1.1 Auctions: Mechanism of Last Resort

    a. What is the relevant policy and/or implementation guidance (if any)?

Implementation Guideline F: If there is contention for strings, applicants may:

        i) resolve contention between them within a pre-established timeframe

        ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;

        iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

    b. How was it implemented in the 2012 round of the New gTLD Program?

Implementation Guideline F spoke more about the alternatives to auctions of last resort and did not reference auctions specifically. However, research was completed by the Implementation Team (a collection of staff members supporting the policy development process)[1] [2] and guidance was sought from auction experts about how auctions could be used to make clear and binding decisions. Auctions were anticipated to be used to resolve contention and further, expert advice was expected in implementing the mechanism.

Along with the first draft of the Applicant Guidebook, ICANN published an Explanatory Memorandum[3] that examined the different mechanisms of last resort that could be used to resolve a contention set. This included the use of comparative evaluations, chance and auctions. The paper concluded for a variety of reasons that auctions should be used as a last resort in resolving contention set. Although there were a large number of changes to the Applicant Guidebook between that first version and the final version, the use of auctions as a last resort to resolve contention sets did not change.

That said, it was hoped that parties involved in string contention would be able to come to a voluntary agreement to resolve the contention prior to being forced into an auction conducted by ICANN (or its designee). However, there were a number of obstacles that were put into place (some intentional, others unintentional) that prevented parties from reaching mutual agreement. The settlement between parties was expected to result in the withdrawal of all but one application for the string. In addition, applicants were precluded from making material changes

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[1] See Implementation Team working document from 5 December 2006 here:
https://gnso.icann.org/sites/default/files/filefield_6371/gnso-pdp-dec05-staffmemo-14nov06.pdf
[2] See Implementation Team working document from 19 June 2007 here:
https://gnso.icann.org/sites/default/files/filefield_6410/pdp-dec05-staffmemo-19-jun-07.pdf
[3] https://archive.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf

to their applications, which prevented many types of voluntary arrangements (such as the creation of a joint venture) which would have been the natural result of a mutual agreement. The ability to create a joint venture is explored in greater detail in section [1.4], Change Requests. In practice, settlement between parties was often completed through private resolutions of contention sets, including private auctions, as described in greater detail in section [1.2], Private Resolution of Contention Sets (including Private Auctions). A more detailed description of the implementation and rules around Auctions: Mechanism of Last Resort can be found in section 4.3 of the Applicant Guidebook.

After an open procurement process, Power Auctions was selected as the vendor to perform ICANN auctions of last resort. Auction procedures were based on an ascending-clock auction methodology and New gTLD Auction Rules[4] were developed to supplement the guidance provided in the Application Guidebook.

The auction process was self-funded, with proceeds from completed auctions covering expenses due to the provider. Any proceeds in excess of expenses were set aside until the Cross-Community Working Group on New gTLD Auction Proceeds[5] determines how the funds should be utilized. As of the writing of this report, ten auctions of last resort have been completed with net proceeds of over $233 million USD[6].

This topic was not specifically identified for review in the Final Issue Report, but the Working Group believes it is important to give the topic some consideration.

   c. *What are the preliminary recommendations and/or implementation guidelines?*

   ● Many in the Working Group believes that ICANN auctions of last resort should remain in place within the program.
   ● 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 [1.4] of this report on Change Requests, which discuss aspects like changes to the applied-for string and forming a joint venture).

   d. *What are the options under consideration, along with the associated benefits / drawbacks?*

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[4] See New gTLD Auction Rules here: https://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf and here for Indirect Contention: https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf
[5] See the CCWG Wiki page here: https://community.icann.org/x/yJXDAw
[6] See the New gTLD Auction Proceeds page here: https://newgtlds.icann.org/en/applicants/auctions/proceeds

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- 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..

- Alternatives to an Auction.

  - 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.

  - 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.

  - 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.

e. *What specific questions are the PDP WG seeking feedback on?*

- 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.
- 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?
- What, if any, other measures should the Working Group consider to enhance "fairness"?
- 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?
- 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?

f. *Deliberations*

This topic was initially introduced on 25 June 2018 at ICANN62, during the Working Group's second face-to-face session, with further consideration during Working Group calls. The Working Group debated both the pros and cons, considered alternative options and brainstormed possible solutions/ideas to reduce the overall need for using methods of last resort.

The Working Group examined whether to continue the use of auctions of last resort or whether to eliminate their usage. Both sides drew upon the idea of fairness but each had a different approach to this concept. Those in support of keeping the auction processes argued that the mechanism is fair and provides an equal-opportunity method to resolve contention sets. Those

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Commented [1]: Comment from Kristina Rosette: It seems to me that the proposed mechanisms (and questions) are all based on the premises that auctions of last resort are unfair, and should be modified, restricted or eliminated. Shouldn't we be asking for public comment on these premises? Aren't those questions we need to have answered as a threshold issue?

Potential text could be: Working Group members disagree on whether auctions of last resort are inherently unfair, and should be modified, restricted, or eliminated. Do you agree or disagree? Please provide a rationale for your answer.

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opposed to auctions stated that auctions are not fair. From this perspective, auctions are too restrictive as they focus solely on financial means when they should be focused on principles of community and diversity in the TLD ecosystem.

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.

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.

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 private auctions), and it could eliminate comparative evaluations. However, it was pointed out that a determinative drawing could be considered a lottery and would therefore be disallowed without proper licensing.

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.

Working Group members raised additional considerations regarding proposed alternative models. Some Working Group members stated that techniques for evaluating and selecting a

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"winner" should not involve evaluation of content as this has implications on the Principle of Freedom of Expression and could implicate the ICANN Bylaws prohibition on regulating content. Working Group members also raised the concern that making decisions based on criteria like diversity or community-focus may not be within the scope of ICANN's mission and impinges on the Principle of Applicant Freedom of Expression. Another Working Group member stated that the process developed from the 2012 round was carefully designed to avoid holding "beauty contests" to select winners and losers.

One Working Group member provided the opinion that it is important for any successful applicant to have the resources to fund the marketing of the gTLD. Otherwise, it may not gain enough registrations to survive as a stand-alone gTLD. Another noted that there is a distinct difference between having funds to market a TLD and having the funds to win a multi-million-dollar auction and also fund a marketing program for the TLD. From this perspective, it should not be presumed that a substantial marketing budget is an absolute requirement or measurement of success, noting specific examples like communities that have built awareness among constituents throughout the application development.

The Working Group discussed the idea that if auctions are ultimately retained as a method of last resort for resolving contention, there could be opportunities to mitigate differences in economic and social conditions of applicants. For example, ICANN could look at different ways to structure the bidding process to take these factors into account, such as introducing a multiplier (e.g., bids could be considered double the actual amount, where an applicant bid of $10,000 USD is treated as $20,000 USD against others in the contention set) for certain string or applicant attributes.

Another potential issue identified with auctions, both last resort and private, is that potentially, a company with the deepest pockets could secure all strings with a certain market, giving it substantial control of that market. The WG discussed putting limits on either the number of applications in total for a round or from any individual applicant (see section 2.2.5 of the Initial Report on Application Submission Limits) and preliminarily decided against imposing such limits. However, that submission limit would not preclude establishing some form of limit in regards to auctions of last resort where for instance, an applicant could participate in five auctions.

The Working Group thought it might be beneficial to look at private methods for resolving contention prior to reaching a mechanism of last resort. One example provided was that two applicants in contention could be permitted to form a joint venture to operate a TLD together. Another example provided was that an applicant could change the applied for string if it was found to be in contention.

One Working Group member raised that if additional types of application changes are permitted for standard applications in subsequent procedures, it is important to consider the potential impact on community applications.

This line of discussion is closely connected to topic Application Change Requests, discussed in Section [1.4] below.

In further considering methods of resolving contention, it was suggested that contention sets could be disclosed earlier in the process, allowing applicants to make informed decisions before they have spent large sums of money in the application process. It was also suggested that applicants in contention could be given additional time to work together to try to privately resolve the string contention.

The Working Group also discussed the issue of auction proceeds, noting that the New gTLD Auction Proceeds Cross Community Working Group (Auction Proceeds CCWG) is working to develop a set of recommendations for a mechanism to distribute auction proceeds from the 2012 application round. While the Auction Proceeds CCWG is focused on funds already collected, fund distribution for subsequent procedures could follow a different model. One Working Group member pointed out that for subsequent rounds, there would be no reason that ICANN could not redistribute proceeds to the "losers" of an auction rather than creating a designated fund to distribute elsewhere. Another Working Group member stated that ICANN's non-profit status and related legal and fiduciary obligations could prevent ICANN from redistributing funds to auction participants.

The Working Group considered how outcomes of the Auction Proceeds CCWG may impact this Working Group's perspective on the role of auctions of last resort. One Working Group member raised that if the CCWG produced recommendations that Subsequent Procedures Working Group members opposed, this could impact further deliberations on whether there should be auctions of last resort in the future.

> g. *Are there other activities in the community that may serve as a dependency or future input to this topic?*

None identified at this time.

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1.2 Private Resolution of Contention Sets (including Private Auctions)

a. What is the relevant policy and/or implementation guidance (if any)?

Implementation Guideline F: If there is contention for strings, applicants may:

i) resolve contention between them within a pre-established timeframe

ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;

iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

b. How was it implemented in the 2012 round of the New gTLD Program?

Per the Applicant Guidebook section 1.1.2.10, Module 4, and in particular, section 4.1.3, self-resolution was encouraged before relying on ICANN-managed methods of contention resolution (i.e., Community Priority Evaluation or Auction: Mechanism of Last Resort). The Applicant Guidebook suggested that string contention may be resolved by one or more applicants withdrawing until there is a single applicant remaining in a contention set, though it did not seek to place any substantial limitations in that regard. Joint ventures, which materially changed the applying entity, were discouraged (and string changes were disallowed). It was envisioned that the majority of contention sets would be resolved by the parties involved, rather than relying on Auctions of Last Resort. For the 2012 round, this was indeed the case, with over 90% of contention sets being self-resolved.

Based on input from applicants in the 2012 round of the New gTLD Program, applicants resolving their contention privately through various means, including private auctions, was common. Private resolution, including private auctions, were not a formal part of the 2012 round of the New gTLD Program and accordingly, there were no policy recommendations or policy guidance on the subject.

There are also no public statistics on how many contention sets were resolved by way of private auction versus other methods of private resolution. In private auctions for example, the majority of the proceeds collected went to the losing parties in the auction. Some have asserted that applicants involved in numerous contention sets have purposely lost in certain private auctions, collected their portion of the proceeds, and then leveraged those funds for private auctions of other higher priority TLD applications. There is a fear amongst some in the community that in future new gTLD procedures, applicants may submit applications for the purpose of collecting funds in private auctions or other types of private resolution.

Private resolutions, including private auctions, have been noted as a particular area of concern by a number of community members[7], as well as the ICANN Board[8], stating that the allowance of applicants to benefit financially from losing in a contention set (which could then be leveraged towards resolution of other contention sets), is contrary to the goals of the program.

However, it has been noted that private auctions are not the only way in which applicants in a contention set could obtain financial benefit by losing. Accordingly, this section which was focused on private auctions originally, has been expanded to consider private resolution of string contention more broadly.

    c. What are the preliminary recommendations and/or implementation guidelines?

- None at this time.

    d. What are the options under consideration, along with the associated benefits / drawbacks?

- 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.
  - 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, 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?

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[7] See comments from the ALAC (https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/2018q3/000035.html), INTA (https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/2018q3/000048.html), the RrSG (https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/2018q3/000052.html), the IPC (https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/2018q3/000063.html), and the GAC (https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/2018q4/000070.html)

[8] See the ICANN Board's public comment to this PDP WG's Initial Report here: https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/2018q3/000046.html

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    Implementation Guidance: The Applicant Guidebook and program Terms & Conditions should be amended to state that resolution of string contention via private auction is disallowed. Further, 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 auction for their given string, it may result in having that TLD taken away from them.

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- 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 1.1. above).
- 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.

e. *What specific questions are the PDP WG seeking feedback on?*

- 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?
- 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?
- 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

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complete ban? Or is it impossible to prevent private resolutions, and they should therefore be allowed (as noted in option 2 above)? Please explain.

- 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?
- 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)?

f. Deliberations

This topic was initially discussed on 25 June 2018 at ICANN62 during the Working Group's second face-to-face session and was later considered further in Working Group discussions. Of note, on the 2 October 2018 Working Group call, concerns were raised about the limited focus of the original topic, which was previously focused exclusively on private auctions. It was noted, with a fair amount of vocal agreement, that private auctions are merely one method in which losing applicants in a contention set are able to derive a financial benefit from losing. This was identified as the underlying issue with private auctions - an applicant can lose in a private auction but can be rewarded financially for having participated, which in turn could incent speculative application submissions. It was pointed out that this incentive, of losing in a private auction for financial gain, could happen in many other types of private resolutions (e.g., negotiation of private sale or payoff to withdraw). As such, it was stated that if private auctions were banned by policy recommendations, the underlying problem may still persist in the form of other private resolutions. It was therefore suggested that unless all private resolutions are banned, not just private auctions, the underlying problem will not have been eliminated.

As a result of this discussion, this section has been broadened to consider other forms of private resolution, such as private sales, negotiations, and other mechanisms to privately resolve contention.

This broadening of the issue did not seem to diminish the general agreement that speculative applications are problematic. While no solution has yet been reached to address the underlying issue presented by speculative applications, it was suggested that perhaps there is in fact a middle ground solution. Working Group members supported the idea that the WG should seek to find such a middle ground solution rather than conceding that there will either be speculation and profiting from withdrawing applications or private resolutions will be banned altogether. One such suggestion was to disallow private resolution with the exception of a finite list of mechanisms, with ICANN serving as the evaluator. Private resolution outside of the acceptable

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mechanisms and without approval from ICANN would result in forfeiture of the application, or the registry if already delegated. While this was presented as a merely a suggestion to stimulate conversation on possible middle ground solutions, it was met with opposition, on the basis that ICANN should not determine what is an acceptable private resolution.

The Working Group discussed the purpose and impact of private auctions and other private resolutions. One challenge to fully understanding how and why private auctions and other private resolutions occurred in the 2012 round, as well as the impact, is that these mechanisms were, by nature, private. Some Working Group members considered private auctions and other private resolutions to be a form of "gaming" the system, signalling that they believed it was a defect in the program that does not serve the public interest. With the process of private auctions and other private resolutions in the 2012 round not known ahead of time, there was less chance of "gaming." With the process and potential benefits now known, the Working Group anticipated that there could be a sizeable increase in speculative applications for the sole purpose of participating in private auctions and other private resolutions. Those who oppose restrictions on private auctions and other private resolutions pointed out that there is currently no data supporting the idea that applicants submitted applications with the sole purpose of profiting from private auctions and believe outreach to the private auction providers may be warranted. However, others have noted that even if the behavior did not occur in 2012, that could be because the notion of potential financial benefit from losing was not yet widely understood.

In terms of potential consequences of private auctions and other private resolutions, it was noted that if an applicant is forced to spend a significant amount of money to win a private auction or other private resolution, it may weaken their financial position to operate a TLD, and therefore could have an impact on stability. Working Group members also raised concerns about reputational harm that private auctions and other private resolutions could bring to ICANN and the New gTLD Program, noting that their prevalence and usage could give the impression that the program is an opportunity for speculators, with no interest in running a TLD in the public interest, to instead apply and seek to make a significant profit.

Some Working Group members stated that they do not support restricting the use of private auctions and other private resolutions on principle. From this perspective, it may not be appropriate to use policy to abridge the freedom of parties to privately resolve contention as they see fit, noting the all participants in a private auction, and other private resolutions, enter the arrangement voluntarily. In addition, one Working Group member raised that the recommendations coming out of the Auction Proceeds CCWG may impact the Subsequent Procedures PDP Working Group's perspective on private auctions, and therefore the Working Group should not make any recommendations to prevent private auctions at this time.

From another perspective, even if it were desirable and possible to effectively restrict private auctions and other private resolutions, this would not prevent one applicant in a contention set from paying another member of a contention set to withdraw an application, an outcome that is functionally similar to a private auction.

Working Group members considered whether there could be a means to require that all auctions and other private resolutions occur in public. Some Working Group members suggested that it would be difficult to prevent auctions and other private resolutions from going "underground." One member proposed that the Applicant Guidebook or Terms & Conditions could state that private auctions and other private resolutions are not permitted. The Registry Agreement could state that a TLD could be taken away from a registry if it was found that the registry participated in private auction or other private resolutions. This threat alone could deter the practice.

The Working Group explored other possible means of discouraging private auctions and other private resolutions in subsequent procedures. The Working Group discussed whether raising application fees could reduce the number of private auctions and other private resolutions that take place. Some noted that while higher fees may discourage the submission of speculative applications, they would also have an impact on the ability of legitimate applicants to apply for TLDs. Others pointed out that a higher fee may not even discourage speculative applications, because the windfall from losing auctions or other private resolutions is potentially significant relative to the cost of the increased fee.

Some indicated that the intent of an applicant could be inferred by reviewing the volume of TLDs applied for, with the idea that an applicant with a few TLDs are less likely to be applying with the intention of entering into private auctions and other private resolutions versus applicants who may apply for a portfolio of TLDs. Others disagree, pointing to the percentage of TLDs purchased versus sold of some of the larger registry operators.

One Working Group member suggested that the Working Group may want to do additional research on ways that private auctions are discouraged in other industries to extract lessons learned.

Members of the Working Group suggested that if the financial benefit of private auctions and other private resolutions is eliminated by having the funds donated to a charity instead of transferred to another applicant, it could eliminate the financial incentive and help ensure that applicants apply for TLDs for legitimate purposes. However, it was noted that enforcing this requirement would be challenging.

The Working Group discussed that another way to reduce the number of private auctions and other private resolutions could be to encourage those in contention sets to resolve contention by other means. This idea of encouraging resolution of contention before it reaches auction, private or last resort, and other private resolutions, is similar to that noted in section [1.1] of this report on auctions of last resort. That section also discusses alternatives to auctions of last resort, such as relying on a determinative drawing, which some envision would make that resolution method more palatable to applicants, thus reducing the incentive to turn towards private auctions and other private resolutions. Another mechanism suggested in section [1.1] of this report is the Vickrey auction, also seen as reducing or eliminating the need for ICANN auctions of last resort, as well as private resolutions.. While the WG did not envision that private auctions

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and other private resolutions would be eliminated by establishing a more palatable alternative to auctions of last resort, a reduction seems likely. WG members also discussed allowing joint ventures in cases of contention, believing it could reduce the pressure to resolve contention through private auctions and other private resolutions. This line of discussion is closely connected to the topic of Application Change Requests, discussed in Section [1.4] below.

> **g. Are there other activities in the community that may serve as a dependency or future input to this topic?**

None identified at this time.

1.3 Role of Application Comment

> *a. What is the relevant policy and/or implementation guidance (if any)?*

Implementation Guideline C: ICANN will provide frequent communications with applicants and the public including comment forums.
Implementation Guideline Q: ICANN staff will provide an automatic reply to all those who submit public comments that will explain the objection procedure.

> *b. How was it implemented in the 2012 round of the New gTLD Program?*

In section 1.1.2.3 of the Applicant Guidebook, it called for a comment period on all applications, called the Application Comment period. This period was to open when all applications were publicly posted on ICANN's website. Comments were to be specific to individual applications and where applicable, related to the relevant panel (e.g., evaluation element).

Comments received within the specified period (the Applicant Guidebook indicated 60 days), would be considered by the relevant evaluation panels. Panelists would perform due diligence on the comments and seek clarification from the applicant if necessary (e.g., where the comment could impact scoring). In those instances, applicants were given the opportunity to respond to the relevant application comments.

Application comments were not to be considered formal objections and any comments related to objections would not be considered by the Initial Evaluation panelists. However, objection based comments could play a role, albeit limited, during relevant objection proceeding. Application comments directed at the Limited Public Interest and Community objection grounds were forwarded to the Independent Objector.

Public comments designated to Community Priority Evaluation (CPE) could be taken into account by the evaluation panelist during CPE.

Governments could utilize the application comment tool, but was not a substitute for formal consensus GAC Advice.

The application comment system was also utilized for application change requests, Public Interest Commitment (PIC) statements, and complaints about code of conduct violations of an evaluation panelist.

In some circumstances, public comments needed to be submitted by certain deadlines in order to be considered by the relevant evaluation panel or process. The general public comment forum remained otherwise open throughout the entire process.

The Program Implementation Review Report (PIRR) contains statistics on the number of application comments received, as well as for which areas of evaluation.

c. What are the preliminary recommendations and/or implementation guidelines?

- 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 be further optimized.
    - Implementation Guidance: 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.
- 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.

Commented [7]: Comment from Kristina Rosette: Is there a reason this isn't a question?

Commented [8]: I believe the co-chairs believed there was preliminary support for this recommendation rather than it being just a question. It being a preliminary recommendation would of course not prevent comment.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None identified at this time.

e. What specific questions are the PDP WG seeking feedback on?

- 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?
- 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 a issue that needs to be addressed? If so, what measures do you propose in response to this problem?
- 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?

f. Deliberations

This topic was initially discussed on 25 June 2018 at ICANN62 during the Working Group's second face-to-face session and was later considered further in Working Group discussions.

The Working Group discussed whether the public comment mechanism and process served its intended purpose and whether there were potential areas for improvement in subsequent procedures. Working Group members generally agreed that the public comment period gave the broader ICANN community an opportunity to submit feedback about applications. Working Group members provided input on ways that the public comment mechanism could potentially be made more robust.

One of the issues discussed was the ability of applicants to respond to comments. One Working Group member stated that some of the comments received were frivolous complaints and that it was difficult for applicants to respond to these comments in an open manner and challenging to correct false assertions in real time. It was noted that applicants were able to respond to comments in the public comment fora, but were not required to do so. They were only required to address comments in cases where evaluators determined that the comments, after having conducted due diligence on them, may impact scoring of the application; in these cases, a Clarifying Question was issued to the applicant. Noting that the current implementation allows for optional applicant response and only requires response when comments may impact scoring, the Working Group did not come to agreement on whether changes were needed in this regard.

Working Group members raised that it was possible to submit comments in the public forum without revealing one's true identity. In the 2012 round, commenters supplied a name and email address, but the identity of the commenter was not verified through any additional measures. Some Working Group members pointed out that it was therefore possible to provide a name that did not match the identity of the person submitting the comment. One Working Group member raised the question of whether this process should be modified in subsequent procedures to ensure that commenter are who they claim to be.

Working Group members considered the functionality of the systems supporting application comment. One Working Group member stated that it would be helpful to allow the use of attachments in application comment submissions. Another shared that some applications received a large number of comments, and it was sometimes difficult in the 2012 round to review these systematically. It was suggested that some type of filtering mechanism could allow for more effective review of comments.

The Working Group discussed the length of the application comment period, at least in respect to Initial Evaluation, and considered whether 60 days from the posting date of the public portion

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of applications was a sufficient period of time. Per the Applicant Guidebook, the time period for application comment on Initial Evaluation is subject to extension, which was the case in 2012, where the period was extended 45 additional days. There were no concerns raised about this period.

The Working Group raised and discussed concerns about the public comment period for community applications, and asked if it was fair that the public comment period for community applications remained open longer than the public comment period for standard applications. Some in the Working Group also stated that it was unclear if and how comments received late in the community application process were taken into account in the evaluation of applications. It was noted that this topic may belong in discussions related to community applications, as there are differences between community and standard application processes, notably that levels of support or opposition were taken into account in the evaluation of community applications which was not the case for standard applications. It was noted by staff that the length of the comment period was established to allow sufficient time for comments to be collated and considered by evaluators. The difference in length of the comment period was a byproduct of where Community Priority Evaluation was performed (i.e., after Initial and Extended Evaluation, objections, and near the end of the evaluation process).

   g. *Are there other activities in the community that may serve as a dependency or future input to this topic?*

None identified at this time.

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Commented [9]: Comment from Kristina Rosette: The public comment period on Spec. 13 applications is 30 days.

Commented [10]: Clarified language.

1.4 Change Requests

    a. What is the relevant policy and/or implementation guidance (if any)?

No relevant policy or implementation guidance.

    b. How was it implemented in the 2012 round of the New gTLD Program?

There are many reasons applicants may wish to change aspects of their applications during the application and evaluation phases of the New gTLD Program. This is especially the case where the application and evaluation periods could last several years. These changes range from the substitution of personnel, corporate name changes, address changes, acquisitions/mergers, changes of officers/directors, etc. Some of these changes are more material than others and some were more substantive than others.

On 5 September 2012, ICANN published criteria for considering and evaluating change requests. Requests were considered against a set of seven criteria and if approved, were published for a 30-day comment period. After enough data was available and after careful consideration the 30-day comment period was removed for certain types of change requests (e.g., changes to confidential parts of the application, updates to the application as a normal course of business, like contact information, stock symbol, etc.). The seven criteria were:

1. Explanation: Is a reasonable explanation provided?
2. Evidence that original submission was in error: Are there indicia to support an assertion that the change merely corrects an error?
3. Other third parties affected: Does the change affect other third parties materially?
4. Precedents: Is the change similar to others that have already been approved? Could the change lead others to request similar changes that could affect third parties or result in undesirable effects on the program?
5. Fairness to applicants: Would allowing the change be construed as fair to the general community? Would disallowing the change be construed as unfair?
6. Materiality: Would the change affect the evaluation score or require re-evaluation of some or all of the application? Would the change affect string contention or community priority?
7. Timing: Does the timing interfere with the evaluation process in some way?

An Application Change Request Process and Criteria page was established[9] with a subsequent advisory[10]

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[9] See here: https://newgtlds.icann.org/en/applicants/global-support/change-requests
[10] See the New gTLD Advisory on the Change Request Criteria here:
https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en

For statistics on the number of change requests submitted, during what aspect of the evaluation process, and approval rates, please consult section 1.4.3 of the Program Implementation Review Report and New gTLD micro site page[11].

Depending on the nature of the requested change, some would require re-evaluation if received after the completion of Initial Evaluation. For instance, substantive changes to the technical or financial portions of the application would be more likely to require re-evaluation than changes to contact information.

While the change request was beneficial in some regards, by allowing applicants to cure deficiencies or concerns (e.g., from GAC Early Warning), the timing of change requests created operational challenges, sometimes requiring redundant reviews, delays in processing, and operational costs. There were also challenges around change requests for applications self identified as community-based, where certain changes that could impact community priority evaluation were not allowed.

c. *What are the preliminary recommendations and/or implementation guidelines?*

- 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 believes that some operational improvements should be made.
    - Implementation Guidance: ICANN org could seek to provide guidance on both changes that will likely be approved and changes that will likely NOT be approved.
    - Implementation Guidance: ICANN org should also set forth the types of changes which are required to be posted for public comments and which are not.
    - Implementation Guidance: 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 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.

d. *What are the options under consideration, along with the associated benefits / drawbacks?*

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

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[11] New gTLD Change Request page here: https://newgtlds.icann.org/en/applicants/global-support/change-requests#statistics

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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.

- 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.

e. *What specific questions are the PDP WG seeking feedback on?*

- Section (d) above outlines possible application changes that could be allowed in subsequent procedures and corresponding implementation guidance that the Working Group is considering.
    a) 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?
    b) If these changes are allowed, what are the potential risks or possibilities for gaming these types of changes? How can those risks be mitigated?
    c) 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?
- What role should public comment play in determining if a change request should be granted?
- 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?

f. *Deliberations*

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This topic was initially discussed on 25 June 2018 at ICANN62 during the Working Group's second face-to-face session and was later considered further in Working Group discussions.

The Working Group reviewed the process ICANN used in the 2012 round to evaluate change requests and discussed whether this same system might be appropriate for subsequent procedures. Some Working Group members felt that going forward, it would be helpful to have a list of types of changes that an applicant could make to an application. Others added that it would also be useful to have a list of types of changes that are definitely not allowed. One Working Group member noted that a review of Clarifying Questions from the 2012 round could assist in identifying changes that were and were not permitted in the 2012 round.

One Working Group member noted that information is available about changes that were allowed but less information is available about change requests that were rejected, which might affect the Working Group's thinking. The Working Group member suggested that since we cannot anticipate all the types of change requests that might be submitted, it might make sense to use criteria (as ICANN did) rather than try to enumerate the different types of changes. From that perspective, it was suggested that it might make sense to review and amend the existing criteria used in 2012, though no specific issues or recommendations have yet to be identified.

The Working Group considered types of changes that should be permitted in subsequent procedures. Some members felt that it should be possible for applicants to form joint ventures after the initial applications have been submitted. This could be particularly useful in cases where two or more applications are in contention. Working Group members noted that allowing applicants to change the application to form a joint venture could be a way to find creative win-win solutions for those in contention. It could also result in fewer private auctions and auctions of last resort, which many Working Group members viewed as a benefit. One Working Group member had concerns about some of the details for allowing joint ventures. The Working Group member asked what factors would lead to re-evaluation, what happens during re-evaluation, and what happens if the joint venture were to dissolve prior to contract signing.

One Working Group member suggested that applicants should be permitted to change the proposed business model for the TLD during the application process, believing that it is unclear if that type of change was disallowed during the 2012 New gTLD Round or whether there were restrictions on those types of changes. The member suggested that the evaluation process used for the Registry Services Evaluation Process (RSEP) could be used as a model in evaluating these requests.

The Working Group also discussed whether applicants should be able to submit a request to change the applied for string. Some Working Group members felt that this would be beneficial, particularly in cases where two or more applications were in contention, and could reduce the need to for auctions of last resort. One Working Group member provided as an example that string contention, and the possibility of an auction of last resort, could have been prevented for .sas in the 2012 round if applicants had more flexibility to change their applications (e.g., one applicant would get .sas while the other could potentially choose .sasair).

Another Working Group member suggested that the WG should review why it was not permitted to change the applied-for TLD to avoid contention in the 2012 round, as this may inform the group's deliberations. A key reason raised included concerns about applicants essentially submitting a placeholder application, aware that they might be able to change their applied-for string after submission, which is viewed as a gaming concern. While there appeared to be support to allow a change of string in some limited circumstances, the Working Group noted that criteria would be needed to prevent gaming. Others noted that allowing string changes would also introduce operational challenges for anything related to the applied-for string. For instance, ICANN org would likely need to 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. Accordingly, the applicant could be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delay.

g. *Are there other activities in the community that may serve as a dependency or future input to this topic?*

None identified at this time.

1.5 Registrar Support for New gTLDs

a. What is the relevant policy and/or implementation guidance (if any)?

Recommendation 19: Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.

b. How was it implemented in the 2012 round of the New gTLD Program?

The 2007 Final Report, the Registrar Constituency (RC, and now known as the Registrar Stakeholder Group, or RrSG), noted in relation to introducing new gTLDs that, "...new gTLDs present an opportunity to Registrars in the form of additional products and associated services to offer to its customers. However, that opportunity comes with the costs if implementing the new gTLDs as well as the efforts required to do the appropriate business analysis to determine which of the new gTLDs are appropriate for its particular business model."

The gTLD Registries Constituency (RyC, and now known as the gTLD Registries Stakeholder Group, or RySG) noted in relation to Recommendation 19 that, "...the RyC has no problem with this recommendation for larger gTLDs; the requirement to use accredited registrars has worked well for them. But it has not always worked as well for very small, specialized gTLDs. The possible impact on the latter is that they can be at the mercy of registrars for whom there is no good business reason to devote resources. In the New gTLD PDP, it was noted that this requirement would be less of a problem if the impacted registry would become a registrar for its own TLD, with appropriate controls in place. The RyC agrees with this line of reasoning but current registry agreements forbid registries from doing this. Dialog with the Registrars Constituency on this topic was initiated and is ongoing, the goal being to mutually agree on terms that could be presented for consideration and might provide a workable solution."

Section 2.9 of the Registry Agreement implemented Recommendation 19 above. It states "All domain name registrations in the TLD must be registered through an ICANN accredited registrar; provided, that Registry Operator need not use a registrar if it registers names in its own name in order to withhold such names from delegation or use in accordance with Section 2.6.[12]" In addition, Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD; provided that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD.

In addition, Specification 9 which requires Registries that are Affiliated with Registrars or vice versa, to adhere to a Code of Conduct, which among other things, requires Affiliated Registries

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[12] Section 2.6, which refers to Specifications 5 and 9, allows the registration of up to 100 names without the use of an ICANN Accredited Registrar necessary for the operation or promotion of the TLD.

and Registrars to maintain structural separation and separate books and records[13]. Only so-called .Brand TLDs that execute Specification 13 or TLDs for which all registrations are registered to the Registry Operator and/or its Affiliates are exempt from that Code of Conduct. In all cases, whether exempt or not, only ICANN Accredited Registrars may be used to register names within the TLD.

Although there is a requirement for Registries to use Accredited Registrars, there is no requirement that all ICANN-Accredited registrars must carry any particular new gTLDs. It was, and continues to be, up to registrar discretion. As such, some new gTLD Registries have complained that this model of having to sell through ICANN Accredited Registrars has made it difficult for them to try new and innovative models because the distribution channel that they are required to use is unable or unwilling to implement the new gTLD Registry's requirements. ICANN Accredited Registrars on the other hand argue that they should not be forced to distribute TLDs for which they do not believe a commercial market exists or for TLDs that require extensive time, development and resources to implement which could easily outweigh the fees generated from registrations in that TLD. As a result, it is believed that in some instances (e.g., locale, type of TLD, etc.), it may be difficult to get a registrar to agree to sell certain TLDs.

ICANN-Accredited Registrars have also made the point that some TLDs are tough for them to distribute because certain gTLD Registries require that the Registrars establish deposit accounts for each TLD and maintain minimum balances in those accounts so that when a registration is made in a TLD, the Registry can immediately deduct the Registry fees from that account. This is the model that was traditionally in place for TLDs prior to the 2012 Introduction of new gTLDs and is often referred to as "Prepayment." There are some registries, particularly those participating in the 2012 new gTLD round that have allowed registrars to register names (on behalf of their registrants) without drawing down on a deposit account, but rather have relied on the payment of periodic invoices after names are registered. This is referred to as "Post Payment."

Section 2.10.2 of the Initial Report, on Registrar Non-Discrimination, discusses the topic of vertical integration in detail. This section deals with whether there should be any additional exceptions to the requirement that gTLD Registries use only ICANN-Accredited Registrars and whether there are any measures that can be taken to assist those new gTLD Registries that are unable to attract Registrars to carry their TLDs.

c. What are the preliminary recommendations and/or implementation guidelines?

None at this time.

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[13] Work Track 2 looked at the topic of Registrar Non-Discrimination, which you can find in Section 2.10.2 of the Working Group's Initial Report. There, you can see that the Work Track requested and received information from Contractual Compliance, which looks at both audits and complaints received related to vertical integration. Please consult that section for relevant data.

d. What are the options under consideration, along with the associated benefits / drawbacks?

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.

- 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.

- ICANN org could provide a "clearinghouse" for payments between the registries and registrars that operate in different currencies.
- 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.
- 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.
- Some members of the Working Group also proposed that the Registry contract should bundle the capacity of becoming an Accredited Registrar.

e. What specific questions are the PDP WG seeking feedback on?

- 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?
- Are there any other proposals that could assist TLD Registries that have difficulty attracting ICANN Accredited Registrars?
- Should ICANN even get involved in assisting Registries or is this outside the scope of ICANN's mission, bylaws, or mandate? Please explain.
- 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?

f. Deliberations

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This topic was initially discussed on 25 June 2018 at ICANN62 during the Working Group's second face-to-face session and was later considered further in Working Group discussions.

As a foundational consideration, the Working Group discussed whether the issue should be treated as a policy issue or a subject that should be addressed by market forces. The Working Group generally agreed that it is difficult to establish whether an underperforming TLD is suffering from "product defect," (the TLD would not attract many registrations even if it was readily available at an attractive price) or from "channel defect" (the TLD is not successful because deficiencies in the market structure prevent registrations). Some support was expressed for treating this issue as a policy concern, although one Working Group member stated that it may not be ICANN's responsibility to address every aspect of this issue through policy, and that some problems faced by registries should be resolved through market forces.

The Working Group discussed the issue of market standardization. The Working Group noted that registrars are less likely to adopt niche TLDs or TLDs that are operated in a unique manner. Some Working Group members supported the idea that standardization (e.g., simple and straightforward pricing, the same renewal pricing, the same expiry process, etc.) could promote registrar adoption of TLDs and reduce concerns about TLDs that are unable to attract registrar resources. From another perspective, it is not realistic for there to be a standard pricing model across TLDs and indeed, placing restrictions on pricing is generally seen outside of ICANN's remit. One Working Group member suggested that the Applicant Guidebook should encourage potential applicants to interact with ICANN accredited registrars before submitting an application, so that they fully understand potential market and technical integration issues that might be encountered. However, others noted that in some cases, the parent company of the registrar may also itself be, or own, a registry, in which case care should be taken in considering that input, as the registrar could represent a competitor.

The Working Group discussed possible policy measures that could address the issue of registries with insufficient registrar resources. The Working Group discussed the possibility of a "must-carry" obligation, under which ICANN could require registrars of a certain size to sell domains under these TLDs. Another way to look at this issue is to consider that registries must use ICANN-accredited registrars, but how about the reverse, where ICANN-accredited registrars must support registries? Working Group members noted that they could only possibly support this option if there was clear evidence of a sales channel defect, because in many cases, the decision for a registrar to carry a registry's TLD will be based on the business opportunity, potential challenges in dealing with a registry, terms of contracting with the registry, and other factors that may be unique to each registry.

An additional proposal was put forward in which wholesale registrars carry all gTLDs that request it. ICANN would pay wholesale registrars to be the "last-resort" registrars who would develop and support integration of these gTLDs. One of the benefits identified for this proposal is that is would allow gTLDs to reach markets for jurisdictions or verticals that have few or no accredited registrars. One Working Group member stated that ICANN should not spend money subsidizing the development of gTLDs, some of which may be poorly conceived or poorly

funded. From this perspective, if ICANN wanted to help potential registrants identify registrars that carry certain TLDs, it could create an online resource providing information about which registrars carry certain TLDs. Another member raised a concern that a registry might have unreasonable requirements, such as a very large and non-refundable initial deposit, and ICANN would be required to pay the bill.

A third proposal focused on the number of names that a registry can allocate directly. Currently, registries are permitted to allocate up to 100 names directly for purposes of operating or promoting the TLD. The limit could be raised to allow a TLD to grow enough to attract market interest from registrars. Working Group members suggested a new limit of 5,000 or 10,000. A variant on this proposal would be to include Registrar Accreditation as a benefit of all registry contracts.

Working Group members identified additional issues that might be addressed through policy measures. First, the fact that many TLDs require deposits result in registrars selecting a small set of TLDs to carry, with a focus on those that have clear market demand. Second, currency issues can create challenges for registry-registrar business relationships in certain jurisdictions. To address these issues, a proposal was put forward for a payment clearinghouse sitting between willing registrars and registries, where a single deposit could vouch for a larger set of smaller TLDs, and where local currency could be used for both parties of a contract. One Working Group member pointed out that in the current environment, there is nothing stopping registries from switching from a pre-pay to post-pay model. From this perspective, some issues should be left for market forces to resolve.

> ### g. Are there other activities in the community that may serve as a dependency or future input to this topic?

None identified at this time.

Opposition noted. However, is it opposition because private auctions are only one mechanism to derive financial benefit from "losing" or disagreement on the underlying problem?