THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/432/ICANN/49

THE FINANCIAL SERVICES ROUNDTABLE

(USA)

vs/

AUBURN PARK, LLC

(USA)

(Consolidated with case No. EXP/507/ICANN/124

AMERICAN INSURANCE ASSOCIATION (USA) vs/
AUBURN PARK, LLC (USA))

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

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List of Abbreviations

Add.Sub.	Additional Submission
Appendix III	Appendix III to the Rules, Schedule of expertise costs for proceedings under the Procedure
Applicant	Auburn Park LLC
Application	Appl. I.D. 1-1512-20834 <.insurance>
Attachment	Attachment to Module 3 of the gTLD Applicant Guidebook
Beijing GAC Advice	GAC Communiqué - Beijing
Centre	International Centre for Expertise
CPE	Community Priority Evaluation procedure
Donuts	Parent company of Applicant, Donuts Inc.
DPML	Donuts Protected Marks List
Durban GAC Advice	GAC Communiqué - Durban
Expert Determination	Expert Determination
GAC	ICANN's Government Advisory Committee
GAC Early Warning	Early warning issued by the GAC at the request of the Australian Government on 20 November 2012
GFIA	Global Federation of Insurance Associations
gTLD	generic Top Level Domain
Guidebook	gTLD Applicant Guidebook
ICANN	Internet Corporation for Assigned Names and Numbers
ICANN Final Report	Final Report -ICANN Generic Names Supporting Organization -August 8, 2007
Note	ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
Objection	Community Objection filed by the Objector
Objector	The Financial Services Roundtable
PIC	Donuts Public Interest Commitment
Procedure	Module 3 of gTLD Applicant Guidebook
Proceedings	Exp. 432/ICANN/49 (c. Exp. 507/ICANN/124)
Requirements	Requirements to be met for an Objection to prevail as detailed in paragraph 35
Rules	Rules for Expertise of the ICC
Three Additional Safeguards	Additional safeguards numbered 6,7, and 8 in the Beijing GAC Advice
URDP	Uniform Domain-Name Dispute-Resolution Policy (UDRP) is a process established by ICANN for the resolution of disputes regarding the registration of internet domain names

1. INTRODUCTION

1. This expert determination ["**Expert Determination**"] is issued pursuant to the proceedings being held before the International Centre for Expertise ["**Centre**"] of the International Chamber of Commerce Centre designated as EXP/432/ICANN/49 ["**Proceedings**"][1].

2. The Proceedings deal with the Community Objection ["**Objection**"] filed by the Financial Services Roundtable ["**Objector**"] to the application registered by Auburn Park, LLC ["**Applicant**"] before the Internet Corporation for Assigned Names and Numbers ["**ICANN**"] for the new generic top level domain ["**gTLD**"] <.insurance> (Appl. I.D. 1-1512-20834) ["**Application**"].

3. Objector – The Financial Services Roundtable – is a "leading advocate on behalf of the financial services community, including insurance members"[2]. Objector's address and representative:

   Mr. Richard Whiting
   Executive Director and General Counsel
   1001 Pennsylvania Avenue, NW Suite 500
   South Washington D.C. 20004 USA
   Ph: (+ 1) 202.589.2413
   rich@fsround.org

4. Applicant – Auburn Park, LLC – is a company formed to acquire and operate generic top level domains under ICANN's new gTLD program[3]. Applicant's address:

   Mr. Daniel Schindler
   Auburn Park, LLC
   155 108th Avenue NE, Suite 510
   Bellevue, WA 98004, USA
   Ph: (+ 1) 424.254.8537
   auburnpark@donuts.co

   The parent company of Applicant is Donuts Inc. ["**Donuts**"].

5. Applicant is represented by:

   John M. Genga, Esq.
   Don C. Moody, Esq.
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[1] This case is consolidated with EXP/507/ICANN/124. However, each of the Objections is being issued a separate Expert Determination.
[2] Objection p. 5.
[3] Declaration of J. Nevett, Annex B to Response, at 3.

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2.   PROCEDURAL BACKGROUND

7.   On 13 June 2012 Applicant filed with ICANN an application requesting the gTLD <.insurance.

GAC Early Warning[4]

8.   At the request of the Australian Government, on 20 November 2012, ICANN's Government Advisory Committee ["**GAC**"] issued an early warning ["**GAC Early Warning**"] stating that "the string (.insurance) is linked to a regulated market sector, and Auburn Park, LLC does not appear to have proposed sufficient mechanisms to minimise potential consumer harm" and suggesting that "Applicant should detail appropriate mechanisms to mitigate potential misuse and minimize potential consumer harm"[5].

9.   Applicant replied to the GAC Early Warning by letter, concluding that "[W]e believe we have more than sufficient protections in place to address the needs of rights holders and insulate end-users against poor experiences, and we intend to proceed with our applications"[6].

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[4] Both the GAC Early Warning and the Beijing GAC Advice will be analysed in detail *infra (see paragraphs 154 et seq.)*.
[5] The GAC Early Warning detailed as reason/rationale for the warning the following: "*The proposed string (.insurance) is linked to a restricted or regulated market sector. This market sector is characterized by the ability to complete entire transactions online, without the need for any face-to-face interaction. In this context, Auburn Park, LLC does not appear to have proposed sufficient protections to address the potential for misuse. Without additional protections, this proposed TLD could result in misuse and consumer harm. Early warnings provide a mechanism to initiate a discussion between a government and an applicant on particular issues or questions. It is intended that a constructive dialogue through this process will assist applicants to better understand the concerns of governments, and help governments to better understand the planned operation of proposed gTLDs.*"
[6] Donuts' response to the GAC Early Warning, p. 6.

<u>Community Objection</u>

10. On 13 March 2013 Objector filed an Objection before ICANN, which gave rise to the present proceedings.

<u>Beijing GAC Advice</u>

11. On 11 April 2013 the GAC issued the GAC Communiqué – Beijing ["**Beijing GAC Advice**"], where it stated that "to reinforce existing processes for raising and addressing concerns the GAC is providing safeguard advice to apply to broad categories of strings (see Annex I)".

12. In Annex I to the Beijing GAC Advice the GAC advised the ICANN Board that:

> "Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm… [I]n the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to: …….
> - Financial: ……insurance".

13. The GAC further advised the ICANN Board in Annex I that:

> "1. In addition, some of the above strings may require further targeted safeguards, to address specific risks, and to bring registry policies in line with arrangements in place off line. In particular, a limited subset of the above strings are associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling….) in multiple jurisdictions, and the additional safeguards below should apply to some of the strings in those sectors:
> […]
> 6. At the time of registration, the registry operator must verify and validate the registrants' authorizations, charters, licenses and/or other related credentials for participation in that sector.
> 7. In case of doubt with regard to the authenticity of licenses or credentials, Registry Operators should consult with relevant national supervisory authorities, or their equivalents.
> 8 The registry operator must conduct periodic post-registration checks to ensure registrant's validity and compliance with the above requirements in order to ensure they continue to conform to appropriate regulations and licensing requirements and generally conduct their activities in the interests of the consumers they serve"[7].

Safeguards 6, 7 and 8 detailed above will be referred to as the "**Three Additional Safeguards**".

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[7] Beijing GAC Advice p. 10.

14. In a response to the Beijing GAC Advice, Donuts (Applicant's parent company) agreed to some of the safeguards suggested by the GAC, but rejected the implementation of the three measures detailed in the prior paragraph[8].

Consolidation of cases

15. By letter of 22 April 2013 the Centre informed the parties that the case had been consolidated with EXP/507/ICANN/124[9].

Applicant's response

16. Applicant filed its Response on 9 June 2013.

Durban GAC Advice

17. On 18 July 2013, the GAC issued a new advice with occasion of its meeting in Durban ["**Durban GAC Advice**"] stating in relation to the Beijing GAC Advice on safeguards to Category 1 new gTLDs, that the GAC would continue the dialogue with the NGPC (New Generics Program Committee) on this issue.[10] The issue remains therefore undecided so far.

18. Donuts stated in its response to the Durban GAC Advice that it believed the protections it established were sufficient, and that it had no plans to amend the applications for the affected gTLDs.

Appointment of Expert

19. The Expert was appointed on 1 July 2013 by the Chairman of the Standing Committee of the International Centre for Expertise of the ICC.

Approval of the Application

20. On 26 July 2013 ICANN declared that the Application had passed the Initial Evaluation.

Main procedural steps of the Proceeding

21. The file was transferred to the Expert on 5 August 2013 following payment in full of the estimated Costs by the parties and the confirmation of the constitution of the Panel by the Centre.

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[8] In its 10 May 2013 Comment on GAC Advice on New gTLDs.

[9] The Applicant was requested to file a response for each objection. The Panel was given the discretion to issue one or two Expert Determinations. The Mission Statement provided that there would be two Expert Determinations.

[10] On 10 September 2013 the NGPC stated that the Category 1 Safeguard advice from the Beijing GAC Advice remained open and would continue the dialogue with the GAC at a further date. The evaluation and objection processes remained on track.

22. By letter of 12 August 2013 the Expert inquired whether the parties required further submissions[11] and on 26 August 2013 the Expert authorised additional submissions, establishing 10 October 2013 as the date to deliver the Expert Determination. It is noted that no hearing was requested by either Objector or Applicant.

23. On 4 September 2013 the Expert delivered to the parties a Mission Statement, reflecting the basic aspects of the Proceeding.

24. Objector delivered the additional submissions on 10 September 2013.

25. By letter of 25 September 2013 the Expert informed the parties that the Centre, upon request from Expert, had authorised the extension of the deadline to deliver the Expert Determination 15 October 2013[12].

26. Applicant filed its additional submissions on 27 September 2013[13].

27. I note that the language of the Proceeding has been English[14] and this is the language of all documentation submitted and that all communications have been delivered by email[15].

Delivery date

28. This Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21 (a) and (b) of the Procedure.

3. REQUIREMENTS APPLICABLE TO THE OBJECTION

29. A community objection permits an application to be rejected if a significant part of the community to which the string is explicitly or implicitly targeted presents substantial opposition. The determination is to be made by an expert panel[16].

A. Applicable rules

30. In its review of a community objection, the panel will apply primarily:

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[11] Objector required further submissions.
[12] Pursuant to article 21 (a) of the Attachment.
[13] Expert granted Applicant's request to extend the deadline to present the additional submissions by two days due to a late filing by Objector of an additional document (Global Federation of Insurance Associations ["**GFIA**"] letter of 19 September 2013).
[14] As required by article 5 (a) of the Procedure.
[15] As required by article 6 (a) of the Procedure.
[16] Recommendation 20 – ICANN Final Report: "An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted."

- Module 3 (Objection Procedures) [the "**Procedure**"] and its attachment [the "**Attachment**"] of the gTLD Applicant Guidebook ["**Guidebook**"] (other parts of the Guidebook will also be helpful as reference, including specifically Module 4 (String Contention Procedures)[17]).
- Rules for Expertise of the ICC ["**Rules**"].
- Appendix III to the Rules, Schedule of expertise costs for proceedings under the Procedure ["**Appendix III**"].
- ICC Practice Note on the Administration of Cases under the new gTLD Dispute Resolution Procedure ["**Note**"].

31. Finally, the Procedure refers to the 8 August 2007 Final Report by the ICANN Generic Names Supporting Organization ["**ICANN Final Report**"][18], which includes the rationales of the different objections[19]. Thus, the panel can draw additional guidance from the ICANN Final Report.

32. I now detail below certain relevant aspects of each of these rules.

B. Requirements and standards

33. Pursuant to the Procedure, an Objection must satisfy the following requirements to be successful:

34. <u>First</u>: Objector must prove that it has standing to object[20] (a).

35. <u>Second</u>: Having proven standing, objector must demonstrate that the following four tests regarding the merits are complied with[21] (b):

- The community invoked by the objector is a clearly delineated community;
- The community opposition to the application is substantial;
- There is a strong association between the community invoked and the applied-for string; and
- The application creates a likelihood of material detriment to the rights of legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

The standing and the four tests described below will be referred to as the "**Requirements**".

36. To assist the panel in its task, the Procedure identifies for each of the Requirements a non-exhaustive list of factors which the panel may consider. The panel is authorised to

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[17] On the reference value of Module 4, see paragraph 50 for further analysis. I note that both the Objector (Add. Sub. p. 1) and the Applicant (Add. Sub. p. 6) make a reference to the CPE (Community Priority Evaluation procedure), which is described in Module 4.
[18] Procedure at p. 3-5.
[19] Recommendation 20.
[20] Procedure at 3-8.
[21] Procedure at 3-22.

balance the relevant factors (though not all factors must be established) and to take other factors into consideration[22].

37. In making its determination, the panel may refer to and base its findings upon the statements and documents submitted by the parties and/or any rules or principles that it determines applicable[23].

38. The panel must bear in mind that it is the Objector who bears the burden of proofing that the requirements and standards applicable to the Objection are met[24].

a.   Standing to object

39. The first step is to qualify for standing to file a community objection. In order to have standing, Objector must prove that it is an established institution and that it has an ongoing relationship with a clearly delineated community.

40. To evaluate whether Objector is an institution, the panel may consider, among others, the following factors[25]:

   - Level of global recognition of the institution;
   - Length of time the institution has been in existence; and
   - Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organisation, or treaty; the institution must not have been established solely in conjunction with the gTLD application process.

41. To evaluate whether there is an on-going relationship with a clearly delineated community, the panel may consider, among others, the following factors[26]:

   - The presence of mechanisms for participation in activities, membership and leadership;
   - Institutional purpose related to the benefit of the associated community;
   - Performance of regular activities that benefit the associated community and
   - The level of formal boundaries around the community.

b.   Requirements on the merits

42. If the Objector is found to have standing, then it must pass the following four tests on the merits.

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[22] Procedure at 3-22/3-25.
[23] Attachment, article 20 (b)
[24] Attachment, article 20 (c)
[25] Procedure at 3-8.
[26] Procedure at 3-8.

(i)   <u>First test: Objector must prove that the community is clearly delineated</u>

43.   To evaluate whether the community is clearly delineated[27], the Procedure allows the panel to consider, among others, the following factors:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

(ii)   <u>Second test: Objector must prove that the community opposition is substantial</u>

44.   This second Requirement will only be analysed if the first test is passed, i.e. if a clearly delineated community is found.

45.   In considering whether the second test[28] is met, the Procedure provides that the panel may consider, among others, the following factors[29]:

- The number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- The level of recognised stature or weight among sources of opposition;
- The distribution or diversity among sources of expressions of opposition, including:
  · Regional
  · Subsectors of community
  · Leadership of community
  · Membership of community
- The historical defence of the community in other contexts; and
- The costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

(iii)   <u>Third test: Objector must prove the existence of a strong association</u>

46.   If substantial opposition to the application is evidenced, the objector must then prove that there is a strong association between the community invoked and the applied-for string[30].

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[27] Procedure 3-23.
[28] Procedure 3-23.
[29] Procedure at 3-8.
[30] Procedure 3-24.

47.   To evaluate the existence of a strong association between the string and the community, the panel may consider, among others, the following factors[31]:

-    Statements contained in the application;
-    Other public statements by the applicant; and
-    Associations by the public.

(iv)   Fourth test: Objector must prove likelihood of detriment to rights

48.   Finally, if a strong association between community and string has been established, the objector must prove that the application creates the likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted[32].

49.   To evaluate the existence of material detriment to the members of the community, the Procedure advises the panel to use, among others, the following factors[33]:

-    Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant`s operation of the applied-for gTLD string;
-    Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
-    Interference with the core activities of the community that would result from the applicant`s operation of the applied-for gTLD string;
-    Dependence of the community represented by the objector on the DNS for its core activities;
-    Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant`s operation of the applied-for gTLD string; and
-    Level of certainty that alleged detrimental outcomes would occur.

* * *

50.   Module 4 of the Guidebook (String contention procedure) also provides criteria to review and score a community-based application. It shares some common concepts with the community objection procedure (such as community establishment and nexus between the string and the community), though its standards are stricter, and thus can only be taken as a general reference[34].

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[31] Procedure 3-23.
[32] Procedure 3-24.
[33] Procedure 3-23.
[34] Thus, Module 4 states that "*It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to*

51. ICANN provides the following guidelines in relation to Recommendation 20 of its Final Report:

> "Guidelines
> a) Substantial – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment.
> b) Significant portion – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.
> c) Community – community should be interpreted broadly and will include, for example, an economic sector, a cultural community or a linguistic community. It may be a closely related community which believes it is impacted.
> d) Explicitly targeting – explicitly targeting means there is a description of the intended use of the TLD in the application.
> e) Implicitly targeting – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.
> f) Established institution – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.
> Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.
> The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.
> g) Formal existence – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.
> h) Detriment – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely".

4. SUMMARY OF THE OBJECTION

52. Objector claims that the granting of the string "<.insurance" to the Applicant will result in material detriment to the insurance community[35], and considers that the Application should be rejected.

53. Objector claims that it has standing to object (A), and meets the four tests on the merits required by the Procedure (B).

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prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid." – Mod. 4 at p. 4-9.
[35] Objection p. 5.

A.   Standing to object

54.   Objector must prove that it is an established institution (a) and that is has an on-going relationship (b) with a clearly delineated community(c).

a.   An established institution

55.   To establish standing in this case, the Objector points out that it is an organisation with a long existence. The first of its predecessor organisations was formed in 1912, and in 1999 the organisation's mission was broadened to represent the interests of integrated financial providers (i.e., banks, insurance and securities). Today the organisation includes approximately 100 of the largest integrated financial services companies operating in the U.S., including 21 major insurance institutions[36].

b.   On-going relationship with the community

56.   The Objector claims that it has an on-going relationship with the insurance community. This is evidenced by its mission to unify the leadership of large integrated financial companies, including insurance. It seeks to be the premier forum for leaders of the financial services industry, to determine and influence critical public policy issues, and to promote the interests of member companies in federal legislative, regulatory and judicial fora[37].

57.   The relationship with the community is further evidenced by the various activities developed on behalf of the community, including a series of programs and working groups; and promoting a trade association of insurance agents and brokers.

58.   Within this context, the Objector has filed through an affiliate, fTLD Registry Services, a Community Application for the string <.insurance, and intends to operate it in a manner consistent with the interests of the insurance community[38]. The Community Application filed by the fTLD Registry Services has the support of a number of relevant international insurance associations.

c.   The community is clearly delineated

59.   The Objector claims that the insurance community is clearly delineated by virtue of the formal regulatory boundaries imposed in all OECD member countries[39]. Further evidence of this boundary is the general restriction on the use of the term "insurance" only to the entities meeting the legal requirements to operate in the insurance market[40].

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[36] Objection p. 4.
[37] Objection p. 4/5.
[38] Objection p. 8.
[39] Objection p. 4.
[40] Objection p. 7.

60. Last, but not least, the strong support by substantial international insurance associations to the Community Application filed by fTLD Registry Services is, according to the Objector, evidence of the delineation of the insurance community[41].

B. Requirements on the merits

61. The Requirements consist of four tests, the first of which (the existence of a clearly delineated community) has already been addressed in the previous section. The Objector's position with respect to the remaining three tests is as follows.

a. There is substantial opposition to the Application

62. Objector claims that, from among this clearly delineated community, there is substantial opposition to the Application. In addition to the opposition as represented by the Objector, including several of its members individually, and other entities such as the Global Federation of Insurance Companies, the Expert should consider the very substantial international support to the fTLD Registry Services Community Application[42].

b. There is a strong association between the string and the community

63. Objector claims that there is a strong association between the community and the string. This is due to the existence of rules or regulations at local and/or national level which regulate who can call themselves an insurance company/agent/broker[43].

64. Objector suggests that the text of the Application itself recognises the nature of this community and its participation[44].

c. The application is likely to cause material detriment

65. The opposition to the Application is based on the material detriment that the operation of the Application will generate to the insurance community. The Objector highlights that the Applicant has stated that it will operate the string in an open manner, without requiring any insurance related qualification by potential registrants[45]. This is against the advice provided in the Beijing GAC Advice, which stated the need to consider

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[41] Additional Submission ["**Add. Sub.**"] p. 2.
[42] Objection p. 8.
[43] Objection p. 9.
[44] Specifically, Objector reflects the following paragraph from the Application: "*.Insurance will be particularly attractive to registrants providing insurance products and services (one of the world's largest and most attractive industries), and the end-users who seek to protect against risk or otherwise are interested in or are required to have insurance coverage. Registrants may include insurance companies, brokerages, adjusters, service providers, reinsurance organizations, agents and others who can use the TLD to more intuitively reach end-users. The TLD also could provide a forum for ratings agencies, journalists, industry analysts, insurance customers, policy makers, and others who take a professional or personal interest in this important financial instrument.*" Objection p. 9.
[45] Objection p. 9/10.

accreditation at the time of registration for the domain of authorisations/licences to act in the insurance market[46].

66. Objector alleges that the lack of safeguards based on proof of such due authorisations/licences at the time of registration will facilitate abusive behavior such as phishing and cybersquatting, with no adequate remedy for the end user[47]. Measures taken to remedy any breach or abuse after the damage to the end user has been done will not repair the damage[48].

67. Objector claims that the risk for harm is even further increased by the Applicant's intent to allow proxy registrations, which facilitate improper and abusive activities[49].

68. Another negative consequence of making available the string to entities on an open basis is the need by the insurance industry to register a substantial number of purely defensive and unnecessary registrations to protect its name. This defensive action, the need to maintain a constant monitoring of the internet and to take remedial action (letters of warning, URDPs, etc.) would result, according to the Objector, in substantial costs to the community every year[50].

C. **Additional aspects**

69. Objector submits that the review of the Objection should be made taking into context the fact that Donuts has a legal and operational relationship with Demand Media, an entity heading affiliates including domain name registrations[51]. For various reasons, Objector calls into question the relationship between Donuts and Demand Media, and its impact on the operation of the string[52].

70. On this subject, Objector states that Auburn Park is a recently incorporated company, with no operational history, and thus the importance of looking at the background of its senior management and the strategic arrangement with Demand Media. Objector requests the Expert to undertake an independent review regarding the relationship between Donuts and Demand Media and its potential impact on the insurance community should Applicant be granted the right to operate the string[53].

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[46] Add. Sub. p. 7.
[47] Objection p. 12.
[48] Add. Sub. p. 7.
[49] Objection p. 11.
[50] Objection p. 12.
[51] Facts provided by the Objector defining the relationship are (i) several key Donut executives previously held senior positions in eNom, (ii) Donuts has contracted with Demand Media Europe Ltd. to provide backend registry services for Donut's 307 applications, and (iii) Demand Media has the right to acquire equal ownership with Donuts for a maximum of 107 gTLDs for which Donuts has applied. Objection p.10.
[52] Among other allegations, the existence of an extraordinary number of rulings against Demand Media companies by URDP panels – based on findings of bad faith, cybersquatting and/or typosquatting. See letter from J. Stoler to S. Crocker dated July 28, 2012 (Objector's Add. Sub.p.8).
[53] Add. Sub. p. 9.

5.   SUMMARY OF APPLICANT'S RESPONSE

71.   Responding to the Objection, Applicant claims that Objector has failed to prove standing (A), and has not proven any of the four tests on the merits (B).

A.   Lack of standing

72.   Applicant alleges that Objector lacks standing for various reasons, namely:

- A clear delineated community is required by the standard and no clearly delineated community exists where it is identified by the broad term "insurance".
- The "community named by the objector must be … strongly associated with the applied-for gTLD string"[54]. In other words, the words "insurance" must readily bring Objector's organisation to mind[55].

73.   Finally, Applicant notes that Objector (through its affiliate, fTLD Registry Services) has applied for the same string as a community, and thus has a different and independent remedy – the Community Priority Evaluation ["**CPE**"][56]. This mechanism is available, whenever there is more than one contender for the same string – one contender being a community. In such case, a Community Application permits its applicant (i.e. the community) to request a Community Priority Evaluation procedure. If the community applicant is successful and meets the stringent tests of the CPE, it will prevail over any other standard application for the same string (even if the other strings have met all requirements, and do not harm the community).

B.   Requirements on the merits

74.   On the merits Applicant submits that Objector has not been able to meet any of the four tests for several reasons, namely:

a.   No clearly delineated community

75.   The Objector has not identified a clearly delineated community[57]:

- Because the word insurance has several meanings, it is impossible to show that this generic term describes a clearly delineated community.
- There is a low or no level of formal boundaries around the term <.insurance> and a large degree of uncertainty as to what person or entities would be considered to form such a community.
- Even if insurance refers only to "regulated insurance", which it does not, the Objector occupies but a fraction of the universe by that term.
- Many different types of insurance exist (e.g. health, life, automobile, liability, home, professional liability, long-term disability, etc. to name a few). Such

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[54] Guidebook section 3.2.2.4 at 3-7.
[55] Response p. 6.
[56] Response p. 6.
[57] Response p. 7/8.

variations make even the narrow product aspect of insurance impossible to delineate.

- Applicant argues that an infinitely greater universe of users with conceivable interest in the various meanings and implications of "insurance" exists. Objector attempts to identify a narrow community more susceptible of "delineation" than the vast population associated with the generic "insurance" designation. In doing so, Objector attempts to change the standard: there must be a clear delineated community invoked by the term "insurance".

b. No substantial opposition

76. Objector has failed to evidence substantial opposition[58]:

- Objector provides no evidence of the stature of those voicing opposition, or of the distribution or diversity of such opposition.
- No evidence is provided of any historical defense mounted for the community or costs incurred.
- The letters of supporting the Community Application dot not imply opposition to the Application[59].

c. Lack of strong association

77. The Objector has not evidenced the existence of a strong association between the community and the string[60]:

- Objector's failure to define the community makes it impossible to assess whether the public associates the word "insurance" with that "community".
- As evidenced by the Application, the string will be made available to a wide variety of internet users, and not just those providing insurance products and services.

d. No material detriment

78. The Objector fails to provide evidence of material detriment to the community:

- Applicant has established effective security protections that are sufficient to protect the best interests of all users[61].
- There is no evidence that Applicant's string poses a likelihood of damage to the purported "community" or its "reputation". While the Objector claims that the operation of the string will invite an increasing cybersquatting and phishing threat, it tenders no evidence that such operation would create any greater or different harm to the industry than exists today[62].

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[58] Response p. 9.
[59] Add. Sub. p.5.
[60] Response p. 10.
[61] Response p. 11.
[62] Response p. 12.

- There is no evidence to the Objector's claim that an <.insurance gTLD could confuse users into believing that they are entering an area with regulatory protection[63].
- There is no evidence as to why members would have to register domain names defensively as a potential harm emanating from the string any more than what its members do now. To the contrary, the Applicant has included as one of its safeguards measures the creation of a Donuts Protected Marks List members, which will allow concerned members to register in advance to get notification of cybersquatting and other internet schemes[64].
- There is no relevant evidence regarding interference with the community's core activities, nor demonstrating any level of certainty regarding the detriment its constituents may suffer[65].

C. **Additional aspects**

79. Regarding Objector's attempt to challenge Applicant's ethics, and to link it with Demand Media and the domain registrar eNom, and to suggest impropriety by all three, Applicant denies the allegations. Donuts has passed the Initial Evaluation for approximately 110 applications, and ICANN has found that Donuts is ethically, technically and financially fit to operate the many registries for which it has applied[66].

6. **FINDINGS OF THE EXPERT**

80. In order to be successful, the Objector must prove that it has standing to object (A) and that the four Requirements are met: the community it invokes is clearly delineated (B), there is substantial opposition from the community to the Application (C), there is a strong association between the community and the string (D), and the Application creates the likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted (E).

81. The Objector claims it has met all the above Requirements, while the Applicant avers that the Objector has failed to prove any of the above Requirements.

82. I turn now to review the Requirements.

A. **Objector's standing to object**

83. To have standing, Objector must prove that it is an established institution (a) with an on-going relationship (c) with a clearly delineated community (b).

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[63] Response p. 13.
[64] Response p. 12.
[65] Response p. 13.
[66] Response p. 12.

a. Objector as an established institution

84. To establish standing the Objector must first prove that it is an established institution.

85. The Objector has submitted evidence that it is an organization representing the interests of integrated financial providers. Its origins date from the early twentieth century. Though originally it was aimed essentially at the banking field, in 1999 it changed its mission to include insurance and securities markets. Today its members include bank companies (which comprise around 44% of the members), insurance companies (around 28%), broad diversified companies (around 17%) and securities companies (around 10%)[67].

86. On the basis of the above, I am satisfied that the Objector has shown it is an established institution for the purposes of this Proceeding.

b. Relationship with a clearly delineated community

87. Having shown that it is an established institution, the Objector must then prove that it has an ongoing relationship with a clearly delineated community invoked by the Objector.

88. The first question to be addressed is the definition of the community the Objector is invoking. The Objector does not specifically state the community it represents (i.e. the global insurance community or the U.S. insurance community). Though there is some contradiction/ambiguity in the Objection, in my opinion it is clear that the Objector is basing its case on the global insurance community, as proven by the fact that the Objector refers to the regulatory constraints at OECD level countries[68]. Additionally, the Objector has gone to great lengths to provide evidence of the opposition from international insurance associations, with references to the "growing ranks of the insurance community explicitly supporting the community approach"[69]. I thus conclude that the community being invoked is the global insurance community.

89. There is no objection in that the community invoked by the Objector coincides with an economic sector. I note that the Guidelines to Recommendation 20 of the ICANN Final Report define community as follows:

> "Community – community should be interpreted broadly and will include, for example, an economic sector, a cultural community or a linguistic community. It may be a closely related community which believes it is impacted".

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[67] Objection p. 4.
[68] Objection p. 6 - Note that Applicant acknowledges this in its own Add. Sub. at p. 6.
[69] Add. Sub. p. 2.

90.   The next question to address is: what should be understood as a <u>delineated</u> community?

91.   Regarding delineation, Module 4 of the Guidebook may serve as a reference[70]. Its criterion 1, which deals with the determination of Community Establishment (i.e. determination of the existence of a community), defines delineation as follows:

> "Delineation relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low"[71].

92.   Thus, delineation deals with the clarity with which the membership definition is established. It follows that the issue turns on whether the global insurance community is clearly delineated[72].

93.   The Objector claims that it is, as evidenced by:

- The fact that insurance companies carrying direct insurance activities are subject to regulation and supervision in the OECD countries[73],
- The restriction on the use of the word "insurance" in various contexts by various national and local laws[74], and
- The need for insurance agents/brokers to be licensed to provide the products or services[75].

94.   The Applicant, on the other hand, submits three counter-arguments seconding the inexistence of a delineated community: (i) clear delineation of a community that has such a sprawl of entities is not achievable[76]; (ii) since the word insurance has several meanings, it is impossible for Objector to show that this generic term describes a clearly delineated community, and (iii) even if insurance referred only to "regulated insurance", the Objector occupies but a fraction of the universe covered by that term.

95.   I am persuaded by the Objector and unconvinced by the arguments put forward by the Applicant.

96.   (i) The insurance community is a highly regulated sector. Most jurisdictions have enacted regulations providing for the need to meet substantial entry requirements. These tests are based on solvency, technical capability and the requirements that officers and share-holders meet fit and proper standards. Regulations also restrict the use of the word

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[70] Module 4 provides the criteria to evaluate the existence of a community in the case of a Community Priority Evaluation. It shares some common concepts with the community objection procedure, though its standards are stricter, and thus can only be taken as a general reference.

[71] Module 4 at 4-11.

[72] This question is one of the four tests on the merits to be reviewed below, where a more detailed consideration could be made. For the purposes of standing, the main factor provided in the Procedure is the level of formal boundaries around the community, which I proceed to consider.

[73] Objection p. 7.

[74] Objector cites Nevada, New Zealand, Canada, British Virgin Islands as examples.

[75] Objection p. 7.

[76] Add. Sub. p. 1.

"insurance": entities which do not meet the entry requirements and are not properly registered are precluded from using the term insurance in their corporate name. Finally, the regulations cover the supervision of the ongoing activities. All these measures have as their ultimate goal the protection of the consumer and of the solvency of the financial system[77].

97.	These formal boundaries, providing high entrance barriers, make the insurance industry a clearly delineated community.

98.	(ii) The Objector does not have to show that the string describes a clearly delineated community uniquely. The Procedure requires the Objector to evidence a strong association between a clearly delineated community and the string. A strong association does not mean that the string term has no meaning other than identification of the community[78].

99.	(iii) Applicant also states that even if insurance refers only to "regulated insurance", an assumption which Applicant rejects, the Objector occupies but a fraction of the universe covered by that term. This argument must fail since the Procedure requires no relationship between the representational size of the Objector and the community invoked. In other words, there is no requirement that the Objector should represent any minimum part of the community invoked.

100.	Applicant also tries to argue that many different types of insurance exist (e.g. health, life, automobile, liability, home, professional liability, long-term disability, etc. to name a few), and that such variations make even the narrow product aspect of insurance impossible to delineate.

101.	This argument must also fail: in my opinion, the existence of different types of insurance does not affect the delineation of the community. The insurance community as invoked involves all sectors of the regulated insurance activity. The fact that some insurers may be involved in life, others in property and casualty does not alter the concept of a single general insurance community, acting to promote the interests of the community as a whole. A clear example can be drawn from a review of the insurance members of the Objector, which cover all areas of insurance, including personal insurance, life, casualty & property, special insurance etc. A similar review of the members list of the Global Federation of Insurance Associations reveals a grouping of insurance associations covering the main ranges of insurance described.

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[77] I note that the Beijing GAC Advice reflects on this point, stating that "In particular, a limited subset of the above strings are associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling, etc.) in multiple jurisdictions".

[78] Module 4 provides the criteria to evaluate the existence of a community in the case of a Community Priority Evaluation. Criterion 2 thereof provides guidance on the valuation of the nexus between the proposed string and the community. The criteria to apply are nexus (matching of string and name of community) and uniqueness (string term has no other significant meaning beyond identifying the community). The nexus criteria could score up to three points, while the uniqueness criteria could score a maximum of one (Guidebook at 4-13). Additionally, when dealing with the definition of relevance in criterion 4, the Guidebook clearly states that there may be more than one community associated to a string (Guidebook, at 4-18).

c. On-going relationship

102. I turn now to the issue of the on-going relationship.

103. On this point, the Objector has shown that it participates in legislative, regulatory and judicial *fora* for the improvement and defence of the sector, and that it has created working groups, committees and other instruments which facilitate the participation of its members in activities related to the general interests of the insurance sector.

104. I have reviewed the activities mentioned by the Objector – this being one of the criteria established in the Procedure[79] – and note that most of them are related to the U.S. market, and not to the global community being invoked.

105. However, as Expert I am authorised to value factors other than those expressly established in the Procedure[80], such as the fact that the international insurance associations have shown clear support to the fTLD Registry Services Community Application (*pro memoria*: the application made through the Objector's affiliate). This support was provided, among others, by:

   - The Global Federation of Insurance Associations, (a representative body for the global insurance industry comprising 35 member associations, who account for approximately 88% of the world insurance premiums);
   - Insurance Europe, the European insurance and reinsurance federation (representing undertakings accounting for around 95% of total European premium income);
   - The Insurance Council of Australia (representing around 90% of total premium income written by private sector insurers), and the
   - Insurance Bureau of Canada, (the Canadian national industry association representing 90% by premium of the P&C Insurance business)[81].

106. I consider this support to be proof of an on-going relationship, especially taking into account that both the Insurance Bureau of Canada and the Insurance Council of Australia have requested fTLD Registry Services to expand the availability of the string to the global insurance community. I understand this as clear evidence of a continuous relationship of trust with fTLD Registry Services and indirectly, with the Objector. These are signs that the international insurance community is confident that the Objector (albeit indirectly through its affiliate) will act in the interest of the community.

107. The above conclusion is reinforced by the fact that the Global Federation of Insurance Associations issued on 19 September 2013 a letter expressly seconding the Objector's actions in this Proceeding, and reiterating the endorsement made to the Community Application registered by its affiliate, fTLD Registry Services.

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[79] Procedure 3-23.
[80] Procedure 3-23.
[81] See GFIA letter of 19 September and letters in annex A to Objector's Add. Sub.

108. It is my opinion that the facts described above are significant and, jointly with the other considerations made, reveal the existence of an ongoing relationship between the Objector and the community invoked.

109. <u>In conclusion</u>, standing requires the Objector to prove that it is an established community with an on-going relationship with a clearly delineated community invoked by the Objector. I find that Objector has satisfied all these elements, and declare that the Objector has standing to file the Objection.

<p style="text-align:center">* * *</p>

110. There are yet two counter-arguments to analyse: Applicant claims that the Objector, having applied for the same string as a community application, has a different and independent remedy –the Community Priority Evaluation (CPE), which in Applicant's opinion is the proper route[82] (d) and that the community named by the objector must be strongly associated with the string (e).

d. Objection procedure vs. CPE

111. In my opinion, there is no basis to conclude that the community objection procedure and the Community Priority Evaluation procedure are mutually exclusive.

112. These are in fact two different mechanisms: whilst the objection seeks to eliminate an application harmful to a community, by contrast, in the CPE a community applicant seeks to prevail over all standard applicants on the basis of its community status (without the need to prove that the contending applications are harmful).

113. The CPE procedure not only reviews different issues, but by its own words it also applies a more stringent level of tests. Thus, the objectives of each of the procedures, the issues reviewed, the level of proof and the chances of success are different.

e. Strong association between the community and the string

114. Applicant states that, for the purposes of a standing review, a "community named by the objector must be … strongly associated with the applied-for gTLD string" in accordance with the Guidebook section 3.2.2.4 at 3-7. In other words, the words "insurance" must readily bring Objector's organization to mind.

115. I do not agree with the Applicant.

116. Section 3.2.2.4 states that:

> "[t]o qualify for standing for a community objection, the objector must prove both of the following: It is an established institution … [and] … [i]t has an ongoing relationship with a clearly delineated community… ."

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[82] Response p. 6.

117. The Procedure provides for two standing requirements, which have both been analysed in the preceding section and which I judged to be sufficiently proven. Once these requirements are established, the Objector must be deemed to have standing[83].

118. Furthermore, the statement that the words "insurance" must readily bring Objector's organization to mind is not correct. Section 3.2.2.4 of the Procedure refers to the association between the string and the community, not between the string and the Objector.

* * *

119. Having established standing, the next task is to review whether the four tests on the merits have been satisfied.

B. Test 1: Clearly delineated community

120. The first test requires proving that a clearly delineated community exists, a concept which has already been considered for the purposes of standing. The analysis made in section 6.A is valid for these purposes, supplemented by the following.

121. One of the strongest arguments proving the existence of a delineated community are the various national laws restricting the use of the word "insurance" to duly licensed and registered service providers.

122. In addition, there are several international organizations that represent the international insurance community. Examples of these include the International Association of Insurance Supervisors; the European Insurance and Occupational Pensions Authority and the International Insurance Foundation.

123. I also find relevant the recent creation of the Global Federation of Insurance Associations, an entity which according to its web page accounts through its members for around 88% of the world's insurance premiums. The existence of a global federation of national insurance associations, which represent a very high percentage of the international insurance market, serves convincingly to evidence a clearly delineated community.

124. <u>In conclusion</u>, I find that there is a clearly delineated insurance community.

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[83] The reference to the strong association between the community and the string made in section 3.2.2.4 must be understood as a general background statement preceding the actual requirements for evaluation of standing. I note that a string may explicitly or implicitly target a community (see test 4, Procedure at p 3-23), and, in my opinion and consistently with the terms of the Procedure, the review of such targeting is to be made under such test on the merits and not at the standing phase. In any event, the question is probably moot since failure to prove the strong association will, regardless of where it is made, result in the failure of the Objection.

C. Test 2: Substantial opposition by the community

125. Having considered that the community invoked by the Objector is clearly delineated, the next test is to determine whether there is substantial opposition from the community.

126. The Objector claims that it has proven substantial opposition from the community. Applicant on the other hand, submits that no such evidence has been provided.

127. To evaluate whether the opposition is substantial, the Procedure invites the Expert to consider several factors, including, among others, the number of expressions of opposition relative to the composition of the community, the representative nature of entities expressing opposition, the level of recognised stature or weight among sources of opposition and the distribution or diversity among sources of expressions of opposition.

128. In this context, I highlight that Objector represents 21 insurance member companies with a substantial size and business activity, of which 14 are within the top 50 U.S. insurance companies and five of them are listed within the 50 largest insurance companies in the world by assets.[84]

129. In addition, the Objector has delivered eight letters of support expressing opposition to the Application, seven from among its members, and one from the Global Federation of Insurance Associations (a representative body for the global insurance industry comprising 35 member associations, which represent insurers and reinsurers in 56 countries, collecting 87% of world-wide premiums – according to the Federation's web)[85].

130. The above is supplemented by several opposition comments made in ICANN's public forum, notably one from the American Insurance Association, an association grouping 300 U.S. Property & Casualty insurers, with more than 100 billion dollars in premiums. This entity is in itself an objector to the Application in the consolidated proceedings 507/CANN/124.

Given these facts, I could probably conclude at this point that there is sufficient evidence of substantial opposition from the global community. However, in addition to the direct expressions of opposition mentioned above, the Objector has also provided the full list of supporters/endorsers of the Community Application filed by the Objector's affiliate fTLD Registry Services[86]. I note two aspects:

131. (i) A success of the CPE implies a defeat of the Applicant in this Proceeding (the ruling in the CPE will prevail over any other standard application for the same string – even if the other strings have met all requirements, and do not harm the community). It follows that any endorsement of a Community Application is an implicit endorsement of such

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[84] Source: www.relbanks.com
[85] www.gfiainsurance.org
[86] Add. Sub. p. 2.

application against any competing strings. Such endorsements must be construed as tacit oppositions to the Applicant's application[87].

132. (ii) The endorsers of the Community Application comprise international insurance associations of substantial size and geographical diversity[88].

133. <u>In conclusion</u>, a significant part of the international insurance associations object to the Application and hence, the Objector has met the requirement of substantial opposition from the community.

D. Test 3: Strong association between community and string

134. Having established substantial opposition to the Application, the next test to consider is whether there is a strong association between the community and the string.

135. The Objector claims that a strong association does indeed exist, whilst the Applicant submits that the string is open to all users, and should not be restricted to a limited number of entities. The Applicant adds that because there is no delineated community, there can be no association with the string[89].

136. To help determine the issue, the Expert may balance factors including: the statements contained in the Application (a), other public statements by the Applicant (b), or the association by the public between community and the string (c).

a. Statements contained in the Application

137. Regarding the Application, both parties have drawn my attention to the answer provided by Applicant to question 18 (a), though inferring different conclusions.

138. The relevant paragraph in the Application states as follows:

> ".Insurance will be particularly attractive to registrants providing insurance products and services (one of the world's largest and most attractive industries), and the end-users who seek to protect against risk or otherwise are interested in or are required to have insurance coverage. Registrants may include insurance companies, brokerages, adjusters, service providers, reinsurance organizations,

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[87] In this sense, the GFIA endorsement states: "The GFIA welcomes the fTLD Registry Services community-backed bid. It believes that community applications such as that by fTLD is the most appropriate way to manage the .insurance gTLD.". Similarly, the IE letters states: "As a community applicant from the industry it represents, fTLD Registry Services understands the industry's need for domain governance and internet security. We have confidence that fTLD will act in the interests of the industry".

[88] Among others, the Global Federation of Insurance Associations, a representative body for the global insurance industry comprising 35 member associations (whose members account for approximately 88% of the world insurance premiums), the Insurance Bureau of Canada, (the Canadian national industry association representing 90% by premium of the P&C Insurance business), Insurance Europe, (the European insurance and reinsurance federation, whose members account for approximately 95% of total premium income in Europe), and the Insurance Council of Australia (representing more than 90% of premium income written by private sector general insurers).

[89] Response p. 10.

agents and others who can use the TLD to more intuitively reach end-users. The TLD also could provide a forum for ratings agencies, journalists, industry analysts, insurance customers, policy makers, and others who take a professional or personal interest in this important financial instrument."

139. Applicant argues that the answer to question 18 (a) shows its intent to make the string available to a wide range of potential end users, and that it cannot be associated to a narrower community. In that answer, the Applicant states that "no entity or group of entities has exclusive rights to own or register second level names in this TLD", and that "[m]aking this TLD available to a broad audience of registrants is consistent with the competition goals of the new TLD expansion program…"[90].

140. Objector, on the other hand, considers that the answer to question 18 (a) reveals that the string is targeted to the insurance community.

141. I tend to side with Objector: to my mind, this paragraph does seem to consider the insurance market as its primary target. The phrase "will be particularly attractive to registrants providing insurance products and services (one of the world's largest and most inclusive industries), and the end users who seek insurance to protect against risk or otherwise are interested in or are required to have insurance coverage" is an acknowledgment that there is a group of registrants that, due to their business, constitute a primary target for the string. The Applicant then goes on to offer a non-exclusive list of such primary targets, stating that "registrants may include insurance companies, brokerages, adjusters, service providers, reinsurance organizations, agents and others who can use the TLD to more intuitively reach end-users".

142. Applicant continues: "[t]he TLD also could provide a forum for ratings agencies, journalists, industry analysts, insurance customers, policy makers, and others who take a professional or personal interest in this important financial instrument". This statement indicates that the primary target will be the insurance community, and additionally, on a second level, a slew of other potential entities and persons.

b. Association between community and the string

143. Regarding association by the public of the community and the string, there are several facts that clearly point to such association:

144. (i) To begin with, the Beijing GAC Advice identifies this problematic issue when referring to the trust that the consumers have in the insurance community. In Beijing, the GAC warned:

> "Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm".

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[90] Response p. 10.

145. In other words, because the string (in this case, <.insurance) is linked to a regulated sector (the insurance sector), the consumers will assume that the users of such domains are part of the regulated community. This association by the public between the string and the regulated community is the cause of the higher level of risk associated with consumer harm.

146. I also consider of relevance the guidelines provided in Module 4 Guidebook (CPE procedure) for valuing the nexus between the string and the community. The guidelines indicate that the matching of the string with the name of the community is a high nexus indicator: the Guidebook grants a score of three points (out of four) if the names match (i.e. string and community have the same name)[91]. In our case, the term insurance and the community invoked provide a clear match.

147. Finally, I am also convinced by the Objector's argument that a general search in internet under the word insurance evidences a strong link between the word insurance and members of the insurance community. The Objector has presented adequate evidence in this regard[92].

148. In conclusion, I am persuaded that there is a strong association between this string and the insurance community invoked by the Objector.

E. Test 4: Likelihood of material detriment

149. Having admitted the existence of a clearly delineated community showing a substantial opposition to a string with which the community is associated, Objector must prove that the application creates the likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted[93].

150. Objector and Applicant have pleaded their case on the likelihood of material detriment, focusing on different interpretations of the GAC findings. *Pro memoria*: ICANN's GAC Committee issued a Warning and subsequently an Advice indicating that the registry operator should verify three issues in connection with strings linked to financial insurance, known as the Three Additional Safeguards: the Applicant's continuous compliance with licences requirements for participation in the sector in conformity with the relevant national supervisory authorities.

151. The Objector contends that Applicant intends to operate the string in an open manner, without providing for safeguards restricting the use of the string to entities with the relevant required accreditation/authorization as recommended by the GAC[94]. This provokes – in Objector's opinion – a substantial risk for the consumers and for the reputation of the insurance community. A risk which is further enhanced by the fact that

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[91] Guidebook at 4-12.
[92] Add. Sub. p. 6.
[93] Procedure, section 3.5.4 at 3-34.
[94] Add. Sub. p. 7.

Applicant would allow the use of proxy registrations, facilitating the misuse of the string[95]. The Objector finally refers to an additional detriment: insurance companies would be forced to make a substantial number of purely defensive string registrations, in order to protect their reputation.

152. The Applicant's position is the opposite. Applicant submits that the safeguards provided in the Application are adequate to protect the interests of the users of the string. It also avers that there is no evidence that the operation of the string as proposed in the Application would result in greater or different harm than under the present circumstances[96], and that Objector has not evidenced any material detriment to the alleged community in general. Applicant contends that Objector misstates the importance of the Beijing GAC Advice[97]: such advice only suggests that certain strings should have the Three Additional Safeguards, but does not identify specifically <.insurance as one of them. Furthermore, Applicant argues that the GAC merely expresses concerns about the strings, but does not suggest precluding or restricting their delegation. Finally, it is up to the GAC and the ICANN Board to decide whether such safeguards should be the subject of recommendations to be followed by the applicants – this is a policy decision that lies with the GAC and the ICANN Board, and not with the Panel. The Applicant concludes that the Beijing GAC Advice cannot be considered as proof of the likelihood of material detriment to the community[98].

153. From the above discussion it follows that my decision must weigh GAC's resolutions (a) and consider any alleged lack of preventing measures (b) as well as alleged increased registration and legal costs for the community (c).

a.   The GAC's resolutions

Introduction

154. The GAC's tasks are provided for in the Procedure[99]:

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

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[95] Objection p. 11.
[96] Response p. 11.
[97] Add. Sub. p. 7.
[98] Add. Sub. p. 8.
[99] The GAC Advice may take one of the following forms:
"I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed…..
II. The GAC advises ICANN there are concerns about a particular application "dot.example". The ICANN is expected to enter into a dialogue with the GAC to understand the scope of concerns. The ICANN is also expected to provide a rationale for its decision.
III. The GAC advises ICANN that an application should not proceed unless remediated…." (Procedure at 3-3).

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

155. The GAC may provide not only GAC Advice, it may also, at an earlier stage, provide GAC Early Warnings. A GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g. potentially violate national law or raise sensibilities. While it is a notice only, the Procedure states:

"[However,] a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process"[100].

156. The GAC has been consistent in stating its concern with regulated sectors. The Procedure reflects that[101]:

"While definitive guidance has not been issued, the GAC has indicated that strings that could raise sensitivities include ......those strings that refer to particular sectors such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse."

The GAC's Early Warning

157. On 20 November 2012 a GAC Early Warning was issued to the Applicant at the request of the Australian Government stating that:

"the string (.insurance) is linked to a regulated market sector, and Auburn Park, LLC does not appear to have proposed sufficient mechanisms to minimize potential consumer harm".

158. The GAC's Early Warning detailed as reason/rationale for the warning the following:

"The proposed string (.insurance) is linked to a restricted or regulated market sector. This market sector is characterized by the ability to complete entire transactions online, without the need for any face-to-face interaction. In this context, Auburn Park, LLC does not appear to have proposed sufficient protections to address the potential for misuse."

The Beijing GAC Advice

159. On 11 April 2013 the GAC issued the Beijing GAC Advice, stating that strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from

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[100] Procedure at 1-7.
[101] Procedure at p 1-7.

consumers, and carry higher levels of risk associated with consumer harm. Among such strings, the GAC identified <.insurance. In addition, the GAC advised that a limited subset of the above strings are associated with market sectors which have clear/and/or regulated entre requirements (such as: financial…) in multiple jurisdictions, and proposed the Three Additional Safeguards[102].

160. In other words, the operation of the string <.insurance is capable of causing consumer harm, and should be subject to preventive registration safeguards to avoid said risk.

161. In summary, the GAC finds that strings in regulated sectors are likely to invoke consumer trust and carry a higher risk that consumer harm will occur. The GAC also suggests the need to bring registry policies in line with arrangements off line. To address these issues, the GAC suggests that the Registry Operators should check the authorisations/licences of registrants at the moment of registration, consult with the relevant authorities whenever in doubt and conduct periodic post-registration checks[103].

162. The Applicant submits that the Beijing GAC Advice has no bearing in this Proceeding, and cannot be a substitute for evidence of material detriment[104]. I disagree for the following reasons.

163. (i) Applicant contends that the GAC does not make specific reference to any particular string when speaking of additional safeguards, recommending registration restrictions only for some of the strings without identifying <.insurance. Applicant adds that the GAC only expresses concerns about such strings, but does not suggest precluding or restricting their delegation[105].

164. This argument is not sufficiently persuasive: the GAC has consistently expressed its concerns regarding strings in regulated financial sectors (as evidenced by the footnote in Guidebook at p 1-8, the GAC Early Warning, and the subsequent Beijing GAC Advice). The Beijing GAC Advice specifically highlights the financial sector (which includes the <.insurance string) as one where the additional safeguards should apply. Though the GAC states that these should apply to some of the strings (without specifying which ones), there is no doubt in my mind that <.insurance should be considered as one of the strings the Beijing GAC Advice was referring to: banking, insurance and securities are the three traditional regulated sectors within the financial markets.

165. (ii) Applicant's second argument is that the Beijing GAC Advice only expresses concerns with certain potentially sensitive strings and only requires the ICANN Board to enter into a dialogue with the GAC. It does however not require ICANN to adopt any of the GAC recommendations[106]. If ICANN does not accept all or part of the Beijing

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[102] See paragraph 19 for the full text.
[103] Applicant's parent company, Donuts, responded to the GAC Early Warning and the Beijing GAC Advice by letter concluding that they considered that the safeguards provided by the Applicant were more than sufficient. Concerning the three measures, discussed above, Donuts believes that such restrictions are inappropriate and difficult to implement.
[104] Add. Sub. p. 6.
[105] Add. Sub. p. 7.
[106] Procedure at p 3-3. In this case the ICANN Board is only expected to provide a rationale for its decision.

GAC Advice, it will have made a policy decision. Thus, Applicant concludes that the Panel cannot decide by itself what ICANN has left for its own Board to resolve in dialogue with the GAC.

166. This second argument is also not convincing: the GAC may express its concerns on any application made and the ICANN Board, after a dialogue with the GAC, may decide to agree or not with the concerns and/or the measures suggested by the GAC. The decision not to follow the GAC Advice may be premised on any number of reasons, which may be different from those to be reviewed in a particular objection. Indeed, hypothetically, one of the factors that may influence the decision not to follow the GAC Advice may be the very fact that the objection procedure will provide a better venue to analyze the concerns raised. In my opinion, the refusal by the ICANN Board to implement a GAC suggestion does not preclude the filing of an objection (whether community or otherwise) to the relevant application.

167. <u>In conclusion</u>, within the terms of the Procedure, the GAC may express concern to a particular application and it has, indeed, voiced worry that the strings in category 1[107] (which includes <.insurance) will invoke a level of implied trust from consumers, creating higher risks of consumer harm. This is an objective evaluation stated by a committee comprised of representatives from the national governments, and must be valued accordingly. The decision as to whether the recommendations made by the GAC should be implemented or not remains within the competence of the ICANN Board; the relevant application is then subjected to the general objection procedure, in accordance with the applicable standards. This notwithstanding, the appraisal of the situation represented by the Beijing GAC Advice remains a fact. As such, it must be taken into consideration for the purposes of this Proceeding.

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168. Once I have decided on the weight to be attributed to the Beijing GAC Advice I must decide on the two arguments raised by the Objector which underpin the alleged likelihood of a material detriment to the rights of the community.

169. Before entering into the merits of said arguments, I must establish the following qualifications:

-   The Objector is not required to prove that the Application will result in actual material detriment; it must only prove that it creates <u>the likelihood</u> of material detriment.
-   The concept of detriment is generally understood to be a wider concept than that of pure damage, and can include loss, damage, disadvantage or injury.
-   The detriment must be caused to the rights or legitimate interests of a significant portion of the community; while the term "rights" is limited to legal rights (arising by contract or by law), the term "legitimate interests" is wider, encompassing business and economic interests.

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[107] As identified in the Beijing GAC Advice.

b. Lack of preventive measures and consequences

170. The worldwide insurance regulations seek to create a safe, or as safe as reasonably possible, legal environment. Within these regulations, the restrictions imposed by many jurisdictions on the use of the word insurance try to ensure that the consumer can rely on the regulated nature of the entity with whom he or she is dealing. The GAC has taken a constant view that the uncontrolled use of financial strings (including <.insurance) create consumer risk. Such risks should be reduced by introducing preventive safeguards.

171. Applicant claims that it has established effective security measures that are sufficient to protect the best interests of all users. It allegedly does so by applying the 14 protections that ICANN demands for all new gTLDS, plus eight additional measures.[108] These extra eight measures are:

   - Periodic audit of Whois data for accuracy;
   - Remediation of inaccurate Whois data, including takedown, if warranted;
   - A new Domain Protected Marks List [**"DPML"**] product for trademark protection;
   - A new Claims Plus product for trademark protection;
   - Terms of use that prohibit illegal or abusive activity;
   - Limitations on domain proxy and privacy service;
   - Published policies and procedures that define abusive activity; and
   - Proper resourcing for all of the functions above.

172. Furthermore, with respect to sensitive strings such as insurance, Applicant intends to adopt four additional steps to shield users from potential misconduct. These are[109]:

   - To supplement the periodic audit referred to above, by a deeper and more extensive verification of Whois data accuracy, with associated remediation and takedown processes;
   - Exclusion of registrars with a history of poor compliance;
   - Regular monitoring by the registry of registered domains for pharming, phishing, spam, botnets, copyright infringement and other forms of abuse, and remediation and takedown processes; and
   - In addition to registry-based procedures, requirements that registrars have a 24/07/365 abuse contact, and remediation and takedown processes.

173. In my view, there is, however, a significant limitation in Applicant's philosophy. Donuts defends that it is not within the registry operator's role to control *ex ante* (i.e. on registration) compliance by the registrant with any legal restrictions regarding authorisations/licences that may be applicable. In its response to the Beijing GAC Advice, Donuts agreed with the GAC's recommendation that registry operators should

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[108] Response p. 11.
[109] Response p. 11.

include in its acceptable use policy that registrants comply with all applicable laws. However, as Donuts explained:

> "Registrants must operate within the law and that requirement can be passed down to them, but registries should not be put in the investigative or law enforcement roles"[110].

174. In my opinion, the safeguards proposed by the Applicant have two main drawbacks:

175. (i) The first drawback is that such safeguards still allow unregulated entities to create the appearance that they are indeed regulated companies, with an enormous potential for confusion. Failure to bring registry policies in line with arrangements in place off line would lead to the existence of a different (and lower) level of protection to online activities as compared to the level for protection offered by the applicable regulations to entities operating in off line activities. The disparity between both areas (on line versus off line) increases substantially the potential for confusion and mistakes by the consumer and abuse of the domain by malicious entities.

176. (ii) The second drawback is that the safeguards provided in the Application are reactive, tending to remedy any breach of such safeguards by the relevant operator after the fact. While this may affect the wrongdoer, it will not remedy the harm done to the affected consumers, nor the general loss of trust for legitimate on line insurance activities.

177. Use of the string <.insurance leads to the presumption that the user is a member of the insurance community, and as such, within the regulatory umbrella of mandatory restrictions and protections. A consumer dealing with an entity perceived as a member of the insurance community may assume that such member acts within the context of its regulated activity, and that products or services contracted are made subject to the applicable regulations.

178. There is a likelihood that entities using the string assume the appearance of being subject to the relevant consumer-protective regulations, with the aim of taking advantage from the confusion created in the mind of the end user[111]. This can only result in harm to the consumer and to the reputation of the internet activity of the insurance community. If at present there already is a substantial number of malicious domain registrations on the basis of second level registrations, it is likely that the

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[110] Response to Beijing GAC Advice p. 11.

[111] The Objector claims that, as articulated in fTLD Registry Services application, the need for verification and validation at the time of registration is critical. In its application fTLD states: *"Regrettably, the industries reputation has been marred by criminal and fraudulent activities that undermine consumer trust and enforcement agency confidence. Internet users, many of whom are consumers, are increasingly challenged by opportunists and charlatans who pretend to be legitimate online business. This is a particular concern of the insurance industry because their consumers are asked to entrust sensitive financial information to external third parties. Rogue online operators engage in cybersquatting and "phishing" attacks that often involve false websites designed to mimic legitimate business, including insurance"*.

reliance placed by the consumers on the gTLD domain <.insurance will increase the level of malicious use[112].

179. Another cause of increased concern is the Applicant's declared intention to allow the use of proxy statements. Proxy statements add another barrier to disclosure of the identity of the string operator. In the context of a highly regulated insurance environment this can only enhance the potential danger for confusion by the end users and for malicious abuse of the string. Though Donut's PIC included a commitment to limit the use of proxy and privacy registration services in case of malfeasance[113], this is again a reactive approach to the potential damage and not a preemptive one.

180. On the basis of the above, I conclude that the Applicant is not providing adequate security protection for user interests, and is not acting in the interests of the community. By failing to provide the safeguards suggested by the GAC, the operation of the string as proposed will very likely result in a material detriment to the legitimate interests of the insurance community to develop their business activities through the internet.

c.   Increased registration and legal costs for the community

181. The detriment to the community is not restricted to the damage to the consumers and the loss of reputation in the internet. Under non-business descriptive gTLDs such as <.com, <.bizz etc. the insurance community holds a portfolio of domain registrations of which 85% are purely defensive[114]. It seems likely that members will be even more inclined to hold a large defensive portfolio in the case of business-related gTLDs such as insurance. Though Donuts has provided in its PIC for a Donuts Protected Marks List (DPML), I agree with the Objector that the protection is limited to the exact trademark, thus leaving intact the need for further defensive registrations[115].

182. In consequence, because of the strong association between the string and the insurance members, I am persuaded by the Objector that the members of the community will find it necessary to file and maintain a substantive number of purely defensive domain registrations.

183. Applicant claims that there is no proof that this new gTLD will create any greater or different harm to the industry than exists today. In this respect, Applicant submits that at present there are over 116,000 uses of the term insurance at second level[116].

184. I do not find the argument persuasive: to begin with, Objector does not have to prove that the operation of the string creates a greater or different harm to the industry. It merely has to prove that there is a likelihood that it will create a material detriment to the interests of the community. Objector has proven that a substantial number of

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[112] The matter is not hypothetical; the Objector has shown numerous cases of abusive domain registrations related to insurance resulting in URDP filings. See annex H Objection.
[113] Donut PIC, at 3.6.
[114] As alleged by Objector - Objection p. 13.
[115] Objection p. 13.
[116] As stated by J. Nevett – annex B exhibit 2 Response.

malicious second level domain registrations exist[117]. It seems reasonable to consider that a gTLD, which has a stronger presumption of representing a duly accredited entity, will attract increased malicious attention. While, for example, <firstnationalinsurance.com may give rise to confusion among the public, <firstnational.insurance holds a much stronger presumption that the entity is a properly registered insurance entity. The risk for consumer confusion is thus increased, and therefore the likelihood that it will be subject to abuse if adequate protections such as those prescribed in the Beijing GAC Advice are not taken.

185. <u>In conclusion</u>, I am persuaded that the Applicant has not committed to institute effective security protection for user interests, and is not acting in the interests of the insurance community. The Application, if allowed, would facilitate an increase in abusive behavior (such as cybersquatting, typosquatting, phishing…) and would result in material detriment to the community through loss of consumer trust, additional difficulty in the development of the online business and need to enter into defensive registrations.

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Additional issues

186. <u>First additional issue</u>: given that the Objector has prevailed on the other arguments, I will not address the allegations made by the parties in relation to the concerns raised by the Demand Media – Donuts strategic relationship[118].

187. <u>Second additional issue</u>: On 3 December 2013, after submission of this determination to the Centre for review, the Applicant submitted *ex tempore* a communication[119] bringing to my attention a letter from ICANN to the GAC, stating that ICANN is intending to accept the GAC's Beijing Advice concerning Category 1 and Category 2 Safeguards. These safeguards would be included in the Specification 11 to the Registry Agreement to be executed between Applicant and ICANN should the string be awarded to Applicant. Applicant submits that to the extent ICANN so adopts the safeguards Applicant will be obliged to comply with such safeguards. Thus, to the extent Objector claims material detriment based on Applicant's alleged lack of GAC-recommended safeguards, ICANN's recent action has rendered that portion of the Objection moot.

188. By emails of 4 December and 5 December 2013, the Objectors (AIA and FSR[120]) in these consolidated Objection Proceedings alleged that (i) the pleadings were untimely and should be ignored, (ii) the dialog between the GAC and ICANN is not yet finalized, and that the issuance of the letter does not mean that the GAC is satisfied, (iii) the specific contractual provisions are not fully determined, and are nonetheless likely to be insufficient to prevent a likelihood of material detriment, and (iv) the principles

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[117] See Objection, Annex H.
[118] See paragraphs 69-70.
[119] In relation to both proceedings: Exp. 432/ICANN/49 (c. 507/ICANN/124).
[120] FSR by express declaration of support for the allegations made by AIA.

established in the determinations relating to .bank, .architect and .medical would lead to the maintenance of the Objection.

189. I note that the pleadings submitted by the Applicant are untimely: the draft Expert Determination had already been submitted to the Centre for review, and no further submissions by the parties should, as a general principle, be allowed. Exceptionally, I would be prepared to review my conclusions based on subsequent, unforeseen events if the events might undisputedly and materially affect the analysis made.

190. This is not, however, the case.

191. The letter from ICANN to the GAC identifies the GAC Category 1 strings more specifically, identifying a list of strings (which includes .insurance) under the heading "Highly-Regulated sectors/Closed Entry requirements in multiple jurisdictions", and with respect to which the safeguards 1-8 of the Beijing GAC Advice are applicable.

192. However, a review of the safeguards to be included in Specification 11 reveal that ICANN is considering, in relation to the safeguards 6 (validation of licenses at registration), 7 (consultation with relevant authorities when in doubt) and 8 (periodic supervision of maintenance of licenses) of the Beijing GAC Advice the implementation of a self-validation structure. This self-validation structure means that the registration agreement between the registrar and the registrant would include, among others, the following provisions:

   - The obligation by registrant to comply with all applicable laws.
   - The registrar's obligation to notify registrants of the requirement to comply with all applicable laws.
   - A representation by the registrant that it possesses any necessary authorizations, charters, licenses and/or other related credentials for participation in the sector associated with the string.
   - The registrant's obligation to report to the registrar any material changes to the validity of the authorizations, charters, licenses and/or other related credentials for participation in the sector associated with the string.

193. The above means that the registrar will not make any review and validation of the authorizations, licenses, charters etc. of the registrants on registration, nor at any time after registration. The registrar will take on trust the self-validation declaration made by the registrant, and would expect to receive notice from the registrant of any change to its status under any regulations applicable to the registrant. Thus, there are no barriers to any malicious entity wishing (i) to effect untrue or misleading statements, or (ii) to fail to communicate any change in its status; and therefore appear in the market under the string .insurance as a regulated entity.

194. I have already concluded above that the lack of adequate validation at the time of registration may allow unregulated entities to maliciously create the appearance that they are indeed regulated companies, with an enormous potential for confusion. Failure to bring registry policies in line with arrangements in place off line would lead to the existence of a different (and lower) level of protection to online activities as compared

to the level for protection offered by the applicable regulations to entities operating in off line activities. The disparity between both areas (on line versus off line) increases substantially the potential for confusion and mistakes by the consumer and abuse of the domain by malicious entities.

195. On the basis of the above, I am not persuaded that the Applicant's *ex tempore* allegations should modify my original conclusions.

7. **CONCLUSION**

196. I find that Objector has proven that, in relation to the Objection presented against Applicant's application for the gTLD <.insurance:

   - Objector has standing to object, and
   - The four following tests have been met:
     · the community affected by the string is a clearly delineated community,
     · there is substantial opposition from the community,
     · there is a strong association between the string and the community, and
     · the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string is explicitly or implicitly targeted.

   Therefore, Objector has prevailed and the Objection is upheld.
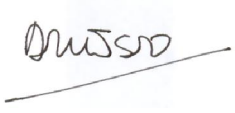
8. **COSTS**

197. Pursuant to article 14 (e) of the Attachment, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. The Objector has prevailed, and thus shall have its advance costs refunded.

DECISION

For the reasons given above, and in relation to the Objection filed by The Financial Services Roundtable as Objector, against the application filed by Auburn Park, LLC, as Applicant, for the gTLD <.insurance, I find and declare that:

I.   The Objector has prevailed and the Objection is upheld;

II.   The Objector is entitled to have its advance payment of costs refunded by the Centre.

Date: 14 January 2014

Signature:

Mr. Juan Fernández-Armesto