Governmental Advisory Committee

9 December 2014

Dr. Stephen Crocker
Chair, ICANN Board Of Directors

Reference: gTLDs Safeguards

Dear Dr. Crocker,

This letter seeks to assist the NGPC in its future work regarding safeguards applicable to new gTLDS by providing further explanation and background about the GAC advice set forth in the October 2014 Los Angeles Communiqué. As you know, the GAC expressed strong concerns about the implementation of GAC advice regarding safeguards applicable to new gTLDs in not only its Los Angeles Communiqué, but also in its Singapore and London Communiqués.

The GAC highlighted in its most recent advice (the LA Communiqué of October 2014) its continuing concerns in light of the responses provided by the NGPC in its June and September 2014 correspondence to the GAC Chair. Our hope is to work with the NGPC to resolve these long-standing issues in a manner that sufficiently protects the public.

The GAC advice issued in the Los Angeles Communiqué addressed the following:

A. Implementation of WHOIS Related-Safeguards

GAC advice adopted at the Los Angeles ICANN meeting:
- provide the GAC with a comprehensive scorecard indicating steps and timelines regarding all streams of work related to the WHOIS accuracy safeguard;
- complete the Pilot study on WHOIS accuracy, including assessment of identity validation, and share the findings in a timely manner for review at the ICANN52; and
- initiate steps towards Phase 3 (identity verification) of WHOIS, including undertaking a cost-benefit analysis of implementation options; and
- commit to defining the process to address and resolve inaccurate WHOIS records and respond to non-compliance reports.

Explanatory statement

The GAC remains concerned about the following: 1) key issues related to WHOIS accuracy; and 2) the appropriate level of WHOIS identity verification.

The GAC is concerned that the NGPC has not provided sufficient detail regarding procedures to deal with WHOIS inaccuracy and responding to law enforcement complaints, and further, has not implemented interim procedures on these important issues. For example, the NGPC has not offered specific details of how it will notify registrars of inaccuracies. Instead of defining a specific process or identifying an adequate interim process, the NGPC indicates that ICANN "is consulting" with registrars and the broader ICANN community to define the process by which inaccurate records are forwarded to registrars, resolved, and re-checked by the reporting system. However, there is no indication of a timeframe for which this process will take place.

Read as a whole, the NGPC response seems more concerned with the burden upon Registrars than the public safety concerns raised by failing to create an appropriate system to verify and respond to WHOIS accuracy issues. As key details on these important issues are ultimately determined, the GAC urges ICANN to carefully weigh all considerations – not just those associated with costs potentially incurred by registrars. Because of the importance of accurate WHOIS information and responding to law enforcement complaints, the GAC recommends that interim procedures be put in place no later than January 1, 2015.

The GAC also urges the ICANN Board and Staff to ensure sufficient time is offered to all stakeholders as these consultations are undertaken and that any relevant materials associated with consultations are made available well in advance to enable constructive dialogue and contributions. The late release of the Pilot Report on the WHOIS Accuracy Reporting System immediately prior to the Los Angeles meeting did not provide sufficient time to analyze and confer regarding this report. The GAC also urges ICANN to consider a process for the GAC to have an opportunity to weigh in on draft recommendations, prior to the issuance of actual reports.

The GAC remains concerned that ICANN has not committed to progressing the identity validation phase (Phase 3) of WHOIS verification. The GAC would like assurance that ICANN remains committed to implementing Phase 3 (identity verification) of WHOIS validation and also remains committed to defining the process to address and resolve inaccurate WHOIS records.

B. Security Risks

GAC advice adopted at the Los Angeles ICANN meeting:
- Inform the GAC and provide GAC members an opportunity to contribute inter-sessionally about the ongoing consultation on the framework for Registries to respond to security risks;
- inform the GAC of the findings of this consultation no later than three weeks before the ICANN52 meeting; and
- ensure an interim mechanism is in place to effectively respond to security risks

Explanatory statement

The GAC remains concerned about delay in developing a framework to respond to identified security risks. In its Beijing Communiqué, the GAC advised that Registry Operators should take action to detect security threats (such as pharming, phishing, malware, and botnets) and

mitigate identified threats by 1) notifying the relevant Registry Operator, and 2) suspending the domain if the registrar does not take immediate action. While Registry Operators currently must assess whether domains are being used to perpetuate security threats, there is no requirement in the Registry Agreement to take further action to mitigate these threats. Further, the NGPC has deferred responding to the GAC's implementation questions about the mechanisms and timeframes for the conduct of security checks by Registries pending input from the ICANN community on this topic.

Given that these security risks are ongoing but the process for addressing them is yet to be developed, we advise ICANN to ensure that there is an interim mechanism in place to detect and respond to security threats, including where appropriate, suspension of a domain name. Moreover, the GAC requests that ICANN provide a briefing to the GAC inter-sessionally about the ongoing consultation on the framework for Registries to respond to security risks, and inform the GAC of the findings of this consultation, no later than three weeks before the ICANN52 meeting.

C. Verification and Validation of Credentials for Category 1 Strings Associated with Market Sectors with Clear and/or Regulated Entry Requirements

GAC advice adopted at the Los Angeles ICANN meeting:

- Reconsider the NGPC's determination not to require the verification and validation of credentials of registrants for the highly regulated Category 1 new gTLDs. The GAC believes that for the limited number of strings in highly regulated market sectors, the potential burdens are justified by the benefits to
  consumers; reconsider the requirement to consult with relevant authorities in case of
  doubt about the authenticity of credentials; and reconsider the requirement to conduct
  periodic post-registration checks to ensure that Registrants' continue to possess valid
  credentials; and
- Ensure these issues (verification/validation; post-registration checks; consultation with
  authorities) are addressed in the review process for any subsequent rounds of new
  gTLDs.

Explanatory statement

We remain concerned that the NGPC's position undermines the GAC's efforts to minimize consumer harm, consumer confusion, and fraud through the actions of un-credentialed registrants in highly regulated or sensitive strings. We note that the NGPC has designated only a very limited number (less than 50) of the new gTLDS as falling within this highly regulated/sensitive category.

The GAC appreciates the NGPC's efforts to consider potential implementation challenges that registry operators might face in adopting the GAC's advice to verify and validate the credentials of registrants for strings representing highly regulated sectors. Nevertheless, the GAC advice required Registry Operators to proactively screen the highly regulated or sensitive Category 1 Registrants to ensure that they are what they purport to be before they do business with the public using the name of a regulated sector like a bank or pharmacy. The GAC believes that for these limited number of strings in highly regulated market sectors (less than 50); the potential

burdens are justified by the benefits to consumers. We view the looser requirement that registrants provide some "representation" that they possess the appropriate credentials (*e.g.,* as a .bank, .insurer, .pharmacy, etc.) as increasing the risk of consumer fraud and potential harm because bad actors will not hesitate to make false representations about their credentials.

The GAC believes that it is in the best interests of those Registries whose gTLDs represent such strings to demonstrate their commitment to best practices by engaging in the proactive verification and validation of credentials and the avoidance of consumer confusion, fraud and/or harm.

We have noted that the majority of new gTLD applicant responses to the GAC's Singapore advice fully endorse the GAC's advice regarding the importance of validation and verification of credentials, and that a significant number of actual and potential Registries associated with highly regulated sectors are willing to conduct the verification and validation of credentials. We believe their commitments should set an example that other Registries should endeavor to follow.

We also remain concerned with the NGPC's elimination of the requirement to consult with relevant authorities (regulatory and quasi-regulatory bodies where applicable) in case of doubt about the authenticity of credentials, and the requirement to conduct periodic post-registration checks to ensure that Registrants' continue to possess valid credentials and generally conduct their activities in the interests of the consumers they serve. The GAC advised these procedures to protect the public from falling prey to scammers and other criminals.

Finally, we believe these issues (verification/validation; post-registration checks; consultation with authorities) need to be addressed in the review process for any subsequent rounds of new gTLDs.

D. Public Interest Commitment Dispute Resolution Process

GAC advice adopted at the Los Angeles ICANN meeting:

- modify the dispute resolution process to ensure that non-compliance is effectively
   and promptly addressed, in particular for cases requiring urgent action.

NGPC's response to the GAC's questions related to the PICDRP addressed some of the GAC's concerns, but left other issues unresolved. The GAC appreciates the need for the NGPC to construct a dispute resolution process, but we remain concerned that the proposed PICDRP process is complex, apparently lengthy, and as yet untested. It remains to be seen whether the PICDRP process will yield effective, fair and timely results.

In particular, the GAC remains concerned that the PICDRP will not provide a suitably nimble method of addressing serious threats, such as botnets and malware. In addition, the current version of the PICDRP lacks certainty as to when remedial measures are imposed and whether the process results in final resolution. For example, as currently drafted, the PICDRP suggests

that ICANN may decline to impose any remedial measure, even if the Registry Operator fails to comply with the compliance notice generated through the process, raising questions as to the effectiveness of this dispute process. Moreover, it is still not clear that the proposed process necessarily results in a final resolution of compliance issues. The PICDRP process does not necessarily resolve compliance issues because if the Registry Operator disagrees with the proposed remedial measure, they can invoke another alternate dispute resolution processes such as mediation and then arbitration (see B.4.4.6 and Article 5.1 and 5.2). These subsequent dispute resolution processes would occur after potentially more than 105 days has elapsed, an excessive time period in circumstances where time is of the essence, *i.e.,* botnets, public safety concerns.

Accordingly, the GAC urges the NGPC to modify the dispute resolution process to ensure that non-compliance is effectively and promptly addressed in accordance with the advice provided by the GAC.

As regards compliance updates, the GAC appreciates the NGPC's commitment to provide regular and consistent periodic updates regarding ICANN's Compliance Department's enforcement of new gTLD safeguards, and proposes that such updates occur, in writing, at a minimum, six weeks prior to each ICANN meeting. The GAC also proposes that the GAC be afforded opportunities to submit questions following these written updates, to be addressed by ICANN staff during each ICANN meeting.

E. Category 2 Safeguards: Ensuring Non-Discriminatory Registration Policies

> GAC advice adopted at the Los Angeles ICANN meeting:
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> - Amend the PIC specification requirement for Category 2 new gTLDs to include a
>   non-discriminatory requirement to provide registrants an avenue to seek redress
>   for discriminatory policies.

The GAC remains concerned about ensuring non-discriminatory registration policies because the NGPC's response to the GAC's questions related to Category 2 safeguards appears unchanged from previous responses. The GAC's explanation in its Singapore and London Communiqués that transparency alone is insufficient to deter discriminatory and preferential registration policies does not appear to have persuaded the NGPC to revisit its original position. Nevertheless, the fundamental problem created by the NGPC's response is the absence of any remedy for a registrant who encounters a discriminatory registration regime, as the discriminatory registration policy only needs to meet the requirement of transparency. It is imperative that registrants be afforded an avenue to seek redress in the event a Category 2 registry implements preferential or discriminatory registration policies. In failing to complement the transparency requirement with a requirement that registration policies should be non-discriminatory, the NGPC does not provide registrants with a process to seek a remedy when confronted by discriminatory, albeit transparent, registration policies.

Therefore, we strongly urge the NGPC to reconsider its position, particularly since the GAC has advised that it does not believe the current requirements in Specification 11 actually meet either the spirit or the intent of the GAC's advice. We also urge the NGPC to either amend the

PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress for discriminatory policies, or to provide clarification as to any other means by which a registrant could remedy potential harm caused by discriminatory registration policies.

Need for consistent application of safeguards

In providing its continuing advice on these matters, the GAC is conscious that the new gTLD program continues to be implemented and a significant number of contracts are already in place. As a matter of urgency I therefore request views from the Board on what measures ICANN plans to take in the current and future rounds to correct the above shortcomings.

Next Steps

As you are aware, there has been extensive correspondence between the GAC and the Board on these issues. If there is some way of addressing the issues more directly, and well before the Singapore meeting, then I suggest that should be explored. The Board has previously expressed its willingness to schedule a conference call, and the GAC is certainly willing and able to participate in such a call. It may assist if ICANN staff and the GAC Secretariat can undertake appropriate preparatory work to enable best use of the time available.

Yours sincerely

Thomas Schneider
Chair, Governmental Advisory Committee