Jeffrey J. Neuman's Views on SubPro Board-GNSO Scorecard 3/7/2023

Output Overview	Issue Synopsis	Neuman Views
Table 3: Applications Assessed in Rounds		
Affirmation with Modification 3.1: The Working Group affirms recommendation 13 from the 2007 policy, which states: "Applications must initially be assessed in rounds until the scale of demand is clear." However, the Working Group believes that the recommendation should be revised to simply read, "Applications must be assessed in rounds."	As noted in the ODA, "ICANN org considered that assessing applications in rounds and establishing criteria for starting subsequent rounds requires deliberation of what it means to close a round and possibly, the implications of simultaneous rounds for both applicants and ICANN org."[1] The Board is considering to direct ICANN org to establish the exact criteria for considering a round "closed" during the implementation process, doing so in consultation with the Implementation Review Team (IRT).	1. Most important thing here is that the Board announces <u>when</u> the next window will open and put that date/criteria in the Applicant Guidebook 2. SubPro has stated that a new "round" may initiate even if steps related to application processing and delegation from previous application rounds have not been fully completed (3.4) 3. Thus, defining when a round is "closed" is really only relevant for Fees section making it less important that an exact "closed date" as opposed to a formula be selected 4. No Consensus within SubPro on First-Come, First Served because it provides a less predictable process for applicants / applicant support, public comment periods, objections, etc. 5. Possible Compromise is to accept applications on a FCFS basis, but publish them for comment/objections, etc. on a predictable time frame. Namely, apps received from Jan-March are published April 1, April through June, July 1, July – Sep., Oct 1, and Oct-December, the next Jan 1. But with the time stamp, only the first application for a string is processed and other

This document contains the Output Overviews and Issue Synopsis sent to the GNSO Council on February 24, 2023 (no changes), except the third column which was "Board Action" has been replaced with my personal views. In certain places, my personal views are expressed based on experience as the former co-chair of the SubPro WG PDP. Blue Items may or may not have been discussed by SubPro, bur in my view would be consistent.

		ones placed on hold unless 1st one does not qualify
Recommendation 3.2: Upon the commencement of the next Application Submission Period, there must be clarity around the timing and/or criteria for initiating subsequent procedures from that point forth. More specifically, prior to the commencement of the next Application Submission Period, ICANN must publish either (a) the date in which the next subsequent round of new gTLDs will take place or (b) the specific set of criteria and/or events that must occur prior to the opening up of the next subsequent round.	See Affirmation with Modification 3.1	See Above
Recommendation 3.5: Absent extraordinary circumstances application procedures must take place at predictable, regularly occurring intervals without indeterminable periods of review unless the GNSO Council recommends pausing the program and such recommendation is approved by the Board. Such extraordinary circumstances must be subject to the Predictability Framework under Topic 2 of this Report. Unless and until other procedures are recommended by the GNSO Council and approved by the ICANN Board, ICANN must only use "rounds" to administer the New gTLD Program.	See Affirmation with Modification 3.1	See Above
Recommendation 3.6: Absent extraordinary circumstances, future reviews and/or policy development processes, including the next Competition,	See Affirmation with Modification 3.1	See Above

Consumer Choice & Consumer Trust (CCT) Review, should take place concurrently with subsequent application rounds. In other words, future reviews and/or policy development processes must not stop or delay subsequent new gTLD rounds.		
Recommendation 3.7: If the outputs of any reviews and/or policy development processes has, or could reasonably have, a material impact on the manner in which application procedures are conducted, such changes must only apply to the opening of the application procedure subsequent to the adoption of the relevant recommendations by the ICANN Board.	See Affirmation with Modification 3.1	See Above.
Topic 6: Registry Service Provider Pre-Evaluation		
Recommendation 6.8: The RSP pre-evaluation program must be funded by those seeking pre-evaluation on a cost-recovery basis. Costs of the program should be established during the implementation phase by the Implementation Review Team in collaboration with ICANN org.	The Board is concerned about the recommended roles and responsibilities during the implementation process. Per Consensus Policy Implementation Framework (CPIF) and the IRT Principles & Guidelines ICANN org leads implementation efforts. Therefore, the costs of the program should be established by ICANN org during implementation in consultation with the IRT.	I believe this wording in the recommendation may have been confusing or at the very lease was not what was intended. It was intended that the formula for figuring out what elements would be considered for determining the costs would be worked on by the IRT (as the formula for application fees in general were worked on by the SubPro WG). But the actual fees themselves are determined by ICANN using the formula / criteria set through IRT work.
Topic 9: Registry Voluntary Commitments / Public Interest Commitments		
Recommendation 9.1: Mandatory Public Interest Commitments (PICs) currently captured in Specification 11 3(a)-(d) of the Registry Agreement[2] must continue to be	The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over risks of challenges related to ICANN's ability to	The SubPro PDP did discuss this issue after the ICANN Board's comments to the Draft Final Report. However, the Working Group believed

included in Registry Agreements for gTLDs in subsequent procedures. Noting that mandatory PICs were not included in the 2007 recommendations, this recommendation puts existing practice into policy. One adjustment to the 2012 implementation is included in the following recommendation (Recommendation 9.2).	enter into and enforce PICs/RVCs in accordance with its mission, due to limitations in the Bylaws Section 1.1.	that the ICANN Board's concerns were not warranted for several reasons. According to the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations dated 23 Feb. 2016 (and provided in the overall transition package to the United States Department of Commerce (https://www.icann.org/en/system/files/files/iana-stewardship-transition-package-10mar16-en.pdf), it was clearly stated in Recommendation 5 that "ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest commitments ("PICs"), with contracted parties in service of its mission." (See line 146). It also importantly states, **"The prohibition on the regulation of "content" is not intended to prevent ICANN policies from taking into account the use of domain names as identifiers in various natural languages" (See Line 147(1)).** These concepts are incorporated into ICANN's Bylaws in Section 1.1 (Mission)(d)(iv) though worded slightly differently. But from the explanation provided by the CCWG, it is clear that the prohibition on the regulation of content was not intended to trump the ability of ICANN to promulgate policy and negotiate PICs. Regardless, what is clear is that the recommendations for having PICs and RVCs in future agreements was adopted by unanimous consensus of the community and therefore, if an

		Amendment to the Bylaws must be made, this does not appear to be controversial.
Recommendation 9.2: Provide single-registrant TLDs with exemptions and/or waivers to mandatory PICs included in Specification 11 3(a) and Specification 11 3(b).[4]	The Board is concerned that a waiver to Spec 11 3 (a) and 3 (b) could lead to DNS abuse for second level registrations in a single registrant TLD going undeterred, unobserved and therefore unmitigated. The Board is also concerned that a waiver to Spec 11 3 (a) and 3 (b) could require a change to the RA's Specification 13, which would introduce significant implementation efforts to harmonize current 2012 agreements with future rounds if ICANN org elected to leverage the current agreement for the future rounds.	In breaking down Specification 11, it does not appear that the Board's concerns would actually come to fruition. 1. Spec 3(a) refers to registries requiring registrars to include a provision in its Registry-Registrar Agreement prohibiting certain activities. First, whether the use of Registrars should be required in a Single Registrant TLD is questionable. But even putting that aside, this is a case where the Registry itself (or its affiliates/licensees) is the registrant. Having an agreement requiring a third party to have an agreement with itself is a bizarre construct to begin with. But if it is that concerning, perhaps an overall requirement with a registry operator that is a single registrant TLD to not use the TLD for those purposes makes a lot more sense than this circular provision. 2. 3(b) requires a technical assessment to assess whether domains are being used to perpetrate threats. With single registrant TLDs, this makes little sense. You are testing whether the TLD for which you are the registrant is being used to perpetrate threats. In other words, you have to test whether you (or your affiliates) are using your own TLD for phishing, pharming, etc.

		If one was going to use a TLD to perpetrate those threats, would having a testing requirement really lead to less abuse. If a TLD operator were going to be malicious and perpetrate threats, why would it accurately perform technical assessments. 3. 3© requires you to operate consistent with principles of openness and non-discrimination…which is the very opposite of what a single registrant TLD is for. This requirement makes no sense. 4. 3(d) requires no Closed Generics. This will work itself out with whatever decision is made on closed generics. **In short, it is nearly impossible to see how the failure to include these PICs in Single Registrant TLDs will lead to abuse.**
Recommendation 9.4: The Working Group recommends establishing a process to determine if an applied-for string falls into one of four groups defined by the NGPC framework for new gTLD strings deemed to be applicable to highly sensitive or regulated industries. This process must be included in the Applicant Guidebook along with information about the ramifications of a string being found to fall into one of the four groups.	See Recommendation 9.1	See above
Recommendation 9.8: If an applied-for string is determined to fall into one of the	See Recommendation 9.1	See Above.

four groups of strings applicable to highly sensitive or regulated industries, the relevant Category 1 Safeguards must be integrated into the Registry Agreement as mandatory Public Interest Commitments.		
Recommendation 9.9: ICANN must allow applicants to submit Registry Voluntary Commitments (RVCs) (previously called voluntary PICs) in subsequent rounds in their applications or to respond to public comments, objections, whether formal or informal, GAC Early Warnings, GAC Consensus Advice, and/or other comments from the GAC. Applicants must be able to submit RVCs at any time prior to the execution of a Registry Agreement; provided, however, that all RVCs submitted after the application submission date shall be considered Application Changes and be subject to the recommendation set forth under topic 20: Application Changes Requests, including, but not limited to, an operational comment period[5] in accordance with ICANN's standard procedures and timeframes.	See Recommendation 9.1	See above. The point of this provision is to try and have applicants actually resolve their differences with objectors, the GAC, public comments, etc. After all, if applicants can resolve its differences with those who have an objection to the application, why would we want to stand in the way of that? In the 2013 round, it was all or nothing. If someone objected, there was no ability to modify proposals to alleviate concerns. This lead to applications either getting rejected completely, or to applications going through as is with no attempt to resolve differences. This in turn led to more disputes and of course more Independent Reviews which may have been able to have been resolved had a process like this been in place. Ultimately, this is what ended up happening in .Amazon, where the parties eventually were forced to the table and try and resolve their differences. It just took about 6 years to get there. This recommendation is a no-brainer to me personally that we need to figure out how to get into the program because it is the right thing to do.

Recommendation 9.10: RVCs must continue to be included in the applicant's Registry Agreement.	See Recommendation 9.1	See above.
Recommendation 9.12: At the time an RVC is made, the applicant must set forth whether such commitment is limited in time, duration and/or scope. Further, an applicant must include its reasons and purposes for making such RVCs such that the commitments can adequately be considered by any entity or panel (e.g., a party providing a relevant public comment (if applicable), an existing objector (if applicable) and/or the GAC (if the RVC was in response to a GAC Early Warning, GAC Consensus Advice, or other comments from the GAC)) to understand if the RVC addresses the underlying concern(s).	See Recommendation 9.1	See above.
Recommendation 9.13: In support of the principle of transparency, RVCs must be readily accessible and presented in a manner that is usable, as further	See Recommendation 9.1	See above.
Recommendation 9.15: The Working Group acknowledges ongoing important work in the community on the topic of DNS abuse[6] and believes that a holistic solution is needed to account for DNS abuse in all gTLDs as opposed to dealing with these recommendations with respect to only the introduction of subsequent new gTLDs. In addition, recommending new requirements that would only apply to the new gTLDs added to the root in subsequent rounds could result in singling	See Recommendation 9.1	Not sure why this recommendation was included as pending, but in either case, the community has moved beyond this and will have proposed changes to agreements to address this for ALL TLDs.

out those new gTLDs for disparate treatment in contravention of the ICANN Bylaws. Therefore, this PDP Working Group is not making any recommendations with respect to mitigating domain name abuse other than stating that any such future effort must apply to both existing and new gTLDs (and potentially ccTLDs). The Working Group has reached this conclusion after duly considering the DNS abuse related CCT-RT Recommendations, which includes 14,[7] 15,[8] and 16[9]. Note, however, that at the time of the drafting of this report, the ICANN Board only approved Recommendation 16. Recommendations 14 and 15 remain in a "Pending" status.[10]		
Topic 16: Applicant Submission Period		
Recommendation 16.1: The Working Group recommends that for the next application window and subsequent application windows, absent "extenuating or extraordinary" circumstances, the application submission period must be a minimum of 12 and a maximum of 15 weeks in length.	The Board is concerned that the time period provided in this recommendation could be too limiting for future rounds.	Perhaps, the Board can approve this recommendation for the next round (as it was approximately the time period used in 2012), and hold its judgement for future rounds. In other words, treat this as two separate recommendations for now.
Topic 17: Applicant Support		

Recommendation 17.2: The Working Group recommends expanding the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process.	The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over the open ended nature of these fees as affirmative payments of costs beyond application fees could raise fiduciary concerns for the Board. Note, this concern does not extend to facilitation of *pro bono* services.	I personally believe that this can be implemented as a form of "reimbursement" for selected applicants that use approved vendors. That reimbursement can be capped at a certain amount. For example, ICANN could have its referral page for service providers and assign an amount for which the applicant must provide receipts to get those reimbursements. An illustration may be that ICANN offers up to $25k in reimbursement for an "approved" providers application drafting services. Or that ever year, ICANN will waive its annual fees for qualifying registries, etc. There are a lot of creative ways in which programs like these could be carried out without being so open ended.

Topic 18: Terms and Conditions		
Recommendation 18.1: Unless required by specific laws, ICANN Board members' fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.	The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over this recommendation unduly restricting ICANN's discretion to reject an application in circumstances that fall outside the specific grounds set out in the recommendation.	The PDP Working Group discussed this recommendation extensively, but also discussed a balancing of harms between Applicants who follow all the rules, pay all the required fees, and get rejected based on criteria that did not exist in the Applicant Guidebook at the time an Applicant applied. In fact, many of the IRPs that ICANN lost dealt with the ways in which ICANN denied applications when those denials were not supported by criteria in the Applicant Guidebook or explained in light of why such rejection was necessary to protect the public interest. There is a reason the community spent many years working on revising this program. To have a provision in the Ts and Cs blankly give ICANN the ability to ignore all of the rules and reject whatever it sees fit, whenever it sees fit, and not have to refund any fees is not only unfair, but truly unnecessary. Not to mention that such a contract is illusory.
Recommendation 18.3: In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in	The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over undue legal exposure.	This PDP Working Group did not believe that this was an issue. Perhaps the recommendation was not worded as clear as it should have been, but the point was essentially that if ICANN adopts an appeals decision where applicants/third parties can have their challenges actually heard, then it

the current ICANN Bylaws). This recommendation is in reference to Section 6 of the Terms and Conditions from the 2012 round.		may be ok to not have the right to sue in court over that issue. However, absent any appeals mechanism, a covenant not to sue, is unfair and leaves applicants without any true form of redress. The Accountability Mechanisms are NOT a substitute for an appeals mechanism or Court. The Accountability Mechanisms only look at whether ICANN staff or org violated the Bylaws with respect to its ultimate decision. It doesn't matter whether or not Org or Staff were substantively wrong (as ICANN makes very clear in all of its IRP filings) so long as the action was taken in "Good Faith." Thus, if ICANN was substantively wrong, but acted in good faith, then not only would an applicant not be able to seek redress in an Accountability Mechanism, but absent an appeals mechanism and with this covenant not to sue, there is NO ability for an Applicant to see any redress. Simply put, if there is an appeals mechanism where applicants/third parties can be heard on the substance, then there is no objection to the covenant not to sue.
Recommendation 18.4: Applicants must be allowed some type of refund if they decide to withdraw an application because substantive changes are made to the Applicant Guidebook or program processes and such	The Board is concerned that the way the recommendation is worded could lead to gaming because of the subjective nature of the terms 'substantive' and 'material'.	The Board's concern while understandable needs to be balanced with fairness to applicants that have applied for a TLD based on one set of assumptions (as contained within the Applicant Guidebook) only to have

changes have, or are reasonably likely to have, a material impact on applicants.[11]		those assumptions fall apart due to a material substantive change introduced through no fault of their own. At the price for a TLD Application, this balance seems like an easy compromise. As an example, I spend $150,000 to apply for a TLD that I want to use in a certain way and that way is clearly allowed in the then-current Applicant Guidebook. Now lets say there is GAC Advice after applications are submitted that says a TLD cannot be used in that specific way and the ICANN Board agrees. If the Applicant's entire business model to recoup its investment is now no longer allowed through no fault of its own, it is only fair to provide a refund.
Topic 19: Application Queuing		
Recommendation 19.3: All applications must be processed on a rolling basis, based on assigned priority numbers. While the 2012 AGB prescribed batches of 500 applications, ICANN org noticed during that round that moving through the priority list without splitting the applications into batches was more efficient. The Working Group affirms that approach by not recommending batches. However, if the volume of Internationalized Domain Names (IDN) applications received equals or exceeds 125, applications will be assigned priority numbers consistent with the formula	The Board is concerned that the precise number of batching could be/is too limiting for future rounds as the recommendation prescribes a batch size that might not align with future system capabilities.	The most important aspect of this recommendation is the formula for processing applications. The number 500 is used because that was what was used in the 2012 Applicant Guidebook. We do not know where the ODA got 450 or any other number, but given that 500 was agreed to for the 2012 round it seemed like the best number to use. However, the main point here as well is to prioritize IDN applications but not completely. In other words if there are thousands of IDN applications, which would be great, then the formula does allow for ASCII TLD applicants to be in the queue after

below. The Working Group recommends that the following formula must be used with respect to giving priority to IDN applications: ○ First 500 applications If there are 125 applications or more for IDN strings that elect to participate in the prioritization draw, the first 25% of applications assigned priority numbers in the first group shall be those applications for IDN strings that elect to participate in the prioritization draw. The remaining 75% of applications in the group shall consist of both IDN and non-IDN applications that elect to participate in the prioritization draw. ○ If there are less than 125 applications for IDN strings that elect to participate in the prioritization draw, then all such applications shall be assigned priority numbers prior to any non-IDN application. • Each subsequent group of those		the first 125 applications. Any future formula should keep that in consideration. With respect to the Board's recent statements on looking at a First-Come, First-Served model, we strongly encourage ICANN to review materials from all of the SubPro work (including Preliminary Report for Work tracks 1-4) to understand why that model was specifically rejected.

electing to participate in the prioritization draw For each subsequent group, the first 10% of each group of applications must consist of IDN applications until there		
Topic 22: Registrant Protections		
Recommendation 22.7: TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations Instrument (COI) requirements or requirements for the successor to the COI.	The Board is concerned that an exemption from an COI for Spec 9 applications would have financial impact on ICANN since there would be no fund to draw from if such a registry went into EBERO. Further, not moving a Brand TLD into EBERO might have a security and stability impact, especially if Brands allocate second level TLDs to customers -such as a car manufacturer providing a second level registration for their cars.	The SubPro PDP Discussed this very topic and came to the following conclusions: (1) Of the critical services failing, the only one that could even necessitate the use of an EBERO would be DNS. Failure of WHOIS, ESCROW or the SRS are really not relevant when there is one registrant owning all registrations. (2) The likelihood of total DNS Failure at the registry level for smaller single registrant TLDs is incredibly miniscule since again, there are generally a lot less registrations and only 1 registrant (3) There has never been a failure of a Single Registrant TLD (4) Its not ICANN's job to look out for the customers of any TLD, much less a brands or Single Registrant TLD, all the users of which know the registry (which again owns and is responsible for all registrations). (5) If the Single Registrant TLD elects to have an EBERO save it, it can then pay for that service.

Topic 24: String Similarity Evaluations		
Recommendation 24.3: The Working Group recommends updating the standards of both (a) confusing similarity to an existing top-level domain or a Reserved Name, and (b) similarity for purposes of determining string contention, to address singular and plural versions of the same word, noting that this was an area where there was insufficient clarity in the 2012 round. Specifically, the Working Group recommends prohibiting plurals and singulars of the same word within the same language/script in order to reduce the risk of consumer confusion. For example, the TLDs .EXAMPLE[12] and .EXAMPLES may not both be delegated because they are considered confusingly similar. This expands the scope of the String Similarity Review to encompass singulars/plurals of TLDs on a per-language/script basis. • An application for a single/plural variation of an existing TLD or Reserved Name will not be permitted if the intended use of the applied-for string is the single/plural version of the existing TLD or Reserved Name. For example, if there is an existing TLD .SPRINGS that is used in connection with elastic objects	The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over the wording in section (a) and (c) of this Recommendation as they stipulate 'intended use' of a gTLD, which implies that ICANN will have to enforce the 'intended use' post delegation, which could be challenged as acting outside its mission. See also Topic 9 above.	1. There is only an (a) and (b) of this recommendation, so not sure what is meant by section (c) of this recommendation when none exists. 2. The use of the term "confusingly similar" with respect to string similarity reviews comes from the 2012 Applicant Guidebook which states: *This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.* *Note: In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone. (Section 2.2.1.1).* Therefore, the SubPro WG is NOT recommending any changes in section (a) to what was done in 2012. Subsection (b) is where the SubPro PDP recommended including singulars and plurals in with visual similarity. The decision in the

and a new application for .SPRING that is also intended to be used in connection with elastic objects, .SPRING will not be permitted. If there is an application for the singular version of a word and an application for a plural version of the same word in the same language/script during the same application window, these applications will be placed in a contention set, because they are confusingly similar. • Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses. For example, .SPRING and .SPRINGS could both be allowed if one refers to the season and the other refers to elastic objects, because they are not singular and plural versions of the same word. However, if both are intended to be used in connection with the elastic object, then they will be placed into the same contention set. Similarly, if an existing TLD • .SPRING is used in connection with the season and a new application for .SPRINGS is intended to be used in connection with elastic objects, the		2012 round to not include Singulars/Plurals was made by ICANN Org without the benefit of policy development and frankly came as a surprise to most of the ICANN community. Enforcing the "use" of the TLDs where Singulars and Plurals are allowed to exist would be done in the form of a PIC / RVC and therefore follows the same response as set forth above in Section 9.1.

new application will not be automatically disqualified. The Working Group recommends using a dictionary to determine the singular and plural version of the string for the specific language. The Working Group recognizes that singulars and plurals may not visually resemble each other in multiple languages and scripts globally. Nonetheless, if by using a dictionary, two strings are determined to be the singular or plural of each other, and their intended use is substantially similar, then both should not be eligible for delegation.		
Recommendation 24.5: If two applications are submitted during the same application window for strings that create the probability of a user assuming that they are single and plural versions of the same word, but the applicants intend to use the strings in connection with two different meanings,[13] the applications will only be able to proceed if each of the applicants agrees to the inclusion of a mandatory Public Interest Commitment (PIC) in its Registry Agreement. The mandatory PIC must include a commitment by the registry to use the TLD in line with the intended use presented in the application, and must also include a commitment by the registry that it will require registrants to use domains under the TLD in line with the intended use stated in the application.	See 24.3 above	See 24.3 above.
Topic 26: Security and Stability		

Recommendation 26.9: In connection to the affirmation of Recommendation 4 from the 2007 policy, Emoji in domain names, at any level, must not be allowed.	The Board is concerned that this recommendation could be argued to fall outside ICANN's mission which states, per the Bylaws (Section 1.1.(i)): "... Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS") and coordinates the development and implementation of policies concerning the registration of **second-level** [emphasis added] domain names in generic top-level domains ("gTLDs"). In this role, ICANN's scope is to coordinate the development and implementation of policies… [.]"	The policy behind this is that ICANN prevent the use of Emojis at all levels within a TLD in which the Registry Operator offers registrations. ICANN has a history within the Registry Agreement of going beyond the second level and is not certain why this issue is any different. If it can collect fees for registrations beyond the second level, and it can prohibit wildcarding at any level, then why would it not be able to prohibit emojis at any level in which the Registry Operator offers registrations. See: (a) Section 6.1 where ICANN has the ability to charge the registry-level fee for annual initial or renewal domain name registrations "(at one or more levels)". (b) Specification 5, Section 1: ICANN reserved the ASCII label "at the second level and at all other levels within the TLD at which Registry Operator offers registrations (such second level and all other levels are collectively referred to herein as, "All Levels") (c) Specification 5, Section 3.1: " The following ASCII labels must be withheld from registration or allocated to Registry Operator at All Levels for use in connection with the operation of the registry for the

		TLD: WWW, RDDS and WHOIS. The following ASCII label must be allocated to Registry Operator upon delegation into the root zone at All Levels for use in connection with the operation of the registry for the TLD: NIC. (d) Specification 5, Section 3.2: "Registry Operator may activate in the DNS at All Levels up to one hundred (100) names (plus their IDN variants, where applicable) necessary for the operation or the promotion of the TLD." (e) Specification 5, Section 3.3: "Registry Operator may withhold from registration or allocate to Registry Operator names (including their IDN variants, where applicable) at All Levels in accordance with Section 2.6 of the Agreement." (f) Specification 5, Section 4: "The country and territory names (including their IDN variants, where applicable) contained in the following internationally recognized lists shall be withheld from registration or allocated to Registry Operator at All Levels." (g) Specification 6, Section 2.2 (Wildcard Prohibition): "This provision applies for all DNS zone files at all levels in the DNS tree for which the Registry Operator (or an affiliate engaged in

		providing Registration Services) maintains data, arranges for such maintenance, or derives revenue from such maintenance.
Topic 29: Name Collisions		
Recommendation 29.1: ICANN must have ready prior to the opening of the application submission period a mechanism to evaluate the risk of name collisions in the New gTLD evaluation process as well as during the transition to delegation phase	The Board has concerns around the potential impact of NCAP on this recommendation and believes it is prudent to wait until after the release of the NCAP2 study before resolving on this recommendation	The understanding is that this study is due out imminently, but it should not hold up future rounds.
Topic 30: GAC Consensus Advice and GAC Early Warning		
Recommendation 30.4: Section 3.1 of the 2012 Applicant Guidebook states that GAC Consensus Advice "will create a strong presumption for the ICANN Board that the application should not be approved." Noting that this language does not have a basis in the current version of the ICANN Bylaws, the Working Group recommends omitting this language in future versions of the Applicant Guidebook to bring the Applicant Guidebook in line with the Bylaws language.[14] The Working Group further notes that the language may have the unintended consequence of hampering the ability of the Board to facilitate a solution that mitigates concerns and is mutually acceptable to the	The GAC has previously raised concerns around the wording of this recommendation. The Board will consult with GNSO Council and GAC before resolving on this recommendation.	At the time the Applicant Guidebook was written, the ICANN Bylaws only stated, "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution."

applicant and the GAC as described in the relevant Bylaws language. Such a solution could allow an application to proceed. In place of the omitted language, the Working Group recommends including in the Applicant Guidebook a reference to applicable Bylaws provisions that describe the voting threshold for the ICANN Board to reject GAC Consensus Advice.[15]		The decision to add the Guidebook's language about a presumption against delegation therefore made more sense and gave the GAC some added comfort that its advice on New gTLDs would be taken into account. However, in 2016, the Bylaws changed to state: *"Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection ("**GAC Consensus Advice**"), may only be rejected by a vote of no less than 60% of the Board, and the Governmental Advisory Committee and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution."* With this new wording in 2016 requiring that the Board must have a supermajority of 60% to override GAC Advice to not delegate a string inherently provides the added comfort that the Guidebook's language formally gave them. If you add the "Strong Presumption" on top of the already Super Majority: (i) what does that actually mean, (ii) it comes much closer to a VETO RIGHT, and (iii) ignores the number

		of Independent Review decisions that found that the strong presumption without public policy back-up violated ICANN's Bylaws. According to the most recent GAC comment on the recommendations, there not only was no consensus to change this recommendation, but there were members of the GAC that SUPPORTED this recommendation. More specifically is states: "Regarding Recommendation 30.4, there are diverse views within the GAC on the "strong presumption" language. Some GAC Members believe that Section 3.1 of the 2012 Applicant Guidebook, which states that GAC Consensus Advice "will create a strong presumption for the ICANN Board that the application should not be approved, "should be maintained, as they consider that this language was part of a delicate compromise during the 2012 round preparations and further consider that it is consistent with past and present Bylaws provisions. Further, said GAC Members consider that the possibility of maintaining a dialogue with the concerned applicant is not hampered by this language, considering that recommendation 30.7 of the PDP WG establishes ways and means to conduct such a dialogue even in the case of GAC Consensus Advice objecting to an application. **However, other GAC Members support the Working Group's recommendation to remove this**

		language, and believe that the text of any future Applicant Guidebook must be consistent with the Bylaws regarding GAC advice." (emphasis added).
Recommendation 30.5: The Working Group recommends that GAC Early Warnings are issued during a period that is concurrent with the Application Comment Period. To the extent that there is a longer period given for the GAC to provide Early Warnings (above and beyond the Application Comment Period), the Applicant Guidebook must define a specific time period during which GAC Early Warnings can be issued.	The GAC has previously raised concerns around the wording of this recommendation. The Board will consult with GNSO Council and GAC before resolving on this recommendation	This recommendation was to provide predictability to the community and ensure there was not an open ended multi-year process to solicit GAC Early Warnings. It does not state that there cannot be a longer period, but rather that the Applicant Guidebook define how long that period would be. This is a very reasonable recommendation.
Recommendation 30.6: Government(s) issuing Early Warning(s) must include a written explanation describing why the Early Warning was submitted and how the applicant may address the GAC member's concerns.	The GAC has previously raised concerns around the wording of this recommendation. The Board will consult with GNSO Council and GAC before resolving on this recommendation.	In the GAC's most recent correspondence on SubPro in June 2021, the GAC supports giving applicants an opportunity for direct dialogue with the GAC. It also remains open to increasing transparency and fairness. More specifically, it states: *The GAC believes that early warnings are a useful mechanism for beginning a discussion with an applicant on particular issues, questions and potential sensitivities by one or more governments, where an application may potentially infringe national laws or raise sensitivities. Constructive dialogue through this process can help applicants better understand the concerns of governments and help governments better understand the*

		planned operation of proposed gTLDs. GAC Early Warnings may help the applicant to know how it can mitigate concerns and find a mutually acceptable solution. The SubPro recommendation is very consistent with the GAC statement and therefore, we are not sure why there is still an issue.
Recommendation 30.7: Applicants must be allowed to change their applications, including the addition or modification of Registry Voluntary Commitments (RVCs, formerly voluntary PICs), to address GAC Early Warnings, GAC Consensus Advice, and/or other comments from the GAC.[17] Relevant GAC members are strongly encouraged to make themselves available during a specified period of time for direct dialogue[18] with applicants impacted by GAC Early Warnings, GAC Consensus Advice, or comments to determine if a mutually acceptable solution can be found.	See Recommendation 9.1	See above. On a personal level, isn't the purpose of GAC Early Warnings, GAC Advice, and objections in general, to engage in constructive dialogue to address any issues members of the community have? It just makes sense to allow that dialogue to result in something other than (a) the application may not proceed, or (b) the application proceeds as it was.
Topic 31: Objections		
Recommendation 31.16: Applicants must have the opportunity to amend an application or add Registry Voluntary Commitments (RVCs) in response to concerns raised in a formal objection. All these amendments and RVCs submitted after the application submission date shall be considered Application Changes and be subject to the	See Recommendation 9.1	See 30.7 and 9.1 above.

recommendations set forth under Topic 20: Application Change Requests including, but not limited to, an operational comment period in accordance with ICANN's standard procedures and timeframes		
Recommendation 31.17: To the extent that RVCs are used to resolve a formal objection either (a) as a settlement between the objector(s) and the applicant(s) or (b) as a remedy ordered by an applicable dispute panelist, those RVCs must be included in the applicable applicant(s) Registry Agreement(s) as binding contractual commitments enforceable by ICANN through the PICDRP.	See Recommendation 9.1	See 30.7 and 9.1 above.
Recommendation 32.1: The Working Group recommends that ICANN establish a mechanism that allows specific parties to challenge or appeal certain types of actions or inactions that appear to be inconsistent with the Applicant Guidebook.[19] The new substantive challenge/appeal mechanism is not a substitute or replacement for the accountability mechanisms in the ICANN Bylaws that may be invoked to determine whether ICANN staff or Board violated the Bylaws by making or not making a certain decision. Implementation of this mechanism must not conflict with, be inconsistent with, or impinge access to accountability mechanisms under the ICANN Bylaws.	The Board is still assessing the concerns regarding this recommendation, as set out in Operational Design Assessment, at topic 32 (pp. 169-176)	The ODA states that all of the recommendations are "feasible" but noted some concerns. The ODA makes an unsupported allegation that applying this process to certain types of challenges/appeals may cause "excessive, unnecessary costs or delays in the application process." 1. First of all, ICANN Org should never use the term "unnecessary" when a unanimous consensus has determined that the opposite is the case: namely, that it is necessary. 2. ICANN Org states that this is the purpose of Extended Evaluation in certain circumstances but admits that Extended Evaluation is not always available. In instances where Extended Evaluation is

The Working Group recommends that the limited challenge/appeal mechanism applies to the following types of evaluations and formal objections decisions[20]: **Evaluation Challenges** 1. Background Screening 2. String Similarity 3. DNS Stability 4. Geographic Names 5. Technical / Operational Evaluation 6. Financial Evaluation 7. Registry Services Evaluation 8. Community Priority Evaluation 9. Applicant Support 10. RSP Pre-Evaluation **Appeals of Formal Objections Decisions** 1. String Confusion Objection 2. Legal Rights Objection 3. Limited Public Interest Objection 4. Community Objection 5. Conflict of Interest of Panelists		available, and a new panel is able to review the applications, then perhaps in those circumstances, a challenge of the evaluation may not be needed. However, it is unclear in the Applicant Guidebook whether the new panel looks at the materials in an Extended Evaluation with a fresh perspective or whether it only looks at whether the new information provided solves the Initial Evaluators concerns. If the former, then this may be ok. If the later, then this may not fulfil the requirements of the SubPro recommendation. 3. The SubPro WG did not share the concern that the challenge/appeals mechanism would delay the opening and closing of rounds. If adequately resourced and planned, there is no reason why these cannot be performed without delaying the opening and closing. For example, if challenges to RSP Pre-evaluation must be made within 30 days of decisions, and the evaluators take another 30 days to evaluate a challenge, that should not result in any delays given that (a) there will likely not be more than 50 RSPs going for Pre-evaluation (at most), (b) most of them will be existing operators, and (c) the percentage of them needing a challenge is likely going to be small.
Recommendation 32.2: In support of transparency, clear procedures and rules	See recommendation 32.1	See above.

must be established for challenge/appeal processes as described in the implementation guidance below.		
Recommendation 32.10: The limited challenge/appeal process must be designed in a manner that does not cause excessive, unnecessary costs or delays in the application process, as described in the implementation guidance below.	See recommendation 32.1	See Above.
Topic 34: Community Applications		
Recommendation 34.12: The process to develop evaluation and selection criteria that will be used to choose a Community Priority Evaluation Provider (CPE Provider) must include mechanisms to ensure appropriate feedback from the ICANN community. In addition, any terms included in the contract between ICANN org and the CPE Provider regarding the CPE process must be subject to public comment.	The Board is concerned that this recommendation may require ICANN to publish for public comment confidential information, such as terms of a contract with a third party, including, e.g., fees and payments.	The recommendation states in pertinent part, "any terms included in the contract between ICANN org and the CPE Provider regarding the CPE process must be subject to public comment" Confidential terms in a contract regarding "fees, payments, etc." do not relate to the "CPE Process." The main point of this recommendation was to understand the exact interplay between ICANN and the CPE Providers; namely, (i) what interaction there was on the establishment of supplemental criteria (if any), (ii) what review (if any) ICANN Org has over any of the results, (iii) what input (if any) ICANN has into individual evaluations or in criteria, (iv) process for clarifying questions from the evaluator(s) and ICANN, etc.

		This recommendation can be adopted and implemented as written without disclosing truly confidential information.
Topic 35: Auctions		
Recommendation 35.3: Applications must be submitted with a bona fide ("good faith") intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit. Evaluators and ICANN must be able to ask clarifying questions to any applicant it believes may not be submitting an application with a bona fide intention. Evaluators and ICANN shall use, but are not limited to, the "Factors" described below in their consideration of whether an application was submitted absent bona fide intention. These "Factors" will be taken into consideration and weighed against all of the other facts and circumstances surrounding the impacted applicants and applications. The existence of any one or all of the "Factors" may not themselves be conclusive of an application made lacking a bona fide use intent. • Applicants may mark	The Board is concerned that this recommendation contains a reference to private auctions. Since there is no policy on private auction, this reference may create confusion during implementation and operationalization of the program.	This recommendation discusses Private Auctions (but does not endorse private auctions) because the PDP Working Group operated under the assumption that if there was no consensus to change a part of the 2012 New gTLD Program, the status quo would govern (meaning that because private auctions were allowed in 2012, and there was no consensus to disallow them, the status quo would mean that there would be private auctions). However, if there are no private auctions allowed, the recommendation would still apply in part (namely, having to apply for a TLD with a good faith intention to operate the TLD). There may be aspects that are no longer applicable, but that can easily be worked out once the Board decides whether there will or will not be private auctions.

portions of any such responses as "confidential" if the responses include proprietary business information. The Working Group discussed the following potential non-exhaustive list of "Factors" that ICANN may consider in determining whether an application was submitted with a bona fide ("good faith") intention to operate the gTLD. Note that potential alternatives and additional language suggested by some Working Group members are included in brackets: If an Applicant applies for [four] [five] or more strings that are within contention sets and participates in private auctions for more than fifty percent (50%) of those strings for which the losing bidder(s) receive the proceeds from the successful bidder, and the applicant loses each of the private auctions, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for each of those applications. • Possible alternatives to the above bullet point: • [If an applicant participates in six or more private auctions and fifty percent (50%)		

or greater of its contention strings produce a financial windfall from losing.] • [If an applicant receives financial proceeds from losing greater than 49% of its total number of contention set applications that are resolved through private auctions.] • [If an applicant: a. Has six or more applications in contention sets; and b. 50% or more of the contention sets are resolved in private auctions; and c. 50% or more of the private auctions produce a financial windfall to the applicant.] • [If an applicant applies for 5 or more strings that are within contention sets and participated in 3 private auctions for which the applicant is the losing bidder and receives proceeds from the successful bidder it MUST send to the evaluators a detailed reconciliation statement of its auction fund receipts and expenditure immediately		

on completion of its final contention set resolution. In addition this may be considered a factor by the evaluators and ICANN in determining lack of bona fide intention to operate the gTLD for all of its applications and in doing so might stop all its applications from continuing to delegation • If an applicant's string is not delegated into the root within two (2) years of the Effective Date of the Registry Agreement, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for that applicant. • If an applicant is awarded a top-level domain and [sells or assigns] [attempts to sell] theTLD (separate and apart from a sale of all or substantially all of its non-TLD related assets) within (1) year, this may be a factor considered by ICANN in determining lack of		

bona fide intention to operate the gTLD for that applicant. • [If an applicant with multiple applications resolves contention sets by means other than private auctions and does not win any TLDs.] Consideration of whether an application was submitted with a bona fide intention to operate the gTLD must be determined by considering all of the facts and circumstances surrounding the impacted application		
Recommendation 35.5: Applicants resolving string contention must adhere to the Contention Resolution Transparency Requirements as detailed below. Applicants disclosing relevant information will be subject to the Protections for Disclosing Applicants as detailed below. **Contention Resolution Transparency Requirements** • For Private Auction or Bidding Process / ICANN Auction of Last Resort: In the case of a private auction or an ICANN Auction of Last Resort, all parties in interest[21] to any agreements relating to participation of the applicant in the private auction or ICANN Auction of Last Resort must be disclosed to ICANN	The Board is concerned that this recommendation contains a reference to private auctions. Since there is no policy on private auction, this reference may create confusion during implementation and operationalization of the program.	See Above comment on Recommendation 35.3. In addition, ICANN has the power to adopt the recommendation at least to the extent that it relates to ICANN Auctions of Last Resort. This is a much better option that rejecting the entire recommendation. This would also clarify some issues that are still being "litigated" in ICANN's Accountability Mechanisms.

within 72 hours of resolution and ICANN must, in turn, publish the same within 72 hours of receipt. This includes: ○ A list of the real party or parties in interest in each applicant orapplication, including a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant; ● List the names and contact information[22] of any party holding 15% or more direct or indirect ownership of each applicant or application, whether voting or nonvoting, including the specific amount of the interest or percentage held; ● List the names and contact information[23] of all officers, directors, and other controlling interests in the applicant and/or the application; ● The amount paid (or payable) by the winner of the auction; The beneficiary(ies) of the proceeds of the bidding process and the respective distribution amounts; ● The beneficiary(ies) of the proceeds of the bidding process;		

and ● The value of the Applicant Support bidding credits or multiplier used, if applicable.[24] ● <u>For Other Forms of Private Resolution</u>: Where contention sets are privately resolved through a mechanism other than a private auction, the following must be disclosed: ○ The fact that the contention set (or part of a contention set), has been resolved privately (and the names of the parties involved); ○ Which applications are being withdrawn (if applicable); ○ Which applications are being maintained (if applicable); ● If there will be a change in ownership of the applicant, or any changes to the officers, directors, key personnel, etc., along with the corresponding information; ● All material information regarding any changes to information contained in the original application(s)(if any). In the event that any arrangements to resolve string contention results in any material changes to the surviving		

application, such changes must be submitted through the Application Change process set forth under Topic 20: Application Change Requests. **<u>Protections for Disclosing Applicants</u>** ● Except as otherwise set forth in the transparency requirements above, no participant in any private resolution process shall be required to disclose any proprietary information such as trade secrets, business plans, financial records, or personal information of officers and directors unless such information is otherwise required as part of a normal TLD application. ● The information obtained from the contention resolution process may not be used by ICANN for any purpose other than as necessary to evaluate the application, evaluate the New gTLD Program, or to otherwise comply with applicable law.		