



# UPDATE & CONSULTATION ON New gTLD Subsequent Procedures Consensus Building on Recommendations

## **OBJECTIONS** (v14)

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# Key Issues in Subsequent Procedures

## Recap of Objections in 2012 Round

- ❖ 4 Objection Grounds – (1) String Confusion (2) Legal Rights (3) Limited Public Interest (4) Community; triggers dispute resolution proceedings
- ❖ Grounds determine standing to file objection – ALAC and Independent Objector both qualify for (3) and (4)
  - ❑ (3) Limited Public Interest – open to anyone, subject to ‘quick look’ mechanism to weed out frivolous or abusive objections; review on the merits
  - ❑ (4) Community – open to “established institutions” with “clearly delineated communities”
- ❖ ALAC had a stringent process, involving RALOs, for considering and approving objections to be filed, funded by ICANN
- ❖ Independent Objector acts independently and in public interest, funded by ICANN, subject to limitation
- ❖ DRSPs are all external third parties selected, contracted by ICANN Org

### What is the New gTLD Subsequent Procedures (“SubPro”)?

- The set of rules and mechanisms applicable to the [next round](#) for New gTLDs i.e. they DO NOT apply to legacy TLDs, ccTLDs, or delegated new gTLDs or those still unresolved from the 2012 application round
- “An update” to the 2012 Round rules and mechanisms

## Topic 31: Objections

### How does the Objections mechanism affect us?

- ❑ Standing, ability of ALAC, *Independent Objector* to file Community Objections, Limited Public Interest Objections
- ❑ Processes for handling objections should be transparent and clear.
- ❑ In order to ensure a fair process for all parties, panelists, evaluators, and Independent Objectors must be free from conflicts of interest.
- ❑ Costs should be reduced where feasible without sacrificing the quality of proceedings
- ❑ Improvements to String Confusion Objections

# Review of existing positions on Objections

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## ALAC STATEMENTS have touched on:

- General aspects for Objection process – Code of Conduct & COI Guidelines, guidance for panelists & IO
- 1-or-3 person panels
- Continued provision for & role of IO
- Continued provision for & role of ALAC
- Community Objections
- String Confusion Objections

\* Did not comment on Legal Rights Objections



## RELATED SubPro Areas/Topics include:

- RVCs and PICDRP
- Application Change Requests
- Limited Challenge / Appeal Mechanism
- String Similarity



## COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- Rec 12:
  - ❖ Create incentives and/or eliminate current disincentives that encourage gTLD registries to meet user expectations ... *re String Confusion*

# Summary of SubPro Recs/IGs: Objections in General

## SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

### Affirmation 31.1

WG affirms from 2007:

- Rec #6 “Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law”. Egs cited – Paris Convention, UDHR
- Rec #20 “An application will be rejected if it is determined, based on public comments or otherwise, that there is substantial opposition to it from among significant established institutions of the economic sector, or cultural or language community, to which it is targeted or which it is intended to support.”
- IG H “External dispute providers will give decisions on objections”
- IG P (specific to Community Objection): “The following process, definitions and guidelines refer to Rec #20  
>> See next slide
- IG Q “ICANN staff will provide an auto reply to all those who submit public comments that will explain the objection procedures.”

WG affirms from 2007 with modification:

### Affirmation with Modification 31.2

- Rec #12 “Dispute resolution and challenge processes must be established prior to the start of the process.” Consistent with IG 31.12, WG affirms Rec #12 with modification, “Dispute resolution and challenge processed must be established prior to the start of the process, details of which must be published in the Applicant Guidebook.”

### Affirmation with Modification 31.3

- IG R “Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated”. WG modifies this Implementation Guideline to “Once a response to the objection has been filed by the applicant(s), there may be a cooling off period for negotiation or compromise by agreement of both parties if formally submitted to the arbitration forum.”

### Affirmation 31.4

- WG affirms overall approach to the Public Objection and Dispute Resolution Process described in 2012 AGB s. 3.2, subject to the recommendations below.
- WG further affirms that parties with standing should continue to be able to file formal objections with designated third-party dispute resolution providers on specific applications based on the following grounds: (i) String Confusion Objection (ii) Existing Legal Rights Objection (iii) Limited Public Interest Objection (iv) Community Objection

### Implementation Guidance 31.5

- Where possible, costs associated with filing an objection should be reduced while maintaining the quality and integrity of the objections process.

### Implementation Guidance 31.6

- Info about fees charged by dispute resolution service providers in previously filed formal objections should be accessible for future review.

### Implementation Guidance 31.7

- Consideration should be given to whether there were barriers to filing an objection in the 2012 round, and if so, whether those barriers can and should be reduced in subsequent procedures. Specifically, WG suggests further consideration of the time required to file an objection, the expertise required, and limited awareness of the opportunity to file.

# Details of Implementation Guidance P – Community Objection

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## Process

Opposition must be objection based

Determination will be made by a DR panel constituted for the purpose

Objector must provide verifiable evidence that it is an established institution of the community

## Guidelines

Task of DR panel is the determination of substantial opposition

a) substantial – in determining substantial, panel will assess: significant portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment

b) significant portion – in determining significant portion, panel will assess balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. Panel will assess significance proportionate to the explicit or implicit targeting

**c) community – community should be interpreted broadly and will include, for eg., an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.**

d) explicitly targeting – explicitly targeting means there is a description of the intended use of the TLD in the application

e) implicitly targeting – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.

f) established institution – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

**The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.**

g) formal existence – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.

h) detriment – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.”

# Impact of SubPro Recs/IGs: Objections in General

## IMPACT For At-Large Consensus Building

- Generally, approach from 2012 round to be retained, with some changes
- Use of third-party DRSP retained
- The 4 Objection grounds remain, to determine standing
- Punted to IRT are issues re:
  - Costs to file, review of DRSP fees
  - Lowering barriers to file including time to file, expertise required and awareness of objection filing opportunity
- For Community Objection,
  - “community” should be interpreted broadly and will include, for eg., an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted
  - ALAC is defined as an established institution
  - **RE: Affirmation 31.4 “WG further affirms that parties with standing should continue to be able to file formal objections ...” based on the 4 existing grounds / types of objections.**

Question: Does this mean that ALAC has standing and therefore no ALAC-filed Community Objection should be dismissed on grounds of “no standing” ?? Consider ....

# Is there a need for more clarity in AGB text?

Potential issue stemming from how AGB is written with respect to Eligibility vs. Standing

- s. 3.2.1 Ground for Objection

Community Objection - “Substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted”

- s. 3.2.2 Standing to Object

Community Objection - “Established institution associated with a clearly delineated community”

- s. 3.2.2.4 Community Objection

- “Established institution associated with clearly delineated communities are eligible to file a community objection”
- “To qualify for standing for a community objection, the objector must prove both
  - (1) it is an established institution and
  - (2) it has an ongoing relationship with a clearly delineated community”

- s. 3.5.4 Community Objection

4 tests for DRSP panel to determine ground for objection should be guiding framework

## IMPACT For At-Large Consensus Building

- ALAC is an established institution, not required to provide verifiable evidence that it is an established institution of the community (per IG P)
- But does ALAC have an ongoing relationship with a clearly delineated community for which opposition is expressed?

- Scenario 1. If ALAC’s objection cites the At-Large as the community then yes, since it has an ongoing relationship with At-Large via RALOs which is a clearly delineated community
  - In this case, ALAC must be **BOTH ELIGIBLE AND HAVE STANDING** to file Community Objections
  - And therefore there should be no dismissal of an ALAC Community Objection on the basis of “no standing”
  - Does this need to made clearer somehow?
- Scenario 2. If ALAC’s objection cites an ‘adopted’ community, then standing is not automatic or may not be readily shown?
  - Should we rectify this?

❖ Err on side of caution: lobbied for insertion of “standing” as one of the limited grounds for appeal

# Breaking down the 4 tests for Community Objection ground

Per: AGB s. 3.5.4, means that in SubPro, for ALAC to succeed, it needs to prove it meets 4 tests

1. The community invoked by the objector is a clearly delineated community

2. Community opposition to the application is substantial

3. There is a strong association between the community invoked and the applied-for gTLD string

4. The application creates a likelihood of material detriment to the rights or legitimate interest of a significant portion of the community to which the string may be explicitly or implicitly targeted

## Community

- Objector must prove that the community expressing opposition can be regarded as a clearly delineated community.
- SUBJECT TO STRUCTURING OF OBJECTION

## Substantial Opposition - within invoked community

- No. of expressions of opposition relative to composition of community
- Representative nature of those expressing opposition
- Level of recognized stature/ weight among sources of opposition
- Distribution of diversity among sources of opposition – regional, subsectors, leadership, membership
- Historical defence of community in other context
- Costs incurred, other channels to convey opposition

## Targeting

- Statements in application
- Other public statements by applicant
- Associations by the public

## Detriment

- Nature & extent of reputation damage to community
- Evidence that applicant not acting or does not intend to act in interest of community / users – no effective institution of security protection for user interests
- Interference with core activities of community resulting from operating string
- Dependence of the community represented on DNS for its core activities
- Nature & extent of concrete or economic damage to community resulting from operating string
- Level of certainty that alleged detrimental outcomes would occur

~ New gTLD Review Group



# Summary & Impact of SubPro Recs/IGs: Independent Objector

## SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

### Affirmation 31.8

- Affirms role of Independent Objector (IO) in subsequent procedures, subject to changes introduced from other recs and IG below
- IO should be given opportunity to file only Community and/or Limited Public Interest objections when doing so serves best interests of the public who use the global Internet.

### Implementation Guidance 31.9

- A mechanism should be established (eg. Standing panel of multiple IO panelists) that mitigates the possible conflict of interest issues that may arise from having a single panelist serving as the IO.

## IMPACT For At-Large Consensus Building

- Aff 31.8 + IG 31.9:
  - Role of Independent Objector to continue
  - IO can file Community and/or LPI objections
  
- Standing panel of multiple IOs to handle conflict of interest risk

# Summary & Impact of SubPro Recs/IGs: Dispute Resolution Panel

## SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

### Recommendation 31.10

- For all types of objections, parties to a proceeding must be given opportunity to mutually agree upon a single panelist or a 3-person panel, bearing the costs accordingly. Absent agreement from parties, default is single panelist.

### Recommendation 31.11

- ICANN must provide transparency and clarity in objection filing and processing procedures, including resources and supplemental guidance used by DRP panelists to arrive at decision, expert panelist selection criteria and processes, and filing deadlines.

### Implementation Guidance 31.12

- All criteria and/or processes to be used by panelists for the filing of, response to, and evaluation of each objection, should be included in AGB.

### Implementation Guidance 31.13

- Information about fees and refunds for DR processes should be readily available prior to commencement / opening of the application submission period.

### Implementation Guidance 31.14

- Prior to launch of application submission period, to the extent DR panelists draw on other guidance, processes and/or sources of information to assist them, such information should be made publicly available and easily found – respective website or preferably, a central location

## IMPACT For At-Large Consensus Building

- Recs 31.10 and 31.11:
  - Parties can choose 1 panelist or 3-person panel, but default is single panelist
  - Transparency, clarity in filing, processing procedures
- IGs 31.12, 31.13 and 31.14 increase transparency on:
  - All criteria, processes used by DR panelists by way of inclusion in AGB
  - DR fees and refunds made known upfront
  - Any other guidance, procession or sources of info relied upon by DR panelists to be made publicly and easily accessible

# Summary & Impact of SubPro Recs/IGs: Eliminating Abuse of Process, Allowing Registry Voluntary Commitments

## SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

### Recommendation 31.15

- “Quick look” mechanism which applied only to LPI Objection, must be developed by the IRT to all objection types. It’s designed to identify and eliminate frivolous and/or abusive objections.

### Recommendation 31.16

- Applicants must have opportunity to amend application or add RVCs in response to concerns raised in objection.
- All these amendments and RVCs submitted after application period closes shall be considered as Application Changes – so subject to Application Change Request procedures (including public comment) per ICANN’s standard procedures and timeframes.

### Recommendation 31.17

- To extent RVCs are used to resolve an objection either (a) as a settlement between objector(s) and applicant(s) or (b) as remedy ordered by an applicable DR panelist, those RVCs must be included in the applicable Applicant RA as binding contractual commitments enforceable by ICANN through PICDRP.

## IMPACT For At-Large Consensus Building

- Recs 31.15, 31.16 and 31.17:
  - Extending “quick look” mechanism to all objections
  - Amendments to application or addition of RVCs for resolving concerns raised in objection – subject to Application Change Request procedures
  - **RVCs included in RA as binding contractual commitments enforceable through PICDRP (now a policy recommendation, hence “mandated”)**

# Summary & Impact of SubPro Recs/IGs: String Confusion Objection

## SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

### Recommendation 31.18

- ICANN must reduce risk of inconsistent outcomes in String Confusion Objection Process, especially where objector seeks to object to multiple applications for the same string.

### Implementation Guidance 31.19

ICANN should allow a single String Confusion Objection to be filed against all applicants for a particular string, rather than requiring a unique objection to be filed against each application. Specifically:

- An objector may file a single objection that extends to all application for an identical string
- Given that an objection encompassing several applications would require more work to process and review, the String Confusion DRSP could introduce tiered pricing structure for these sets. Each applicant for that identical string would still prepare a response to the objection.
- Same panel to review all documentation associated with the objection, each response to be reviewed on its own merits
- Panel would issue a single determination that identified which applications would be in contention. Any outcome that resulted in indirect contention would be explained as part of the panel's determination.

## IMPACT For At-Large Consensus Building

- Rec 31.18 + IG 31.19 seek to resolve key issues arising from String Confusion Objections from 2012 round:

Reduce inconsistent outcomes in objections filed where objection is against multiple applications for same string

- So, 1 objection for all applications for identical string
- But, applicants affected required to submit own response (if any)
- Have same panel to review all documentation on the one objection
- Panel to issue single determination; to include explanation on any resulting indirect contention