

GAC Advice Response Form for Applicants



Please complete this form and submit it as an attachment to the current Customer Portal case using the following naming convention: “[Application ID] Additional Response to GAC Cat 2 Advice” (e.g, “1-111-11111 Additional Response to GAC Cat 2 Advice”). All responses must be received no later than 23:59:59 UTC on 17-January-2014.

Please note: This form will be publically posted.

Respondent:

Application Prioritization Number	867
Applicant Name	Wal-Mart Stores, Inc.
Application ID	1-2064-74519
Applied for TLD (string)	GROCERY

Response:

Wal-Mart Stores, Inc. (Walmart) thanks ICANN for the opportunity to further address the proposed operation of the .Grocery gTLD. In developing the new gTLD program, ICANN envisioned a wide range of differing business models so that the market may determine which business models are most appropriate. This principle is incorporated into the Preamble to the gTLD Applicant Guidebook, which states that the program “will open up the top level of the Internet’s namespace to foster diversity, encourage competition, and enhance the utility of the DNS.”

It is important to emphasize at the forefront that the gTLD program does not prohibit so-called “exclusive access registries” operating under a “closed generic” business model. In fact, the gTLD Applicant Guidebook (Guidebook) expressly contemplates the possibility of such operations. Specifically, Section 6 of the Registry Operator Code of Conduct (Specification 9 to the New gTLD Agreement) permits registry operators to request an exemption from the Code of Conduct where three conditions are met: (i) all domain name registrations in the TLD are registered to, and maintained by, the registry operator for its own exclusive use; (ii) the registry operator does not provide any registrations to unaffiliated third parties; and (iii) application of the Code of Conduct is not necessary to protect the public interest. The first two criteria describe the same “exclusive access registries” that are the subject of the instant inquiry – registries maintained by the operator for its own use and not offered to unaffiliated third parties.¹

¹ Although the Section 6 exemption also could include .Brand TLDs, ICANN currently is contemplating whether to adopt a separate Specification 13 for .Brand TLDs which, among other things, exempts .Brand TLDs from complying with the Code of Conduct, rendering the Section 6 exemption moot as to those TLDs. This would leave closed generic registries as the only registries to which Section 6 of the Code of Conduct applies.

ICANN's Code of Conduct Exemption Process explains that, in most cases, satisfaction of these criteria (i.e., operating an "exclusive access registry") "will indicate the lack of a public interest concern because compliance with the Code of Conduct in such cases would only serve to protect the Registry Operator from itself."² Thus, by ICANN's own rules and procedures, Walmart's application for .Grocery presumptively serves the public interest. At the very least, Walmart respectfully suggests that the instant inquiry is premature; the analysis that ICANN proposes to undertake via the instant request is the same analysis required under the exception to Specification 9, which Walmart's application for .Grocery satisfies. Should ICANN nevertheless proceed to conduct this analysis at this time, satisfaction of the present inquiry should be considered by ICANN as automatically satisfying the exemption analysis under Specification 9.

Walmart's proposed application of the .Grocery TLD serves several public interest goals under standards adopted by ICANN and under other widely-recognized norms. Neither the instant request nor any prior statement by ICANN provides specific criteria for determining whether the proposed exclusive access model for a new TLD advances public interest goals. The only reference to the term "public interest goal" in the Guidebook is found in Section 3.2.5, which, in the context of the role of the Independent Objector, defines the term as acting "in the best interests of the public who use the global Internet." Under this standard, then, an exclusive access model serves a public interest goal if that approach is "in the best interests of the public who use the global Internet." The standard for evaluating a "public interest goal" is further illuminated by Article I, Section 2 of the ICANN Bylaws, which expresses as one of ICANN's core values: "Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."³ In light of the foregoing, Walmart responds to the instant inquiry with the understanding that, for this purpose, a "public interest goal" relates to activities that are in the best interests of the public who use the global Internet, particularly as it relates promoting competition in the registration and/or use of domain names.

The business model proposed in Walmart's application for .Grocery would further ICANN's mission of increasing competition in the registration and/or use of domain names. The ICANN Board has recognized that the new gTLD program is designed based on a "marketplace model that would enhance competition, opportunities for

² See ICANN, *Code of Conduct Exemption Process 2*, <http://newgtlds.icann.org/en/applicants/agb/ro-code-of-conduct-exemption-28oct13-en.pdf> (last visited Jan. 8, 2014).

³ This concept of equating competition with the public interest is consistent with United States communications law, which recognizes competition as one of three public interest goals along with localism and diversity. See, e.g., United States Federal Communications Commission, *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc. Applications For Consent to Assignment of Licenses from Subsidiaries of Belo Corp. to Subsidiaries of Sander Media, LLC and Tucker Operating Co., LLC*, Memorandum Opinion and Order, DA 13-2423 ¶ 22 (rel. Dec. 20, 2013), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1220/DA-13-2423A1.pdf.

innovation, and increase choice for consumers.”⁴ As a general rule, then, if the new gTLD program results in the delegation of registries with several different operating models, ICANN will have achieved its goal for the program. Importantly, ICANN’s core values speak to competition “in the registration of domain names,” not between domain names themselves. The issue, then, is not whether the proposed operation would foster competition for domains within a particular registry, but rather whether the proposed operation would foster competition in registration – *i.e.*, competition between registries. It is with this understanding that the ICANN Board previously determined that cross-ownership between registries and registrars “foster[s] greater diversity in business models and enhance[s] opportunities offered by new TLDs.”⁵ Walmart’s proposed operation of .Grocery is pro-competitive because: (1) the closed-generic business model will allow Walmart to provide a unique, secure marketplace in contrast with other TLDs focused solely on the sale of second-level domains; (2) Walmart will have an incentive to invest in the promotion of .Grocery to differentiate it from other TLDs and create an association between .Grocery and Walmart; and (3) myriad alternatives will remain available for competitors desiring to reach consumers on the Internet through use of alternative TLDs.

The benefits of operating .Grocery as a secure, controlled namespace are evident from Section 18(b)(i) of Walmart’s application. In contrast to unrestricted, unfiltered, and potentially unreliable consumer-targeted TLDs, Walmart’s .Grocery gTLD will: (1) provide a secure channel for Walmart to deliver information about grocery products and services to Internet users worldwide; (2) provide a platform for Walmart to deliver a broad assortment of quality merchandise and services at everyday low prices; (3) complement Walmart’s branding and brand protection strategies and lower Walmart’s overall costs by reducing the need for defensive registrations in other TLDs; (4) build consumer trust in products and services offered through the .Grocery gTLD; and (5) provide consumers with an easy and intuitive resource for locating information, products and services that they desire. An open registry, where a second level domain can be used in any manner by anyone willing to pay the applicable registration fee, cannot provide these same benefits.

Walmart understands that achieving these benefits requires a substantial investment in the promotion and operation of the .Grocery TLD, providing another competitive benefit of the proposed model for operation of .Grocery. By way of example, among the services and second level domain names that may be used by Walmart are produce.grocery, deli.grocery, health.grocery, and thanksgivingmeals.grocery. These domain names have no inherent value; rather, their value derives from an association in the minds of consumers between WalMart, the world’s largest grocer, and the .Grocery

⁴ See ICANN Board Notes on the GAC New gTLDs Scorecard 9-10 (4 Mar. 2011), available at <http://archive.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf>.

⁵ ICANN, *Adopted Board Resolutions* (5 Nov. 2010), available at <http://www.icann.org/en/groups/board/documents/resolutions-05nov10-en.htm>.

TLD. Walmart's investment in promoting .Grocery thus will benefit the gTLD program as a whole by creating awareness in the minds of consumers of the availability of alternatives to incumbent TLDs such .com, .net, and .org, and will encourage other registry operators to make similar investments in their TLDs and, in turn, in the success of the new gTLD program.

Finally, myriad alternatives will remain available for persons or entities who might be interested in a .Grocery second-level domain. Under common antitrust principles, courts look to the availability of substitutes, or the cross-elasticity of demand, as the starting point of any competition analysis.⁶ There are many alternatives for potential registrants to the .Grocery TLD. In addition to incumbent TLDs such as .com, .net, and .org, the new gTLD program also promises to spawn registries such as .food, .market, .shop, and .store. It follows that, if the new gTLD program achieves the goals set by ICANN for expansion of the domain name system, there will be no shortage of alternative gTLDs for potential registrants. In fact, Walmart's business model could encourage potential registrants to seek out these alternative TLDs, bolstering the new gTLD program and fulfilling ICANN's public interest goal of introducing and promoting competition in the registration of domain names.

The public interest benefits from Walmart's proposed operation of the .Grocery TLD extend beyond just promoting competition in the registration of domain names. Governments and other regulatory bodies frequently have recognized the benefits of providing secure and reliable commercial platforms, such as operation of .Grocery as proposed by Walmart, even at the expense of some intra-platform competition. Thus, courts have found that the public interest favors restricting unregulated competition in areas ranging from ambulance service⁷ to electrical service⁸ to taxicab service⁹. Just as additional competition in these fields ultimately would harm consumers by forcing them to distinguish between reliable and unreliable providers while reducing incentives for innovation, so too would operating .Grocery as an unrestricted registry make it more difficult, if not impossible, for consumers to distinguish between reliable and unreliable information while reducing the incentive for the registry operator or individual registrants to innovate.

The public interest in providing secure and reliable commercial platforms is particularly relevant when it comes to information disclosure. Although as a general matter courts have recognized the benefits of a "marketplace of ideas," where different views are

⁶ See, e.g., *United States v. E.I. du Pont de Nemours and Co.*, 351 U.S. 377, 393-96 (1956).

⁷ See *Gentry v. Howard*, 365 F. Supp. 567, 570 (W.D. La. 1973) (influx of unregulated competition not in public interest in safe, reliable ambulance service).

⁸ See *Howard Cnty. v. Potomac Elec. Power Co.*, 319 Md. 511, 528, 573 A.2d 821, 830 (1990) (recognizing "public interest of providing safe and reliable electrical service to larger areas").

⁹ See *Virgin Islands Port Auth. v. Virgin Islands Taxi Ass'n*, 979 F. Supp. 344, 352 (D.V.I. 1997) (exclusive taxicab franchise was appropriate "because the exclusive franchise ensured that all travelers at the airport would be provided reliable transportation").

entertained and the truth can rise to the forefront, courts have recognized a corresponding interest in the dissemination of truthful or trustworthy information.¹⁰ ICANN has recognized a similar interest in providing safe, reliable channels for information and preventing consumer confusion or misdirection when it approved existing closed models, such as .aero, .pro, .coop and others. The new gTLD program will introduce additional gTLDs that are restricted to serve a public interest, such as .bank, .lawyer, and .pharmacy.

Here, Walmart’s proposed operation of the .Grocery TLD will provide a channel for the distribution of useful, trustworthy information and products to the public who use the global Internet. By example, consumers searching for healthy foods on the Internet will currently find a plethora of untrustworthy computer generated or sponsored blog posts discussing healthy foods. Meanwhile, consumers visiting healthyfoods.grocery will understand that they are receiving reliable information about healthy eating from Walmart—a source they know and trust. This easily identifiable, reliable source of information will benefit consumers worldwide as they navigate the seemingly endless amount of information on the Internet and seek to distinguish among that information. At the same time, Walmart is just one of many voices, and given the alternatives referenced above, users will have ample access to competing sources of information.

As the foregoing demonstrates, Walmart’s operation of .Grocery as a closed registry is in the best interests of the public who use the global Internet. Nevertheless, Walmart’s application for a .Grocery gTLD contemplates the possibility of “opening” the gTLD in the future based upon market conditions and consumer adoption of new gTLDs. Finally, should ICANN promulgate a more concrete standard for assessing whether a proposed “exclusive access registry” serves a public interest goal or otherwise determine that Walmart’s application for .Grocery does not satisfy the applicable standard, Walmart requests the option to seek amendment of its application.

¹⁰ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 52 (1988) (false statements of fact “interfere with the truth-seeking function of the marketplace of ideas); *Brown v. Hartlage*, 456 U. S. 45, 60-61 (1982) (false statements are not entitled to the same protection as truthful statements).