

9 December 2001

To the Names Council:

On 1 December 2001, a “Final Report of the ORG Divestiture Task Force” was submitted for consideration at the 13 December 2001 Names Council teleconference. The report raises significant practical and legal concerns regarding (a) what policy recommendations are intended by the report and (b) whether the policy recommendations could be implemented in a manner that is practical and fulfills fundamental aspects of ICANN’s mission.

As submitted, the report proposes a wholly new kind of TLD: a *sponsored yet unrestricted* TLD. This aspect of the report leads to a series of inconsistencies that in turn lead to ambiguities and irreconcilable conflicts in the policies being recommended. There are inherent conflicts between the notions of sponsored and unrestricted that make it extraordinarily cumbersome – if not impossible – for both concepts to apply to the same situation. Attempting coexistence would present significant problems that I believe will require complicated (and possibly unworkable) elaborations, augmentations, and revisions. If corrective measures are not taken at the DNSO level now, there is a significant danger that either (a) corrections will be required through policy revisions at the Board level or in the implementation process or (b) the .org transition from VeriSign will be delayed as clarifying and additional policy recommendations are sought from the Names Council.

In this document, I will attempt to provide you with the background as to why the concepts of sponsorship and unrestricted do not work together.

I. Nature of and Justification for the Sponsored TLD Concept. First it is helpful to understand the details of the “sponsorship” idea that has developed over the past two years. The fundamental characteristic of a “sponsored” TLD is that it has a Sponsor to which ICANN delegates a portion – but not all – of ICANN’s policy-formulation responsibility. This delegation is made on the premise that ICANN’s mission of developing DNS policies through consensus-based processes involving all affected parties can best be done, in the case of TLDs with registration policies limited to a well-defined community, by a community-based organization that represents the spectrum of interests of the registrants and others in the community who may be affected. The delegation is not simply a matter of granting the customary discretion to the registry operator regarding how to run its business; it is a delegation of ICANN’s responsibility to act in a way that represents all the affected registrants.

As recently noted in my analysis of objections to the .aero agreement <<http://www.icann.org/tlds/agreements/aero/report-aero-tld-24nov01.htm>>, this has been accomplished in the present sTLD agreements by stating a “charter” defining the purposes for which the TLD may be used and then expressly defining a “Sponsored TLD Community”, which in general terms is “either commensurate in scope with or broader than the registrants within the scope of the charter.” To ensure that requirements that policies made under ICANN’s policy ambit are developed in a manner that involves all affected, whether directly by ICANN or through delegation to a Sponsor, subsection 4.2 of the sTLD agreement sets forth a series of requirements on how the Sponsor may exercise delegated authority:

4.2. General Obligations of Sponsor. During the Term of this Agreement, Sponsor shall, in developing or enforcing standards, policies, procedures, or practices within the scope of its delegated authority with respect to the Sponsored TLD:

4.2.1. publish such standards, policies, procedures, and practices so they are available to members of the Sponsored TLD Community;

4.2.2. conduct its policy-development activities in manner that reasonably provides opportunities for members of the Sponsored TLD Community to discuss and participate in the development of such standards, policies, procedures, or practices;

4.2.3. maintain the representativeness of its policy-development and implementation process by establishing procedures that facilitate participation by a broad cross-section of the Sponsored TLD Community;

4.2.4. ensure, through published procedures, adequate opportunities for members of the Sponsored TLD Community to submit their views on and objections to the establishment or revision of standards, policies, procedures, and practices or the manner in which standards, policies, procedures, and practices are enforced;

4.2.5. ensure that any revenues received by Sponsor or any affiliated entity directly or indirectly from the provision of Registry Services are used solely for the benefit of the Sponsored TLD Community; and

4.2.6. ensure that any contract with a Registry Operator precludes any control by that Registry Operator over the policy-development process of the Sponsored TLD.

<<http://www.icann.org/tlds/agreements/sponsored/sponsorship-agmt-29aug01.htm#4.2>>

II. Contradictions in Unrestricted, Sponsored TLDs. In attempting to overlay this sponsorship concept on a wholly unrestricted TLD, the task force report raises many difficulties.

(a) Scope of representation. Because the TLD is proposed to be unrestricted (both as to existing registrations and future registrations), the affected community is unbounded. The justification of delegating ICANN's responsibility to an organization that can represent a narrower community in a more focused way (than ICANN) is simply absent. Correspondingly, the Sponsor of a wholly unrestricted TLD carries the full weight of representing the entire Internet community. Since it carries ICANN's full representational responsibility, the sponsor in essence becomes a second ICANN, which should be subject to all the procedures ICANN must follow, including taking into account all the views of all segments of the Internet community.

(b) Scope of delegation. The difficulties of the attempt to combine sponsorship and a prohibition of restrictions is also apparent from the limits the task force report proposes on the Sponsor's authority. The recently completed sTLD agreements set forth seventeen items as to which policy-development responsibility is delegated to the Sponsors in attachment 2 to the agreements:

.aero:

<<http://www.icann.org/tlds/agreements/aero/sponsorship-agmt-att2-20nov01.htm>>

.coop:

<http://www.icann.org/tlds/agreements/coop/sponsorship-agmt-att2-06nov01.htm>

.museum:

<<http://www.icann.org/tlds/agreements/museum/sponsorship-agmt-att2-20aug01.htm>>

These delegated items fall into six broad categories:

- A. naming conventions within the TLD, restrictions, and name-selection principles (items 1-5 and 14);
- B. additional dispute-resolution mechanisms (item 6);
- C. selection and supervision of the registry operator (items 7-9);
- D. selection of qualified registrars, practices of registrars, and terms of dealing of registrars with registrants and the registry operator (items 10-13);
- E. start-up of the TLD (item 15); and
- F. Whois policies (item 16).

(Item 17 generally supports implementation of the prior 16 items.)

Comparing this list of delegated items with the task force report makes clear that the task force report envisions that only a small slice of this authority will be delegated. Instead of proposing to find an organization representative of a distinct sub-community and thereby allowing that community to formulate basic policy, the task force report at one point appears to give no delegation of authority at all. As point 6 of the task force report says: "TLD administration must adhere to policies defined through ICANN processes, such as policies regarding registrar accreditation, shared registry access, dispute resolution, and access to registration contact data." If this provision means what it literally says, the TLD simply would not be sponsored at all.

At other points in the report, however, it appears to propose to give the Sponsor broader policy authority. Point 2b, for example, indicates that the Sponsor might be responsible for "accreditation of registrars"; this seems at odds with the language of point 6 quoted immediately above. This leaves unclear what the role of the Sponsor is—can it dictate who can be and who cannot be a registrar? This is only one of several ambiguities in the report's proposed role of the .org sponsor and for ICANN.

III. Sponsored Status Is Unnecessary in an Unrestricted TLD. The confusing character of the report's proposal of an unrestricted, sponsored TLD is unnecessary. Operators of unsponsored TLDs (VeriSign, NeuLevel, Afiliias, and Global Name Registry) are responsible for operating their businesses within well-defined, but expansive, bounds set forth in their registry agreements. This business discretion would

appear to allow the flexibility that the task force sought to “promote and attract” registrations from the community of non-commercial (broadly defined, including cultural, expressive, etc.) organizations.

It should be emphasized that there is no reason that a uTLD operator must be commercial. A non-profit entity could readily be selected as the registry operator and then outsource the back-end to a commercial entity (similar to Afilias’s outsourcing to Liberty).

As noted in the 15 August 2000 “Criteria for Assessing TLD Proposals” document, some degree of policy-formulation responsibility is devolved in both uTLDs and sTLDs:

In the context of unsponsored TLDs, this can appropriately be accomplished for many operational matters by giving the registry operator flexibility in the registry contract. For restricted TLDs, some have suggested a "sponsorship" model, in which policy-formulation responsibility for the TLD would be delegated to a sponsoring organization that allows participation of the affected segments of the relevant communities.

<<http://www.icann.org/tlds/tld-criteria-15aug00.htm#7>>

The task force report states that sponsorship is beneficial because it can give the non-commercial community greater influence over (a) the image of .org presented to the public; (b) distribution of surplus revenues; and (c) selection of management personnel. All these things, however, could readily be handled in the unsponsored TLD context. Operators of uTLDs routinely engage in marketing and select their management personnel. They also choose what to do with any surplus revenues.

As well-stated by Bret Fausett in his 1 December 2001 icann.Blog article entitled “Sponsored, Unrestricted .Org”:

So it’s not entirely clear what a sponsoring entity would do when overseeing an unrestricted TLD. Each of the possible benefits listed in the report (“Sponsorship is beneficial because...”) also would be realized simply with a new registry operator and some guidelines for operation built into a new .org registry accreditation contract. To my way of thinking, all the Task Force’s proposed change would do is create a new level of bureaucracy for .org domain name registrants and registrars.

That view counsels strongly in favor of reforming the task force’s recommendations to call for an organizational structure that is either (a) sponsored and restricted (like .museum), (b) unsponsored and restricted (like .name or .biz), or (c) unsponsored and unrestricted (like .com or .info) – but not sponsored and unrestricted.

Please let me know if I can provide further information on these points.

Best regards,

Louis Touton