SubPro ODP: Policy Question Set #4 (Overarching & Topic-Specific)

Overarching Policy Question

1. Is it the Council's view that affirmations of 2007 policy in the SubPro Final Report be treated by the Board in the same way as new policy recommendations? (see, e.g., Rec 6.1).

Policy Questions | TLD Types:

Recommendation 4.1: The Working Group recommends differential treatment for certain applications based on either the application type, the string type, or the applicant type. Such differential treatment may apply in one or more of the following elements of the new gTLD Program: Applicant eligibility 20; Application evaluation process/requirements21; Order of processing; String contention22; Objections23; Contractual provisions.

- Different application types:
  - Standard
  - Community-Based (for different application questions, Community Priority Evaluation, and contractual requirements)
  - Geographic Names (for different application questions)
  - Specification 13 (.Brand TLDs) (for different application questions and contractual requirements)

- Different string types:
  - Geographic Names (for different application questions)
  - IDN TLDs (priority in order of processing)
  - Variant TLDs
  - Strings subject to Category 1 Safeguards

- Different Applicant Types:
  - Intergovernmental organizations or governmental entities (for different contractual requirements)
  - Applicants eligible for Applicant Support

Recommendation 4.2

Other than the types listed in Recommendation 4.1, creating additional application types[32] must only be done under exceptional circumstances. Creating additional application types, string types, or applicant types must be done solely when differential treatment is warranted and is

NOT intended to validate or invalidate any other differences in applications.

Implementation Guidance 4.3

> To the extent that in the future, the then-current application process and/or base Registry Agreement unduly impedes an otherwise allowable TLD application by application type, string type, or applicant type, there should be a predictable community process by which potential changes can be considered. This process should follow the Predictability Framework discussed under Topic 2. See also the recommendation under Topic 36: Base Registry Agreement regarding processes for obtaining exemptions to certain provisions of the base Registry Agreement.

Questions on 4.1,4.2, and 4.3:

A. Can the Council provide clarity on what the recommended differences are relative to the 2012 round with respect to the types of TLDs mentioned in Recommendation 4.1?
B. Does the Council agree that the lists of application types and string types listed in 4.1 are not exhaustive and that some other applicant types already exist - wording in Rec 4.2 notwithstanding? Otherwise, for example, applicants requesting a Code of Conduct exemption might be grouped with Spec 13 applicants despite not being exactly the same; similarly, IDNs do not just differ in prioritization, such strings will require different technical reviews.

Policy Questions | Conflicts of Interest:

Recommendation 8.1:

"ICANN must develop a transparent process to ensure that dispute resolution service provider panelists, Independent Objectors, and application evaluators are free from conflicts of interest. This process must serve as a supplement to the existing Code of Conduct Guidelines for Panelists, Conflict of Interest Guidelines for Panelists, and ICANN Board Conflicts of Interest Policy."

Questions on 8.1

A. Does the Council have additional input on the Working Group's position that provisions in the 2012 round were insufficient to effectively guard against conflicts of interest among dispute resolution service provider panelists, the Independent Objector, and application evaluators, as detailed in the Rationale for Recommendation 8.1?

Policy Questions | PICs/RVCs:

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 comment, 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 Application Changes Requests, including, but not limited to, an operational comment period in accordance with ICANN's standard procedures and timeframes."

Questions on 9.9

A. Does the Council agree that there should be no other reasons than those listed in 9.9 because of which an applicant can submit a revised RVC?

B. Does the Council agree that an applicant can amend an RVC?

C. If the Council's answer is 'yes' to question 9.9 B, then the ODP team notes that allowing the change up until the execution of a Registry Agreement could lead to less predictability for stakeholders and added operational complexity for ICANN org, both of which may lead to additional processing time. This also provides an opportunity for applicants to resolve a contention set via the introduction or revision of the RVC, then submit another change request to revert back to its original RVC afterwards as a way to "cheat the system." Does the Council have any concerns about the reduced predictability and transparency under such a scenario?

D. Does the Council agree that if an RVC is utilized to address GAC Advice, prevailing objections, it will be up to the applicant and the objector or the GAC to mutually agree that the RVC addresses the original concern and to communicate to ICANN how the RVC addresses the original objection or GAC advice?

E. Does the Council agree with ICANN org's interpretation that in such a scenario, when no mutual agreement is reached, the application will not be able to proceed. If not, what is the way forward for the applicant according to the Council?

Recommendation 9.10

RVCs must continue to be included in the applicant's Registry Agreement.

Question on 9.10

A. Does the Council agree that this means that RVCs must continue to be in the Registry Agreement after contract renewal or assignment and cannot be modified or removed from the Registry Agreement in the future.

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)."

Questions on 9.12

A. Is it expected that the RO cannot terminate a RVC mid-operation unless that was explicitly set forth at the time the RVC was made?
B. Are there any scenarios under which an RVC can be changed?

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).

Questions on 9.2:

A. Can the Council provide guidance on the following: Recommendation 9.2 requires providing single-registrant TLDs with exemptions to Specification 11.3(a) and (b). Single registrant TLD is not defined among the TLD types under topic 4. Single registrant TLD does not appear to be defined in the report. Should this be considered an "additional application type" under Recommendation 4.2? What criteria are expected to be used to determine when this exemption applies?

B. ICANN org notes that Spec 13 and CoC exemptions are not only single registrant scenarios, as both include affiliates, too. Does this the Council agree that 9.2 applies to those type of TLD operators, too.

C. Can the Council provide guidance on the following: The rationale for Recommendation 9.2 notes that security threat monitoring should not apply for single-registrant TLDs because the threat profile is much lower compared to TLDs that sell second-level

domains. Given that single-registrant TLD is not defined, how can the level of risk be known?

Policy Questions | Application Change Request:

Recommendation 20.8:

"The Working Group recommends allowing .Brand TLDs to change the applied-for string as a result of a contention set where (a) the change adds descriptive word to the string, (b) the descriptive word is in the description of goods and services of the Trademark Registration, (c) such a change does not create a new contention set or expand an existing contention set, (d) the change triggers a new operational comment period and opportunity for objection and, (e) the new string complies with all New gTLD Program requirements"

Questions on 20.8:

A. Does the Council agree that the intent of 20.8 is that only one single descriptive word - and not multiple descriptive words - can be added to the string? For example, .delta-faucets would be acceptable, whereas .delta-kitchen-faucets would not be acceptable.
B. Does the Council agree that the descriptive word must be in the language of the relevant trademark registration and cannot be a translation or transliteration thereof? For example, if said company had its trademark registered only in Germany, .delta-wasserhahn* would be acceptable, whereas .delta-faucet would not be. Similarly, if Delta had a trademark registration in German and English, then both those examples would be acceptable.

   *wasserhahn being the German translation of faucet.

Policy Questions | Registrant Protection:

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."

Question on 22.7:

A. This Recommendation is based on the rationale that an EBERO event would not be necessary "in business models where there are no registrants in need of such

protections in the event of a TLD failure." ICANN org notes a concern that the inclusion of Specification 9 exemption or Specification 13 in a Registry Agreement does not ensure there are no registrants or other end users in need of protection. For example, a car manufacturer with a Specification 13 may allow individual/independent car dealerships and/or their customers to use registrations in that TLD.

B. ICANN org notes the potentially significant impact on end users should any gTLD fail without failover or continuity mechanisms in place. Is the Council comfortable that the broader risks, i.e., that such a failure might not reflect only on the specific brand/gTLD but also potentially undermines confidence in the stability of the DNS and the Internet, has been fully considered in the context of this recommendation? In this context, the Council may wish to provide further guidance on whether EBERO protections would be appropriate in some instances of TLDs with a Specification 9 exemption or Specification 13.

Policy Questions | Applicant Reviews: Technical and Operational, Financial and Registry Services:

<u>Implementation Guidance 27.8:</u> A mechanism(s) should be established to meet the spirit of the goals embodied within Q30b - Security Policy without requiring applicants to provide their full security policy. The Applicant Guidebook should clearly explain how the mechanism meets these goals and may draw on explanatory text included in the Attachment to Module 2: Evaluation Questions and Criteria from the 2012 Applicant Guidebook.

<u>Question on 27.8:</u>

A. Does the Council agree that, because there is no additional guidance on meeting the spirit of the goals embodied within Q30b, it is up to ICANN org to develop this as part of designing the evaluation process?

<u>Implementation Guidance 27.20:</u>

The following is a tentative but exhaustive set of financial questions:

- "Identify whether this financial information is shared with another application(s)" (not scored).

- “Provide financial statements (audited and self-certified by an officer where applicable or audited and independently certified if unable to meet the requirements for self-certification)” (0-1 scoring) (certification posted).

- “Provide a declaration, self-certified by an officer where applicable or independently certified if unable to meet the requirements for self-certification, that the applicant will be able to withstand missing revenue goals, exceeding expenses, funding shortfalls, and will have the ability to manage multiple TLDs where the registries are dependent upon the sale of registrations” (0-1 scoring) (publicly posted).

Question on 27.20:

A. Can the Council provide clarity on how "tentative but exhaustive," is defined as noted in IG 27.20?

Policy Questions | Role of Application Comment:

Implementation Guidance 28.5

“In addition, each commenter should be asked whether they are employed by, are under contract with, have a financial interest in, or are submitting the comment on behalf of an applicant. If so, they must reveal that relationship and whether their comment is being filed on behalf of that applicant.”

Questions on 28.5:

A. Does the Council have any input on how the information obtained through the questions detailed in 28.5 would be used during the evaluation?

Policy Questions | Objections:

Affirmation with Modification 31.3:

For full text see Final Report pp.145-147

Question on 31.3:

A. Does the Council agree with the assumption that, once notified, the dispute resolution provider is not involved in any communication between the objecting party and applicant during the cooling off period?

Implementation Guidance 31.6:
"Information about fees that were charged by dispute resolution service providers in previously filed formal objections should be accessible for future review."

Questions on 31.6:

A. Does the Council have further guidance on to whom, by whom, for what purpose the information "should be accessible for review"?

B. Does the Council agree that the "previously filed formal objections" will not include objections from previous rounds nor any other type of objections administered by the dispute resolution provider in the past - but only apply to objections filed during each respective round of new gTLDs?

Implementation Guidance 31.12

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

Question on 31.12:

The ODP team believes that the provider documentation is the best source for applicants, not the AGB: Implementing 31.12 will require ICANN to contract with the dispute resolution vendors prior to finalizing the AGB to collaboratively create and finalize such criteria and/or process, in advance of the commencement of the application submission window. The ODP team notes that this will likely result in significantly higher costs for the program and may have additional resourcing impacts, too. Updating this information would also mean updating the AGB, which would invoke the Predictability Framework, leading to timing implications. For the ease of participants in any objection process, dispute resolution providers are the best source of information, as long as all relevant information is available in a timely manner. Does the Council agree that this would meet the intention of 31.12?

Policy Questions | Dispute Resolution Procedures After Delegation:

Recommendation 33.2:

“For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.“

Question on 33.2:

A. Does the Council agree that publishing all relevant guidance on the scope will be sufficient to implement this recommendation?

B. If not, can the Council provide guidance on any particular deficiencies or areas that the org should consider in developing “clearer, more detailed, and better-defined” in the context of this recommendation?