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STATUS: Ratified

AT-LARGE ADVISORY COMMITTEE
ALAC Comment on the Proposed Language for the Next Round Applicant Support Program and Registry Service Provider Evaluation Program Terms and Conditions

Preamble

On 24 July 2024, the Public Comment proceeding opened for the [Proposed Language for the Next Round Applicant Support Program and Registry Service Provider Evaluation Program Terms and Conditions](#). An At-Large workspace was developed in preparation for this Public Comment submission. The At-Large Consolidated Policy Working Group (CPWG) decided it would be in the interest of end users to develop and submit an ALAC Public Comment Statement.

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Executive Summary

The ALAC and At-Large Community (“ALAC”) appreciates the opportunity to comment on the Proposed Language for the Next Round Applicant Support Program (ASP) and Registry Service Provider (RSP) Evaluation Program Terms and Conditions in preparation for its incorporation into the New gTLD Program ASP Handbook and RSP Handbook.

After reviewing the proposed language for the Terms and Conditions for the New gTLD program: Next Round ASP and the RSP Evaluation Handbook, the ALAC finds the language falling short of the Final Report recommendations 18.4 and 18.6 from Topic 18: Terms and Conditions, as well as Topic 17: Applicant Support (to ASP).

In particular to ASP, the ALAC believes there is a need to ensure that the terms and conditions regarding eligibility of applicants which apply at the time the ASP application window opens must be preserved right up till when the applicant has the TLD successfully delegated to it. The ALAC also believes that the entire intent of the SubPro Final Report Implementation Guidance 17.17 should be incorporated as a Term and Condition for ASP as it is important for applicants to understand and accept the restrictions as enforceable by ICANN.

The ALAC also seeks clarification and/or suggests several changes to a number of clauses in the ASP terms and conditions. These include:

- simplifying the language in proposed clause 3 regarding chances of success;
- providing clarity on the consequential relationship between limb (a) and limb (b) in proposed clause 4;
- providing clarification in proposed clause 5 regarding who “ICANN Affiliates” are;
- providing additional clarification to proposed clause 7, in regards to confidentiality obligations towards Applicants; and
- reinstating in proposed clause 10 the provisions from the 2012 AGB around rights and obligations of an Applicant.

Regarding the RSP Evaluation Program, the ALAC, similar to the ASP suggestions, recommends reinstating the provisions from the 2012 AGB around rights and obligations of an Applicant, and providing clarification in proposed clause 5 regarding who “ICANN Affiliates” are.

The ALAC thanks ICANN org for the opportunity to comment on these vital resources to potential applicants for the Next Round Program. The ALAC believes that the aforementioned sought-after clarifications and suggested changes, which have been expanded on below, will be helpful to future ASP and RSP applicants.

Ratification Record

On 24 July 2024, the Public Comment proceeding opened for the Proposed Language for the Next Round Applicant Support Program and Registry Service Provider Evaluation Program Terms and Conditions. On 31 July 2024, Justine Chew discussed the comments for the ALAC statement during the CPWG call. The At-Large Consolidated Policy Working Group (CPWG) decided it would be in the interest of end users to develop and submit an ALAC statement for this Public Comment proceeding. Justine Chew volunteered to draft the initial ALAC statement.

On 07 August 2024, the initial draft statement was shared with the CPWG for review and input. On 16 August 2024, the At-Large Public Comment Statement was finalized. The ALAC Chair, Jonathan Zuck, requested that the Public Comment Statement be ratified by the ALAC before submission to the ICANN Public Comment feature.

On 19 August 2024, staff confirmed the online vote resulted in the ALAC endorsing the statement with 15 out of 15 votes in favor. 0 votes against, and 0 abstentions. Please note 100% of ALAC members participated in the poll. The ALAC members who participated in the poll are (alphabetical order by first name): Aziz Hilali, Bill Jouris, Bukola Oronti, Claire Craig, Eduardo Diaz, Joanna Kulesza, Jonathan Zuck, Justine Chew, Lilian Ivette De Luque, Marcelo Rodriguez, Pari Esfandiari, Raihanath Gbadamassi, Satish Babu, Shah Zahidur Rahman, and Tommi Karttaavi. You may view the results here:
<https://tally.icann.org/cgi/results?e=4b060acb650>.

Guided Submission Questions

1. Is the proposed language for the Terms and Conditions for the New gTLD Program: Next Round Applicant Support Program consistent with recommendations 18.4 and 18.6 from Topic 18: Terms and Conditions and Topic 17: Applicant Support of the Final Report?

Answer: **No** ▾

If no, please explain.

Note: Comments herein incorporates deliberations at the IRT Plenary and IRT-ASP Sub-track levels.

1. Proposed Clause 4: Intention for ASP

We refer to the sentence which reads, “*The Applicant Support Program is not intended to provide support to applying entities that were created by, are affiliated with existing gTLD Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the Applicant Support Program, or have sufficient ongoing funding or investment from other sources at the time this [ASP] Application is submitted or when ICANN proposes to delegate the new gTLD.*”

(a) “Or” is the incorrect conjunctive

The ALAC understands “*when ICANN proposes to delegate the new gTLD*” to mean when the ASP qualifier’s application for a gTLD string is approved. The ALAC believes that the use of the conjunctive “or” between “*at the time this Application is submitted*” and “*when ICANN proposes to delegate the new gTLD*” suggests a gap in time period and processes - i.e. ASP application evaluation to submission of gTLD string application to evaluation of gTLD string application - where it is unclear what terms and conditions are to apply to the applicant. **We therefore suggest that “or” be amended to “up to”** in order to clarify that the eligibility criteria applying to an ASP applicant, particularly in regards to the prohibition of not being majority (than 50%) owned or controlled by any existing Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the ASP, be preserved up to when the applicant has the TLD delegated to it. This is reinforced by the provision of dire consequences (at the end of Clause 4) should ICANN determine, in its sole discretion, prior to the delegation of a TLD, that the applicant’s financial conditions have changed and the Applicant would not have qualified for ASP.

(b) Legal impact of SubPro Implementation Guidance 17.17

We understand that the IRT-ASP Sub-track has agreed that the intent of IG 17.17 should apply to all successful ASP applicants, regardless of whether they succeed in getting their applied-for string *vide* the benefit of a bid credit or not. The ALAC supports this position and believes the **entire intent of IG 17.17 (as updated by the IRT-ASP Sub-track) should be incorporated as a Term and Condition for the ASP**. Whilst the applicant would need to know the restrictions under IG 17.17 at the point of applying for ASP, it is equally important that they understand and accept that those restrictions will be contractually enforceable by ICANN and are not merely informational.

The above points not only preserve the eligibility criteria formulated by the IRT-ASP Sub-Track to make the ASP more accessible to eligible entities, but recognizes that ASP qualifiers may seek investors to strengthen their gTLD string application within reasonable limits, which if absent would likely open the ASP to an unchecked risk of abuse by otherwise ineligible entities.

2. Proposed Clause 3: Language on chances

There are 2 references to the level of chances of success. We suggest that that language be simplified as follows:

“Applicant also acknowledges that the final Applicant Guidebook for the New gTLD Program ~~are~~ **is** still being ~~determined~~ **developed** and that qualifying for applicant support through the Application Support Program will ~~not~~ **neither** be considered an endorsement of the Applicant’s ultimate New gTLD application ~~and will not increase the chances~~ **nor assures** that such Applicant ~~will be~~ **of being** ultimately qualified or eligible for a New gTLD or awarded a new gTLD. Furthermore, Applicant acknowledges that being awarded financial or other support pursuant to the Applicant Support Program in no way ~~increases (or decreases) the Applicant’s chances of~~ **assures** the Applicant **of** being able to satisfy the criteria established by the New gTLD Program to operate a New gTLD.”

3. Proposed Clause 7: Confidentiality obligations

The ALAC would like clarification on several parts to this clause.

(a) Permission / authority to ICANN to announce, publicize etc

There is a sentence which reads, "ICANN authorized to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with this Application, including evaluations, analyses and any other materials prepared in connection with the evaluation of this Application; provided, however, that information will not be disclosed or published **to the extent that the Handbook expressly states that such information will be kept confidential**, except as required by law or judicial process."

Yet, the ASP Handbook v3 does not allude to any information that will be kept confidential (except personal data). We would like to know if this disconnect will be addressed.

Further, this clause suggests that ICANN and ICANN Affiliated Parties are to be given wide ability to publicize any materials submitted to, or obtained or generated in connection with an applicant's Application. Although ASP applicants will be advised not to mention their desired gTLD string in their ASP application, it is highly possible that the desired gTLD string would be obvious based on the applicant's identity and potentially exposed well before the new gTLD application window opens. We strongly propose that:

- (a) ASP applicants be afforded the same expectation of confidentiality towards their ASP applications such that ICANN's and ICANN Affiliated Parties' authority as described in proposed Clause 7 be effective only after all applications for gTLD strings have been revealed;
 - The same level of confidentiality is preserved for string applicants in that knowledge of the applicants and their string applications are only made public by ICANN on reveal day;
 - Prior to reveal day, the only parties who need to know the identities of the ASP applicants are ICANN and ICANN contractors who are engaged for SARP-related tasks;
 - It would be only the ASP applicants themselves that ICANN needs to inform of their success of their ASP application, so that the applicant can then confidentially avail themselves of any non-financial support services; and
 - ICANN could confirm privately to any party nominated by an ASP qualifier to receive such confirmation of success on the ASP qualifier's part.
- (b) Where (a) is not manifestly feasible then ICANN's and the ICANN Affiliated Parties' authority as described in proposed Clause 7 should be subject to strict confidentiality obligations by ICANN and ICANN's Affiliated Parties which would not result in an ASP applicant dispensing with a reasonable expectation of confidentiality in its plans for its desired string. There is no urgency to widely publicize the ASP qualifiers prior to reveal day.

4. Proposed Clause 10: Treatment of rights, obligations

The ALAC notes that the provisions around rights and obligations of an applicant from the 2012 AGB have been dropped. We suggest that these provisions be reinstated to provide absolute clarity that an applicant will not acquire any rights in connection with any TLD that is intended to be applied for and rights (if any) are solely in respect of its application as set out in the ASP Handbook. It is equally important to state that an applicant may not resell, assign, or transfer any of its rights or obligations in connection with its application. An example of such a right could be its position in the queue for evaluation.

5. Other Comments, Queries

(a) With respect to the last sentence in proposed Clause 4, the ALAC would like clarity on whether limb (b) is meant to be the consequence of non-compliance of limb (a); or that ICANN can act on limb (b) without first having to make a request under limb (a) and under what circumstances would ICANN resort to doing so.

(b) The ALAC would like to understand who “ICANN Affiliates”, as referred to in Proposed Clause 5, are.

2. Is the proposed language for the Terms and Conditions for the New gTLD Program: Next Round Registry Service Provider Evaluation Program consistent with recommendations 18.4 and 18.6 from Topic 18: Terms and Conditions and Topic 6: Registry Service Provider Pre-Evaluation?

Answer: **No**

If no, please explain.

Consistent with our comments in respect of ASP:

1. Proposed Clause 10: Treatment of rights, obligations

The ALAC notes that the provisions around rights and obligations of an applicant from the 2012 AGB have been dropped. We suggest that these provisions be reinstated to provide absolute clarity that an applicant will not acquire any rights in connection with any new gTLD that is intended to be applied for and rights (if any) are solely in respect of its application as set out in the RSP Handbook. We think it is equally important to state that an applicant may not resell, assign, or transfer any of its rights or obligations in connection with its application.

2. Proposed Clause 5: “ICANN Affiliates”

The ALAC would like to understand who “ICANN Affiliates”, as referred to in Proposed Clause 5, are.

Other Comments:

Finally, some general suggestions:

(a) Delete a redundant “the” in the first sentence of proposed Clause 3.

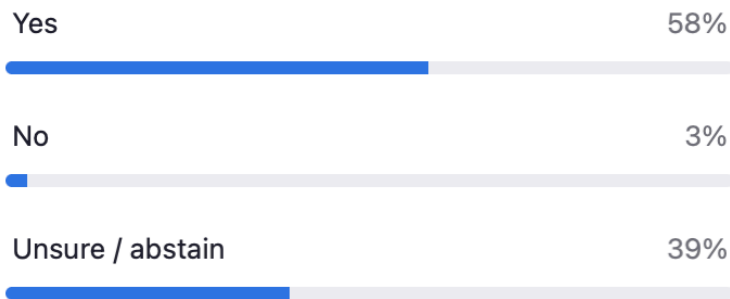
(b) Proposed Clause 15, to add a hyperlink to the information source for OFAC.

(c) Need for consistent use of “Applicant Support Program” throughout in lieu of “ASP”.

● ● ● Polls/quizzes
You are viewing the poll results (shared by host)

CPWG - August 7th - Issue 1 - Question 1

1. Do you agree that there is a gap between "at the time this Application is submitted" and "or when ICANN proposes to delegate the new gTLD" which should be addressed? (Single choice)



You did not answer this question

Close

● ● ● Polls/quizzes
You are viewing the poll results (shared by host)

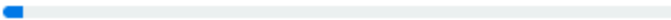
CPWG - August 7th - Issue 1 - Question 2

1. Do you agree that the SAME INTENTION should apply during the identified gap"? (Single choice)

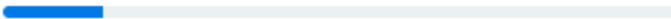
Yes – need to ensure ASP applicant is NOT majority owned or controlled by existing RO or "rich entity" at the time this Application is submitted UP TO when ICANN proposes to delegate the new gTLD." 82%



No 3%



Unsure / abstain 15%



You did not answer this question

Close

Polls/quizzes

You are viewing the poll results (shared by host)

CPWG - August 7th - Issue 1 - Question 3

1. Do you agree that the "restrictions" under IG 17.17 should be regarded as Terms & Conditions? (Single choice)

Yes – all of what’s in IG 17.17 should be part of T&C Clause 4	55%
No – it’s enough that the first part is a T&C and the second part is a restriction	20%
Unsure / abstain	25%

You did not answer this question

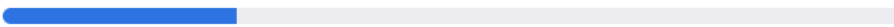
Close

● ● ● Polls/quizzes
You are viewing the poll results (shared by host)

CPWG - August 14th - Issue 1 - Question 4

1. Do you agree there is a need to clarify what Applicant details ICANN and the ICANN Affiliated Parties should be obligated to keep confidential?
(Single choice)

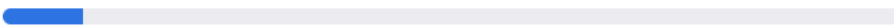
Yes, but up to the ASP application window is closed. 26%



Yes, but only until evaluation result of each ASP application is determined. 65%



No, not at all. 9%



You did not answer this question

Close

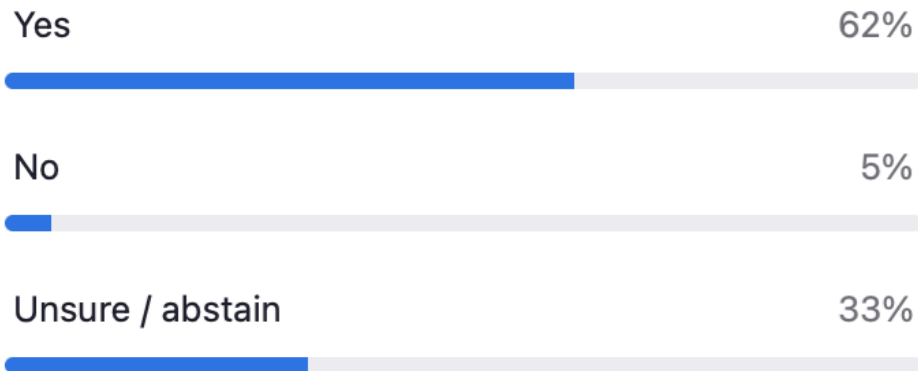


Polls/quizzes

You are viewing the poll results (shared by host)

CPWG - August 14th - Issue 1 - Question 5

1. Do you agree that these disclaimers, treatment of rights or obligations should be reinstated? (Single choice)



You did not answer this question

Close