New gTLD Subsequent Procedures Supplemental Recommendations

Background

On 10 September 2023, the ICANN Board resolved (see scorecard) to not adopt select recommendations from amongst five topics contained in the New gTLD Subsequent Procedures Final Report. On 26 October 2023, the ICANN Board resolved (see scorecard) to not adopt recommendations related to one additional topic. As indicated in the ICANN Bylaws, the Council, "shall meet to affirm or modify its recommendation, and communicate that conclusion (the "**Supplemental Recommendation**") to the Board, including an explanation for the then-current recommendation."

Herein contained are the GNSO Council's conclusions related to recommendations not adopted by the ICANN Board[1].

Supplemental Recommendations

Topic 9: Registry Voluntary Commitments / Public Interest Commitments

Supplemental Recommendation

Supplemental Recommendation 9.2: TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for specification 13, may be granted, upon a successful application for a waiver, an exemptions from either or both the mandatory PICs included in Specification 11 3(a) and Specification 11 3(b), provided that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator, or its Affiliates, for the exclusive use of Registry Operator or its Affiliates, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate or Registry Operator, and (iii) in the case of Spec 11 (3)(b), Registry Operator demonstrates that it takes or will take other effective steps to identify and mitigate domains in the TLD perpetrating DNS Abuse, but which may not constitute periodical technical analysis as envisaged under the Registry Agreement.

Implementation Guidance:

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[1] For Topic 22: Registrant Protections, the Council is not developing a Supplemental Recommendation. The GNSO Council understands from Next Round implementation staff that the Continued Operations Instrument (COI) will be discontinued and that potential registry failures will be considered as a risk of the new gTLD program overall and will be covered by the program's collective applications fees. In the unlikely event that Next Round implementation staff's position changes, the Council may revisit at that time whether or not a Supplemental Recommendation will be necessary.

- All TLDs will continue to be subject to the Spec 11 (3)(a) and (b) obligations unless they apply for, and meet the requirements to be granted, a waiver.
- The application for a waiver may be made as part of the application process, with the applicant making a contractual commitment to operate the TLD only in the required manner, once delegated.
- The registration policies for the TLD must reflect the limitations on registration and use necessary to qualify for the waiver.
- The Registry Operator must promptly notify ICANN in writing of any change to the TLD that could cause the TLD to fail to meet the requirements for the waiver. Registry Operator must also provide ICANN with any amendment or modification to the registration policies for the TLD that could potentially disqualify the TLD for the waiver.
- Registry Operator must conduct internal reviews at least once per calendar year to ensure that the TLD meets the requirements for the waiver. Within 20 calendar days following the end of each calendar year, Registry Operator will provide ICANN with the results of its internal review(s), along with a certification executed by one of its executive officers certifying that the TLD meets the requirements for the waiver.
- If, at any time, the TLD ceases to meet the requirements for a waiver, the Registry Operator will become subject to the Spec 11(3)(a) and (b) obligations.
- Denial of a waiver will not trigger any appeals process internal to the new gTLD program

Explanation for Supplemental Recommendation

The Council sought to address the concerns of the ICANN Board by making the following amendments to the original recommendation:

- The waiver for Spec 11 3(a) and/or 3(b) is not automatic; applicants must apply for and be granted a waiver.
- All domains in the gTLD must be registered to and controlled by the Registry Operator or its affiliates.
- The Registry Operator must take effective steps to identify and mitigate domains that are perpetrating DNS abuse, which may not constitute periodical technical analysis (as envisaged in the RA).

Topic 17: Applicant Support

Supplemental Recommendation

Supplemental Recommendation 17.2: The GNSO Council recommends expanding the scope of Applicant Support provided to Applicant Support Program beneficiaries beyond the application fee to provide access to an array of resources useful for the capacity building, planning, application, evaluation, pre-delegation and post-delegation phases of the lifecycle of the application. For the avoidance of doubt, this recommendation does not obligate ICANN to provide support for all phases of the lifecycle of the application process as well as the registry.

Community suggestions for implementation of supplemental recommendation 17.2: Below are some suggestions from the community which Council believes should be considered for possible implementation:
https://docs.google.com/document/d/1O9Kn0sTNB83wuYZC-xaD2WMW52x5fUYOWH_EmF6KWjA/edit

Explanation for Supplemental Recommendation

The Council sought to address the concerns of the ICANN Board by making the following amendments to the original recommendation:
- The specific reference to "application writing fees and attorney fees" was substituted for a much broader reference to an "array of resources useful for the capacity building, planning, application, evaluation, pre-delegation and post-delegation phases of the lifecycle of the application." However, the recommendation acknowledges that it may not be feasible to provide support for all phases of the application lifecycle.
- Because of the flexibility afforded by the phrasing of the Supplemental Recommendation, the Council has included a reference to community suggestions that should be considered during the implementation of the recommendation.

Topic 18: Terms & Conditions

Supplemental Recommendation (18.1)

Supplemental Recommendation 18.1: ICANN may only reject an application in accordance with the Applicant Guidebook, ICANN Board members' fiduciary duties, the ICANN Bylaws, or applicable laws. In the event an application is rejected, ICANN org must cite with specificity the reason(s) in accordance with the above for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.

Explanation for Supplemental Recommendation (18.1)

The Council sought to address the concerns of the ICANN Board by making the following amendments to the original recommendation:
- The emphasis was shifted away from specifying the grounds that would require ICANN org to reject an application, to providing the allowable grounds under which ICANN org may reject an application.

Supplemental Recommendation (18.3)

Supplemental Recommendation 18.3 In subsequent rounds, there must be mechanisms in place whereby Applicants have the ability to have evaluation decisions and objection decisions substantively reviewed. This may be satisfied by implementing challenge and appeal mechanisms described generally under Topic 32. If there are challenge and appeal mechanisms or other processes whereby those decisions can be substantively reviewed, ICANN may continue to have Terms and Conditions that contain a covenant not to sue. This recommendation is in reference to Section 6 of the Terms and Conditions from the 2012 round.

Explanation for Supplemental Recommendation (18.3)

The Council sought to address the concerns of the ICANN Board by making the following amendments to the original recommendation:
- The dependent language between the covenant not to sue and specific reference to the challenge and appeals mechanism as described under Topic 32 was removed. It was

clarified that there simply must be a process by which decisions can be substantively reviewed.

Topic 24: String Similarity Evaluations

Supplemental Recommendation

Supplemental Recommendation 24.3A: The GNSO Council recommends updating the string similarity policy 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 GNSO Council recommends prohibiting plurals and singulars of the same word within the same language/script.

1. An application for a single/plural variation of a word in the same language/script of an existing TLD or Reserved Name will not be permitted.
2. 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.

Supplemental Recommendation 24.3B: An application for a registered trademark term being applied for as a dotBrand TLD will not be placed in the same contention set with a non dotBrand application pursuant to 24.3A , if the application is one for which, pursuant and subject to Specification 13, domains are allocated and used only by the registry operator, its Affiliates and Trademark Licensees. For this 24.3B exception to apply, the applicant for the dotBrand would need to commit to maintaining Specification 13 in its contract. In the event that it ceased to be eligible for Specification 13, the TLD would need to be terminated. Nothing in this Supplemental Recommendation affects the right of any party to file a timely Objection pursuant to the Applicant Guidebook.

Supplemental Recommendation 24.3C: The GNSO Council recommends identifying and using recognised linguistic resources to determine the singular and plural version of the string for the specific language. If by using a recognised linguistic resource, two strings are determined to be the singular or plural of each other, then-these will be placed in a contention set.

Explanation for Supplemental Recommendation

The Council sought to address the concerns of the ICANN Board by making the following amendments to the original recommendation:
- The intended use elements of the recommendation were completely removed. Extraneous explanatory text and rationale were removed, which did not seem appropriate for inclusion in a recommendation.
- A provision was added that allows both the singular and plural to proceed when at least one application is a dotBrand.
- The sole reliance on a dictionary was expanded to recognised linguistic resources.

Topic 32: Limited Challenge/Appeal Mechanisms

Supplemental Recommendation

Supplemental Recommendation 32.1: The GNSO Council recommends that as set forth in Annex F[2], where feasible and implementable, ICANN establish a mechanism that allows specific parties[3] to, on a limited and one-time basis: (i) challenge evaluation results for which Extended Evaluation is unavailable, or (ii) appeal formal objection results, where such evaluation results or dispute resolution results appear to be inconsistent with the Applicant Guidebook.

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.

Supplemental Recommendation 32.2: In support of transparency, clear procedures and rules must be established for challenge/appeal processes generally aligned with the principles in the implementation guidance below.

Supplemental 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, generally aligned with the principles in the implementation guidance below.

Explanation for Supplemental Recommendation

The Council sought to address the concerns of the ICANN Board by making the following amendments to the original recommendation:
- The prescriptive list of evaluation and objection elements were removed and instead, the specific set of challengeable or appealable program elements will be dependent on them being feasible and implementable.
- The recommendation provides stronger emphasis that the challenge or appeal is limited and on a one-time basis.
- Evaluation elements where Extended Evaluation is available are unable to be challenged.
- The linkage between the recommendation and the underlying implementation guidance was softened.

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[2] As a result of limiting the challenge mechanism to only evaluation elements where Extended Evaluation is unavailable, Annex F should be considered to exclude these specific evaluation areas: Geographic Names, Technical & Operations, Financial, Registry Services, and RSP Pre-Evaluation.
[3] In Annex F, "specific parties" refers to the the column titled "Parties with standing"