

To: New gTLD Subsequent Procedures PDP Working Group

From: Cole Quinn, President, Brand Registry Group

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Public Comment - Supplemental Initial Report on the New gTLD Subsequent Procedures PDP (Overarching Issues & Work Tracks 1-4)

The Brand Registry Group (BRG) appreciates the opportunity to comment on the Supplemental Initial Report issued by the New gTLD Subsequent Procedures PDP Working Group on 1 November 2018.

The attached document includes our responses to many of the preliminary recommendations and questions raised in the Initial Report.

With regards,



Cole Quinn
President, Brand Registry Group

About the BRG

The BRG is an association of companies and organisations, created to support the collective interests of our members and to provide a voice for brand owners across the globe. We work to improve and develop domain name policies and operational practices on behalf of the BRG members' dotBrand registries and for future dotBrand applicants.

Annex B – Table of Recommendations, Options and Questions

Topic	Type	Text	BRG Comments
2.1 Auctions: Mechanism of Last Resort	Preliminary Recommendation	2.1.c.1: Many in the Working Group believes that ICANN auctions of last resort should remain in place within the program.	The BRG is supportive towards the preliminary recommendation for the auctions of last resort to remain in place within the program. Whilst the BRG appreciates the different options that have been discussed within the working group, there does not appear to be any that a) improve on the existing process and/or b) avoid introducing new negative issues. On balance, the BRG considers the current process to be reasonable as a mechanism of last resort.
2.1 Auctions: Mechanism of Last Resort	Preliminary Recommendation	2.1.c.2: However, the Working Group considered whether there should be additional options for applicants to voluntarily resolve contention sets by mutual agreement before being forced into an ICANN auction of last resort. The Working Group focused mainly on allowing applicants to change certain elements of their applications as a potential way to resolve contention sets earlier in the process (Please see recommendations in section 2.4 of this report on Change Requests, which discuss aspects like changes to the applied-for string and forming a joint venture).	See response to 2.1.c.1
2.1 Auctions: Mechanism of Last Resort	Option	2.1.d.1: Different Types of Auctions. Some Working Group members proposed alternative ways to implement an auction. One such suggestion was to utilize a sealed-bid auction, or sometimes known as a Vickrey auction, where in this instance, applicants would submit their single highest bid upon application submission. If an applicant's applied-for string is in contention, the highest bidder would be placed first in the queue to have their application evaluated and if successful, would pay the second highest bid to ICANN. It was suggested that this type of auction allows for applicants to bid the precise value of the string. This could almost entirely eliminate contention sets at the beginning of the application process. Some noted concerns that evaluators, knowing the value placed on the string by an applicant, could be biased in some manner. Others noted that utilizing a different form of auction is still a mechanism that relies heavily on having deep pockets. It was also noted that this form of auction would need to consider how it handles Applicant Support and community-based applications. Finally, others raised concerns about ICANN securing this highly proprietary information and it was acknowledged that this would need to be factored into the mechanisms that support this auction style.	See response to 2.1.c.1

2.1 Auctions: Mechanism of Last Resort	Option	2.1.d.2.1: Request for Proposals. Some Working Group members proposed alternatives to auctions of last resort. The Working Group discussed the possibility of having a request for proposals process that could be used to resolve contention sets. Such an approach could potentially involve third-party evaluators. One proposal was put forward to establish criteria around diversity that could be used as a basis for awarding the TLD. For example, priority could be given to applicants applying for their first TLD, applicants that are more community-focused rather than commercially-focused, and minority-supported applicants.	See response to 2.1.c.1
2.1 Auctions: Mechanism of Last Resort	Option	2.1.d.2.2: Random Draw. Another possible alternative discussed was the use of a determinative drawing mechanism to select a “winner” in the contention set, noting that a drawing is simple, effective, and fair. A determinative drawing seems to eliminate a number of issues with resolving string contention in that it does not favor those with the most money, it does not result in losing applicants receiving a financial benefit (e.g., in the case of most private resolutions), and it could eliminate comparative evaluations. However, it was pointed out that running a determinative drawing could be encounter issues with being considered a lottery and would require proper licensing.	See response to 2.1.c.1
2.1 Auctions: Mechanism of Last Resort	Option	2.1.d.2.3: System of Graduated Fees. One Working Group member suggested that a system of graduated fees could be established for each additional application submitted by an applicant, which could reduce the size of the pool of total applications and perhaps limit the number of applications that ultimately end in an auction of last resort. Another Working Group member noted that a system of graduated fees would favor larger entities with multiple applications and might also affect applicants' strategies in relation to the formation of applicant entities.	See response to 2.1.c.1
2.1 Auctions: Mechanism of Last Resort	Question	2.1.e.1: The preliminary recommendation above states that auctions of last resort should remain in place. However, some participants in the Working Group believe that auctions of last resort are inherently unfair and should be modified, restricted or modified. One of the main arguments is that auctions reward only those with the most amount of money rather than those that may best operate the TLD in the public interest. In addition, they believe that auctions discriminate against applicants in the developing world who may not have the resources to complete in an auction. Do you agree or disagree? Please provide a rationale for your response.	See response to 2.1.c.1

2.1 Auctions: Mechanism of Last Resort	Question	2.1.e.2: Should other aspects (e.g., non-financial) be introduced to make auctions of last resort more "fair"? One mechanism that has been mentioned is to consider auction bids from an entity in the Global South as double or triple that of the same bid from an entity not from the Global South. For example, a bid of \$100 from an entity in the Global South could be comparable to a bid of \$200 from a bidder on the same string that was not from the Global South. Why or why not?	See response to 2.1.c.1
2.1 Auctions: Mechanism of Last Resort	Question	2.1.e.3: What, if any, other measures should the Working Group consider to enhance "fairness"?	See response to 2.1.c.1
2.1 Auctions: Mechanism of Last Resort	Question	2.1.e.4: Some participants in the Working Group believe that auctions of last resort should be eliminated and replaced with a comparative evaluation process. Some examples include a request for proposals (RFP) process that advantages community-based applicants, minority-supported applicants, or other factors yet to be determined or relying on a drawing. Do you believe that a comparative evaluation process, a determinative drawing, or some other mechanism could replace auctions of last resort? Why or why not?	See response to 2.1.c.1
2.1 Auctions: Mechanism of Last Resort	Question	2.1.e.5: Some participants noted that auctions of last resort could allow a deep-pocketed applicant to secure all strings within a given market. One potential solution raised was to place a limit on the number of auctions an applicant could participate in though others argued that limiting the number of applications would be considered anti-competitive and difficult to enforce. Do you agree that the identified issue is of concern and if so, what do believe is a potential solution?	See response to 2.1.c.1
2.2 Private Resolution of Contention Sets (including Private	Option	2.2.d.1: A number of Working Group members expressed concern about the use of private auctions and other forms of contention resolution in subsequent rounds of new gTLD applications. More specifically, they are concerned that there will be some applicants that apply for new gTLD strings for the sole purpose of being paid to withdraw their applications in a contention set for which the applicant would receive compensation greater than the application fee. Thus, many Working Group members are opposed to the usage of private resolution mechanisms to resolve string contention in future new gTLD procedures and recommend that measures should be put into place to prevent their occurrence in the future. However, others think that private resolutions may be acceptable.	Private auction can be a valid way to resolve a contention set. In view of the fact that all parties in the contention set would need to agree to this option, it should not be assumed that this will automatically be pursued in each case. The applicant will always risk losing in an auction of last resort (via ICANN) whereby none of their costs will be recovered. The BRG does not believe restrictions should be imposed to conduct private auctions.

Auctions)		<ul style="list-style-type: none"> • Implementation Guidance under discussion: Should the Applicant Guidebook and program Terms & Conditions should be amended to state that resolution of string contention via private resolution, where a party is paid to withdraw, is disallowed. If so, should the future base Registry Agreement should include a provision that states that if a registry operator is shown to have taken part in a private resolution for their given string, it may result in having that TLD taken away from them? 	See response to 2.2.d.1.
2.2 Private Resolution of Contention Sets (including Private Auctions)	Option	2.2.d.2: Several Working Group members believe that a simple "no private auction" rule could easily be circumvented with other forms of private resolutions of contention sets that amounted to compensating one or all of the other losing members of a contention set. Thus, they proposed a second option of banning all forms of private resolution of contention sets. This would mean modifying Implementation Guidance F by not allowing parties to mutually agree on how to resolve a contention set. All contention sets, by definition, would be resolved through the mechanism of last resort (described in Section 2.1. above).	See response to 2.2.d.1.
2.2 Private Resolution of Contention Sets (including Private Auctions)	Option	2.2.d.3: A third option a Working Group Member proposed was allowing certain types of private resolutions, but disallowing others. For example, as discussed in several sections of the Initial Report and in this Supplemental Initial Report, many Working Group members favored allowing applicants in a contention set to change their applied-for-string if that change is mutually agreed by the members of the contention set and the newly changes strings (a) were reasonably related to the original applications and (b) did not move the applicants' newly selected strings into a different contention set. Under this option, the Working Group member proposed that changes would need to be approved by ICANN. Another Working Group member noted that under this option, any proposed newly selected string that ICANN intended to approve would need to be (a) subject to name collision risk assessment, (b) put out for public comment and (c) open to established Objection procedures (note, this line of discussion is also found in section 1.4, on Change Requests). If parties are found to have engaged in non-acceptable forms of private resolution, that will result in (a) the application not being allowed to proceed - if a Registry Agreement was not signed by the time it is discovered, or (b) forfeiture of the registry (if after a Registry Agreement is signed). Some members of the Working Group, however, were not comfortable in putting ICANN in a position of approving (or disapproving) mechanisms of private resolution.	See response to 2.2.d.1.

2.2 Private Resolution of Contention Sets (including Private Auctions)	Question	2.2.e.1: Do you believe private resolutions should be continued in the future? If so, should the funds be distributed amongst the remaining applicants within the auction or in some other method i.e. charity, ICANN, etc? If so, what methods are most appropriate?	See response to 2.2.d.1.
2.2 Private Resolution of Contention Sets (including Private Auctions)	Question	2.2.e.2: Do you believe that issues with private resolutions are, generally speaking, equally problematic across different types of TLDs? Do you believe that the type of TLDs may be a factor in determining whether private resolution should be allowed? Does the type of TLD have any impact on the options above?	See response to 2.2.d.1.
2.2 Private Resolution of Contention Sets (including Private Auctions)	Question	2.2.e.3: Do you agree with many Working Group members who believe that prohibitions in the Applicant Guidebook, Terms & Conditions, and in the Registry Agreement are the best way to prevent private resolutions in the future. In other words, participation in a private resolution, including private auction, where applicants may profit from withdrawing their applications would result in a cancellation of your application (if discovered during the application process) or forfeiture of its TLD (if it is discovered after the TLD is awarded). Do you agree? Do you believe other suggested mechanisms (e.g., increasing application fees), may be more effective, or could be used in tandem?	See response to 2.2.d.1.
2.2 Private Resolution of Contention Sets (including Private Auctions)	Question	2.2.e.4: If you agree that private resolution overall is potentially problematic, do you believe that there is any practical way to prevent private resolution that allows losing applicants to receive a financial benefit? Or is the issue with private resolution one that requires a complete ban? Or is it impossible to prevent private resolutions, and they should therefore be allowed (as noted in option 2 above)? Please explain.	See response to 2.2.d.1.
2.2 Private Resolution of Contention Sets (including Private Auctions)	Question	2.2.e.5: Do you believe instead that there are practical ways to allow some forms of private resolution but disallow others, as indicated in option 3 above? What would be the acceptable or non-acceptable forms of private resolution and why? Who should determine whether parties in a contention set have or have not engaged in non-acceptable forms of private resolution and how would such a determination be established?	See response to 2.2.d.1.
2.2 Private Resolution of Contention Sets (including Private Auctions)	Question	2.2.e.6: Some believe that if an application fee for a TLD were high enough, it would deter applicants from applying for TLDs with the intent of profiting from a private resolution. Do you believe that increasing application fees will have that effect? Why or why not? If you agree, at what amount would application fees need to be set at to deter applicants from applying for TLDs with the intent of profiting from withdrawing their applications (e.g., rough estimate or instead, criteria by which an amount could be established)?	The BRG does not support the idea of using the Application Fee as a control mechanism, as this could adversely impact the many good actors that apply in good faith to operate a TLD.

2.3 Role of Application Comment	Preliminary Recommendation	<p>2.3.c.1: The Working Group supports continuing the guidance in Implementation Guideline C, particularly around the provision of comment forums. However, the Working Group believes that the mechanism and system could be further optimized.</p> <ul style="list-style-type: none"> • Implementation Guidance under consideration: The system used to collect application comment should better ensure that the email and name used for an account are verified in some manner. • Implementation Guidance: The system used to collect application comment should support a filtering and/or sorting mechanism to better review a high volume of comments. The system should also allow for the inclusion of attachments. 	<p>The BRG supports the preliminary recommendation for continuing Implementation Recommendation C relating to the provision of comment forums during the application process. This provides the broader ICANN community an opportunity to submit feedback, positive or negative, about an application.</p> <p>During the last application round, it was not always clear who or which organisation submitted comments, as this information was not validated. The BRG agrees that the submitter of any comment must be captured and the source verified to minimise frivolous claims from being submitted, avoid comments by competitors with ulterior motives, and prevent repeated comments from the same source. ICANN should verify the source of comments where comments may have a material impact on action taken against a particular application.</p> <p>The BRG agrees with the implementation guidance and believes that these enhancements would aid applicants in reviewing and prioritising the comments. Pre-determined categories of responses, based on experiences of the 2012 round, could help filter the comments for the applicant and the evaluation panels, identifying comments that could impact the scoring, or trigger clarifying questions. However, all comments should require substantiation of the issue as it pertains to the particular comment. The system should continue to allow applicants to respond publicly to comments, especially to correct any false assertions submitted in public comments. In this respect, time to respond to comments received towards the end of the comment period should be available to the applicant, e.g. a period of 7-10 days where the applicant has an opportunity to reply.</p>
2.3 Role of Application Comment	Preliminary Recommendation	<p>2.3.c.2: ICANN should be more explicit in the Applicant Guidebook on how public comments are to be utilized or taken into account by the relevant evaluators, panels, etc. and to what extent different types of comments will or will not impact scoring. In addition, to the extent that public comments are to be taken into account by the evaluators, panels, etc., applicants must have an opportunity to respond to those comments.</p>	<p>The BRG supports the intent of this preliminary recommendation, which is to improve predictability. However, more detailed information and definitions are required in terms of the types of comments, how they would be interpreted by the evaluators and their impact on the application scoring is needed to fully assess the impact of this proposal. We would not support a recommendation that leaves ICANN discretion to define new actions to be taken against applications on the basis of public comments as part of the implementation process.</p>
2.3 Role of Application Comment	Question	<p>2.3.e.1: The Working Group has noted that while there was a cutoff for application comments to be considered by evaluators, the cutoff for Community Priority Evaluation was far later in the process, allowing for a much longer period of time for comments to be received for this evaluation element. The longer period of time allowed was due to the timing of CPE (i.e., only after program elements like Initial Evaluation, Extended Evaluation, and objections conclude). Is this, or other factors, valid reasoning and/or fair to have the comment period for CPE extend longer than for Initial Evaluation? Do you believe it makes sense to shorten this particular application comment period, perhaps just having it run in parallel to the Initial Evaluation comment period?</p>	<p>In view of the different treatment of community applications to standard applications, which included the evaluation of the level of support or opposition to community applications, the BRG does not recommend any changes to the extended comment period for these applications.</p>

2.3 Role of Application Comment	Question	2.3.e.2: In the 2012 round, applicants were given the opportunity through Clarifying Questions to respond to comments that might impact scoring. From one perspective, this may have reduced the incentive for applicants to respond to all input received through the public forum, including comments that may be perceived as negative. Do you consider this an issue that needs to be addressed? If so, what measures do you propose in response to this problem?	The BRG believes the applicant should continue to have the option to respond to public comments available, where the applicant feels appropriate to do so. However, to minimise frivolous comments and false assertions, the source of the comments should be obtained and verified before publishing. For comments that may have a material impact on application scoring, we believe it is appropriate to continue to allow both general responses through the public forum and directly to ICANN through the designated application response period. In some cases, applicants may have information that is pertinent to assessing the relevance of a comment that they do not wish to share publicly through the public comment forum. Applicants should have mechanisms at their disposal for providing both public and not public information that is responsive to comments received.
2.3 Role of Application Comment	Question	2.3.e.3: If there is a application comment period prior to evaluations, should applicants be given a certain amount of time to respond to the public comments prior to the consideration of those comments. For example, if there is a 60-day public comment period, should an additional time period of 7-10 days be added solely for the purpose of providing an opportunity for applicants to respond to the comments if they so choose?	The BRG believes this is a sensible enhancement, providing the applicant with an opportunity to reply to comments, especially those received at the end of the comment period.
2.4 Change Requests	Preliminary Recommendation	2.4.c.1: The Working Group believes that at a high-level, a criteria-based change request process, as was employed in 2012, continues to make sense going forward. However, the Working Group believes that some operational improvements should be made.	The BRG agrees with the preliminary recommendation to continue the criteria-based change request process.
		<ul style="list-style-type: none"> Implementation Guidance under consideration: ICANN org could seek to provide guidance on both changes that will likely be approved and changes that will likely NOT be approved. 	The BRG is supportive of this suggestion.
		<ul style="list-style-type: none"> Implementation Guidance under consideration: ICANN org should also set forth the types of changes which are required to be posted for public comments and which are not. 	The BRG is supportive of this suggestion.
		<ul style="list-style-type: none"> Implementation Guidance under consideration: ICANN org should set forth in the Applicant Guidebook the types of changes that would require a re-evaluation of some or all of the application and which changes would not. 	The BRG is supportive of this suggestion.
		<ul style="list-style-type: none"> Implementation Guidance under consideration: The Working Group believes that several types of change requests that were disallowed in 2012 should be allowed in subsequent procedures under certain circumstances. The types of change requests for which some members of the Working Group believe should be allowed under limited circumstances are set out for public comment below in section (d). Please see section (e) for specific questions about these options. 	

2.4 Change Requests	Option	<p>2.4.d.1: One of the types of changes that some members of the Working Group believe should be allowed are certain application changes intended to resolve string contention. For example, if there is string contention and each of the applicants in a contention set agree, then applicants should be allowed to 1) create joint ventures or 2) have a limited ability to select a different string, which must be closely related to the original string.</p> <ul style="list-style-type: none"> Implementation Guidance: ICANN org may determine that in the event of a joint venture, re-evaluation is needed to ensure that the new entity still meets the requirements of the program. The applicant may be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delays. Implementation Guidance: Some examples to consider in allowing for a new string to be selected include prepending/appending a new element to the original string or selecting a string that is closely related to the class/sector of the original string. ICANN org must perform a re-evaluation of the new applied-for string in all string related evaluation elements (e.g., DNS Stability, String Contention, etc.) and the application for the new string would be subject to string related objections (e.g., String Confusion Objections, Legal Rights Objections, etc.). Another Working Group member noted that in allowing for a string change, the new string would need to be (a) subject to name collision risk assessment, (b) put out for public comment and (c) open to established Objection procedures. The applicant may be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delay. 	<p>The BRG believes this is an interesting option to consider and may help to resolve string contention, whereby each applicant included in the contention set has the opportunity to proceed forward with a closely related string. This could eliminate the need for auctions (private or last resort).</p>
			<p>The BRG considers this to be reasonable in terms of re-evaluation and to cover additional costs.</p>
			<p>The BRG considers this to be reasonable in terms of re-evaluation and to cover additional costs.</p>
2.4 Change Requests	Question	<p>2.4.e.1: Section (d) above outlines possible application changes that could be allowed in subsequent procedures and corresponding implementation guidance that the Working Group is considering.</p>	
2.4 Change Requests	Question	<p>2.4.e.1.1: Do you agree with allowing these types of changes? Why or why not? Does the implementation guidance above seem reasonable if these changes are allowed? The implementation guidance asks that ICANN provide better clarity on what types of changes will or will not be allowed and also what changes may require re-evaluation. Do you have suggestions on how to provide more precise guidance? Would this guidance replace or complement the seven criteria (see section (b) above for reference) above?</p>	<p>The BRG believes this is an interesting option to consider and may help to resolve string contention, whereby each applicant included in the contention set has the opportunity to proceed forward with a closely related string. This could eliminate the need for auctions (private or last resort).</p>
2.4 Change Requests	Question	<p>2.4.e.1.2: If these changes are allowed, what are the potential risks or possibilities for gaming these types of changes? How can those risks be mitigated?</p>	<p>The opportunity to make these changes should be limited, with a strict process applied.</p>

2.4 Change Requests	Question	2.4.e.1.3: For the limited ability to change the applied-for string, what do you believe should be the criteria in considering such requests? Are there examples of where a change of an applied-for string should NOT be approved?	Change of strings should not be approved whereby the new string would create a new contention set or be added to an existing contention set.
2.4 Change Requests	Question	2.4.e.2: What role should public comment play in determining if a change request should be granted?	Public comments should be considered as if it were a new application, providing an important opportunity to raise concerns or show support.
2.4 Change Requests	Question	2.4.e.3: Reflecting on the seven criteria utilized for considering change requests in 2012 (see section (b) above for reference), do you have specific changes that you would suggest being made to those criteria for usage in the future?	No comment
2.5 Registrar Support for New gTLDs	Option	2.5.d.1: The following proposals have been discussed by the Working Group as options which can be pursued if there is support from the community to do so. Many of them require substantial resources by ICANN. No cost benefit analysis on these options have been performed and the Working Group is seeking input from the community on these proposals.	No comment
2.5 Registrar Support for New gTLDs	Option	2.5.d.1.1: ICANN org could select a "last-resort" wholesale registrar that would provide resellers with the ability to sell TLDs that lacked market interest and/or have their target markets in regions or verticals lacking ICANN-Accredited registrars. In order to not burden ICANN org or the selected registrar with making initial deposits for TLDs, only registries allowing Post Payment terms would be eligible for this resource.	No comment
2.5 Registrar Support for New gTLDs	Option	2.5.d.1.2: ICANN org could provide a "clearinghouse" for payments between the registries and registrars that operate in different currencies.	No comment
2.5 Registrar Support for New gTLDs	Option	2.5.d.1.3: In order to assist smaller registries during their launch period, ICANN could allow an increase to the number of names that can be registered without the use of an ICANN-Accredited Registrar. Expanding the number of names while at the same time allowing these names to be registered for purposes other than the promotion or operation of the TLD could allow these smaller registries to "get off the ground" and gain the momentum needed to become attractive enough for ICANN Accredited Registrars to carry.	No comment
2.5 Registrar Support for New gTLDs	Option	2.5.d.1.4: The Applicant Guidebook could note that there may be some benefit to potential applicants in communicating with ICANN accredited registrars before submitting an application, so that they fully understand potential market and technical integration issues that might be encountered.	No comment
2.5 Registrar Support for New gTLDs	Option	2.5.d.1.5: Some members of the Working Group also proposed that the Registry contract should bundle the capacity of becoming an Accredited Registrar.	No comment

2.5 Registrar Support for New gTLDs	Question	2.5.e.1: Please comment on each of the proposal set forth above. What are the pros and cons of those proposals? Should any or all of them be adopted? Why or why not?	No comment
2.5 Registrar Support for New gTLDs	Question	2.5.e.2: Are there any other proposals that could assist TLD Registries that have difficulty attracting ICANN Accredited Registrars?	No comment
2.5 Registrar Support for New gTLDs	Question	2.5.e.3: Should ICANN even get involved in assisting Registries or is this outside the scope of ICANN's mission, bylaws, or mandate? Please explain.	No comment
2.5 Registrar Support for New gTLDs	Question	2.5.e.4: The Working Group has not yet found a way to identify whether a TLD with low market performance has low performance due to lack of demand or lack of sales channels. How could the underlying issues be identified?	No comment
2.5 Registrar Support for New gTLDs	Question	2.5.e.5: Does ICANN forcing registrars to carry TLDs or designating registrars as "registrars of last resort" pose challenges to compliance oversight of these entities? Should registrars be liable for compliance actions for TLDs for which they did not want to carry but were forced to? By handpicking a few selected registrars as "last resort" does this create the possibility for compliance to go easy on them because ICANN needs them to play a specific role in the marketplace?	No comment