Below are my personal responses to the questions posed by the Subsequent Procedures Working group. These are my personal views and do not reflect the views of any current or former clients.

As currently envisioned by the WG, such a program would be on a voluntary basis and would not preclude the approval of a Registry Operator's acting as its own RSP or the approval of additional new RSPs.

1.1.1 - Benefits and risks have been identified by the WG as provided above in the Context section. What additional benefits or risks do you see in implementing such a program? Are there other considerations that need to be considered?

Answer

As I have mentioned in WG calls, I do not believe there should be an accreditation or pre-approval program. It has recently come to light that existing registry operators and their RSPs for the 2012 round continue to have challenges meeting the existing SLAs in the Registry Agreement. This results in ICANN having to intervene, but not trigger EBERO, to provide consultations on how to come into compliance. It proves that even once a RSP is "approved" or accredited by ICANN, issues do arise and that necessitates ongoing testing by ICANN to ensure RSPs are performing at adequate levels. See this presentation from ICANN that outlines the problems they are seeing from their monitoring.
https://www.icann.org/en/system/files/files/presentation-slam-13may17-en.pdf

Now this does not preclude the need to find efficiencies in the program, such as eliminating the repeated testing of identical registry set ups (identical meaning same deployment with exact Schedule A of registry services) or finding a way to ease the switching of back end providers. But that is completely different than a precertification or pre-approval program.

For applicants looking for a "level of comfort" in their choice of RSPs, that is not something ICANN should be in the business of providing. For ICANN to provide a Good Housekeeping-like seal of approval is beyond their mission. Differentiation in the marketplace happens in many forms, including previous experience in running a registry.

1.1.5 - Should there be an Agreement between an RSP and ICANN? If so, what enforcement mechanisms should be made available to ICANN in the event that such an Agreement is breached?

Answer

There should not a contract between RSPs and ICANN. The registry operator is the party who signs the Registry Agreement. Some can provide their own registry services. Some cannot. Those who cannot outsource that function. Those providers should not be forced to contract directly with ICANN for that service. They are responsible to their client, which in these cases is the Registry Operator, not ICANN.

1.3 Clarity of Application Process (Wiki page: https://community.icann.org/x/JT2AAw)

1.3.1 - The WG noted that there were a number of changes to the gTLD program after the release of the Applicant Guidebook, including the processes for change requests, customer support, application prioritization, Registry Agreement, etc. Many applicants have stated that the changes impacted their TLD applications throughout the application process both before submission and after the applications were submitted resulting in confusion, additional work and overall dissatisfaction. For instance, the final version of the Applicant Guidebook was released in June of 2012, which was nearly half a year after the

application submission period started. Another example would be the difficulty in reaching a common understanding on the requirements for procuring a Continuing Operations Instrument (COI). How should changes to the Applicant Guidebook and/or the new gTLD Program be handled in subsequent application windows?

Answer
If changes are made to the guidebook after applications are submitted there needs to be some sort of mechanism that allows impacted applicants the chance to either receive a full refund, or be tracked into a parallel process that deals with their issues directly without impacting the rest of the program.

In the last round, there were no prohibitions against so called "closed generics" in the applicant guidebook. Several entities applied in good faith and ICANN accepted their $185,000 in application fees. It wasn't until months (if not more than a year later) that a provision was added to the registry agreement by ICANN that prohibits closed generics. The appropriate response in my opinion. But those who did apply, should have been offered full refunds as there were no prohibitions at the time of application. The rules of the game changed after they applied and they should not be penalized as a result.

Another example involves the applications for .MAIL, .CORP and .HOME. ICANN was first made aware of the issue of name collisions via SAC045 which was developed by the SSAC on November 15, 2010, https://www.icann.org/en/system/files/files/sac-045-en.pdf. ICANN's failure to address the issue prior to opening the application window has caused many issues, including sending these applications into a permanent state of limbo. ICANN collected millions in application fees from these parties yet has stated it does not intend to offer them a full refund. If ICANN had addressed this issue prior to the opening of the window, these applicants would have never been able to apply, saving them the time and resources spent developing these applications.

1.6 Application Submission Period (Wiki page: https://community.icann.org/x/Mz2AAw)

1.8 Systems (Wiki page: https://community.icann.org/x/Kz2AAw)

1.8.1 - The WG considers this subject to be mainly implementation focused, but nevertheless, has identified areas for improvement. For instance, security and stability should be improved, more robust user testing (e.g., potential applicants) should be incorporated, systems should be better integrated, adequate time for system development should be afforded, etc. Do you have suggestions on additional areas for improvement?

Answer
The failures of the last application system are well noted. The new system should undergo a sustained period of testing before being put into use.

1.8.2 - The WG also noted that ICANN should expand its system capabilities to include the ability to send invoices to organizations who require documentation in order to process payments for any fees related to their application. Do you agree that this would be beneficial?

Answer
YES – this was an issue for many .brand applicants and should be easy to fix.

1.10 Applicant Guidebook (Wiki page: https://community.icann.org/x/Iz2AAw)

1.10.1 - The Applicant Guidebook served as the roadmap for applicants, but also all other participants to the program. As such, there is a mixture of historical and practical information, some of which is relevant to only certain parties. Do you think it makes sense to partition the Applicant Guidebook into different audience-driven sections or by type of application?

Answer

This seems like an implementation issue, not policy.

Work Track 2 - Legal, Regulatory, and Contractual Requirements

2.1 Base Registry Agreement (https://community.icann.org/x/Pz2AAw)

2.1.1 - The question of whether or not a single Registry Agreement is suitable is tied into the subject of different TLD categories. Throughout the working group's discussions, there has been support for a model similar to what is currently in place: a single Registry Agreement with exemptions that allow for TLDs with different operational models (e.g., Specification 13 for Brand TLDs or Specification 12 for Community TLDs). There is also support for different Registry Agreements for different TLD categories, centered around a common, core base set of contractual requirements. Which of these models do you think would be most effective for recognizing the different operational requirements of different TLDs? Which of these models do you think would be most efficient in terms of development, implementation, and operational execution (e.g., contracting, contractual compliance, etc.)? Do you think there are any alternative options that could effectively facilitate TLDs with different operational requirements?

Answer

If the goal of the new gTLD program is to increase competition among registry providers, then forcing everyone into a standard contract runs counter to those goals. Even with the identified specification variances, there is a limit to what registries can achieve with the current contracts.

ICANN argued in the 2012 round that managing multiple implementations of a contract would be burdensome. I disagree. ICANN has matured into a $100+ million per year organization. Contractual compliance is one of the bedrocks of the trust people place in the organization. If they need more resources to allow for multiple contracts, then a review of the existing allocations of resources should be under taken.

2.3 Registrant Protections (Wiki page: https://community.icann.org/x/QT2AAw)

2.3.1 - ICANN has included the following programs to protect registrants: an Emergency Back-End Registry Operator (EBERO), Continued Operations Instrument (COI), Data Escrow requirements, and Registry Performance Specifications in Specification 10 of the base registry agreement? Such programs are required regardless of the type of TLD. Are there any types of registries that should be exempt from such programs? If so, why? Do the above programs still serve their intended purposes? What changes, if any, might be needed to these programs if an RSP pre-approval program, discussed in section 1.1.1., were to be developed?

Answer
The entire EBERO concept need to be re-examined. It is an ICANN created artificial safety net that ensures no registry ever fails. That is not how markets work. ICANN is supposed to be ensuring competition in the registry space. By not allowing registries to fail, they are preventing full competition from happening.

2.4 Closed Generics (Wiki page: https://community.icann.org/x/UT2AAw)

2.4.1 - In the 2012 round, the operation of a TLD where the string was considered "generic" could not be closed to only the Registry Operator and/or its Affiliates. Originating from GAC Advice on the subject, this rule was promulgated by ICANN's New gTLD Program Committee of the ICANN Board, but was never adopted as a policy by the GNSO. This rule was subject to public comment and input from the community. Should this rule be enforced for subsequent application windows? Why or why not?

Answer
While the process that developed the prohibition on closed generics was messy and open to improvement, the result is the appropriate one. There is a ban on closed generics for the 2012 round and that should be extended to future rounds or allocation methods.

2.5.3 - According to Section 14 of the Applicant Terms and Conditions, ICANN has the ability to make changes to the Applicant Guidebook. One task of this Working Group is to address the issue of predictability in future rounds, including with respect to the AGB. Do you think that ICANN should be limited in its ability to make changes to the Applicant Guidebook after an application procedure has been initiated? Please explain.

Answer
Absolutely – ICANN should be limited. ICANN's insistence on a unilateral right to amend the contract is a prime example of ICANN imposing its will against the wishes of the community. Going forward, any post application procedure changes should be made in concert with the community.

3.1.11 - What improvements and clarifications should be made to GAC Advice procedures? What mitigation mechanisms are needed to respond to GAC Advice? How can timelines be made more precise?

Answer
One of the GNSO principles for the new gTLD program is "There must be a clear and pre-published application process using objective and measurable criteria." The issuance of GAC advice after applications were submitted threw the entire program in the air for years and arguably violated this principle. To this day, we are still dealing with the implications from this.

Now that the community, including the GAC, has been through the 2012 round, we have a track record to look back upon and utilize. Nearly all the GAC advice pertained to all applications, or categories of

applications. There were one offs, but the GAC really focused on broad categories. One would expect that advice still stands.

For the benefit of ICANN, the community and applicants, GAC advice should be developed and issued **prior** to the launch of the next application period (round or otherwise). This allows applicants to have the full benefit of the GAC concerns prior to expending time, energy and resources applying for new gTLDs. Some may choose to do so in contradiction of advice and others may decide not to. It is unfair for applicants who follow the Application Guidebook, which the GAC contributed to, to file an application and suddenly find their business plans upended because of unforeseen objections from the GAC.

3.3.3 - CPE was the one instance in the New gTLD Program where there was an element of a comparative evaluation and as such, there were inherently winners and losers created. Do you believe there is a need for community priority, or a similar mechanism, in subsequent procedures? Do you believe that it can be designed in such a fashion as to produce results that are predictable, consistent, and acceptable to all parties to CPE? The GNSO policy recommendations left the issue of a method for resolving contention for community claimed names to Board and the implementation. Do you believe that a priority evaluation is the right way to handle name contention with community applicants? Should different options be explored? If so which options should be explored and why?

Answer
The CPE process was shown by an IRP proceeding to have been compromised. It is premature to make any assertions as to what changes need to be made prior to the completion of the investigation being undertaken by the ICANN CEO into this matter. Once the full spectrum of issues related to CPE deficiencies are known, then it would be appropriate to answer this question.

3.4.6 Do you believe that private auctions (i.e., NOT the auctions of last resort provided by ICANN) resulted in any harm? Could they lead to speculative applications seeking to participate in a private auction in future application processes? Should they be allowed or otherwise restricted in the future?

Answer
The business model of losing private auctions was extremely profitable for some entities. That is widely known. As a result, we can expect to see applications submitted in future procedures that attempt to replicate this behavior. The only value of private auctions may have been it ended some contention sets. That's it.

3.5 Accountability Mechanisms (Wiki page: https://community.icann.org/x/WT2AAw)

3.5.1 – Do you believe that the existing accountability mechanisms (Request for Reconsideration, Independent Review Process, and the Ombudsman) are adequate avenues to address issues encountered in the New gTLD Program?

Answer
Clearly no. The fact that the ICANN Board Governance Committee (BGC) has had to create a separate subcommittee to deal with reconsideration requests related to new gTLDs is Exhibit A. They are not equipped to handle these. It was also the case that IRP decisions found that the BGC violated the ICANN by laws in their handling of reconsideration requests.

4.3 Application Evaluation (Wiki page: https://community.icann.org/x/YT2AAw)

4.3.2 Financial Evaluation

It is generally agreed that financial stability of a gTLD operator is necessary to ensure the security, stability, and resiliency of the Internet.

Answer
While the obvious answer is yes, the presence of an EBERO program makes this a moot question. If registries are not allowed to fail, then their financial stability has no bearing because the TLDs will always be operated by someone, with ICANN being the last resort.

4.3.2.6 - Do you believe that financial evaluation should be done per application or per possible registry family assuming all applied-for strings are won?

Answer
Per application as operation of strings within a family varies.

4.4 Name Collision (Wiki page: https://community.icann.org/x/Yz2AAw)

4.4.1 - What general guidance for namespace collisions would you like the community to consider for subsequent procedures, and why?

Answer
When presented with advice from the SSAC, ICANN should act on it in a timely manner. The issue of Name Collisions was raised by the SSAC in 2010. (SAC045) The ICANN Board and staff had years to deal with this prior to the opening of the application window but they chose not to. This decision had significant impacts on the rollout of the 2012, many of which were avoidable.