



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 16, 2011

Dr. Stephen D. Crocker
Chairman of the Board of Directors
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Rod Beckstrom
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Re: Consumer Protection Concerns Regarding New gTLDs

Dear Dr. Crocker and Mr. Beckstrom:

We write in reference to the Internet Corporation for Assigned Names and Numbers' (ICANN) plan to open the application period for new generic top-level domains (new gTLDs) on January 12, 2012. As you know, the Federal Trade Commission ("FTC" or "Commission") expressed concerns about the need for more consumer protection safeguards during the Board's consideration of the gTLD program's expansion. The FTC has also long urged for the improvement of ICANN policies that affect consumers engaged in e-commerce or that frustrate law enforcement efforts to identify and locate bad actors.

We write now to highlight again the potential for significant consumer harm resulting from the unprecedented increase in new gTLDs. Before approving any new gTLD applications, we urge ICANN to take the steps described below to mitigate the risk of serious consumer injury and to improve the accuracy of Whois data.

We also urge ICANN to take immediate steps to address the FTC's and the Governmental Advisory Committee's (GAC) longstanding concerns with various ICANN policies and procedures. The exponential expansion of the number of gTLDs will only increase the challenge of developing and implementing solutions to the problems the FTC and the GAC have previously brought to ICANN's attention. In the Affirmation of Commitments, ICANN pledged to ensure that various issues involved in the expansion of the gTLD space—including consumer protection and malicious abuse issues—would "be adequately addressed prior to

implementation.”¹ We look forward to working with ICANN as it honors these commitments to ensure that the new gTLD program benefits both consumers and businesses alike.

1. Federal Trade Commission

The FTC is an independent agency of the United States government that enforces competition and consumer protection laws.² The FTC fulfills its consumer protection mission in a variety of ways—through civil enforcement actions, policy development, rulemaking, and consumer and business education.

The principal consumer protection statute that the FTC enforces is the FTC Act, which prohibits “unfair or deceptive acts or practices.”³ The FTC has used its authority to take action against a wide variety of Internet-related threats, including bringing a substantial number of cases involving online consumer fraud and almost 100 spam and spyware cases.⁴ In addition, the FTC has made a high priority of protecting consumers’ privacy and improving the security of their sensitive personal information, both online and offline.⁵

¹ See Affirmation of Commitments, at 9.3, available at <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>.

² The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. The President chooses one Commissioner to act as Chairman. No more than three Commissioners can be of the same political party.

³ See 15 U.S.C. § 45. The FTC also enforces several other consumer protection statutes. See, e.g., Restore Online Shopper’s Confidence Act, Pub. L. 111-345, 124 Stat. 3618 (2010); Children’s Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506; CAN-SPAM Act, 15 U.S.C. § 7701-7713; Truth in Lending Act, 15 U.S.C. §§ 1601-1667f; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u; Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o; Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108.

⁴ See, e.g., *FTC v. Flora*, No. SACV11-00299-AG-(JEMx) (C.D. Cal., filed Feb. 22, 2011), press release available at <http://www.ftc.gov/opa/2011/02/loan.shtm>; *FTC v. Johnson*, No. 2:10-cv-02203 (D. Nev., filed Dec. 21, 2010), press release available at <http://www.ftc.gov/opa/2011/01/iworks.shtm>; *FTC v. Infusion Media, Inc.*, No. 09-CV-01112 (D. Nev., filed June 22, 2009), press release available at <http://www.ftc.gov/opa/2010/10/googlemoney.shtm>; *FTC v. Pricewert LLC*, No. 09-CV-2407 (N.D. Cal., filed June 1, 2009), press release available at <http://www.ftc.gov/opa/2010/05/perm.shtm>; *FTC v. Innovative Mktg., Inc.*, No. 08-CV-3233-RDB (D. Md., filed Dec. 2, 2008), press release available at <http://www.ftc.gov/opa/2011/01/winsoftware.shtm>; *FTC v. CyberSpy Software, LLC*, No. 08-CV-0187 (M.D. Fla., filed Nov. 5, 2008), press release available at <http://www.ftc.gov/opa/2008/11/cyberspy.shtm>; *FTC v. Spear Sys., Inc.*, No. 07C-5597 (N.D. Ill., filed Oct. 3, 2007), press release available at <http://www.ftc.gov/opa/2009/07/spear.shtm>; *FTC v. ERG Ventures, LLC*, No. 3:06-CV-00578-LRH-VPC (D. Nev., filed Oct. 30, 2006), press release available at <http://www.ftc.gov/opa/2006/11/mediamotor.shtm>; *FTC v. Enternet Media*, No. CV 05-7777 CAS (C.D. Cal., filed Nov. 1, 2005), press release available at <http://www.ftc.gov/opa/2006/09/enternet.shtm>; *FTC v. Cleverlink Trading Ltd*, No. 05C 2889 (N.D. Ill., filed May 16, 2005), press release available at <http://www.ftc.gov/opa/2006/09/spammers.shtm>.

2. Federal Trade Commission Investigations

Our ability to protect consumers in cases involving unfair or deceptive practices online often depends on navigating an environment in which scam artists easily manipulate the domain name system to evade detection. We routinely consult Whois services in Internet investigations to identify website operators. However, the Whois information often contains incomplete or inaccurate data or, increasingly, proxy registrations, which shield the contact information for the underlying domain name registrant. To give just one example, in a case against illegal spammers promoting pornography websites, false Whois data slowed down our ability to identify and locate the individuals behind the operation,⁶ requiring the FTC investigators to spend additional time consulting multiple other sources. In other instances, we have encountered Whois information with facially false address and contact information, including websites registered to “God,” “Bill Clinton,” and “Mickey Mouse.”⁷ In Internet investigations, identifying domain name registrants immediately is especially important, as fraudsters often change sites frequently to evade detection.

The FTC has highlighted these concerns about Whois with ICANN and other stakeholders for more than a decade.⁸ In particular, we have testified before Congress on Whois

⁵ See, e.g., *In the Matter of Facebook, Inc.*, FTC File No. 092-3184 (proposed settlement posted for public comment on Nov. 29, 2011), *press release available at* <http://www.ftc.gov/opa/2011/11/privacysettlement.shtm>; *In the Matter of ScanScout, Inc.*, FTC File No. 102-3185 (proposed settlement posted for public comment on Nov. 8, 2011), *press release available at* <http://www.ftc.gov/opa/2011/11/scanscout.shtm>; *In the Matter of Google, Inc.*, FTC Docket No. C-4336 (Oct. 13, 2011), *press release available at* <http://www.ftc.gov/opa/2011/10/buzz.shtm>; *U.S. v. W3 Innovations, LLC*, No. CV-11-03958-PSG (N.D. Cal., filed Aug. 12, 2011), *press release available at* <http://www.ftc.gov/opa/2011/08/w3mobileapps.shtm>; *U.S. v. Teletrack, Inc.*, No. 1:11-CV-2060 (filed June 24, 2011), *press release available at* <http://www.ftc.gov/opa/2011/06/teletrack.shtm>; *In the Matter of Lookout Servs., Inc.*, FTC Docket NO. C-4326 (June 15, 2011), *press release available at* <http://www.ftc.gov/opa/2011/05/ceridianlookout.shtm>; *In the Matter of Ceridian Corp.*, FTC Docket No. C-4325 (June 8, 2011), *press release available at* <http://www.ftc.gov/opa/2011/05/ceridianlookout.shtm>; *In the Matter of Twitter, Inc.*, FTC Docket NO. C-4316 (Mar. 2, 2011), *press release available at* <http://www.ftc.gov/opa/2011/03/twitter.shtm>.

⁶ See *FTC v. Global Net Solutions, Inc.*, No. CV-S-05-0002-PMP (LRL) (D. Nev., filed Jan. 3, 2005), *press release available at* <http://www.ftc.gov/opa/2005/11/globalnet.shtm>.

⁷ See *Hearing on the Accuracy and Integrity of the Whois Database Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2002) (Prepared Statement of the Federal Trade Commission, presented by Howard Beales).

⁸ See Letter from Comm’r Jon Leibowitz to Peter Dengate Thrush, (former) Chairman, ICANN Board of Directors, Dr. Paul Twomey, (former) President and CEO, ICANN, and Jonathan Nevett, (former) Chair, Registrar Constituency (Feb. 8, 2008) [hereinafter “Whois and RAA Letter”]; *Hearing on Internet Governance: The Future of ICANN Before the Subcomm. on Trade, Tourism, and Econ. Dev. of the Senate Committee on Commerce, Science, and Transp.*, 109th Cong. (2006) (Prepared Statement of the Federal Trade Commission, presented by Comm’r Leibowitz), *available at* <http://www.ftc.gov/os/testimony/P035302igovernancefutureicanncommissiontestsenate09202006.pdf>; *Hearing on ICANN and the Whois Database: Providing Access to Protect Consumers from Phishing*

information several times, issued a Commission statement on Whois services, delivered presentations to the GAC, participated as a panelist in joint sessions organized by the GAC and the Generic Names Supporting Organization (GNSO), provided briefings to the ICANN Board, and worked directly with a wide range of stakeholders to develop pragmatic solutions to this difficult problem.

The FTC has not been alone in highlighting the importance of this issue or in its effort to urge ICANN to develop effective solutions to Whois problems. In 2003, the Organization for Economic Co-operation and Development's Committee on Consumer Policy issued a policy paper unequivocally stating that for commercial registrants, all contact data "should be accurate and publicly available via Whois."⁹ In 2007, the GAC issued policy principles urging ICANN stakeholders to "improve the accuracy of Whois data, and in particular, to reduce the incidence of deliberately false Whois data."¹⁰ In 2009, global law enforcement agencies, led by the U.S. Federal Bureau of Investigation and the UK Serious Organized Crime Agency, issued a set of law enforcement recommendations to improve a wide range of ICANN policies, including the accuracy of Whois data. In October 2011, the GAC reiterated its previous requests for the Board to address the law enforcement recommendations.¹¹ Last week, ICANN's own Whois Review Team issued its draft report, acknowledging the "very real truth that the current system is broken

Before the Subcomm. on Fin. Institutions and Consumer Credit of the House Comm. on Fin. Servs., 109th Cong. (2006) (Prepared Statement of the Federal Trade Commission, presented by Eileen Harrington), available at <http://www.ftc.gov/os/2006/07/P035302PublicAccessstoWHOISDatabasesTestimonyHouse.pdf>; FTC, Prepared Statement of the Federal Trade Commission before the ICANN Meeting Concerning Whois Databases (June 2006); Letter from Comm'r Jon Leibowitz to Dr. Paul Twomey, (former) President and CEO, ICANN (Feb. 9, 2005); *Hearing on the Accuracy and Integrity of the Whois Database Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2002) (Prepared Statement of the Federal Trade Commission, presented by Howard Beales); and Comment of the Staff of the FTC Bureau of Consumer Protection before the ICANN Public Comment Forum, In the Matter of Tentative Agreements among ICANN, U.S. Dep't of Commerce, and Network Solutions, Inc. (Oct. 29, 1999).

⁹ OECD, *Consumer Policy Considerations on the Importance of Accurate and Available Whois Data*, at 8 (June 2, 2003), available at [http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=dsti/cp\(2003\)1/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=dsti/cp(2003)1/final&doclanguage=en).

¹⁰ Governmental Advisory Committee, GAC Principles Regarding gTLD Whois Services, at 4.1 (Mar. 28, 2007), available at https://gacweb.icann.org/download/attachments/1540132/WHOIS_principles.pdf?version=1&modificationDate=1312460331000.

¹¹ See Governmental Advisory Committee, GAC Communiqué-Dakar, at III (Oct. 27, 2011), available at <https://gacweb.icann.org/download/attachments/4816912/Communique+Dakar+-+27+October+2011.pdf?version=1&modificationDate=1319796551000>.

and needs to be repaired.”¹² ICANN has failed to adequately address this problem for over a decade.

A rapid, exponential expansion of gTLDs has the potential to magnify both the abuse of the domain name system and the corresponding challenges we encounter in tracking down Internet fraudsters. In particular, the proliferation of existing scams, such as phishing, is likely to become a serious challenge given the infinite opportunities that scam artists will now have at their fingertips. Fraudsters will be able to register misspellings of businesses, including financial institutions, in each of the new gTLDs, create copycat websites, and obtain sensitive consumer data with relative ease before shutting down the site and launching a new one. The potential for consumer confusion in other variations of these types of scams is significant. As an example, “ABC bank” could be registered in .com, but another entity could register “ABC” in a new .bank gTLD, and a different entity could register “ABC” in a new .finance gTLD. Scam artists could easily take advantage of this potential for confusion to defraud consumers.

In addition, the number of individuals with access to the Internet infrastructure will substantially increase. This creates an increased possibility that malefactors, or others who lack the interest or capacity to comply with contractual obligations, will operate registries. It is inevitable that malefactors may still pass a background screening due to inadequate or incomplete records. Or, malefactors could use straw men to assist them and be the party “on record” with ICANN. Either way, a registry operated by a bad actor would be a haven for malicious conduct. As discussed below, ICANN’s contractual compliance office has encountered tremendous challenges trying to secure compliance under the current framework, and the unprecedented increase in domain registries only increases the risk of a lawless frontier in which bad actors violate contractual provisions with impunity, resulting in practices that ultimately harm consumers. The gTLD expansion will also increase the number of entities in foreign jurisdictions with relevant data on registrants. This will likely cause further delays in obtaining registrant data in investigations of global fraud schemes. In short, the potential for consumer harm is great, and ICANN has the responsibility both to assess and mitigate these risks.¹³

¹² See Whois Review Team, Final Report (Draft), at 5 (Dec. 5, 2011), *available at* <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf>.

¹³ As the U.S. government, the GAC, and several other stakeholders have urged, ICANN should conduct a more thorough economic study to assess the costs and benefits of introducing a significant number of new gTLDs. See Letter from Assistant Secretary Strickling to Rod Beckstrom, President and CEO, ICANN (Dec. 2, 2010), *available at* <http://forum.icann.org/lists/5gtld-guide/pdf3Ep9MhQVGO.pdf>; Governmental Advisory Committee, GAC Communiqué—Cartagena, at 5 (Dec. 9, 2010), *available at* https://gacweb.icann.org/download/attachments/1540144/GAC_39_Cartagena_Communique.pdf?version=1&modificationDate=1312225168000; Letter from Janis Karklins, (former) Chairman, Governmental Advisory Committee to Peter Dengate Thrush, (former) Chairman, ICANN Board of Directors (Aug. 18, 2009), *available at* <http://www.icann.org/en/correspondence/karklins-to-dengate-thrush-18aug09-en.pdf> (“The GAC remains concerned that the threshold question has not been answered whether the introduction of new gTLDs provides potential benefits to consumers that will not be outweighed by the potential harms.”).

3. Recommended Changes to the New gTLD Program

In light of the dramatically increased opportunity for consumer fraud, distribution of malware, and proliferation of other malicious activity, it is critical that ICANN take immediate steps to ensure that consumer protection is not compromised by the introduction of new gTLDs. Accordingly, we urge ICANN to: (1) implement the new gTLD program as a pilot program and substantially reduce the number of gTLDs that are introduced in the first application round, (2) strengthen ICANN's contractual compliance program, in particular by hiring additional compliance staff, (3) develop a new ongoing program to monitor consumer issues that arise during the first round of implementing the new gTLD program, (4) conduct an assessment of each new proposed gTLD's risk of consumer harm as part of the evaluation and approval process, and (5) improve the accuracy of Whois data, including by imposing a registrant verification requirement. We strongly believe that ICANN should address these issues before it approves any new gTLD applications. If ICANN fails to address these issues responsibly, the introduction of new gTLDs could pose a significant threat to consumers and undermine consumer confidence in the Internet.¹⁴

As you know, the GAC and several other stakeholders in the ICANN Community urged the Board to revise the gTLD applicant guidebook, which sets forth the new gTLD evaluation and approval process. Stakeholders urged ICANN to address the potential for malicious conduct and implement certain consumer protection safeguards before authorizing the launch of the new gTLD program.¹⁵ Although changes were made to the guidebook to include some safeguards,

¹⁴ We are aware that a wide range of stakeholders has expressed concern about potential conflicts of interest on the ICANN Board. *See, e.g.,* Eric Engleman, *ICANN Departures After Web Suffix Vote Draw Criticism*, Wash. Post, August 20, 2011, available at http://www.washingtonpost.com/business/icann-departures-draw-criticism/2011/08/19/gIQAzpeDTJ_story_1.html. According to these critics, several members of the Board have affiliations with entities that have a financial stake in the expansion of new gTLDs. *See* Esther Dyson, *What's in a Domain Name?* (Aug. 25, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/08/25/whats-in-a-domain-name/>.

In light of the potential for the appearance of impropriety to exist, we believe that ICANN should promote transparency, accountability, and confidence in its decision-making processes by developing a more comprehensive conflict of interest and ethics policy that prevents individuals with actual and potential conflicts of interest from participating in the deliberations and decisions for which the conflict exists or which raise an appearance of impropriety. We are aware of the Board's ongoing effort to review and revise its current conflict of interest policies. *See* Board Member Rules on Conflicts of Interest for New gTLDs (Dec. 8, 2011), <http://www.icann.org/en/minutes/resolutions-08dec11-en.htm#4>. The implementation of a more robust and comprehensive conflict of interest policy is especially important in light of the public interests that ICANN is charged with protecting, and the substantial impact the Board's decisions has on consumers operating in the online world. Accordingly, we encourage ICANN to complete the ongoing reviews of its conflict of interest and ethics practices and implement a revised Board conflict of interest policy before approving any new gTLD applications.

¹⁵ These safeguards included imposing an obligation on new gTLD registry operators to respond to law enforcement requests; maintaining a requirement that new gTLD registry operators maintain a "thick" Whois service; expanding the categories of criminal offenses screened during the vetting process, which could serve as a basis for disqualifying new gTLD applicants; adding civil consumer protection decisions

ICANN failed to respond effectively to all of the concerns that were raised, did not implement some of its commitments to improve the new gTLD program, and did not provide adequate solutions to widely documented problems in the existing gTLD marketplace. Indeed, despite offering some protections, the safeguards now in place do not provide comprehensive solutions to the problems likely to arise as a result of the introduction of new gTLDs. For example, while registries will be required to maintain “thick” Whois services, the lack of meaningful obligations to ensure Whois accuracy, such as registrant verification, still hampers the ability of law enforcement agencies to track down Internet fraudsters quickly. We recognize that ICANN has taken some of the GAC’s concerns into account, but we urge ICANN to do more to protect consumers and adequately address law enforcement concerns.

A. Implement New gTLDs as a Pilot Program

Despite the modest improvements to the new gTLD program, overarching consumer protection concerns persist. As an initial matter, the potential number of expected new gTLDs is itself a serious challenge. The initial estimate for expected applications was 500, but recent estimates have suggested that there could be more than 1500 applications. If the number of approved new gTLDs reaches even the minimum estimate, the Internet landscape will change dramatically. Indeed, an increase from 22 existing gTLDs to 500 gTLDs would be an unprecedented expansion of the domain name system. Among other things, the number of registered websites is likely to increase exponentially, the number of registry operators and other actors with an operational role in the Internet ecosystem will expand, and the ability to locate and identify bad actors will be frustrated significantly due to a likely increase in the number of registries located in different countries and limited ability to obtain relevant data maintained abroad.

We understand that ICANN is currently considering batching applications in the event that the number of new gTLD applications exceeds initial expectations, and that it has set a maximum of 1,000 gTLDs to be introduced per year. We strongly believe that ICANN should substantially reduce the maximum number of new gTLDs that could be introduced in the initial round to a much smaller number. Indeed, doubling the number of existing gTLDs in one year would be an aggressive increase. The imposition of a more reasonable limit is necessary to curb

to the background screening process; publicly disclosing the names of the principal officers associated with the new gTLD application; and adding an extra point in the scoring criteria for applicants that include measures to promote Whois accuracy.

The U.S. Department of Commerce’s National Telecommunications and Information Administration, which serves as the U.S. representative to the GAC, contributed significantly to the GAC’s efforts to enhance protections for consumers and implement recommendations from law enforcement agencies. FTC staff provided input on these issues both as part of the U.S. delegation to the GAC and directly to ICANN. The Department of Commerce has worked extensively to enhance ICANN’s accountability and ensure that ICANN develops consensus-based policies in a fair, open, and transparent manner. We believe that ICANN represents an important multi-stakeholder model for Internet governance, which has been critical to keeping the Internet open and innovative, and we encourage ICANN to enhance its efficacy by implementing comprehensive solutions to these consumer protection issues.

the risks inherent in expanding the number of gTLDs, including the proliferation of malicious conduct. We recommend that ICANN use this round as a limited pilot program, as it has done in previous rounds, assess the organization's ability to evaluate, introduce, and manage additional gTLDs, conduct an assessment of the increased risks posed by the program, and then consider whether a more significant expansion would be appropriate.

B. Strengthen ICANN's Contractual Compliance Program

Currently, ICANN is ill-equipped to handle the contract enforcement for the 22 existing gTLDs and several hundred accredited registrars. In particular, ICANN lacks an adequate number of compliance staff, has failed to close contractual loopholes that limit the existing compliance staff's ability to take action against registrars and registries, and needs to implement a more rigorous enforcement program.¹⁶ The likely effect of introducing large numbers of new gTLDs is that it will significantly increase the number of entities that operate pursuant to registry contracts with ICANN. In addition, the number of registered domain names will increase as Internet users begin to register domains in new gTLDs. This will likely increase the number of complaints the compliance office receives, including those related to Whois data accuracy. Thus, the expansion of the gTLD space will require a substantial increase in resources devoted to contract enforcement and improvement of policies that hold both registries and registrars accountable.

During the GAC-Board consultations earlier this year, the Board announced its commitment to augment ICANN's contractual compliance function with additional resources. The GAC, in unambiguous terms, emphasized that a "strengthened contract compliance function must be in place prior to the launch of new gTLDs."¹⁷ Specifically, the GAC highlighted the

¹⁶ In the registrar context, despite its knowledge of proposed law enforcement recommendations to amend the Registrar Accreditation Agreement that were presented in October 2009, the Board only recently took action to ensure that these concerns would be addressed in contractual negotiations between the Board and the registrars. See <http://www.icann.org/en/minutes/resolutions-28oct11-en.htm#7>.

¹⁷ See GAC comments on the ICANN Board's response to the GAC Scorecard, at 9 (Apr. 12, 2011), available at <http://www.icann.org/en/topics/new-gtlds/gac-comments-board-response-gac-scorecard-12apr11-en.pdf>. The GAC stated:

The GAC appreciates the Board's agreement to strengthen ICANN's contractual compliance function. The GAC respectfully requests ICANN, in the coming weeks, to identify the amount of personnel it intends to hire to support the compliance function and the timeline for hiring. In particular, the GAC would like to know how many staff ICANN intends to have in place prior to the expected launch of new gTLDs. As ICANN adds new resources to its compliance program, the GAC encourages ICANN to ensure that it is staffed globally, perhaps using regional compliance officers consistent with the five RIR regions. The GAC believes that a robust compliance program is necessary to enforce registry and registrar contracts and that a strengthened contract compliance function must be in place prior to the launch of new gTLDs.

Id. (emphasis added).

need to hire enough staff to address contractual compliance issues for hundreds of new registry contracts. However, contrary to the Board’s commitment, ICANN has not yet hired additional compliance staff to support the registry contract support program. It is also unclear whether ICANN has taken any other steps to improve its contract enforcement program, and whether those steps are adequate to handle the myriad issues that will arise with such a dramatic increase in the number of registries. In FY12, ICANN budgeted only a 25 percent increase for all contractual compliance resources, despite the likelihood that the number of new gTLD contracts could increase in 2013 by over 2000 percent.¹⁸ Further, the total expected staffing level for contractual compliance in FY12 is equal to the staffing level in FY10,¹⁹ lacking the substantial increase necessary to respond to additional compliance issues resulting from the introduction of new gTLDs. Notably, ICANN’s own Whois Review Team has highlighted the lack of compliance resources available to address existing gTLD contractual concerns, recommending that ICANN should allocate “sufficient resources, through the budget process, to ensure that ICANN compliance staff is fully resourced to take a proactive regulatory role and encourage a culture of compliance.”²⁰

In addition to adequately staffing its contractual compliance program, ICANN should strengthen its contracts to ensure that registries and registrars are obligated to adhere to stringent policies that promote consumer trust and enhance security. In particular, these contracts should require verification of domain name registrants, impose further obligations on registrars for maintaining accurate Whois data, and hold domain name resellers accountable. ICANN should also ensure that the contracts provide adequate sanctions for noncompliance. In 2008, then-FTC Commissioner Leibowitz highlighted in his letter to ICANN that: “The FTC frequently has observed that transparent enforcement mechanisms are an essential element of effective private sector self-regulation and that there must be *meaningful consequences* for noncompliance.”²¹ ICANN’s Whois Review Team recently advocated for a similar approach, recommending in its draft final report that “ICANN should ensure that clear, enforceable and graduated sanctions apply to registries, registrars and registrants that do not comply with its Whois policies.”²² Significantly, ICANN must also ensure that its compliance team vigorously enforces these contracts.

¹⁸ See ICANN FY12 Operating Plan and Budget Fiscal Year Ending 30 June 2012, at 14, available at <http://www.icann.org/en/financials/adopted-opplan-budget-fy12-09sep11-en.pdf>.

¹⁹ *Id.* at 45.

²⁰ See Whois Review Team, Final Report (Draft), at 9 (Dec. 5, 2011), available at <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf>.

²¹ See Whois and RAA Letter, *supra* note 5, at 5 (emphasis in original). The letter addressed issues relating to registrar contracts, which were amended in 2009 to provide some intermediate sanctions, but the principle applies equally to registry contracts.

²² See Whois Review Team, Final Report (Draft), at 9 (Dec. 5, 2011), available at <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf>.

As the GAC and other stakeholders have emphasized, ICANN must adequately strengthen its contractual compliance program before it approves any new gTLD applications to ensure that consumers' interests are protected and the commitments made by gTLD registries are enforced.

C. Develop Program to Monitor Consumer Issues During New gTLD Implementation

Further, in light of the substantial impact the introduction of new gTLDs will likely have on consumers, the investment of additional resources into the contractual compliance program is really just the first step in developing an overall more effective approach. To address the issue in a comprehensive manner, we recommend that ICANN create a new program under its compliance framework that monitors consumer issues arising during the implementation of the new gTLD program, reviews the feasibility of existing mechanisms for addressing consumer issues, applies current contractual enforcement tools to resolve these issues, identifies areas where new policies may be needed, and outlines a plan for working with ICANN's supporting organizations on policy development processes that address these issues. We are aware that the compliance office has operated a C-Ticket System that captures and tracks complaints, many of which relate to consumer issues, and that ICANN follows up on complaints that fall within its purview. However, we believe that ICANN should supplement this work, and that the Board should provide more direction by approaching consumer issues more systematically and developing a dedicated program that is well resourced and that proactively addresses these issues.

ICANN should act now to ensure that consumer interests are protected in the gTLD implementation process. We understand that, pursuant to the Affirmation of Commitments, ICANN will conduct a review of the new gTLD program one year after it has been in operation, followed by subsequent reviews, and that the issue of consumer trust and consumer choice will be a key focus of that review.²³ We intend to participate actively in this review process.²⁴

²³ See Affirmation of Commitments, available at <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>. The Affirmation of Commitments states, in relevant part:

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years.

Id.

However, in advance of the competition, consumer trust, and consumer choice review, ICANN should create a program that monitors and addresses consumer issues on an ongoing basis to ensure that the potential for consumer harm resulting from the introduction of new gTLDs is addressed effectively and timely.

D. Evaluate Proposed gTLDs' Potential Harm to Consumers

Attention to consumer issues should not be relegated to an external review process but rather function as an integral part of the new gTLD evaluation process. During the GAC-Board new gTLD consultations, the GAC recommended that proposed gTLDs implicating regulated industries or gTLDs that were otherwise particularly susceptible to abuse (e.g., .kids, .bank) should receive additional vetting and scrutiny. The Board rejected this proposal and did not provide an alternative that adequately addresses this concern.²⁵ ICANN should conduct its own evaluation of the potential consumer risks associated with each proposed new gTLD, especially those that will inherently raise heightened concern among stakeholders. Accordingly, we urge ICANN to reconsider its decision not to apply additional vetting or scrutiny to proposed gTLDs associated with regulated industries or gTLDs that are particularly susceptible to abuse and pose an increased risk of consumer fraud, or to otherwise incorporate the risk of consumer harm into the evaluation process for each proposed gTLD.

E. Improve Whois Accuracy

As we have advocated for more than a decade, and as discussed earlier in this letter, ICANN should improve the accuracy of Whois data.²⁶ A wide range of stakeholders has strongly urged ICANN to address this problem, including the GAC, which noted in its 2007

²⁴ We are aware that a cross-constituency working group has been formed to address preliminary matters related to this review. We are also aware that ICANN will be reviewing aspects of new gTLD implementation as a result of concerns raised by the GAC.

²⁵ The Board supplemented the evaluation and approval process with a GAC early warning mechanism, which allows individual governments to notify applicants via the GAC that they have concerns about a proposed gTLD, as well as preserving the ability of the GAC to provide consensus advice on a particular application. Certainly, these mechanisms allow governments an important opportunity to communicate their views about proposed gTLDs, but they do not obviate the need for ICANN to conduct its own assessment of potential consumer harm during the evaluation process.

²⁶ *See supra* note 8. We recognize, as we have done in the past, that ICANN's Whois policies should protect the privacy of individual registrants. *See* FTC, Prepared Statement of the Federal Trade Commission before the ICANN Meeting Concerning Whois Databases, at 9 (June 2006) ("The FTC, as the primary enforcement agency for U.S. consumer privacy and data security laws, is very concerned about protecting consumers' privacy. Thus, the Commission has always recognized that non-commercial registrants may require some privacy protection from *public* access to their contact information, without compromising appropriate real-time access by law enforcement agencies.").

Whois principles, that “stakeholders should work to improve the accuracy of Whois data, and in particular, to reduce the incidence of deliberately false Whois data.”²⁷

The violations of Whois data accuracy requirements are pervasive, and ICANN’s response to this persistent problem has been woefully inadequate. As ICANN’s own Whois Review Team recognized,

Cyber security and cybercrime experts make extensive use of WHOIS to thwart and respond to a varied set of threats. Information contained within WHOIS is invaluable in these efforts and practitioners have conveyed to us their frustration at the continuing high levels of inaccuracy of WHOIS data. **We find that ICANN has neglected to respond to the needs of this community both in the accuracy of WHOIS data and in response times for access and action.**²⁸

We believe, as law enforcement agencies from around the world have advocated, that registrars should be required to implement verification procedures when registering domain names. Such efforts could significantly reduce the incidence of completely inaccurate data. In addition to imposing verification requirements, ICANN should adopt any other appropriate measures to reduce the amount of inaccurate Whois data.²⁹ We urge ICANN to develop and to implement a plan to address the problem of Whois inaccuracy before new gTLDs are introduced, which will likely exacerbate these problems.

In sum, the dramatic introduction of new gTLDs poses significant risks to consumers, and ICANN should take the steps described above to reduce the potential for consumer injury before approving any new gTLD applications. We look forward to working with ICANN to ensure that adequate consumer protection safeguards are implemented in the new—and existing—gTLD marketplace.

²⁷ See Governmental Advisory Committee, GAC Principles Regarding gTLD Whois Services, at 4.1 (Mar. 28, 2007), available at https://gacweb.icann.org/download/attachments/1540132/WHOIS_principles.pdf?version=1&modificationDate=1312460331000.

²⁸ See Whois Review Team, Final Report (Draft), at 7 (Dec. 5, 2011), available at <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf> (emphasis added). In March, an Interpol representative delivered a blistering critique of the Whois system during ICANN’s Forum on DNS Abuse, noting that “Accurate WHOIS is a joke. It just doesn't happen. We don't see it. We never get it. Even if we do see something within it that might give us indications, it's -- it's always a dead end and it's a waste of time even trying. And for me, what's the point in having a WHOIS database if it can't be accurate? Somebody has to be responsible for having that accurate. Somebody has to be. I'm sorry. And whoever that “somebody” is, can you please step up to the plate and do your work?” See Transcript: Forum on DNS Abuse (Mar. 14, 2011), available at <http://svsf40.icann.org/node/22219>.

²⁹ See also Whois Review Team, Final Report (Draft), at 9 (Dec. 5, 2011), available at <http://www.icann.org/en/reviews/affirmation/whois-rt-draft-final-report-05dec11-en.pdf> (recommending that ICANN take appropriate measures to reduce the number of unreachable Whois registrations).

Sincerely,



Jon Leibowitz
Chairman



J. Thomas Rosch
Commissioner



Edith Ramirez
Commissioner



Julie Brill
Commissioner

cc: The Honorable John D. Rockefeller IV
Chairman, Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Kay Bailey Hutchison
Ranking Member, Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Fred Upton
Chairman, Committee on Energy and Commerce
United States House of Representatives

The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
United States House of Representatives

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Lamar Smith
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Committee on the Judiciary
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The Honorable John Conyers, Jr.
Ranking Member
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The Honorable Bob Goodlatte
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The Honorable G.K. Butterfield
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The Honorable John Bryson
Secretary
United States Department of Commerce

The Honorable Lawrence E. Strickling
Assistant Secretary for Communications and Information and Administrator
National Telecommunications and Information Administration
United States Department of Commerce