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

Objections
[GAC Advice & GAC Early Warning]

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Key Issues in SubPro

GAC Advice & GAC Early Warning

(part of "Objections")

- Timing and nature of Advice/Early Warning
- Impact on applicants/applications

- 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

GAC Advice / GAC EW: Consensus Building

ALAC STATEMENTS support/state:

- GAC Advice:
  - (1) should *[sic]* include clearly articulated rationale, including national or international law or policy basis.
  - (2) GAC Advice and ensuing Board action on categories should be issued prior to finalization of next AGB, thereafter GAC Advice issued during application period to apply to individual strings based on merit and details of application.
  - (3) No GAC Advice if no full consensus support by GAC.
- Issuance of GAC Early Warnings should be during a specified time and to include both written rationale/basis and specific action requested of applicant.
- Suggestion to remove of all references to a strong presumption to be taken by the ICANN Board

RELATED SubPro Areas/Topics include:

- Mandatory PICs, Voluntary PICs
- Safeguards for Sensitive Strings – Verified TLDs
- Appeal Mechanism

COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- Rec. 33:
  - GAC Advice to include rationale and be subject to timelines; also when does GAC Advice apply to categories of TLD applications vs individual TLD application; to allow ICANN Board to determine how to apply advice.
  - ICANN should provide a template to the GAC for advice related to specific TLDs; and AGB should clarify the process and timelines by which GAC advice is expected for individual TLDs.
  - CCT believes there should be a mechanism created to specifically allow objections by individual members of the GAC and means to challenge assertions of fact by GAC members.
  - Finally, some sort of appeals mechanism is imperative.

Impact of SubPro Recommendations * as at 3 June 2020

SubPro PDP WG

Affirmation #1

- GAC has ability of the GAC to issue GAC Consensus Advice in accordance with the ICANN Bylaws
- Keep GAC Early Warning mechanism as has served its intended purpose

Implementation Guidance

- Deals with treatment of GAC Consensus Advice provided:
  - ❑ Prior to finalization & publication of AGB
  - ❑ After finalization & publication of AGB – regardless of categories, groups or classes of applications or string types, or to a particular string

Recommendation #4

- WG 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 AGB must define a specific time period during which GAC Early Warnings can be issued

For At-Large Consensus Building

Impact

- Affirmation #1: **Continue to have GAC Early Warning mechanism**, limited to:
  - ❑ Applicable to single applications /strings, not category of strings
  - ❑ Distinct to GAC Consensus Advice, so can be issued by one or more GAC members
  - ❑ During [public] comment period; Recommendation #4 unless extended as specified in AGB

- Implementation Guidance:
  - ❑ **GAC should provide GAC Consensus Advice on categories of TLDs (if any) prior to the finalization and publication of the next AGB**
  - ❑ **If GAC Consensus Advice is issued after the finalization and publication of the next AGB, then ICANN Board should take into account the circumstances resulting in such timing and the possible detrimental effect of such timing in deciding on what to do with the GAC Consensus Advice, per Bylaws**

Additional intervention

- Any concerns?

** From SubPro PDP WG, not limited to recommendations, but also affirmations and implementation guidance*

SubPro WG Rationale for Affirmation #1

Affirmation #1

- WG acknowledges the ability of the GAC to issue GAC Consensus Advice in accordance with the ICANN Bylaws. In addition, subject to the recommendations below, WG supports the 2012 implementation of GAC Early Warnings. Section 1.1.2.4 of the 2012 AGB describes the Early Warning mechanism: "Concurrent with the [public] comment period, ICANN's GAC may issue a GAC Early Warning notice concerning an application. This provides the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments."

WG's Rationale

- WG believes that the **GAC Early Warning mechanism served its intended purpose of allowing GAC members to raise concerns about New gTLD applications**, and further **acknowledges the role of GAC Consensus Advice as defined in the ICANN Bylaws**. The Working Group supports continuation of these mechanisms in subsequent rounds, subject to the recommendations included in this report

** From SubPro PDP WG, not limited to recommendations, but also affirmations and implementation guidance*

SubPro WG Rationale for Affirmation #1 (Cont'd)

Affirmation #1

Implementation Guidance

- To the extent that the GAC provides **GAC Consensus Advice** (as defined in the ICANN Bylaws) in the future **on categories of TLDs**, the GAC **should provide this Advice prior to the finalization and publication of the next AGB**.
- **In the event that GAC Consensus Advice is issued after the finalization and publication of the next AGB** and whether the GAC Consensus Advice applies to categories, groups or classes of applications or string types, or to a particular string, **the ICANN Board should take into account the circumstances resulting in such timing and the possible detrimental effect of such timing in determining whether to accept or override such GAC Consensus Advice as provided in the Bylaws**."

WG's Rationale

- GAC Consensus Advice in the 2012 round was provided for whole categories of applications, whereas the 2012 AGB states that Consensus Advice is to be provided for individual applications -- applicants and other parties experienced uncertainty because it was unclear if the lists were exhaustive and was also unknown whether those applying for strings in related industries might be impacted
- Believes that in support of predictability, if the GAC issues **Consensus Advice on categories** in the future, this Consensus Advice **should be given by the GAC before the next AGB is finalized and published**, so that prospective applicants and the Internet community fully understand the implications and scope of the Consensus Advice before the application process begins.
- **GAC Consensus Advice issued once the application submission period has begun whether the GAC Consensus Advice applies to categories, groups or classes of applications or string types, or to a particular string, the ICANN Board should take into account the circumstances resulting in such timing and the possible detrimental effect of such timing in determining whether to accept or override such GAC Consensus Advice as provided in the Bylaw**.
- Considered input from individual GAC members on an early draft of the text. A number of GAC members emphasized that it is important for the GAC to have flexibility in providing Consensus Advice. Noting this input, WG revised the Implementation Guidance to provide for flexibility while also encouraging the Board to consider all relevant factors when making a decision on GAC Advice.

SubPro WG Rationale for Recommendation #4

Recommendation #4

- WG 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 AGB must define a specific time period during which GAC Early Warnings can be issued

WG's Rationale

- WG supports processes that provide the GAC with a fair and consistent opportunity to provide Early Warnings while also ensuring that that application process is transparent and predictable for all parties.
- Believes that by providing a clear timeframe in which GAC members may provide Early Warning(s) on applications, predictability will be increased in the application process for all parties

Impact of SubPro Recommendations

SubPro PDP WG

Recommendation #2

- As stated in the ICANN Bylaws, GAC Consensus Advice must include a clearly articulated rationale.
- WG recommends that GAC Consensus Advice be limited to the scope set out in the applicable Bylaws provisions and elaborate on any "interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."
- To the extent that the rationale for GAC Consensus Advice is based on public policy considerations, well-founded merits-based public policy reasons must be articulated.

For At-Large Consensus Building

Impact

- Requires GAC Consensus Advice to include clearly articulated rationale
- Consistent with CCT-RT Rec 33, "*…GAC consensus advice to the Board regarding gTLDs should also be* ***clearly enunciated, actionable and accompanied by a rationale****, permitting the Board to determine how to apply that advice ..*"

Additional intervention

- Any concerns?

SubPro WG Rationale for Recommendation #2

Recommendation #2

- As stated in the ICANN Bylaws, GAC Consensus Advice must include a clearly articulated rationale.
- WG recommends that GAC Consensus Advice be limited to the scope set out in the applicable Bylaws provisions and elaborate on any "interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."
- To the extent that the rationale for GAC Consensus Advice is based on public policy considerations, well-founded merits-based public policy reasons must be articulated.

WG's Rationale

- **The ICANN Bylaws require that Advice provided by ACs must be clear, unambiguous and accompanied by a rationale.**
- **Notes that CCT-RT Recommendation 33 specifically references this requirement with respect to GAC Consensus Advice related to gTLDs**.
- Emphasizes that by providing a rationale that is in line with the scope of GAC Consensus Advice per ICANN Bylaws, the GAC not only permits the Board to determine how to apply that Advice, but it also gives applicants an opportunity to remedy concerns raised in GAC Consensus Advice while still proceeding with the application process if those concerns have been sufficiently addressed.
- WG further believes that the requirement to provide a rationale supports transparency and predictability, which are essential in processes related to the New gTLD Program

Impact of SubPro Recommendations

SubPro PDP WG

Recommendation #3

- 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, WG recommends omitting this language in future versions of the AGB to bring the AGB in line with the Bylaws language.
- To avoid unintended consequence of limiting Board's facilitation of a solution that mitigates concerns and is mutually acceptable to applicant and GAC, per Bylaws. Such a solution could allow an application to proceed.
- Instead, include in AGB a reference to applicable Bylaws provisions that describe the voting threshold for the ICANN Board to reject GAC Consensus Advice.

For At-Large Consensus Building

Impact

- Removes strong presumption for ICANN Board that GAC Consensus Advice means the application should not be approved. Bringing in line with Bylaws.

Additional intervention

- Any concerns?

SubPro WG Rationale for Recommendation #3

Recommendation #3

- 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, WG recommends omitting this language in future versions of the AGB to bring the AGB in line with the Bylaws language.
- 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 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, WG recommends including in the AGB a reference to applicable Bylaws provisions that describe the voting threshold for the ICANN Board to reject GAC Consensus Advice.

WG's Rationale

- WG seeks to ensure that policy and future versions of the AGB are consistent with the applicable provisions of the ICANN Bylaws
- In the 2016 revisions to the ICANN Bylaws, changes made to sec. 12.2, which describes the role of the GAC and GAC Consensus Advice – do not indicate that GAC Consensus Advice "will create a strong presumption for the ICANN Board that the application should not be approved.
- By omitting the language referenced in this recommendation, the Board has greater flexibility to facilitate a solution that both accepts GAC Consensus Advice and allows for the delegation of a string if the underlying concerns that gave rise to the GAC Consensus Advice are addressed.
- Allowing for mutually acceptable solutions is consistent with the relevant section of the Bylaws.
- WG considered input from individual GAC members regarding this recommendation, noting that a number of GAC members, although not all, favored retaining the existing "strong presumption" language in the Applicant Guidebook. WG appreciates this input but nonetheless believes that it is appropriate to omit the language for the reasons stated above.

Impact of SubPro Recommendations

SubPro PDP WG

Recommendation #5

- 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.

For At-Large Consensus Building

Impact

- Require GAC Early Warnings to include explanation and how to resolve concerns.

Additional intervention

- Any concerns?

SubPro WG Rationale for Recommendation #5

Recommendation #5

- 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.

WG's Rationale

- Written explanation in the Early Warning needed as to why it is being issued and how the applicant may potentially be able to address the underlying concerns.
- This measure provides greater transparency in the process and also enables applicants to propose specific changes to the application to address concerns raised by GAC members

Impact of SubPro Recommendations

SubPro PDP WG

Recommendation #6

- 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 and/or GAC Consensus Advice.

- **Relevant GAC members** are strongly encouraged to make themselves available during a specified period of **time for direct dialogue with applicants impacted by GAC Early Warnings or GAC Consensus Advice** to determine if a mutually acceptable solution can be found.

For At-Large Consensus Building

Impact

- GAC members encouraged to dialogue with applicant impacted by GAC Early Warnings of GAC Consensus Advice to strive for mutually acceptable solution.
- Solutions which lead to addition or modification of RVCs allowed, subject to Application Change Request process – evaluation, PC.

Additional intervention

- Any concerns?

SubPro WG Rationale for Recommendation #6

Recommendation #6

- 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 and/or GAC Consensus Advice.
- Relevant GAC members are strongly encouraged to make themselves available during a specified period of time for direct dialogue with applicants impacted by GAC Early Warnings or GAC Consensus Advice to determine if a mutually acceptable solution can be found.

WG's Rationale

- To the extent that applicants can address concerns raised in GAC Early Warnings or GAC Consensus Advice through proposed changes to the application, they must have the opportunity to make such changes and continue with the application process.
- Potential amendments could include the addition of RVCs.
- Application changes would be subject to evaluation by ICANN as discussed under "Application Change Requests".
- Believes that applicants and GAC members both benefit from the opportunity to engage directly in dialogue about the content of Early Warnings and GAC Consensus Advice, as well as underlying concerns that the GAC members may have about an application - provides parties the opportunity to avoid misunderstandings, address any incorrect assertions of fact, and potentially come to a mutually agreeable solution.

New Issue as at 3 June 2020

SubPro PDP WG

❑ 1. Harmonizing PDP recommendations with CCT-RT recommendation 33 – additional work?

Recommendation 33 states: "As required by the October 2016 Bylaws, GAC consensus advice to the Board regarding gTLDs should also be clearly enunciated, actionable and accompanied by a rationale, permitting the Board to determine how to apply that advice. ICANN should provide a template to the GAC for advice related to specific TLDs, in order to provide a structure that includes all of these elements. In addition to providing a template, the Applicant Guidebook (AGB) should clarify the process and timelines by which GAC advice is expected for individual TLDs."

- WG believes that recommendation #2 is consistent with the CCT-RT's recommendation that GAC Consensus Advice is "enunciated, actionable and accompanied by a rationale."
- **Not yet made a decision** about whether to provide further recommendations corresponding to the other elements of the CCT-RT recommendation, in particular regarding the *proposed template for GAC Consensus Advice related to specific TLDs and clarification in the AGB regarding process and timelines for GAC Consensus Advice directed at specific TLDs*.

- Re: a *mechanism created to specifically allow objections by individual members of the GAC and means to challenge assertions of fact by GAC members*, WG believes that creating the opportunity for **dialogue between applicants and GAC members** as part of the Early Warning and GAC Consensus Advice processes (recommendation #6) provides a potential means to "challenge assertions of fact by GAC members."

For At-Large Consensus Building

Impact

- CCT-RT Rec 33 elements seemingly partly met? Vis a vis:
  - ❑ GAC Consensus Advice including clear enunciated, actionable, with rationale,
  - ❑ Mechanism to allow objection by individual GAC members, means to challenge assertion of fact

Additional intervention

- Do you have further concerns, suggestions on what should be done?