

1.12 Deliberations and Recommendations: Post-Delegation

Post-Delegation		
1.12.1	TLD Rollout	Work Track 2
1.12.2	Second-level Rights Protection Mechanisms	Work Track 2
1.12.3	Contractual Compliance	Work Track 2

1.12.1 TLD Rollout

a. What is the relevant policy and/or implementation guidance (if any)?

Implementation Guideline 1: "An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process."

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b. How was it implemented in the 2012 round of the New gTLD Program?

The Applicant Guidebook specifies that applicants must complete the contracting phase nine (9) months following the date in which they are notified that their TLD(s) has completed the evaluation process - including, if necessary, the dispute resolution and string contention processes. Applicants were allowed to request an extension of this time period for up to an additional nine (9) months if it could demonstrate, to ICANN's reasonable satisfaction, that it was working diligently and in good faith toward successfully completing the steps necessary for entering into the registry agreement.² Applicants for what later became known as "Brand Registries" were given until nine (9) months following the date in which Specification 13 to the Registry Agreement was completed.

Section 4.3(b) of the Registry Agreement provides that, "ICANN may, upon notice to Registry Operator, terminate this Agreement if Registry Operator fails to complete all testing and procedures (identified by ICANN in writing to Registry Operator prior to the date hereof) for delegation of the TLD into the root zone within twelve (12) months of the Effective Date. Registry Operator may request an extension for up to additional twelve (12) months for delegation if it can demonstrate, to ICANN's reasonable satisfaction, that Registry Operator is working diligently and in good faith toward successfully completing the steps necessary for delegation of the TLD."

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While some applications remain undelegated, this is more of a matter of remaining processing

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<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

² See Module 5 of the Applicant Guidebook.

steps (e.g., string contention resolution, reconsideration requests, etc.) rather than the result of delays from either ICANN org or the applicants.

Commented [1]: Added based on comments from Christopher Wilkinson email on 11 April 2018.

c. What are the preliminary recommendations and/or implementation guidelines?

- The ICANN Organization should be responsible for meeting specific deadlines in the contracting and delegation processes.
- The Work Track supports the time frames set forth in the Applicant Guidebook and the Base Registry Agreement; namely (i) that successful applicants continue to have nine (9) months following the date of being notified that it successfully completed the evaluation process to enter into a Registry Agreement, and (ii) that Registry Operators must complete all testing procedures for delegation of the TLD into the root zone within twelve (12) months of the Effective Date of the Registry Agreement. In addition, extensions to those time frames should continue to be available according to the same terms and conditions as they were allowed during the 2012 round.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

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e. What specific questions are the PDP WG seeking feedback on?

- One of the reasons the delegation deadline was put into place was to prevent the incidence of squatting/warehousing.⁴ Is this reason still applicable and/or relevant? Are other measures needed? If so, what measures and how will these measures address the issue?
- For the 2012 round, Registry Operators were required to complete the delegation process within twelve (12) months from the Effective Date of the Agreement.⁵ This was the only requirement regarding use of the TLD. Other than delegation (which includes the maintenance of a required NIC.TLD page and a WHOIS.NIC.TLD page), no other use of a TLD is required. Is the definition of use of a TLD from the 2012 round still appropriate or are adjustments needed? If so, what adjustments are necessary and why?

Commented [2]: Kristina Rosette: "Need citation to statement that delegation deadline put into place to avoid squatting and warehousing."

Commented [3]: suggested resolution.

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Commented [5]: Quotation marks around the word USE were removed following feedback from Kristina Rosette.

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Commented [6]: Added in response to comments from Erica Varlese.

f. Deliberations

The Work Track discussions focused on three primary questions:

1. Is it necessary and beneficial to have deadlines for applicants related to TLD rollout?
2. Are the deadlines included in the 2012 Applicant Guidebook appropriate?
3. Are any changes needed with respect to evaluating requests for extensions to the deadlines and granting those extensions?

⁴ See the comments of the IPC, "...does not support the warehousing of TLD strings and supports a timeframe after applicant grant by which the TLD string must be operational" here: <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm>

⁵ See section 4.3 (b) of the Registry Agreement.

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As a foundational question, the Work Track discussed whether deadlines are needed for the contracting and delegation phases of TLD rollout. The deadlines included in the Applicant Guidebook sought to follow implementation guidance that a TLD string must be used within a fixed timeframe. Some Work Track members expressed their understanding that these measures sought, at least in part, to discourage squatting or warehousing of TLDs.⁶ Work Track members noted that if the provisions seek to encourage use of the TLD, it should be clear what it means for a TLD to be used. For example, some TLDs meet use guidelines but have only delegated nic.TLD. The Work Track ultimately found it difficult to assess the effectiveness of deadlines in preventing unwanted behavior and promoting desirable practices given the lack of clarity around definitions associated with these objectives. The Work Track was also careful to avoid drawing the conclusion that only having nic.TLD registered constituted “squatting” or “warehousing.”

One Work Track member commented that there are a number of New gTLDs, and Brands in particular, that only have a nic.TLD. Other Work Track members responded that there were unique circumstances surrounding the 2012 round and each Brand registry has different strategic and business considerations to take into account. Therefore, the Work Track should not rush to draw conclusions about the use of the TLD based solely on the fact that only the nic.TLD has been delegated.

On the question of whether the deadlines included in the 2012 AGB continue to be appropriate, Work Track members generally agreed that if deadlines are retained, the timeframes specified in the 2012 Applicant Guidebook are appropriate. Many of the CC2 comments supported this perspective, as well. No argument or evidence was provided in support of changing these deadlines.

Work Track members also agreed that it is important for the ICANN Organization to set and meet deadlines for steps in the process for which the ICANN Organization is responsible. CC2 comments supported this point. The Work Track felt that by maintaining deadlines for tasks associated with contracting and delegation, the Organization can more effectively support predictability for applicants.

In the 2012 round, the ICANN Organization provided extensions to deadlines on a case-by-case basis. The Work Track reviewed data⁹ provided by the ICANN Organization regarding the number of extensions requested and provided, as well the reasons for these extensions. This review did not prompt the Work Track to suggest any changes to policy or implementation. CC2 comments tended to support the view that criteria applied by ICANN in evaluating and granting those extensions were reasonable.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

⁶ See the comments of the IPC, “...does not support the warehousing of TLD strings and supports a timeframe after applicant grant by which the TLD string must be operational” here: <https://qnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm>

⁹ <https://community.icann.org/download/attachments/58735943/Data%20Request%20-%20TLD%20Rollout.pdf?version=1&modificationDate=1507591802000&api=v2>

Commented [7]: Kristina Rosette: Even if terms aren't precisely defined, report should provide whatever definitions are being relied upon.

Commented [8]: suggested resolution.

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Commented [9]: Kristina Rosette: Confusing to have “use” in quotations. Juxtaposition of sentences 4 and 5 (not clear what use is, but use satisfied) is confusing.

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Deleted: The Work Track further noted that it may be difficult to draw lessons from the 2012 round with respect to the effectiveness of maintaining deadlines for TLD rollout. The 2012 round was the first of its kind, meaning that both applicants and the ICANN Organization were navigating a new program and making mid-course corrections as they did so. The rate at which TLDs were actively used in the 2012 round may have been impacted by unique factors, particularly those that resulted in substantial delays in the program, that will hopefully not exist in subsequent procedures. Therefore, data from additional rounds may be necessary to draw any conclusions about whether deadlines are an effective means of discouraging unwanted behavior.

Commented [11]: Kristina Rosette: Need to explain what constitutes “actively used” - especially given statements in preceding paragraph.

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Deleted: Service Level Agreements (SLAs)

Commented [13]: Kristina Rosette: It's a stretch to refer to targeted deadlines as SLAs (although I wish they had been).

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Commented [15]: Kristina Rosette: in relation to this issue” is unclear. Identify the issue (e.g., in relation to X).

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Commented [17]: Kristina Rosette: words missing after support - the view that?

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None identified at this time.

1.12.2 Second-level Rights Protection Mechanisms

The topic of second-level Rights Protection Mechanisms has direct overlap with the Review of All Rights Protection Mechanisms in All gTLDs and the charters of the two respective PDPs require that the PDPs coordinate and ensure that overlapping or contradictory policy work does not take place. As a result, this PDP has not performed any substantive work on this subject other than on questions specifically referred to this PDP by RPM PDP Working Group. Those questions are dealt with elsewhere in this Initial Report.

1.12.3 Contractual Compliance

a. What is the relevant policy and/or implementation guidance (if any)?

Recommendation 17: "A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination."

b. How was it implemented in the 2012 round of the New gTLD Program?

Section 5.4.2 of the 2012 Applicant Guidebook describes the contractual compliance function. More specifically, it states: "ICANN's contractual compliance function will perform audits on a regular basis to ensure that gTLD registry operators remain in compliance with agreement obligations, as well as investigate any complaints from the community regarding the registry operator's adherence to its contractual obligations. See <http://www.icann.org/en/compliance/> for more information on current contractual compliance activities."

In addition, the Base Registry Agreement grants ICANN the right to terminate the Registry Agreement for the failure to cure any fundamental and material breach of the Agreement where such breach is confirmed through an arbitration process (see Section 4.3). It also allows ICANN to seek sanctions and punitive damages against Registry Operators in such arbitration proceedings (see Section 5.2).

c. What are the preliminary recommendations and/or implementation guidelines?

The Work Track believes that the foundational elements of the Contractual Compliance program put into place by ICANN as well as the relevant provisions in the Base Registry Agreement have satisfied the requirements set forth in Recommendation 17. That said, members of the Work Track believe that ICANN's Contractual Compliance department should publish more detailed data on the activities of the department and the nature of the complaints handled.

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Commented [19]: Kristina Rosette: need citations to RA provisions

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Commented [21]: Edited following suggestion from Kristina Rosette that "ICANN Organization" is confusing in this context.

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Commented [22]: Kristina Rosette: replace "granular" with "detailed" and/or "more specific"

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Commented [25]: I see your point Steve, whilst it was of course discussed within the WT and "if" it stays in then we need to make the agreed to edits away from vernacular terms as agreed in the last PDP WG Call

Commented [26]: Going back through the meeting notes and chat, it looks like the group did not discuss specifically what types of data compliance should share. Note that some data is already shared by compliance through performance reporting: <https://www.icann.org/resources/compliance-reporting-performance>. Perhaps the recommendation could be more general, something like "The Working Group suggests that the ICANN Organization should examine what additional data may be beneficial to collect, analyze, and share with the community to support transparency and accountability of the department."

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d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

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e. What specific questions are the PDP WG seeking feedback on?

1. [The Work Track noted that with the exception of a generic representation and warranty in Section 1.3(a)(i) of the Registry Agreement¹³, Specification 12 (for Communities) and voluntary Public Interest Commitments in Specification 11 of the Registry Agreement (if any), there were no mechanisms in place to specifically include other application statements made by Registry Operators in their applications for the TLDs. Should other statements, such as representations and/or commitments, made by Applicants be included in the Registry Operator's Agreements? If so, please explain why, you think these statements should be included.? Would adherence to such statements be enforced by ICANN Contractual Compliance?

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2. A concern was raised in the CC2 comment from INTA about operational practices, specifically, "arbitrary and abusive pricing for premium domains targeting trademarks; use of reserved names to circumvent Sunrise; and operating launch programs that differed materially from what was approved by ICANN." What evidence is there to support this assertion? If this was happening, what are some proposed mechanisms for addressing these issues? How will the proposed mechanisms effectively address these issues"?

Commented [27]: Kristina Rosette: need to provide basis for referring to application statements as "representations and/or commitments"; also, second-to-last question should be revised to ask commenter to explain why they've identified any specific representations and/or commitments.

Commented [28]: Co-leaders - please review proposed resolution.

Commented [29]: Kristina Rosette: Need to ask "How will the proposed mechanisms effectively address these issues"?

Commented [30]: resolved.

f. Deliberations

The Initial Report anticipated that no policy development would be needed on this topic. The Work Track agreed with this assessment. The Work Track further expected that any new contractual requirements would be made enforceable by inclusion in the Base Registry Agreement. CC2 comments tended to support Work Track conclusions on both points.

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Commented [31]: Kristina Rosette: Base Registry Agreement (for consistency)

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The Work Track discussed the enforceability of representations made by applicants in the submitted application and considered the following questions:

- How much reliance can be placed on the representations made by applicants in their submitted application?
- Were representations integrated into the signed RA enough to be enforceable?
- What was the impact of change requests?

¹³ Section 1.3(a)(i) states that Registry Operator represents and warrants to ICANN as follows: (i) all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;"

- Should representations made by the applicant be integrated into the Registry Agreement going forward, and if so, why and how?

The Work Track considered a proposal that all applicant representations should be included in the Registry Agreement to ensure that these representations are enforceable. There was no agreement among Work Track members in support of this proposal.

In discussing CC2 comments, the Work Track noted a comment from INTA suggesting that ICANN Contractual Compliance should publish more detailed data on the activities of the department and the nature of the complaints handled. Work Track members expressed support for recommending that ICANN Contractual Compliance publish additional non-confidential data to increase transparency.

The Work Track also discussed concern raised in the CC2 comment from INTA about operational practices, specifically, “arbitrary and abusive pricing for premium domains targeting trademarks; use of reserved names to circumvent Sunrise; and operating launch programs that differed materially from what was approved by ICANN.”¹⁶ The Work Track did not have sufficient data to assess the extent to which these reported issues are documented. Members of the Work Track also raised questions about whether these issues were in scope for Contractual Compliance, or even if the topic of pricing is out of scope entirely for the PDP. To the extent the topic is in scope, it is likely more appropriate to consider in the context of the base Registry Agreement (section 1.10.1) or rights protection mechanisms. The Work Track has not reached any conclusions on this issue.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

None identified at this time.

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Commented [33]: Kristina Rosette: 1.12.3.f, para 2: revise 4th bullet – Should representations made by the applicant be integrated into the Registry Agreement going forward and, if so, why and how?

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Commented [35]: Kristina Rosette: insert “, non-confidential” between “additional” and “data”

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¹⁶ See INTA response to CC2 question 2.8.1.

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