

Staff input to GNSO Discussion Group on New gTLD Subsequent Procedures

23 January 2015

Dear Discussion Group members,

ICANN thanks you for your work and the consideration you're giving the issues related to subsequent procedures in the New gTLD Program. In response to discussions during the ICANN 52 meeting in Los Angeles in October 2014, ICANN staff has prepared the following input to the issues the group has raised for potential policy consideration in future application rounds of new gTLDs. Staff has remained brief in its comments because we are still in the early stages of reviewing the New gTLD Program. We're offering our input in the hopes that it will enhance your own discussions.

The objective of this input is to offer questions based on staff experiences with the issues identified to date by the group. Staff considerations, as reflected in this document, are organized around the [mind map](#) prepared based on your initial discussions of potential issues that may be incorporated in future policy development processes (PDPs.)

Staff input includes contributions from ICANN's Global Domains Division, including operations and industry engagement staff as well as legal teams. The feedback presented below is meant to raise questions for the discussion group's consideration, rather than suggesting outcomes. With these contributions, staff's aim is to ensure that implementation experience is reflected in areas where the GNSO might wish to do policy work.

Further, we note the Board resolution of 17 November 2014, providing input on future gTLD application rounds. This [resolution](#) includes the Board's suggestions for areas that the GNSO may want to consider for future policy work. Many of these topics are covered in the GNSO Discussion Group's list and several are also referenced in the sections below.

The following sections correspond to the topics listed on the mind map, and contain feedback on specific points within each section. For some topics, we also include questions that may help you to narrow the focus of your discussions. We hope you will find this input useful.

Application Processing: In light of the GNSO policy recommendations, there are multiple possible methodologies for allocating names. ICANN anticipates that the GNSO may want to advise on alternative paths for processing applications even if the policy recommendations don't change. In some cases, the questions raised below may not be relevant if the application process is altered. For example, if a first-come, first-served application processing model is adopted, a contention resolution mechanism would not be necessary. With that in mind, are there alternative methodologies for name allocation being considered?

1. **Scale of Demand/Rounds:** It is difficult to establish a scale of demand from a single round of applications. How can demand be defined? Is it based on the number of applications? Given that the GNSO's Recommendation 13 calls for rounds until the scale of demand is clear, it would be helpful to set parameters for determining how that demand has been met.

While ICANN continues to complete the work of delegating new gTLDs approved in this round, we note that it would be a logistical and policy challenge to open any concurrent rounds without first considering the implications and results of how the New gTLD Program fared in this round.

Questions:

- i. Are policy objectives better met with the current practice of processing applications in rounds or establishing a perpetually open or other type of application process?
- ii. Should the GNSO allow for considerations other than the scale of demand, such as how gTLDs are granted, not only mechanically, but as a matter of policy?
- iii. What are the pros and cons of switching to another type of process and how would that impact the other GNSO principles and policy recommendations?

2. **Financial and Technical Criteria:** While ICANN required documentation about applicants' financial and technical capabilities, the evaluation did not require tests for applicants' capacity to provide current services. As part of its planned Program Implementation Review process, ICANN plans to evaluate how these analyses were conducted in this round and may provide further feedback to the GNSO on this topic. The GNSO's policy recommendations on this matter – specifically, Recommendations 7 and 8 – note that applicants must be able to demonstrate financial and technical capability to operate a registry, but do not offer objective criteria for evaluating such capacity. In addition, Recommendation 9 notes the need for objective and measurable criteria in the application process.

Questions:

- i. Does the GNSO wish to articulate additional policy principles for the goals of future technical and financial evaluations?
- ii. How can such criteria be established with multiple types of applications?
- iii. Should applicants be evaluated based on their business models or experience?

- iv. Should the policy goals for technical evaluations be implemented differently?
- v. Should criteria be developed for applicants with multiple applications? Or technical back end providers supporting multiple TLDs?

3. Adequate Roadmap/Timelines: Moving ahead, ICANN welcomes advice on how to enhance predictability and tackle unexpected issues and challenges, some of which may be dependent on the methodology used for the application process. There are a number of issues related to whether the application process provided an adequate roadmap to encourage the submission of applications. The GNSO's Recommendation 1 notes the importance of predictable criteria for evaluation. ICANN has made significant efforts to create a predictable process, but it cannot eliminate all unforeseen events. If the GNSO wishes to consider additional guidance regarding the implementation of this recommendation, it may be useful to ensure the early inclusion of other SOs and ACs in its policy discussions.

Questions:

- i. Should processing applications by type (i.e. geographic, generic, brand, etc.) be treated as a policy or procedural issue? What external factors would impact this decision?

4. Different application tracks for different TLD types? Defining a distinct, finite set of application categories may be extremely challenging. There has been no policy recommendation related to this manner of evaluations. Under the current process all applications are consistently treated and follow the same procedures. Names that have raised concerns as potentially falling into separate categories include those of highly regulated industries and generic strings.

Questions

- i. Can application categories be adequately defined to ensure distinct definitions and be done in a fair, objective and definitive manner?
- ii. If there are to be additional application types, what requirements would apply to different types? For example, would this result in different registry agreements? New enforceable provisions?
- iii. Should each registry type be regulated according to an entity appointed by ICANN or should anyone be able to apply for any string?
- iv. If a registry applies for and is granted a specific classification, can it later opt out of that category?
- v. How would defining these categories advance the goals of the New gTLD Program and ICANN's mission?

- vi. Should there be policy surrounding highly regulated industries and markets? Should this include products that have regional restrictions, or professions that require licensing and certification?

5. String reviews adequate to prevent technical instability? ICANN has asked the GNSO if it is interested in establishing policy related to concerns surrounding technical stability, such as the impact of name collisions and single-character TLDs. Note ICANN's Name Collision Occurrence Management Framework, approved by the Board in July 2014: <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf>

Questions:

- i. Are there policy concerns related to name collisions or single-character TLDs that may warrant GNSO policy recommendations?

6. Base contract: The DG raised several contract-related questions, including: whether the Registry Agreement and Registrar Accreditation Agreement ought to be made available in multiple languages, whether there is a need for longer timelines for TLD rollout, contractual obligations for highly regulated TLDs, practices around registry reservation of names, and issues around premium pricing. The current base contract for new gTLDs does not address many of these issues and thus it is open to the GNSO whether it will seek to conduct policy work on these topics.

Questions:

- i. Should there be different contractual obligations for different types of strings? If so, how should these be classified?

7. Geographic names at the top level: During the 2012 application round, country and territory names were not available at the top level based on advice from the Governmental Advisory Committee providing interpretation of Principle 2.2 of the [GAC Principles regarding New gTLDs](#). ICANN notes that the GNSO is working to provide regular updates to the GAC on its policy work and believes this topic may be one of mutual interest for further coordination.

Questions:

- i. Should there be special treatment for national-level geographic indicators? Should documentation be required, and if so, of what kind?

8. Adequate program governance? The DG suggested possible problems with the program's principle of non-discriminatory treatment and the conflict-of-interest

framework. ICANN would be interested to hear about specific instances of such behavior. The DG also raised several issues related to whether redress options were adequate. Currently, experts make determinations on each application, and the process is built to consider all elements of an application. Ideally, use of an appeal mechanism would be an exception in the application process, and a redress process would need to be carefully crafted to ensure equitable treatment of all applications.

Questions:

- i. What factors would be important to consider for a meaningful and equitable appeals process?
- ii. Should the process make a distinction between appeals relating to substantive and procedural issues?
- iii. Who is an appropriate final arbiter?
- iv. Should redress be available only for certain issues but not for others?

9. Additional mechanisms for developing country support? The DG raises the issue of limited usage of the Applicant Support Program. While there is no GNSO policy advice on this topic, Implementation Guideline N provides for a fee reduction scheme for applications from economies classified by the UN as ‘least developed.’ If such a scheme is integrated into future rounds, the qualifications may be addressed in policy.

Questions:

- i. What level of support would be appropriate for applicants from developing countries? Is it only financial? Technical?
- ii. Would additional outreach, communication and education serve to spur more interest from these regions?
- iii. Should all applications from developing countries be treated as a different application type?

Can the new gTLD program better account for registrars?

1. Impact of vertical integration on the marketplace? The DG raised several issues regarding registrar-registry relationships, which are not enshrined in policy issues. If the GNSO wants to recommend more specific requirements on how a registry signs up or communicates with registrars, this may be a separate work stream for the GNSO to consider.

GNSO policy recommendations’ implementation consistency with their intent

1. Changes after program launch, including GAC advice: ICANN built the New gTLD Program based on policy recommendations from the GNSO, as well as GAC advice, and other implementation guidelines. Changes such as the Public Interest Commitments

(PICs) were developed in response to GAC advice and thus were incorporated into the Program. When changes were made throughout the operation of the Program, they were due to emerging circumstances that were unaddressed in existing procedures, or to input via existing procedures, such as the GAC advice procedure. When changes occurred, this has generally been done in consultation with the community. Additional guidance on managing change throughout the process may be beneficial.

2. **Impact on competition, consumer choice and consumer trust:** ICANN is preparing to launch a review of how the New gTLD Program has impacted competition, consumer choice and consumer trust, as specified in the [Affirmation of Commitments](#). The review is scheduled to begin in 2015 and will measure the Program's performance along dozens of metrics, and will incorporate data from a global survey of Internet users and registrants, as well as an economic study to determine how pricing and marketing practices in the new gTLD space influenced competition.

Confusing similarity

1. **Contention mechanisms effective?** The GNSO's Implementation Guidelines F and H* and Recommendation 20 described how contention resolution mechanisms should be implemented. Implementation faced particular challenges when the contention set included community-based applications. In the evaluation process, consistent with guideline H*, community-based applications were accepted based on the applicant's designation. Where a community-based application sought priority, additional guidelines were applied to assess whether priority would be awarded.

Questions:

- i. Can the GNSO further articulate its policy goals in terms of how communities ought to be defined? If ICANN continues to use community as a basis for establishing priority among applications, can additional guidance be provided on demonstrating qualifications to earn the preference?
 - ii. Are auctions the recommended last-resort mechanism for resolving contentions?
2. **Effective in preventing consumer confusion?** The DG notes the issue of plurals and string confusion. ICANN welcomes the DG's input in this area. If the GNSO wishes to advise specifically on plurals (including irregular plurals) and string confusion, we note that this should consider how such guidance would apply in all languages. Further, the GNSO may wish to discuss particular elements of similarity that are of particular concern to consumers.

Objections fairly processed? The GNSO did not recommend an objection procedure for this round and the Independent Objector role was not the result of a policy recommendation. ICANN is considering the objection procedures in its program implementation reviews, which are outlined at <http://newgtlds.icann.org/en/reviews/implementation>.

Questions:

- i. If the GNSO were to undertake policy work related to objections, what areas would you recommend for review or changes in implementation?

Rights protection mechanisms

- 1. Legal rights effectively protected?** The GNSO's Recommendation 3 provides advice on protection of legal rights. Specific rights protection initiatives, such as the Trademark Clearinghouse (TMCH) and Uniform Rapid Suspension (URS) were not a result of policy recommendations. ICANN is planning a review of the rights protection mechanisms to be included in the program review process, which may be useful for GNSO consideration in this area.

Questions:

- i. Should these mechanisms continue to be required for all gTLDs?
- ii. Given that ICANN is planning an independent review of the TMCH, are there particular topics you'd recommend including in the scope of work?
- iii. Should there continue to be a parallel mechanism with UDRP or could there be adjustments made to UDRP?

- 2. Block lists:** These remain at the discretion of the registry. As an example, various registry-specific services around blocking names from registration have been mentioned as helpful tools that supplemented the mandatory rights protection mechanisms.

Questions:

- i. Should the market determine whether block lists are an appropriate solution for rights protection or should policy be created to mandate standards for block lists?

- 3. IP concerns appropriately addressed?** While there was policy guidance provided on protecting trademark names, there were few discussions regarding other categories of protections, such as for cities or geographic names.

Questions:

- i. Could policy guidance address balancing of trademark rights with other categories of potentially protected names?
- ii. How would particular categories or trademarks be prioritized against one another? For example, prioritizing a public authority versus a trademarked name?
- iii. Should there be guidance on limitations or requirements associated with which names can be reserved, when they can be released and what RPMs may be employed?

We hope these points are helpful to the continued work of the DG. Please do not hesitate to reach out if staff can provide any additional information or clarification on this input.