

# 2020-06-02 New gTLD Subsequent Procedures PDP

The call for the New gTLD Subsequent Procedures Working Group will take place on **Tuesday, 02 June 2020 at 03:00 UTC for 90 minutes**.

For other places see: <https://tinyurl.com/y9hxxwhy>

## PROPOSED AGENDA

1. Review Agenda/Updates to Statements of Interest
2. Discussion of Final Report Topics:
  - a. Review "Can't Live With" comments on packages 1-3: <https://docs.google.com/document/d/1Hh8Wj3lwXvi91Am1k4Zoooct2zmPOmVe1pLmjQLuQuo/edit?usp=sharing> [docs.google.com]
  - b. Review Category 1/Verified TLDs in 2.3.2 Registry commitments / Public Interest Commitments: <https://docs.google.com/document/d/1kUImZH8nxWTgfcRluA5FxlheMm4XhhOwkRt7om52aQU/edit?usp=sharing> [docs.google.com], page 139; see also the ICANN46 Beijing Communique' at: <https://gac.icann.org/content/Migrated/icann46-beijing-communicue> [gac.icann.org]
  - c. DNS Abuse (time permitting) in 2.3.2 Registry commitments / Public Interest Commitments – see attached GAC comments and <https://docs.google.com/document/d/1kUImZH8nxWTgfcRluA5FxlheMm4XhhOwkRt7om52aQU/edit?usp=sharing>. [docs.google.com], page 143
3. AOB

## BACKGROUND DOCUMENTS

[Link](#)

## RECORDINGS

[Audio Recording](#)

[Zoom Recording](#)

[Chat Transcript](#)

GNSO transcripts are located on the [GNSO Calendar](#)

## PARTICIPATION

[Attendance](#)

**Apologies:** Susan Payne, Katrin Ohlmer, Annebeth Lange, Maxim Alzoba, Donna Austin

## Notes/ Action Items

**Actions:**

### PACKAGE 1:

Recommendation Implementation Guidance xx (rationale 4): In the event that an application fee floor is used to determine the application fee, excess fees received by ICANN should [must] be used to benefit the New gTLD Program and not any other ICANN program or purpose; that includes one or more of the following elements of the New gTLD Program:

Re: "(e) other purpose(s) that benefits the New gTLD Program."

ACTION ITEM: Accept the revised text in brackets.

2.5.3 Application Submission Period

## 1. Deliberations and rationale for recommendations and/or implementation guidelines

Re: [Namely, if **ICANN's** communications and outreach efforts are effective prior to the point at which the window opens, prospective applicants will be prepared to apply and will therefore need less time to actually submit the [application.]

ACTION ITEM: Accept the revised text in boldface.

### 2.5.5 Terms and Conditions

#### 1. Recommendations and/or implementation guidelines

##### Recommendation xx (rationale 1):

ACTION ITEM: Change the text to: "Recommendation xx (rationale 1): [Unless required under specific laws, [or by the ICANN Board members' fiduciary duties, or the ICANN Bylaws] **or as the Board determines in the exercise of its fiduciary duties as contemplated in the ICANN Bylaws**, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook.]" Consider whether the language can be made more clear.

##### Recommendation xx (rationale 3):

ACTION ITEM: Make it clear that "recourse" refers to refunds and differs from the normal refund schedule.

#### PACKAGE 2:

ACTION ITEM: Look for comments from Anne Aikman-Scalese and incorporate them into the production document.

#### PACKAGE 3:

##### 2.2.1 Continuing Subsequent Procedures

##### Rationale for Affirmation xx (rationale 1):

ACTION ITEM: Accept the revised language in brackets.

Re: While the Working Group recognizes that some parties believe the New gTLD market to already be saturated [others have indicated that they are aware of interested potential applicants, including dot Brands. Overall], the Working Group did not agree that a compelling reason was identified to override existing policy.

ACTION ITEM: Accept the revised language in brackets.

Rationale for Affirmation xx (rationale 2): A major theme that was repeatedly raised throughout the life cycle of this PDP was the need for predictability for all parties involved. The desire for an "orderly, timely and predictable" New gTLD Program is universally supported. [A major theme that was repeatedly raised throughout the life cycle of this PDP was the need for **balanced** predictability for all parties involved. **It is on this basis that** the desire for an "orderly, timely and predictable" New gTLD Program is universally supported.]

ACTION ITEM: Accept the revised language in brackets.

## 1. Dependencies/relationships with other areas of this report or external efforts

### Section 2.2.3 Applications Assessed in Rounds

Re: [The Working Group Chair has directed a letter to GNSO Council relative to addressing CCT-RT recommendations re DNS Abuse holistically. The letter is dated 27 April 2020 and is attached to this report as \_\_\_\_\_.]

ACTION ITEM: Accept the revised language in brackets.

### 2.2.3 Applications Assessed in Rounds

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Recommendation xx (rationale 2): Upon the commencement of the next Application Submission Period, there must be clarity around the timing and/or criteria for initiating subsequent procedures from that point forth. More specifically, prior to the commencement of the next Application Submission Period, ICANN shall [must] publish either (a) the date in which the next subsequent round of new gTLDs will take place or (b) the specific set of criteria and/or events that must occur prior to the opening up of the next subsequent round.

ACTION ITEM: Accept the revised language in brackets.

Page 30, block of highlighted text:

ACTION ITEM: Accept the revised language in brackets and find a more appropriate place for the bullet identified.

Recommendation xx (see rationale 3): Application procedures must take place at predictable, regularly occurring intervals without indeterminable periods of review unless the GNSO Council recommends pausing the program and such recommendation is approved by the Board. Unless and until other procedures are recommended by the GNSO Council and approved by the ICANN Board, ICANN must only use "rounds" as part of [to administer] the New gTLD Program.

ACTION ITEM: Accept the revised language in brackets

Rationale for Recommendation xx-xx (rationale 2):

ACTION ITEM: Leadership will consider how/whether to call out dissenting views.

#### 2.2.5 Applications Submission Limits

1. New issues raised in deliberations since publication of the Initial Report, if applicable.

Re: New text from Kathy Kleiman

ACTION ITEM: Leadership will consider how/whether to call out dissenting views. At least include the final paragraph.

#### 2.2.6 RSP Pre-Evaluation

1. New issues raised in deliberations since publication of the Initial Report, if applicable.

Re: [Ultimately, the Working Group did not think a recommendation was necessary.]

ACTION ITEM: Accept the revised text in brackets.

#### Notes:

1. Updates to Statements of Interest: No updates provided.

1. Review "Can't Live With" comments on packages 1-3: <https://docs.google.com/document/d/1Hh8Wj3lwXvi91Am1k4Zoooct2zmPOmVe1pLmjQLuQuo/edit?usp=sharing>

PACKAGE 1:

#### 2.5.1 Application Fees & 2.5.2 Variable Fees, page 12

RecommendationImplementation Guidance xx (rationale 4): In the event that an application fee floor is used to determine the application fee, excess fees received by ICANN should [must] be used to benefit the New gTLD Program and not any other ICANN program or purpose; that includes one or more of the following elements of the New gTLD Program:

-- Neustar 1.1 - Neustar proposed changing "should" to "must" in this sentence. Rationale: "ICANN should not have any discretion regarding excess fees."

Re: "(e) other purpose(s) that benefits the New gTLD Program."

-- With this additional category it seems there is a potential for a very large amount of money to be stuck in this category and not really be usable; need to have some level of exception.

-- WG agrees to the additional text.

**ACTION ITEM: Accept the revised text in brackets.**

### 2.5.3 Application Submission Period

#### 1. Deliberations and rationale for recommendations and/or implementation guidelines

Re: [Namely, if **ICANN's** communications and outreach efforts are effective prior to the point at which the window opens, prospective applicants will be prepared to apply and will therefore need less time to actually submit the [application].]

-- KK1.1 - Kathy Kleiman proposed adding "ICANN's" to this sentence, as indicated in bold text. Rationale: "It's unclear in current text who should be responsible for the communications and outreach efforts. Since it's ICANN, we should make that quite clear. It's ICANN's outreach into communities around the world, including the Global South, that will help to generate the diversity of applications we are seeking."

**ACTION ITEM: Accept the revised text in boldface.**

### 2.5.5 Terms and Conditions

#### 1. Recommendations and/or implementation guidelines

Recommendation xx (rationale 1): Unless required under specific laws or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. [Unless required under specific laws, [or by the ICANN Board members' fiduciary duties, or the ICANN Bylaws] **or as the Board determines in the exercise of its fiduciary duties as contemplated in the ICANN Bylaws**, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook.]

-- AAS1.3 - Anne Aikman-Scalese proposed alternate text (in bold). Rationale: "The language does not account for the fact that the Board is required to act in a fiduciary capacity. For example, you cannot say that the Board has to approve an application made in accordance with the AGB if the Board determines it has a fiduciary duty to reject the application or if it would be permitted by the ByLaws, in the exercise of its fiduciary duty, to reject it. (This is different from saying that the ByLaws require them to reject it.)"

-- Seems to open up a huge loophole to basically give the ICANN board complete discretion to reject an application for any reason, it seems fit.

-- Seems to give the Board the right to rewrite the AGB.

-- Whether or not this language is in here the Board is going to act according to its fiduciary duties.

-- It's part of their fiduciary duties to keep ICANN from harm and they could reject an application if they thought it would harm ICANN. Don't think you can tie their hands and not allow them to do that.

-- Can we have some examples of how the Board would do that?

-- The Board has to act in good faith and it could say that it was acting in good faith in rejecting an application.

-- For the Board to decide at the last minute to reject an application is contrary to ICANN's mission and the multi-stakeholder process.

-- It could be something that was a danger to the DNS, such as an application that causes name collisions.

-- Compromise to change to: "[or by the ICANN Board members' fiduciary duties, or the ICANN Bylaws] **or as the Board determines in the exercise of its fiduciary duties as contemplated in the ICANN Bylaws**

**ACTION ITEM:** Change the text to: “**Recommendation xx (rationale 1):** [Unless required under specific laws, [or by the ICANN Board members’ fiduciary duties, or the ICANN Bylaws] or as the Board determines in the exercise of its fiduciary duties as contemplated in the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook.]” Consider whether the language can be made more clear.

Recommendation xx (rationale 3): Applicants must be allowed some type of recourse if substantive changes are made to the Applicant Guidebook or program processes if such changes have, or are reasonably likely to have, a material impact on Applicants. [Applicants must be allowed to challenge substantive changes made to the Applicant Guidebook after applications are submitted through an appeals mechanism or Request for Reconsideration or both, at Applicant’s discretion. In such cases, the Applicant will have the burden of proof to demonstrate that the change has, or is likely to have, a material impact on the Applicant.]

-- AAS1.4 - Anne Aikman-Scalese proposed alternate text for this recommendation. Rationale: "The recommendation does not specify:

(1) What “some type of recourse” means.

(2) The timing at which changes are made that result in the “material impact”.

(3) The standard of proof for determining “material impact”

This language is very confusing and indefinite in many respects. Did we establish a separate appeals mechanism for decisions by ICANN that fit under this recommendation? And how do the Applicant's rights in this regard fit into the application of the Predictability Framework?"

-- Not sure the appeals mechanism or the Request for Reconsideration are the appropriate methods to challenge.

-- We originally were thinking in terms of a refund, as opposed to a challenge.

-- What would happen if the AGB was changed due to an appeals mechanism which could put in jeopardy previous applications.

-- Maybe just solve it my saying that this intended to reference refunds.

-- Should we put in “full refund”? Not sure we should in this case. Thought we would leave this to the Implementation Team.

**ACTION ITEM:** Make it clear that “recourse” refers to refunds and differs from the normal refund schedule.

PACKAGE 3:

2.2.1 Continuing Subsequent Procedures

Rationale for Affirmation xx (rationale 1): The existing policy for New gTLDs states that there will be a “systemized manner of applying for gTLDs to be developed in the long term.” **In affirming the continuation of this policy the Working Group applied the consistent approach outlined in Section xx [the introduction] of this report.**

-- Valideus3.1 - Susan Payne/Valideus proposed changing the second sentence of the rationale. Rationale for proposed change: "The Final Report will contain a number of Affirmations of the existing policy. It makes more sense, and presumably was the intention, to have an overarching/introductory section which explains the Working Group's overall approach, since this applies not just to this particular affirmation but to all of them. If that is not the case, then the overall approach applied ought to be specified against every other Affirmation the WG makes and not just in this case."

**ACTION ITEM:** Accept the revised language in brackets.

Re: While the Working Group recognizes that some parties believe the New gTLD market to already be saturated [others have indicated that they are aware of interested potential applicants, including dot Brands. Overall], the Working Group did not agree that a compelling reason was identified to override existing policy.

-- Valideus3.2 - Susan Payne/Valideus proposed adding text to this sentence. Rationale: "Rationale focuses only on the negative opinion of some that the TLD market is “saturated” and does not also acknowledge that there are also areas of demand, including from among Dot Brands who do not rely on sale of second level names and thus are not impacted by any perceived market saturation at the second level (if this even exists), and would challenge the notion of market saturation at the top level."

**ACTION ITEM:** Accept the revised language in brackets.

Rationale for Affirmation xx (rationale 2): A major theme that was repeatedly raised throughout the life cycle of this PDP was the need for predictability for all parties involved. The desire for an “orderly, timely and predictable” New gTLD Program is universally supported. [A major theme that was repeatedly raised throughout the life cycle of this PDP was the need for **balanced** predictability for all parties involved. **It is on this basis that** the desire for an “orderly, timely and predictable” New gTLD Program is universally supported.]

-- JC3.1 - Justine Chew proposed edits to this sentence. Rationale: "It is important to recognize that the need for predictability be balanced for all parties involved and should not necessarily default in favour of or against applicants. The universal support for the affirmation is, arguably, predicated on this understanding. For eg, in Section 2.2.3 Applications Assessed in Round, we expressly mentioned, “Rounds enhance the predictability for applicants (e.g., preparation), the ICANN community and other third-party observers to the program (e.g., public comments, objections)””

**ACTION ITEM: Accept the revised language in brackets.**