

# **GNSO Issues Report on Vertical Integration Between Registries and Registrars**

## **STATUS OF THIS DOCUMENT**

This is the Issues Report on Vertical Integration Between Registries and Registrars requested by the GNSO Council.

## **SUMMARY**

This report is submitted to the GNSO Council in response to a request received from the Council pursuant to a Motion proposed for the 3 September 2009 GNSO Council meeting, and carried during the Council teleconference meeting on 24 September 2009.

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## 1. Executive Summary

With significant community input, the implementation process for new gTLDs is proceeding on a separate track from a potential PDP. The commencement of a PDP by the GNSO Council on vertical integration will not halt or delay the implementation of the New gTLD Program. Instead, if the GNSO chooses to launch a PDP, and it results in Board-approved policy, that policy would be incorporated in subsequent new gTLD application rounds following the implementation plan for that policy advice.

Initiating a PDP on vertical integration is within the scope of ICANN's mission, and within the scope of the GNSO's mandate. Due to contractual restrictions, it is doubtful that a Consensus Policy could be adopted that would affect existing gTLD registries. Thus, a PDP initiated at this time would not be successful in achieving a uniform approach to vertical integration affecting new and existing gTLD registries, or among new gTLD registries participating in different rounds of applications, in the same manner.

Although policy potentially could be developed in this area, given the status of implementation of the GNSO's new gTLD policy, this issue is likely to be more effectively addressed through GNSO participation in the new gTLD implementation planning process. Staff recommends that consideration of launching a PDP on vertical integration be delayed until after the launch of new gTLDs (perhaps 1-2 years) 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.

## 2. History

### 2.1 Background on the Issue of Vertical Integration

The issue of revisiting vertical integration of registries arose as a result of ICANN's evaluation of the economic relationship between registries and registrars in developing the implementation details for the New gTLD Program. As part of this initiative, the research firm CRA International was retained by ICANN and delivered a report on 23 October 2008, commonly referred to as the CRA Report<sup>1</sup>, that explored the historical framework for the economic relationship between registrars and registries. The CRA Report recommended that ICANN consider changing its current practice of prohibiting structural and contractual separation between registries and registrars, and the functions that are performed by these different participants in the distribution chain for domain name registration services.

After the publication of the CRA Report, ICANN Staff initiated a series of consultations with the Community on the issue of vertical integration. In response, Staff published a proposed model in the Draft Applicant Guidebook- Version 2 that included minimal restrictions on vertical integration in the form new gTLD registry agreement. 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 is seeking further guidance and suggestions from the Community on the appropriate model for the launch of new gTLDs. Resolution of these issues is currently being managed under Board guidance by Staff through its implementation process for the New gTLD Program.

This report<sup>2</sup> is in response to the request made by the Generic Names Supporting Organization (GNSO) resulting from the motion made by Councillor Mary Wong on behalf of the Non-Commercial Users Constituency (NCUC) on 3 September 2009, and approved by the GNSO Council on 26 September 2009.<sup>3</sup> In explaining the rationale for the motion, Ms. Wong referred to the NCUC's 28 August 2009

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<sup>1</sup> The CRA Report is posted at <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>

<sup>2</sup> Under the Bylaws, an issues report is the first step before the GNSO Council can decide whether to launch a policy development process on this topic. The issuance of an Issues Report does not mean that a policy development process is underway or will be commenced by the GNSO. Instead, it is meant to provide information to the GNSO Council on whether the issue is within scope of the GNSO Council's mandate, and on Staff's assessment of whether a PDP should be launched. For more information, please refer to: <http://www.icann.org/en/general/bylaws.htm#AnnexA>.

<sup>3</sup> The text of the GNSO motion is described in **Annex 1** to this Issues Report. Although Annex A of the ICANN Bylaws calls for delivery of an issues report within fifteen (15) calendar days, the GNSO agreed that the Issues Report could be delivered on or before 11 December 2009.

Statement<sup>4</sup> (the NCUC Statement) that observed that the introduction of new gTLDs raises many questions about the distribution model adopted by ICANN in response to the U.S. Department of Commerce's desire to introduce competition in the domain name market.

The NCUC views the topic of vertical integration as one that the GNSO is required to consider, because it is a policy issue within the GNSO's mandate. In recommending that the GNSO initiate a policy development process on this topic, the NCUC states that:

“Vertical separation of registries and registrars is a *policy* issue – one of the most fundamental policies underlying ICANN's regulation of the domain name industry. And yet this important policy change is being handled as if it were an “implementation” decision that can be inserted into new gTLD contracts. Although ICANN's management has commissioned economist reports on the topic, there has been no GNSO process to make a policy change. We fail to see how a policy as important as this can be changed without a GNSO proceeding...”

The issue of vertical integration is a complex one that couples antitrust analysis, historical practice, market dynamics, and consumer protection concerns in a truly unique manner, making it difficult to easily identify whether a consensus is achievable. This report attempts to shed light on these topics and suggests options to the GNSO as it considers future policy work on the issue of vertical integration.

## 2.2 Background on the GNSO's New gTLD Policy

ICANN is in the implementation planning stage of defining the processes for adding new generic top-level domain names (TLDs) to the Domain Name System. The expansion of the generic top-level domains (gTLDs) will allow for more innovation, choice and change to the Internet's addressing system, now represented by 20 gTLDs, including .com, .net, .org, and .biz.

The policy recommendations to guide the introduction of new gTLDs were created by the GNSO over a two year effort through its bottom-up, multi-stakeholder policy development process. The policy<sup>5</sup> was completed by the GNSO in 2007, and adopted by ICANN's Board in June, 2008. The GNSO's policy advice is described in the GNSO Final Report on the Introduction of New Top Level Domains (the “GNSO

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<sup>4</sup> The NCUC Statement in support of the GNSO motion is described in **Annex 2** to this Issues Report.

<sup>5</sup> For more information on the details of the policy approved by the GNSO, please refer to the documents posted at ICANN's website at <http://gnso.icann.org/issues/new-gtlds/>.

Final Report”) and in its Summary of Implementation Principles and Guidelines on 22 October 2009 (the “GNSO Implementation Guidelines”).

ICANN is currently in the process of finalizing the implementation details<sup>6</sup> for the launch of new gTLDs. ICANN has posted three draft applicant guidebooks (commonly referred to as the Draft Application Guidebook), for public comment describing the manner in which ICANN proposes to implement this program. In addition, in the past two years, ICANN has released a series of topic papers to help the Internet community to understand in depth several processes and requirements adopted by the Program<sup>7</sup>.

ICANN’s implementation plan results from a bottom-up, multiyear, multi-stakeholder policy process that proposed the creation of new gTLDs. The Community has been provided numerous opportunities to participate and comment on the New GTLD Program. This public consultation process has resulted in a series of important questions being raised by the global Internet community in its efforts to identify the best path to implement this effort to liberalize the gTLD marketplace. One of these questions relates to the issue to be addressed in this Issues Report- vertical integration, and whether cross-ownership restrictions or other rules related to vertical integration should be adopted in the New gTLD Program.

ICANN’s approach to the issue of vertical integration has varied over time. The GNSO has not formally addressed this issue through its prior policy recommendations. Neither the GNSO Final Report, nor the GNSO’s Implementation Guidelines for the New gTLD Program, provide direct guidance to ICANN on the topic of vertical integration. There are, however, a few recommendations that may have some bearing on the issue of vertical integration.

Recommendation 19, states:

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

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<sup>6</sup> 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>.

<sup>7</sup> The explanatory memorandum on Registrar/Registry Separation that details the Staff Proposed Model is posted at: <http://www.icann.org/en/topics/new-gtlds/regy-regr-separation-18feb09-en.pdf>.

Recommendation 10 provides further guidance to ICANN in developing its implementation guidelines that is relevant to the GNSO's consideration on whether to commence a PDP on vertical integration:

“There must be a base contract provided to applicants at the beginning of the application process.”

As described in greater detail in Section 4.1 of this Report, the initiation of a PDP on vertical integration would not cause a suspension of implementation activities for the previously approved policy that launched the New gTLD Program. Since any restrictions to be adopted by ICANN on vertical integration are to be included in the form registry agreements, this requirement to have the base agreement finalized at the beginning of the application process precludes any new policies that affect the registry agreement from retroactively impacting an application round that has commenced prior to the adoption of the new policy. Instead, under Recommendation 19, any new policies that could result from a PDP would only impact subsequent rounds of applications for new gTLDs.

### **2.3 Description of Registry/Registrar Relationships in the Domain Market**

ICANN operates under a series of contracts with registries and registrars that define its relationships with each of these contracting parties, and the role that each of these parties performs in the distribution of domain names. ICANN's contract terms with its registries are not uniform across each of the sixteen gTLD registries under contract with ICANN. The contracts are to a large extent similar and follow a basic framework and format, enabling generalizations to be made regarding the topic of vertical integration. In contrast, the Registrar Accreditation Agreement (RAA) is generally uniform and the same across all registrars that have adopted the same version of the agreement<sup>8</sup>.

In the past, cross-ownership between registrars and registries was more prevalent. At the time of the formation of ICANN, the domain name market for .com, .net and .org domain names was served by one vertically integrated supplier, Network Solutions Inc. (NSI), where the functions of registrar and registry were performed by a single legal entity. NSI was subsequently acquired by VeriSign in 2000<sup>9</sup>, and in 2003 VeriSign sold NSI to a private equity firm, retaining a 15% interest in NSI<sup>10</sup> until (2006), when

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<sup>8</sup> There are two versions of the Registrar Accreditation Agreement (RAA) currently in effect, as posted on <http://www.icann.org/en/registrars/agreements.html>. For the purposes of this Issues Report, they will be referenced as the RAA.

<sup>9</sup> See VeriSign press release announcing the NSI acquisition on March 7, 2000, posted at: <https://investor.Verisign.com/secfiling.cfm?filingID=950103-00-362>.

<sup>10</sup> VeriSign's Form 8k, filed with the SEC, describing the sale of NSI and retention of a 15% equity stake is posted at: <https://investor.Verisign.com/secfiling.cfm?filingID=1193125-03-91907>.

VeriSign divested itself of all equity in NSI<sup>11</sup>. In an effort to introduce competition into the marketplace, ICANN separated the functions of registry and registrar, and commenced its registrar accreditation program, but allowed the registry to maintain ownership of NSI. After NSI was divested, VeriSign maintained a reseller relationship with registrars through its Digital Brand Management Services business, registering .com and .net domain names on behalf of corporate clients, until 2008, when this business was divested and sold to MelbourneIT.<sup>12</sup>

Cross-ownership was also common among the TLDs that were launched after 2001. Neulevel, the initial owner of the .biz registry, was a joint venture between MelbourneIT, a large domain name registrar, and NeuStar<sup>13</sup>. Register.com was an initial owner of the .pro registry.<sup>14</sup>

Today, widespread competition flourishes at the registrar level, with hundreds of registrar entities serving the retail domain marketplace. Some cross-ownership exists among registrars and registries, and among the back end registry infrastructure service providers. The .pro registry is owned by Hostway, which is an ICANN accredited registrar. Hostway also owns the ICANN accredited registrar Domain People<sup>15</sup> and registers domain names in this TLD.<sup>16</sup> The .info registry is owned by Afilias, which in turn is owned by a consortium of domain name registrars that are able to register .info domain names.<sup>17</sup> CORE Internet Council of Registrars, is an ICANN accredited registrar which is organized as a not-for-profit association of registrars, and also serves as the registry infrastructure service provider for .museum and .cat<sup>18</sup>. Some of CORE's members serve as registrars for these TLDs. The registry infrastructure service

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<sup>11</sup> See Form 10-Q, filed with the SEC, describing the sale of the remaining interest in NSI posted at: <http://sec.edgar-online.com/VeriSign-incca/10-q-quarterly-report/2007/07/12/section11.aspx>.

<sup>12</sup> See MelbourneIT's press release dated 30 April 2008, posted at: <http://corporate.melbourneit.com.au/news/newsfile.php?docid=269>.

<sup>13</sup> See MelbourneIT's Announcement regarding its holdings in Neulevel dated 28 September 2009, <http://corporate.melbourneit.com.au/news/newsstory.php?id=85> and see MelbourneIT announcement of sale of interest in Neulevel: <http://corporate.melbourneit.com.au/news/newsfile.php?docid=177>

<sup>14</sup> See article on Register.com's control of the .PRO Registry, posted at: <http://www.internetnews.com/bus-news/article.php/973061>

<sup>15</sup> See press release announcing the acquisition of Domain People's parent corporation by Hostway, posted <http://www.domainpeople.com/press-releases/2003-08-22.html>

<sup>16</sup> See information on Hostway's ownership of RegistryPro posted at: -- <http://www.registrypro.pro/about/index.shtml>, and Domain People's .pro related business, posted at: <http://www.domainpeople.com/domain-names/pro-domain.html>

<sup>17</sup> For information on the ownership structure of Afilias, please see the .ORG bid at: <http://www.isoc.org/dotorg/bid/section4.html>

<sup>18</sup> For information on CORE, please see: [http://corenic.org/CORE\\_FAQ](http://corenic.org/CORE_FAQ)

provider for .coop (Mid-counties Co-Operative, Ltd.) is also the wholly owned parent of one of its accredited registrars, the Domains.coop Registrar.<sup>19</sup>

Examples of cross-ownership and vertical integration are also found in the ccTLD marketplace. Afilias and GoDaddy formed a joint venture to submit a bid for administration of the .us registry (ccTLD),<sup>20</sup> which was ultimately re-awarded to NeuStar,<sup>21</sup> and have formed a successful joint venture to manage the .me registry (ccTLD). A number of ccTLDs offer registration services directly to the public, in addition to through a registrar-type relationship, including the .uk, .de, .mx, .ch, and .li registries.<sup>22</sup> Some ccTLD registries are fully integrated, and do not use registrars, instead offering registrations directly to the public, including, .gi, .jo, .gm, and .gw.<sup>23</sup>

These examples highlight a commercial desire for some participants in the industry to offer both the registry and registrar functions in the domain name marketplace. The issue for ICANN to resolve is whether the current practice of restricting cross-ownership should be extended to new gTLDs, and whether additional safeguards or rules are needed to minimize any anti-competitive effects of such cross-ownership. The GNSO should consider whether resolution of this issue is more effectively addressed through the implementation process that is currently underway, or through its policy development process that may be unable to produce a consensus policy prior to the launch of the New gTLD program.

## 2.4 Terms and Conditions in Prior Registry Agreements

Prior registry agreements contained fewer restrictions on cross-ownership than those which exists today, but imposed additional rules to promote competition and to safeguard registrants against possible abuses involving the commonly owned registry and registrar.

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<sup>19</sup> For more information on .COOP Registry, please see: <http://www.nic.coop/About/History.aspx> and <http://www.na.domains.coop/content.php?action=mypages&page=aboutus.html>.

<sup>20</sup> The press release announcing the joint venture is posted at: [http://www.godaddy.com/gdshop/pressreleases/Alliance\\_Press\\_Release\\_7\\_31\\_07.pdf](http://www.godaddy.com/gdshop/pressreleases/Alliance_Press_Release_7_31_07.pdf).

<sup>21</sup> For information about .us, please see: [http://nic.us/about\\_us/index.html](http://nic.us/about_us/index.html).

<sup>22</sup> For information about Nominet, please see <http://www.nic.uk/registrants/onlineservices/>, for DENIC, see <http://direct.denic.de/en/denicdirect-servicecenter.html?cHash=3486f26050>, for NIC Mexico, see <http://www.nic.mx/es/Inicio>, for SWITCH, see <https://www.nic.ch/reg/indexView.action?mid=1&mcid=862890654> and <https://www.nic.ch/reg/wcmPage.action?id=b0df267e-af37-11de-ad7f-b9cfa6b6b3c3&lid=en>.

<sup>23</sup> For Information on the .mw ccTLD, see <http://www.registrar.mw/>; the .jo ccTLD, see <https://www.dns.jo/login.aspx>; the .gt ccTLD see <http://www.gt/>; the .gi ccTLD, see <http://www.nic.gi/>.

For example, the 1999 NSI Agreement<sup>24</sup> that resulted from the initial introduction of competition in the registrar market place, included a number of rules to promote competition and protect registrants against possible abusive activities. In this agreement, NSI agreed to provide independent providers equal access to the shared domain name registration system, and obligated NSI to create an operational firewall between the registry and registrar business, although there were no legal ownership separation requirements. NSI agreed to operate the registry in such a manner as to not use the registry revenues and assets to the detriment of the independent registrars. NSI was also obligated to submit a certificate to ICANN every six months certifying its compliance with certain equal access requirements. The 1999 NSI Agreement included price caps on the registry fees that could be charged by NSI to the registrars. The NSI Agreement did not prohibit cross-ownership, but instead included incentives for the registry to divest its ownership interest. The 2001 VeriSign Agreements<sup>25</sup> similarly did not prohibit cross-ownership, but required the registry and registrar functions to be performed by separate legal entities, and maintained the structural separation requirements that required the registry to maintain an operational firewall between the two businesses.

The registry agreements adopted for the unsponsored registries participating in the 2000 round of applications did not include any ownership restrictions, but instead required structural separation of the registry and registrar functions. Each of these agreements included commitments on the part of the registry to provide fair treatment of ICANN accredited registrars<sup>26</sup> and price caps on the registry fees to registrars.

Throughout the evolution of the registry agreements over the last decade, changes to the distribution model and restrictions on vertical integration were accomplished by ICANN without the need to have a formal GNSO policy process consider the issue. Instead, these details were developed by ICANN through the implementation processes utilized by ICANN that included negotiations with the registries, opportunities for community input, and approval by the ICANN Board.

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<sup>24</sup> The 1999 NSI Agreement is posted at <http://www.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm>.

<sup>25</sup> The 2001 VeriSign Agreements are posted at <http://www.icann.org/en/tlds/agreements/VeriSign/com-index-25may01.htm>, <http://www.icann.org/en/tlds/agreements/verisign/net-index.htm>, and <http://www.icann.org/en/registries/agreements-archive.htm>.

<sup>26</sup> See, for example, Section 3.5 Fair Treatment of ICANN-Accredited Registrars” of the .info Registry Agreement, located at <http://www.icann.org/en/tlds/agreements/unsponsored/registry-agmt-11may01.htm>.

## 2.5 Terms and Conditions in Current Registry Agreements

ICANN's current practice with respect to vertical integration did not arise from a prior GNSO policy but is a product of changes over time in the structure of the marketplace and in the individual registries. As a result, current registry agreements include varying restrictions on a registry's ability to hold an ownership interest in a registrar, and on performing the registrar functions for its registry. In general, most registry agreements prohibit registries from acquiring an ownership interest of more than 15% of a registrar and from serving as a registrar in their registry. Some registry agreements allow affiliated registrars to serve as a registrar for domain names in their TLD under limited circumstances.

The .ORG Registry Agreement highlights some of the terms and conditions related to the issue of vertical integration:

"7.1(a) Access to Registry Services. Registry Operator shall make access to Registry Services, including the shared registration system, available to all ICANN-accredited registrars ....Such nondiscriminatory access shall include without limitation the following:

(a)(i) All registrars (including any registrar affiliated with Registry Operator, if any) can connect to the shared registration system gateway for the TLD via the Internet by utilizing the same maximum number of IP addresses and SSL certificate authentication;..."

"7.1(b) Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to the TLD. This shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar. "

"7.1(c) Restrictions on Acquisition of Ownership or Controlling Interest in Registrar. Registry Operator shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar."

The .asia, .biz, .cat, .com., .coop, .name, .net, .info, and .tel registry agreements include language similar to that of the .ORG Registry Agreement. These provisions generally prohibit the Registry Operator from serving as a registrar for its TLD, or acquiring, directly or indirectly, a greater than 15% ownership interest in any ICANN Accredited registrar.

Subtle variations on these covenants exist in other registry agreements. The relevant excerpts from these agreements are described in **Annex 3** to this Issues Report. For example, the .AERO Sponsorship Agreement allows the registry to serve as a registrar with respect to domain names identified on an Appendix to the Agreement. The .info and .museum registry agreements allows the registry to register up to 5,000 domain names, as described on a reserved names appendix. The .info registry may register these 5,000 domain names through an accredited registrar or as otherwise permitted by ICANN.

The .MUSEUM Registry Agreement authorizes the registry to *directly manage* up to 5,000 domain names as specified on the .MUSEUM reserved names appendix. This authority stems from the acknowledgement that .MUSEUM is a sufficiently restrictive and small TLD operated by a not-for-profit entity that is open to a limited community, and as such, may face difficulties with market demand and registrar uptake.

The .MOBI Registry Agreement includes a slightly relaxed language allowing the registry or an affiliate to directly register second level or higher levels of domain names (e.g., john.smith.mobi) registrations in certain circumstances.

The .PRO Agreement contains no prohibitions on cross-ownership between the registry and a registrar. Instead, its agreement allows the Registry Operator to directly register .pro domain names, without using a registrar, in certain circumstances and in limited quantities. This right includes the right to register words specified in an appendix for reserved names, up to an aggregate of 5,000 domain names.

The terms of the Registry Agreements as highlighted above reveal that there is no uniformity among the existing registry agreements on the issue of vertical integration. Instead, the current restrictions resulted from changing market conditions, and the unique circumstances of the specific registry. From this survey of existing agreements, it is difficult to identify a single, coherent principle followed by ICANN that describes the current practice for addressing issues of vertical integration.

## **2.6 Terms and Conditions in the Registrar Accreditation Agreement**

In contrast to the registry agreements, ICANN adopts a uniform agreement to be signed by accredited registrars. The only variations that exist relate to whether a registrar is operating under a prior agreement, or an updated agreement. Registrars typically adopt the latest version of the RAA at the time of renewal, and can also voluntarily adopt any updated form of the RAA prior to renewal.

The RAA forms currently in effect do not include any restrictions against a registrar or its affiliates acting as a registry operator or registry infrastructure services. One RAA provision that may be applicable to the issue of vertical integration relates to use of ICANN accredited registrars by gTLD registries. Specifically, the RAA provides:

“2.4 Use of ICANN Accredited Registrars. In order to promote competition in the registration of domain names, and in recognition of the value that ICANN-accredited registrars bring to the Internet community, ICANN has ordinarily required gTLD registries under contract with ICANN to use ICANN-accredited registrars, and ICANN will during the course of this agreement abide by any ICANN adopted specifications or policies requiring the use of ICANN-accredited registrars by gTLD registries.”

## 2.7 The CRA Report and Community Reaction

The issue of revisiting vertical integration of registries arose as a result of ICANN’s evaluation of the relationship between registries and registrars in developing the implementation details for the New gTLD Program. As part of this initiative, the research firm CRA International was retained by ICANN and delivered the CRA Report<sup>27</sup>, which explored the historical framework for the economic relationship between registrars and registries. The CRA Report recommended that ICANN consider changing its current practice of prohibiting structural and contractual separation between registries and registrars, and the functions that are performed by these different participants in the distribution chain for domain name registration services.

The CRA Report identified several pro-competitive effects of a vertically integrated marketplace. Based on evaluation of other industries and interviews with industry executives involved in the domain name market, the CRA Report noted that eliminating vertical separation may provide registrants with increased quality, and improved innovation and service. In addition, it observed that registrants may see lower prices as a result of the elimination of the “middle man” and the double marginalization that occurs.<sup>28</sup> The Report also noted that fully integrated registries may be more able to offer specified segmented market services, such as serving different geographical characteristics, and be able to serve different customer

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<sup>27</sup> The CRA Report is posted at <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf>.

<sup>28</sup> Double marginalization is a term that describes the circumstances where both the registry and the registrar needs to earn a profit on the registration of domain names to support their businesses.

types. The Report did highlight that while it may be difficult for small or specialized registries to garner registrar support for its marketing initiatives, such support could be guaranteed if the registry could own and operate an affiliated registrar.

CRA also highlighted areas of potential concerns associated with lifting all restrictions on vertical ownership and integration. The industry executives interviewed by CRA generally believed that there is at least a substantial risk, or the prospect of harmful perceptions, that an integrated registry would have incentives to discriminate against the non-affiliated registrars. Such discrimination could take the form of price breaks, better operational support, and access to registry information that the registry may uniquely have as a result of operating the registry. As a result of this concern, CRA noted that if ownership requirements were relaxed, there may be a need for enhanced or more rigorous equal access rules.

CRA recommended that ICANN consider a full liberalization of the restrictions on vertical separation in the New gTLD Program. Recognizing that it might not be feasible to lift all restrictions at once, and that once lifted, it would be difficult to reverse, the CRA recommended that ICANN consider pursuing two test cases. Specifically, CRA suggested two models for a limited relaxation of the rules as a test bed in the New gTLD Program. The “Hybrid Model” allows a single entity to own a registrar and operate a registry, so long as it did not provide registrar services to that registry. The “Single Organization TLD” model<sup>29</sup> would allow relaxation in situations where the registry and the registrants are one and the same. If ICANN decides to go ahead with these test cases, CRA recommended that it should be ready to actively monitor the performance of these new TLDs. After a reasonable period of time, if ICANN is satisfied that competition is not being harmed, it could relax one or both of the vertical separation and equal access requirements for a broader group of gTLDs.

In response to the recommendations contained in the CRA Report, and a series of consultations and public comment forum with the Community, Staff proposed relaxing the structural and contractual restrictions as described in the Draft Applicant Guidebook- Version 2,<sup>30</sup> and the proposed new gTLD registry agreement.<sup>31</sup> Because the comments<sup>32</sup> received in response to Draft Applicant Guidebook-v2

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<sup>29</sup> There is no policy recommendation from the GNSO to adopt a Single Organization TLD as a special type of TLD for the New gTLD Program.

<sup>30</sup> The explanatory memorandum on Registrar/Registry Separation that details the Staff Proposed Model is posted at: <http://www.icann.org/en/topics/new-gtlds/registry-separation-18feb09-en.pdf>.

<sup>31</sup> The proposed registry agreement is posted at: <http://www.icann.org/en/topics/new-gtlds/draft-summary-changes-base-agreement-18feb09-en.pdf>.

indicated substantial discussion and debate among the ICANN Community, Staff modified the proposal in the Draft Applicant Guidebook- Version 3, and is seeking further guidance and suggestions from the Community on the appropriate model to be followed in the launch of new TLDs.

Community consultations and public comment forums have demonstrated significant interest in the vertical integration issue, indicating a wide range of disparity in identifying the appropriate distribution model for the New gTLD Program. A number of constituency statements have been published reflecting each of their unique perspectives on the topic, as referenced in **Annex 4**.

Several proposals were developed by members of the Community suggesting alternative approaches to vertical integration in the New gTLD Program, as referenced in **Annex 5**. The more substantive contributions include proposals from Jon Nevett (Network Solutions), Brian Cute (Afilias), Richard Tindel (Enom/Demand Media), Eric Brunner-Williams (CORE International Council of Registrars), joint proposals from Milton Mueller (Syracuse University/NCUC) and Michael Palage (Pharos Global, Inc.), and Alexa Raad (Public Interest Registry). These proposals offer different, and in many ways conflicting, methods of addressing the vertical integration issue, and suggest that the Community may face significant hurdles in achieving a consensus policy recommendation through a PDP process.

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<sup>32</sup> Summary of the Public Comments on the CRA Report are posted at <http://forum.icann.org/lists/CRA-report/pdf2e61sQcOaY.pdf>.

## 3. GNSO Policy Development Process

### 3.1 How the NCUC Is Affected by Vertical Integration

The request for an issues report was submitted by Mary Wong on 2 September 2009 on behalf of the NCUC. The NCUC Statement submitted by Ms. Wong in support of her motion makes the following observations on how non-commercial users and consumers are affected by the issue of vertical integration and the ultimate distribution model to be adopted by ICANN:

“The introduction of new gTLDs raises many questions about this model. It is not clear that new TLDs need to be price-capped, given their competitive disadvantage relative to established domains; it is possible that new TLDs are handicapped by the registry-registrar cross-ownership and integration restrictions; it is clear that the separation seems inappropriate for certain kinds of TLDs, such as self-provided TLDs confined to a single organization, or very small nonprofit communities.”

Some NCUC members support<sup>33</sup> what they consider to be the core principle underlying what they consider to be the current “policy,” which is the continued functional and contractual separation of registries and registrars, and the ability of any ICANN-accredited registrar to sell domain name registrations in any TLD on an equal access basis. While there may be reasons to deviate from that “policy” in the future, they believe that any major alteration requires a bottom-up policy development process and ratification by the Board. However, the NCUC position does not take into account the distinction between changing a GNSO *policy* versus changing an ICANN *practice*. As described in Section 2.2 of this Report, there is no GNSO recommendation on this topic and, as a result, ICANN’s practice has varied in response to changing market conditions, through processes that are outside of the GNSO’s policy making activities.

The NCUC concern about this issue arises out of a recognition that its members may benefit from the services to be offered by smaller, specialized TLDs that target non-profit communities. Some in the NCUC assert that new gTLDs lack market power and must compete intensely for new registrations. They believe that new gTLDs will face severe barriers to public recognition and acceptance, especially smaller

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<sup>33</sup> The information in this Section 3.1 arises from the NCUC Statement and communications with members of the NCUC executive committee.

ones targeted at specialized communities. These smaller gTLDs cannot easily attract customers who have already registered in existing domains because of the high switching costs consumers face. They recognize that major registrars may or may not be interested in giving these new gTLDs the visibility and "shelf space" they need and that the success of many new gTLDs may hinge on allowing them to integrate registrar ownership with the marketing and promotion of their domain. As a result, they assert that allowing a new registry to own and operate a registrar encourages robust competition in the market for back-end registry services, which should dramatically decrease the wholesale cost of registry services and lead to benefits for consumers.

Some in the NCUC caution that attempts to maintain artificial boundaries between the ownership and joint operation of the two functions will not work. They recognize that lines of separation are eroding in the marketplace and any attempts to impose complex ownership and marketing restrictions only reduces overall efficiency without producing much benefit to the public.

The NCUC Statement also notes that this issue affects existing gTLDs in addition to new gTLDs:

“Although debate over this issue has been sparked by the introduction of new gTLDs, the policy associated with introducing new TLDs is conceptually distinct from the issue of cross-ownership and vertical integration. One could change the policies regarding cross-ownership and vertical integration without introducing new TLDs; one could introduce new TLDs without changing the cross-ownership and vertical integration policy.”

The NCUC's primary recommendation is that the issue of changes to the registry-registrar separation be submitted to the GNSO as a policy matter. According to the NCUC, the debate over this issue has sparked several economic studies, policy analysis papers, mobilizations for and against by registrars and registries, and comment by users and consumers. The NCUC believes that policy changes of this magnitude applicable to gTLDs must go through the GNSO, and that this is required by the ICANN bylaws.

The NCUC suggests that *all* policies adopted by ICANN affecting gTLDs must be approved by the GNSO. However, while the ICANN Bylaws grant the GNSO the right to recommend policies affecting gTLDs, such right is not exclusive, and policies may be recommended under the Bylaws by any of the advisory

committees<sup>34</sup>, including the GAC, ALAC, and SSAC. An example of a recent policy affecting gTLDs that was not recommended by the GNSO, is the policy to prohibit redirection and synthesized DNS responses by TLDs adopted by the ICANN Board on 26 June 2009<sup>35</sup>, resulting entirely from an SSAC recommendation. Since the GNSO's approval is not required, resolving the vertical integration issue through the implementation processes that are currently underway instead of through a PDP would be consistent with the ICANN Bylaws.

### 3.2 Scope

As required by the Bylaws, the following section sets forth the opinion of the ICANN General Counsel regarding whether the issue proposed to initiate the PDP is properly within the scope of the ICANN policy process and within the scope of the GNSO. In determining whether the issue of vertical integration is within the scope of the ICANN policy process and the scope of the GNSO, the Bylaws call for consideration of the following factors:

#### **Whether the issue is within the scope of ICANN's mission statement**

The issue of vertical integration between registrars and registries is within the scope of ICANN's mission statement, and is an appropriate topic for the GNSO to consider.

The ICANN Bylaws state that:

“The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

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<sup>34</sup> For example, Bylaws Article XI Section 2.2(a) Section 6 relating to the SSAC states that the SSAC's responsibilities shall include: “to make policy recommendations to the ICANN community and Board.” Bylaws Article XI Section 2.1(i) relating the GAC states that the GAC “may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”

<sup>35</sup> The ICANN Board resolution is posted at <http://www.icann.org/en/minutes/resolutions-26jun09.htm#6>

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are
  - a. domain names (forming a system referred to as "DNS");
  - b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and,
  - c. protocol port and parameter numbers.
2. Coordinates the operation and evolution of the DNS root name server system.
3. Coordinates policy development reasonably and appropriately related to these technical functions.”

Also, Article X, Section 1, provides that:

“There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.”

If the GNSO undertakes policy development activities on the topic of vertical integration between registrars and registries in gTLDs, this activity should be within the scope of ICANN’s mission, and within the scope of the GNSO’s mandate.

However, although the issue may be in scope, the GNSO Council should recognize that not all policy making on this topic may result in a “Consensus Policy” binding on registrars and registries. Specifically, if the GNSO recommended a policy that attempted to redefine the distribution models for existing gTLD registries, the applicable contracts may limit the extent to which registry operators would be required to conform to the new policy.

Most registry agreements for existing gTLD registries include language that is similar to the .ORG Registry agreement, which provides in Section 3.1(b)(iv) that:

“Consensus Policies shall relate to one or more of the following: (1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, Security and/or Stability of the Internet or DNS; (2) functional and performance specifications for the provision of Registry Services (as defined in Section 3.1(d)(iii) below); (3) Security and Stability of the registry database for the TLD; (4) registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars; or (5) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).”

The .ORG Registry Agreement Section 3.1(b)(iv) A-F clarifies categories of topics that are appropriate for Consensus Policies, including, without limitation: (A) principles for allocation of registered names in the TLD; (b) prohibitions on warehousing of or speculation in domain names by registries or registrars; (C) reservation of registered names in the TLD that may not be registered initially or that may not be renewed; (D) maintenance of and access to accurate and up-to-date information concerning domain name registrations; (E) procedures to avoid disruptions of domain name registration due to suspension or termination of operations by a registry operator or a registrar; and (F) resolution of disputes regarding whether particular parties may register or maintain registration of particular domain names.

The ORG Registry Agreement also describes issues that are not appropriate as a “Consensus Policy”<sup>36</sup>, but this list of excluded topics does not expressly call out vertical integration or other topics that seem to incorporate vertical integration.

The issue of vertical integration does not easily fall within these categories, and thus, it is possible that a policy recommendation generated from the PDP might not qualify as a “Consensus Policy” that could be made binding on existing registries.

A similar analysis would also be appropriate with respect to the RAA if the intent GNSO intended to adopt a consensus policy to be enforceable against a registrar to address the vertical integration issue. Although the language of the RAA regarding “Consensus Policies” differs from the language discussed above, the principles are somewhat similar.

Thus, questions remain on whether a new GNSO policy on vertical integration could be made enforceable against registries and registrars, without requiring contract amendments in order to achieve the effectiveness of the policy. However, to reach a definitive conclusion on the GNSO’s ability to adopt a Consensus Policy that would be binding on existing registries or registrars, evaluation of the specific details of the proposed policy would be required, since there could be aspects of the vertical integration issue that could fall within the parameters of Consensus Policies as described in the applicable contracts. Consequently, the Office of the General Counsel reserves the right to re-evaluate this opinion in light of

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<sup>36</sup> In addition to the other limitations on Consensus Policies, the .ORG Registry agreement clarifies that Consensus Policies (Section 3.1(b)(A)) cannot: (i) prescribe or limit the price of Registry Services; (ii) modify the standards for the consideration of proposed Registry Services; (iii) modify the procedure for the consideration of proposed Registry Services; (iv) modify the terms or conditions for the renewal or termination of this Agreement; (v) modify certain ICANN’s obligations to Registry Operator; (vi) modify the limitations on Temporary Specifications or Consensus Policies; (vii) modify the definition of Registry Services; (viii) modify the terms of Sections 7.2 (relating to fees paid to ICANN); or (ix) alter services that have been implemented except in certain circumstances.

any specific policy recommendations to be proposed by the GNSO Council through a PDP if one is initiated on the topic of vertical integration.

**Whether the issue is broadly applicable to multiple situations or organizations.**

Although the issue of vertical integration applies broadly to multiple organizations or situations, it is not clear that a one-size-fits-all solution would be appropriate for all gTLDs, or that the GNSO policies, if adopted, would apply uniformly to all organizations in the same situation. As pointed out above, depending upon when the GNSO policy is finally adopted by the Board, applications submitted during earlier rounds may be subject to different restrictions—the ones incorporated into the final Guidebook—instead of the restrictions arising out of the new policies. A new GNSO policy may not be enforceable against existing registries either, as a result of contractual limitations. Consequently, it may be difficult for the GNSO to develop a policy that would apply uniformly to multiple situations or organizations.

**Whether the issue is likely to have lasting value or applicability, albeit with the need for occasional updates.**

One of the goals of the New gTLD Program is to encourage innovation, consumer choice and competition into the domain name marketplace. Contractual provisions relating to vertical integration have varied over the last decade (as described above), as a result of the changing gTLD marketplace, and the need to address situations presented by unique TLDs. It may be difficult to predict today the competitive harms and benefits of a domain name system with hundreds, or even thousands, of unique TLDs with differing purposes and communities. Accordingly, the GNSO should consider the possibility that any policy arising out of a PDP may be quickly out-of-date, and potentially cause harm to consumers. However, if the vertical integration issue is addressed through an implementation process instead of through a PDP, ICANN would not be bound to rigid a “one-size-fits-all” policy that would be difficult to change.

**Whether the issue will establish a guide or framework for future decision-making**

Initiating a PDP at this time would not be helpful in establishing a guide or framework for future decision making on the issue of vertical integration, since the resulting policy would likely be too late to affect the initial round of applications for the New gTLD Program. Instead, if the GNSO desires to guide ICANN and provide a framework for future decision making, the most efficient way of doing so would be to participate in the implementation processes currently underway.

**Whether the issue implicates or affects an existing GNSO Policy**

The GNSO adopted its policy recommendations on the new gTLDs in 2007, and subsequently produced extensive implementation advice to ICANN<sup>37</sup>. This advice did not include specific requirements related to the issue of vertical integration. At the Board's direction, Staff is conducting a separate process developing the implementation details for the New gTLD Program, with significant community input, and will develop the initial distribution model to be adopted, including any rules on vertical integration. Initiating a PDP on vertical integration at this time would create the possibility that different rules would apply to future gTLDs than might apply to existing gTLDs or gTLDs that are approved in any new gTLD rounds that occur prior to the adoption of any new GNSO policy.

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<sup>37</sup> The GNSO's Summary – Recommendations, Principles and Guidelines dated 22 October 2009 are posted at <http://gns0.icann.org/files/gns0/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>.

## 4. Staff Recommendation

Staff recommends that the GNSO delay a PDP on vertical integration, and instead recommends that the GNSO Constituencies and Stakeholder Groups provide focused timely input through the implementation process that is currently underway for the New gTLD Program.

When the GNSO concluded its policy work that recommended the launch of new gTLDs, Staff was directed by the ICANN Board<sup>38</sup> to develop the implementation plan for the launch of new TLDs through a consultative process with the community. With significant community input, this implementation process for new gTLDs is proceeding on a separate track from a potential PDP. This process has produced multiple opportunities for the Community and GNSO constituencies and stakeholders to actively participate and influence the implementation details for the New gTLD Program. Numerous interactive sessions, workshops, outreach events, and webinars have been held by ICANN Staff to facilitate resolution of the many issues presented by the New gTLD Program, one of them being the issue of vertical integration.

Staff recommends that consideration of launching a PDP on vertical integration be delayed until after the launch of new gTLDs (perhaps 1-2 years) 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. Addressing vertical integration through a new policy development process instead of through the current implementation process may not produce a consistent policy that could be implemented across all new gTLDs, if such GNSO policy is adopted after the launch of the first round of applications. If the GNSO chooses to launch a PDP, and it results in Board-approved policy, that policy would be incorporated in subsequent new gTLD application rounds following the implementation plan for that policy advice.

Should the GNSO choose to launch a PDP on vertical integration, any policy that might be generated will likely be too late to impact the current proposal for implementation of new gTLDs. Considerations of the timing of the policy development process must be considered or it may interfere with the implementation of the GNSO's previous policy recommendations.

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<sup>38</sup> The Board Resolution dated 26 June 2008 authorizing the new gTLD Program included a resolution that: Resolved (2008.06.26.03), the Board directs staff to continue to further develop and complete its detailed implementation plan, continue communication with the community on such work, and provide the Board with a final version of the implementation proposals for the board and community to approve before the new gTLD introduction process is launched.

Recommendation 10<sup>39</sup> from the GNSO's policy on the New gTLD Program states that there must be a base contract provided to applicants at the beginning of the application process. Since any restrictions to be adopted by ICANN on vertical integration would be included in the form registry agreements, this requirement precludes any new policies from affecting the registry agreement if it would impact an application round which has commenced prior to the adoption of the new policy. Instead, under Recommendation 19<sup>40</sup>, any new policies would impact subsequent rounds of applications for new gTLDs. One potential outcome of the proposed PDP would be that new gTLD registries in earlier rounds would operate under a different set of principles than later rounds, raising concerns of fairness and equity.

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 implementation processes currently underway. The GNSO can provide input to the ongoing development of the new gTLD implementation plan in a less formal way. For example, the GNSO can, if it chooses, coordinate its responses to future public comment forums, or develop additional implementation guidelines for Staff to consider in finalizing the Draft Applicant Guidebook.

### **Considerations in evaluating whether to initiate a PDP:**

#### **1. The Initiation of a PDP will not delay the implementation of the new gTLD program**

As a general principle, a subsequent commencement of a PDP on an issue that affects implementation of a prior GNSO policy adopted by the Board should not delay implementation of that policy. Nothing in the Bylaws gives such effect to the initiation of new PDPs. If it were possible to halt the implementation of fully adopted policies by starting consideration of a related new policy, one could imagine a councillor who initially opposed the policy attempting to prevent or delay its implementation by initiating a PDP on a related topic, relying on the lower voting thresholds that apply to initiation of a PDP.<sup>41</sup> Because it is possible that a PDP will not ultimately produce a new policy recommendation, it is ICANN's practice to continue with implementation planning on the prior GNSO policy recommendations until such time as any

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<sup>39</sup> Recommendation 10 is described in the GNSO Implementation Guidelines posted at ICANN's website at <http://gns0.icann.org/issues/new-gtlds/>.

<sup>40</sup> Recommendation 19 is described in the GNSO Implementation Guidelines posted at ICANN's website at <http://gns0.icann.org/issues/new-gtlds/>.

<sup>41</sup> In this case, since the issue is within scope of the GNSO's mandate, the required vote under the Bylaws to commence a PDP would be more than 33% of each house, or more than 66% of one house.

new policies are adopted by the Board. To do otherwise could be contrary to the Board's directions when it approved the initial policy.

This principle suggests that commencement of a PDP on vertical integration should not cause a delay in the launch of the New gTLD Program or the implementation planning activities currently underway. Instead, the implementation activities would continue at their current pace, and the PDP on vertical integration, should it be commenced, would proceed under a parallel, but separate track.

## **2. The GNSO may be restricted in its ability to recommend policies affecting Existing gTLDs**

Although initiation of PDP on vertical integration may be within the scope of GNSO's mandate, a resulting policy recommendation may not affect all gTLDs in the same manner. As described above, gTLDs that were delegated or applied for *before* the effective date of the policy should not be affected by the new policy due to the requirement of making the form registry agreements available to applicants at the commencement of the process (consistent with Recommendation 10).

In calling for an issues report, the NCUC Statement notes that the vertical integration issue affects both existing gTLDs and new gTLDs. If the GNSO decides to address both existing and new gTLDs in the PDP, it may need to consider whether it intends the resulting policy to be enforceable against existing registries. Because the current restrictions on vertical integration are part of existing registry agreements, it is doubtful that a change to these terms would be deemed a "Consensus Policy" enforceable against the registry without a contract amendment. The answer depends upon the specific attributes of the policy to be adopted. If the policy cannot be construed as a Consensus Policy, the new GNSO policy would, at best become non-binding advice to ICANN that it should seek amendments from existing registries.

## **3. Resources Needed From the Community**

As of this writing, the GNSO has approximately twenty policy-related efforts underway being addressed by sixteen groups of community members (the highest workload ever recorded). In addition, at the ICANN annual meeting recently concluded in Seoul, the GNSO Council underwent a major restructuring, creating a new bi-cameral voting structure comprised of two new "houses" and four new stakeholder groups. A substantial portion of the restructuring work continues, such as the development of new work team rules, new policy development process rules, and operations rules. The GNSO is addressing this restructuring work through approximately seven community work teams and committees. Staff recently provided the GNSO with analysis of community participation rates in policy-related groups that shows clear evidence of sporadic attendance and, in some cases, very low participation by some Constituencies

and inconsistent participation by others<sup>42</sup>.

In this environment, with numerous working groups chartered and carrying on policy analysis and restructuring activities, the new GNSO leadership and Staff have expressed concerns regarding whether the Community has sufficient resources and bandwidth to undertake another significant project. The GNSO Chair, Vice Chairs, and Staff have been evaluating methodologies to prioritize existing tasks, and the time needed from the Community volunteers to conduct its important policy work.

The issue of vertical integration is highly complex and will likely require significant attention from the community members likely to participate in the PDP effort. The GNSO Council should evaluate whether it has sufficient bandwidth to adequately address the issue of vertical integration at this time. Specifically, the GNSO could consider whether the convening of a new group would draw volunteers away from the limited number of community volunteers available, and whether a new PDP would adversely affect the quality of the work product to be delivered from currently pending working groups. If the GNSO elects to proceed with a PDP, Staff recommends that the Council identify the specific projects to be delayed in order to accommodate the work. The GNSO should also consider whether the Community has the appropriate expertise and resources to conduct an in-depth analysis of the issue of vertical integration at this time. If the initiation of a PDP would not produce a better outcome than that produced through the implementation process, then the GNSO should consider alternative approaches to inform the implementation process.

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<sup>42</sup> The Staff report describing the sporadic attendance and low participation rates of some members of the community is posted at: <http://gns0.icann.org/correspondence>.

## 5. Options for the GNSO to Consider in Future Policy Work

If the GNSO Council would decide to initiate a PDP on vertical integration notwithstanding Staff's recommendation, whether now or in the future, the GNSO should consider the following options for future policy work:

1. Determine whether it intends to propose uniform policies to apply to both existing gTLDs and new gTLDs. If the GNSO intends to pursue a policy to apply to all gTLDs, it should consider that the contracts may prevent uniform application to existing gTLDs, and may, in practice be only guidelines that ICANN should pursue amendments with each of the registries to obtain compliance with the new policy.
2. Request that ICANN consult additional economists and experts to evaluate the then current state of the domain registration market. Such analysis could also evaluate the impact of the then current vertical integration restrictions on consumers, and whether such restrictions have produced the expected innovation and choice into the domain name marketplace.
3. Analyze the various levels of distribution in the domain name to determine if new policies should apply to the different segments of the market, including registry infrastructure service providers, registry operators, registrars, registrars, and resellers.
4. Evaluate each of the substantive proposals on distribution models for new gTLDs received by ICANN from the Community, and identified in the CRA Report.
5. For each model, analyze the additional compliance costs associated with enforcing the proposed restrictions on vertical integration.
6. Evaluate whether ICANN has the institutional capabilities necessary to make effective determinations of anti-competitive behaviour in the domain name marketplace, or whether this determination is more appropriate for local competition authorities.

## Annex 1– GNSO Request for Issues Report

Motion proposed for the 3 September 2009 GNSO Council meeting, and carried during the Council teleconference meeting on 24 September 2009:

### **Item 4: Vote on motion on Vertical Separation**

**Avri Doria** reminded Council that absentee voting is allowed for this motion.

#### **Motion Requesting an Issues report on vertical Integration and Registry/Registrar cross-ownership**

Motion proposed by Mary Wong and seconded by Philip Sheppard with friendly amendments from Kristina Rosette.

Whereas, Recommendation 19 of the GNSO policy authorizing the new gTLD process states: "Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars;"

Whereas, opening up the market to many new TLD operators may call into question some of the assumptions on which the separation of registry and registrar functions is based;

Whereas, economic research commissioned by ICANN staff also suggests that changes in these assumptions might be justified;

Whereas, the new gTLD policies passed by the Council do 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;

Resolved: the GNSO Council hereby requests the preparation of an Issues Report for delivery within 45 days on future changes in vertical integration and cross-ownership between gTLD registrars and registries, to assist in determining whether a PDP should be initiated regarding what policies would best serve to promote competition and to protect users and registrants.

**The motion passed with 11 Council votes in favor.**

## Annex 2 – NCUC Statement in Support of Motion for Issues Report

### Noncommercial Users Constituency statement on vertical separation of registries and registrars

Version 2.0, 28 August 2009

#### Observations.

Registry-registrar separation was a regulatory response to the dominance of the entire gTLD market by one vertically integrated provider (Network Solutions, Inc., now VeriSign). By separating the retail side of the market (registrars) from the wholesale maintenance of the list of unique registrations (registry), capping the wholesale price of the registry, and giving any number of registrars “equal access” to the opportunity to register available names in the .com, .net and .org domains, the U.S. Commerce Department introduced vigorous retail competition in the domain name market.

The introduction of new gTLDs raises many questions about this model. It is not clear that new TLDs need to be price-capped, given their competitive disadvantage relative to established domains; it is possible that new TLDs are handicapped by the registry-registrar cross ownership and integration restrictions; it is clear that the separation seems inappropriate for certain kinds of TLDs, such as self-provided TLDs confined to a single organization, or very small nonprofit communities.

Although debate over this issue has been sparked by the introduction of new gTLDs, the policy associated with introducing new TLDs is conceptually distinct from the issue of cross-ownership and vertical integration. One could change the policies regarding cross ownership and vertical integration without introducing new TLDs; one could introduce new TLDs without changing the cross ownership and vertical integration policy. We note that Recommendation 19 of the GNSO policy authorizing the new gTLD process states: “Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.”

#### Recommendations of NCUC

*a) This issue must be resolved through the GNSO*

Vertical separation of registries and registrars is a *policy* issue – one of the most fundamental policies underlying ICANN's regulation of the domain name industry. And yet this important policy change is being

handled as if it were an “implementation” decision that can be inserted into new gTLD contracts. Although ICANN’s management has commissioned economist reports on the topic, there has been no GNSO process to make a policy change. We fail to see how a policy as important as this can be changed without a GNSO proceeding. We are deeply concerned by what appears to be yet another case of staff-made policy.

Our primary recommendation is that the issue of changes to the registry-registrar separation be submitted to the GNSO as a policy matter. The debate over this issue has sparked several economic studies, policy analysis papers, mobilizations for and against by registrars and registries, and comment by users and consumers. Policy changes of this magnitude applicable to gTLDs must go through the GNSO; that is required by ICANN bylaws.

*b) One thing at a time*

The addition of what will certainly be dozens, and possibly hundreds of new top level domains over the next few years will put an enormous burden on ICANN staff, its policy development processes and ICANN’s monitoring and enforcement capabilities. We think it unwise to link the addition of new TLDs – which by itself involves enormous policy changes – to a major change in ICANN’s approach to market structure and competition policy in the industry.

*c) Support for one of the two CRA recommendations*

The [Charles Rivers Associates \(CRA\) report](#) made two very cautious proposals for making exceptions to the separation of registries and registrars. Both, in our opinion, were clearly supported by economic analysis; one of them is justifiable under current rules without a new policy proceeding.

1. Recommendation 1 was that single organization TLDs (for example, .ibm or .bbc) should be permitted to operate both the registry and the registrar that registers second-level domain names. Because single-organization TLDs are basically a new phenomenon, we do not consider this to be a major policy change and thus we favor making this exception and incorporating it into the implementation of the new gTLD round. There might be substantial demand for internalizing a major corporation’s or organizations’ domain names under a single, self-provided TLD. It is not realistic and serves no public interest to force these organizations to use third-party registrars. Indeed, such a policy might compromise the security of these organizations. There are no competition policy issues raised by this change, as long as the organization’s use of the TLD is confined to its own internal departments, employees and units.
2. Second, CRA proposes that a registry may own a registrar so long as the wholly-owned registrar does not sell second-level domain name subscriptions in the TLDs operated by the registry.

This, in our opinion, is a reasonable recommendation. Nevertheless, it is a policy change (it alters the policy governing the commercial terms and conditions applicable to existing gTLD registries and registrars) and should therefore be part of a new policy proceeding in the GNSO. Thus, action on this should be deferred until the GNSO resolves it.

## ANNEX 3- RELEVANT EXCERPTS FROM EXISTING AGREEMENTS ON VERTICAL INTEGRATION

### **.ORG Registry Agreement**

Section 7.1 of the .ORG Registry Agreement states:

“(a) Access to Registry Services. Registry Operator shall make access to Registry Services, including the shared registration system, available to all ICANN-accredited registrars ....Such nondiscriminatory access shall include without limitation the following:

(a)(i) All registrars (including any registrar affiliated with Registry Operator, if any) can connect to the shared registration system gateway for the TLD via the Internet by utilizing the same maximum number of IP addresses and SSL certificate authentication; ...”

“7.1(b) Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to the TLD. This shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar. “

“7.1(c) Restrictions on Acquisition of Ownership or Controlling Interest in Registrar. Registry Operator shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar. “

The .asia, .cat, .com., .coop, .name, .net, .info, biz,.....the registry agreements except for the .pro registry include language similar to the above.

### **.AERO Sponsorship Agreement**

Section 7.1(b) of the .AERO Sponsorship Agreement states:

“Sponsor Shall Not Act as Own Registrar. Sponsor shall not act as a registrar with respect to the TLD, *except to the extent described in Appendix S Part 6*. This shall not preclude Sponsor from registering names within the TLD to itself through a request made to an ICANN-accredited registrar.”

However, Appendix S is missing Part 6 (reason unknown) and does not provide additional guidance in this regard.

### **.INFO Registry Agreement**

Section 7.1(b) of the .INFO Registry Agreement states:

“Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to the TLD. This shall not preclude Registry Operator from registering names within the TLD to itself (i) through a request made to an ICANN-accredited registrar, or (ii) as otherwise permitted by ICANN. Without limiting the generality of the foregoing, the parties agree that:

(i) Registry Operator may register the domain names listed on Appendix 6 (Part E.A.) for its own use in operating the registry and providing Registry Services under this Agreement, provided the total number of domain names listed on Appendix 6.E. at any time does not exceed 5000. At the conclusion of its designation by ICANN as the operator for the Registry TLD, Registry Operator shall transfer all such domain-name registrations to the entity or person specified by ICANN.

Appendix 6 (Part E.A.) may be revised upon the written notice by Registry Operator to ICANN and written consent by ICANN, which shall not be unreasonably withheld;

(ii) Registry Operator may register the domain names listed on Appendix 6 (Part E.B.) for its own use, provided that the total number of domain names listed on Appendix 6.E. at any time does not exceed 5,000. Registry Operator may retain registration of those names at the conclusion of its designation by ICANN as the operator for the Registry TLD, provided registration fees are paid and all other requirements for registration by third parties are met. Appendix 6 (Part E.B) may be revised upon written notice by Registry Operator to ICANN and written consent by ICANN, which shall not be unreasonably withheld; and

(iii) As instructed from time to time by ICANN, Registry Operator shall maintain the registration of up to 5000 domain names within the domain of the Registry TLD for use by ICANN and other organizations responsible for coordination of the Internet’s infrastructure.”

The .INFO Appendix 6 includes a number of generic words as part of the reserved list, that are not apparently related to the registration of the registry, including: phone.info, list.info, search.info, web.info.

#### **.MUSEUM SPONSORSHIP AGREEMENT**

.MUSEUM Appendix 6, Section 7.1(b) states:

“Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to the TLD. Provided, however, that this shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar, and, further, Registry Operator is expressly permitted to manage directly up to 5,000 domain names as specified in ...”

Appendix S, Part 7 states:

“Recognizing that: i) the charter of the .MUSEUM top-level domain is sufficiently restrictive so that it has appeal to a small, identifiable and limited community, and that said restrictions have

created conditions that substantially limit market demand and as a result, registrar uptake; ii) MuseDoma is a not-for-profit entity as is the community it is required to serve by the definition of its charter; and iii) MuseDoma makes available to its community members under certain conditions, at no cost, third-level domain names.

Therefore, MuseDoma is permitted to maintain up to 4,000 domain names directly with the Registry Operator and keep these names under direct management for purposes stated in iii) of this Section until the conclusion of its designation by ICANN as the Sponsor for the Sponsored TLD.”

### **.MOBI Registry Agreement**

Section 7.1(b) states:

“Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to a “domain name registration” as that term is defined in Section 7.2(b) below. This shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar.”

Section 7.2(b) states:

“... a "domain name registration" shall include a domain name within the registry for the TLD, whether consisting of two or more (e.g., john.smith.tel) levels, about which Registry Operator or an affiliate thereof maintains Registry Operator Data on behalf of Registry Operator.

### **.PRO Registry Agreement**

Section 3.6 of the .PRO Registry Agreement states:

“Registrations Not Sponsored by Registrars Under Registry-Registrar Agreements. Registry Operator shall register domain names within the domain of the Registry TLD, other than on a request submitted by a registrar pursuant to that registrar's Registry-Registrar Agreement, only as follows:

3.6.1. Registry Operator may register the domain names (a) listed on Appendix X (Part A) or (b) matching a pattern specified in Appendix X (Part C) for its own use in operating the registry and providing Registry Services under this Agreement. At the conclusion of its designation by ICANN as the operator for the Registry TLD, Registry Operator shall transfer all such domain-name registrations to the entity or person specified by ICANN.

3.6.2. Registry Operator may register the domain names listed on Appendix X (Part B) for its own use, provided that the total number of domain names listed on Appendix X at any time does not exceed 5,000. Registry Operator may retain registration of those names at the conclusion of its designation by ICANN as the operator for the Registry TLD, provided registration fees are paid and all other requirements for registration by third parties are met.

3.6.3 Appendix X may be revised only (a) upon written notice by Registry Operator to ICANN and written consent by ICANN, which ICANN shall not withhold without reason, or (b) in the manner provided in Subsections 4.3 through 4.6. It shall be reasonable for ICANN to withhold consent to revise Appendix X where the revision would result in more than 5,000 names being listed on Parts A and B of Appendix X.

3.6.4. As instructed from time to time by ICANN, Registry Operator shall maintain the registration of up to 5000 domain names within the domain of the Registry TLD for use by ICANN and other organizations responsible for coordination of the Internet's infrastructure.

3.6.5. Subsection 3.6 shall not preclude Registry Operator from registering domain names within the domain of the Registry TLD through an ICANN Accredited Registrar pursuant to that registrar's Registry-Registrar Agreement.

#### **.PRO Appendix W- Additional Covenants:**

##### 3. Limitation on Merger, Consolidation or Reorganization

During the Term of this Agreement, Registry Operator shall not: (1) merge, consolidate or otherwise reorganize into or with a Registry Operator for a TLD that has more than 10,000,000 Registered Names under management, or any of its affiliates; or (2) sell or otherwise transfer all of its assets or stock to a Registry Operator for a TLD that has more than 10,000,000 Registered Names under management, or any of its affiliates. Registry Operator may merge, consolidate or otherwise reorganize into or with a (1) Registry Operator that has less than 10,000,000 Registered Names under management, or (2) a domain name registrar, only upon the express written consent of ICANN, which consent may not be unreasonably withheld or delayed. In considering whether to give consent, ICANN may consider Concepts 3, 5 and 6 in Appendix U to this Agreement.

#### **.TRAVEL Registry Agreement**

Section VII.1 Registry-Registrar Agreement.

(a) Access to Registry Services. Registry shall make access to Registry Services, including the shared registration system, available to all ICANN-accredited registrars. The criteria for the selection of registrars shall be as set forth in Appendix S. Registry shall provide all ICANN-accredited registrars authorized to register names in the Registry TLD, which shall mean such registrars have entered into Registry's form of Registry-Registrar Agreement, operational access to Registry Services, including the shared registration system for the TLD and with nondiscriminatory access to such additional services as Registry may elect to furnish to such registrar which services may include without limitation the following:

- (i) The registrar toolkit software and any updates available;
- (ii) Access to customer support personnel via telephone, e-mail and Registry's website;

- (iii) Access to registry resources to resolve registry/registrar or registrar/registrar disputes and technical and/or administrative customer service issues;
  - (iv) Access to data generated by Registry to reconcile their registration activities from Registry's Web and ftp servers;
  - (v) Automated registrar account management functions using the same registrar tool made available to all registrars by Registry; and
  - (vi) The shared registration system does not include, for purposes of providing discriminatory access, any algorithms or protocols that differentiate among registrars with respect to functionality, including database access, system priorities and overall performance.
- Such Registry-Registrar Agreement may be revised by Registry from time to time, provided however, that any such revisions must be approved in advance by ICANN, which approval shall not be unreasonably withheld.
- (b) Registry Shall Not Act as Own Registrar. Registry shall not act as a registrar with respect to the TLD. This shall not preclude Registry from registering names within the TLD to itself through a request made to an ICANN-accredited registrar.
  - (c) Restrictions on Acquisition of Ownership or Controlling Interest in Registrar. Registry shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar.

## ANNEX 4- Constituency Statements on Vertical Integration

Business Constituency Position on Registry/Registrar Vertical Separation September 2009, posted at <http://www.bizconst.org/>

NCUC Statement on Vertical Separation 28 August 2009 (described in Annex 2)

IPC Statement 8 December 2008 on the CRAI Report, posted at [http://www.ipconstituency.org/PDFs/2008\\_Dec08\\_IPC\\_Comments\\_on\\_CRAI\\_Report.PDF](http://www.ipconstituency.org/PDFs/2008_Dec08_IPC_Comments_on_CRAI_Report.PDF)

Registrar Statement on Vertical Integration submitted to the Public Forum on 29 October 2009, transcript posted at: <http://sel.icann.org/node/6957>

Registry Constituency Comments on Registrar/Registry Separation (and Section 2.8 of the Second Draft Applicant Guidebook for the New gTLD Process) 13 April 2009, posted at [http://www.gtldregistries.org/webfm\\_send/40](http://www.gtldregistries.org/webfm_send/40)

## Annex 5 – Alternative Proposals Submitted by Members of the Community

Richard Tindel, *The case for a registry owning a registrar that sells its names*, posted at:

<http://www.icann.org/en/topics/new-gtlds/presentation-tindal-19oct09-en.pdf>

Brian Cute, *Overarching Themes of the Registry Position*, posted at: <http://www.icann.org/en/topics/new-gtlds/presentation-cute-19oct09-en.pdf>

Michael Palage and Milton Mueller, *Registry/Registry Separation: A Path Forward Toward Integration With Consumer Safeguards*, posted at: <http://www.icann.org/en/topics/new-gtlds/presentation-palage-19oct09-en.pdf>

David Sappington, *Assessing the Benefits and Costs of Expanded Cross Ownership of Registries and Registrars*, posted at:

<http://www.icann.org/en/topics/new-gtlds/presentation-sappington-19oct09-en.pdf>

Eric Brunner-Williams, *About Models*, posted at: <http://www.icann.org/en/topics/new-gtlds/presentation-brunner-williams-19oct09-en.pdf>

Alexa Raad letter to Peter Dengate Thrush dated May 8, 2009 on Proposed Changes to Registry Registrar Separation, describing solutions supported by NeuStar, PIR and Afilias, posted at:

<http://www.icann.org/correspondence/raad-to-dengate-thrush-08may09-en.pdf>