

New gTLD Program Terms & Conditions for Next Round ASP & RSP Evaluation Program

Update #15 to At-Large CPWG Discussion for Public Comment Proceeding

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⦿ Public Comment Proceeding

- On Proposed Language for the Next Round Applicant Support Program and Registry Service Provider Evaluation Program Terms and Conditions
- <https://community.icann.org/pages/viewpage.action?pageId=357105879>
- 30 days: 23 Jul – 23 Aug 2024 (no extensions)

⦿ Should ALAC submit a comment? Consider:

1. **ASP – Further need to prevent abuse of ASP intent**
2. **ASP – Refining language on increase or decrease chances for ASP**
3. **ASP – Confidentiality obligations towards applicants**
4. ASP & RSP – No rights in connection with a gTLD; Prohibition on reselling, assigning or transferring rights & obligations in connection with ASP application
5. ASP & RSP – Clarifications, Typographical errors, Formatting

1. ASP – Preventing abuse of but not impede ASP Intent ₁

- Preventing abuse partly addressed in ASP application evaluation process
 - *“Applicant acknowledges that the intent of the ASP is to make the New gTLD Program evaluation fees and processes accessible to entities that would like to operate a gTLD but would otherwise be unable to apply to the New gTLD Program because of financial and resource constraints.”*
 - ASP Handbook Section 4: Applicant Eligibility and Evaluation Categories
 - 5 Criteria –
 - (1) General Business Due Diligence,
 - (2) Public Responsibility Due Diligence,
 - (3) Financial Need,
 - (4) Financial Viability,
 - (5) 5 Eligible Entity Categories & Indicators
- But what about after ASP applicant is successful in getting AS?
 - “The ASP 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 ASP**, or have **sufficient ongoing funding or investment from other sources at the time this Application is submitted or when ICANN proposes to delegate the new gTLD.**”

1. ASP – Preventing abuse of but not impede ASP Intent ₂

- Consider impact to ASP qualifier securing \$\$ at different stages

STAGE	RESTRICTIONS	LOGIC / IMPACT
<p>1. When ASP application is submitted</p>	<ul style="list-style-type: none"> • <u>T&C CI 4</u> The ASP 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 ASP, 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. • <u>ASP s 4.2 Public Responsibility Due Diligence</u> Criterion 2: Applicant is not affiliated with an existing gTLD Registry Operator and/or another prospective gTLD applicant in the next round that would not meet the ASP criteria. Note that a relationship with a back-end Registry Service Provider (RSP) is expected and permissible; the RSP cannot have control over the ASP applicant entity, per the definition of “affiliate”. • <u>ASP s 4.3 Financial Need</u> The applying entity may not be >50% owned or controlled by an entity that does not meet the above criteria. 	<ul style="list-style-type: none"> • Ensures ASP applicant is really one in need of applicant support • Does “another prospective gTLD applicant” mean anyone? • Ensures ASP applicant isn’t majority owned or controlled by “rich entity”

1. ASP – Preventing abuse of but not impede ASP Intent ₃

- ⦿ "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, or in combination with one or more other persons or entities, controls, is controlled by, or is under common control with, the person or entity specified, and "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise."

1. ASP – Preventing abuse of but not impede ASP Intent 4

- Consider impact to ASP qualifier securing \$\$ at different stages

STAGE	RESTRICTIONS	LOGIC / IMPACT
<p>2. When gTLD string application is submitted</p>	<ul style="list-style-type: none"> <u>T&C CI 4</u> <p>The ASP 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 ASP, 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.</p>	<ul style="list-style-type: none"> Is it clear that SOME restrictions should continue to apply when string application is submitted? What restrictions would these be? See: SubPro IG 17.17 Should s 4.6.7 be part of T&Cs section?
<p>TO</p> <p>3. When ICANN proposes to delegate the new gTLD</p>	<ul style="list-style-type: none"> <u>ASP s 4.6.7</u> <p>Supported applicants that progress to delegation will be restricted from assigning the Registry Agreement or from any Change of Control for a period of three years. Necessary assignments permitted.</p>	

1. ASP – Preventing abuse of but not impede ASP Intent ₅

⦿ SubPro Implementation Guidance 17.17 - modified

Supported applicants that progress to delegation will be restricted from assigning the Registry Agreement or from any Change of Control for a period of three years. Assignments that become necessary for the following reasons shall be permitted:

- Assignments due to the TLD being unable to meet its financial obligations and unable to secure financing or restructure operations to carry out operations in the short-term
- Assignments due to death or retirement of a majority shareholder
- Assignments due to EBERO
- Assignments to affiliates or subsidiaries
- Assignments required by competition authorities

All assignments after such time shall be governed under the then-current Registry Agreement standard provisions; provided that any Assignment or Change of Control after the third (3rd) year, but prior to the seventh (7th) year, shall require the applicant to repay the full amount of financial support received through the ASP Program, including application fees and any bid credit, multiplier, or related benefits, plus an additional ten percent (10%).

1. ASP – Preventing abuse of but not impede ASP Intent ₆

- Consider impact to ASP qualifier securing \$\$ at different stages

STAGE	RESTRICTIONS	LOGIC / IMPACT
4. Post delegation of new gTLD	<ul style="list-style-type: none">T&C Silent <ul style="list-style-type: none"><u>ASP s 4.6.7</u> All assignments after such time shall be governed under the then-current Registry Agreement standard provisions; provided that any Assignment or Change of Control after the third (3rd) year, but prior to the seventh (7th) year, shall require the applicant to repay the full amount of financial support received through the ASP Program, including application fees and any bid credit, multiplier, or related benefits, plus an additional ten percent (10%).	<ul style="list-style-type: none">Assignment after 3rd year of RA allowedHowever, penalty applies for any assignment or Change of Control within 4th-7th year of RAShould this be part of T&Cs section instead of restrictions in ASP Handbook?

2. ASP – Language on Chances for Securing ASP

⦿ T&Cs Cl. 3

- Applicant also acknowledges that the final Applicant Guidebook for the New gTLD Program ~~are~~ is still being determined 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. ASP – Confidentiality obligations toward applicants

◎ T&Cs Cl. 7

TERMS & CONDITIONS	CONSIDERATIONS
<ul style="list-style-type: none">• Applicant gives ICANN permission to use Applicant’s name in ICANN’s public announcements (including informational web pages) relating to Applicant's Application and any action taken by ICANN related thereto.• Applicant hereby authorizes ICANN 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.• Access to confidential information shall be limited to those individuals and entities who need access to complete the review process, including individuals within ICANN and any third parties conducting application evaluations or providing dispute resolution or challenge/appeals services.• Except for information afforded confidential treatment, Applicant understands and acknowledges that ICANN does not and will not keep the remaining portions of this Application or materials submitted with this Application confidential	<ul style="list-style-type: none">• Should ICANN and the ICANN Affiliated Parties be obligated to keep all details of an ASP Applicant confidential, including the name of Applicant?• Should the permission given to use or publicize Applicant’s name apply only after the Reveal Day for New gTLD applications?• ASP Handbook does not state any information that will be kept confidential.

4. ASP & RSP – No rights to new gTLD string; No reselling, assigning, transferring any rights/obligations

⊙ T&Cs Cl. 10

- Text from 2012 AGB removed altogether.
- Propose re-instating:
 - Applicant understands and agrees that Applicant will not acquire any rights in connection with any new gTLD that Applicant intends to apply for and that Applicant's rights are solely in respect of this Application as set out in the Handbook.
 - Applicant may not resell, assign, or transfer any of Applicant's rights or obligations in connection with this Application.

5. ASP & RSP – Clarification, Typos, Formatting

TERMS & CONDITIONS	ACTION
<p>1. If prior to the delegation of a new gTLD ICANN determines, in its sole discretion, that the Applicant’s financial conditions have changed and the Applicant would not have qualified for the financial and non-financial support under the Applicant Support Program, then (a) at ICANN’s request the Applicant will pay ICANN the full gTLD evaluation fee promptly upon request, or (b) ICANN may reject the Application without any liability or recourse to the Applicant.</p>	<p>Is (b) meant to be the consequence of non-compliance of (a); OR Are we saying that ICANN can do (b) without first having to make a request under (a)?</p>
<p>2. Applicant shall indemnify, defend, and hold harmless ICANN and any ICANN affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, (collectively, the “ICANN Affiliated Parties”)....</p>	<p>Who are ICANN affiliates?</p>
<p>3.</p> <ul style="list-style-type: none"> • Extra “the”; • “is” instead of “are” 	<p>General typo error corrections</p>
<p>4. Applicant agrees to comply with all applicable laws and regulations, including those economic, financial, and trade restrictions imposed, administered or enforced by the U.S. government, including but not limited to those administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury (“Economic Sanctions”).</p>	<p>URL link for OFAC</p>