1.12 Deliberations and Recommendations: Post-Delegation

Post-Delegation		
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1.12.1 TLD Rollout

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

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

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 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 entry into the registry agreement. 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."

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.

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 incidence of squatting/warehousing. Is this still the case? Are other measures needed?
- For the 2012 round, Registry Operators were only required to complete the delegation process within twelve (12) months from the Effective Date of the Agreement. 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?

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?

As a foundational question, the Work Track discussed whether deadlines are needed for the contracting and delegation phases of TLD rollout. The purpose of setting these deadlines in the 2012 round was to discourage squatting or warehousing of TLDs. The terms "squatting" and "warehousing" are not precisely defined in this context. Further, if the provisions seek to encourage "use" of the TLD, the Work Track noted that it must 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."

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.

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 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 Service Level Agreements (SLAs) 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 data provided by the ICANN Organization regarding the number of extensions requested and provided, as well the reasons for these extensions. In evaluating the data, the Work Track did not find any evidence that changes are needed in relation to this issue. CC2 comments tended to support 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?

None.

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 states "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. It also allows ICANN to seek sanctions and punitive damages against Registry Operators in such arbitration proceedings.

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

The Working Group believes that the foundational elements of the Contractual Compliance program put into place by the ICANN Organization 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 Working Group believe that ICANN's Contractual Compliance department should publish more granular and meaningful data on the activities of the department and the nature of the complaints handled.

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

None.

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

1. The Working Group noted that with the exception of a generic representation and warranty in Section 1.3(a)(i) of the Registry Agreement, 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 representations and/or commitments made by Registry Operators in their applications for the TLDs. Should other representations and/or commitments made by Applicants be included in the Registry Operator's Agreements? If so, which representations and/or commitments? Would adherence to such representations and/or commitments be enforced by ICANN Contractual Compliance?

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?

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 agreement. CC2 comments supported Work Track conclusions on both points.

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?
- How should representations made by the applicant be integrated into the Registry Agreement going forward?

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 granular and meaningful 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 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." 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 or rights protection mechanisms. The WT 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?

No.