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Hearing on ICANN's Top- Level Domain Name Program

Subcommittee on Communications and Technology
House Energy and Commerce Committee

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The Association of National Advertisers (ANA) appreciates the opportunity to present our serious concerns about the new generic Top-Level Domain Name (gTLD) Program that was approved last June by the Internet Corporation for Assigned Names and Numbers (ICANN).

ANA is the advertising industry's oldest trade association, founded in 1910. Our membership includes 400 companies with 10,000 brands that collectively spend over \$250 billion in marketing communications and advertising. More information about our association is available at <http://www.ana.net>.

I am also appearing on behalf of CRIDO, the Coalition for Responsible Internet Domain Oversight. CRIDO represents 156 major national and international companies and trade associations that have joined together to oppose the roll-out of ICANN's new gTLD Program. A list of all of the members of CRIDO, which represents virtually every sector of the American economy and many important international companies, associations and federations, is attached to this statement.¹ CRIDO members carry out some 90 percent of global marketing communications spending, equivalent to \$700 billion annually. While CRIDO members may follow different approaches to domain name activity, they are all united in the belief that the proposed unfettered expansion of generic Top Level Domains is both dangerous and misguided. This proposed ICANN initiative is not merely a bad policy choice but a serious threat to the legitimate interests of business and consumers on the Internet.

On November 10, 2011, ANA and the other members of CRIDO sent a Petition to Commerce Secretary John Bryson outlining our serious concerns about the new gTLD Program approved last June by ICANN despite significant objections from many global Internet stakeholder groups. The CRIDO Petition called on the Department of Commerce, and specifically the National Telecommunications and Information Administration (NTIA), "to use its best efforts to persuade ICANN to stop or postpone the opening of the gTLD application window," which is currently scheduled to begin on January 12, 2012.²

Other important groups have also independently spoken out against ICANN's gTLD Program, including the National Retail Federation (NRF), the Screen Actors Guild (SAG) and the

¹ See Exhibit A.

² See Exhibit B.

American Federation of Television and Radio Actors (AFTRA). Their letters to the Secretary are available at <http://www.ana.net/getfile/16997> (NRF), <http://www.ana.net/getfile/16998> (SAG) and <http://www.ana.net/getfile/17000> (AFTRA).

We commend the Subcommittee for holding this hearing on this critical issue which could impact the shape of the Internet for decades, and perhaps in perpetuity. In the past twenty years, the Internet has grown from being used by a limited number of engineering and academic elite to being relied on every day by over 2 billion people worldwide. According to a May 2011 report from the McKinsey Global Institute, nearly \$8 trillion are exchanged annually through e-commerce. The former Secretary of Commerce, Gary Locke, emphasized that “[t]he Internet is becoming the central nervous system of our information economy and society.”³ We cannot emphasize enough that the Internet serves as a recognized catalyst for global economic growth. In fact, for the first 39 days of this holiday season, online spending is up 15% from a year ago.⁴ With our fledgling economic recovery hanging in the balance there is far too much at stake not to ensure that ICANN’s policies are fair, impartial and productive. This is in keeping with the promises that ICANN made in the Affirmation of Commitments between ICANN and the NTIA, in exchange for the considerable power to oversee the Internet that was delegated to ICANN by the U.S. government.

We believe the new gTLD Program is bad for marketers, consumers and the entire online marketplace. Consistent with the Affirmation of Commitments, ICANN has a responsibility to ensure that its actions further the public interest, promote consumer trust and the burgeoning Internet domain.⁵

We strongly believe that ICANN’s new gTLD Program fails all of these standards.

This Program in aggregate has multi-billion dollar implications for all marketers, both in the commercial and the nonprofit sectors, and their brands. It would cause irreparable harm and damage to the entire online business community. It would throw the domain name universe into substantial confusion for both marketers and consumers.

³ Commercial Data Privacy and Innovation in the Internet Economy: a Dynamic Policy Framework, Department of Commerce (2010), Message from Secretary of Commerce Gary Locke at 1, available at: <http://www.commerce.gov/sites/default/files/documents/2010/december/iptf-privacy-green-paper.pdf>

⁴ comScore, Inc., “U.S. Online Holiday Spending Approaches \$25 Billion for the Season, Up 15 Percent vs. Year Ago,” Press Release (Dec. 11, 2011) *available at*: http://www.comscore.com/Press_Events/Press_Releases/2011/12/U.S._Online_Holiday_Spending_Approaches_25_Billion_for_the_Season.

⁵ See <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>. (In relevant part,

- Section 3(a) requires ICANN to “ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent”;
- Section 3(c) requires ICANN to “promote . . . consumer trust . . . in the DNS marketplace” and Section 8(c) commits ICANN to operating “as a multi-stakeholder, private sector led organization with
- input from the public, for whose benefit ICANN shall in all events act.”)

FTC Chairman Jon Leibowitz discussed the ICANN program last week at a hearing before the House Judiciary Subcommittee on Intellectual Property, Competition and the Internet. He stated that the unlimited gTLD roll-out could be “a disaster for businesses and consumers” and could dramatically increase problems for law enforcement. When the Chairman of one of the chief consumer protection agencies in the U.S. labels the program a potential “disaster,” that should be a clear signal to everyone that this unlimited expansion should be delayed until a full examination of the program is provided by ICANN and the Department of Commerce (DOC).

In particular, it is critical that the various requirements regarding the public interest, consumer trust and public benefits contained in the Affirmation of Commitments between ICANN and the DOC that ICANN agreed to carry out in order to obtain the freedom to manage major essential functions of the Internet are being adequately fulfilled. Clearly, the Chairman of the FTC believes that there are likely to be serious dangers in this area or he would not have so strongly stated his concerns about the possibility of a disastrous threat to the Internet community from this new ICANN initiative.

ICANN has been considering this Program for several years. ANA objected to these proposals as did many other industry groups and companies. Even important governmental entities, including international law enforcement and consumer protection organizations,⁶ expressed deep misgivings about ICANN’s proposed gTLD Program. Unfortunately these strong objections have largely fallen on deaf ears. Chairman Leibowitz brought up his concerns regarding an accurate WHOIS database in 2006.⁷ Law enforcement organizations brought many of these same concerns to ICANN’s attention in 2009. Why are we to believe that ICANN, after five years of such awareness, will now fix its law enforcement problems in one short month before the application window is opened?

In last week’s hearing we believe that Senator Kelly Ayotte (R-NH) encapsulated our concerns in two critical statements:

AYOTTE: "One thing that leaps out at me is that we're talking about a January roll-out and you're negotiating things that are incredibly important when we think about protecting consumers...from fraudulent actions. The Internet...is a wonderful tool but it also has been used by predators...so when I hear negotiations are ongoing for something that's a January roll-out, that leaps out...to say, why are we rushing into this?"

⁶ In 2009, a coalition of law enforcement agencies including the Australian Federal Police; the U.S. Department of Justice; the U.S. Federal Bureau of Investigation; the New Zealand Police; the Royal Canadian Mounted Police and the United Kingdom’s Serious Organized Crime Agency issued “Law Enforcement Due Diligence Recommendations for ICANN.” It is our understanding from the GAC Communiqué at Dakar, dated October 27, 2011, that **none** of law enforcement’s recommendations has been adopted; in fact of the 12 recommendations registrars were only able to report on their consideration of **three of the twelve law enforcement recommendations**. GAC Communiqué – Dakar attached hereto as Exhibit C.

⁷ See <http://www.ftc.gov/os/2006/06/P035302WhoisDatabases.pdf>.

AYOTTE: "...it seems to me that inherently these are very, very important issues and it doesn't make sense to me that you'd have a January 12th roll out with outstanding issues...that will impact important protections for consumers and the law enforcement community...it is very challenging for a member of law enforcement to investigate these kinds of cases, and as I hear your testimony, you're not even sure how many [domain name endings] you'll have at the end of the day when you open this up. So that's really going to be a challenge when you go from 22 to who knows -- a thousand -- and it seems to me that that in and of itself is going to be a huge challenge for law enforcement...caution should be used to make sure we do not rush into this."⁸

Certainly, without at least specific law enforcement and consumer harm commitments enacted in the Registry Agreements, ICANN should not proceed with the new gTLD program.

ICANN consistently states that it is a multi-sectoral, bottom-up policy development organization. However, the creation of a massive bureaucratic labyrinth and process does not mean that ICANN is, in fact, representing the views of the majority of the Internet community. There clearly is not “consensus” support for the ICANN gTLD proposals. We cannot let the repetitive mantra that ICANN is a “multi-sectoral organization” camouflage or mask ICANN’s lack of responsiveness to the real concerns of a very broad cross-section of the business community, and a growing group of non-governmental organizations, consumer groups and other Internet users.

Key Reasons Why the ICANN Program Must Be Stopped or Delayed

For a variety of reasons, we believe it is critical that the roll-out of the new gTLD Program be delayed.

Flawed Justification: ICANN justifies the Program on grounds that it: “might” or “may” (1) spur competition, (2) relieve scarcity in domain name space and (3) support differentiated services and new products. Yet evidence is sorely lacking that the introduction of new TLDs will actually achieve any of these goals. The very reports relied upon by ICANN to buttress its gTLD proposal prove that such justifications are unsupportable.

Competition. Regarding competition, in the December 2010 report commissioned by ICANN, entitled “Economic Considerations in the Expansion of Generic Top-Level Domain Names, Phase II Report: Case Studies” (“Phase II Report”),⁹ the

⁸ Senator Ayotte Urges Caution on Proposed Expansion of Domain Name Endings, Press Release, Dec. 8, 2011, available at: http://ayotte.senate.gov/?p=press_release&id=369.

⁹ Michael L. Katz et al., Economic Considerations in the Expansion of Generic Top-Level Domain Names Phase II Report: Case Studies (2010) <http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf>. See also, Michael L. Katz et al., An Economic Framework for the Analysis of Expansion of Generic Top-Level Domain Names (2010), <http://www.icann.org/en/topics/new-gtlds/economic-analysis-of-new->

authors of the Phase II Report clearly conclude that the introduction of new undifferentiated gTLDs is not likely to have a “significant competitive impact” in the market for registry services (Phase II Report, ¶ 12).

Scarcity. It is equally clear that scarcity is not a current problem. As the Phase II Report concludes, “. . . [T]he relief of name scarcity is unlikely to be the principal source of social benefits derived from new gTLDs” (Phase II Report, ¶ 20).

Differentiated Services and New Products. The Phase II Report notes new domain uses that are possible with TLDs, comparing such prospects to existing TLDs, *e.g.*, domains that are restricted to particular functions or applications (such as existing TLD .mobi), domains that restrict second level registration to a particular class of owners (such as existing TLDs .museum, and .aero), and domains that restrict second-level registration to presenting a certain type of content (such as current domains relating to a specific geographic area). However, in each case, the experts conclude that the benefits were little more than speculative and that many of the TLDs adopted by ICANN in the last expansion round have been practical failures (Phase II Report, ¶¶ 39, 50, 58, 59, 62).

There is no demonstrable need to increase generic Top Level Domain names on an unlimited basis, and no likely benefit that would result from such an unrestricted increase.

A wide array of 22 suffixes such as “.biz,” “.info,” “.jobs,” “.travel” and “.museum” currently exist, not including the country codes. Most of those gTLD names are minimally used, but nonetheless actively policed by brand owners concerned about trademark dilution, cybersquatting and the online sale of pirated or counterfeited products.¹⁰ The gains assumed by ICANN are completely unsubstantiated. In contrast, the new Program will throw the domain name universe into widespread confusion, impose major costs on marketers and cause harm to consumers. If there is no scarcity of space within the existing domain name system, the ICANN Program appears to be a solution in search of a problem. Even more seriously, the “solution” proposed by ICANN is likely to impose enormous costs on the Internet and divert productive resources at a time where these dollars could be far more effectively used for job creation and productive capital investment.

gtlds-16jun10-en.pdf; Michael L. Katz et al., Reply to Comments on An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names (2010 [sic]) <http://www.icann.org/en/topics/new-gtlds/analysis-response-economic-framework-21feb11-en.pdf>; Michael L. Katz et al., Reply to Comments on Economic Considerations in the Expansion of Generic Top-Level Domain Names Phase II Report: Case Studies (2011) <http://www.icann.org/en/topics/new-gtlds/analysis-response-phase-ii-report-21feb11-en.pdf>.

¹⁰ For further background on the online piracy and counterfeiting arguments, *see* Mark Monitor, Traffic Report: Online Piracy and Counterfeiting (January 2011) (The study used only 22 brands and found that for those brands online distribution of pirated digital content and e-commerce sales of counterfeit goods were rampant).

Serious Adverse Economic Impacts if the Program is Adopted

AFE Consulting, a globally-respected economic consulting firm, is carrying out an economic analysis of the ICANN gTLD program at the request of ANA. One of the principals of the firm is Robert E. Hall, who is the Robert and Carole McNeil Joint Professor of Economics at Stanford University and Senior Fellow at Stanford's Hoover Institution. Also, in 2010, he served as the President of the American Economic Association.

In a letter last week to Commerce Secretary John Bryson, Professor Hall noted that, “the proliferation of gTLDs would raise the monitoring costs of domain name owners. ICANN has acknowledged that such proliferation would raise costs but nevertheless maintains—without any quantification of either costs or user benefits—that the benefits would exceed these costs.”¹¹ Professor Hall then emphasized that, “In fact, the benefits, as we have demonstrated above are negligible. The costs are not.”

Professor Hall then concludes that ICANN's unlimited expansion would be “contrary to the interests of both consumers and businesses” and would impose serious costs on the global multi-stakeholder community that ICANN serves.¹²

These are not just our views. The studies ICANN initiated itself recognize that the Program may cause several severe economic harms. As set forth in Paragraph 63 of the Phase II Report, the costs of the Program may include the following:

Misappropriation of Intellectual Property. The experts cite a key concern of misappropriation of intellectual property rights, including the “costs of domain watching, defensive registrations, litigation or other measures to end misappropriation, and costs due to misappropriation that is not blocked (*e.g.*, lost profits due to sales of counterfeit goods or brand dilution).”¹³

Defensive Registrations. As noted, brand owners may be compelled to file defensive registrations, *i.e.*, “registrations undertaken to protect legitimate trademark or intellectual property rights from misuse, not registrations undertaken as the ‘defense’ of one’s business against increased competition on the merits.”¹⁴ This cost alone could be in the hundreds of thousands of dollars per brand name, creating a multi-million dollar liability for major corporations and a multi-billion dollar cost to the industry.

¹¹ Letter to the Honorable John Bryson from Dr. Robert E. Hall and Michael A. Flynn, dated Dec. 7, 2011 (attached hereto as Exhibit D).

¹² *Id.*

¹³ Michael L. Katz et al., Economic Considerations in the Expansion of Generic Top-Level Domain Names Phase II Report: Case Studies (2010) at ¶63, <http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf>.

¹⁴ *Id.*

Several Internet Domain name sellers have estimated the range of costs for gTLD applications alone. For example, in an article entitled, “Sweeping Away Confusion Regarding gTLD’s,” Gretchen Olive stated that, “Those applying will need a *minimum* of \$800,000 to \$1 million to not only submit the application, but also to defend it against objections lodged by third parties and to get through the contract process with ICANN and set up the registry technical infrastructure (emphasis added).”¹⁵ The article further noted that, “Monitoring for infringement and submission of objections will likely run most organizations between \$25,000 and \$50,000 in 2012.”¹⁶

Domain Navigation Dilution because Consumers have More Places to Look. The experts note that the “introduction of additional gTLDs may increase the costs of Internet navigation by increasing the number of potential domains over which a user may search. To the extent that such effects arise, they can dilute the value of existing domain names as navigation devices. The costs associated with such dilution include the costs of defensive registrations . . . and the costs due to dilution that cannot be mitigated.”¹⁷

Harm to Internet Users from Increased Cybersquatting. One of the most incipient and costly challenges to the adoption of any new gTLD is the prospect of cybersquatting and the substantial costs associated with preventing and policing it, which are already well into the billions of dollars. With respect to cybersquatting, the experts note, “In addition to harm in the form of increased search costs consumers may suffer more direct harm from increased cybersquatting. This direct harm may result from malware, phishing, and the unknowing purchase of counterfeit goods.”¹⁸ While the experts opine that such a result “may” occur, history proves that cybersquatting will occur, just as it has with every TLD that has ever been administered by ICANN.

Reduced Investment by Intellectual Property Owners. The protection and development of intellectual property is a core value for the global economy, particularly given the world’s reliance on technology. As ICANN’s own experts conclude, the Program seriously undermines intellectual property rights – “There may also be indirect harms from the loss of intellectual property owners’ incentives to invest in that intellectual property due to concerns that some of the benefits of that investment would be misappropriated.”¹⁹

¹⁵ Gretchen Olive, Sweeping Away Confusion Regarding gTLDs, ADOTAS (Nov. 8, 2011) *available at*: <http://www.adotas.com/2011/11/sweeping-away-confusion-regarding-gtlds/>.

¹⁶ *Id.*

¹⁷ *Id.* at note 9, *supra* (Phase II Report).

¹⁸ *Id.*

¹⁹ *Phase II Report.*

Losses from Failed TLDs. History itself discredits ICANN's position that the introduction of new TLDs will increase innovation and competition. One need only look at the dismal financial registration and track record of TLDs like .museum and .aero to prove the point. Such failures are very disruptive and costly to companies that have registered. This reality is borne out by the authors of the Phase II Report, who conclude that “[i]f a new gTLD failed and ceased operation, external costs might be imposed on the Internet community. Registrants in a failed gTLD might be stranded, unable easily to move their websites (on which they may have based their business) to other TLDs due to embedded links. More generally, Internet users might face increased clutter on the Internet if links fail to resolve.”²⁰ Clearly, these types of dangers are likely to be substantially magnified by allowing an unrestricted proliferation and explosive growth of domains.

ICANN has in effect dismissed these concerns in reliance on what its own experts have noted as “speculative” competitive benefits of the Program. However, is it really credible that the broad group represented by the CRIDO membership - that includes some of the largest national and international advertisers, brand holders and associations in the world, with representation cutting across a vast range of industry sectors - can all be unable to foresee what are their true competitive interests?

ICANN’s Deliberation Process is Flawed

Nevertheless, ICANN is now moving forward with the Program. ICANN justifies ignoring these studies in its report entitled, “Rationale for Board Decision on Economic Studies Associated with the New gTLD Program.”²¹ With all due respect, the “Rationale” is nothing short of a nullification of ICANN’s own mandate to conduct economic studies. Rather than calling for further expert analysis, ICANN dismisses the very economic evidence derived from the studies and opts for a default justification of “competition” in which any TLDs may be adopted. Furthermore, ICANN minimizes the Phase II Report’s conclusion that registry competition will not be significantly affected by the Program; ICANN says its real interest is competition in business generally, and claims that any additional economic study on that subject would be futile.²² We understand that ICANN contemplates further studies once the new gTLD Program

²⁰ *Id.*

²¹ Available at www.icann.org/en/minutes/rationale-economic-studies-21mar11-en.pdf. See also ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, available at www.icann.org/en/minutes/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf. Even in its final rationales, ICANN acknowledges that no determination could be made that the benefits of the new gTLD program will outweigh the costs.

²² See ICANN, Minutes of Board Meeting 25 January 2011, Economic Studies - <http://www.icann.org/en/minutes/minutes-25jan11-en.htm> (“[T]he Board has determined that no further commissioned economic studies could better inform the Board's decision.” *Id.* at 8). See also ICANN, Rationale for Resolution 2011.01.25.22 (2011) at 1, <http://www.icann.org/en/minutes/rationale-economic-studies-21mar11-en.pdf>; see also Anthony Van Couvering, ICANN’s Economic Study – It Depends, Minds + Machines Blog (Jul 21, 2010)(Commenting on the June 2010 Katz economic study Mr. Van Couvering said, “Should observers of ICANN

is underway,²³ but at that point, the damage will have been done. Once new gTLDs are deployed, there is no turning back.

If this Program, in fact, were likely to enhance competition and the Internet marketplace, one would expect broad statements of support for it. This support would come from many Internet and governmental sources. Instead, the voices that are speaking in favor of the Program appear to come almost exclusively from registrars, registries and others who will directly profit from facilitating the gTLD roll out – not those whom ICANN says will benefit. The broader Internet business community is clearly rejecting the proposal.

This scant and conflicting economic analysis is one of many examples in which ICANN has disregarded its own requirements and unilaterally issued an edict. ICANN's own Code of Conduct²⁴ mandates that ICANN will “[w]ork to build consensus with other stakeholders in order to find solutions to the issues that fall within the areas of ICANN’s responsibility. The ICANN model is based on a bottom-up, consensus driven approach to policy development.” Its undertakings with the U.S. Department of Commerce additionally require that ICANN act rationally and transparently.²⁵

Clearly, the legal and due diligence requirements of ICANN's own mandates have not been met here. An effort to foist on the world community and markets a change of this magnitude is not the measured “bottom up” approach described in the Code of Conduct. Moreover, it is impossible to describe the decision to adopt the Program as a decision based upon consensus where the research, comments and reports submitted to ICANN clearly show that there was and still is no consensus on the purported benefits of the Program.

Excessive Costs and Harms to Brands

The immediate cost imposed on businesses is likely to be in the billions of dollars. Applying for a new Top Level Domain name will require an extraordinarily expensive registration fee of

lend any credence to this study? If your goal is to advocate a position without any empirical evidence, it is an excellent tool. If your goal is to understand what the new gTLD program will produce, it will, if printed out and bound, make a splendid paperweight”).

²³ <http://www.icann.org/en/minutes/minutes-25jan11-en.htm>.

²⁴ <http://www.icann.org/en/documents/code-of-conduct-10jan08-en.pdf>.

²⁵ ICANN's Code of Conduct at <http://www.icann.org/en/documents/code-of-conduct-10jan08-en.pdf>; see also, Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (September 30, 2009) at <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm> (“ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: . . . (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development”).

\$185,000 as well as a minimum cost of \$25,000 paid annually to ICANN over the ten-year contractual commitment that successful applicants must make. Costs will further escalate at the second level of naming – the word to the left of the “dot” – as brand owners will have to consider registering each of their brand-related terms, for either commercial or defensive purposes.

Some have estimated that, for a typical company, the cost of acquiring a single gTLD and managing it over the initial commitment of ten years could easily exceed \$2 million, including expenses for the application process, operations, disputes, and related legal services. The costs associated with trademark monitoring and protection in all the new gTLD spaces will run even higher. Some CRIDO members spend over \$1 million a year today to enforce against cybersquatting and fraud in the existing 22 gTLD spaces. These numbers will clearly escalate if ICANN’s proposal goes forward. In addition, many companies may face an auction for a generic Topic Level Domain, which will result in higher costs to ICANN’s benefit. Many companies have hundreds or even thousands of brands to defend. Brand owners will face a Hobson’s choice of either being compelled to spend substantial resources to acquire and manage new gTLDs or risk the harm to their brands that could occur if they take no action. This has certainly been the message spoken loud and clear to us from our members and the many groups within CRIDO.

Following the Money

Existing and prospective Internet registries and registrars stand to be the primary beneficiaries of the new gTLD Program. Just examining ICANN’s own financial statements, it would appear that registries and registrars pay fees that comprise the lion’s share of ICANN’s budget. According to ICANN’s own audit reports for the Fiscal Year 2011, ICANN’s primary source of revenue comes from Internet registries and registrars. In fact, of ICANN’s \$69.3 million in revenue for Fiscal Year 2011, \$64.5 million came from fees paid by registries and registrars.²⁶ That is 93% of ICANN’s 2011 revenue. In 2010, that same figure was 94%.²⁷ Looking ahead to this new gTLD program, more TLDs mean new business for registries and registrars and greater numbers of registries and registrars, which in turn creates more fees for ICANN.

However, ICANN’s budget incentive for new gTLDs will be more than increased registry and registrar fees. The initial application fees expected in FY 2012 and 2013 will provide the organization with a considerable boost to its budget – a \$92.5 million boost - which in fact is likely to be a quite conservative figure because it only projects 500 applications. However, at last week’s hearing held by the Senate Commerce Committee, ICANN’s representative suggested that the new gTLDs that will be allowed in the first year alone could be as high as 1,000 or more applications.²⁸ In the Fiscal Year 2012 budget projections for new gTLD

²⁶ See Report of Independent Auditors and Financial Statements for the Internet Corporation for Assigned Names and Numbers, prepared by Moss-Adams LLP June 30, 2011 and 2010, *available at*: <http://www.icann.org/en/financials/financial-report-fye-30jun11-en.pdf>.

²⁷ *Id* at 2.

²⁸ New gTLD Program Cash Flow and P&L by Fiscal Year, ICANN.org, (September 9, 2011) (showing the gTLD financial projections) *available at*: <http://www.icann.org/en/financials/new-gtld-program-cash-flow-09sep11-en.pdf>

revenues are expected to add another \$27.8 million to ICANN's revenue – or adding another 40% to its budget.²⁹ Likewise, in draft Fiscal Year 2013 new gTLD revenues are expected to add another \$64.8 million – that is nearly a 94% increase in revenues above the 2011 fiscal year figures mentioned above.³⁰

ICANN says that it will use these revenues for intensive application review processes, but we would be remiss if we did not add that \$30 million or nearly one-third of all expected gTLD application revenues will be earmarked for a litigation risk fund. ICANN is clearly expecting many problems with this application window given the large litigation budget anticipated.³¹

Lack of Consensus

It is true that ICANN spent a number of years considering this Program at meetings around the world. However, the 156 members of CRIDO, representing major global companies and business groups, are living proof that the objections of industry sectors most affected by this Program have not been adequately considered or addressed by ICANN. A number of CRIDO members have actively voiced objections to the new gTLD process and the lack of adequate trademark protection mechanisms, yet this entire constituency – the one required to fund the new names and maintain the Internet's economic model – has been largely ignored. On the other hand, we do not hear any clamor for the Program. ICANN has failed to reach stakeholder consensus, a specific requirement of its contract with the NTIA.

The lack of consensus is demonstrated by a report from ICANN's own Implementation Recommendation Team (IRT), a group of 18 experts in trademark protection on the Internet. In a statement presented to ICANN and the public at large, the IRT noted that, "A sizeable number of our team would have preferred status quo with no new gTLDs until better Rights Protection Mechanisms are in place for the existing gTLDs."³² In addition, the IRT emphasized that others in the IRT group favored only "the measured introduction of community based gTLDs."³³ The

("gTLD Cash Flows Projections"); Delegation Rate Scenarios for New gTLDs, ICANN.org, (Oct. 2010) at p 6 (showing 1000 applications as extremely high activity and 1000's of applications as the maximum throughput) *available at:* <http://www.icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf>. *See* Senate Commerce Committee "ICANN's Expansion of Top Level Domains" Archived Webcast (Dec. 8, 2011) *available at:* http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=22f4a71e-93e9-4711-acec-3ed7f52277cc&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=12&YearDisplay=2011.

²⁹ *gTLD Cash Flow Projections* at 2.

³⁰ *Id.*

³¹ *Id.*

³² *See* Final Draft Report of the Implementation Recommendation Team as submitted to ICANN Board and posted for public comment on May 29, 2009, *available at:* www.icann.org/en/topics/new-gtlds/irt-final-report-trademarkprotection-29may09-en.pdf ("IRT Report").

³³ *Id.*

report noted that the team was frequently reminded of the scale of abusive behavior in the current domain name system: “It emerged that each one of the five brand owners on the IRT expects to face at least one new domain name infringement somewhere in the world every day of the year.”³⁴ What is clear is that despite ICANN’s reference to this group’s efforts, the IRT’s views do not represent a “consensus” in favor of the proposed unlimited expansion of gTLDs and actually suggest that many of the members believed that such a step would be, at the very least, premature or even misguided.

Conflict of Interest Concerns

We are very concerned about potential conflicts of interest that may be present in this expansion proposal, for both the Board and staff of ICANN. It is very troubling that many of the same individuals who approved this expansion, including ICANN’s former Chairman, now stand to benefit substantially from companies that will register applicants and manage the expansion. For example, within one month after the vote of the ICANN Board to approve the new gTLD expansion, former ICANN Chairman Peter Dengate Thrush had joined a London company called Top Level Domain Holdings, a company that will directly profit from the decision.

These events have cast a serious cloud over the legitimacy of the vote to approve the new gTLD Program. ICANN serves as a quasi-governing body for the day-to-day operations of the Internet. It is absolutely critical that all decisions are made in the public interest, not in the best interest of the closely-knit ICANN family.

We believe that ICANN can reclaim its legitimacy as an Internet governance body only by conducting a thorough and proactive review of both the gTLD expansion and the broader conflict of interest and ethics policies for the organization. We expressed these concerns in a letter to ICANN on October 2, 2011, which is available at <http://www.ana.net/getfile/16766>. Our letter notes that serious concerns about the inadequacy of the ICANN conflict of interest policies have been expressed by Senator Ron Wyden (D-OR), by Lawrence Strickling, Assistant Secretary for Communications and Information at the U.S. Department of Commerce, and by the full European Commission.

At its October meeting in Dakar, ICANN’s Governmental Advisory Committee (GAC) expressed “extreme concern about the inadequacy of the existing rules of ethics and conflict of interest” in ICANN.³⁵ The conflict of interest issues threaten to undermine confidence in ICANN’s decision-making. Obviously, if ICANN merely adopts prospective conflict of interest corrections they will not undo harms that have already occurred. Attention must be paid to the effects of conflicts on ICANN’s deliberations and the legitimacy of the gTLD roll out proposal.

³⁴ *Id.* at page 2.

³⁵ *See* note 6, GAC Communiqué, *supra*.

Exemptions to the Program

Three groups were exempted or exempted themselves from the new gTLD Program: the Red Cross, the Olympics and ICANN itself. In letters to ICANN, both the Red Cross and the Olympics stated that they needed this type of protection to assure that the public who trust their brand identities would not fall victim to typosquatting, cybersquatting and phishing. The Red Cross noted that a substantial portion of their resources are used to counteract “fraudulent websites containing Red Cross names to solicit donations routinely after virtually every newsworthy disaster.”³⁶

While these exemptions may be appropriate, no other exemptions were extended to the thousands of other charities and foundations that similarly use the Internet to foster their public interest activities – yet they surely face the same kinds of harms.

The fact that ICANN exempted itself is even more informative. ICANN not only exempted its own name from the gTLD process, but several other names as well. But the protections for ICANN will not end at the top level. ICANN will have the opportunity to negotiate more protections for itself at the second level once new gTLD registries are selected. Take for example, the many reservations that ICANN made for itself on the new .xxx domain. In the .xxx registry, ICANN was even able to protect names of some of its leadership.³⁷ No other groups received the same protection. Major universities across the country, for example, have recently found it necessary to purchase multiple .xxx domain names to protect against links of their names to porn sites. The Ohio State University purchased a total of 19 domains, including buckeyeblitz.xxx and goldpants.xxx.³⁸ Texas A&M purchased 15 secondary domains, including the name of their mascot “Reveille” at a “cost of \$3,000 to \$5,000.” Gary Suswein, a spokesman at the University of Texas at Austin, explained why colleges and universities are taking these actions: “The way we view this is an insurance policy. It costs us something upfront but we avoid the problem of having our reputation...tarnished by websites we can’t control or don’t support.”³⁹

In addition, the Council of Better Business Bureaus (CBBB) has been told that it cannot even protect BBB, one of the most recognized trademarks in North America because the ICM

³⁶ David Meltzer, Senior Vice President International Services, Peggy Dyer, Chief Marketing Officer and Mary S. Elcano, General Counsel and Corporate Secretary, American Red Cross, to Kurt Pritz, Senior Vice President, Stakeholder Relations and Amy Stathos, Deputy General Counsel, ICANN, June 16, 2011, page 2.

³⁷ Kevin Murphy, RodBeckstrom.xxx Will Never See the Light of Day, Domain Incite (Sept. 14, 2011) *available at*: <http://domainincite.com/rodbeckstrom-xxx-will-never-see-the-light-of-day/>.

³⁸ FoxNews.com, Penn State Bought Adult .XXX Domain Names to Block Usage Prior to Sex Abuse Scandal (Nov. 30, 2011) *available at* <http://www.foxnews.com/us/2011/11/30/penn-state-buys-adult-domain-names-to-block-usage/>.

³⁹ Associated Press, Colleges Buying .XXX Sites to Head Off Porn, Chron.com (Dec. 11, 2011) *available at*: <http://www.chron.com/news/article/Texas-colleges-buying-xxx-sites-to-head-off-porn-2395705.php>.

Registry that oversees the .xxx Top Level Domain had reserved “bbb.xxx as a premium name that it can later auction off to the highest bidder.”⁴⁰

The problems the CBBB faces are hardly isolated. Angela F. Williams, general counsel of the YMCA, testified last week on behalf of that organization and a consortium of other similar organizations which comprise the Not-for-Profit Operational Concerns Constituency (NPOC) before the Senate Commerce Committee. Ms. Williams emphasized that the 1.5 million not-for-profit entities in this country are likely to be severely impacted by the virtually unlimited expansion of gTLDs, as this initiative is likely to increase “public confusion and fraud” and that “this will greatly increase the likelihood that the public will be misled in a manner that is both financially devastating and dangerous to the reputation of those organizations – making it difficult for them to achieve their worthy mission.”⁴¹

These exemptions explode the argument that ICANN makes that it has developed adequate protections against cybersquatting, typosquatting and phishing. These charitable and other NGO groups will face the same dangers that the Red Cross and the Olympics highlighted, and many of them will not have the financial wherewithal to defend and protect their good name in the Internet marketplace.

Not All TLDs Are Alike

Our concerns primarily focus on generic Top Level Domains (gTLDs). These concerns do not generally extend to so-called ccTLDs dealing with country designators such as .co, .cn, .eu, and .de. Nor are we opposed to the use of other languages and character sets in the Domain system, although we believe that the public interest requires that all Top Level Domains be cost beneficial and not impose undue burdens on the Internet or undermine consumer trust. Neither do we believe that there is something sacrosanct about maintaining the existing 22 gTLD system unaltered. However, all of our companies, associations and groups believe the unrestricted and unlimited expansion of gTLDs is a reckless experiment that needs to be halted and reassessed before it damages the very positive growth of consumer trust that is fundamental to the Internet marketplace.

The Department of Commerce and ICANN

In a speech on December 8 before the Practicing Law Institute, NTIA Administrator Larry Strickling addressed the growing concerns about ICANN’s proposal.⁴² Administrator Strickling

⁴⁰ See Exhibit E.

⁴¹ See Testimony of Angela F. Williams before the Senate Commerce, Science and Transportation Committee (Dec. 8, 2011), available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=56a49ede-865f-4bbe-9635-58d0b59add7b.

⁴² See Remarks of Assistant Secretary Strickling at the Practicing Law Institute's 29th Annual Telecommunications Policy & Regulation Conference, dated, Dec. 8, 2011 available at:

made several points with which we agree: consumer trust in the Internet is of paramount importance. It is in the best interest of all that the Internet not be controlled by any one nation or group. In addition, a multi-stakeholder process that achieves consensus will ensure that stakeholders are both involved in the discussions and, hopefully, result in an environment that encourages creativity and innovation. Unfortunately, we do not believe that these goals have been fostered by ICANN's gTLD roll-out program.

As noted above, ICANN's expansion proposal raises dramatically increased risks for cyberharm. Instances of cybersquatting, malware, phishing and other dangerous Internet activities that occur today will only increase exponentially with the expansion in domain names that ICANN proposes. These growing threats will lead to consumers placing less – rather than more – trust in the Internet, as they fear their online activities may be subject to harmful or predatory practices.

Furthermore, we do not advocate that the U.S. Government – or any government, for that matter – control the Internet. We also do not seek the abolition of ICANN. Rather, we are concerned that the severe harms that could result from this proposal (if implemented in its current form) could drastically undermine the foundations of ICANN and its supervisory role over Top Level Domains.

As noted previously, the stakeholder process conducted by ICANN clearly has not achieved consensus. The concerns expressed by CRIDO's members alone – representing an extraordinary cross section of the varied and numerous sectors of our economy – show that there is no agreement about the need for, or method of, proceeding with the expansion at this time. Numerous non-profit organizations and law enforcement agencies are also expressing their deep concerns.

When so many business sectors forcefully express their view that the expansion will be severely harmful, it is difficult to imagine that the expansion will create the flexible and innovative environment needed to produce jobs and spur product development. Instead, if companies' need to engage in widespread defensive measures and have to incur major other costs to protect their brands, then this is almost certain to divert key resources from the productive and constructive efforts so needed in today's challenging economic environment.

Conclusion

We commend the Subcommittee for holding this important hearing. Given the serious concerns expressed by the extraordinarily broad and growing cross-section of the entire American and global business community, the companies which provide the economic foundation of the Internet, and the potential dangers to consumers, we believe it would be totally irresponsible and reckless for ICANN to proceed full-speed ahead with the roll-out next month.

We very much appreciate this opportunity to testify and for your careful consideration of our and the other members of CRIDO's views.

Association Signatories to the ICANN Petition

AAF-Amarillo
AAF-Dallas
AAF-Fort Worth
AAF Hampton Roads
AdClub Cincinnati
Advertisers Association of Guatemala (Guatemala)
Advertisers Association of Nigeria (Nigeria)
Advertisers Association of Turkey (Turkey)
Advertisers Business Group (United Arab Emirates)
Agrupacion Nacional de Anunciantes de Mexico (Mexico)
American Advertising Federation (AAF)
American Advertising Federation Baltimore, Inc.
American Advertising Federation of Des Moines
American Apparel & Footwear Association (AAFA)
American Association of Advertising Agencies (4As)
American Beverage Association (ABA)
American Council of Life Insurers (ACLI)
American Health Care Association (AHCA)
American Insurance Association (AIA)
American Intellectual Property Law Association (AIPLA)
American Society of Association Executives (ASAE)
Asociacion Espanola de Anunciantes (Spain)
Asociacion Nacional de Anunciantes de Colombia (Colombia)
Asociacion Nacional de Anunciantes Peru (Peru)
Asociacion Nacional de Anunciantes Venezuela (Venezuela)
Asociacion Nacional de Avisadores Chile (Chile)
Associacao Brasileira de Anunciantes (Brazil)
Associacao Portuguesa de Anunciantes (Portugal)
Association of Advertisers in Ireland (Ireland)
Association of Canadian Advertisers (Canada)
Association of National Advertisers (ANA)
Association of New Zealand Advertisers (New Zealand)
Association of Swiss Advertisers (Switzerland)
Austin Advertising Federation
Australian Association of National Advertisers (Australia)
Boise Advertising Federation
Bond van Adverteerders (The Netherlands)
Bulgarian Association of Advertisers (Bulgaria)
Cable Advertising Bureau (CAB)
Camara Argentina de Anunciantes (Argentina)
Camara de Anunciantes del Paraguay (Paraguay)
Camara de Anunciantes de Uruguay (Uruguay)
China Association of National Advertisers (China)

Consumer Electronics Association (CEA)
Czech Association for Branded Products (Czech Republic)
Cyprus Advertisers Association (Cyprus)
Dansk Annoncoerforening (Denmark)
Direct Marketing Association (DMA)
European Association of Communications Agencies (EACA)
European Publishers Council (EPC)
Food Marketing Institute (FMI)
Grocery Manufacturers Association (GMA)
Groupement des Annonceurs du Maroc (Morocco)
Hellenic Advertisers Association (Greece)
Hungarian Branded Goods Association (Hungary)
Idaho Advertising Federation
Idaho Falls Advertising Federation
Incorporated Society of British Advertisers (United Kingdom)
Indian Society of Advertisers (India)
Indonesia Advertisers Association (Indonesia)
Intellectual Property Owners Association (IPO)
Interactive Advertising Bureau (IAB)
IAB Europe
The Israel Marketing Association (Israel)
Japan Advertisers Association (Japan)
Lebanese Association of Advertisers (Lebanon)
Lewis-Clark Valley Advertising Federation
Magic Valley Advertising Federation
Mainostajien Liitto (Finland)
Malaysian Advertisers Association (Malaysia)
The Marketing Association of South Africa (South Africa)
Mobile Marketing Association (MMA)
MPA - the Association of Magazine Media
National Association of Broadcasters (NAB)
National Association of Manufacturers (NAM)
National Confectioners Association
National Council of Chain Restaurants (NCCR)
National Restaurant Association (NRA)
Norwegian Association of Advertisers (Norway)
Organisation Werbungtreibende im Markenverband (Germany)
Pakistan Advertisers Society (Pakistan)
Philippine Association of National Advertisers (The Philippines)
Pocatello Advertising Federation
Promotion Marketing Association (PMA)
Property Casualty Insurers Association of America
Radio Advertising Bureau (RAB)
Retail Industry Leaders Association (RILA)
Russian Association of Advertisers (Russia)
Singapore Advertisers Association (Singapore)

Slovak Association for Branded Products (Slovakia)
Slovenian Advertising Chamber (Slovenia)
Sveriges Annonsorer (Sweden)
Television Bureau of Advertising (TVB)
Union Belge des Annonceurs (Belgium)
Union des Annonceurs (France)
U.S. Chamber of Commerce
Utenti Pubblicita Associati (Italy)
World Federation of Advertisers (WFA)

Company Signatories to the ICANN Petition

Acxiom
adidas
Adobe Systems Incorporated
Allstate Insurance Company
American Express
Autodesk, Inc.
Brinker International
Burger King Corporation
The Coca-Cola Company
Chrysler Group LLC
Church's Chicken
Combe Incorporated
ConAgra Foods
Costco Wholesale Corporation
Darden Restaurants, Inc.
Dell Inc.
Denny's Corporation
Dunkin' Brands, Inc.
Educational Testing Service (ETS)
Fidelity Investments
Ford Motor Company
General Electric Company
GroupM
Hack Creative
Havas
Hewlett-Packard Company
Hunter Douglas NA
J.C. Penney Company, Inc.
The J.M. Smucker Company
Johnson & Johnson
Kellogg Company
Kraft Foods
La Quinta
Liberty Mutual

MillerCoors
Money Mailer of Amarillo
Nationwide Mutual Insurance Company
Neon Sun Tanning Salon
Nestle USA
ORCI
OSI Restaurant Partners, LLC
Papa John's
Procter & Gamble
Publicis Groupe
Pulte Group
Reebok
Rollins, Inc.
Samsung
Siemens AG
Siemens Corporation
The Toro Company
Toyota
US Bank
Vanguard
Verge
Visa, Inc.
Walmart
Xerox Corporation



November 10, 2011

The Honorable John Bryson
Secretary
US Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Bryson:

We, the undersigned, representing large and small business, in virtually every industry sector, in the United States and around the world, are writing to express our strong concern with respect to the June 2011 decision by the Internet Corporation for Assigned Names and Numbers (ICANN) to approve the top-level domain (gTLD) Applicant Guidebook and to move forward with plans to open the new gTLD application window on January 12, 2012 (the ICANN plan, decision or ICANN Proposal) on a virtually unlimited basis.

ICANN's action was taken despite widespread and significant objections raised throughout the process by many in the global community of Internet users. ICANN's decision was not made in the public interest, does not promote consumer trust, and does not benefit the public, as required in the Affirmation of Commitments between ICANN and the National Telecommunications and Information Administration (NTIA).

Moreover, additional facts have come to light since ICANN announced the most recent iteration of the Applicant Guidebook – including rounds of troubling conflict of interest questions - which cast a shadow over the entire process leading up to ICANN's decision. Those facts, combined with the current state of the global economy, raise substantial issues regarding the wisdom of moving forward with ICANN's plan, given its undisputed costs and its merely putative benefits.

The ICANN Proposal would unduly burden a diverse range of public and private brand holders, as they would be forced to spend ever-greater amounts of time and resources simply to protect their brands. In addition, there is an unacceptably high risk that the ICANN plan would confuse consumers, increase the already unacceptable level of fraud and identity theft on the Internet, create new opportunities for Internet crime, and jeopardize cyber security. Businesses and not-for-profits alike have repeatedly raised these issues with ICANN over the last four years, with no acceptable resolution.

For these reasons, we respectfully call on the Department of Commerce and, specifically the NTIA, to persuade ICANN to postpone the opening of the top-level domain application window unless or until such time as ICANN convincingly demonstrates that unlimited TLD name expansion would:

- Promote consumer trust;
- Enhance Internet security;
- Promote widespread economic benefits across diverse economic sectors and stakeholders; and
- Demonstrate that these benefits will exceed the costs that such gTLD expansion would inevitably impose on the global Internet community.

Respectfully submitted,

Organizations

AdClub Cincinnati

American Advertising Federation (AAF)

AAF-Amarillo

AAF-Dallas

AAF-Fort Worth

AAF Hampton Roads

American Advertising Federation Baltimore, Inc.

American Advertising Federation of Des Moines

American Apparel & Footwear Association (AAFA)

American Association of Advertising Agencies (4As)

American Beverage Association (ABA)

American Council of Life Insurers (ACLI)

American Health Care Association (AHCA)

American Insurance Association (AIA)

American Intellectual Property Law Association (AIPLA)

American Society of Association Executives (ASAE)

Association of Canadian Advertisers (ACA)

Association of National Advertisers (ANA)

Austin Advertising Federation

Boise Advertising Federation

Cable Advertising Bureau (CAB)

Consumer Electronics Association (CEA)

Direct Marketing Association (DMA)

European Association of Communications Agencies (EACA)

European Publishers Council (EPC)

Food Marketing Institute (FMI)

Grocery Manufacturers Association (GMA)

Idaho Advertising Federation

Idaho Falls Advertising Federation

Intellectual Property Owners Association (IPO)

Interactive Advertising Bureau (IAB)

IAB Europe
Lewis-Clark Valley Advertising Federation
Magic Valley Advertising Federation
Mobile Marketing Association (MMA)
MPA - the Association of Magazine Media
National Association of Broadcasters (NAB)
National Association of Manufacturers (NAM)
National Confectioners Association
National Council of Chain Restaurants (NCCR)
National Restaurant Association (NRA)
Pocatello Advertising Federation
Promotion Marketing Association (PMA)
Radio Advertising Bureau (RAB)
Retail Industry Leaders Association (RILA)
Television Bureau of Advertising (TVB)
U.S. Chamber of Commerce
World Federation of Advertisers (WFA)

Corporations

Acxiom
Adobe Systems Incorporated
Allstate Insurance Company
American Express
Brinker International
Burger King Corporation
The Coca-Cola Company
Combe Incorporated
ConAgra Foods
Costco Wholesale Corporation
Darden Restaurants, Inc.
Dell Inc.
Dunkin' Brands, Inc.
Educational Testing Service (ETS)
Fidelity Investments
Ford Motor Company
General Electric Company
Hack Creative
Hewlett-Packard Company
Hunter Douglas NA
J.C. Penney Company, Inc.
Johnson & Johnson

Kellogg Company
La Quinta
Liberty Mutual
MillerCoors
Money Mailer of Amarillo
Nationwide Mutual Insurance Company
Neon Sun Tanning Salon
Nestle USA
ORCI
OSI Restaurant Partners, LLC
Papa John's
Procter & Gamble
Publicis Groupe
Pulte Group
Samsung
US Bank
Vanguard
Verge

cc: Lawrence E. Strickling, Assistant Secretary for Communications and Information and
Administrator, National Telecommunications and Information Administration, U.S.
Department of Commerce

Fiona Alexander, Associate Administrator, National Telecommunications and
Information Administration, U.S. Department of Commerce

Vernita Harris, Deputy Associate Administrator of the Office of International Affairs,
National Telecommunications and Information Administration, U.S. Department of
Commerce

Suzanne Murray Radell, Senior Policy Advisor, National Telecommunications and
Information Administration, U.S. Department of Commerce

Elizabeth Bacon, Telecommunications Policy Specialist, National Telecommunications
and Information Administration, U.S. Department of Commerce

Cameron F. Kerry, General Counsel, U.S. Department of Commerce

Daniel K. Inouye, Chairman, Committee on Appropriations, U.S. Senate

John D. Rockefeller, Chairman, Committee on Commerce, Science and Transportation,
U.S. Senate

Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate

Thad Cochran, Ranking Member, Committee on Appropriations, U.S. Senate

Kay Bailey Hutchison, Ranking Member, Committee on Commerce, Science and Transportation, U.S. Senate

Charles E. Grassley, Ranking Member, Committee on the Judiciary, U.S. Senate

Barbara Mikulski, Chair, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. Senate

Al Franken, Chairman, Subcommittee on Privacy, Technology and the Law, Committee on the Judiciary, U.S. Senate

Tom Coburn, Ranking Member, Subcommittee on Privacy, Technology and the Law, Committee on the Judiciary, U.S. Senate

Ron Wyden, Chairman, Subcommittee on International Trade, Customs, and Global Competitiveness, Committee on Finance, U.S. Senate

Harold Rogers, Chairman, Committee on Appropriations, U.S. House of Representatives

Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives

Lamar Smith, Chairman, Committee on the Judiciary, U.S. House of Representatives

Norm Dicks, Ranking Member, Committee on Appropriations, U.S. House of Representatives

Henry A. Waxman, Ranking Member, Committee on Energy and Commerce, U.S. House of Representatives

John Conyers, Ranking Member, Committee on the Judiciary, U.S. House of Representatives

Bob Goodlatte, Chairman, Subcommittee on Intellectual Property, Competition and the Internet, Committee on the Judiciary, U.S. House of Representatives

Frank Wolf, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. House of Representatives

Mel Watt, Ranking Member, Subcommittee on Intellectual Property, Competition and the Internet, Committee on the Judiciary, U.S. House of Representatives

Chaka Fattah, Ranking Member, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. House of Representatives



Governmental Advisory Committee

Dakar, 27 October 2011

GAC Communiqué – Dakar

I. Introduction

The Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) met in Dakar, Senegal during the week of October 22-27, 2011. Forty-nine Governments participated in the meeting: 46 present and 3 by remote participation and six Observers. The GAC expresses warm thanks to the local hosts, The Ministry of Communication, Telecommunications and Information Technology (MICOMTELTIC) and the Regulatory Authority for Telecommunications and Post (ARTP) for their hospitality in organizing the meeting and ICANN for supporting the GAC during the meeting.

II. New gTLDs

The GAC further discussed and decided on the formulation of GAC advice for inclusion in Module 3 of the Applicant Guidebook [Annex I].

During the discussion ICANN Staff underlined their understanding that advice regarding the definition of Geographic Names should be adopted by the GAC.

The GAC congratulates the JAS working group on the final report and recommendations, which are consistent with GAC advice. The GAC looks forward to the Board providing clear timelines for implementation of the recommendations to enable needy applicants to join in full and meaningfully in the first round.

The GAC raised concern about the unpredictability of the actual number of applications that governments would have to digest to proceed after the end of the application period. The GAC made clear, that if the number of applications published by ICANN significantly exceeds 500, GAC members might not be able to process a very large number of applications in the very short early warning procedure and in the limited time for issuing GAC advice on all these strings.

Further, the GAC asked ICANN for clarification about its intention to process these applications in batches of 500, in the case that there are more than 500 applications. The GAC urges ICANN to clarify the procedures and implications for applicants being processed in different batches, as this might have implications for competition and applicants' business models.

Following presentations by the ICANN staff and the Security and Stability Advisory Committee, the GAC took note of the SSAC consideration of the combined impact of new gTLDs and other changes such as the introduction of IPv6, DNSSEC and IDNs to the root. The GAC welcomes the confirmation of the commitment by the ICANN Board to provide a full report with a complete analysis, including all underlying data, of the root system scalability well before the opening of the new gTLDs application round. The GAC further welcomes the confirmation of the commitment by the Board to evaluate the impact on the system after the 1st round, with the understanding that the launch of a second round is contingent on the outcome of this evaluation, in particular the absence of negative effects on the root system. The GAC believes that in order for this evaluation to be effective, an appropriate and trustable monitoring system needs to be in place.

In its discussions with the Board regarding the Communication Plan for new gTLDs, the GAC emphasised the importance of promoting the gTLDs application round in all countries, including developing countries. The GAC suggested that levels of awareness be continually assessed and reviewed, and priorities and target areas under the Plan be adjusted accordingly in the run up to the launch of the round.

The GAC welcomed the assurances received from the Board and staff that the evaluation of applications will ensure a level playing field for applicants and that any conflicts of interest will be identified and avoided accordingly.

III. Law Enforcement (LEA) Recommendations

In recent years, the Internet has grown to have over two billion users and be a significant contributor to the global economy.

Cyber-crime is a growing threat to the security and stability of the Internet, with broad and direct public policy impacts. Recent estimates suggest that the direct financial impact of cyber crime is extremely significant.

Law enforcement agencies have identified a series of specific problems which are limiting their ability to address this growing problem.

As part of this, law enforcement agencies have identified specific areas of concern in the ICANN context, relating to contractual weaknesses and a lack of necessary due diligence.

To address these urgent problems, in 2009 law enforcement agencies made 12 concrete recommendations to reduce the risk of criminal abuse of the domain name system.

These recommendations were informally socialized with the registrar community, the GAC, and with ICANN compliance staff over the course of several months, before the GAC advised the Board in its Brussels communiqué that it formally endorsed the recommendations.

Direct exchanges between law enforcement agencies and registrars continued in September 2010 in Washington D.C., in February 2011 in Brussels, and during the March and June 2011 ICANN meetings.

As a complement to the June exchanges in Singapore, the GAC urged the Board to support actions necessary to implement those recommendations as a matter of urgency.

To date, none of the recommendations have been implemented, and the risks remain. The GAC therefore advises the ICANN Board to take the necessary steps to ensure that ICANN's multistakeholder process effectively addresses these GAC-endorsed proposals as a matter of extreme urgency.

IV. Accountability and Transparency Review Team Recommendations (ATRT)

The GAC welcomes the update provided by ICANN staff on the ATRT Recommendations progress and the suggestions presented with regards to the implementation of recommendations 9 through 14 on the GAC role, effectiveness and interaction with the Board.

The GAC looks forward to an expedited implementation of the Joint Working Group and ATRT recommendations and is keen to continue working with the Board on the Recommendations related to the GAC.

V. Conflict of interest

The GAC expresses extreme concern about the inadequacy of the existing rules of ethics and conflict of interest in the light of recent events and therefore welcomes the approval of the motion by the Board Governance Committee on 15 September 2011 concerning "ethics and conflicts of interest". The GAC looks forward to the publication of a timeline with clear and effective actions as a conclusion of the Dakar meeting or shortly thereafter. In order to ensure the legitimacy and sustainability of the multi-stakeholder model as enshrined in ICANN, the GAC underlines the extreme urgency of putting in place effective and enforceable rules on conflicts of interest.

The GAC will keep this important issue under review and may come forward with further advice before the Costa Rica GAC meetings.

VI. Meeting with the Generic Names Supporting Organisation (GNSO)

The GAC and the GNSO exchanged views on a number of issues, beginning with an overview by ICANN staff of the GNSO policy development process. Consistent with the recommendations of the Accountability and Transparency Review Team and the related GAC-Board Joint Working Group, the GAC stressed its interest in ensuring that GAC views are provided and taken into account at early stages in the policy development process.

The meeting also discussed the implementation of the Law Enforcement Agency (LEA) recommendations to mitigate Domain Name System abuse, which were endorsed by the GAC in June 2010. The GAC expressed its disappointment that registrars were only able to report on their consideration of three of the twelve LEA Recommendations. Further, the reported progress fell substantially short of what GAC members believed had been achieved during its meetings with registrars in Singapore in June 2011. The GAC also expressed concern that there was no clarity on how the other nine recommendations were being progressed, despite the registrars' agreement at the Singapore meeting to provide regular status

reports. The GAC informed the GNSO Council of its intention to request the ICANN Board to take prompt and concrete action to implement the GAC/LEA recommendations.

The meeting also addressed the GAC's proposal to the GNSO on the protection mechanism for the International Olympic Committee and Red Cross/Red Crescent names at the top and second levels. The GAC requested feedback from the GNSO on the proposal as a first step in collaborating on advice for the ICANN Board in this regard, consistent with the ICANN Board Resolution in Singapore.

The GAC looks forward to further engagement with the GNSO to work more effectively within the ICANN processes and reinforce the sustainability of the multi-stakeholder model.

VII. Meeting with the At-Large Advisory Group (ALAC)

The GAC met with the ALAC to discuss Conflict of Interest issues within the ICANN Board and staff. The GAC agrees that this is a critical matter that needs to be addressed as a high priority within the community.

The GAC and ALAC also discussed the Joint Applicant Support (JAS) Working Group as well as the ALAC and GAC Joint Statement. The GAC expects a decision to be taken for implementation in time for the opening of the first new gTLD round.

In light of the common interest of advancing improvements in the ICANN model, the GAC and ALAC also discussed the ongoing work of the Accountability and Transparency Review Team (ATRT). The GAC shared the areas identified as a priority in the framework of the ATRT and the Joint Working Group recommendations, looking forward to an expedited implementation.

VIII. GAC Operating Principles

The GAC amended Principle 47 of its Operating Principles clarifying its understanding of consensus. The definition now introduced derives from United Nations practice and understands consensus as adopting decisions by general agreement in the absence of formal objections. The GAC noted that according to UN practice individual members may make reservations, declarations, statements of interpretation and/or statements of position regarding a consensus decision, provided such texts do not represent an objection to the consensus [Annex II].

IX. Joint session with the Country Code Names Supporting Organization (ccNSO)

The GAC met with the ccNSO to discuss the progress and ongoing work of the Framework of Interpretation cross-community Working Group (Fol) on delegation and redelegation, and the mechanisms for the GAC to provide feedback and contribute to this work within a timeline that the ccNSO has provided. In addition, the ccNSO shared an update of its current work areas and its organisational structure.

The GAC is eager to further engage with the ccNSO to provide timely inputs on the different stages of the Fol work.

X. Meeting with the Security and Stability Advisory Committee (SSAC)

The GAC thanks the SSAC for providing an update on its work including blocking and reputation systems, WHOIS matters and single label domain names. Further, the GAC thanks the SSAC Chair for discussions on Root Zone Scaling and Resource Public Key Infrastructure (RPKI).

The GAC looks forward to receiving further updates on DNS blocking matters and other relevant security and stability related matters.

XI. Meeting with the Nominating Committee (NomCom)

The GAC met with the Nominating Committee and discussed the skill-sets needed of an ICANN Director, as outlined in the Accountability and Transparency Review Team (ATRT) recommendations to improve the selection process. The NomCom invited individual GAC members to provide further inputs.

XII. Election of Vice-chairs

The GAC has reelected the current vice-chairs, Choon-Sai Lim (Singapore), Maria Häll (Sweden) and Alice Munyua (Kenya) to continue their mandate for another year.

The GAC warmly thanks all those among the ICANN community who have contributed to the dialogue with the GAC in Dakar.

The GAC will meet during the period of the 43rd ICANN meeting in San José, Costa Rica.

Applicant Guidebook Module 3.1: GAC Advice on New gTLDs

ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

The process for GAC Advice on new gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

GAC Advice may take one of the following forms:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.*
- II. The GAC advises ICANN that there are concerns about a particular application "dot-example". The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.*
- III. The GAC advises ICANN that a particular application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing one or more government's approval) that is implemented by the applicant.*

Operating Principles Article XII Principle 47

The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice¹, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.

[Foot note to UN practice be inserted]

¹ Statements by GAC members related to such advice will be posted on the GAC website.



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December 7, 2011

The Honorable John Bryson
Secretary
US Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Bryson:

AFE Consulting, at the request of the Association of National Advertisers (ANA), is carrying out an economic analysis of ICANN's announced intention to allow and encourage a virtually unlimited expansion of the Domain Name System (DNS) by adding many hundreds of new generic Top Level Domains (gTLDs) to the 22 already in existence and to continue to expand the number of gTLDs by the thousands in later years. The authors of this letter are professional economists leading the AFE study. We have reached the conclusion that this dramatic alteration in the landscape of the Internet would be contrary to the interests of both consumers and businesses. Our brief biographies are attached at the end of this letter.

ICANN's authority to consider the possible expansion of the number of gTLDs dates back to the November 25, 1998 Joint Memorandum of Understanding between the U.S. Department of Commerce and ICANN. We believe it is critical to keep in mind this foundational document, which, among other provisions, requires ICANN to:

Collaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs. The designed process should consider and take into account...potential consumer benefits/costs associated with establishing a competitive environment for gTLD registries.¹

¹ *Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, November 25, 1998.*



In December 2008, as ICANN proceeded with its plans for the introduction of new gTLDs, the U.S. Department of Commerce wrote to ICANN's Chairman Peter Dengate Thrush:

[I]t is unclear that the threshold question of whether the potential consumer benefits outweigh the potential costs has been adequately addressed and determined. In that regard, we would like to call to your attention a decision of the ICANN Board on October 18, 2006, that called for an economic study to address [this and related questions] ... ICANN needs to complete this economic study and the results should be considered by the community before new gTLDs are introduced.²

Following its receipt of that December 2008 letter, ICANN acknowledged that:

[S]everal members of the ICANN community requested that ICANN commission economic studies that would specifically address the possible economic consequences of new gTLDs ... Accordingly, ICANN retained the services of economist Dennis Carlton, who recently had served as the chief economist to the United States Department of Justice Antitrust Division.³

Thereafter, in March 2009, Carlton issued a report in which he concluded, generally, that:

ICANN's proposed framework for introducing new TLDs is likely to improve consumer welfare by facilitating entry and creating new competition to the major gTLDs such as *.com*, *.net*, and *.org*. Like other actions that remove artificial restrictions on entry, the likely effect of ICANN's proposal is to increase output, lower price and increase innovation. This conclusion is based on the fundamental principles that competition promotes consumer welfare and restrictions on entry impede competition.⁴

But in his series of reports, Carlton never squarely addressed or analyzed whether or not the potential future benefits of ICANN's gTLD expansion would outweigh the future costs.

² Letter to Peter Dengate-Thrush from Meredith A. Baker, December 18, 2008.

³ ICANN, *Rationale for Board Decision on Economic Studies Associated with the New gTLD Program*, March 21, 2011, at page 3.

⁴ *Preliminary Report of Dennis Carlton Regarding Impact of New gTLDs on Consumer Welfare*, March 2009, at pages 2-3, available at <http://www.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf>



To remedy this shortcoming (of which many took notice), ICANN turned to Michael Katz⁵ and Gregory Rosston for additional economic analyses. They submitted a series of three reports in June 2010, December 2010 and February 2011. In their third report—the final economic analysis of the new gTLDs received by ICANN—Katz and Rosston conceded:

[O]ur report does not conclude that benefits will exceed costs for new gTLDs as a whole...The purpose of [our report] is to lay out a structure within which *to think about* the benefits and costs of new gTLDs.⁶

They added:

[Our report] summarized prior studies on issues relevant to the introduction of new gTLDs. The report identified shortcomings of specific studies and concluded that existing studies were incomplete. *The central finding was that additional information should be collected.*⁷

At the end of this series of economic reports that ICANN itself had commissioned, ICANN reported:

Ultimately, ICANN obtained reports from several economists, including some of the world's leading economists who specialize in competition issues...[T]he studies made clear that the economists did not anticipate that the costs that might be associated with new gTLDs would outweigh the overall benefits of their introduction, and determined that it was too difficult to predict...As a result, ICANN's Board has concluded that there is no economic basis that would justify stopping the New gTLD Program from proceeding and no further economic analysis will prove to be any more informative in that regard than those that have already been conducted.⁸

⁵ Katz had also served as the chief economist of the Justice Department's Antitrust Division.

⁶ Michael L. Katz, Gregory L. Rosston and Theresa Sullivan, *Reply to Comments on An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names*, February 21, 2011, at page 3 (emphasis added), available at <http://www.icann.org/en/topics/new-gtlds/analysis-response-phase-ii-report-21feb11-en.pdf>

⁷ *Id.* at page 4 (emphasis added).

⁸ ICANN *Rationale* at page 1.



The Carlton and Katz-Rosston reports reflect almost no actual investigation of the practical effects of the huge expansion of gTLDs that ICANN plans. It is an axiom of competition analysis that any such analysis must rest on a factual background. Moreover, these reports do nothing to demonstrate that general principles that apply in many markets actually apply to the unique nature of gTLDs and the scale of ICANN's planned increase in their number. A new gTLD is not a product in the sense that a new electric car is a product.

Domain names like *NYTimes.com* are essentially trademarks. They are small fragments of text that consumers associate with the products and services of businesses and organizations on the Internet. By convention, Internet domain names ("trademarks") have two parts separated by a period. On the left is a brief version of a product or business name and on the right is the gTLD (or non-generic TLDs such as country codes that are not at issue today).

From the perspective of the consumer, a second-level domain, such as *NYTimes*, connected to a given gTLD, such as *.com*, is essentially the same as *NYTimes.info* or *NYTimes.biz*. Competition based on differentiation of only the gTLD is expressly prohibited by trademark law and by the rules of ICANN, which has procedures that can lead to cancellation of such registrations by a non-owner of the left side of a domain name, but only after the owner successfully brings a legal action against the registrant of the infringing domain name. This key, undisputed principle of the Internet—essential to its usefulness to Internet users—refutes the simplistic Carlton claim that adding gTLDs, *ipso facto*, increases competition, improves product variety and provides more choice to consumers.

As the ICANN economists noted, the gTLDs added by ICANN in the last decade have attracted relatively few registrations, and the overwhelming majority of these merely duplicate second-level domain names already registered under *.com*. They add little or nothing to the benefits that brand owners and consumer achieve from the Internet. Today, many Internet users find desired websites by running searches on Bing, Google, or other search engines. They don't type in *NYTimes.com*, they just type in "NYTimes", or "New York Times" or "NY times" or even just "times" (try it—on Google, *NYTimes.com* is the second search result for a search on "times"). It adds absolutely nothing if the search engine then offers them a choice between *NYTimes.com* and *NYTimes.biz*.

An analogy to printed brand names may be useful in explaining why the extreme proliferation of gTLDs is contrary to the interests of Internet users. Under existing trademark law, a registration of a brand name, say "Tide", also protects the name in other type fonts, such as "Tide" and "Tide" and "TIDE" and "Tide". The differences in type fonts are analogous to the gTLD name after the dot in a domain name. They are differentiating markers that do not alter the sense of the brand name and mean almost nothing to the consumer.



The addition of gTLDs is as if a company other than Procter & Gamble could register “Tide” as a trademark and use it until Procter & Gamble discovered the misuse and filed a legal proceeding against it. Under ICANN’s plan to expand the number of gTLDs, Procter & Gamble would either need to preempt such misuse by paying to register “Tide” defensively under these new gTLDs, or it could elect to spend the time and resources needed to detect such registrations after the fact and then incur the expense of dealing with them individually as they are discovered. And even this assumes that it is possible to determine ultimately who the registrant is, something that is not always possible with the *Who-Is* databases available today.

Of course, it is true, as ICANN has said, that both trademark law and ICANN’s procedures for dealing with cybersquatting would be available to domain-name registrants. But the proliferation of gTLDs would raise the monitoring costs of domain-name owners. ICANN has acknowledged that such proliferation would raise costs, but nevertheless maintains—without any quantification of either costs or user benefits—that the benefits would exceed these costs.

In fact, the benefits, as we have demonstrated above, are negligible. The costs are not. Of course, the proliferation of gTLDs will create profit opportunities for companies that offer domain name registration and consulting services as they process defensive registrations under the additional gTLDs. The revenue these companies will derive from either defensive or infringing domain registrations—and the motivation behind these registrations would appear to be a matter of indifference to such companies—is a cost to legitimate domain-name owners.

Our analysis to date shows that an unlimited expansion of gTLDs would not add anything material to the product variety facing Internet users. It would merely create a costly nuisance for those users. ICANN is sponsoring a perversion of the economic analyses that it commissioned by even suggesting that this nuisance has net benefits for the Internet community. We therefore urge you to take action to block the unlimited expansion of gTLDs unless it is satisfactorily and transparently demonstrated that any such expansion—or a limited expansion on a case-by-case basis—would be in the public interest and that the benefits to any expansion would exceed the clear costs that the expansion would impose on the global multi-stakeholder community that ICANN serves.



The Honorable John Bryson
December 7, 2011
Page 6 of 9

Respectfully submitted,

A handwritten signature in cursive script that reads 'Robert E. Hall'.

Robert E. Hall

A handwritten signature in cursive script that reads 'Michael A. Flynn'.

Michael A. Flynn

- cc: Lawrence E. Strickling, Assistant Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce
- Fiona Alexander, Associate Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce
- Vernita Harris, Deputy Associate Administrator of the Office of International Affairs, National Telecommunications and Information Administration, U.S. Department of Commerce
- Suzanne Murray Radell, Senior Policy Advisor, National Telecommunications and Information Administration, U.S. Department of Commerce
- Elizabeth Bacon, Telecommunications Policy Specialist, National Telecommunications and Information Administration, U.S. Department of Commerce
- Cameron F. Kerry, General Counsel, U.S. Department of Commerce



John D. Rockefeller, Chairman, Committee on Commerce, Science and Transportation, U.S. Senate

Kay Bailey Hutchison, Ranking Member, Committee on Commerce, Science and Transportation, U.S. Senate

Amy Klobuchar, Chair, Subcommittee on Competitiveness, Innovation and Export Promotion, Committee on Commerce, Science and Transportation, U.S. Senate

Daniel K. Inouye, Chairman, Committee on Appropriations, U.S. Senate

Thad Cochran, Ranking Member, Committee on Appropriations, U.S. Senate

Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate

Charles E. Grassley, Ranking Member, Committee on the Judiciary, U.S. Senate

Barbara Mikulski, Chair, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. Senate

Al Franken, Chairman, Subcommittee on Privacy, Technology and the Law, Committee on the Judiciary, U.S. Senate

Tom Coburn, Ranking Member, Subcommittee on Privacy, Technology and the Law, Committee on the Judiciary, U.S. Senate

Ron Wyden, Chairman, Subcommittee on International Trade, Customs, and Global Competitiveness, Committee on Finance, U.S. Senate

Harold Rogers, Chairman, Committee on Appropriations, U.S. House of Representatives

Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives

Henry A. Waxman, Ranking Member, Committee on Energy and Commerce, U.S. House of Representatives

Greg Walden, Chairman, Subcommittee on Communications and Technology, and Technology, Committee on Energy and Commerce, U.S. House of Representatives

Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives

Lamar Smith, Chairman, Committee on the Judiciary, U.S. House of Representatives



Norm Dicks, Ranking Member, Committee on Appropriations, U.S. House of Representatives

John Conyers, Ranking Member, Committee on the Judiciary, U.S. House of Representatives

Bob Goodlatte, Chairman, Subcommittee on Intellectual Property, Competition and the Internet, Committee on the Judiciary, U.S. House of Representatives

Frank Wolf, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. House of Representatives

Mel Watt, Ranking Member, Subcommittee on Intellectual Property, Competition and the Internet, Committee on the Judiciary, U.S. House of Representatives

Chaka Fattah, Ranking Member, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. House of Representatives



ROBERT E. HALL

Robert E. Hall is the Robert and Carole McNeil Joint Professor of Economics at Stanford University and Senior Fellow at Stanford's Hoover Institution. He served as President of the American Economic Association for the year 2010, served earlier as the Association's Vice President and Ely Lecturer, and is now a Distinguished Fellow of the Association. He is an elected member of the National Academy of Sciences and Fellow of the American Academy of Arts and Sciences, the Society of Labor Economists, and the Econometric Society, the professional organization of economists specializing in measurement issues. He is Director of the Research Program on Economic Fluctuations and Growth of the National Bureau of Economic Research. He was a member of the National Presidential Advisory Committee on Productivity. For further information about his academic activities, see Stanford.edu/~rehall . He received his Ph.D. in economics from MIT and his BA from the University of California, Berkeley. Professor Hall is co-author of the college textbook *Economics: Principles and Applications*, now in its fifth edition, and author or co-author of numerous articles in the *American Economic Review*, the *Journal of Political Economy*, and other academic journals. Professor Hall has advised a number of government agencies on national economic policy, including the Treasury Department, the Federal Reserve Board, and the Justice Department, and has testified on numerous occasions before congressional committees.

MICHAEL A. FLYNN

Mr. Flynn is a consulting and testifying expert economist, specializing in antitrust, economic damages, intellectual property and other complex business litigation and consulting engagements. He has extensive case experience in a broad range of industries, markets and products. Mr. Flynn studied in the PhD Program in Economics of the Massachusetts Institute of Technology, Cambridge, Massachusetts, from 1971 to 1974, where he was a National Science Foundation Fellow. He completed his general and field examinations for the PhD degree in 1974. Mr. Flynn was awarded his AB degree from the University of California, Berkeley, where he was the 1971 recipient of the Department of Economics Citation as the Outstanding Graduating Senior.



December 8, 2011

The Honorable Jay Rockefeller
The Honorable Kay Bailey Hutchinson
Committee on Commerce, Science and Technology
United States Senate
Washington, DC 20510

Dear Chairman Rockefeller and Senator Hutchinson:

The Council of Better Business Bureaus (CBBB) would like to thank you for holding a hearing on the important topic of Internet domain expansion.

CBBB concurs with the concerns expressed by the Association of National Advertisers and the nonprofit constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). Currently, there is insufficient control over the rampant crime that takes place via the Internet in the form of pirating of intellectual property, identity theft, phishing scams and other types of brand infringement and consumer fraud. CBBB and its constituents – small and medium business, nonprofits and consumers – are victimized by Internet crime on a daily basis.

Before ICANN undertakes a mass expansion of potential websites, it needs to come up with a workable solution, in conjunction with international crime fighting organizations and victims of crime, to improve the ability of law enforcement to track and shut down illicit activities on currently registered Internet websites.

As a not-for-profit trade association with famous and well-recognized trademarks, CBBB has to devote considerable resources to tracking and taking action against illicit use of its trademarks on the Internet. We also have to spend scarce financial resources each year purchasing domain names in all of the different top level domains corresponding to all of our trademarks and programs to keep illegitimate users from purchasing our name and diverting traffic to their fraudulent websites. An increase in the top level domains will exponentially increase these costs.

ICANN's current proposal requires trademark holders to register their trademarks in a Trademark Clearinghouse and then purchase or block each trademark in each new top level domain (an expense that most non-profits and small businesses cannot afford). Instead of the current proposal, ICANN should block the new TLD registries from selling domains that belong to trademark holders and have been properly registered in the Trademark Clearinghouse.

As an example of the backward manner in which ICANN "protects" trademarks, it is notable to consider the experience the CBBB had in the most recently opened top level domain, the .xxx TLD operated by ICM Registry for the adult entertainment industry. Any trademark holder that wanted to ensure that its trademark was not sold in that registry had to block it during the "sunrise" period. Otherwise, ICM could sell the trademark as domain names, a common practice. In all, ICM and the registrars selling to

.xxx made approximately \$23 million from this type of defensive registration by trademark holders who simply wanted to protect their good names from abuse.

Even more astounding was the fact that ICM Registry refused to accept CBBB's registration of its most famous trademark ("BBB," one of the most recognized trademarks in North America) because ICANN allowed ICM to reserved bbb.xxx as a premium name that it can later auction off to the highest bidder.

Another type of Internet crime and organizational identity theft occurred just yesterday when the BBB network email and registered torch logo were used as tools in a widespread phishing scam that sent emails to thousands of people across North America and victimized unsuspecting email recipients who believed these emails came from BBB. Despite best efforts, long hours and wasted resources, it is difficult to identify the perpetrators of phishing scams such as this.

ICANN was authorized to operate the domain naming and addressing system under the condition that it act in the public interest, per the terms of its Memorandum of Understanding with the Department of Commerce and its subsequent Affirmation of Commitments. To fulfill this public interest requirement, ICANN must balance the desire for greater competition on the Internet with suitable protections for legitimate organizations and hard working business owners. That is essential to fulfilling its public interest commitment.

Without more controls on Internet registries and registrars, the Internet will increasingly serve criminal interests over the public interest. More resources must be made available to combatting Internet crime. We recommend that these strong actions be taken before ICANN expands top level domains, an expansion that will only exacerbate these grave problems.

The Council of Better Business Bureaus and our entire BBB network appreciate the work of the Committee in helping solve these issues that impact large and small companies, nonprofits, charities and, ultimately, consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "SAC", written in a cursive style.

Stephen A. Cox
President and CEO