

## Updates to Module 3: Dispute Resolution Procedures

30 May 2009

Module 3 of the draft Applicant Guidebook describes dispute resolution procedures applicable in the gTLD application process; see the full module at <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-clean-18feb09-en.pdf>. The module includes an overview of objection filing and dispute resolution procedures, and principles applied by dispute resolution service providers for each of four enumerated objection grounds.

Potential changes in these sections are based on public comments (see analysis of public comments on draft Applicant Guidebook v2) and continuing development work by staff. Areas with updated text are:

- Changes to standing requirements for Morality and Public Order Objections. The standing has been established to allow anyone to file an objection on this ground. However, to decrease the possibility of frivolous objections that might come from this broad standing, ICANN is investigating whether some type of “quick look” process to identify and eliminate frivolous objections could be implemented without requiring a full dispute resolution proceeding. ICANN seeks and encourages suggestions or recommendations on the development and implementation of such a process.
- Updates to standing requirements for Community Objections. The standing requirements have remained essentially the same, although the terminology has been adjusted to be consistent with that used in assessing community considerations in comparative evaluation (see Updates to Module 4). Established institutions associated with clearly delineated communities are eligible to file a Community Objection. A DRSP would balance a number of factors to confirm standing of an objector as such an institution. This section contains new text to clarify that the factors listed are part of a balancing: it is not expected that an objector must satisfy each and every factor listed in order to be granted standing.
- Additional detail on the role of the Independent Objector. ICANN introduced the Independent Objector as an element of the dispute resolution process in draft v2 of the Applicant Guidebook, to remedy the situation that might arise where, for one reason or another, no objection is filed against a “highly objectionable” gTLD application. ICANN presented the rationale and briefly described how that person would act in an Explanatory Memorandum published for comment on 18 Feb 2009, entitled “Description of Independent Objector for the New gTLD Dispute Resolution Process.” (See <http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf>.) Comments on this subject contained several requests for more information and definition concerning this role. The updated text below discusses the Independent Objector in greater detail.

- Changes to the dispute resolution principles (standards) for Community Objections. Community feedback on this section indicated concern that certain of the factors listed were too vague or unclearly stated. This section has been revised to provide additional clarity. Additionally, some comments focused on the ‘complete defense’ available to applicants who could also meet the standing requirements for a Community Objection. The description of the defense has been revised for additional clarity.

Accordingly, several sections of this module have been updated, and the relevant excerpts are included, as follows:

- 3.1.2/3.1.2.3 Standing to Object / Morality and Public Order Objection
- 3.1.2/3.1.2.4 Standing to Object / Community
- 3.1.5 Independent Objector
- 3.4.4 Dispute Resolution Principles (Standards) /Community Objection

ICANN encourages comment on the interim language provided here. This language is for discussion only, and has not yet been incorporated into the Applicant Guidebook. Comments will be considered for version 3 of the full draft Applicant Guidebook, scheduled to be published in September 2009. As discussed more fully in the analysis of comments on version 2 of the draft Applicant Guidebook, numerous other changes to Module 3 can be expected in version 3 of the draft Applicant Guidebook.

### 3.1.2 *Standing to Object*

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

Objection Ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round
Legal rights	Rightsholders
Morality and Public Order	Unlimited
Community	Established institution

#### 3.1.2.3 *Morality and Public Order Objection*

Anyone may file a Morality and Public Order Objection. However, because of the inclusive standing base, objectors may be subject to a “quick look” or other process designed to identify and eliminate frivolous objections.

The inclusive standing is consistent with the “universal” dimension of Morality and Public Order Objections.

In an attempt to decrease the possibility of frivolous objections that might come from this broad standing, ICANN is looking at whether some type of “quick look” process to identify and eliminate frivolous objections could be implemented without requiring a full dispute resolution proceeding. ICANN seeks and encourages suggestions or recommendations on the development and implementation of such a process.

#### 3.1.2.4 *Community Objection*

Established institutions associated with clearly delineated communities are eligible to file a Community Objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a Community Objection, the objector must prove both of the following:

***It is an established institution*** – Factors that may be considered in making this determination include:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and

- Public historical evidence of its existence, such as the presence of formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

***It has an ongoing relationship with a clearly delineated community***

– Factors that may be considered in making this determination include:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

### 3.1.2 Standing to Object (Redlined to Show Changes from Guidebook v2)

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

Objection Ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round
Legal rights	Rightsholders
Morality and Public Order	<u>Unlimited</u> <del>To be determined</del>
Community	Established institution

#### 3.1.2.3 *Morality and Public Order Objection*

Anyone may file a Morality and Public Order objection. However, because of the inclusive standing base, objectors may be subject to a “quick look” or other process designed to identify and eliminate frivolous objections.

The inclusive standing is consistent with the “universal” dimension of Morality and Public Order Objections.

In an attempt to decrease the possibility of frivolous objections that might come from this broad standing, ICANN is looking at whether some type of “quick look” process to identify and eliminate frivolous objections could be implemented without requiring a full dispute resolution proceeding. ICANN seeks and encourages suggestions or recommendations on the development and implementation of such a process.

Standing requirements for morality and public order objections remain under study. ICANN is still working to develop standing requirements for filing objections relating to Morality and Public Order. Some concerns have been expressed about leaving standing open to any person or entity, but concerns have also been raised about limiting this to just one defined group, such as governments. Allowing anyone to object is consistent with the scope of potential harm, but may be an insufficient bar to frivolous objections. On the other hand, while groups such as governments are well suited to protecting morality and public order within their own countries, they may be unwilling to participate in the process.

The current thought, on which ICANN invites further public comment, is to develop a mechanism by which those objecting on the ground of morality and public order must show a legitimate interest and harm or potential harm resulting from the applied for gTLD string. As in other objection proceedings, such a mechanism likely will lead to a two-phased process for the dispute resolution panels wherein first they would assess standing, and if that is satisfied, the panel would then consider the merits of the objection.

#### 3.1.2.4 Community Objection

Established institutions associated with ~~clearly delineated~~defined communities are eligible to file a ~~C~~community ~~O~~objection. The ~~“defined community”~~ community named by the objector must be a community ~~strongly associated with~~related to the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a ~~C~~community ~~O~~objection, the objector must prove both of the following:

***It is an established institution*** – Factors that may be considered in making this determination include:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

***It has an ongoing relationship with a ~~clearly delineated~~defined community that consists of a restricted population*** – Factors that may be considered in making this determination include:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

### 3.1.5 Independent Objector

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A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

In light of this public interest goal, the IO is limited to filing objections on the grounds of Morality and Public Order and Community.

Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

**Mandate and Scope** -- The IO may file objections against "highly objectionable" gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Morality and Public Order objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Morality and Public Order objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. ICANN will submit comments to the IO from the appropriate time period, running through the Initial Evaluation period until close of the deadline for the IO to submit an objection.

**Selection** -- The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant.

Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators

provide models for the IO to declare and maintain his/her independence.

The IO's (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

***Budget and Funding*** -- The IO's budget would comprise two principal elements: (a) salaries and operating expenses, and (b) dispute resolution procedure costs – both of which should be funded from the proceeds of new gTLD applications.

As an objector in dispute resolution proceedings, the IO is required to pay filing fees and advance costs just as all other objectors are required to do. Those payments will be reimbursed in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before DRSP panels that will not be reimbursed, regardless of the outcome. These expenses include the fees and expenses of outside counsel (if retained) and the costs of legal research or factual investigations.



### 3.1.5 Independent Objector <sup>1</sup>(Redlined to Show Changes from Guidebook v2)

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A formal objection to a gTLD application may also be filed by ~~the Independent~~ the Independent Objector (IO). The ~~IO~~ Independent Objector does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

In light of this public interest goal, the ~~IO~~ Independent Objector is limited to filing objections on the grounds of Morality and Public Order and Community.

Neither ICANN staff nor the ICANN Board of Directors ~~has~~ will have authority to direct or require the ~~IO~~ Independent Objector to file or not file any particular objection. If the ~~IO~~ Independent Objector determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

**Mandate and Scope** -- The IO may file objections against "highly objectionable" gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Morality and Public Order objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Morality and Public Order objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. ICANN will submit comments to the IO from the appropriate time period, running through the Initial Evaluation period until close of the deadline for the IO to submit an objection.

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<sup>1</sup>This section is included to provide an initial opportunity for public comment. For further discussion, see the Explanatory Memorandum at <http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf>.

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**Selection** -- The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with~~have~~ considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant.

Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence.

The IO's (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

**Budget and Funding** -- The IO's budget would comprise two principal elements: (a) salaries and operating expenses, and (b) dispute resolution procedure costs – both of which should be funded from the proceeds of new gTLD applications.

As an objector in dispute resolution proceedings, the IO is required to pay filing fees and advance costs just as all other objectors are required to do. Those payments will be reimbursed in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before DRSP panels that will not be reimbursed, regardless of the outcome. These expenses include the fees and expenses of outside counsel (if retained) and the costs of legal research or factual investigations.

### 3.4.4 Community Objection

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The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community;
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- There is a likelihood of detriment to the community named by the objector if the gTLD application is approved.

Each of these tests is described in further detail below.

**Community** – The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial or cultural); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

**Substantial Opposition** – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including:

- Number of expressions of opposition relative to the composition of the community;
- Level of recognized stature or weight among sources of opposition;

- Distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

**Targeting** – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

**Detriment** – The objector must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community. Factors that could be used by a panel in making this determination include:

- Damage to the reputation of the community that would result from the applicant’s operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community;
- Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string; and
- Dependence of the community on the DNS for its core activities.

If opposition by a community is determined, but there is no likelihood of detriment to the community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

**Defenses** – Satisfaction of the standing requirements for filing a Community Objection (refer to subsection 3.1.2.4) by a community-based applicant is a complete defense to an objection filed on community grounds.

To invoke the complete defense, the community-based applicant must affirmatively prove, in its response to the objection, that it meets all elements of the standing requirements.

A complete defense, based on standing requirements, may not be invoked by an open applicant whose application is the subject of a Community Objection. However, an open applicant may prevail in the event that a Community Objection is filed against it, and the applicant can otherwise present a defense to the objection.

### 3.4.4 *Community Objection* (Redlined to Show Changes from Guidebook v2)

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The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated~~defined~~ community;
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- There is a likelihood of detriment to the community named by the objector if the gTLD application is approved.

Each of these tests is described in further detail below.

**Community** – The objector must prove that the community expressing opposition can be regarded as a clearly delineated~~well-defined~~ community. A panel could balance a number of factors to determine this, including:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities elements are considered to form the community;
- The length of time~~How long~~ the community has been in existence;
- The global distribution of the community~~How globally distributed is the community (breadth, level of importance)~~ (this may not apply if the community is territorial); and
- The number of~~How many~~ people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector~~claiming opposition~~ is not determined to be a clearly delineated~~distinct~~ community, the objection will fail.

**Substantial Opposition** – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including:

- Number of expressions of opposition relative to the composition of the community;
- Level of recognized stature or weight among sources of opposition:
- Distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community

Nature/intensity of opposition:

- Historical defense of the community and in other contexts; and
- Costs incurred by objector in expressing opposition, including ~~what~~ other channels the objector may~~they~~ have used to convey ~~their~~ opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

**Targeting** – The objector must prove a strong~~a~~ association between the applied-for gTLD string and the community represented by the objector~~expressing opposition~~. Factors that could be balanced by a panel to determine this include:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association~~clear connection~~ between the community and the applied-for gTLD string, the objection will fail.

**Detriment** – The objector must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community. Factors that could be used by a panel in making this determination include:

- Damage to the reputation of the community that would result from the applicant's operation of the applied-for gTLD string;

- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; and
- Dependence of the community on the DNS for its core activities.

If opposition by a community is determined, but there is no likelihood of detriment to the community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

**Defenses** – Satisfaction of the standing requirements for filing a Community Objection (refer to subsection paragraph 3.1.2.4) by a community-based applicant is a complete defense to an objection filed on community grounds.

In order to invoke the complete defense, the community-based applicant must affirmatively prove, in its response to the objection, that it meets all elements of the standing requirements.

A complete defense, based on standing requirements, may not be invoked by an open applicant whose application is the subject of a Community Objection. However, an open applicant may prevail in the event that a Community Objection is filed against it, and the applicant can otherwise present a defense to the objection.