30 September 2015

Jonathan Robinson
Chair, ICANN Generic Names Supporting Organization

Alan Greenberg
Chair, ICANN At-Large Advisory Committee

Re: Proposal from Ron Andruff to establish a PICS review committee

Dear Messrs. Robinson and Greenberg:

Mr. Ron Andruff sent the attached proposal to Cherine Chalaby, Chair, Board New gTLD Program Committee (NGPC) to establish a highly-regulated string PICS review committee (PICS review committee). According to Mr. Andruff, the purpose of this committee would be to "ensure a set of PICS that more fully protects public interest is established in an expeditious, open and transparent manner."

The NGPC does not believe that it currently possesses the authority to establish a new community-based mechanism like the PICS review committee suggested by Mr. Andruff. Rather, consistent with ICANN's bottom-up multistakeholder model, we think it is more appropriate to provide you with Mr. Andruff's proposal for your consideration.

Please let us know if you have any questions or concerns. Thank you.

Sincerely,

Cherine Chalaby
Chair, Board New gTLD Program Committee

Los Angeles   12025 Waterfront Drive, Suite 300   Los Angeles, CA 90094   USA   T +1 310 301 5800   F +1 310 823-8649
Offices: Beijing   •   Brussels   •   Istanbul   •   Montevideo   •   Singapore   •   Washington

http://icann.org

From: Ron Andruff <ra@dotsportllc.com>
Date: August 21, 2015 at 2:19:17 PM EDT
To: <cherine.chalaby@icann.org>
Cc: 'Akram Atallah' <akram.atallah@icann.org>
Subject: Moving forward on PICS reviews

Dear Cherine,

It was good to see you again in BA, my friend.

Pursuant to the mail (below) that I sent you, Akram and others while in BA, along with our brief discussion during the break at the Public Forum, the purpose of this email is to re-present the way forward to resolve this matter once and for all.

Based upon the GAC BA Communique (specifically the language noted below), the NGPC now has the authority to establish a highly-regulated string PICS review committee (hereafter referred to as "PICS review committee").

> **The GAC recommends that the NGPC:**
>
> Create a list of commended public interest commitment (PIC) examples related to verification and validation of credentials for domains in highly regulated sectors to serve as a model. These public interest commitments could demonstrate a best practice for other gTLD registry operators. For example the PIC for .bank appears to have taken steps to provide confidence to consumers that they can rely on the *bona fide* of the Registrants listed. Relevant stakeholders should be identified and encouraged to devise a set of PICs that work well for the protection of public interests in each of the new gTLDs related to highly regulated sectors.
>
> **The GAC additionally recommends**
> That the ICANN community creates a harmonised methodology to assess the number of abusive domain names within the current exercise of assessment of the new gTLD
> That the NGPC clarifies its acceptance or rejection of Safeguard advice. It would be useful to develop a straightforward scorecard on all elements of GAC Safeguard advice since the Beijing 2013 GAC Communiqué in order to clarify what elements of GAC advice have been implemented, what remains a work in progress, and what has not been accepted for Implementation. In any instances of complete or partial rejection of the Advice, the GAC urges the NGPC to clarify the milestones intended to be followed in order to seek a potentially "mutually acceptable solution" as mandated by ICANN's Bylaws.

In our view, with this authorization, the NGPC can now ask the constituencies and advisory committees within the ICANN community that have been focused on improvement of the current PICS to collegially review each of the highly-regulated strings in question to ensure a set of PICS that more fully protects public interest is established in an expeditious, open and transparent manner. The NGPC can invite 2 members from each part of the community to participate on the PICS review committee (on an informal basis); which enables everyone to participate (if they so choose). I would be delighted to be selected as Interim-Chair Chair of this

committee to get this work underway until such time as the committee can make its determination as to who they would like to Chair, should you so wish.

The methodology can follow the strawman, which was proposed at our second high-level meeting (call of April 7th) and is attached for your ease of reference. This clearly addresses the question I raised in the BA email (below): *Is it reasonable that ICANN gives the operation of a highly-regulated string to an operator that has <u>zero nexus to the affected community</u>, which effectively allows that operator to force unilaterally developed policy on that community <u>without any comment or input from that community</u>?* In short, each highly-regulated string registry will be invited by the PICS review committee to present its PICS (or logic for having no PICS) to the committee, along with one or two respective representatives from each respective 'affected community'. Once the affected community representative(s) give their feedback/input to the committee, the committee itself will then work together to determine which PICS should be included and/or which ones should not be on the basis of ICANN's second level of consensus, namely 'rough consensus' (which allows for any and all dissenting voices to articulate their reasoning when the recommendations are submitted). Note that I am recommending rough consensus because it assures no party can block the decision of the majority of the committee; hence the committee can produce an outcome in the shortest time frame possible. At the end of this brief review process, the committee will send its recommendations to the NGPC to forward on to the GAC or put the recommendations out for short public comment, first, before sending them on – whichever the NGPC feels is more appropriate.

One last point that cannot be underscored enough. Regarding PICS for .BANK, as noted in the BA Communique ("For example the PIC for .bank appears to have taken steps to provide confidence to consumers that they can rely on the *bona fide* of the Registrants listed") this comment must be better understood for what it is, i.e. <u>a perfect example of what we have been asking for</u>. The reason that the PICS in .BANK are acceptable to the community is because <u>the affected community, the banking industry developed them</u>; that is to say, the impacted community was engaged in developing the highly-regulated string registry policies.

Cherine, after all these years of working on this matter, we finally have this one opening to get this right. Through this undertaking we can demonstrate that ICANN is accountable to the community and can find its way through tricky situations. You and I both know that doing a full review is the right thing to do, so I cannot implore you enough to take these steps to set us on the road to getting the reviews accomplished.

Perhaps needless to say, I am available to discuss this further by mail or phone, as you wish.

Standing by for your soonest reply,

RA

Ron Andruff
dotSport LLC
www.lifedotsport.com

Response to PICs Meeting #1 re: Potential New PICs

[ASSIGNMENT: Possible Voluntary New PICs (Ron Andruff): Suggest potential new PICs that could be voluntarily added by registries to Specification 11 that would both (a) improve consumer protection and (b) enhance the commercial attractiveness of the highly regulated new gTLDs to the registries.]

INTRODUCTION

The BC, GAC and other SG/Cs' central argument regarding deficiencies in the level of protection for consumers relating to strings for sectors that are highly-regulated in the vast majority of jurisdictions around the world, where a few relatively simple ex ante actions would help to address and minimize potential fraud, is to avoid harm to consumers' health and safety while increasing trust and confidence in the Internet and the DNS. Our concern is that the safeguards (PICs) that the NGPC accepted for strings associated with highly-regulated industries and professions fall short of the necessary mark[1]. The strings we are speaking about evoke trust among consumers, they relate to professions or sectors that are highly-regulated domestically in most jurisdictions in order to protect consumers, and consequently abuse by potential registrants will have important negative consequences not just for consumers' health and safety, but for respect and confidence in the DNS. Accordingly, with these strings subjected to significant amounts of fraudulent behavior and abuse by potential registrants, registry operators who view such protections as interference with their "open" business models will ultimately be victims in the future when bad publicity, bodily harm and lawsuits result from their reluctance to engage in ex ante validation and verification of registrants due to advancing deficient models at the expense of a trusting general public.

Furthermore, to truly meet its public interest obligations, ICANN cannot allow PICs to be unilaterally created by registries. End-user communities or representatives impacted by these strings have a right to be given an opportunity to weigh in on what is being proposed and what they will be subjected to pursuant to those proposals. As end users of gTLDs that implicate a regulated space, impacted parties must have an opportunity to voice their views in this debate pursuant to ICANN's Mission and Core Principles[2]. To that end, ICANN has a moral, if not legal obligation, to ensure that voluntary PICs for these strings follow common principles and vary according to the relative weight and share of potential harm possible to consumers if registrants using these strings are fraudulent, unlicensed, etc.

We have a common concern that principles are not applied consistently, for example one applicant for multiple gTLDs related to extensively regulated industries and professions included clauses in their voluntary PICs that allow the registry, in its sole discretion, to modify or discontinue their public interest

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[1] http://www.bizconst.org/wp-content/uploads/2014/12/BC-comment-on-safeguards-for-Category-1-gTLDs.pdf#page=3&zoom=auto,-99,383

[2] Core Value [c]. *To the extent feasible, delegate coordination functions to responsible entities that reflect the interests of affected parties.*

commitments for any compelling business reason at any time. Such language defeats the purpose of Specification 11, which is meant to ensure that ICANN can enforce all commitments made as part of the new Registry Agreement on an ongoing and long-term basis. 'Commitment' is defined as: *an obligation that restricts freedom of action*. Accordingly, the BC continues to recommend that ICANN develop a community participation process [3] where such Registry Operators may seek amendments to, or withdrawals of, certain PICs.

The purpose of this document is to focus this PICs group on the substance of the shared concerns noted above by way of three examples in an effort to scope the work ahead. The examples highlight (1) a highly-regulated string where no safeguard controls have been put in place; (2) a sting where superfluous policies have been included (which may also reflect anticompetitive practices); and (3) a string that has the appearance of having struck the right public interest balance, but needs to be tested to prove this is so.

Lastly, we offer a Strawman Proposal – a methodology – whereby the ICANN community (constituted with representatives from this PICs group) can collegially work through each of the selected highly-regulated strings to reach a set of PICs in an expeditious, open, and transparent manner. We believe that this proposal meets the requirement to *(a) improve consumer protection; (b) enhance the commercial attractiveness of the highly regulated new gTLDs to the registries, and (c) ensures ICANN compliance with its Articles of Association[4].*

SAMPLE OF CURRENT PICs

Example #1: No Public Interest Commitment Specifications / No controls

24	LOTTO	Afilias Ltd	**Contracted**	**PICS – none offered**

We take the perspective that when ICANN contracts with a registry to manage an online space (gTLD) that is highly-regulated in the physical world, ICANN is duty-bound to ensure that such registry has a minimum set of safeguards (PICs) in place to ensure that – first and foremost – the public interest is protected.

While we recognize that regulations governing the conduct of lotteries (policies on use as well as the ability for maligned parties to seek remedies/redress) differ broadly from nation to nation, we are reassured that countless regulations, in

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[3] see further detail in the attached Strawman Proposal

[4] "The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

fact, cut across all nations of the world, thus enabling this policy implementation work to be achieved.

This particular example highlights the fact that more than thirty applicants for highly-regulated strings (from the list provided) consciously chose to wholly disregard the GAC request for PICs. ICANN nonetheless signed contracts with many of these registries notwithstanding the actuality that the applicants for these highly-regulated strings put <u>zero public interest commitments in place</u>.

Example #2: Registries Using String for Self-interest / Unnecessary controls

| 30 | PHARMACY | National Association of Boards of Pharmacy | **Contracted** | Registration limited to online pharmacies and related entities that meet all regulatory standards in the jurisdictions in which they are based **and in which they do business**. Validation **process under evaluation**. <mark>Registrants must limit registration to business or trade name</mark>. Generic domains not initially reserved/allocated by the registry would not initially be permitted to be registered until discussed within the broader community. Registry **operator is looking into active monitoring options** for non-compliant activity. Potential creation of policy advisory board |

Apart from the ambiguous, non-committal language noted above in red text, this example demonstrates applicants that have put PICs in place, but have included superfluous 'safeguards' that are not intended to protect consumers but rather to limit registration, i.e. autocratic or self-serving controls. The applicant in this case, an American organization, National Association of Boards of Pharmacy (NABP), is effectively an instrument of large pharmaceutical companies[5]. NABP submitted PICs that appear on their face to be reasonable, but in reality they enable the registry to restrict registrations and dictate anticompetitive policies (e.g., see yellow highlight above). By including the phrase, *"…**and in which they do business**"* at the end of the sentence "…*online pharmacies and related entities that meet all regulatory standards in the jurisdictions in which they are based…"*, NABP institutes a restrictive and exploitative policy that in truth denies all pharmacies the right to do any Internet prescription fulfillment outside of their immediate physical location. This runs directly contrary to the global nature of the Internet and the expectations of consumers, and goes far beyond the legitimate scope of relevant PICs, which should be to assure that a domain

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[5] http://safe.pharmacy/about-us From this link it would appear that Eli Lilly and Company, Merck & Co. Inc., Pfizer Inc., Gilead and Janssen Therapeutics are funding the .PHARMACY registry.

registrant fully meets is regulatory obligations in its home jurisdiction and is selling genuine, unexpired, and unadulterated medicines.

The hundreds of thousands, if not millions, of pharmacies all around the world are retail stores; more often than not small businesses. To amplify this point, industry experts cannot come up with a single pharmacy (single store, chain or brand) that has outlets in multiple national jurisdictions (multinational pharmacies). Which begs the question of the purpose of this policy. While a full discussion of this policy with the applicant (registry) should reveal the rationale, in essence this policy supports the pharmaceutical industry's nation-by-nation pricing rules, which directly impacts its ability to maintain the world's highest prescription pricing structure in the United States. Invoking the popular platform of reigning in 'rogue Internet pharmacies' that are purveyors of bad drugs, this unwarranted policy gives the registry the unbridled authority to deny a .PHARMACY domain name to trustworthy licensed pharmacies that meet all other relevant applicable standards.

Example #3: Inclusive Industry-based Strings / Appropriate controls

3	BANK	fTLD Registry Services LLC	**Contracted**	Registration limited to verified banks, savings associations, and associations, service providers, and government regulators serving the banking industry. ==Registrants must demonstrate that they are eligible members of the banking community== (business charter, mission statement, etc.); banks must provide government regulatory authority and ID issued by this authority.

This example is the one most often cited as a demonstration of a registry that 'got it right'. Those that agree with this sentiment do so because they believe that the consortium of banks behind the application understands that – irrespective of the whether banking activities are taking place in the digital or physical world – banks have an iron-clad responsibility to meet certain regulatory requirements in their jurisdictions, encourage and develop consumer trust by avoiding fraud and ensuring consumer protection. Internet users expect that a website ending in a .BANK domain name, will ensure certain baseline protections and confidence. This registry operator's requirements for demonstration of being a regulated financial institution stands in sharp contrast to those of portfolio applicants, as no attempt is made to maintain that the term 'bank' could refer to blood bank, sperm bank, river bank, etc. (see yellow highlighted text above), and that protection for consumers should be reactive rather than proactive.

While some agree that .BANK's PICs are commendable, it is nonetheless imperative to review even those registries that appear to have gotten their PICs right. In this way, ICANN can confidently point to examples of demonstrable fairness that validate ICANN upholding its Core Values.

Strawman Proposal for Reviewing Highly-regulated String PICS

This proposal enables the indispensable PICs reviews to be done in an accelerated time frame, while ensuring that each Registry-under-review as well as those parties that will be impacted by the PICS are given an appropriate opportunity to present their positions to a Public Interest Commitments Standing Committee (PSC) to fully inform the PSC's recommendations to the NGPC.

In addition, in cases where a registry would like to remove, modify or otherwise amend their PICs at some future point in time, the PSC can assume the role of reviewer/adjudicator on behalf of the community to develop recommendations following the same methodology (noted below).

1. Constitution of PSC (each sends two reps):
   - GAC
   - ALAC
   - BC
   - Registry constituency
   - Registrar constituency
   - NGPC
   - Other C/SG
   - Staff (e.g. Akram or Alan)

2. Staff support to facilitate calls, drafting of summaries, preparing public comments, etc.

3. Methodology:
   - Invite 2 representatives from Registry-under-review and 2 representatives from recognized, impacted group to present views to the 14 PSC members, thereby ensuring that both the Registry and that part of the general public impacted by the string are afforded equal opportunities to inform the PSC determinations around each string.
   - Recordings/transcripts of all meetings (conference calls) will allow any interested community members and other stakeholders to follow/track discussions/information as they are presented.
   - Once the PSC has heard the PICs fully described and clarified, along with the rationale for why those particular PICs were selected as opposed to others, the impacted party will be given equal time to respond or present their case for or against the PICs presented.
   - The PSC will work on a rough consensus basis. After a fulsome discussion, staff will put the PSC determinations/recommendations out for expedited Public Comment. All members of the community and other stakeholders will have the opportunity to bring their views to the discussion via the Public Comment period that will follow each review.
   - Following a review of staff summarized public comments on the PICs of each Registry-under-review, the PSC will submit its recommendations to the NGPC for ratification.
   - Reviews will be undertaken in chronological order according to each applicant's original lottery number (issued at the start of the application review process).

- All 38 highly-regulated strings – pre contract and contracted – must go through the review process. Once PICs for a string have been finally determined and vetted by this process, that applicant/registry will be invited to add them as voluntary PICs to their contracts. Those registries that choose to pushback will face ICANN's formal unilateral contract revision process.

4. Timing (example of PSC work schedule):
   - Week 1 / Day 1: One hour call – 20 minute presentation of existing PICS and rationale by Registry-under-review; 20 minute presentation by impacted group (what they like; what they don't like; what is missing); 20 minute PSC discussion
   - Week 1 / Day 2-5: PSC members exchange views on-list – pros/cons, support/no support, recommendations…
   - Week 2 / Day 1: One hour call for PSC to discuss/debate views on PICS for string in question
   - Week 2 / Day 2-5: Finalize PSC member views; staff to prepare PSC rough consensus recommendations along with any dissenting arguments for Public Comment and put them out for 21-day Public Comment period)
   - Week 3 – 5: Public Comment
   - Week 6: Staff produces Public Comment summary and delivers it to PSC for final comment/recommendation prior to submission to NGPC
   - Week 7: NGPC receives PSC PICS final recommendations for Registry-under-review. If in agreement, NGPC sends on to GDD staff to implement; if not, sends back to PSC with rationale for further consideration (process begins anew)
   - Week 8: GDD staff requests Registry-under-review to voluntarily undertake recommended PICS (or face unilateral contract change provisions).
   - Week 8: If Registry-under-review agrees to take on recommended PICS, contract revised and Registry is freed from moratorium, i.e. free to move forward unencumbered

This strawman proposal suggests that the PSC could work on 4 strings per month, each string demanding 2 one-hour calls and say, 3-5 hours for the concomitant on-list debate/discussions. While this is an aggressive schedule, there are strings such as .BANK and .INSURANCE that are considered by some to already possess a commitment to necessary safeguards. Overall, we believe that the workload is reasonable, allowing for processing all 39 strings within the course of this calendar year. The additional time required is fully justified in that, once these registries open for business, the public will be impacted by their protective policies (or lack thereof) for many years to come.

~ END ~