CC2 Section 1: Objections

3.1.1 - Do you think that the policy recommendations (Recommendations 2, 3, 6, and 20) require any modifications? If so, what would you suggest?

Recommendations 2, 3, 6, 12 and 20;
2. Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.
3. Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.

> Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).

6. Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.

> Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

12. Dispute resolution and challenge processes must be established prior to the start of the process.

20. An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted

INTA, Nominet, RySG, BRG, and Afilias believe that the existing recommendations **do not need to be revised**, though this does not preclude changing the implementation.

Sample excerpts:

"While INTA does not recommend amendments to the Recommendations themselves, INTA does recommend that the AGB be amended to be more precise in the definitions of string similarity and trademark rights as they apply to the LRO. INTA also recommends that the AGB be amended to include fundamental principles of international trademark law (e.g., trademark fame or well-known status, doctrine of foreign equivalents, etc.)." – INTA

"The recommendations look reasonable, but it will be interesting to see how in practice they are to be implemented in a way which still gives certainty to prospective applicants – reasonable people can disagree as to whether one string is confusingly similar to another, and what is a generally acceptable legal norm relating to morality and public order." – Nominet

"We support the identified recommendations from the 2012 round and their continued application to a future gTLD application process...Further, we support the continued use of objection processes to implement these

recommendations. Notwithstanding, we believe that the objection process could be generally improved through a number of procedural changes to all four categories of objection proceeding." – RySG, BRG, Afilias

RySG, BRG, and Afilias suggest a **minor change to Recommendation 20**

Sample excerpts:

"...minor modifications to Recommendation 20 above to clarify what constitutes "a significant portion of the community." - RySG, BRG, Afilias

ALAC suggests **change to Recommendation 2**

Sample excerpts:

"The recommendation on string confusion is one that must be enhanced. Singular and plural versions of related strings proved to be problematic in the first round and must be addressed this time. Such provision should not be limited to just the addition of an S but should be more generalized as suggested in a recent Registry SG document.

That being said, as discussed in relation the ccNSO Extended Process Similarity Review Panel (EPSRP) document, for strings that are inherently confusing in their own right, but for which STRONG irrevocable policies mitigating against confusion in full domain names, delegation could be considered." - ALAC

3.1.2 - Do you believe that those recommendations (which led to the establishment of the String Confusion, Legal Rights, Limited Public Interest, and Community Objections grounds) were implemented effectively and in the spirit of the original policy recommendations? If no, please provide examples.

Jannik Skou, BC, RySG, BRG, and Afilias suggested that **String Confusion needs to be improved**

Sample excerpts:

"...String confusion: in case of multiple applicants for same string, cases should be consolidated. ALL TLDs should list the language(s) they approach. Singular and Plurals should not be allowed in those languages targeted by the TLD operator(applicant) (and this includes already delegated/applied for strings from previous rounds – "old TLDs" would have to add the languages they target. So .HOTEL would have to list all the languages they would like to "protect" from .HOTELS. (Know this is too late in this example). But for instance plural of .HOTEL in Danish is not HOTELS but "HOTELLER" and so forth. Each TLD could be allowed to define a maximum of three languages. CPE – to be deleted – not needed if five new categories as suggested above." – Jannik Skou

"While the objection process in the first round was generally effective, one notable flaw was the inconsistency in panel decisions for string confusion objections. In order to address this flaw for the subsequent round we support the publication by ICANN of more detailed and objective criteria for determining string similarity, as well as a broader appeals mechanism for challenging any decisions that are perceived to fall outside of such criteria." – BC

"During the 2015 round, the String Confusion Objection process resulted in indirect contention situations for identical strings proposing similar use cases. For example, in one objection determination, the strings .car/.cars

were determined to be confusingly similar, while in another they were determined to not be confusingly similar. This resulted in a situation where the ability or inability for the two strings to coexist depended on which party prevailed at auction. This outcome was seen as inconsistent by many in the community (both objectors and respondents) and saw late stage intervention by the ICANN board to introduce a limited appeals process. The appeals process was only made available to the applicants who were placed in contention, and not to the party filing the objection. We believe that these could be largely avoided by allowing 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. We propose the following guidelines:

● An objector could file a single objection that would extend to all applications for an identical string.
● Given that an objection that encompassed several applications would still require greater work to process and review, the string confusion panel could introduce a tiered pricing structure for these sets.
● Each applicant for that identical string would still prepare a response to the objection.
● The same panel would review all documentation associated with the objection.
● Each response would be reviewed on its own merits to determine whether it was confusingly similar.

The panel would issue a single determination that identified which applications would be in contention. Any outcome that resulted in an indirect contention would be explained as part of the panel's response. A limited appeals process (as described above) would be available to both the objectors and the respondents to handle any perceived inconsistencies." – RySG, BRG, Afilias

"No. String confusion proved to be problematic and the potential for differing rulings on the same pairs of strings was particularly problematic." – ALAC

Jannik Skou and the ALAC suggested that **Legal Rights Objections need to be improved**

Sample excerpts:

"Legal Objection: Applications should be binding (including Q18), so that one can not describe intended use in the application and still win a legal rights objection case based on the argument that the domain name is not yet in use..." – Jannik Skou

"A recent report looking at defensive registrations may imply that legal rights protections were not sufficient." -- ALAC

The RySG, BRG, and Afilias suggested that **Community Objections need to be improved**

Sample excerpts:

"Make the costs of community objections more predictable
The costs associated with Community Objections were surprisingly high compared to other types of objections, and were hard to predict in advance of filing. This may have been particularly problematic for communities that chose to file objections with a low probability of success. ICANN should prioritize cost in choosing a vendor. Costs should be transparent up front to participants in objection processes with a fixed fee absent extraordinary circumstances.

In some cases, applicants should be able to remediate impact identified in Community Objections

In the 2012 round, community objections were "all or nothing". Even if the impact to the affected community could be corrected by the applicants, the panel had no option but to either allow the application to proceed or to terminate it. This made the standard to win an objection quite high, and also meant that some applications that probably could have been remediated were instead rejected.

Allow arbitrator to identify remedies or cures that would address the detriment to the community, which could be adopted by the applicant and would form a binding portion of the eventual registry agreement." – RySG, BRG, Afilias

The BC suggested developing a **process to appeal decisions**

Sample excerpts:

"Both losing Objectors and Applicants must have standing to appeal the panel's decision. The language from the 2012 round vests appellate discretion solely with "Losing Applicant[s]," creating a presumption that the rights of gTLD applicants are given more weight than the rights of objectors. Inconsistencies in panel decisions may be further prevented through greater transparency in the process, namely, through publication of any evidence considered by expert panels, arbitration providers, and ICANN staff in its evaluation of objections. Additionally, for the subsequent round, we propose that any review or appeals panels be comprised of arbitrators with specific demonstrated experience in new gTLD program objections." – BC

The RySG, BRG, and Afilias suggested specific **procedural improvements to the objections processes**

Sample excerpts:

"Strictly enforce objection page limits

One of the factors contributing to the high costs of objections during the 2012 round was a failure of the the panels to curb submission of additional objection documentation. As panels are paid hourly they are incentivized to accept additional documentation even if it was not strictly necessary for the purpose of evaluating the substance of the objection. Further, in some instances, attachments were used to make and support additional arguments not made in the body of the original objection, resulting in additional work and cost to respondents. We believe that the page caps proposed are appropriate and should be more strictly enforced as part of a subsequent application procedure. To these ends, we would welcome additional language clarifying that attachments should be limited to supporting documentation and must not be used to make additional arguments not covered within the 5,000 word/20 page limit and that, following submission of the initial objection, additional documentation will only be accepted if it is specifically requested by the Objection panel.

Allow parties to jointly determine whether to use a one or three-Expert panel

The selection of a one or three-Expert panel raises tradeoffs related to cost and consistency. While one-Expert panels are lower cost, three expert panels may be more reliable and less likely to generate concerns around inconsistent application of objection procedures or outcomes. In light of these tradeoffs, we believe that, for all Objection types, Parties should be able to jointly determine whether to use a one or three-expert panel. In the event that the Parties fail to reach agreement the default will be to rely on a three-Expert panel." – RySG, BRG, Afilias

3.1.3 - Do you believe there were any issues with standing requirements as defined in the Applicant Guidebook (AGB), or as carried out by the providers? Please explain.

3.2.2 Standing to Object
Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD
Legal rights	Rightsholders
Limited public interest	No limitations on who may file – however, subject to a "quick look" designed for early conclusion of frivolous
Community	Established institution associated with a clearly delineated community

The RySG, BRG, and Afilias had **concerns with the standing requirements for Recommendation 20**

Sample excerpts:

"We believe that there is some lack of clarity around how objection by a "significant portion of the community," as is referenced in Recommendation 20 of the GNSO principles, is defined. This could warrant further clarification. We note that ICANN and the Community Objection Provider established additional definitions and procedures regarding the standing to file a community objection. Per Module 4 of the Applicant Guidebook, standing required that the filer meet the following criteria:

It is an established institution with purposes beyond the gTLD application process (evaluated based upon level of global recognition of the institution;
length of time the institution has been in existence;
and public historical evidence of its existence);
It has an ongoing relationship with a clearly delineated community – (evaluated based upon the presence of mechanisms for participation, institutional purpose and regular activities that benefit of the associated community;
and the level of formal boundaries around the community.

Objectors were required to state their basis for standing, as well as grounds for objection. ICANN performed a 30-day administrative review of the objection before it proceeded to evaluation by the Dispute Resolution Provider. We believe that the administrative review process failed to weed out objections where the objection filer did not meet the conditions to establish standing to file.

We believe that standing requirements were clearly established for the other application types." – RySG, BRG, Afilias

3.1.4 - Do you believe there is evidence of decisions made by objection dispute panels that were inconsistent with other similar objections, the original policy recommendations, and/or the AGB? Please explain.

BC, RySG, BRG, and Afilias pointed to **evidence of inconsistencies**.

Sample excerpts:
"Yes. For string confusion objections, despite conditions being effectively the same, one ICDR panel came to the conclusion that .HOTEL and .HOTELS were not confusingly similar, while another determined that .PET and .PETS were confusingly similar. There were multiple other examples of such inconsistencies, e.g., .CAR and .CARS found not similar, and .GAME and .GAMES similar.

To prevent such results in future rounds, we support allowing 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. As stated above, we would also support an appeals process with panels comprised of arbitrators with specific demonstrated experience in new gTLD program objections." – BC

"Yes, we believe that objection processes during the 2012 saw inconsistent outcomes, where different decisions were reached despite similar fact patterns, or where panels appeared to apply different logic and standards in arriving at their decisions. . . The perception of inconsistent outcomes led to overreliance on existing accountability mechanisms, particularly the Reconsideration Request process, which was ill suited to address the objection related issues as Reconsideration Requests are intended to address action or inaction by ICANN staff or the ICANN Board and not determinations by a third party panel. . . We believe a much better approach is to introduce the option of a narrow appeals process for all applicants where parties that identify either a reasonable inconsistency in outcome or a specific argument as to why the panel failed to apply the proper standard. . .

Inconsistencies were most obvious in the String Confusion Objection Process, which resulted in indirect contention situations for identical strings proposing similar use cases. For example, in one objection determination, the strings .car/.cars were determined to be confusingly similar, while in another they were determined to not be confusingly similar. This resulted in a situation where the ability or inability for the two strings to coexist depended on which party prevailed at auction. This outcome was seen as inconsistent by many in the community (both objectors and respondents) and saw late stage intervention by the ICANN board to introduce a limited appeals process. The appeals process was only made available to the applicants who were placed in contention, and not to the party filing the objection. The inconsistent results process has been extended to other objection results as well (e.g. .hospital (Limited Public Interest) and .Charity) community. ICANN should strive to avoid inconsistent results for similarly situated applicants in all objections." – RySG, Afilias, BRG

INTA provided additional suggestions on this topic:

"Review of the LRO decisions in the first Round showed that demonstrating bad faith before a registry launches is virtually impossible. In addition to the three factors outlined in the AGB, LRO panels consider eight non-exhaustive factors in determining whether the applied-for string meets one or more of these three grounds for sustaining the objection. In determining intent of the Applicant, the evidence is limited to (a) the use of the applied-for gTLD string or actions by Applicant at the time of the filing of the Application in relation to the applied-for gTLD string, and (b) the Application itself. . . INTA recommends additional work to add additional factors directly into the AGB that would guide Applicants and LRO panels on the concepts of bad faith, including, but not limited to history of the Applicant and the individuals behind the applicant, whether the underlying

trademark rights acquired by the Applicant were filed solely with respect to supporting the business of the Application." – INTA

3.1.5 - Are you aware of any instances where any party or parties attempted to 'game' the Objection procedures in the 2012 round? If so, please provide examples and any evidence you may have available.

dotgay LLC provided **evidence of gaming.**
Excerpt (note – only a small portion of this substantive comment is displayed below. WT members are encouraged to review the full comment which provides greater detail about the example.):

A form of gaming that attempted to take place was an effort to force a community applicant into a Community Objection when achieving "standing" for the objector was a known impossibility due to deceptive representation. The purpose for objecting appears to be related to financially burdening dotgay LLC (dotgay) and projecting fake opposition to a community based application for .GAY. Both community objections against dotgay came from the same network of political organizations in the USA, one claiming to represent the national organization and one from an affiliate member organization in Dallas. The contents of each objection were similar and in many cases verbatim in wording. . . Consolidation of objections was never an ICC guarantee and dotgay is aware of weak excuses that prevented objections from being consolidated, even when near identical. For community applicants that don't have deep pockets, this form of gaming could knock them out of the new gTLD program. . . This form of gaming went unchecked under the current procedures. No process existed to defend against a spurious objection without first formalizing the objection and making payment to the ICC. To submit a community objection that has no hope of achieving "standing" raises serious questions of gaming, especially given the associated costs the objector (or the party financially supporting them) would be expending on an objection known to be deficient." -- dotgay

dotgay LLC, RySG, and Afilias made **suggestions to reduce the likelihood of gaming**.

"We believe that some preliminary steps should be implemented to screen the source of community objections so as to ensure that organizations listed on the objections are:
1. Legitimate organizations that meet basic requirements for "standing"
2. Aware & approving of the objection – via multiple contacts at the organization, using published and legitimate contact methods for the organization
3. Actively engaged & educated on the opposition and not simply surrogates for purposes of gaming Taking these simple steps with the filing fee funds of those who filed the opposition could prevent a lot of unnecessary expense to community applicants. If additional cost to determine standing is required then a portion of the deposit could be paid by the objector to cover the costs of solidifying standing. If standing is achieved then the funds go back into their objection deposit. By weeding out frivolous and fraudulent objections that have no chance of meeting standing requirements, before ever forcing community applicants to pay a filing fee and respond, would save everyone a lot of time, energy and money. It would also serve as a line of defense against coordinated efforts aimed at financially drowning out community applicants." – dotgay LLC

"While we believe that there may have been some instances of gaming objections during the 2012 round, we will defer to individual comments to raise specific examples.

We note one recommendation that we believe will reduce the likelihood of gaming generally with respect to the Community objection process: Communities should be limited to participating in either Objections or CPE, but not both. During the 2012 round, some entities who were involved in TLD applications took "two bites of the apple"

by filing both objections and participating in CPE for the same strings. This meant that they had two opportunities to potentially defeat a competitive application. We don't believe this matches the intent of the policy or the guidebook.

No individual entity should be able to participate in both an objection and CPE for the same string." – RySG and Afilias