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**JURISDICTION SUBGROUP MEETING**

Monday, February 12, 2018 -- 19:00-20:30

(This meeting is now being recorded).

>>MR. SHATAN: Hello and welcome to the CCWG Accountability WS 2, jurisdiction Subgroup meeting for February 14th, 2018. Happy Valentine's Day to all.

We will go through our usual agenda, although it's a virtual agenda. And following the usual standard, we will be going through our administrative minute for SOI, audio, participants phone number only participants, and then getting to the meat of our meeting which is to continue going through the comments, picking up where we left off at the end of the last meeting, and looking at the changes that are being proposed to the draft report based on those comments.

Following that, we'll have AOB. And then adjourn. So, I'm hopeful that we can get through quite a bit on this call. So I will ask first if we have any changes to statements of interest? (beep).

>>MR. SHATAN: Seeing no hands for changes in statements of interest.

So I'll ask if we have anybody who is only on the audio bridge.

Doesn't appear we have anybody only on the audio bridge.

So, we'll then get to the heart of the meeting. And when last we are dropped off, we were talking about the comments of N CSG which is line 6.03 of the comment tool. So, if he we could get that up in the frame, that would be helpful.

We don't have the comment tool up in front of us, but the NCSG comment that we left off with was that the NCSG strongly agrees with the proposals of Subgroup, whoever become the accessibility issue that sanction decree a and sanction, to be able to provide relief for those who are not on the US ghost designated national SBN list.

We support all of the recommendations relating to OFAC affection, however we believe the following improvements could significantly increase the value and quality of the OFAC recommendation in the report.

ICANN and then there are two points in which they believe we should change our recommendation. One, ICANN should prioritize obtaining one or two general OFAC licenses; therefore we suggest that the recommendation to obtain general OFAC licenses be clearly prioritized in the report.

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And second in our view this is one of the most important recommendations that ICANN should act upon. We believe that the report should propose a detailed timeline for the implementation of this recommendation by ICANN.

So, that is the, what's under discussion. I had hoped that we might have a markup of the general license recommendation, and staff, let's actually just put the document back up, the report. Well, it will probably be more helpful in the end. And if we can get to the section on the general license. (ringing).

As far as your hands up, please go ahead.

>> (indiscernible) I just wanted to know, explain NCSG comments, because last week I left early and I think you had a brief discussion on that. Whatever you see fit, just allow me to explain.

>>MR. SHATAN: You can explain now, if you like.

>> Okay. Great. So, I first apply one to two assigns the group for allowing us to explain the addition to our recommendation and the rationale for it. There is an action, not a change in the recommendation. It's in line with the recommendation, but it is an addition.

So, what we had in mind was that in implementing these recommendations was we want, we don't want achieve or barriers for implementation. So I'll put a study group to be done for the fax natural licenses and then they are going to look at what, how it's going to be implemented. And we have all these measures. So, we suggested to prioritize looking into getting the general OFAC license so that it, these recommendation does not fall through cracks and also be ignored.

One, and our recommendation I think, the addition that we are asking for is very important now considering that when you look at board's comments on this OFAC general license or in general on our recommendation of this jurisdiction, see where (indiscernible) and they are not really (indiscernible) in light of the recommendation to the select full extent.

For example, for the general OFAC license, the board sends back the (indiscernible) the study sheet, consider up for (indiscernible). And I think that is something that is going to interfere with the implementation of this recommendation.

So, considering the board's reaction in general, and also considering the budget at the moment, I have seen that for the implementation of the recommendation of W S 2, the board is 500,000 dollars, which I don't think it's quite substantial, So considering that, I think we should ask them to prioritize looking at reaching into getting a general OFAC license.

It's just prioritizing to look into it. It's not about just ICANN right now should go and start the process or whatever. Whatever we implement, they have to come up with implementation plan, and they should

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start the process of looking into it. They can say, no, we can't do this, because of this reason and that reason, but at least they should look into it.

Now, for the other recommendation that we said there should be a timeline for interpretation for prioritizing. The timeline for implementation of a recommendation. Really? I'm sorry, I've been talking for too long.

And I can't

>>MR. SHATAN: If I could interrupt for just a second. First as I think you just noticed, people are having some difficulty understanding you. It sounds like you're perhaps maybe far away from the mic in a very live room, So it sounds like you're kind of talking six feet away from a mic in a closet, not an empty closet, a full closet. Maybe that would work better. So if you could get closer and eliminate that.

Also, it would be helpful to focus soon on what change if any would be made to the actual text of the document because that's really where I think we kind of need to get some concrete idea for the group of what we might change in this, in this recommendation. Thanks. You can continue.

>> (Mr. Badii). Also, can you hear me better now?

>> Somewhat better.

>> Okay. So, I said that provide the rationale on why NCStinks it should be prioritized and also yes, comment saying that the timeline is not up to us, but, and we discussed that in the plenary, but I think if we could say in our recommendation that they need to come up with a timeline that when they are going to start this work, maybe just in general, that would be good.

So, the change that we are really recommending is that they prioritize looking into getting an OFAC general license. That's what we are asking, not the change, an addition. Just one sentence to prioritize.

If you think that would be too problematic, then that's fine, but considering that the board is not really supportive of the suggestion, and also the implementation and also like concerning the budget, I would like to insist on prioritization, but that's up to the group. That's about a sentence.

>> Greg, we have no sound. You may be speaking to a muted mic.

>>MR. SHATAN: Sorry, I was speaking to a mute button. It agreed with everything I said.

What I was saying is that the second sentence of the recommendation says initially ICANN should make it a priority to study the costs, benefits, timeline and details of seeking and securing one or more general licenses for DNS related transactions. So we already have in there a priority to look into getting a general license and to study the timeline, which I don't know if we want to be more clear about that, but I think,

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again, we probably caught a balance between those two. Say we should not be at all giving advice regarding priority in time lines and those who say that we should make securing a general license a priority and a specific instruction to generate a timeline.

So, I guess comes back to the question of how we would want to change this recommendation and whether we would get consensus within the group to change the recommendation and noting what Thomas has said, whether we would also get the, the plenary behind a change.

So that's kind of where we're at on this recommendation.

David, I see your hand is up.

>> Greg, thanks. It David McAuley, speaking for the record. I just wanted to say, I agree with you and Thomas. And I understand where far see is coming from, this is such an important topic. But the line you read from the recommendation of prioritizing, looking into this, is what it say. Then the next line goes on to say, ICANN should then pursue a license, pursue a license depending on that.

And when we get into discussions or adding language on priority sayings, it's possible that we could sort of create the idea that applying for specific licenses, for actual applicants that are standing in the doorway asking to get in, we would sort of lower that standard. Among priorities, I'm not sure that's the outcome we would want. Thanks very much.

>>MR. SHATAN: Thank you, David.

I see Farzaneh's comment in the chat. Just prioritizing looking into and obtaining, looking into and obtaining OFAC general license, I guess.

I guess where I think we diverge between what's in the report and what might be suggested, my NCSG, I think, I think it's on the priority of actually obtaining the license, and prioritizing that against other things. And Thomas asks whether that's only jurisdictional priorities or priorities of other sub teams or all other ICANN efforts; which is I think a good question.

So, I guess, I'm still a little unclear if the NCSG comment wants us to tell ICANN to prioritize obtaining it once they've done the study. I guess the study is necessary to determine what, whether in a sense it can be prioritized and what the, what the factors are, the costs and efforts and all those sorts of things.

So, is there a suggestion? I agree with Kavouss that we need a concrete suggestion, looking at the language, how would it be changed? If this suggestion were to be considered for adoption?

So, I don't see any hands up. I guess one potential change would be to change the third sentence to say that ICANN should then make it a priority to pursue one or more OFAC general licenses; or one or two OFAC general licenses.

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Is that the, the NCSG view that we should change the third sentence as well to prioritize the license and do we think that is something we'll be able to change in this Subgroup? I don't know if there is any answers to that.

My concern is that if things, once we get to actually telling memorandum to prioritize the execution after the study, which we don't know the result of, and there is definitely, you know, push back on trying to say too much about priorities without knowing what your prioritizing things against. My personal view, maybe I'm half taking off my wrap tour hat here, we might be pushing past where we can get consensus here, much less the group, larger group.

But, in the absence of any concrete language suggestions other than my own, I don't know what we have to work with exactly.

Thomas, your hand is up, please go ahead.

>> Thanks. Thomas Greg. Hi everyone.

I understand that, that this is a very important topic. And what I have a hard time getting my head around is how the mechanics of such prioritizations would work. And at least as I understood our recommendation to be quite prescriptive in terms of ICANN doing some ground work to find out what the cost involved would be.

But does the Sub Team actually want to make obtaining the license a priority among all the recommendations that we have in the jurisdiction Sub Team? So would that be more important than developing the menu option.

And then, if this request for prioritization to get it done, affects the order of dealing with the recommendation and jurisdiction Sub Team, how would that impact the other recommendation from the other sub teams?

It was my understanding that we would come up with our found report and let ICANN and the community decide on budget, timing, and priorities, because I'm sure that, unlike WorkStream one when we had to meet this very delicate time window, that we don't have this sense of urgency now, and we have ICANN now dealing with limited budget.

So, the question is, shall we be prescriptive or would we change the nature of our recommendation if we ask for that prioritization, or would it be more appropriate to potentially keep a marker and chime in if and when the community discusses this with, with the board, how to allocate funds and how to prior advertise for those who make themselves heard that want to give this particular topic weight and priority?

>>MR. SHATAN: Thank you Thomas. I see Tatiana has a hand up.

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>> Hi everyone. Can you hear me?

>>MR. SHATAN: Tatiana, you seem a bit low.

>> Can you hear me now?

>>MR. SHATAN: Yes.

>> Hello?

>>MR. SHATAN: Yes, I hear you.

>> Okay. Good. So, I suggest that maybe we just try to prioritize the recommendation itself, or other recommendations. You know what I mean to say is that the entire recommendation is a priority without changing its language.

This would be a solution for our side. I don't know if this is going to be a solution for the group.

>>MR. SHATAN: Thank you Tatiana.

I guess the question would be, is there other support in this, for prioritizing this entire recommendation against all other jurisdiction recommendations, I guess, including changing the specific license treatments that are the other OFAC recommendations and the choice of law recommendations.

So, I think that's, that's a question whether there is support for that type of prioritization. I don't know that we could prioritize this against nonjurisdiction matters out of our group.

So, I mean, keep in mind that there are over 80 recommendations coming out of WorkStream 2. So, the question then becomes how this prioritization decided on them overall.

Do we want to say that this is the most important recommendation that comes out of our group? Personally, again, personally it's my feeling that the study will take some time, and that during that time it would be the right time to change the treatment on specific licenses, because that's a shorter term project.

By the time the study is done, that other issue should already be accomplished. So prioritizing this ahead of that other one, might also have the perverse result of delaying that without speeding this one up.

I'm a little wary of trying to set priorities in that fashion. I mean, we can maybe find a way to emphasize this, the importance without necessarily using the term priority, because prioritization gets to the question of competing against other consideration, both ours and the 76 recommendations that are not coming out of this group but they're coming out of other groups.

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So, perhaps we can consider a way of stating that we consider this to be of great importance. Or, the other half of it, and going back to what both Tatiana says in the chat and early on, we want to avoid delay; or any speaking out opportunities to make this slow down.

So, again, if we could get some language change from maybe I'll nominate specifically, Farzaneh and Tatiana on this, and as early in hopefully maybe before the weekend, we could look at that and see if that's a change that we could broadly agree to without getting into the morass of trying to put this thing at a certain place in the line of priorities which I think is going to raise eyebrows. So I think that's kind of the better focus for something that might get traction in the group.

Also to answer questions that I saw Thiago in the chat the formal recommendation of the group is the one that's on, for me in the Google doc page 18. What's in the beginning is just a summary. So, if we're going to change anything, and perhaps we should, the summary should be changed to match the formal recommendation more closely; or rather than the other way around.

I'll take a look at that as well.

And Tatiana, I'm not looking for you to draft on the fly, don't worry, we just get this out before the weekend So we can keep progress going, that would be great.

So, why don't we move past this unless we have other comments on 6.03 and the OFAC general license.

And the next that we indicated we would pick up with is 6.05, which is comment from government of Russia. Also about the general license. And states, recommendations that are to make ICANN to take any steps to reduce the method OFAC sanctions against foreign governments are noted with appreciation as well but can be recognized only as first attempt to handle the ICANN jurisdiction challenges. Taking into account the high risk that OFAC sanctions against foreign government would harm lower number of businesses and sanctioned countries, we consider the recommendations proposed by the Subgroup for the corresponding I can actions are limited in the ability to tackle positive, negative effects since the principle of best efforts provides no guarantee that ICANN would be able to adequately address the problem.

So, I guess the question here is whether there is any thing in this comment that would, anybody would like to propose to the, made into a change in our report, then we can see if there is such a change, and see if there is support, consensus support for actually making that change.

The only concrete thing I see in this comment is feeling that best efforts is not the appropriate standard. Which we've already discussed in our group. This is actually on the specific license. We've actually gone a little in the other direction to reasonable best efforts, and that seems to be the new consensus of the group.

So, are there any comments on this?

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Thiago, I see you disagree. I'm not sure what your suggestions.

Okay, we have decided on the last call, let's go back to, for instance section, the section on approval of GTLD registries. Where we've changed best efforts to reasonable best efforts. Aside from Thiago, is there anybody that grease that we should take out the reasonable item that we decided in the past call to put in?

Thea writes, best efforts is already a soft obligation which needs to qualification to be an obligation of conduct as opposed to obligation of results.

Given it's the government that issues the OFAC license how would you propose giving an obligation of result?

And just to recall, best efforts means taking every possible effort, even if it's commercially unreasonable, even if it would result in bankrupt, would result in every other priority being dropped and discarded. And arguably even death.

That is what best efforts goes to. Best efforts is an extreme obligation. Perhaps under US law, perhaps it's different else where. If it is, maybe we're using a term that generally isn't understood but I had heard it to be, I thought it to be generally understood.

Kavouss suggests utmost effort instead of best effort. That has no meaning as far as I know in any Jouris prudent. We already decided that, or we're in the process that deciding it should be reasonable, So I don't know what reasonable utmost efforts would mean and how that would differ from anything else.

We will see here, if there are objections to the language as it currently stands, which reads, ICANN should commit to applying for and using reasonable best efforts to secure an OFAC license for all such applicant.

If Europe posed to that, put up a red X. And if you believe that this is an appropriate way to phrase this recommendation, put up a green check.

I'm not seeing much of either. So, I'm assuming that most have no real opinion on this?

So, we came to a ten tentative access of reasonable events. Now the question is whether we should change that back. Kavouss, please go ahead.

>> Yes. I wish to say that if the changing or change of best effort to any other words, raise the consensus to not to change it. Thank you. I didn't say that's the consensus. (indiscernible) I didn't say raise the consensus. I said that if you change the best to any other word, we brace the consensus not to change it.

Please kindly, carefully listen, thank you. Break, not brace. Break, B R E A K. (sorry). But not brace. Brace has different meaning of break.



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>>MR. SHATAN: I don't see significant support on this call for changing back from the consensus we arrived at on the last call. So, I think we keep it as it was. We can bring this up, if you wish on the list. But, as far as he says, we really wrap this up on the last call.

So, we will leave this as it is. Each place that it occurs.

So that moves us past 6.05.

I will skip 6.06 since that's an agreement.

Next is 6.07.

>> Excuse me, Greg.

>>MR. SHATAN: Yes?

>> This is (indiscernible) speaking for the record. Just, So, I would like to leave it on recovered why I'm opposing the addition of the word reasonable in front of best efforts. While I understand that there is a discussion that the group may have had during the last call to which I could not attend and I apologize for that, but I will repeat the point that I attempted to make on the chat. And that is that the position arrived at prior to the proposed change has certainly more legitimacy in terms of the process. Many participants participated in the process that lead to the reasonable language, and the, then I assume that during the last call where the proposed change was allegedly accepted, many of those participants were not present, different reasons. One of these reasons might be that we are at the stage in the, in the process that may not be too of interest to many of those participants to participate again. They were interested, not expecting changes of these nature to be undertaken.

So, I would caution against relying on the decision that was supposedly made during last call as opposed to the decision that the group as a whole arrived when it adopted the consensus position of consensus on this recommendation.

So, again I don't think we should add reasonable to best efforts, because the concept of best efforts itself already contains the idea of reasonable. We would be adding words with no specific meaning that wouldn't necessarily change much. And this is one point and the other point relates to the legitimacy of the proposed change. I don't think the group on a call change as easy as it seems to be happening now; a recommendation that was arrived at through a very difficult process.

Thank you.

>>MR. SHATAN: If I could ask you, what is your reason for saying best efforts already encompasses reasonableness? Certainly my understanding that it does not, and that's why we often see reasonable best efforts, commercially reasonable best efforts, as distinguished from best efforts. Again it's my

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understanding from, at least US Juris prudent, as I said before, best efforts require best efforts even beyond what is reasonable, essentially going to the ends of the earth.

So, I would like to know, kind of where your basis is, because there didn't seem to be any consent at least from the distinction on the last call. I know you couldn't participate. But if this is a distinction without a difference, that's one question. If it's a distinction with a difference, that's another question.

But the decision was made and we reviewed quite a number of other comments that suggested reasonableness. And we did have that discussion, this has also been out on the list. So we have your objection now and I would like to know first, why you think best efforts includes reasonableness?

>> Thank you Greg. This is Thiago speaking for the record.

I would speak to the question you raised. First of all, I would say that I would have to present a reason and explain in terms of, in terms of legal knowledge what is the difference between one expression and the other; but we'll try to do that in any case.

So you obviously speak from a US law background. And this is a problem we are facing here. See, it is ICANN operates, if this is the major problem, transitional problem, you take for granted ICANN operates according to US standards, US laws, et cetera, but then we have governments in this particular recommendation, we might be dealing with governments in this particular recommendation, not necessarily US laws will be the appropriate standards from the perspective of many governments. In terms of international as opposed to US law, one could see the best effort obligations as attribute of an obligation of conduct. This in itself already sends the necessary message that the obligation upon ICANN to undertake best efforts doesn't necessarily mean that it will have to reach a result, only that it will have to do whatever is within its means to achieve that result.

That's it. All the other details that might result from US, they are not pertinent here.

Looking over that explanation, in spite whether it is olfactory to you or not, the main point and I think the main reason why my objection should be taken on board here, is related to the way we can change things here, right? The group has arrived at the original language through a very difficult process and now we're changing it. And one could say, we are changing it to make it more in line with US legislation language and the like, but it doesn't matter. What matters here is the language that the group has arrived at before.

And I understand, there might be a disagreement as to whether my point is valid, whether a decision was taken during last call should or should not over ruled what was agreed before, but my point is, it's put on the table and I would like you to take it.

Thank you.

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>>MR. SHATAN: Okay. Well, we have that on the table. Thank you. I didn't actually hear anything in that, that stated why reasonableness would be assumed into best efforts. And I don't think we need to go, nor did I hear anything that was different from US Juris prudent. Plus I think it's a matter of common sense. You said yourself best efforts means that ICANN has to do all within its power, which it doesn't imply reasonableness. And reasonableness, we don't need to go to US law to, it just indicates dined of a sound judgment and good sense, and the like. So, I don't think this is really a Juris Prudential issue in that way.

So, agree we're not categorized defying US laws here. We don't need to. Reasonable efforts I think speaks for itself. We took a number of comments in a position that objected to best efforts as creating too high obligation for ICANN, given the every effort implication. And now we have opinion we should go back to that.

Cheryl, your hand is up, please.

>> Yes. Thank you Greg. Cheryl for the record. I had my hand up earlier and took it down, because you pointed out what I was going to, and that was that from the discussion we had last week, which was in reaction to the public comments received, that we, we had enough conversation to have the people on the call see that the unreasonableness of the terminology best efforts under US law could perhaps be a problem; however, I am not going to dine this over having to put reasonable in or reasonable out, best in or best out; but what I am going to want on the table in response to Thiago, is the apparent belief or concept that the purpose of going through public comments to our, yes, I admit, hard Roth recommendations is nothing more than window dressing. And that no changes would be considered.

It's the opposite. The exact purpose of these groups going through the public comments and considering whether or not any change should be made to a recommendation is the purpose of all of these 90 minute grueling weekly calls.

So, I just want to make sure that we don't have anything on the record that somehow indicated the process we're going through now in response to public comments is invalid, because it is an absolute validation and it is quite probable that the weight of public comment could over turn absolutely a hard wrought outcome. Thank you.

>>MR. SHATAN: Thank you, Cheryl. That seems reasonable.

So, I also think that we can't say that one call is more legitimate than another, as long as we have a quorum. So, at this point, do we have a consensus on this call to change it back?

So, all of those who would like to change it, I see a couple of hands. Listen to Thiago and Kavouss, I hope we can get past that point on this call. We may end up with no recommendation at all. Thiago, go ahead.

>> This is Thiago speaking for the record. Let me try to be constructive for the record to get past that point. Perhaps we could strike out the reasonable in front of best efforts and add a footnote that would explain what Mr. Rapporteur has just explained, that is that the, under US laws, and which might be the Jouris ducks in which ICANN efforts will eventually operate, it is important to take into account the best efforts obligations must be qualified by the objected reasonable. Something like that.

It is quite clear in that particular, that the concerns that have been expressed by some of the people who have provided public comments are taken on board.

And then the reason why reasonable as a word is being added, if circumstantial, might have, has all that in terms of US laws. (indiscernible). At the same time it would be preserving the original language which has a broader meaning, I would say and might be useful for ICANN in other ways. Thank you.

>>MR. SHATAN: Thank you, Thiago. I think what you actually stated is the opposite of US law. But best efforts without reasonable in front of it does not include any implication that the efforts used will only be reasonable efforts.

So, I think we need to try to avoid kind of getting too deep into any one country's law on this, but unless, if we want, if we do drop a footnote that says this is understood to be reasonable best efforts, I don't see why that's any different than saying that's reasonable best efforts, because we're asking the reader to interpret best efforts as reasonable best efforts. I think that seems a bit like a gyration to me.

Kavouss please go ahead.

>> Yes, I am sorry, I don't understand the meaning of best, meaning of best. What does it mean, reasonable best? Either best or is not best. Either best efforts or reasonable efforts, but not reasonable best efforts has no meaning. Thank you.

>> Thanks. Is there anybody else who believes that reasonable best efforts has no meaning? If you believe reasonable best efforts has no meaning, please give me a green check.

If you believe that you understand reasonable best efforts to have a meaning, and the meaning of it is different than best efforts, then give me a red X.

So, Thiago, you're now agreeing with Kavouss that you don't believe reasonable best efforts has any meaning? Okay. That's an interesting change in our position.

>> If I may explain myself. I agree with Kavouss in that his statement favors the deletion of the word reasonable, So that the expression best effort is preserved as it was originally written. Thank you.

>>MR. SHATAN: So, we have at least two people on this call who believe that ICANN should be held to a best efforts standard which is that they need to take every effort, reasonable or unreasonable, good

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business judgment or bad judgment, they must take that effort; using all resources regardless of what else those resources could be used for. Because that's what best efforts means. Unless that's not what somebody thinks best efforts means.

So, the question is, who would support ICANN being told that they must use that level of effort to secure an OFAC license for a particular applicant? If that's the level of effort you support for ICANN, please put up a green check.

Okay. I am seeing no green checks. So, I'm assuming nobody actually wants ICANN to be taken to that level.

So, what we do in fact mean is reasonable best efforts. Best efforts qualified by objectively reasonable limitations.

I am not sure Thomas, I think your hand is up next.

>> Thanks very much, Greg. Indeed, I guess the problem might probably be, not everyone is familiar with US legal concepts and definitions as you are, and that the request for, or the hesitance to accept language that suggests that is not, is because people don't understand exactly what the legal terms mean.

Do we have any legal reading or other third party trusted resource where we could pull a definition from, to explain what reasonable best efforts are? Because I guess this is something that we probably can't resolve here. We just have a different views, but pointing to a neutral independent result for that definition might be the trick. Just trying to build a bridge here.

>>MR. SHATAN: Thank you, Thomas. That's a good suggestion. Perhaps we could footnote reasonable best efforts. Maybe, here's a suggestion. We could footnote reasonable best efforts and explain what best efforts mean and what qualifying it by reasonableness means. That way since it seems nobody wants to hold ICANN to go to the ends of the earth standard, the term reasonable best efforts is the, seems to be the appropriate one, but we can footnote that to indicate how in this context the terms best efforts would be interpreted, and what, and why reasonable is being added in front of it.

Kavouss, I see your hand is up, please go ahead.

>> Yes. I don't know why you pushing So much to put reasonable before best. You're doing more than necessary. I think you kindly need to listen that it has no meaning, the reasonable best. I don't understand that.

We also should understand, every possible effort to understand, all possible effort to understand, every effort to understand. But every or any or reasonable, what is reasonable best? Best is best. What does it mean reasonable best?

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>>MR. SHATAN: Reasonable best efforts means that your efforts are limited by what would be reasonable under the circumstances.

>> Who decides it's reasonable, Greg? Who decide?

>>MR. SHATAN: It's an objective standard. It would be an objective standard as to what would be reasonable and, really what the difference is, is that under an every effort or best effort standards, you would need to do everything, even if it involves bankrupting yourself, stopping every other priority, and basically putting everything else at risk in order to do that. That's what every effort or best efforts or all efforts means. So that seems like that includes doing some things that would be unreasonable.

So, reasonable best efforts means that you wouldn't do the unreasonable. That seems to be, probably the easiest way to say it that you don't need to do what is unreasonable.

>> We don't have the same understanding. I'm sorry.

>>MR. SHATAN: What's your understanding?

>> We don't understand what you mean by reasonable. You are not in favor of this. That's all.

>>MR. SHATAN: I'm trying to understand what you want. Why do you think having, do you want ICANN to do things that are unreasonable in order to satisfy a best effort standard?

>> Not unreasonable. Every possible effort. Every possible effort. Whether it's possible or not possible.

>>MR. SHATAN: So if that's everything possible even if it's unwise or imprudent, they would have to take that effort? As long as it's not impossible. That's the standard you want? It's good to get that out and understand that.

Does anybody else support that level of effort for ICANN in attempting to get a specific license for an applicant to be a registry or registrar, to do the imprudent, the unsafe, the extreme?

I'm not seeing any other support Kavouss.

>> Greg, you should listen. Of this call, you went ten times to voted. This is a voting.

>>MR. SHATAN: Yeah, I'm looking.

>> Ten percent or not. Please count it. Do not ask who is support. Who is not support? We should convince that every reasonable, sorry, reasonable best has no meaning. For you, everything you have no meaning. Why the vote? Why are you asking for vote? This is a consensus. Please, this is a consensus meeting. Not by voting. You also vote ten times. Please.

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>>MR. SHATAN: Whether it's a vote or consensus is really beside the point at this point. The question is whether there is sufficient support for a level of effort that requires ICANN to do risky, imprudent extreme things which is what best efforts or every effort or all possible efforts would mean.

So, if there is consensus support for that, we can take out reasonable and move on.

So, is there a consensus, what is the level of support for a true best efforts standard that has no limitations other than what's possible?

If you do support that level of effort, please put up a green check.

I'm not seeing any green checks. So, Thiago, I see your hand is up, please go ahead.

>> Thank you, Greg. This is Thiago speaking for the record. I understand there were concerns. And I think the sensible solution to be to do as I suggested before. I think that solution would be in line with Kavouss' preoccupations, my preoccupations as well.

We could leave the text as it is, best efforts. And then in the footnote, we would explain that, according to US standards that might apply whenever ICANN is trying to fulfill that recommendation, best effort is understood as reasonable best efforts, as per the US law's definition. That's it.

Leave the original text as it is, add a footnote that explains and make it clear that the best efforts obligations will not create those very heavy obligations that you are afraid of, that's it. Thank you.

>>MR. SHATAN: Thank you, Thiago. Just to reiterate, those heavy obligations are what comes under US law. So if we do use the US law definition, then we are finding ICANN for these extreme obligations.

So, I have thought that what you, I'm a little confused. Do you want ICANN's efforts to be subject to some limitation to what is reasonable to do? Or don't you? Thiago, I'm not hearing you.

>> This is Thiago, I was on mute. Sometimes, we need to find terms that are pleasing to everyone because there might be some ambiguity there. So what I'm suggesting is that we leave as it is, best efforts. Then we add the footnote to explain that in terms of US laws and explain that when the obligation is being carried out for, according to US laws, because it is within US jurisdiction.

Then the understanding that best efforts is reasonable best efforts. That's it. Is that clear enough?

>>MR. SHATAN: Yes. Thank you. I see a suggestion from Farzaneh, and David and Tatiana, to have a footnote. Leave in the worried reasonable but have a footnote that explains the terms. So, that seems to be a, a reasonable suggestion.

What's your view on that Thiago?

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>> Thank you, Greg. This is Thiago speaking. The difficulty for us is to have an expression that is from, taken from US laws, appearing in the recommendation itself. You see? It would be putting our stamp, this is fine. As we are using and relying on US legislation concepts.

We would rather prefer to see the definition, the explanation that best efforts might mean reasonable best efforts under US laws in a footnote. And preserve the expression best effort.

Other legislation and jurisdiction they use the standard best effort. International law has those best effort obligation. It doesn't have reasonable best efforts obligations. Thank you.

>>MR. SHATAN: Thiago, under international law, what is best efforts interpreted as? Is it interpreted as best efforts or reasonable best efforts?

>> It is certainly more vague and open to different interpretations under international law. Thank you.

>>MR. SHATAN: I suggest So we don't spend the entire call on this, we can put two alternatives in front of the group and see what gets more traction; one a footnote for reasonable best efforts and one otherwise. And see what gets more traction in terms of people understanding. Because it seems regardless of the language we use that what people mean is best efforts, that is limited by a concept of reasonableness. And that the disagreement here seems to be on whether when one reads the word best efforts, one implies reasonableness or not. So we are actually trying to say reasonable best efforts, but the concern is that by estimating reasonable best efforts, perhaps we are not saying reasonable best efforts from the standpoint of certain readers.

So, that seems to be what I understand it. So let's try to get some definitions in front of us and Thiago, if you have definitions on reasonable best efforts, understand international Juris prudent, that would be happy to see, or some common sense definitions too. That might even be more helpful, to get our head out of the law and into common sense.

In any case, why don't we move along to 6.07. This is the ICANN board on general licenses. Regarding the fourth component search OFAC general licenses the board appreciates the recommendation of initial step where the ICANN organization studies cost, benefits time lines and details of such a process. The board also requests that opportunity costs be identified in that study. Opportunity costs, then it says the study may also be aided by a further problem statement from the community to identify the scope of issues that the CCWG community believes will be solved through a general license.

I tend to believe that our report already says why, what a general license would do, but if people think there is more needed, we could do that.

It assist did your deliberations details are provided by ICANN organization to the Subgroup regarding some concerns regarding seeking a general Lions. For example there is no obligation process to seek a general license. A general license requires a change in regulation by US Department of Treasury or



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change in legislation. As the report notes the regulatory process may be significant with no guarantee of success.

Second part of the recommendation regarding removing friction from transactions could be clarified. If the CCWG capability has further recommendations beyond what is laid out in the report, those would be beneficial to state as there is no basis against which to measure if ICANN can successfully implement this part of the recommendation.

So, does anybody believe that we should change our recommendation based on this? I think the most concrete suggestion would be to add opportunity costs to the study recommendation. I think a lot of the other stuff is already in, in our report, more or less. Other than trying to put more meat on the term avoiding friction.

We already have costs and benefits and timeline and details. I think ICANN could run the study as it sees fit. I see a big disagreement from Farzaneh to add opportunity costs. Is there any agreement to, to add opportunity costs?

This is not a closed ended suggestion that the study should only do these things. So, my tendency is to believe that we, we've said enough. But if others believe we should say more, now is the time to say So.

I'm something only agreement with the idea of keeping this as is. So why don't we move on.

From 6.07, to 6.08. There is from ENT A. The Subgroup wreck men's that ICANN take steps to (indiscernible) by first making it a priority to study the cost benefits timeline and details of seeking and securing such licenses. The Subgroup recommended I can proceed to secure such license unless a study notices obstacle, et cetera.

In the that general licenses should be study, however entail does not support to recommendation that the study be a priority. Given ICANN current budget and funding issues, ICANN should have greater discretion to set priorities, taking other potential priorities into consideration. Further an reference to significant object tackles is ambiguous and the Subgroup's report should be amended to provide that ICANN should not be required to take more than commercially reasonable efforts to obtain general licenses.

We don't say anything about the level of efforts here.

In interview ICANN should have the discretion not to pursue general licenses if the process is unreasonably onerous for the organization.

From this I take two concrete suggestions on how to change our recommendation. One, would be to take out the word priority from the second sentence. And just say initially ICANN should study the costs. And the second would be to add in a reasonable efforts limitation to ICANN for general licenses.

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Is there any support for either of those, such that we should discuss either of those changes as ones that should go forward?

I'm not seeing any support for taking away even the priority of the study. Nor am I seeing any support for adding an explicit reasonable efforts limitation to ICANN's efforts to pursue a license; or for that matter to pursue a study.

So I think here we don't see the balance going in the opposite direction either from this change. So, the proposed change would be too, just I can't tell if Thiago said it after I said it. But the proposed change would be in the second sentence of recommendation which is, for me on page 18 of the Google doc, at the very end of the OFAC portion of our report before we get the choice of law. The change would be instead of saying initially ICANN should make it a priority to study, we should only say initially ICANN should study.

And then in the third sentences to change ICANN should then pursue to ICANN should use reasonable efforts to pursue one or more OFAC general licenses.

I don't have a way to display it on the screen. I'm sorry. But basically, take away make it a priority. Too, in the second sentence and add in use reasonable efforts to pursue in the third sentence.

If there is any support for either of these changes, I see no support. I see some objection. And therefore I think we should not take these changes. We've given them due consideration, but I don't think they change our consensus on this recommendation. So, we should move on.

Skipping over those that just agreed completely with our proposals, we next come to 7.05, government of Russia on, this is again just the same comment on OFAC licenses. So we've really already considered this as well. It's just, I guess what happens when you cut up the recommendations into So many, or cut up the comments into pieces, the same language occurs kind of several times.

So, this is with regard to the license of the new GPLD. We've kind of, I think we've beaten the best effort horse to death there.

Thiago please go ahead.

>> Thank you, Greg. This is Thiago speaking. Very quick comment. To demonstrate what I was saying before. You see the second proposal to insert a best efforts obligation in the second and third sentence of that recommendation, would have been meaning would have been meaningless, because at the very even of the that sentence, there is a caveat which says that ICANN should do whatever it is recommended to do, unless significant object tackles are identified in the study stage.

Those there, in the wording as it was originally written, the explanation in a way of what would consist best efforts obligation. So it would be redundant to flesh out again the word best efforts.

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This is the same sort of comment would apply to my previous considerations regarding the previous point. Thank you, sorry.

>>MR. SHATAN: Thank you, Thiago.

So, I think we've covered 7.08. At this point, the next one on which does not dignify support for the report as it is, again is government of Russia, same comment regarding best efforts. So, I think we can consider that one already considered.

We have at least a tentative way forward, a way forward to decide our way forward on that.

Then it brings us back to ENT A. Again 8.07, where says that therefore recommend that the best effort standard be reconsidered and that a less onerous standard of reasonable efforts or reasonable best efforts be recommended by the Subgroup to ensure that I can may exercise reasonable judgment in pursuit of a license becomes unreasonably onerous for the organization in a particular case. As a matter of transparency, (indiscernible) for OFAC license and terminate a application process, such reasoning will be well documented and available to the community on request.

And to also recommends the meaning of the term otherwise qualified be clarified. It is unclear whether an otherwise qualified applicant is one that would otherwise become a registrar or one that could still be rejected by ICANN on other grounds.

And to suggest using the term approved or acceptable. This will more clearly indicate that ICANN has decided that the applicant should become an accredited registrar, but for the need for an OFAC license.

So, I think we can see the first part of this, we have discussed enough, I think for one call.

The second part of this relates to the otherwise qualified, which we in this draft have changed otherwise acceptable, which the, we saw those on the last week's call thought was less ambiguous and there were no objections to that when this was posted.

Is there any objection to that change from otherwise qualified to otherwise acceptable?

I'm not seeing any, So I think we Kavouss says, yes, I object.

Kavouss, would you like to tell us the rationale for your objection, to see if others might be persuaded?

>> Rationale is that all the discussions and argument provided is to not use what would be meant and what we agreed at the meeting, previous meetings. So I don't understand this otherwise unreasonable, reasonable, many reasonable, and unreasonable, I don't understand this. So, well not like to change anything. We retain whatever we already have in the previous calls. Before this public comment. So we

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don't agree with this otherwise unless reasonable, unreasonable. It's totally misusing and totally confusing the people. Thank you.

>>MR. SHATAN: Thank you, Kavouss. We were actually not talking about the reasonable question, but just whether otherwise qualified should be changed to otherwise acceptable or not.

So, are there any objections to the change to otherwise acceptable?

As a registrar?

>> Acceptable by whom? Excuse me.

>>MR. SHATAN: Well, I think that would be acceptable by ICANN, which is the party that grants it. In terms of the registrar. The registry, would be otherwise acceptable under the process by which new GLPD registries are approved.

>> Excuse me, who decides whether it is acceptable or not? ICANN?

>>MR. SHATAN: Whoever normally makes those decisions regarding applications to be a registrar or a application to be the operator of a new GTLD registry.

>> So, this census does not come from me. The group drafted it like that, and now one comment saying to change that otherwise qualified by otherwise acceptable. Still I don't understand what is the reason? What is the rationale behind that?

>>MR. SHATAN: The concern that was expressed and discussed on the last call, it would be helpful if in the future you read the last transcript before participating in the next one. Was that the otherwise qualified might leave out the discretion to decide whether an applicant for either registry or registrar was unacceptable. Had other reasons why they should be refused. That merely having the necessary qualifications might be insufficient to actually be approved. And that otherwise acceptable better expressed the idea that there should essentially be no other impediments to their receiving a registrar accreditation or approval or new registry other than the OFAC license issue.

So, that was the point. So, is there any objection to otherwise acceptable? I think we have one from Kavouss.

>> Yes. I have objection with that. Because when you say acceptable, means acceptable by one party. You propose something to me? I could say that I don't accept that. This is acceptable. If you say acceptable by both parties, yes. But if you say acceptable meaning only one person, sorry one party, but not two. This acceptable or unacceptable give the right to object to something, saying that is unacceptable.

>>MR. SHATAN: I believe that ICANN has that right with regard to registrar applications generally. If there is anybody who deals with registrar applications and it's only a matter of mechanical qualification and not some larger review, that would be helpful to know.

>> Again, I don't understand. Who deciding on the acceptability? ICANN or registrar? Which one? Thank you.

>>MR. SHATAN: Not the registrar, because the registrar is the one making application. They obviously think they themselves are acceptable.

I see a hand from Sam, maybe she can give us, enlighten us on the process; and perhaps she has some thoughts on the difference between otherwise acceptable versus otherwise qualified. Sam? Please go ahead.

>> Thanks, this is Sam Eisner from ICANN. It's been awhile since I've been involved in the registrar accredit distribution process, but I don't believe the qualifications themselves have changed very much since I was familiar with it.

I think where (indiscernible) expressed earlier, we get applications for registrar accreditation and there are some specific requirements that registrars, or that applicants must meet before they're qualified to be a registrar. So I think in that case, maybe qualified is better than acceptable, because it goes to meeting the qualifications.

Then what I've also understood this recommendation to mean is that for those who qualify on every other realm but the only, the issue that ICANN faces is the OFAC sanction that says to ICANN that we are not allowed to do business with that registrar unless we have it, a license. That that would be the world of people that we are expected to move forward with the licensing process.

So those who do meet the qualifications and wish to be registrars would then have the opportunity to do So, without the impediment of OFAC registration standing in their way.

>>MR. SHATAN: Thanks, Sam. So, at least with accrediting registrars, is it fair to say there is only a question of meeting qualifications and that is there reasons, could there be reasons that somebody who is a qualified on paper would nevertheless be refused a registry, registrar accredit distribution? Or is it pretty much at that point, once you check all the boxes, you'll get accredited?

>> Again, you know, I haven't been involved in the registrar accreditation process for over five years here, So I'm not sure. I think it is more about if you meet the qualification, then you, then you're able to become a registrar. I think that's generally where it is. I don't know that there is much room for subjective review of, but do we like them or not, that's not really what we go for. You know, we base that on qualifications. Have they been a registrar before and didn't pay all their bills. All those things. But

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those are objective qualifications that we look at, as opposed to subjective determinations once we (indiscernible).

>>MR. SHATAN: Thanks Sam, I think we may have lost the end of you there.

Kavouss, is that a new hand?

Oh, we have and Sam, that was a newer hand? No, that's the end of Sam's hand.

We have five minutes left in the call. I think we need to see whether this language works better with acceptable or qualified or perhaps we would say, if the applicant would otherwise be accredited might be another way of doing it. At least I think basically says, the, what we're trying to convey, that it is the only, the only thing standing between them and success is the need for the license. So we just need to make sure we're expressing that correctly.

So, I see Kavouss says the term qualified is used in the applicant guide book and being discussed by new GTLD as the correct term. If somebody could check that, that would be helpful. I'll try. But if qualified turns out to be the better word, then we can do that. And if it's the word that's being used there and with regard to the registrars then we should go back to qualified.

Let's try to check that against kind of a larger universe that we're working in.

So, I think at this point, given that we now have four minutes, we should talk about the, the road ahead.

With this, we have in fact almost gotten through the second reading of the, of the comment, of the comment tool; where we need to pick up tomorrow or not, sorry, in a week, wishful thinking; is with section 9.01 of the comment tool. So we're down to the last eight lines or So.

So, between now and next week, it would be good for everyone to review the draft document. With regard to best efforts or reasonable best efforts, I'll put together two foot noted proposals. And see how, how they seem to work for people.

And with regard to qualified, it will be good to get some perspective on how the, what words are properly used to describe the success criteria for a registry or registrar.

And then take a look at the last two pages from 9.01 on of the comment tool So we can hopefully dispose of them relatively quickly.

So, that I think is the route forward.

And last but not least, would be to get some language before the weekend to look at the NCSG suggestion in a concrete fashion, to see how that would work.

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So, that I think is kind of our homework for the coming week. We have essentially two meetings left on the 21st and the 28th. I believe that both are at 1300 hours, if I'm not mistaken. Hopefully you can all check your calendars and see when that is. I'm quickly checking mine; and seeing that it is 1300 hours on the 21st. That is when we will reconvene. And then on the 28th, it is again 1300 hours, the last day of February and pretty much the last day of our time together.

So, with those two calls, and with the open issues that we have from this call, and the need to review the other changes that are in the document that are sitting there, and the last of the comment tool, we'll have our hands full for the next call. I'll try to get us as organized as possible to make that call efficient So that hopefully our very last call can be used to tie up and neatly with a bow our report and deliver it back to the plenary as the new and improved consensus of the group.

Any questions?

Any objections to that approach?

It's now the bottom of the hour. Our time is done. Kavouss I don't know if that's a new hand or an old hand.

>> New hand. A new hand. Please. Please (indiscernible) rediscuss this reasonable best or best efforts footnote. You propose us a two alternatives to the (indiscernible) plenary, and reselect any of those two, because the more participants, more representations and more time to reflect. So please kindly as you have suggested proposed two alternatives. Thank you.

>>MR. SHATAN: We will propose two alternatives. I think it would be better however if we can resolve it in this group, rather than providing the plenary with decisions; unless we're incapable of making one. Hopefully, if we make the wrong decision, the plenary will let us know.

So, in any case, with that, and it now being 3:31, and Belgium waffles are awaiting me in the conference room. I will say good bye to all. Happy Valentine's Day. It's a pleasure to spend Valentine's Day with you.

You may stop the recording. Good bye all.

(End of call).