Case No. 06-1216

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT PETERSON,
Appellant

vs.

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION; UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL D. GALLAGHER, in his capacity as Assistant Secretary of Commerce for Communications and Information; CARLOS GUTIERREZ, in his capacity as Secretary of Commerce; and NEUSTAR, INC., a Delaware Corporation,
Appellees

On Appeal from the United States District Court
for the Eastern District of Virginia
Civ. Action No. 1:06cv96
Honorable Gerald Bruce Lee, United States District Judge

APPELLANT'S OPENING BRIEF

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February 20, 2006
(date)

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For the Court's convenience, Appellant attaches statutes and excerpts from the Federal Register that were relied on heavily in the briefing, including:

5 U.S.C. § 551

5 U.S.C. § 552

5 U.S.C. § 553

63 Fed. Reg. 8825 (Feb. 20, 1998)

65 Fed. Reg. 50964 (Aug. 22, 2000)

I. INTRODUCTION

Without overstatement, the Internet has revolutionized free speech in the United States. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). The Supreme Court has long held that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." (*Id.*)

The National Telecommunications and Information Administration ("NTIA") disagrees. NTIA opened the .us top-level domain (".us-TLD") for the public's use years ago, explicitly permitted "proxy" registrations so beneficial website owners could register websites through a responsible proxy to maintain a level of anonymity in their speech, and even enticed users with slick promotions that the .us-TLD was "America's Internet Address" where users could "establish unique, memorable American identities online." NTIA now says it can burden anonymous speech as it pleases; it can do so without real evidence of any harm from anonymous speech; and without even complying with the Administrative Procedure Act ("APA").

NTIA's actions have victimized plaintiff/appellant Bob Peterson ("Peterson"), among more than 17,000 others who took advantage of proxy registrations to maintain a level of anonymity, but who now finds himself without either his website or, for a time, the anonymity that he tried to protect. Like the 18th century pamphleteer, Peterson used his website to espouse sometimes-controversial political ideas, with a contractual promise that a dissenter would not have ready access to his home address or phone number.

Despite the already well-established First Amendment protection for free speech on the Internet, the United States District Court for the Eastern District of Virginia ("District Court") rejected any similarity between Peterson's plight and the pamphleteer, and likened NTIA's regulation to the right of a government to require permits for any large group's use of a public park. Armed with nothing more than conclusory allegations, lacking a scrap of evidence of any actual harm caused by the anonymous speaker, NTIA prevailed in its arguments before the District Court that an order preliminarily enjoining its new rule against anonymous non-commercial websites would harm governmental interests.

Peterson asks this Court to reverse the District Court's denial of a preliminary injunction and, pending a full trial on the merits, allow Peterson to re-establish his website with the level of anonymity he enjoyed previously. Peterson asks this Court to recognize that the Internet is not like the limited space of a

public park. Rather, the Internet is a medium of speech, akin to a leaflet, a piece of mail, or a newspaper. Government regulations of the content of such speech survive only if narrowly tailored to serve an overriding governmental interest – a burden that NTIA has not shouldered here.

II. JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346(a) because this case arises under the First Amendment to the United States Constitution and under 5 U.S.C. § 551 *et seq.* This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because Peterson appeals from an interlocutory order of the District Court, dated February 17, 2006, denying his request for a preliminary injunction. The decision was appealable as an interlocutory order, and notice of this appeal was filed February 21, 2006.

III. STANDARD OF REVIEW

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion. *See, e.g., Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Pub. Sch.*, 373 F.3d 589, 593, 602 (4th Cir. 2004) (reversing the denial of a preliminary injunction on the ground that the plaintiff demonstrated likelihood of success on the merits of its First Amendment claims). To the extent the District Court made conclusions of law, those conclusions are reviewed *de novo*, and findings of fact are reversed if there is clear error. *Giovani Carandola,*

Ltd. v. Bason, 303 F.3d 507, 511, 520-21 (4th Cir. 2002) (affirming a grant of a preliminary injunction where First Amendment claims were impinged for even a minimal period and the state is in not harmed by the injunction).

Similarly, in analyzing a district court's decision regarding standing, this Court reviews factual findings for clear error, and the legal question of whether Peterson has standing under a *de novo* review. *See Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 262 (4th Cir. 2001) (citing *Marshall v. Meadows*, 105 F.3d 904, 905-06 (4th Cir. 1997)).

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues for review:

(1) Did the District Court err in finding that Peterson lacks standing to challenge NTIA's new rule that prohibits Peterson and others from maintaining websites on the .us-TLD unless they publicly disclose in a globally-accessible database their name, address, telephone number, and affiliation with their website?

(2) Did the District Court err in concluding that NTIA's rule prohibiting any person from registering a website on the .us-TLD without publicly disclosing his or her name, address, telephone number, and affiliation with that website, is a reasonable time, place, and manner restriction?

(3) Did the District Court err in holding that the NTIA was exempt from the notice and hearing requirements of the APA in adopting its rule

prohibiting anonymous .us website registration because the NTIA imposed its rule through a contract; that is, by compelling the change through a new contract with its registry, that required the registry to require private registrars to accept the change or lose the ability to register users in the .us-TLD?

V. STATEMENT OF THE CASE

Peterson filed a complaint for injunctive relief in the District Court to enjoin NTIA, United States Department of Commerce, Michael D. Gallagher, in his capacity as Assistant Secretary of Commerce for Communications and Information, Carlos Gutierrez, in his capacity as Secretary of Commerce, and NeuStar, Inc. ("NeuStar") (collectively, "NTIA"), from enforcing a regulation banning all anonymous website registration on the .us TLD on the grounds that it runs afoul of the First Amendment and the APA.

Peterson initially sought a temporary restraining order, but NTIA agreed to delay enforcement of its new rule and respond to the application for temporary restraining order as if it were a motion for preliminary injunction. After hearing the parties, the District Court denied Peterson's request for an injunction. Peterson now appeals that order.

VI. STATEMENT OF FACTS

Peterson operated a non-commercial Internet website entitled "Point-CounterPoint City, US" ("PCP City") on the .us-TLD. (*See* JA20 at ¶ 2.) Peterson

operated his website as a resource and forum for the direct exchange of competing points of view on current political and social topics. (*Id.*) There, he discussed controversial topics such as the war in Iraq, social policy, and capital punishment. (*Id.*) Peterson's website contained no advertising and made no profit. (*Id.*)

The .us domain is the country code top level domain (".us TLD") associated with the United States. (*See* JA34 at ¶ 3.) Just as ".com" is associated with general commerce, .us is associated with the United States. (*Id.*) Peterson registered his website, www.pcpcity.us, because it reinforced his belief that his website represented American ideals by fostering political debate. (*See* JA20 at ¶ 3.)

NTIA, an agency within the Department of Commerce, contracts with a private registry to assign names on the .us domain to private parties. (*See* JA34 at ¶ 2.) NTIA entered into its agreement in October 2001 with NeuStar, a Virginia corporation, to manage and coordinate the .us domain registry. (*See* JA55 at ¶ 12; JA145.) A stated objective of the agreement between NTIA and NeuStar was to "promote increased use of the [.us domain] by the Internet community of the United States (including small businesses, consumers, Internet users, not-for-profit organizations, and local governments) . . . ." (JA146 at ¶ 2.) NTIA, through its contractor, NeuStar, actively enticed users to the .us TLD with slogans like, "Make

'America's Internet Address' Yours!", and "Here's where citizens . . . establish unique, memorable American identities online." (JA778 at ¶ 4; JA798.)

NeuStar entered into agreements with domain registrars, which offer registrations on the .us domain to the public. (*See* JA778 at ¶ 4; JA798; *see also* JA150.) The Go Daddy Group, Inc. is one of many such domain registrars that entered into agreements with NeuStar to offer registrations on the .us-TLD. (*See* JA187 at ¶ 5). Peterson registered the PCP City website in September 2004 through GoDaddy.com ("Go Daddy"), The Go Daddy Group, Inc.'s flagship company. (JA34 at ¶ 3.) Go Daddy is a domain name registrar accredited by the Internet Corporation for Assigned Names and Numbers. (*Id.*; *see also* JA55 at ¶ 13; JA165-66.)

Typically, when anyone registers a website, his or her personal information (home address, phone number, and email address) is listed in an online, public database called "WHOIS." (JA34 at ¶ 3; *see also* www.whois.net.) The WHOIS database allows anyone with a computer and access to the Internet to find the address and phone number of the registrant for a particular website. (JA34 at ¶ 3.) To protect his anonymity, Peterson registered his website using Go Daddy's proxy service, Domains by Proxy, Inc. ("Domains by Proxy") so that the WHOIS database would show Domains by Proxy as the registrant. (*Id.*)

Using a proxy did not impenetrably shield Peterson's identity if legitimate concerns arose about his website. Domains by Proxy maintained personal contact information and would disclose it in response to a request by law enforcement or a subpoena. (*See* JA54-55 at ¶ 9; JA94-95; *see also* JA34 at ¶ 3.) In addition, Domains by Proxy had a system in which, upon receiving reasonable evidence of actionable harm to a third person, the registrar would suspend the proxy website, identify the beneficial owner, and take any other action necessary to avoid harm. (*See* JA34 at ¶ 3; JA801-02 at ¶¶ 8-9; JA16 at ¶¶ 6-9.) Beneficial owners of websites, such as Peterson, however, had the opportunity to contest the disclosure of their personal information in civil cases. (*See* JA54-55 at ¶ 9; JA94-95.)

Peterson registered his website by proxy to keep his home address and telephone number from being disclosed to the public in connection with his website. (JA34-35 at ¶ 4.) Peterson feared that if his personal information were publicly available through the WHOIS database, those who disagreed with his views could more easily retaliate against him. (*Id.*) By using a proxy registration, Peterson could more securely engage in vigorous and direct political and social discourse because he did not have to fear reprisal. (*Id.*)

Go Daddy, Inc., through its affiliate Domains by Proxy, offered proxy registration to .us-TLD users beginning in 2002. (*Id.*) Early in the program's existence, Go Daddy discussed the service with NTIA's agent, NeuStar. NeuStar

did not protest that the service would violate the registrar's agreement, breach any treaties, or cause any other problem. (*See* JA802-03 at ¶ 12.) Indeed, from the beginning, NTIA approved the form agreement between NeuStar and registrars that explicitly allowed proxy registrations:

> Any registrant that intends to license use of a domain name to a third party is nonetheless the Registrant of record and is responsible for providing its own full contact information and for providing and updating technical and administrative contact information adequate to facilitate timely resolution of any problems that arise in connection with the Registered Name. A Registrant licensing use of a Registered Name according to this provision shall accept liability for harm caused by wrongful use of the Registered name, ***unless it promptly discloses the identity of the licensee to a party providing the Registrant reasonable evidence of actionable harm.***

(JA321 at ¶ 21; JA562 at ¶ 3.7.7.4 (emphasis added).) As discussed above, Peterson's registrar complied with the latter requirement, promptly disclosing identities upon receiving reasonable evidence of actionable harm. In fact, a registrar had an incentive to comply: the safe harbors of laws like the Digital Millennium Copyright Act. 17 U.S.C. § 512 at ¶ 8. For three years, Go Daddy offered registrations by proxy without receiving any complaint from NTIA or NeuStar that such registration interfered with their ability to administer the .us-TLD. (JA34-35 at ¶ 4.)

On February 2, 2005, with no notice or public input, NTIA dispatched a letter to NeuStar demanding a termination of proxy registrations on the .us-TLD.

(*See id.*; JA55 at ¶ 10; JA113-14.) NTIA unilaterally directed NeuStar to amend its Accreditation Agreement to reflect this new prohibition:

> Notwithstanding Section 3.7.7.4.1 [formerly section 3.7.7.4] above, neither Registrar nor any of its resellers, affiliates, partners and/or contractors shall be permitted to offer anonymous or proxy domain name registration services which prevent the Registry from having and displaying the true name and accurate data elements contained in Section 3.3 for any Registered Name.

(JA174; *see also* JA34-35 at ¶¶ 4-5.) Registrars had no choice but to sign the amended agreement or lose the right to issue domain names in the .us-TLD. (JA34-35 ¶ 4-5.) Oddly, NTIA's new rule prohibits proxy registration by registrars or their affiliates, but not by others. (JA174.) NTIA ordered that all new proxy registrations cease immediately, and that registrars terminate existing websites registered by proxy if the registrants did not allow their personal information to be released into the WHOIS database by January 26, 2006. (*Id.*)

After his desperate search for counsel finally resulted in finding the undersigned counsel, Peterson filed an action in the District Court on January 25, 2006 to seek an injunction against NTIA's new rule, and sought a preliminary injunction to delay the rule while his case proceeded. (JA22 at ¶ 8.) Peterson was not aware that his attempt to stop the new rule rather than comply meant that he was too late to terminate his website in time to avoid public disclosure of his personal identifying information. (JA880 at ¶¶ 4-8.) After the District Court denied Peterson's request for a preliminary injunction, Peterson's identifying

information appeared for a time on the WHOIS database. (JA880 at ¶ 4.) Peterson immediately cancelled his website registration to stop the disclosure of his personal identifying information on the Internet. (JA879-80 at ¶¶ 3-5.)

VII. SUMMARY OF THE ARGUMENT

The District Court abused its discretion in denying Peterson's request for a preliminary injunction to prevent NTIA from continuing to strip individuals' free speech rights on the .us-TLD. Contrary to the District Court's holding, Peterson has standing to pursue this action. He has suffered an injury in fact and also raises a proper challenge to NTIA's rule on overbreadth grounds. Moreover, Peterson satisfies the requirements for a preliminary injunction: he has been irreparably harmed through the loss of his First Amendment right to anonymous speech on his website (or any .us-TLD website). Meanwhile, the Government's proffered justifications lack either evidentiary support or logical coherence. NTIA's rule is a content-based regulation of speech that fails to pass the requisite constitutional scrutiny.

In addition to its constitutional infirmity, NTIA's action does not comply with the APA. The contracts exception to the APA does not permit NTIA to avoid any public notice or discussion of its decision to prohibit anonymous speech on the .us-TLD. Consequently, the District Court also abused its discretion

in holding that NTIA did not need to comply with the APA when it regulated speech on .us.

VIII. ARGUMENT

A. The District Court Erred In Concluding That Peterson Lacks Standing To Assert His First Amendment Claim.

The District Court erred in finding that, because Peterson did not adequately protect his anonymity, he lacks standing to bring his First Amendment claim. (JA933:9-12.) Peterson suffered an injury as a direct result of NTIA's new regulation. (*See* JA21-22 at ¶¶ 6, 9 (explaining that Peterson fears retaliation for his speech, and would rather shut down his website than publicly disclose his address and telephone number).) As a precondition to maintaining a .us website, the new NTIA rule compels Peterson to publicly disclose personal information and therefore link it to his website. Under *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002), Peterson has an anonymity interest even though his identity is not fully anonymous. Peterson also has a privacy interest in preventing public disclosure of his personal information. In addition to first-party standing, Peterson challenges the regulation under the overbreadth doctrine because the regulation is unconstitutional as applied to the anonymous speech of others not before the Court.

1. Peterson has Article III, first-party standing.

To satisfy the requirements of Article III standing, as articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), a party must provide evidence to support the conclusion that: "(1) [he or she] . . . suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there [is] a causal connection between the injury and the conduct complained of; and (3) it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (citations omitted); *see also White Tail Park, Inc. v. Stroubl*e, 413 F.3d 451, 458 (4th Cir. 2005) (emphasizing that standing does not turn on whether plaintiff will be successful on the merits, but on whether plaintiff is the proper person to bring the claim, and holding that an organization had standing to challenge a statute that impinged on the First Amendment rights of the organization and its members).

a. Peterson has suffered an injury in fact because his personal identifying information was released on the WHOIS database, and he was forced to close his website.

Peterson's constitutional injury is concrete and particularized as well as actual. *See Lujan*, 504 U.S. at 561 n.1 (clarifying that "[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way"). NTIA's rule requiring disclosure of personal information on the WHOIS database

forced Peterson to choose between sacrificing his anonymity and closing down his website thus silencing his speech. Peterson chose to terminate www.pcpcity.us. While NTIA's rule is enforced, Peterson cannot restart his website on "America's Internet Address," or open a new .us website, without disclosing his name, address, and telephone number on the WHOIS database. Thus, he brings a case or controversy before the court. (JA879 at ¶¶ 5-8.)

(1) <u>One need not maintain absolute anonymity to enjoy First Amendment protections</u>.

Notwithstanding Peterson's clear injury, the District Court found that Peterson lacked standing because he had not adequately protected his anonymity. (JA933:9-12.) The District Court based this conclusion on the fact that Peterson's name appeared on his website and other personal information could be found through a Google search. (JA933:14-20.) However, the notion of anonymity does not encompass absolutes as much as it controls the dissemination of identifying information. *See generally McIntyre*, 514 U.S. at 334 (finding that distributors of handbills did not need to identify themselves on the handbills as they had a right to speak anonymously). In *McIntyre*, for example, the plaintiff attempted to protect her right to speak anonymously through distributing handbills that did not have her name on them. *Id.* at 337. McIntyre did not protect her anonymity flawlessly. Some of the handbills she distributed identified her as the author. *Id.* She

presumably handed out the leaflets with no effort to conceal her identity. A recipient who saw her face-to-face could find out who she was and where she lived by following her home. Nonetheless, McIntyre fought for, and won, her right to control the way in which her personal information was disseminated. *Id.* at 357.

Similarly, in *Watchtower Bible*, plaintiffs challenged an ordinance that required canvassers to obtain a permit from the mayor's office, and reveal their identities in a publicly-accessible list, in order to canvass door-to-door for any cause. 536 U.S. at 153-54. The Court rejected the idea that the canvassers had no anonymity interest because "the very act of going door-to-door requires canvassers to reveal a portion of their identities." *Watchtower Bible*, 240 F.3d 553, 563 (2001), *rev'd*, 536 U.S. 150. The Court held that the canvassers retained an anonymity interest: "the fact that circulators revealed their physical identities did not foreclose our consideration of the circulator's interest in maintaining their anonymity." *Watchtower Bible*, 536 U.S. at 166-67.

Peterson's situation is analogous. While Peterson's name appears on his website, this partial disclosure of his identity does not strip him of all interest in maintaining his anonymity. Peterson protects that anonymity by not listing his address, telephone number, or personal email address on his website. (JA21 at ¶ 6.) Thus, like the canvassers in *Watchtower Bible*, Peterson still maintains an interest in protecting his anonymity, even though that anonymity is not complete.

The holding of *Watchtower Bible* recognizes that in this day and age, absolute anonymity is impossible – indeed it would be difficult to function in our society if that were the goal. But the Supreme Court's opinions have also been sensitive to the fact that the desire to maintain anonymity is legitimate – fear of retaliation, whether by officials or society, "or merely by desire to preserve as much of one's privacy as possible." *Id.* (quoting *McIntyre*, 514 U.S. at 341-42); *see also Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999) (striking down requirement that petition circulators wear name badges even though they must file an affidavit with personal identifying information because "the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest.").

Peterson does not contend that he is absolutely anonymous, nor is that his goal; rather, Peterson seeks to avoid linking his personal identifying information, such as his address and telephone number, with the political views he expresses on his website. (*See* JA21 at ¶ 6; JA22 at ¶ 9.) Much like the speakers in *Watchtower Bible* and *McIntyre*, Peterson may have lost a degree of anonymity, but the registration requirement, just like the permit requirement for canvassing, still implicates anonymity interests. *Watchtower Bible*, 536 U.S. at 166.

No person can participate in society without sacrificing some anonymity. Peterson has an unlisted phone number and he chose to register his

website anonymously. Peterson's First Amendment rights are not forever destroyed merely because his name is discoverable through a Google search. Indeed, every American most likely has a web-presence.

(2) The right to informational privacy should be protected on the Internet.

Even if Peterson lacked an anonymity interest, he nonetheless retains a privacy interest in preventing disclosure of his name, address, and telephone number in the WHOIS database. Even the District Court appeared to concede that Peterson would have an injury if his private information were made public, if being made public is an offense to the First Amendment. (*See* JA933 at 21-24 ("Now, as it relates to his address and telephone number, again, that may be – that may be some injury if that is protected somehow by the First Amendment.").) On February 22, 2006 – shortly after the District Court's denial of a preliminary injunction – Peterson's personal information was made public on the WHOIS database. (JA880 at ¶ 4.)

The courts are still struggling with the extent of an individual's privacy interests in personal identifying information. The recent emergence of online databases such as WHOIS has raised new concerns regarding privacy in a digital age. The potential for breaches of privacy and identity theft is great in an era where mass amounts of personal information are available at the click of a button. The WHOIS database is a perfect example of the dangers posed by such

data compilations: it provides globally available, instantly accessible information about .us web registrants to anyone, including stalkers, spammers, and identity thieves. For this reason, individuals should be able to control the information disseminated about themselves. Courts that have confronted the challenges presented by this new technology are increasingly recognizing that individuals should be able to choose when their personal information is made public.

Several courts have touched upon the issue of "informational privacy." In *Whalen v. Roe*, 429 U.S. 589 (1977), for example, the Supreme Court discussed the threat to privacy that occurs as a result of the accumulation of personal information. *Id.* at 605 (discussing a New York statutory scheme that provided restricted access to a compilation of personal medical information, but finding that due to the limited nature of the statute, the inaccessibility of the information, and the destruction of the information within five years, it did not violate a privacy right).

In his concurring opinion, Justice Brennan aptly stated that "central storage and easy accessibility of computerized data vastly increase the potential for abuse of the information – future technology developments might demonstrate the necessity of some curb on such technology." *Id.* at 606-07 (Brennan, J., concurring). With uncanny prescience about the coming "Information Age," Justice Brennan warned that, as information becomes more and more accessible,

and as we become more and more dependant on technology, our personal information is at risk. *Id.* at 607. Rather than condone and facilitate compilations of personal information, the Government should continue to protect privacy, especially when there is a viable alternative.

In the *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court stated that the common law notion of privacy encompasses individuals' control of information concerning themselves. *Id.* at 759, 763 (addressing whether reporters could have access to compiled rap sheets under the Freedom of Information Act, and rejecting a "cramped notion of personal privacy"). The Court recognized a difference between public records that can be found after a diligent search and information that is collected and summarized in a public clearinghouse of information. *Id.* at 764. Further, as quoted in *Reporters Committee*, "[h]ardly anyone in our society can keep altogether secret very many facts about himself. Almost every such fact, however personal or sensitive, is known to someone else. Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure, but with an interest in selective disclosure." *Id.* at 763, 763 n.14 (quoting Kenneth L. Karst, *"The Files:" Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 Law & Contemp. Prob. 342, 342-44 (1966)).

b. An injunction against the NTIA's rule would cure Peterson's First Amendment violation.

NTIA's regulation directly caused the violation of Peterson's First Amendment rights. There is a direct causal connection between NTIA forcing all .us-TLD domain registrants to list their names and addresses in a public registry, and the violation of Peterson's right to speak anonymously. *See Lujan*, 504 U.S. at 562. NTIA placed Peterson in the untenable situation of being forced to choose between making public his private information, or shutting down his website. If the regulation is ruled unconstitutional, Peterson's right to engage in anonymous speech in a public forum will be restored.

2. In addition to first party standing, Peterson has third-party standing under the Overbreadth Doctrine.

Even if Peterson himself lacks an anonymity interest, he asserts a challenge to the NTIA regulation on behalf of anonymous .us website registrants. First Amendment cases present an exception to the general rule that Constitutional rights are personal and may not be asserted vicariously. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). The Supreme Court has altered the traditional rules of standing for First Amendment challenges to permit attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with

the requisite narrow specificity. *Id.* at 612 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

The *Broadrick* court stated that a court may grant third-party standing based on a prediction or assumption that "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* The Court's concern is that overbroad proscriptions harm society by muting valuable speech. *Id.* In analyzing prudential standing in the First Amendment arena, a primary concern, as summarized by the Supreme Court in *Secretary of State of Maryland v. Munson*, 467 U.S. 947, 956 (1984), is the risk that one who engages in protected activity might rather chill his or her own speech than risk punishment for his conduct in challenging the statute.

To address this concern, in *Schad v. Borough of Mount Ephram*, 452 U.S. 61, 66 (1981), the Supreme Court held that those who challenge a law are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own when their claims are rooted in the First Amendment. Overbroad laws deter privileged activities, and the Supreme Court's cases firmly establish the right of a party to assert third-party standing in an overbreadth challenge. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)).

a. Under the test outlined in *Munson*, Peterson can challenge the NTIA rule as applied to anonymous web registrants.

For third-party standing, the litigant must first satisfy the court that there is a case or controversy. *Munson*, 467 U.S. at 954 (holding that a professional fundraising corporation had standing to challenge a statute regulating the way in which charities raise funds based both on the potential for silencing many people's speech, and the corporation's injury). Thus, a litigant suffering an injury-in-fact, whether or not attributable to unconstitutional actions in the litigant's case, need only be able to satisfactorily frame the issue that unconstitutional actions may harm others. *Id.* at 958.

Peterson suffered an injury-in-fact when he was forced to shut down his website on the .us-TLD to protect his First Amendment right to speak without revealing his address, and telephone number on a publicly-searchable database, and he was injured when his personal identifying information was published on the WHOIS database. *See supra* Part VIII.A.1.a. Peterson is able to satisfactorily frame the issues to the Court because Peterson's interests are consistent with other .us web registrants who want to prevent their personal information from being made publicly available. *See Munson*, 467 U.S. at 958. Further, the NTIA rule is substantially overbroad. While the NTIA purportedly enacted this rule in part to prevent Internet fraud and unwanted spam, the rule sweeps within its net all

anonymous website registrations on the .us-TLD – including family, church, social, and charity websites, as well as political websites like Peterson's, that do not engage in commercial activity or spamming.

b. The District Court's reliance on *Gilles v. Torgerson* was misplaced.

NTIA relied heavily on *Gilles v. Torgerson*, 71 F.3d 497, 501 (4th Cir. 1995), in arguing that Peterson could not assert third-party standing because he is not completely anonymous and thus suffered no injury. (*See* JA917:5-24.) In *Gilles*, a minister challenged a Virginia Polytechnic Institute policy that denied campus access to any outside speakers unless they first obtained a university sponsor, such as a student organization. *Gilles*, 71 F.3d at 499. The minister was sponsored and allowed to speak on campus, though he was not permitted to speak in a desired location. *Id.* This Court concluded the minister lacked standing because he was not injured by the sponsorship policy he challenged. *Id.* at 501. To the extent he suffered an injury by not being able to speak where he wanted, that injury was caused by a different policy, not the sponsorship requirement. *Id.* Because the minister suffered no injury caused by the statute he challenged, the Court concluded that he also lacked third-party standing to challenge the statute for overbreadth. *Id.*

The crucial distinction between *Gilles* and the instant case is that Peterson's injury *was caused by the NTIA regulation*: he maintained a .us website

but was forced to shut it down because he did not want to disclose information on the WHOIS database. By contrast, the minister in *Gilles* challenged a policy that did not affect him in any way. The minister was injured, but by a *completely different policy* than the one he was challenging. *Id.*

The District Court's conclusion that Peterson was not injured by the NTIA rule because he was only partially anonymous conflates the injury requirement with the merits of Peterson's claim. Peterson does not need to be anonymous to suffer an injury for third-party standing purposes. Even if Peterson made no claim that he was anonymous, but simply did not want to disclose his personal identifying information for his own reasons, he would still be injured *by the NTIA rule* because he is prohibited from maintaining his website unless he disclosed his information in the WHOIS database. Although the statute ultimately may be held constitutional as applied to him (merits), the overbreadth doctrine still allows him to assert the rights of those to whom the rule could not be constitutionally applied (standing).

In summary, Peterson stands before this Court on behalf of himself and those others who were forced either to publish their personal identifying information or to silence their speech. Prospective .us-TLD website users who wish to speak with a level of anonymity are now barred from the .us-TLD. Many individuals create a web presence for themselves, but do not want to identify

themselves publicly. Operators of websites who were victims themselves and now provide forums for other victims of domestic abuse, stalking, and other threats are inherently safer if the public – and former victimizers – do not know their identities or addresses. (*See* JA54 at ¶¶ 4-5; JA61-63; JA70-80; *see also* JA34 at ¶ 3.)

For those people, stepping forward before the courts does not make practical sense. Maintaining their anonymity is potentially more pressing than challenging NTIA's new regulation. *See Munson*, 467 U.S. at 957-58 (explaining that the risk of chilling speech is great when one is forced to either face punishment for engaging in speech or not speak at all; in these situations, "[s]ociety as a whole then would be the loser"). There is a "judicial presumption" that a statute's existence may cause others not before the court to refrain from engaging in protected speech. *See Broadrick*, 413 U.S. at 612. In these situations, a litigant may challenge a statute on behalf of those not before the Court. Therefore, the District Court abused its discretion in holding that Peterson lacked standing to bring this action because he was not an anonymous speaker. Under the overbreadth doctrine, NTIA's rule is unconstitutional as applied to third-party, anonymous speakers.

B. The District Court Erred In Denying Peterson's Motion For A Preliminary Injunction.

In considering whether to grant preliminary injunctive relief, this Court requires the district court to evaluate four factors: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest." *L.J. v. Massinga*, 838 F.2d 118, 120 (4th Cir. 1988) (citing *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194-95 (4th Cir. 1977)). In applying these factors, the District Court erred when it denied Peterson's preliminary injunction for the reasons stated below.

1. Peterson suffered an irreparable injury.

The District Court erroneously concluded that Peterson had not demonstrated irreparable harm because "there is no restriction on the time or manner of his speech" and NTIA's new rule is "regulatory in purpose." (JA936:23-4.)

In fact, Peterson has demonstrated a clear injury. After the District Court's denial of the preliminary injunction, NTIA enforced its new rule, and Peterson's home address and phone number were linked to his website and made widely and readily available on the WHOIS database. (JA880 at ¶ 4.) Peterson was forced to shut down his website on the .us-TLD to remove his personal

information from WHOIS. (JA879-80 at ¶¶ 3-5.) As long as NTIA's rule is enforced, Peterson cannot reclaim his website, www.pcpcity.us, or any website on "America's Internet Address" without disclosing personal information. He is thus being denied the right to express his political views on the .us-TLD, the only place where he can "establish [his] unique, memorable American identit[y] online." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

2. The District Court had no evidentiary support for its finding that a preliminary injunction would harm governmental interests.

The District Court concluded that the likelihood of harm to the Government if a preliminary injunction were granted was substantial. (JA936:6-13; JA937:14-20.) The basis for this finding was that the injunction would: (1) impair the United States' ability to comply with international treaties, (2) interfere with regulating Internet-related crimes such as theft, identity theft, fraud, or child pornography, and (3) hinder finding the proper holder of a website in the event of technical problems. (*Id.*)

The error of this decision is made apparent by the complete lack of evidence to support any of these findings. NTIA did not explain how the proxy system breached treaty obligations. Though the proxy system has been operating

on the .us-TLD for at least three years, NTIA did not cite a single example to support a finding of harm. *See* discussion *infra* Part VIII.B.3.a.(2). NTIA did not cite not a single incident in which proxy registration impeded efforts to prevent Internet-related crimes such as theft, identity theft, fraud, or child pornography. In fact, the record reveals that registrars readily disclose contact information for proxy registrants in response to law enforcement requests or subpoenas. (JA802-03 at ¶ 9 (stating that Go Daddy provides contact information voluntarily to law enforcement when they make a legitimate request for information).) Finally, there is no evidence in the record that proxy registration has prevented anyone from resolving technical difficulties on a proxy registered site. To the contrary, the record reveals that registrars can forward messages to the proxy registrant or shut down the website in response to complaints. (JA800-01 at ¶¶ 5-8).

Because NTIA has presented no evidence to support its conclusory justifications, the balance of harm to Peterson compared with the harm to NTIA tips sharply in favor of granting the preliminary injunction, and thus the District Court erred in its denial.

3. The District Court erred in concluding Peterson was not likely to succeed on the merits.

The District Court also erred in holding that Peterson had "a slim likelihood of success on the merits" of his First Amendment claim. (JA937:22-2.) The court held that NTIA's rule was a content-neutral, time, place, and manner

restriction. (JA933:3-7.) Additionally, the court held that NTIA's rule is narrowly tailored to significant governmental purposes. (JA934:20-935:24.) The court mentioned regulation of technical problems, compliance with treaties, and crime prevention as adequate justifications provided by the Government. (JA934:20-935:14.) As explained below, NTIA's ban on proxy registrations is neither a content-neutral time, place, and manner restriction nor narrowly tailored. As a content-based restriction that fails to satisfy strict scrutiny, the rule violates the First Amendment. Consequently, the District Court erred in failing to recognize Peterson's strong likelihood of success on the merits.

a. NTIA's rule violates the First Amendment.

(1) The NTIA rule prohibiting proxy registrations is content-based and must satisfy strict scrutiny.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Freedom of speech includes the right to speak anonymously, including the right not to disclose one's identity. *Talley v. California*, 362 U.S. 60, 64 (1960) (striking down a municipal ordinance that banned distribution of handbills that did not contain the names and addresses of the persons who prepared, distributed, or sponsored them). The decision to speak anonymously "may be motivated by fear

of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42.

Whatever the motivation, there is no denying that "anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind." *Id.* Many authors with profound impact on the formation of American democracy chose to speak anonymously or employed pseudonyms to conceal their identities. *See id.* at 342 n.4, n.6.

The NTIA rule is a drastic departure from our country's historic recognition and appreciation of anonymous speech. Under the rule, "America's Internet Address" is no longer open to any individual or group who would prefer to speak anonymously. This sweeping prohibition, which affects all .us websites, commercial and non-commercial, political, religious, or personal, regulates the content of speech in two ways. First, the rule compels proxy registrants to disclose their identities on the WHOIS database, thereby compelling them to speak. Second, it places a greater burden on the expression of controversial and unpopular ideas because their proponents are more likely to speak only if they may remain anonymous.

(a) The NTIA's new rule is content-based because it compels website registrants to identify themselves.

The NTIA's rule prohibiting proxy registration at the .us-TLD constitutes a content-based regulation because it forces website owners to publicly reveal their names, addresses, and telephone numbers. Forcing a speaker to make a certain statement, such as disclosing his or her identity, is a content-based regulation. *McIntyre*, 514 U.S. at 348 (prohibition on anonymous handbill distribution constitutes content-based regulation because the "identity of the speaker is no different from other components of the document's content that the author is free to include or exclude"). In *McIntyre*, the defendant was cited for distributing leaflets at a public meeting at her local middle school in violation of an ordinance requiring that all leaflets contain the name and address of the leaflet's author. *Id.* at 347. Some of McIntyre's leaflets identified her as the author, but others expressed the views of "Concerned Parents and Tax Payers." *Id.* at 337. The Court held that the statute was a content-based restriction on core political speech because it dictated that authors include their names and addresses on the leaflet. *Id.* at 345. As a result, the Court applied "exacting scrutiny," under which a law can be validated "only if it is *narrowly tailored to serve an overriding state interest*." *Id.* at 347 (emphasis added).

Similarly, under the NTIA rule, all .us-TLD registrants are now required to publicly state their names, addresses, and telephone numbers on the WHOIS database and to link themselves publicly with the ideas expressed on their websites. No web registrant can create or maintain a .us-TLD website without also revealing this information. While *McIntyre* required disclosure on the leaflet itself, this distinction is irrelevant because in both situations, the rule strips individuals of their anonymity. It is the right to speak anonymously that the Supreme Court sought to protect in *McIntyre*. *See id.* at 341-43 (recounting the "important role" of anonymous pamphlets, leaflets, brochures, and books in the "progress of mankind"). Because the Government's rule against proxy registration similarly strips individuals of their anonymity, it is content-based and should be subjected to strict scrutiny.

(b) The NTIA's new rule is content-based because it places greater burdens on controversial and unpopular speech than on speech advocating the status quo.

By banning anonymous website registration, the Government's rule places a greater burden on advocates of controversial and unpopular ideas. Advocates of unpopular ideas are less likely to speak if required to disclose their identities, for fear of retaliation or social ostracism, and are also less likely to be able to find another website willing to host their controversial views and risk the

retaliation or ostracism that the speaker would have risked. *See id.*, 438-39 n.8 (stating that "[a]rguably the disclosure requirement places a more significant burden on advocates of unpopular causes than on defenders of the status quo"); *Talley,* 362 U.S. at 64 (noting that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all"); *see also* Laurence H. Tribe, *American Constitutional Law* 794 (2d ed. 1988) (asserting that a law should be considered content-based if its intent is to restrict controversial speech). This is certainly true of Peterson, who registered for his .us-TLD through a proxy service because he intended to engage in provocative political speech and feared retaliation from those who do not share his point of view. (JA20 at ¶¶ 2, 3.) Peterson removed his website from the .us-TLD to protect his address and telephone number from public disclosure on the WHOIS database. (JA879-80 at ¶¶ 3-9.) As a result, the NTIA rule has chilled and will chill the expression of controversial and potentially unpopular ideas by speakers who choose to remain anonymous. Because it imposes a greater burden on such unpopular ideas, the NTIA rule must be subjected to strict scrutiny.

(c) <u>The District Court erred in concluding that the NTIA rule is content neutral.</u>

Following the reasoning from *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), the District Court incorrectly held that the NTIA rule is content

neutral, and therefore subject to only intermediate scrutiny. (JA935:1-7.) In *Thomas*, the government was concerned with scheduling the use of a park, and ensuring that damage was not done to the facility. *Id.* at 319. The Internet is not a physical location, and thus does not share the same physical constraints as a park. Unlike a park, there is essentially no limit to the number of people that can use the .us domain. Rather, like the Internet generally, the .us domain is a medium of communication, much more akin to a letter, leaflet, or even a newspaper. *See, e.g.*, *Reno*, 521 U.S. at 870 (distinguishing the government's authority to regulate broadcasting from the authority to regulate the Internet; "[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.").

In *McIntyre*, the appellee distributed leaflets at a public meeting at her local middle school. *McIntyre*, 514 U.S. at 347. The superintendent of the school district had called the meeting to speak about an upcoming referendum on a proposed school tax levy. McIntyre's leaflets expressed her opposition to the levy on behalf of "Concerned Parents and Tax Payers." *Id.* at 337. She was fined by the Ohio Elections Commission for illegally distributing unsigned leaflets. *Id.* The law burdened core political speech, so the court applied "exacting scrutiny,"

under which a law can be validated "only if it is *narrowly tailored to serve an overriding state interest.*" *Id.* at 347 (emphasis added).

The permit in *Thomas* did not require speakers to publicly surrender their anonymity. While certainly the government would know the name of the sponsoring group, there is no indication that the sponsor's name, address, or other information was made *publicly available.* Thus, *Thomas* did not implicate the right to speak anonymously in the same way as the NTIA rule. More importantly, *Thomas* did not purport to regulate individual speakers – only those groups large enough to impact the public use of the park. *See Reno*, 521 U.S. at 870 ([T]he Internet can hardly be considered a 'scarce' expressive commodity.").

In summary, the NTIA rule compels web registrants on the .us-TLD to publicly disclose their names, addresses, and telephone numbers, thus precluding individuals who wish to remain anonymous from hosting websites on the .us-TLD – and, as noted previously, imposing greater burdens on controversial and unpopular speech. As a result, it is a content-based restriction which must satisfy strict scrutiny.

(2) The NTIA rule fails strict scrutiny because it is not narrowly tailored to achieve a compelling state purpose.

As a content-based regulation on speech in a public forum, the NTIA's rule must be subjected to "the most exacting scrutiny." *Boos v. Berry*, 485

U.S. 312, 321 (1988). Such regulations survive only if they are "narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347. The NTIA rule, which is neither narrowly tailored nor justified by a compelling state interest, fails this rigorous constitutional test.

The District Court relied on three justifications offered by the NTIA to support its decision that no injunction should issue: (1) enforcing treaties with other countries (JA936:8-12); (2) addressing technical problems (including spam) (JA937:14-16); and (3) responding to a violation of the law by a proxy registrant. (JA93715-20.) None of these "justifications" is either supported or meritorious. (*See generally* JA773-JA776.)

The District Court emphasized that the regulation is necessary to enforce and uphold treaties between the United States and other countries. (JA922:19-25.) The District Court accepted NTIA's argument that the treaties prohibit proxy registration by requiring registrars to maintain an accurate, searchable database of personal contact information for .us registrants. (JA934:4-7; *see also* JA922:13-15; JA933:16-19.) Yet proxy registrations do not violate this provision because the proxy registrar – who has the ability to enable or disable the website – is the "registrant." The proxy registrar provides contact information that is accurate and searchable in the WHOIS database. (*See* JA800 at ¶ 4.)

The District Court's finding also is not supported by any evidence. Nor could it be, since NTIA provided none. NTIA simply identified the existence of the treaties and asserted in a conclusory manner that proxy registrations ran afoul of the treaties. There is no evidence that other treaty signatories interpret the treaty is a similarly restrictive manner. In fact, a brief inquiry discredits this justification. By typing an Australian webpage into the WHOIS database for that country's top-level domain (http://whois.auregistry.net.au), one can see that the information included in the database is only that information required for contacting the website operator, and nothing more. The registry includes only the domain name, the registrar name, the registrant name, and email addresses for the registrant and the registrant's "tech contact." Even for a commercial website, WHOIS publishes no address or telephone number. This information is essentially the same as that offered when a website operator registers by proxy. In any event, it has long been settled that a treaty does not permit the Government to violate the Constitution. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 432 (1920).

As Peterson explained during the hearing before the District Court, the claim that allowing proxy registrations creates or exacerbates some sort of technical difficulty is without merit. (JA899:17-JA890:3.) The District Court's conclusion that disallowing proxy registration will solve technical problems among web-users is unsupported by the record. (JA920:17-7.) To the contrary, a proxy

system is preferable because the proxy has technical control over the website and can terminate the website should there be a problem. (JA902:5-11.) An individual user has no incentive to respond to a telephone call or email regarding problems with his or her website, whereas a proxy server has its business to protect, and its protections to maintain under the Digital Millennium Copyright Act or other statutes. (JA902:4-20.) In the unlikely event that the technical problem is so extreme as to cause harm, the registrar can quickly and effectively shut down the website pending resolution. (JA895:15-JA896:21; *see also* JA800 at ¶ 6.)

The District Court's holding that the new rule prevents fraud and identity theft also is not supported by the record. To the extent that the rule will curtail fraud, it is patently overbroad. It bans all anonymous .us websites, whether commercial or not, political, religious, or personal, not just those bent on practicing fraud. The District Court found that the NTIA rule was necessary to enable law enforcement to shut down websites that break the law. (JA900:17-JA901:2.) However, NTIA has offered no reason why web registrants' personal information must be disclosed publicly to enable law enforcement to prevent illegal activity on websites. Registrants such as Go Daddy respond to information requests from law enforcement without requiring a subpoena as a matter of course. (JA801-02 at ¶ 9.) Rather than protecting against identity theft, forcing beneficial website owners to disclose personal identifying information exposes them to identity theft.

As Peterson explained, publishing personal information in a publicly accessible database creates a clearinghouse for those would-be thieves. (JA900; *see also* discussion *infra* Part VII.B.3.a.(3).)

NTIA briefed, through the course of these proceedings, three additional reasons it claims require public disclosure of proxy registrants' identities that the District Court did not consider, but alluded to, during argument. These "justifications" are similarly without merit, and cannot explain the existence of the new regulation: (1) enforcing the nexus requirement; (2) resolving problems arising from bankruptcy or business failure by a registrar; (3) facilitating NTIA's contracts to manage the .us domain. (JA319 at ¶ 18.)

NTIA's first argument, that proxy registration permits beneficial website owners to circumvent the requirement that the .us domain only be used by those with a sufficient nexus to the United States, is spurious because registrars currently check registrants' compliance with the nexus requirement as a condition of their registration. (*See* JA802 at ¶ 11.) Even still, in the three years Go Daddy facilitated proxy registration, NTIA did not request information even once about a proxy registrant's compliance with the nexus requirement. (JA802 at ¶ 10.) Therefore, proxy registrations have not, and will not, interfere with the Government's ability to enforce the nexus requirement.

The second point, that eliminating proxy registration will facilitate the continued service to domain name holders should a registrar suffer a business failure, does not explain how the new rule will further this goal, or why this is a compelling state interest. (JA319 at ¶ 18.) NTIA offers no example of any disruption caused by a proxy registrar's business failure. (*Compare id. with* JA774.) The responsibility to maintain the records in case of a business failure rests with the registrar, not with the Government agencies. Even if NTIA were involved, NTIA does not explain why it is necessary to publish the information publicly, rather than providing it to NTIA privately. Even if this was a legitimate governmental concern, NTIA easily could address it through the contracting process by requiring NeuStar to include a provision in its registrar contracts that registrars maintain a back-up tape of all registrants to be used in the event of business failure.

Finally, Defendants claim that "potential bidders" for contracts to manage the .us domain name space rely upon full and complete identity information to make their bids. (JA319 at ¶ 18.) Defendants have not explained this mysterious assertion and no reasonable explanation is apparent. (JA774.) NTIA's current contractor does not claim to have relied on such information in making its bid. (*See generally* JA186-91.) Furthermore, the current contractor did not object that proxy registrations would undermine its ability to fulfill its contract

when Go Daddy disclosed plans for proxy registrations at least three years ago. (*See* JA802-03 at ¶ 12.)

The District Court abused its discretion in denying Peterson's request for a preliminary injunction as NTIA has offered no compelling governmental interest to justify its new rule, and NTIA has offered no support to lend any credence to its "justifications." (JA933:20-935:19.) Proxy registration on the .us-TLD was in place for at least three years, and yet the NTIA did not, and can not, cite to one concrete example that would provide justification for stripping web-users' privacy and compiling their personal information in a public database. (*See* JA774.)

(3) The NTIA rule is unconstitutionally overbroad.

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick*, 413 U.S. at 611-12. A law that regulates substantially more speech than the Constitution allows is defectively overbroad. *Id.* Such a statute is unenforceable "unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 613.

One of the Government's principal justifications for its rule against anonymous websites is to prevent fraud and spam. (JA920:3-7.) However, the rule broadly prohibits not just anonymous commercial websites, but all anonymous websites, including political, religious, and personal websites that do not solicit funds, engage in consumer transactions, or send spam emails. The mere fact that NTIA's rule sweeps so broadly "raises constitutional concerns." *Watchtower Bible*, 536 U.S. at 165. The Supreme Court has previously struck down as fatally overbroad municipal ordinances that imposed similarly far-reaching restrictions on anonymous speech. In *Talley*, the City of Los Angeles defended its ordinance against distribution of anonymous handbills in part on preventing fraud, false advertising, and libel. 362 U.S. at 64. The Court rejected this argument because the ordinance was not limited to those evils; rather it "simply banned all handbills under all circumstances anywhere that do not have the names and addresses printed on them." *Id.* Similarly, in *McIntyre*, the court stated that, to the extent the state's ordinance against anonymous leaflets was designed to prevent untruthful statements, it failed because nothing in the language of the statute limited its application to fraudulent, false, or libelous statements. 514 U.S. at 343-44.

More recently, in *Watchtower Bible*, the Supreme Court confronted a municipal ordinance that required all door-to-door canvassers to register and obtain a permit from the mayor's office. 536 U.S. at 154-55. The municipality asserted

that the ordinance was designed in part to prevent fraud. *Id.* at 164-65. The court rejected this argument, stating that the permit requirement applied to a significant number of non-commercial canvassers, including Camp Fire Girls, Jehovah's Witnesses, political candidates, and "Trick or Treaters during Halloween Season." *Id.* at 165. The Court concluded that "requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Id.* at 166.

Like in *Talley*, *McIntyre*, and *Watchtower Bible*, the NTIA rule is not limited to websites that engage in fraudulent practices or produce unwanted spam. It applies to all proxy-registered websites on the .us-TLD, including personal websites hosting "blogs" and family photos (where parents might not want to post their children's photos for family and friends if they must also give their address to every other website visitor), websites devoted to religious organizations, clubs and charitable organizations, and political websites like Peterson's, that do not engage in the sort of commercial activity that would raise concerns about fraud and spam. Consequently, to the extent that the District Court relied on the NTIA's justification based on fraud and spam prevention, the court abused its discretion, and was in clear error.

b. NTIA's decision to prohibit proxy registrations without notice violates the APA.

As a second and independent basis for his request for a preliminary injunction, Peterson contended in the District Court that NTIA violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, by failing to allow for public notice and comment before implementing its new prohibition on proxy registrations. The District Court did not address whether NTIA had given proper notice and opportunity for public comment, but held that the public contracts exception to the APA exempted NTIA from its notice and comment obligations.

The APA requires an agency to issue notice of proposed rulemaking and offer interested persons an opportunity to participate through submission of written data, views, or arguments. 5 U.S.C. § 553. "Rule making" is the "agency process [of] formulating, amending, or repealing a rule." *Id.* § 551(5). A "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." *Id.* § 553(4). Consequently, agencies such as NTIA must provide notice and an opportunity for participation before adopting rule changes.[1]

[1] The NTIA and the U.S. Department of Commerce are agencies subject to the APA. 5 U.S.C. § 551(1).

(1) NTIA's prior notice and comment period does not apply to its decision to ban proxy registrations.

Before developing the .us-TLD registrant database in 2001, NTIA allegedly solicited public input. (*See* JA316 at ¶ 13; JA318-319 at ¶¶ 16-17.) These notices did not suggest any prohibition on proxy registration. In fact, the notices implicitly allowed proxy registration. (*See* JA316 at ¶ 13 (citing notices in Federal Register); Improvement of Technical Management of Internet Names and Addresses, Proposed Rule, 63 Fed. Reg. 8825, 8829 (Feb. 20, 1998) (suggesting registrants could supply their name and sufficient information to locate the applicants *or their representative*) (emphasis added); *see also* Management and Administration of the .us Domain Space, Notice, Request for Public Comment, 65 Fed. Reg. 50964, 50967 (Aug. 22, 2000).) Pursuant to this notice and comment period, NTIA executed management, registrar, and accreditation agreements for the .us-TLD with NeuStar. (JA113.) Under these agreements, NeuStar accredited registrars to sell .us-TLD domain names. (JA34 at ¶¶ 2-3.)

From the beginning, NTIA's registrar agreements explicitly allowed the proxy registrations offered by Go Daddy. (JA562 at ¶ 3.7.7.4.) Thus, domain registrars allowed individuals, such as Peterson, to register websites anonymously through proxy registration. Yet, on February 2, 2005, NTIA issued a letter to NeuStar disallowing these proxy registrations for the first time. (*See* JA113-14.)

NTIA also coerced registrars who wished to continue offering .us domain names to sign a new agreement forbidding only registrars and their affiliates from offering proxy registrations. (JA35 at ¶ 5; JA44.)

Prior to the rule change, NTIA did not provide Peterson or other proxy registrants any notice or opportunity to comment. (*See* JA21-22 at ¶¶ 7-8; JA34-35 at ¶ 4-5.) NTIA claims that proxy registration was never permissible under its agreements with NeuStar and thus its original notice and comment period covered its decision to ban proxy registrations. However, as set forth above, the original contract between NeuStar and its registrars plainly permitted proxy registrations. (JA173-74; JA562 at ¶ 14.) For three years, NTIA's agent, NeuStar, was aware of proxy registrations on the .us-TLD and interpreted NTIA's rule as allowing them. (JA802-03 at ¶ 12.) That NTIA added an entirely new section to its agreements, as opposed to simply pointing to evidence in the administrative record or its contract with NeuStar showing that proxy registrations are not allowed, demonstrates NTIA never prohibited proxy registrations.[2] Consequently, NTIA's original notice and comment period did not apply because NTIA has changed its rule regarding proxy registrations.

[2] Moreover, NTIA's amendment still allows proxy registrations by non-registrar affiliated entities. (JA44; JA173-74.) Thus, even now, NTIA does not prohibit proxy registrations.

Even if NTIA had prohibited proxy registrations in its original contract, the agency never solicited input and the public never had the opportunity to respond to the important issue of proxy registrations. Notice is inadequate under the APA unless the public has an opportunity to respond to the substance of pivotal actions. *Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Weinberger*, 658 F. Supp. 48, 55 (D. Colo. 1987) (holding that notice of generalities is insufficient). At the time of its original notice and comment period, NTIA effectively knew that website owners could register domain names through representatives, yet made no mention of any potential ban on proxy registrations. NTIA was required, but failed, to issue a notice and opportunity for public comment on prohibiting proxy registrations before enacting this rule.

(2) The public contracts exception does not apply to prescriptive changes that constitute a significant rule change.

The District Court abused its discretion by holding that the public contracts exception to the APA applied, so that the APA itself did not. (JA937:14-938:21.) Section 553 requires a public notice and comment period for rulemaking but contains an exception for public contracts. 5 U.S.C. § 553(a)(2). However, the public contracts exception is inapplicable in this instance.

The public contracts exception does not apply when an agency makes prescriptive changes to an agreement that amount to a significant policy change.

Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children, 658 F. Supp. at 54. NTIA's ban on proxy registrations is a significant policy change, and NTIA cannot avoid the APA's requirements simply because it regulates the .us-TLD through contracts with private entities. *Cf. Vigil v. Andrus*, 667 F.2d 931, 936 n.4 (10th Cir. 1982) (holding that public contracts exception did not apply because direct effect of policy change fell upon Indian school children and their families, rather than party to government's contract). Interpreting the exception as broadly as NTIA advocates will allow any agency to circumvent the APA by finding a private contractor to violate individuals' rights.

Moreover, application of the public contracts exception would far exceed the scope of the policy behind the exception. A primary justification for the public contracts exception is that "the government enters into contracts in its proprietary capacity, and private parties have no right to participate in the government's conduct of its own business affairs." *Id.* In this instance, NTIA entered into its contract with NeuStar purely to perform its regulatory function. The contract at issue primarily impacts the rights of individuals and has little, if anything, to do with NTIA's business affairs. Such regulation by contract violates the purpose behind the public contracts exception.

The public contracts exception is also justified on the ground that the recipient has no right to the contract. *Id.* The Government can terminate the

contract whenever it wants or the recipient can avoid the Government's restrictions by not entering into the contract in the first place. *Id.* This justification is also inapplicable in this instance. The U.S. Government is the exclusive administrator of the .us-TLD. A citizen who wishes to speak on the .us-TLD must comply with NTIA's regulations. As an unavoidable restriction of the fundamental right to free speech, NTIA's ban of proxy registration falls outside the contracts exception.

Indeed, the public contracts exception has never been used to deny the public its right to notice and comment on an important policy decision.[3] Accordingly, all of the cases cited by NTIA in the lower court applying the public contracts exception dealt with a change already authorized under a statute or public contract that did not amount to a policy decision. *See Thomas v. Network Solutions, Inc.*, 2 F. Supp. 2d 22, 27 (D.D.C. 1998) (holding that addition of a fee structure for domain registrations under a contract that already expressly provided for the imposition of fees fell under public contracts exception); *Rainbow Valley*

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[3] *Vigil v. Andrus* also calls into question the validity of using a government contract to change the rights of members of the public who did not contract with the government themselves. *Vigil v. Andrus*, 667 F.2d 931, 936 n.4 (10th Cir. 1982) (distinguishing cases that did apply the public contracts exception on the basis that those contracts affected the conduct of party at the other end of Government's contract). In this instance, the Government is attempting to use its contract with NeuStar, to alter NeuStar's contract with Go Daddy, to compel changes in Go Daddy's contract with Peterson. Under *Vigil*, the contracts section does not apply. *Id.* at 936 (holding that direct effect of policy change fell upon Indian school children and their families, rather than party to government's contract).

Citrus Corp. v. Fed. Crop Ins. Corp., 506 F.2d 467, 469 (9th Cir. 1974) (holding that decision to reclassify area as uninsurable, under express statutory authorization to do so, fell under public contracts exception).

In contrast to the cases NTIA cited, NTIA's decision to change all future contracts to prohibit proxy registrations was not pursuant to any previously expressed contractual or statutory authority.[4] NTIA's substantial contractual change rose to the level of a policy decision that makes the contracts exception to the APA inapplicable. NTIA was required to comply with the APA, and its failure to do so renders its new rule prohibiting proxy registrations unlawful.

(3) The public contracts exception does not apply to Section 552's requirement that an agency publish substantive rules of general applicability.

At the very least, an agency must publish in the Federal Register its substantive rules or interpretations of general applicability and statements of general policy. 5 U.S.C. § 552; *see Energy Consumers & Producers Assoc. v. Dep't of Energy*, 632 F.2d 129, 136 (Temp. Emer. Ct. App. 1980) (quoting H.R. Rep. No. 1980 (1946), *as reprinted in* 1946 U.S. Cong. Code Serv. 1195, 1206) (stating that section 552 is "of the broadest application because . . . all administrative operations should as a matter of policy be disclosed to the public except as secrecy may

[4] In fact, Peterson has been unable to find any statutory authority for NTIA's regulation of the .us-TLD, and NTIA has yet to cite any.

obviously be required or only internal agency 'housekeeping' arrangements may be involved")).

In *NI Industries, Inc. v. United States*, 841 F.2d 1104, 1107 (Fed. Cir. 1988), the United States Court of Appeals for the Federal Circuit rejected a public contracts exception defense, holding that the exception did not apply to the publication requirement in section 552. The dispute involved the Government's value engineering exchange program (VECP) which was governed by a value engineering clause required in all supply contracts exceeding a certain amount. *Id.* at 1105. Under the program, a contractor submitted a VECP to the Government, proposing a change to its contract that would reduce the cost to the Government. *Id.* If an agency adopted the proposed change, the contractor received a share of the savings. *Id.*

The appellants had signed a delivery order for projectiles with the United States Army Armament Materiel Readiness Command (ARRCOM) which included the value engineering clause. *Id.* At around the same time, NI and the Army's other manufacturer of the projectile, Chamberlain Manufacturing Corp., discovered the same cost-saving design change. *Id.* NI was the first to notify ARRCOM of its intent to submit a VECP, but Chamberlain was the first to submit a VECP and have it entered into the command log. *Id.* at 1105-06. ARRCOM resolved the duplicate VECPs by applying its internal, unpublished policy to

accept or reject identical VECPs according to the date of their entry into the command log. *Id.* at 1106. The policy was contained in the appendix of the ARRCOM Standard Operating Procedure (SOP) 700-2 and not publicly available. *Id.* The Armed Services Board of Contract Appeals denied NI's appeal of the decision to reject its VECP. *Id.* The Federal Circuit reversed because the rule should have been published but was not. *Id.* at 1105.

Application of section 552 requires that the rule, interpretation, or policy in question be substantive. A substantive rule is one which affects individual rights and obligations. *Id.* at 1108. The Federal Circuit held that by denying NI its contractual right to share in the savings of the design change, the Army affected NI's substantive rights. *Id.*

The Government may not use unpublished regulations to adversely affect such substantive rights of individuals. *Id.* at 1107; *see Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (holding agency's denial of general assistance based on provisions in internal manual violated APA). An agency must publish its standards to ensure that it applies them consistently and to avoid "inherently arbitrary" denials of benefits based on unpublished decisions. *Morton*, 415 U.S. at 231-32. The Federal Circuit also stressed that NI had "no reason even to suspect that such policy might exist" because "the very people with whom NI was negotiating its contract" were unaware of SOP 700-2. *NI Indus.*, 841 F.2d at 1107-08. The APA

thus protects individuals from being held to administrative standards they could not have known about.

Nonetheless, NTIA in the instant action has committed the very wrong that the APA's publication requirements were designed to prohibit. NTIA's prohibition of proxy registrations – implemented without public notice in a letter to its registry, NeuStar – affects substantive rights because it denies individuals like Peterson their First Amendment and contractual rights to speak anonymously. Additionally, the decision to ban proxy registrations was based on an unpublished policy. NTIA claimed that contractual language banned proxy registrations all along, but, as previously discussed, the earlier registry-registrar contract did not ban proxy registrations (and even the surviving contract does not).

Like the plaintiff in *NI Industries*, Peterson signed his agreement with Go Daddy without any knowledge of NTIA's alleged unpublished and unknowable interpretation that its contract with registrars prohibited proxy registrations on the .us-TLD. Moreover, the entity that Peterson negotiated with – Go Daddy – also had no knowledge of NTIA's alleged rule regarding proxy registrations. (*See* JA34-35 at ¶ 3-5 (reviewing Go Daddy's development of proxy registrations).) If NTIA truly disallowed proxy registrations, this was a rule it kept secret from the registrars and individuals to which the policy applied. *See Morton*, 415 U.S. at 237 (stating that agency "through its own practices and representations" led Congress to believe that appropriations covered

particular class of individuals, thus making it too late to later argue for different construction of the language). Consequently, even if the public contracts exception did apply to excuse NTIA's failure to provide a notice and comment period, NTIA still violated the APA by failing to publish, in the Federal Register, a clear statement of its rule prohibiting proxy registrations.

4. The District Court erred in finding that the public interest would be served by denying the preliminary injunction.

The District Court also stated that the public interest would be served by allowing "a free flow of exchange of information on the Internet." (JA937:5-7.) This assertion does not comport with the nature of the First Amendment harm at issue. By stripping .us website users of their anonymity, the regulation unduly burdens the free exchange of ideas, because individuals who will speak only under a cloak of anonymity are silenced. The District Court also found that when governments, including the United States, enter into international agreements "to promote the free flow of information" and to implement administrative regulations the public interest is served by ensuring that the United States Government comply with the treaty. (JA937:8-12.) As explained in Part VIII.B.2, *supra*, the treaties at issue do not support the court's holding. Furthermore, the public has a greater interest in the Government's upholding the Constitution. As such, the Supreme Court has held that Constitutional rights are not put second to treaties. *See, e.g.*,

Holland, 252 U.S. at 432. The public interest weighs heavily in favor of Peterson rather than NTIA.

IX. STATEMENT REGARDING ORAL ARGUMENT

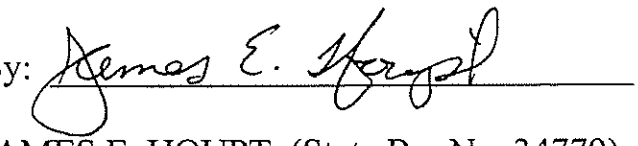
This appeal presents two novel issues for the Court's consideration. First, Peterson raises the issue of the extent to which the First Amendment protects the right to speak anonymously on "America's Internet Address," the .us top level domain. While precedent lays a strong foundation for recognizing individual privacy and anonymity interests in speaking on the Internet, the Court has not squarely addressed the issue in this modern context. Also at issue in this appeal is the extent to which the federal government can use the contracts exception to avoid the notice and hearing requirements of the Administrative Procedures Act when it uses contracts with private parties to achieves regulatory objectives. In light of the novelty of the questions presented by this appeal, Peterson respectfully submits that oral argument is appropriate.

X. CONCLUSION

The District Court abused its discretion when it denied Peterson's request for a preliminary injunction. Peterson has standing to bring this First Amendment claim, and NTIA's decision to ban proxy registrations violates the First Amendment because it is not a reasonable time, place, and manner restriction. Furthermore, NTIA failed to comply with the APA in adopting this new rule. For

these reasons, Peterson respectfully requests this Court to reverse the District Court's order. NTIA's ban of proxy registration should be declared unconstitutional and preliminarily enjoined pending discovery and a trial on the merits. Alternatively, enforcement of NTIA's rule should be enjoined as in violation of the APA.

Dated: April 17, 2006.

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ADDENDUM

5 U.S.C. § 551

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5 U.S.C.A. § 551

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 5--ADMINISTRATIVE PROCEDURE
SUBCHAPTER II--ADMINISTRATIVE PROCEDURE
→§ 551. Definitions

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

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(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Derivation:	United States Code	Revised Statutes and Statutes at Large

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5 U.S.C.A. § 551

(1)	5 U.S.C. 1001(a)	June 11, 1946, ch. 324, § 2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, § 302, 60 Stat. 918. Aug. 10, 1946, ch. 951, § 601, 60 Stat. 993. Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37. June 30, 1947, ch. 163, § 210, 61 Stat. 201. Mar. 30, 1948, ch. 161, § 301, 62 Stat. 99.
(2)-(13)	5 U.S.C. 1001 (less (a))	June 11, 1946, ch. 324, § 2 (less (a)), 60 Stat. 237.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

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END OF DOCUMENT

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5 U.S.C. § 552

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5 U.S.C.A. § 552

Effective: November 27, 2002

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 5--ADMINISTRATIVE PROCEDURE
SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

→§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to

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become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any

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subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his

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principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

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(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster

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processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

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(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the

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agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

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5 U.S.C.A. § 552

(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1002	June 11, 1946, ch. 324, § 3, 60 Stat. 238.

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12174

Ex. Ord. No. 12174, Nov. 30, 1979, 44 F.R. 69609, which related to minimizing Federal paperwork, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

EXECUTIVE ORDER NO. 12600

<June 23, 1987, 52 F.R. 23781>

PREDISCLOSURE NOTIFICATION PROCEDURES FOR CONFIDENTIAL COMMERCIAL INFORMATION

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5 U.S.C.A. § 552

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act [this section] concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency subject to the Freedom of Information Act [5 U.S.C.A. § 552] shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act [FOIA], 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

Sec. 2. For purposes of this Order, the following definitions apply:

(a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) [subsec. (b)(4) of this section], because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

Sec. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

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5 U.S.C.A. § 552

Sec. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

Sec. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Sec. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

Sec. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Sec. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act [5 U.S.C.A. § 552], and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Sec. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

Sec. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

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5 U.S.C.A. § 552

RONALD REAGAN

EXECUTIVE ORDER NO. 13110

<Jan. 11, 1999, 64 F.R. 2419>

NAZI WAR CRIMINAL RECORDS INTERAGENCY WORKING GROUP

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Nazi War Crimes Disclosure Act (Public Law 105-246) (the "Act") [set out as a note under this section], it is hereby ordered as follows:

Section 1. Establishment of Working Group. There is hereby established the Nazi War Criminal Records Interagency Working Group (Working Group). The function of the Group shall be to locate, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration all classified Nazi war criminal records of the United States, subject to certain designated exceptions as provided in the Act. The Working Group shall coordinate with agencies and take such actions as necessary to expedite the release of such records to the public.

Sec. 2. Schedule. The Working Group should complete its work to the greatest extent possible and report to the Congress within 1 year.

Sec. 3. Membership.(a) The Working Group shall be composed of the following members:

(1) Archivist of the United States (who shall serve as Chair of the Working Group);

(2) Secretary of Defense;

(3) Attorney General;

(4) Director of Central Intelligence;

(5) Director of the Federal Bureau of Investigation;

(6) Director of the United States Holocaust Memorial Museum;

(7) Historian of the Department of State; and

(8) Three other persons appointed by the President.

(b) The Senior Director for Records and Access Management of the National Security Council will serve as the liaison to and attend the meetings of the Working Group. Members of the Working Group who are full-time Federal officials may serve on the Working Group through designees.

Sec. 4. Administration.(a) To the extent permitted by law and subject to the availability of appropriations, the National Archives and Records Administration shall provide the Working Group with funding, administrative services, facilities, staff, and other support services necessary for the performance of the functions of the Working Group.

(b) The Working Group shall terminate 3 years from the date of this Executive order.

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5 U.S.C.A. § 552

WILLIAM J. CLINTON

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

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5 U.S.C. § 553

5 U.S.C.A. § 553

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 5--ADMINISTRATIVE PROCEDURE
SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

→§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

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5 U.S.C.A. § 553

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1003	June 11, 1946, ch. 324, § 4, 60 Stat. 238.

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

Current through P.L. 109-211 (excluding P.L. 109-171, P.L. 109-177, P.L. 109-178) approved March 24, 2006

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65 Fed. Reg. 50964
(Aug. 22, 2000)

SCHEDULE OF MEETINGS—Continued

Washington State Delegation	7 a.m.	Sierra B Room

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 326–6352 at least 5 days prior to the meeting date.

Dated: August 16, 2000.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 00–21370 Filed 8–21–00; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket Number 980212036–0235–06]

RIN 0660–AA11

Management and Administration of the .us Domain Space

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice, Request for Public Comment.

SUMMARY: The National Telecommunications and Information Administration ("NTIA"), Department of Commerce, requests comments on a draft statement of work and draft methods and procedure section (the "Draft SOW"), which is expected to be incorporated in a request for proposals [1] for management and administration of the .us domain space. The Draft SOW is set forth in Appendix A of this document. The public is invited to comment on any aspect of the Draft SOW including, but not limited to, the specific questions set forth below. NTIA expects to revise the Draft SOW based on public comments received. Further, NTIA may solicit additional comments for this or other elements of its request for proposals, proceed with alternative procurement mechanisms, or choose to take other actions necessary to secure appropriate management and administration of the .us domain space.

DATES: Interested parties are invited to submit comments on the Draft SOW no later than October 6, 2000.

SUBMISSION OF DOCUMENTS: The Department invites the public to submit comments in paper or electronic form. Comments may be mailed to Karen A. Rose, Department of Commerce, National Telecommunications and Information Administration, Room 4701 HCHB, 1401 Constitution Avenue, NW., Washington, DC 20230. Paper submissions should include a diskette in ASCII, WordPerfect (please specify version) or Microsoft Word (please specify version) format. Diskettes should be labeled with the name and organizational affiliation of the filer, and the name and version of the word processing program used to create the document. In the alternative, comments may be submitted electronically to the following electronic mail address <usdomain@ntia.doc.gov>. Comments submitted via electronic mail should also be submitted in one or more of the formats specified above.

FOR FURTHER INFORMATION CONTACT: Karen A. Rose, Office of International Affairs, NTIA, telephone: 202–482–1866, electronic mail: <krose@ntia.doc.gov>; or Jeffrey E.M. Joyner, Esq., Office of Chief Counsel, NTIA, telephone: 202–482–1816, or electronic mail: <jjoyner@ntia.doc.gov>.

Authority: 15 U.S.C. 1512; 47 U.S.C. 902(b)(2)(H); 47 U.S.C. 902(b)(2)(I); 47 U.S.C. 902(b)(2)(M); 47 U.S.C. 904(c)(1).

SUPPLEMENTARY INFORMATION: The .us domain is the country code top level domain ("ccTLD") of the Internet domain name system ("DNS") that corresponds to the United States. Network Solutions, Inc., is responsible for the administration of the .us top level domain ("usTLD") under its Cooperative Agreement with the Department of Commerce. Network Solutions has subcontracted administration of the usTLD to the Information Sciences Institute of the University of Southern California ("USC/ISI" or the "usTLD Administrator"). Dr. Jon Postel established the original structure and administrative mechanisms of the usTLD in RFC 1480, entitled The US Domain. Currently, second-level domain space is designated for states and U.S. territories, and the usTLD space is further subdivided into localities. Individuals and organizations may request an exclusive delegation from the usTLD Administrator to provide a registry and registrar services for a particular locality or localities. Local governments and community-based organizations typically use the usTLD, although some commercial names have been assigned. (Current usTLD policy requires prospective subdomain managers to submit written authorization from the relevant local public authority for the delegation.) Where registration for a locality has not been delegated, the usTLD Administrator itself provides necessary registry and registrar services. The usTLD is a widely distributed registry, currently with over 8000 subdomain delegations to over 800 individuals and entities, who maintain a registry and provide registration services for commercial, educational, and governmental entities. This distributed registration model affords scalable registration services and opportunities for commercial entities to provide name registration services. Nevertheless, because of the relative lack of public awareness about the availability of usTLD domain names and its deeply hierarchical and somewhat cumbersome structure, the usTLD has not attracted a high level of domain name registration activity and remains under-populated in comparison with other ccTLDs. It has been suggested for some time that the general absence of non-locality based registration space in the usTLD has contributed to overcrowding in the generic .com, .net, and .org top level domains ("gTLDs").

[1] The request for proposal, if issued, will be consistent with all pertinent U.S. Government procurement regulations, and will be posted in the Commerce Business Daily and on the National Telecommunications and Information Administration's homepage at <www.ntia.doc.gov>.

On July 1, 1997, as part of the "Framework for Global Electronic Commerce," President Clinton directed the Secretary of Commerce to privatize management of certain technical aspects of the DNS in a manner that increases competition and facilitates international participation in DNS management.[2] In response to this directive, the Department of Commerce, through NTIA, published a request for comment on a "green paper" entitled "Improvement of Technical Management of Internet Names and Addresses."[3] NTIA subsequently issued a statement of policy entitled "Management of Internet Names and Addresses" setting forth the Administration's policy regarding privatization of certain technical aspects of the domain name system.[4] As part of both the proposal and the final statement of policy, the Department noted its commitment to further explore and seek public input, through a separate request for comment, about the evolution of the usTLD space.

On August 4, 1998, NTIA solicited comments addressing the future expansion and administration of the usTLD space.[5] On March 9, 1999, NTIA hosted a public meeting regarding the future management and administration of the .us domain with approximately 60 participants, including the current usTLD Administrator, current .us registrars, educators, representatives of the technical, public interest and business communities, and federal, state and foreign government officials.[6] NTIA also established an open electronic mailing list to facilitate further public discussions of the issues.[7]

In an effort to develop a more concrete framework for the procurement of usTLD administration services, NTIA has now prepared this Draft SOW for public comment, which may be incorporated in a request for proposal ("RFP") for management and administration of the usTLD. The public is invited to comment on any aspect of the Draft SOW.

Questions for the Draft SOW

The public is invited to comment on any aspect of the Draft SOW including, but not limited to, the specific questions set forth below. When responding to specific questions, responses should cite the number(s) of the questions addressed, and the "section" of the Draft SOW to which the question(s) correspond. Please provide any references to support the responses submitted.

Section I.A

Question 1

Regardless of the naming structure or registration policies of the usTLD, several core registry functions need to be provided by the successful offeror responding to an RFP to administer the usTLD ("Awardee"). Does the list in Section I.A of the Draft SOW accurately reflect the full range of core registry functions? Should other/additional core functions be included?

Section I.B

Question 2

Are any particular technical specifications, software, or methods and procedures necessary to complete the tasks outlined? Are there other tasks that should be required as part of this section?

Section I.C

Question 3

While usTLD registration policies may change or be adjusted over time, the Draft SOW contemplates that the current usTLD locality-based structure will continue to be supported. What mechanisms should Awardee employ to provide outreach to and coordination among the current usTLD community? Is information dissemination through a website (as required in Section I.A. of the Draft SOW) sufficient?

Question 4

Are there any drawbacks or disadvantages to continuing the support for the current .us structure? If support for the existing usTLD structure, or portions of it, should be discontinued, please describe how any transition should take place.

Question 5

Regarding the requirement to investigate and report on possible structural, procedural, and policy improvements to the current usTLD structure, are there specific procedures or policy improvements that should be implemented by Awardee prior to completion of this study? Are there issues that need to be specifically addressed in the required study, such as "locality-squatting," the role of state and local governments, or appropriate cost recovery mechanisms?

Question 6

In the SOW, the Department of Commerce contemplates directing the usTLD Administrator to suspend additional locality delegations and to provide registration services directly for all undelegated subdomains. The Draft SOW contemplates that this arrangement would continue until the required study is completed. This "status quo" period is intended to provide a stable environment in which to conduct the study. Is such delegation suspension during this time necessary? Is the requirement to provide direct registration services in the undelegated subdomains enough to ensure the continued availability of the usTLD during this period? Should delegation transfers also be suspended?

Question 7

Currently, the usTLD Administrator does not charge fees for its services. We contemplate that the Awardee would administer the existing locality-based usTLD structure under this same policy, pending completion of the study and the approval of any recommended cost recovery mechanism. Should the

[2] See "A Framework for Global Electronic Commerce" (July 1, 1997) (available at <http://www.ecommerce.gov/framewrk.htm>).

[3] See "Improvement of Technical Management of Internet Names and Addresses," Proposed Rule and Request for Public Comment, National Telecommunications and Information Administration, Department of Commerce, 63 FR 8825 (Feb. 20, 1998) (available at <http://www.ntia.doc.gov/ntiahome/domainname/domainname130.htm>).

[4] See "Management of Internet Names and Addresses," Statement of Policy, National Telecommunications and Information Administration, Department of Commerce, 63 FR 31741 (June 10, 1998) (available at <http://www.ntia.doc.gov/ntiahome/domainname/domainhome.htm>). The Department of Commerce entered into a memorandum of understanding with the Internet Corporation for Assigned Names and Numbers (ICANN) on November 25, 1998, in which the parties agreed to collaborate on a transition mechanism to privatize technical management of the domain name system.

[5] See "Enhancement of the .us Domain Space," Notice, Request for Comments, National Telecommunications and Information Administration, Department of Commerce, 63 FR 41547 (Aug. 4, 1998) (available at <http://www.ntia.doc.gov/ntiahome/domainname/usrfc/dotusrfc.htm>). The comment period was extended to October 5, 1998, to afford interested parties a full opportunity to address the issues raised in the request. See also "Extension of Comment Period," National Telecommunications and Information Administration, Department of Commerce, 63 FR 45800 (Aug. 24, 1998) (available at <http://www.ntia.doc.gov/ntiahome/domainname/usrfc/dotusext.htm>).

[6] See "Enhancement of the .us Domain Space, Notification of Public Meeting," Notice, National Telecommunications and Information Administration, Department of Commerce, 64 FR 6633 (Feb. 10, 1999). The agenda for that meeting is available at <http://www.ntia.doc.gov//ntiahome/domainname/dotusagenda.htm>.

[7] See "Enhancement of the .us Domain Space, Notification of Open Electronic Mailing List for Public Discussions Regarding the Future Management and Administration of the .us Domain Space," Notice, National Telecommunications and Information Administration, Department of Commerce, 64 FR 26365 (May 14, 1999) (available at <http://www.ntia.doc.gov/ntiahome/domainname/usrfc/dotuslistfedreg51099.htm>).

Awardee be allowed to establish a cost recovery mechanism for the existing usTLD space upon award? If so, on what basis should such fees be determined and how should such fees be phased in?

Section I.D

Question 8

Commenters have suggested that an expanded usTLD structure that allows direct registrations under the usTLD as well as under specified second level domains would be most attractive for prospective registrants. In this Draft SOW we provide a great deal of latitude to consider and propose expansion of the usTLD structure. Should the final SOW impose more specific requirements in this area? Should certain second-level domains in the usTLD be required or specified? If so, which ones and how should they be selected? Should a second level domain for the registration of domain names for personal, non-commercial use be created? Are there disadvantages to allowing second level domain registrations directly under .us? Would a system that both establishes specific second level domains and allows direct registration under .us be feasible or would a mixed approach cause confusion for users?

Question 9

The Draft SOW contemplates that the Awardee will follow ICANN adopted policies relating to open ccTLDs, unless otherwise directed by the Department of Commerce. NTIA believes that this will allow straightforward administration of the expanded usTLD, with little additional policy development required. To the extent that additional substantive policy is required, NTIA contemplates that it would work cooperatively with the Awardee to develop such policy. What are the advantages and disadvantages to such an approach? Should other approaches be considered? Please describe alternate approaches, and discuss their advantages and disadvantages.

Question 10

Under current usTLD policy, registrations in the usTLD must be hosted on computers in the United States (RFC 1480 Section 1.3). Should this requirement apply to the expanded usTLD structure? Should registrations in the usTLD be further restricted to individuals or entities "located in" or "with a connection to" the United States? If so, what are appropriate criteria for determining eligibility: valid street address in the United States; citizenship or residency in the United States; incorporation and/or establishment in the United States? How would such criteria be established and enforced? How would such requirements affect administration of the usTLD?

Question 11

The Draft SOW contemplates that registrations in the expanded usTLD would be performed by competitive registrars through a shared registration system. (Awardee will not be permitted to serve as a usTLD registrar, except with respect to registrations in the existing, locality-based usTLD space until the required study has been completed.) Under this system, who should be eligible to serve as usTLD registrars? ICANN has established accreditation procedures for registrars in the .com, .net and .org top level domains. Should all individuals and entities accredited by ICANN be eligible to register in the usTLD? If not, why not? What alternative process, procedures, criteria, or additional requirements should be used?

Question 12

What type of contractual arrangement and provisions should be required of usTLD registrars? Should usTLD registrars enter into an agreement similar to ICANN's Registrar Accreditation Agreement (see <http://www.icann.org/nsi/icann-raa-04nov99.htm>). How would the ICANN agreement need to be modified to fit the usTLD context? Is this a feasible approach? Are there any provisions of the ICANN agreement that should not be included in a usTLD accreditation agreement? If so, which provisions should not be included and why? Are there any provisions that should be added, and if so, why?

Question 13

Should the interface between Awardee's usTLD registry and the usTLD registrars be specified in the final SOW? If so, should the interface follow the specifications set forth in RFC 2832 (see <http://www.ietf.org/rfc/rfc2832.text?number=2832>), or should other/additional technical and/or functional specifications be used? What, if any, quality of service requirements should Awardee be expected to meet? If other/additional specifications should be used, what should these specifications be?

Question 14

It is likely that Awardee will want to license usTLD registrars to use its registry access software. Is Network Solutions' Registrar License Agreement (see http://www.icann.org/nsi/nsi-rla-28sept99.htm) a good model for such a license? If not, why not? What provisions of the NSI agreement should be deleted? What provisions should be added?

Section II

Question 15

On February 23, 2000, ICANN's Governmental Advisory Committee ("GAC") adopted "Principles for the Delegation and Administration of Country Code Top Level Domains" (see <http://www.icann.org/gac/gac-cctldprinciples-23feb00.htm>). The document sets forth basic principles for the administration and management of ccTLDs, as well as a framework for the relationships among the relevant local governments in the context of a ccTLD, the ccTLD administrator, and ICANN. The Department of Commerce has endorsed and intends to implement the GAC Principles. Are there any provisions of the GAC Principles that should not be included in an agreement between Department of Commerce and the Awardee, or between the Awardee and ICANN? If so, which provisions should not be included and why? Are there any provisions that should be added, and if so, why?

Kathy D. Smith,

Chief Counsel.

Appendix A

I. Statement of Work

Considerable latitude exists for the submission of creative proposals responsive to this solicitation; however, each proposal must address lists of minimum services that are outlined below. These lists should not be viewed as exhaustive; as such, offerors are encouraged to suggest other services that they consider important to the efficient administration and management of the usTLD. The provision of services below may be accomplished through coordinating resources and services provided by others, but joint proposals should clearly indicate how the requirements of the Statement of Work will be fulfilled.

Proposals should describe the systems, software, hardware, facilities, infrastructure, and operation, for the following functions:

A. Core Registry Functions

- Operation and maintenance of the primary, authoritative server for the usTLD;
- Operation and/or administration of a constellation of secondary servers for the usTLD;
- Compilation, generation, and propagation of the usTLD zone file(s);
- Maintenance of an accurate and up-to-date registration (Whois) database for usTLD registrations;
- Maintenance of an accurate and up-to-date database of usTLD sub-delegation managers; and

• Promotion of and registration in the usTLD, including maintenance of a website with up-to-date policy and registration information for the usTLD domain.

B. Technical Enhancements to the Existing, Locality-Based usTLD

A number of technical enhancements to the usTLD system functions are required to make the system more robust and reliable. Because the usTLD has operated for the most part on a delegated basis for a number of years, the availability of centralized contact information for the usTLD has proven difficult to maintain. For example, the current usTLD Administrator advises but does not require that the administrator of a delegated subdomain operate a database of accurate and up-to-date registration information ("Whois") service.

There is considerable latitude for suggesting enhancements to the existing, locality-based usTLD system, however, the following tasks must be incorporated into each proposal. Proposals should describe the systems, software, hardware, facilities, infrastructure, and operation, for completing the tasks as well as proposed methods for the collecting registration and delegation information:

• Development of a single database for up-to-date and verified contact information for all delegations made in the usTLD to locality-level and second level (where delegated) administrators, and for all sub-delegations made by such locality-level and second level administrators. Such databases should allow for multiple string and field searching through a free, public, web-based interface, and consist of at least the following elements:

The name of the delegation;

The IP address of the primary nameserver and secondary nameserver(s) for the delegation;

The corresponding names of those nameservers;

The date of delegation;

The name and postal address of the delegated manager;

The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the delegated manager; and

The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the delegated manager.

• Development of an enhanced searchable Whois database that contains, or provides access to, all domain name registrations at the delegated and sub-delegated levels. Such Whois database should allow for multiple string and field searching through a free, public, web-based interface, and consist of at least the following elements:

—The name of the domain registered;
—The IP address of the primary nameserver and secondary nameserver(s) for the registered domain name;
—The corresponding names of those nameservers;
—The identity of the delegated manager under which the name is registered;
—The creation date of the registration;
—The name and postal address of the domain name holder;
—The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the domain name holder; and
—The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the domain name holder.

• Modernization and automation of .us registry and registration operations, including the creation of an electronic database to store historical usTLD registration data.

C. Administration of the Existing, Locality-Based usTLD Structure

During previous consultations with the public on the administration of the usTLD, a considerable number of parties expressed a desire for the continued operation and support of the existing usTLD domain structure. Some also noted that enhanced coordination of the existing locality-based usTLD structure would make the space more easily accessible and increase communication and cooperation within the community of usTLD subdelegation managers. Some concerns have been expressed that more should be undertaken to ensure that the locality-based aspects of the usTLD are operating in the interest of the relevant local community.

Proposals should describe how the offeror will perform the following functions:

• Continue to provide service and support for existing delegees and registrants in the existing, locality-based usTLD structure under current practice, including policies set forth in RFC 1480 and other documented usTLD policies.

• Conduct an investigation and submit a report to the Department of Commerce, within 9 months of the award, evaluating the compliance of existing sub-domain managers with the requirements of RFC 1480 and other documented usTLD policies. Such report must recommend structural, procedural, and policy changes designed to enhance such compliance and increase the value of the locality-based structure to local communities. During this evaluation period, Awardee shall make no additional locality delegations unless otherwise directed by the Department of Commerce.

• Continue to provide direct registry and registrar services for all other undelegated third level locality sub-domains, including services for CO and CI, and undelegated special purpose domains (K12, CC, TEC, LIB, MUS, STATE, DST, COG and GEN).

D. Expansion of the .us Space

Many parties in previous consultations have suggested that the current usTLD space should be expanded by creating opportunities for registration directly at the second level and/or at the third level under specified second level domains. It has been suggested that this more "generic" space would greatly increase the attractiveness of the usTLD to potential registrants. Awardee will not be allowed to act as a registrar in the expanded usTLD space.

Proposals should describe how the offeror will perform the following functions:

• Develop and implement a new structure for the usTLD that enables the registration of domain names directly under the usTLD and/or under specified second level domains. The proposed expanded usTLD structure, including proposed administration procedures and registration policies, must be described. Awardee must agree to be bound by a Department of Commerce contract to follow ICANN adopted policies applicable to open ccTLDs unless otherwise directed by the Department of Commerce.

• Develop and implement a shared registration system whereby qualified competing registrars may register domain names for their customers in the expanded usTLD space. At a minimum, the system must allow an unlimited number of accredited/licensed registrars to register domain names in the expanded usTLD; provide equivalent access to the system for all accredited/licensed registrars to register domains and transfer domain name registrations among competing accredited/licensed registrars; update domain name registrations; and provide technical support for accredited/licensed registrars.

• Provide customer service and technical support to accredited/licensed usTLD registrars and registry support for the expanded usTLD space.

• Provide the core registry functions listed in Section A above.

• Require usTLD registrars to participate in an alternative dispute resolution procedure, consistent with United States law and international treaty obligations, to resolve cases of alleged cyber-squatting. Offerors are encouraged to consider how ICANN's uniform dispute resolution procedure (UDRP) might be implemented in the context of the usTLD.

• Develop an enhanced searchable Whois database that contains, or provides access to, all domain name registrations in the enhanced usTLD space. Such database must be accessible through any "universal Whois service" adopted by ICANN registrars and must accommodate multiple string and field searching through a free public, web based interface and consist of at least the following elements:

—The name of the usTLD domain registered;
—The IP address of the primary nameserver and secondary nameserver(s) for the registered usTLD domain name;
—The corresponding names of those nameservers;
—The identity of the usTLD registrar under which the name is registered;
—The creation date of the registration;
—The name and postal address of the usTLD domain name holder;
—The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the usTLD domain name; and
—The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the usTLD domain name.

II. Methods and Procedures

On February 23, 2000, ICANN's Governmental Advisory Committee adopted "Principles for the Delegation and Administration of Country Code Top Level Domains" (*see* <http://www.icann.org/gac/

gac-cctldprinciples-23feb00.htm>). The document, which enjoys the support of the Department of Commerce, sets forth basic principles for the administration and management of ccTLDs, as well as a framework for the relationship between the relevant local government in the context of a ccTLD, the ccTLD administrator, and ICANN. The Awardee will be required to abide by the principles and procedures set forth in the document, and enter into contractual arrangement consistent with the document, unless otherwise directed by the Department of Commerce not to follow specific provisions.

[FR Doc. 00–21338 Filed 8–21–00; 8:45 am]

BILLING CODE 3510–60–P

CONSUMER PRODUCT SAFETY COMMISSION

Petition Requesting Banning of Baby Bath Seats

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Commission has received a petition (HP 00–4) requesting that the Commission ban bath seats and bath rings used for bathing infants in bathtubs. The Commission solicits written comments concerning the petition.

DATES: The Office of the Secretary must receive comments on the petition by October 23, 2000.

ADDRESSES: Comments, preferably in five copies, on the petition should be mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 504–0800, or delivered to the Office of the Secretary, Room 501, 4330 East-West Highway, Bethesda, Maryland 20814. Comments may also be filed by telefacsimile to (301) 504–0127 or by email to cpsc-os@cpsc.gov. Comments should be captioned "Petition HP 00–4, Petition to Ban Bath Seats." A copy of the petition is available for inspection at the Commission's Public Reading Room, Room 419, 4330 East-West Highway, Bethesda, Maryland.

FOR FURTHER INFORMATION CONTACT: Rockelle Hammond, Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504–0800, ext. 1232.

SUPPLEMENTARY INFORMATION: The Commission has received correspondence from The Consumer Federation of America ("CFA") and other consumer groups requesting that the Commission issue a rule banning baby bath seats and bath rings. The petitioners assert that these products pose an unreasonable risk of injury primarily by giving parents and other caregivers a false sense of security that children using the products will be safe in the bathtub. They argue that recent research indicates that parents using bath seats are more likely to engage in "risk-taking behavior," such as leaving the infant alone briefly and using more water in the bathtub, than caregivers who do not use bath seats. The petitioners state that, to date, 66 incidents of drowning and 37 reports of near drowning involving bath seats have been identified. The Commission is docketing the correspondence as a petition under provisions of the Federal Hazardous Substances Act, 15 U.S.C. 1261–1278.

Interested parties may obtain a copy of the petition by writing or calling the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–0800. A copy of the petition is also available for inspection from 8:30 a.m. to 5 p.m., Monday through Friday, in the Commission's Public Reading Room, Room 419, 4330 East-West Highway, Bethesda, Maryland.

Dated: August 16, 2000.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission

[FR Doc. 00–21257 Filed 8–21–00; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the President's Information Technology Advisory Committee (Formerly the Presidential Advisory Committee on High Performance Computing and Communications, Information Technology, and the Next Generation Internet

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for the next meeting of the President's Information Technology Advisory Committee. The meeting will be open to the public. Notice of this meeting is required under the Federal Advisory Committee Act, (Pub. L. 92–463).

DATES: September 20, 2000.

ADDRESSES: NSF Board Room (Room 1235), National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

PROPOSED SCHEDULE AND AGENDA: The President's Information Technology Advisory Committee (PITAC) will meet in open session from approximately 8:00 a.m. to 12:15 p.m. and 1:30 p.m. to 3:30 p.m. on September 20, 2000.

This meeting will include: (1) Updates and reports from the PITAC's panels on learning, digital libraries, healthcare; the digital divide; and international issues; (2) a discussion on 21st century technologies; (3) a discussion on IT and the Humanities; and (4) a discussion of PITAC next steps and future studies.

FOR FURTHER INFORMATION CONTACT: The National Coordination Office for Computing, Information, and Communications provides information about this Committee on its web site at: http://www.ccic.gov; it can also be reached at (703) 292–4873. Public seating for this meeting is limited, and is available on a first-come, first-served basis.

Dated: August 15, 2000.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 00–21269 Filed 8–21–00; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Environmental Research and Development Program, Scientific Advisory Board

ACTION: Notice.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following Committee meeting:

Date of Meeting: October 16, 2000 from 0830 to 1645 and October 17, 2000 from 0830 to 1705.

Place: Coeur D'Alene Resort, West 414 Appleway, Coeur d'Alene, Idaho 83814.

Matters to be Considered: Research and Development proposals and continuing projects requesting Strategic Environmental Research and Development Program funds in excess of $1M will be reviewed.

This meeting is open to the public. Any interested person may attend, appear before, or file statements with the Scientific Advisory Board at the time and in the manner permitted by the Board.

For Further Information Contact: Ms. Veronica Rice, SERDP Program Office, 901 North Stuart Street, Suite 3093, Arlington, VA or by telephone at (703) 696–2119.

Dated: August 16, 2000.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, DoD.

[FR Doc. 00–21268 Filed 8–21–00; 8:45 am]

BILLING CODE 5001–10–M

63 Fed. Reg. 8825
(Feb. 20, 1998)

federal register

Friday
February 20, 1998

Part IV

Department of Commerce

National Telecommunications and Information Administration

15 CFR Chapter XXIII

Improvement of Technical Management of Internet Names and Addresses; Proposed Rule

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

15 CFR Chapter XXIII

[Docket No. 980212036–8036–01]

RIN 0660–AA11

Improvement of Technical Management of Internet Names and Addresses

AGENCY: National Telecommunications and Information Administration (NTIA), Commerce.

ACTION: Proposed rule; request for public comment.

SUMMARY: This document sets forth ways to improve technical management of the Internet Domain Name System (DNS). Specifically, it describes the process by which the Federal government will transfer management of the Internet DNS to a private not-for-profit corporation. The document also proposes to open up to competition the administration of top level domains and the registration of domain names.

DATES: Comments must be received by March 23, 1998.

ADDRESSES: Comments may be mailed to Karen Rose, Office of International Affairs, National Telecommunications and Information Administration (NTIA), Room 4701, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C. 20230 or sent via electronic mail to dns@ntia.doc.gov. Messages to that address will receive a reply in acknowledgment. Comments submitted in electronic form should be in ASCII, WordPerfect (please specify version), or Microsoft Word (please specify version) format. Comments received will be posted on the NTIA website at http://www.ntia.doc.gov. Detailed information about electronic filing is available on the NTIA website, *http://www.ntia.doc.gov/domainname/domainname130.htm*. Paper submissions should include three paper copies and a version on diskette in the formats specified above.

FOR FURTHER INFORMATION CONTACT: Karen Rose, NTIA, (202) 482–0365.

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. 1512; 47 U.S.C. 902(b)(2)(H); 47 U.S.C. 902 (b)(2)(I); 47 U.S.C. 902(b)(2)(M); 47 U.S.C. 904(c)(1).

I. Introduction

On July 1, 1997, The President directed the Secretary of Commerce to privatize, increase competition in, and promote international participation in the domain name system. Domain names are the familiar and easy-to-remember names for Internet computers (*e.g.* "www.ecommerce.gov"). They map to unique Internet Protocol (IP) numbers (*e.g.*, 98.37.241.30) that serve as routing addresses on the Internet. The domain name system (DNS) translates Internet names into the IP numbers needed for transmission of information across the network. On July 2, 1997, the Department of Commerce issued a Request for Comments (RFC) on DNS administration (62 FR 35896). This proposed rule, shaped by over 430 comments received in response to the RFC, provides notice and seeks public comment on a proposal to transfer control of Internet domain names from government to a private, nonprofit corporation.

II. Background

Today's Internet is an outgrowth of U.S. government investments in packet-switching technology and communications networks carried out under agreements with the Defense Advanced Research Projects Agency (DARPA), the National Science Foundation (NSF) and other U.S. research agencies. The government encouraged bottom-up development of networking technologies through work at NSF, which established the NSFNET as a network for research and education. The NSFNET fostered a wide range of applications, and in 1992 the U.S. Congress gave the National Science Foundation statutory authority to commercialize the NSFNET, which formed the basis for today's Internet.

As a legacy, major components of the domain name system are still performed by or subject to agreements with agencies of the U.S. government.

A. Assignment of Numerical Addresses to Internet Users

Every Internet computer has a unique IP number. The Internet Assigned Numbers Authority (IANA), headed by Dr. Jon Postel of the Information Sciences Institute (ISI) at the University of Southern California, coordinates this system by allocating blocks of numerical addresses to regional IP registries (ARIN in North America, RIPE in Europe, and APNIC in the Asia/Pacific region), under contract with DARPA. In turn, larger Internet service providers apply to the regional IP registries for blocks of IP addresses. The recipients of those address blocks then reassign addresses to smaller Internet service providers and to end users.

B. Management of the System of Registering Names for Internet Users

The domain name space is constructed as a hierarchy. It is divided into top-level domains (TLDs), with each TLD then divided into second-level domains (SLDs), and so on. More than 200 national, or country-code, TLDs (ccTLDs) are administered by their corresponding governments or by private entities with the appropriate national government's acquiescence. A small set of generic top-level domains (gTLDs) do not carry any national identifier, but denote the intended function of that portion of the domain space. For example, .com was established for commercial users, .org for not-for-profit organizations, and .net for network service providers. The registration and propagation of these key gTLDs are performed by Network Solutions, Inc. (NSI), a Virginia-based company, under a five-year cooperative agreement with NSF. This agreement includes an optional ramp-down period that expires on September 30, 1998.

C. Operation of the Root Server System

The root server system contains authoritative databases listing the TLDs so that an Internet message can be routed to its destination. Currently, NSI operates the "A" root server, which maintains the authoritative root database and replicates changes to the other root servers on a daily basis. Different organizations, including NSI, operate the other 12 root servers. In total, the U.S. government plays a direct role in the operation of half of the world's root servers. Universal connectivity on the Internet cannot be guaranteed without a set of authoritative and consistent roots.

D. Protocol Assignment

The Internet protocol suite, as defined by the Internet Engineering Task Force (IETF), contains many technical parameters, including protocol numbers, port numbers, autonomous system numbers, management information base object identifiers and others. The common use of these protocols by the Internet community requires that the particular values used in these fields be assigned uniquely. Currently, IANA, under contract with DARPA, makes these assignments and maintains a registry of the assigned values.

III. The Need For Change

From its origins as a U.S.-based research vehicle, the Internet is rapidly becoming an international medium for commerce, education and communication. The traditional means

of organizing its technical functions need to evolve as well. The pressures for change are coming from many different quarters:

- There is widespread dissatisfaction about the absence of competition in domain name registration.
- Mechanisms for resolving conflict between trademark holders and domain name holders are expensive and cumbersome.
- Without changes, a proliferation of lawsuits could lead to chaos as tribunals around the world apply the antitrust law and intellectual property law of their jurisdictions to the Internet.
- Many commercial interests, staking their future on the successful growth of the Internet, are calling for a more formal and robust management structure.
- An increasing percentage of Internet users reside outside of the U.S., and those stakeholders want a larger voice in Internet coordination.
- As Internet names increasingly have commercial value, the decision to add new top-level domains cannot continue to be made on an ad hoc basis by entities or individuals that are not formally accountable to the Internet community.
- As the Internet becomes commercial, it becomes inappropriate for U.S. research agencies (NSF and DARPA) to participate in and fund these functions.

IV. The Future Role of the U.S. Government in the DNS

On July 1, 1997, as part of the Clinton Administration's Framework for Global Electronic Commerce, the President directed the Secretary of Commerce to privatize, increase competition in, and promote international participation in the domain name system.

Accordingly, on July 2, 1997, the Department of Commerce issued a Request for Comments (RFC) on DNS administration, on behalf of an inter-agency working group previously formed to explore the appropriate future role of the U.S. government in the DNS. The RFC solicited public input on issues relating to the overall framework of the DNS system, the creation of new top-level domains, policies for registrars, and trademark issues. During the comment period, over 430 comments were received, amounting to some 1500 pages.[1]

This discussion draft, shaped by the public input described above, provides notice and seeks public comment on a proposal to improve the technical management of Internet names and addresses. It does not propose a monolithic structure for Internet governance. We doubt that the Internet should be governed by one plan or one body or even by a series of plans and bodies. Rather, we seek to create mechanisms to solve a few, primarily technical (albeit critical) questions about administration of Internet names and numbers.

We expect that this proposal will likely spark a lively debate, requiring thoughtful analysis, and appropriate revisions. Nonetheless, we are hopeful that reasonable consensus can be found and that, after appropriate modifications, implementation can begin in April, 1998. Recognizing that no solution will win universal support, the U.S. government seeks as much consensus as possible before acting.

V. Principles for a New System

Our consultations have revealed substantial differences among Internet stakeholders on how the domain name system should evolve. Since the Internet is changing so rapidly, no one entity or individual can claim to know what is best for the Internet. We certainly do not believe that our views are uniquely prescient. Nevertheless, shared principles have emerged from our discussions with Internet stakeholders.

A. Stability

The U.S. government should end its role in the Internet number and name address systems in a responsible manner. This means, above all else, ensuring the stability of the Internet. The Internet functions well today, but its current technical management is probably not viable over the long term. We should not wait for it to break down before acting. Yet, we should not move so quickly, or depart so radically from the existing structures, that we disrupt the functioning of the Internet. The introduction of a new system should not disrupt current operations, or create competing root systems.

B. Competition

The Internet succeeds in great measure because it is a decentralized system that encourages innovation and maximizes individual freedom. Where possible, market mechanisms that support competition and consumer choice should drive the technical management of the Internet because they will promote innovation, preserve diversity, and enhance user choice and satisfaction.

C. Private, Bottom-Up Coordination

Certain technical management functions require coordination. In these cases, responsible, private-sector action is preferable to government control. A private coordinating process is likely to be more flexible than government and to move rapidly enough to meet the changing needs of the Internet and of Internet users. The private process should, as far as possible, reflect the bottom-up governance that has characterized development of the Internet to date.

D. Representation

Technical management of the Internet should reflect the diversity of its users and their needs. Mechanisms should be established to ensure international input in decision making.

In keeping with these principles, we divide the name and number functions into two groups, those that can be moved to a competitive system and those that should be coordinated. We then suggest the creation of a representative, not-for-profit corporation to manage the coordinated functions according to widely accepted objective criteria. We then suggest the steps necessary to move to competitive markets in those areas that can be market driven. Finally, we suggest a transition plan to ensure that these changes occur in an orderly fashion that preserves the stability of the Internet.

VI. The Proposal

A. The Coordinated Functions

Management of number addresses is best done on a coordinated basis. As technology evolves, changes may be needed in the number allocation system. These changes should also be undertaken in a coordinated fashion.

Similarly, coordination of the root server network is necessary if the whole system is to work smoothly. While day-to-day operational tasks, such as the actual operation and maintenance of the Internet root servers, can be contracted out, overall policy guidance and control of the TLDs and the Internet root server system should be vested in a single organization that is representative of Internet users.

Finally, coordinated maintenance and dissemination of the protocol parameters for Internet addressing will best preserve the stability and interconnectivity of the Internet.

We propose the creation of a private, not-for-profit corporation (the new corporation) to manage the coordinated functions in a stable and open institutional framework. The new corporation should operate as a private

[1] The RFC and comments received are available on the Internet at the following address: <http://www.ntia.doc.gov>.

entity for the benefit of the Internet as a whole. The new corporation would have the following authority:

1. To set policy for and direct the allocation of number blocks to regional number registries for the assignment of Internet addresses;

2. To oversee the operation of an authoritative root server system;

3. To oversee policy for determining, based on objective criteria clearly established in the new organization's charter, the circumstances under which new top-level domains are added to the root system; and

4. To coordinate the development of other technical protocol parameters as needed to maintain universal connectivity on the Internet.

The U.S. government would gradually transfer existing IANA functions, the root system and the appropriate databases to this new not-for-profit corporation. This transition would commence as soon as possible, with operational responsibility moved to the new entity by September 30, 1998. The U.S. government would participate in policy oversight to assure stability until the new corporation is established and stable, phasing out as soon as possible and in no event later than September 30, 2000. The U.S. Department of Commerce will coordinate the U.S. government policy role. In proposing these dates, we are trying to balance concerns about a premature U.S. government exit that turns the domain name system over to a new and untested entity against the concern that the U.S. government will never relinquish its current management role.

The new corporation will be funded by domain name registries and regional IP registries. Initially, current IANA staff will move to this new organization to provide continuity and expertise throughout the period of time it takes to establish the new corporation. The new corporation should hire a chief executive officer with a background in the corporate sector to bring a more rigorous management to the organization than was possible or necessary when the Internet was primarily a research medium. As these functions are now performed in the United States, the new corporation will be headquartered in the United States, and incorporated under U.S. law as a not-for-profit corporation. It will, however, have and report to a board of directors from around the world.

It is probably impossible to establish and maintain a perfectly representative board for this new organization. The Internet community is already extraordinarily diverse and likely to become more so over time. Nonetheless, the organization and its board must derive legitimacy from the participation of key stakeholders. Since the organization will be concerned mainly with numbers, names and protocols, its board should represent membership organizations in each of these areas, as well as the direct interests of Internet users.

The board of directors for the new corporation should be balanced to equitably represent the interests of IP number registries, domain name registries, domain name registrars, the technical community, and Internet users (commercial, not-for-profit, and individuals). Officials of governments or intergovernmental organizations should not serve on the board of the new corporation. Seats on the initial board might be allocated as follows:

- Three directors from a membership association of regional number registries, representing three different regions of the world. Today this would mean one each from ARIN, APNIC and RIPE. As additional regional number registries are added, board members could be designated on a rotating basis or elected by a membership organization made up of regional registries. ARIN, RIPE and APNIC are open membership organizations that represent entities with large blocks of numbers. They have the greatest stake in and knowledge of the number address system. They are also representative internationally.
- Two members designated by the Internet Architecture Board (IAB), an international membership board that represents the technical community of the Internet.
- Two members designated by a membership association (to be created) representing domain name registries and registrars.

Seven members designated by a membership association (to be created) representing Internet users. At least one of those board seats could be designated for an individual or entity engaged in non-commercial, not-for-profit use of the Internet, and one for individual end users. The remaining seats could be filled by commercial users, including trademark holders.

- The CEO of the new corporation would serve on the board of directors.

The new corporation's processes should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders. Its decision-making processes should be sound and transparent; the bases for its decisions should be recorded and made publicly available. Super-majority or even consensus requirements may be useful to protect against capture by a self-interested faction. The new corporation's charter should provide a mechanism whereby its governing body will evolve to reflect changes in the constituency of Internet stakeholders. The new corporation should establish an open process for the presentation of petitions to expand board representation.

In performing the functions listed above, the new corporation will act much like a standard-setting body. To the extent that the new corporation operates in an open and pro-competitive manner, its actions will withstand antitrust scrutiny. Its standards should be reasonably based on, and no broader than necessary to promote its legitimate coordinating objectives. Under U.S. law, a standard-setting body can face antitrust liability if it is dominated by an economically interested entity, or if standards are set in secret by a few leading competitors. But appropriate processes and structure will minimize the possibility that the body's actions will be, or will appear to a court to be, anti-competitive.

B. The Competitive Functions

The system for registering second-level domain names and the management of the TLD registries should become competitive and market-driven.

In this connection, we distinguish between registries and registrars. A "registry," as we use the term, is responsible for maintaining a TLD's zone files, which contain the name of each SLD in that TLD and each SLD's corresponding IP number. Under the current structure of the Internet, a given TLD can have no more than one registry. A "registrar" acts as an interface between domain-name holders and the registry, providing registration and value-added services. It submits to the registry zone file information and other data (including contact information) for each of its customers in a single TLD. Currently, NSI acts as both the exclusive registry and as the exclusive registrar for .com, .net, .org, and .edu.

Both registry and registrar functions could be operated on a competitive basis. Just as NSI acts as the registry for .com, .net, and .org, other companies could manage registries with different TLDs such as .vend or .store. Registrars could provide the service of obtaining domain names for customers in any gTLD. Companies that design Web sites for customers might, for example, provide registration as an adjunct to other services. Other companies may perform this function as a stand-alone business.

There appears to be strong consensus that, at least at this time, domain name

registration—the registrar function—should be competitive. There is disagreement, however, over the wisdom of promoting competition at the registry level.

Some have made a strong case for establishing a market-driven registry system. Competition among registries would allow registrants to choose among TLDs rather than face a single option. Competing TLDs would seek to heighten their efficiency, lower their prices, and provide additional value-added services. Investments in registries could be recouped through branding and marketing. The efficiency, convenience, and service levels associated with the assignment of names could ultimately differ from one TLD registry to another. Without these types of market pressures, they argue, registries will have very little incentive to innovate.

Others feel strongly, however, that if multiple registries are to exist, they should be undertaken on a not-for-profit basis. They argue that lack of portability among registries (that is, the fact that users cannot change registries without adjusting at least part of their domain name string) could create lock-in problems and harm consumers. For example, a registry could induce users to register in a top-level domain by charging very low prices initially and then raise prices dramatically, knowing that name holders will be reluctant to risk established business by moving to a different top-level domain.

We concede that switching costs and lock-in could produce the scenario described above. On the other hand, we believe that market mechanisms may well discourage this type of behavior. On balance, we believe that consumers will benefit from competition among market oriented registries, and we thus support limited experimentation with competing registries during the transition to private sector administration of the domain name system.

C. The Creation of New gTLDs

Internet stakeholders disagree about who should decide when a new top-level domain can be added and how that decision should be made. Some believe that anyone should be allowed to create a top-level domain registry. They argue that the market will decide which will succeed and which will not. Others believe that such a system would be too chaotic and would dramatically increase customer confusion. They argue that it would be far more complex technically, because the root server system would have to point to a large number of top-level domains that were changing with great frequency. They also point out that it would be much more difficult for trademark holders to protect their trademarks if they had to police a large number of top-level domains.

All these arguments have merit, but they all depend on facts that only further experience will reveal. At least in the short run, a prudent concern for the stability of the system requires that expansion of gTLDs proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs and well-reasoned evolution of the domain space. The number of new top-level domains should be large enough to create competition among registries and to enable the new corporation to evaluate the functioning, in the new environment, of the root server system and the software systems that enable shared registration. At the same time, it should not be so large as to destabilize the Internet.

We believe that during the transition to private management of the DNS, the addition of up to five new registries would be consistent with these goals. At the outset, we propose that each new registry be limited to a single top-level domain. During this period, the new corporation should evaluate the effects that the addition of new gTLDs have on the operation of the Internet, on users, and on trademark holders. After this transition, the new corporation will be in a better position to decide whether or when the introduction of additional gTLDs is desirable.

Individual companies and consortia alike may seek to operate specific generic top-level domains. Competition will take place on two levels. First, there will be competition among different generic top-level domains. Second, registrars will compete to register clients into these generic top-level domains. By contrast, existing national registries will continue to administer country-code top-level domains if these national government seek to assert those rights. Changes in the registration process for these domains are up to the registries administering them and their respective national governments.

Some have called for the creation of a more descriptive system of top-level domains based on industrial classifications or some other easy to understand schema. They suggest that having multiple top-level domains is already confusing and that the addition of new generic TLDs will make it more difficult for users to find the companies they are seeking.

Market driven systems result in innovation and greater consumer choice and satisfaction in the long run. We expect that in the future, directory services of various sorts will make it easy for users to find the sites they seek regardless of the number of top-level domains. Attempts to impose too much central order risk stifling a medium like the Internet that is decentralized by nature and thrives on freedom and innovation.

D. The Trademark Dilemma

It is important to keep in mind that trademark/domain name disputes arise very rarely on the Internet today. NSI, for example, has registered millions of domain names, only a tiny fraction of which have been challenged by a trademark owner. But where a trademark is unlawfully used as a domain name, consumers may be misled about the source of the product or service offered on the Internet, and trademark owners may not be able to protect their rights without very expensive litigation.

For cyberspace to function as an effective commercial market, businesses must have confidence that their trademarks can be protected. On the other hand, management of the Internet must respond to the needs of the Internet community as a whole, and not trademark owners exclusively. The balance we strike is to provide trademark holders with the same rights they have in the physical world, to ensure transparency, to guarantee a dispute resolution mechanism with resort to a court system, and to add new top-level domains carefully during the transition to private sector coordination of the domain name system.

There are certain steps that could be taken in the application process that would not be difficult for an applicant, but that would make the trademark owner's job easier. For instance, gTLD registrants could supply basic information—including the applicant's name and sufficient contact information to be able to locate the applicant or its representative. To deter the pirating of domain names, the registry could also require applicants to certify that it knows of no entity with superior rights in the domain name it seeks to register.

The job of policing trademarks could be considerably easier if domain name databases were readily searchable through a common interface to determine what names are registered, who holds those domain names, and how to contact a domain name holder. Many trademark holders find the current registration search tool, who is, too limited in its functioning to be effective for this purpose. A more robust and flexible search tool, which features multiple field or string searching and retrieves similar names, could be

employed or developed to meet the needs of trademark holders. The databases also could be kept up to date by a requirement that domain name registrants maintain up-to-date contact information.

Mechanisms that allow for on-line dispute resolution could provide an inexpensive and efficient alternative to litigation for resolving disputes between trademark owners and domain name registrants. A swift dispute resolution process could provide for the temporary suspension of a domain name registration if an adversely affected trademark holder objects within a short time, e.g. 30 days, of the initial registration. We seek comment on whether registries should be required to resolve disputes within a specified period of time after an opposition is filed, and if so, how long that period should be.

Trademark holders have expressed concern that domain name registrants in faraway places may be able to infringe their rights with no convenient jurisdiction available in which the trademark owner could file suit to protect those rights. At the time of registration, registrants could agree that, in the event of a trademark dispute involving the name registered, jurisdiction would lie where the registry is domiciled, where the registry database in maintained, or where the "A" root server is maintained. We seek comment on this proposal, as well as suggestions for how such jurisdictional provisions could be implemented.

Trademark holders have also called for the creation of some mechanism for "clearing" trademarks, especially famous marks, across a range of gTLDs. Such mechanisms could reduce trademark conflict associated with the addition of new gTLDs. Again, we seek comment on this proposal, and suggested mechanisms for trademark clearance processes.

We stop short of proposals that could significantly limit the flexibility of the Internet, such as waiting periods or not allowing any new top-level domains.

We also do not propose to establish a monolithic trademark dispute resolution process at this time, because it is unclear what system would work best. Even trademark holders we have consulted are divided on this question. Therefore, we propose that each name registry must establish minimum dispute resolution and other procedures related to trademark considerations. Those minimum procedures are spelled out in Appendix 2. Beyond those minimums, registries would be permitted to establish additional trademark protection and trademark dispute resolution mechanisms.

We also propose that shortly after their introduction into the root, a study be undertaken on the effects of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property right holders. This study should be conducted under the auspices of a body that is internationally recognized in the area of dispute resolution procedures, with input from trademark and domain name holders and registries. The findings of this study should be submitted to the board of the new corporation and considered when it makes decisions on the creation and introduction of new gTLDs. Information on the strengths and weaknesses of different dispute resolution procedures should also give the new corporation guidance for deciding whether the established minimum criteria for dispute resolution should be amended or maintained. Such a study could also provide valuable input with respect to trademark harmonization generally.

U.S. trademark law imposes no general duty on a registrar to investigate the propriety of any given registration.[2] Under existing law, a trademark holder can properly file a lawsuit against a domain name holder that is infringing or diluting the trademark holder's mark. But the law provides no basis for holding that a registrar's mere registration of a domain name, at the behest of an applicant with which it has an arm's-length relationship, should expose it to liability.[3] Infringers, rather than registrars, registries, and technical management bodies, should be liable for trademark infringement. Until case law is fully settled, however, registries can expect to incur legal expenses in connection with trademark disputes as a cost of doing business. These costs should not be borne by the new not-for-profit corporation, and therefore registries should be required to indemnify the new corporation for costs incurred in connection with trademark disputes. The evolution of litigation will be one of the factors to be studied by the group tasked to review Internet trademark issues as the new structure evolves.

E. The Intellectual Infrastructure Fund

In 1995, NSF authorized NSI to assess new domain name registrants a $50 fee per year for the first two years, 30 percent of which was to be deposited in a fund for the preservation and enhancement of the intellectual infrastructure of the Internet (the "Intellectual Infrastructure Fund").

In excess of $46 Million has been collected to date. In 1997, Congress authorized the crediting of $23 Million of the funds collected to the Research and Related Activities Appropriation of the National Science Foundation to support the development of the Next Generation Internet. The establishment of the Intellectual Infrastructure Fund currently is the subject of litigation in the U.S. District Court for the District of Columbia.

As the U.S. government is seeking to end its role in the domain name system, we believe the provision in the cooperative agreement regarding allocation of a portion of the registration fee to the Internet Intellectual Infrastructure Fund should terminate on April 1, 1998, the beginning of the ramp-down period of the cooperative agreement.

VII. The Transition

A number of steps must be taken to create the system envisioned in this paper.

1. The new not-for-profit organization must be established and its board chosen.

2. The membership associations representing (1) registries and registrars, and (2) Internet users, must be formed.

3. An agreement must be reached between the U.S. government and the current IANA on the transfer of IANA functions to the new organization.

4. NSI and the U.S. government must reach agreement on the terms and conditions of NSI's evolution into one competitor among many in the registrar and registry marketplaces. A level playing field for competition must be established.

5. The new corporation must establish processes for determining whether an organization meets the transition period criteria for prospective registries and registrars.

6. A process must be laid out for making the management of the root server system more robust and secure, and, for transitioning that management from U.S. government auspices to those of the new corporation.

A. The NSI Agreement

The U.S. government will ramp down the NSI cooperative agreement and phase it out by the end of September 1998. The ramp down agreement with NSI should reflect the following terms and conditions designed to promote competition in the domain name space.

[2] See generally *MDT Corp. v. New York Stock Exchange, 858 F. Supp. 1028 (C.D. Calif. 1994).*

[3] See *Lockheed Martin Corp. v. Network Solutions, Inc.*, 1997 WL 721899 (C.D. Calif. 11/17/97); *Panavision International v. Toeppen*, 1996 U.S. Dist. LEXIS 20744, 41 U.S.P.Q.2d 1310 (C.D. Calif. 1996).

1. NSI will effectively separate and maintain a clear division between its current registry business and its current registrar business. NSI will continue to operate .com, .net and .org but on a fully shared-registry basis; it will shift operation of .edu to a not-for-profit entity. The registry will treat all registrars on a nondiscriminatory basis and will price registry services according to an agreed upon formula for a period of time.

2. As part of the transition to a fully shared-registry system, NSI will develop (or license) and implement the technical capability to share the registration of its top-level domains with any registrar so that any registrar can register domain names there in as soon as possible, by a date certain to be agreed upon.

3. NSI will give the U.S. government a copy and documentation of all the data, software, and appropriate licenses to other intellectual property generated under the cooperative agreement, for use by the new corporation for the benefit of the Internet.

4. NSI will turn over control of the "A" root server and the management of the root server system when instructed to do so by the U.S. government.

5. NSI will agree to meet the requirements for registries and registrars set out in Appendix 1.

B. Competitive Registries, Registrars, and the Addition of New gTLDs

Over the past few years, several groups have expressed a desire to enter the registry or registrar business. Ideally, the U.S. government would stay its hand, deferring the creation of a specific plan to introduce competition into the domain name system until such time as the new corporation has been organized and given an opportunity to study the questions that such proposals raise. Should the transition plan outlined below, or some other proposal, fail to achieve substantial consensus, that course may well need to be taken.

Realistically, however, the new corporation cannot be established overnight. Before operating procedures can be established, a board of directors and a CEO must be selected. Under a best case scenario, it is unlikely that the new corporation can be fully operational before September 30, 1998. It is our view, based on widespread public input, that competition should be introduced into the DNS system more quickly.

We therefore set out below a proposal to introduce competition into the domain name system during the transition from the existing U.S. government authority to a fully functioning coordinating body. This proposal is designed only for the transition period. Once the new corporation is formed, it will assume authority over the terms and conditions for the admission of new top-level domains.

Registries and New gTLDs

This proposal calls for the creation of up to five new registries, each of which would be initially permitted to operate one new gTLD. As discussed above, that number is large enough to provide valuable information about the effects of adding new gTLDs and introducing competition at the registry level, but not so large as to threaten the stability of the Internet during this transition period. In order to designate the new registries and gTLDs, IANA must establish equitable, objective criteria and processes for selecting among a large number of individuals and entities that want to provide registry services. Unsuccessful applicants will be disappointed.

We have examined a number of options for recognizing the development work already underway in the private sector. For example, some argue for the provision of a "pioneer preference" or other grand fathering mechanism to limit the pool of would-be registrants to those who, in response to previous IANA requests, have already invested in developing registry businesses. While this has significant appeal and we do not rule it out, it is not an easy matter to determine who should be in that pool. IANA would be exposed to considerable liability for such determinations, and required to defend against charges that it acted in an arbitrary or inequitable manner. We welcome suggestions as to whether the pool of applicants should be limited, and if so, on what basis.

We propose, that during the transition, the first five entities (whether from a limited or unlimited pool) to meet the technical, managerial, and site requirements described in Appendix 1 will be allowed to establish a domain name registry. The IANA will engage neutral accounting and technical consultancy firms to evaluate a proposed registry under these criteria and certify an applicant as qualified. These registries may either select, in order of their qualification, from a list of available gTLDs or propose another gTLD to IANA. (We welcome suggestions on the gTLDs that should be immediately available and would propose a list based on that input, as well as any market data currently available that indicates consumer interest in particular gTLDs.)

The registry will be permitted to provide and charge for value-added services, over and above the basic services provided to registrars. At least at this time, the registry must, however, operate on a shared registry basis, treating all registrars on a nondiscriminatory basis, with respect to pricing, access and rules. Each TLD's registry should be equally accessible to any qualified registrar, so that registrants may choose their registrars competitively on the basis of price and service. The registry will also have to agree to modify its technical capabilities based on protocol changes that occur in Internet technology so that interoperability can be preserved. At some point in the future, the new organization may consider the desirability of allowing the introduction of non-shared registries.

Registrars

Any entity will be permitted to provide registrar services as long as it meets the basic technical, managerial, and site requirements as described in Appendix 1 of this paper. Registrars will be allowed to register clients into any top-level domain for which the client satisfies the eligibility rules, if any.

C. The Root Server System

IANA and the U.S. government, in cooperation with NSI, the IAB, and other relevant organizations will undertake a review of the root server system to recommend means to increase the security and professional management of the system. The recommendations of the study should be implemented as part of the transition process to the new corporation.

D. The .us Domain

At present, the IANA administers .us as a locality based hierarchy in which second-level domain space is allocated to states and US territories.[4] This name space is further subdivided into localities. General registration under localities is performed on an exclusive basis by private firms that have requested delegation from IANA. The .us name space has typically been used by branches of state and local governments, although some commercial names have been assigned. Where registration for a locality has not been delegated, the IANA itself serves as the registrar.

Some in the Internet community have suggested that the pressure for unique identifiers in the .com gTLD could be relieved if commercial use of the .us space was encouraged. Commercial

[4] Management principles for the .us domain space are set forth in Internet RFC 1480. (http://www.isi.edu/in-notes/rfc1480.txt)

users and trademark holders, however, find the current locality-based system too cumbersome and complicated for commercial use. Expanded use of the .us TLD could alleviate some of the pressure for new generic TLDs and reduce conflicts between American companies and others vying for the same domain name.

Clearly, there is much opportunity for enhancing the .us domain space, and the .us domain could be expanded in many ways without displacing the current geopolitical structure. Over the next few months, the U.S. government will work with the private sector and state and local governments to determine how best to make the .us domain more attractive to commercial users. It may also be appropriate to move the gTLDs traditionally reserved for U.S. government use (i.e. .gov and .mil), into a reformulated .us ccTLD.

The U.S. government will further explore and seek public input on these issues through a separate Request for Comment on the evolution of the .us name space. However, we welcome any preliminary comments at this time.

E. The Process

The U.S. government recognizes that its unique role in the Internet domain name system should end as soon as is practical. We also recognize an obligation to end this involvement in a responsible manner that preserves the stability of the Internet. We cannot cede authority to any particular commercial interest or any specific coalition of interest groups. We also have a responsibility to oppose any efforts to fragment the Internet, as this would destroy one of the key factors—interoperability—that has made the Internet so successful.

Our goal is to seek as strong a consensus as possible so that a new, open, and accountable system can emerge that is legitimate in the eyes of all Internet stakeholders. It is in this spirit that we present this paper for discussion.

VIII. Other Information

Executive Order 12866

This proposal has been determined not to be significant under section 3(f) of Executive Order 12866.

Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy, the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

We believe that the overall effect of the proposal will be highly beneficial. No negative effects are envisioned at this time. In fact, businesses will enjoy a reduction in the cost of registering domain names as a result of this proposal. In 1995, the National Science Foundation authorized a registration fee of $50 per year for the first two years, 30 percent of which was to be deposited in a fund for the preservation and enhancement of the intellectual infrastructure of the Internet (the "Intellectual Infrastructure Fund"). The proposal seeks to terminate the agreement to earmark a portion of the registration fee to the Intellectual Infrastructure Fund. We also believe that a competitive registration system will lead to reduced fees in registering domain names.

The proposal is pro-competitive because it transfers the current system of domain name registration to a market-driven registry system. Moreover, as the Internet becomes more important to commerce, particularly small businesses, it is crucial that a more formal and robust management structure be implemented. As the commercial value of Internet names increases, decisions regarding the addition of new top-level domains should be formal, certain, and accountable to the Internet community. For example, presently, mechanisms for resolving disputes between trademark holders and domain name holders are expensive and cumbersome. The proposal requires each name registry to establish an inexpensive and efficient dispute resolution system as well as other procedures related to trademark consideration.

The U.S. government would gradually transfer existing Internet Assigned Numbers Authority (IANA) functions, the root system and the appropriate databases to a new not-for-profit corporation by September 30, 1998. The U.S. government would, however, participate in policy oversight to assure stability until the new corporation is established and stable, phasing out completely no later than September 30, 2000. Accordingly, the transition period would afford the U.S. government an opportunity to determine if the structure of the new corporation negatively impacts small entities. Moreover, the corporation would be headquartered in the U.S. and incorporated under U.S. law. Accordingly, the corporation would be subject to antitrust scrutiny if dominated by economically interested entities, or if its standards are established by a few leading competitors.

As a result, no initial regulatory flexibility analysis has been prepared.

Paperwork Reduction Act

This rule does not contain information collection requirements subject to the provisions of the Paperwork Reduction Act.

Kathy Smith,

Acting Deputy Assistant Secretary for Communications and Information.

Appendix 1—Recommended Registry and Registrar Requirements

In order to ensure the stability of the Internet's domain name system, protect consumers, and preserve the intellectual property rights of trademark owners, all registries of generic top-level domain names must meet the set of technical, managerial, and site requirements outlined below. Only prospective registries that meet these criteria will be allowed by IANA to register their gTLD in the "A" server. If, after it begins operations, a registry no longer meets these requirements, IANA may transfer management of the domain names under that registry's gTLD to another organization.

Independent testing, reviewing, and inspection called for in the requirements for registries should be done by appropriate certifying organizations or testing laboratories rather than IANA itself, although IANA will define the requirements and the procedures for tests and audits.

These requirements apply only to generic TLDs. They will apply to both existing gTLDs (e.g., .com, .edu., .net, .org) and new gTLDs. Although they are not required to, we expect many ccTLD registries and registrars may wish to assure their customers that they meet these requirements or similar ones.

Registries will be separate from registrars and have only registrars as their customers. If a registry wishes to act both as registry and registrar for the same TLD, it must do so through separate subsidiaries. Appropriate accounting and confidentiality safeguards shall be used to ensure that the registry subsidiary's business is not utilized in any manner to benefit the registrar subsidiary to the detriment of any other registrar.

Each top-level domain (TLD) database will be maintained by only one registry and, at least initially, each new registry can host only one TLD.

Registry Requirements

1. An independently-tested, functioning Database and Communications System that:

a. Allows multiple competing registrars to have secure access (with encryption and authentication) to the database on an equal (first-come, first-served) basis.

b. Is both robust (24 hours per day, 365 days per year) and scalable (i.e., capable of handling high volumes of entries and inquiries).

c. Has multiple high-throughput (i.e., at least T1) connections to the Internet via at least two separate Internet Service Providers.

d. Includes a daily data backup and archiving system.

e. Incorporates a record management system that maintains copies of all transactions, correspondence, and communications with registrars for at least the length of a registration contract.

f. Features a searchable, on-line database meeting the requirements of Appendix 2.

g. Provides free access to the software and customer interface that a registrar would need to register new second-level domain names.

h. An adequate number (perhaps two or three) of globally-positioned zone-file servers connected to the Internet for each TLD.

2. Independently-reviewed Management Policies, Procedures, and Personnel including:

a. Alternate (i.e., non-litigation) dispute resolution providing a timely and inexpensive forum for trademark-related complaints. (These procedures should be consistent with applicable national laws and compatible with any available judicial or administrative remedies.)

b. A plan to ensure that the registry's obligations to its customers will be fulfilled in the event that the registry goes out of business. This plan must indicate how the registry would ensure that domain name holders will continue to have use of their domain name and that operation of the Internet will not be adversely affected.

c. Procedures for assuring and maintaining the expertise and experience of technical staff.

d. Commonly-accepted procedures for information systems security to prevent malicious hackers and others from disrupting operations of the registry.

3. Independently Inspected Physical Sites that feature:

a. A backup power system including a multi-day power source.

b. A high level of security due to twenty-four-hour guards and appropriate physical safeguards against intruders.

c. A remotely-located, fully redundant and staffed twin facility with "hot switchover" capability in the event of a main facility failure caused by either a natural disaster (e.g., earthquake or tornado) or an accidental (fire, burst pipe) or deliberate (arson, bomb) man-made event. (This might be provided at, or jointly supported with, another registry, which would encourage compatibility of hardware and commonality of interfaces.)

Registrar Requirements

Registries will set standards for registrars with which they wish to do business. The following are the minimal qualifications that IANA should mandate that each registry impose and test or inspect before allowing a registrar to access its database(s). Any additional requirements imposed by registries on registrars must be approved by IANA and should not affect the stability of the Internet or substantially reduce competition in the registrar business. Registries may refuse to accept registrations from registrars that fail to meet these requirements and may remove domain names from the registries if at a later time the registrar which registered them no longer meets the requirements for registrars.

1. A functioning Database and Communications System that supports:

a. Secure access (with encryption and authentication) to the registry.

b. Robust and scalable operations capable of handling moderate volumes.

c. Multiple connections to the Internet via at least two Internet Service Providers.

d. A daily data backup and archival system.

e. A record management system that maintains copies of all transactions, correspondence, and communications with all registries for at least the length of a registration contract.

2. Management Policies, Procedures, and Personnel including:

a. A plan to ensure that the registrar's obligations to its customers and to the registries will be fulfilled in the event that the registrar goes out of business. This plan must indicate how the registrar would ensure that domain name holders will continue to have use of their domain name and that operation of the Internet will not be adversely affected.

b. Commonly-accepted procedures for information systems security to prevent malicious hackers and others from disrupting operations.

3. Independently inspected Physical Sites that features:

a. A backup power system.

b. A high level of security due to twenty-four-hour guards and appropriate physical safeguards against intruders.

c. Remotely-stored backup files to permit recreation of customer records.

Appendix 2—Minimum Dispute Resolution and Other Procedures Related to Trademarks

1. Minimum Application Requirements.

a. Sufficient owner and contact information (e.g., names, mail address for service of process, e-mail address, telephone and fax numbers, etc.) to enable an interested party to contact either the owner/applicant or its designated representative; and a

b. Certification statement by the applicant that:

—It is entitled to register the domain name for which it is applying and knows of no entity with superior rights in the domain name; and

—It intends to use the domain name.

2. Searchable Database Requirements.

a. Utilizing a simple, easy-to-use, standardized search interface that features multiple field or string searching and the retrieval of similar names, the following information must be included in all registry databases, and available to anyone with access to the Internet:

—Up-to-date ownership and contact information;

—Up-to-date and historical chain of title information for the domain name;

—A mail address for service of process;

—The date of the domain name registration; and

—The date an objection to registration of the domain name was filed.

3. Updated Ownership, Contact and Use Information.

a. At any time there is a change in ownership, the domain name owner must submit the following information:

—Up-to-date contact and ownership information; and

—A description of how the owner is using the domain name, or, if the domain name is not in use, a statement to that effect.

4. Alternative Dispute Resolution of Domain Name Conflicts.

a. There must be a readily available and convenient dispute resolution process that requires no involvement by registrars.

b. Registries/Registrars will abide by the decisions resulting from an agreed upon dispute resolution process or by the decision of a court of competent jurisdiction.

If an objection to registration is raised within 30 days after registration of the domain name, a brief period of suspension during the pendency of the dispute will be provided by the registries.

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CERTIFICATE OF COMPLIANCE

This Brief of Appellant has been prepared using:

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EXCLUSIVE of the Corporate Disclosure Statement; Table of Contents; Table of Authorities; Addendum; Certificate of Compliance and Certificate of Filing and Service, this Brief contains 12,786 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line print-out.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of April 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand delivery, the required number of copies of this Brief of Appellant and Joint Appendix, and further certify that I served, via UPS Ground Transportation, the required copies of said brief and appendix to the following:

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