



New gTLD Program Explanatory Memorandum

GAC and Government Objections; Handling of Sensitive Strings; Early Warning

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Background—New gTLD Program

This is one of a series of new Explanatory Memos related to recent consultations between ICANN's Board and Governmental Advisory Committee concerning ICANN's New gTLD Program.

These memos were developed to document the latest position on these topics by taking into account the current thinking, discussions and public comments received. Each memo not only reflects GAC advice but also contains the reasoning and rationale on each of the relevant issues regarding the Applicant Guidebook and the launch of the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Introduction

Current Environment

The current version of the Applicant Guidebook, in accordance with the GNSO New gTLD Policy Recommendations, provides for objection and independent dispute resolution processes in order to provide protections for certain important interests such as intellectual property rights and community names.

The GAC, in its Indicative Scorecard on New gTLD Outstanding Issues, provided several recommendations regarding the handling of sensitive strings and the objection processes, among them (excerpted):

Delete the procedures related to “Limited Public Interest Objections”

Amend the evaluation process to include review by governments, via the GAC.

Expand categories and consideration of community-based strings and geographical place names (including names relating to particular sectors, such as those subject to national regulation).

Implement a free objection mechanism that would allow governments to protect their interests.

Provide for an early warning to applicants when a proposed string would be considered controversial or to raise sensitivities.

Recommendation

Based on consideration of the GAC’s advice and consultations between the GAC and Board, it is recommended that:

The current application evaluation process flow be augmented to include a GAC Early Warning procedure and a GAC Advice on New gTLDs (i.e., objection) procedure. GAC Early Warning and GAC Advice on New gTLDs can be applied to any application, e.g., sensitive, community, sector, or geographic strings of any type.

Key aspects of the GAC Early Warning process are:

The GAC Early Warning Notice should be submitted in the 60 days following the posting of the applications.

The Early Warning Notice is a notice to the applicant from the GAC that the application or proposed string would be considered controversial or raise national sensitivities.

The Early Warning Notice does not require GAC consensus; it requires a GAC decision to issue a notice based upon statements of member states or governments.

The GAC will forward the Early Warning Notice to the Board, and ICANN will notify the applicants. Applicants who withdraw within, say, 21 days of receiving the Notice will receive an 80% refund in order to incent resolution of the issue or withdrawal of applications where appropriate.

Key aspects of the GAC Advice on New gTLDs procedure are:

The GAC can provide advice to the Board on any application. To be considered by the Board during the application evaluation and delegation processes, the Advice must be submitted within a five-month timeframe after the applications are posted.

GAC advice that is stated to be a “GAC consensus” position and that states, this application should not proceed, will create a strong presumption for the Board that the application should not be approved. If the Board decides to approve the application, the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

GAC advice that does not indicate consensus or does not state that the TLD should not be delegated will be passed on to the applicant but will not trigger a Bylaws-required good-faith attempt at reconciliation if the Board decides to delegate the string. (Notwithstanding, of course, that the Board will take seriously any other advice that GAC might provide.)

GAC advice that is stated to be a “GAC consensus” position and that states, “the TLD in this application should not be delegated unless remediated” will raise a strong presumption for the Board that the application should be turned away. If there is a remediation method available in the Guidebook (such as securing government approval) that action may be taken. But material amendments to applications are generally prohibited and if there is no remediation method available, the application will be rejected and the applicant can re-apply in the second round.

Since ICANN and its constituent bodies are committed to operate to the maximum extent feasible in an open and transparent manner (consistent with

procedures designed to ensure fairness), ICANN will expect that GAC advice addressing new gTLD applications would identify objecting countries, the public policy basis for the objection, and the process by which consensus was reached.

The Board will consider the GAC advice as soon as practicable.

The creation of the new procedures obviates the need to eliminate the existing objection procedures, as they will continue to be available to other entities and individuals.

While category definitions will not be expanded, proposed GAC Early Warning and GAC Advice on New gTLDs procedures are designed so the GAC can provide input on any application for any reason, eliminating the need for specific definitions. Therefore, the procedures will address sensitive, community, geographic and sector (regulated industry) string issues where these are of concern to governments and also give indications to applicants on ways to avoid formal objections.

A limited “free” objection mechanism for governments wishing to participate in the dispute resolution process is proposed under separate cover that provides a finite amount of fees and also limits ICANN’s significant financial risk.

Rationale for recommendation

1. Delete the procedures related to “Limited Public Interest Objections”

The GAC indicated in Brussels that its concern relates to requiring governments to use this objection process. The Board and GAC therefore agreed that it would be consistent with GAC advice to leave the provision for Limited Public Interest Objections in the Guidebook, but the GAC (as a whole) would not be obligated to use the objection process in order to give advice.

2. Amend the evaluation process to include review by governments, via the GAC and provide for an early warning to applicants when a proposed string would be considered controversial or to raise sensitivities

Refer to the attached graphic, describing the new process flows. The existing procedures are in black and the proposed procedures, “GAC Early Warning” and GAC Advice on New gTLDs” are in blue.

The GAC Early Warning procedure is merely a notice but it is meant to advise applicants that government objection or GAC Advice on New gTLDs to not delegate the TLD is likely. The refund is set at a higher rate than the otherwise

maximum refund in order to encourage withdrawal in the face of the potential government-level objection. While the higher refund might seem to suggest that GAC statements are of greater import than other objections, this is justified. This is because GAC Early Warning need not be based on existing objection criteria in the Guidebook, so the Early Warning may be unanticipated by the applicant. This “surprise” is partially addressed by increasing the refund.

The GAC Advice on New gTLDs procedure is intended to address the concerns of governments and also to retain some certainty for applicants. It attempts to have the GAC clearly label its advice as consensus, if it is, and to specify that the TLD should not be delegated so it is clear when the Board might be disagreeing with GAC advice.

The Board will consider the GAC advice as soon as practicable, rather than waiting for the rest of the evaluation and any dispute resolution process to conclude.

3. Expand categories and consideration of community-based strings and geographical place names (including particular sectors, such as those subject to national regulation).

Expansion of categories in a clear way is extremely difficult. This is reflected in the public comment received. Community definitions have been drawn narrowly in the Guidebook to prevent abuses. Even expansion of categories will probably not address GAC concerns in some way as even the expanded definition might leave some genuine area of sensitivity unaddressed.

The proposed GAC Early Warning and GAC Advice on New gTLDs procedures are designed so the GAC can provide input any application for any reason, eliminating the need for specific definitions. Therefore, the procedures will address sensitive, community, geographic and sector (regulated industry) string issues. The GAC will not be barred from protecting its members interests by existing or even expanded limitations.

4. Implement a free objection mechanism that would allow governments to protect their interests.

It is understood that governments are reticent to pay for objections. However, governments are often the best suited to drive objections, and they do pay for similar services regularly, including resolution of disputes. The GAC also mentioned that governments must budget for dispute resolution fees if they anticipate the need to object to applications. There still is time for that and now is the time.

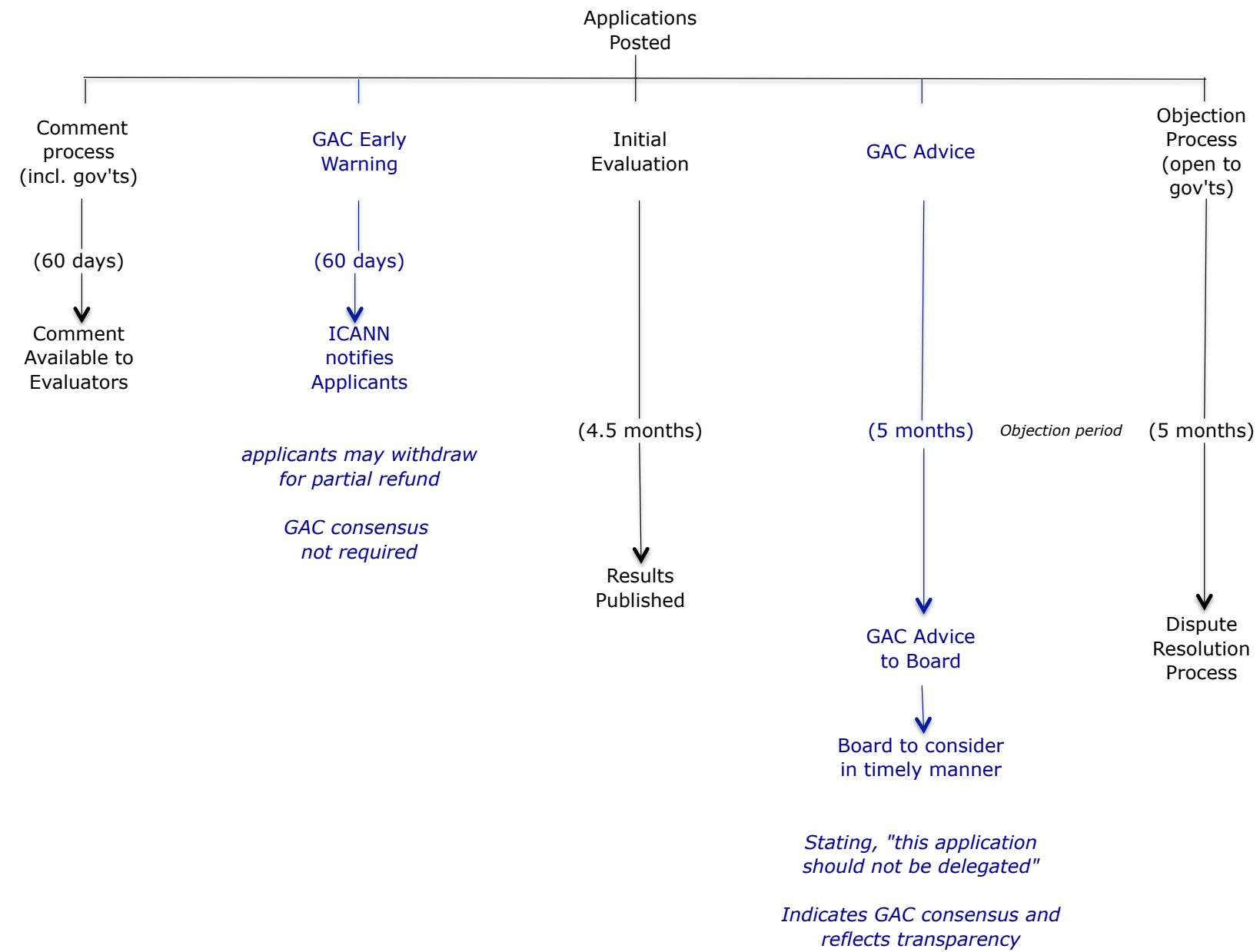
Payment of dispute resolution fees, multiplied by several times would pose a significant risk for ICANN. There is no provision in the current evaluation fee for recovering these costs. The costs must either be limited in some way, or allocated to other applicants. The latter seems inappropriate and, in any case, would be extremely difficult to calculate a priori.

Providing unlimited dispute resolution to governments would be the subject of abuses, as governments might become proxies for objectors seeking to block applications.

In order to protect government interests, ICANN will set aside a limited amount from reserves, say \$1MM to \$2MM. A model for limiting the number of ICANN-funded objections is published under separate cover. The money that is expended in providing limited fee exemptions will be recouped out of the \$25K in each evaluation fee that is earmarked for development costs. When development costs are recovered and dispute resolution fees reach a steady state, that portion of the fee will be eliminated.

Public comment has suggested that if the government does not pay a dispute resolution fee, neither should the applicant. This feature is not included in the model. If the applicant wins, the loser pays model means the applicant does not pay. If the applicant loses it means that the objection has merit, the applicant for TLD would violate the interests protected in the process, and it is reasonable for the applicant to bear those costs.

NEW gTLDs: GAC OBJECTION AND ADVICE PROCESSES
 (Draft: Best Current Thinking)



- Notes:
1. GAC Early Warning and GAC advice can be applied to any application: e.g., sensitive, community, sector, or geographic strings of any type
 2. Refunds increased to 80% for applicants who withdraw within, say, 21 days of GAC Early Warning
 3. Limited fee relief for governments participating in objection process
 4. Time spans are minimums and may be extended