction of new gTLDs.

Objective 4: To identify and clearly articulate the differences between the current restrictions and practices concerning registry-registrar separation and equal equivalent access, on the one hand, and the options described in the most recent version of the DAG and supporting documents¹ and changes considered by staff, on the other hand.

Objective 5: Determine as best as possible, to the extent reasonable in the time given, the potential impacts of any recommendations on any affected parties.

Objective 6: To perform the PDP activities in a manner that does not delay the launch of the New GTLD Program.

Objective 7: WG shall examine relationship, if any, between VI and CO.

Working Definitions to be used by the Working Group²

"Vertical Integration" (VI) is defined as a business structure in which there is no separation between the Registry Operator and the registrar in relation to a particular gTLD. They are either

owned or controlled by the same company or have another contractual affiliation that controls the specific gTLD, and the Registry Operator is not required to provide equivalent access and non-discriminatory access to non-affiliated registrars to sell names under its gTLD.

"Cross ownership" (CO) is defined as the controlling ownership of a share of a registry by a registrar, or vice-versa.

"Minority Interest" is defined as the minority ownership of a share of a registry by a registrar, or vice-versa.

1 The working group understands that the DAG is a fluid document. As a result, the working group will conduct its activities based upon the version of the document available.

- ¹ The working definitions included in this charter are subject to further development and refinement but are included in the interests of time in order to allow the remainder of the charter to be finalized and approved by the GNSO Council.

Operating procedures for the Working Group

The Working Group will operate according to the guidelines set out in the Draft Working guidelines of 5 Feb 2010.

Milestones From Charter Approval Date 2

Week	Dates	Tasks/Goals
1-2	26 Mar	Original recruitment for group members will go out to the constituencies and the ICANN community.
1-3	2 Apr	Staff begins documentation on existing approaches and practices, differentiating among Vertical Integration, Joint Marketing approaches.
2	22 Mar	Group begins work.
3-5	16 April	Collect Constituency/SG statements and community comments.
5-7	30 April	Review of existing documents and commentary.
16 April		Publish Staff document on existing approaches and practices.
6-8	7 May	Review staff document and constituency and public comments.
9-11	28 May	Discuss conditions under which various practices are appropriate.
9-12	4 Jun	Discuss and document policy recommendations.
16	30 Jun	Final Report to Council and out for public review.

² Assuming Council Approval on 10 Mar

ANNEX H - Proposal Matrix

A complete version of the proposal matrix available in Microsoft Excel format at:
https://st.icann.org/vert-integration-pdp/index.cgi?initial_report_snapshots

ANNEX I – Summary of Public Comment Forum on the Initial Report

For more information, the summary of public comments on the Initial Report is posted at:

<http://forum.icann.org/lists/vi-pdp-initial-report/msg00022.html>