ICANN Transcription
GNSO New gTLD Subsequent Procedures Working Group
Thursday, 07 May 2020 at 03:00 UTC

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UNIDENTIFIED FEMALE: Good morning, good afternoon, and good evening. Welcome to the New gTLDs Subsequent Procedures Working Group call on Thursday, the 7th of May, 2020.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you're only on the audio bridge, could you please let yourself be known now?

Hearing no names, I would like to remind all participants to please state your name before speaking for transcription purposes and please keep your phones and microphones on mute when not speaking to avoid background noise. As a reminder, those who partake in ICANN multi-stakeholder process are to comply with the expected standards of behavior.

With this, I will turn it over to Jeff Neuman. Please begin.

JEFF NEUMAN: Thank you very much. Hopefully, everyone got through the new kind of Zoom room today and didn't have any issues. I know that they're still in the process of updating all the Zoom rooms for all

the different working groups. You may have noted—I think it was the case here—that there was a waiting room, so you had to actually be let into the room by, I guess, Julie. Were you the one that was letting people in? So you'll find that now it may take a couple seconds to get into the room, so just try to sign on a little bit earlier to make sure you can get in on time.

With that, today we're going to revisit the GAC consensus advice and GAC early warnings but only really two of the recommendations, which relate to some alternative text provided by Paul McGrady—that was kicked around the list with Anne and Justine and others—and also talk about some of the GAC comments we got in that relate primarily to two provisions of the GAC early warnings GAC advice. So we'll spend about half the time on that, and then we'll go back to the discussion on auctions. The reason I wanted to start with objections is because we've been saying for a couple weeks now that we would discuss that topic today, so I wanted to make sure that we got to that topic first and could cover that. If need be, we could always extend the auction discussion into the next meeting if we still need some more time.

The other thing I wanted to draw attention is to please keep checking the workplan. The workplan is revised at least once a week to make sure that it's updated with the topics that we're covering. I don't know if I could ask whoever is maintaining the screen right now if they could go to the workplan. Great. Thanks. What you'll notice that we, for next week, will be talking about predictability and also the topic of closed generics. Please note

that the closed generics meeting on the 14th is an extended call, so that's a two-hour meeting instead of the 90 minutes like today.

Then, if you could see, on May 18th, we'll review the can't-live-with comments on the first three packages. I know you've only gotten the first two packages so far, but, by the end of this week, you will have the third package. With a seven-day comment period from you all, [we] could turn that around by the 14th or so. Then we can review those three packages on the 18th and then also cover Category 1 verified TLDs because we said we would cover that topic as well. That may bleed into the 21st, but then we'll revisit the community applications and application queuing—application queuing primarily to look at the compromised proposal that was put out there a couple weeks ago.

With that, you'll also notice that we're going to do the public interest and DNS abuse again on the 26th, as those relate to a number of comments from the GAC. Then still we have some PVDs, but we're in pretty good shape right now to make sure that we should have enough time to publish the draft final report prior to ICANN68.

Jim asks when we're going to get Package 3. By the end of this week, so you'll have a seven-day turnaround for those comments. That should still be well in time to discuss those on the 18th.

Any questions? Actually, let me ask first if there are any updates to any statements of interest. I apologize for skipping over that.

I'm not seeing any, so let me ask if there's any questions on the workplan so far.

KATHY KLEIMAN: Jeff, this is Kathy. I've got one.

JEFF NEUMAN: Okay. Go ahead, Kathy.

KATHY KLEIMAN: Sorry. I just was in a different screen. How really can we get materials for meetings so that we have some time to prepare, especially as we go into summer projects and things?

JEFF NEUMAN: You get the copies of all the materials generally at least 48 hours prior to the meeting unless we're re-going over a topic or continuing a topic from the previous session. So it takes a little bit of time to make sure we get that section updates with the comments, like today with the auction stuff. That came out with 24 hours' notice. But generally it's at least 48 hours if not sooner.

KATHY KLEIMAN: Okay. The more time, the better. Thanks so much.

JEFF NEUMAN: Understood. With that, let's turn to the topic of GAC early warnings and GAC consensus advice. We went over this section fairly extensively, so we're going to really just focus on—whoops, wrong section on the screen—pretty much two areas which we're

both the focus of comments from Paul and the group but also comments from GAC members. Hopefully, you've had a chance to read at least this section of the GAC comments that was sent around first thing on Monday. So we'll be going over some of those, although you'll find generally that there were certain patterns within at least this section of the GAC comments.

If you could scroll down to the implementation guidance—right—that's highlighted there. Oh, I'm sorry. Can you just go a little bit up so we can just see at least the—yeah. There you go. That's fine. Just stay there. First of all, if you read the government comments, they all support the notion of continuing the concept of early warnings and GAC advice. So that was pretty universally shared by the members that submitted the comment. So, on that, there's no disagreement.

On this next one—this next paragraph which is currently in here—I don't know if you can open the comments from—yeah. There we go. if we can get that comment fully displayed—yeah. In the comment section, Steve put in the suggested language from Paul, Anne, and Justine. I believe this is the final version. I'm just looking to see if Paul, Justine, and Anne are on the call or at least a couple of them just to double-check to make sure that this is the latest language. Do we have them on the call? Sorry, I'm trying to scroll—yeah. Paul, I see, is on the Paul. Great. So I think this is the latest language in the comment section.

Before we talk about the comment, I also, in reviewing the governments that submitted comments, it was actually interesting: there was a split. You had some countries—the United States; Belgium, I think, is another one—that supported the … Actually,

I'm talking about the wrong section. Let's talk about this first. Sorry. On this one, there was some governments that felt that this was limiting the ability for governments to provide advice on classes and categories. Most of the governments that commented on this particular one not surprisingly pushed back and said that they needed some flexibility to provide the types of comments on classes of particular categories, especially when they were unforeseen. So they're unexpected. So I don't think that's a surprise to any of us on this call. They've certainly made that point to us before.

On the other hand, this group has discussed on many occasions that there needs to be some sort of balance between providing advice on—a again, we're talking really about advice here—on categories, to the extent that advice could have been provided prior to the round opening up. That's really what the GAC should be working on now as opposed to after the applications are submitted to enhance stability, predictability, etc.

With that in mind, with the notion that the governments have pushed—or at least the ones that have commented—back on the notion of not being able to provide advice on categories at all, let's take a look at this language from Paul, Anne, and Justine to see if this language provides some more flexibility sought by the governments but also provides balance and predictability for applicants. In reading this last version, at least from a personal perspective, I think it does move a little bit in the direction of not banning consensus advice from governments but asks the Board to consider the circumstances resulting in the timing and a possible detrimental effect.

I'll read the language from, again, Paul, Anne, and Justine. It says, "To the extent that the GAC provides GAC consensus advice as defined in the ICANN bylaw in the future on categories of TLDs"—so that first part is the same—"the GAC should provide this advice prior to finalization of the next Applicant Guidebook. In the event that GAC consensus advice is issued after the application period has begun and whether the GAC consensus advice applies to categories, groups or classes of applications or string types or to a particular string, the ICANN Board should take into account the circumstances resulting in such timing and a possible detrimental effect of such timing in determining whether to accept or override such GAC consensus advice as provided in the bylaws."

Let me throw that out to the group. I think there's certainly some positives in that language. I think some of it may need to be tweaked but just in terms of just being consistent. So, instead of saying—where is it?—"after the application period has begun," we would say something like, "after the opening of the application submission period"—that kind of thing.

Kathy is asking if we could put this language directly underneath. Steve, are you the one with control over the—yeah. Okay.

Paul, go ahead while Steve is doing that.

PAUL MCGRADY: Thanks. I just wanted to give a bit of background for those who were not following along on the list, which is that my original ask was much stronger than this. I really believe that the GAC should get their advice in at a point where applicants can rely on it and

base their applications around it. I don't know how much, frankly, is unforeseeable out there. Anne and Justine worked with me on the list over the days and weeks, and we ended up here. The reason why we ended up here is because I think Anne and Justine wisely realized that there's only so much pre-hand-tying you can do, either with the GAC, who have pushed back, or with the Board. While I think that spot is probably more strict in this, I also realize that you don't get everything you want when you operate a in a working group.

So I think what Anne and Justine and I came up with is a great middle way to basically make sure that the GAC is as encouraged as possible to get their advice in and, if they don't because of some unforeseeable circumstances—Jeff points out that the Board really thinks through what's the downside of both accepting and not accepting the advice/what's the detriment to the applicant—that obviously can't be a controlling factor but it should at least be considered. That's, I think, why we've written it this way. So I hope the rest of the folks on this call take a look at this and see it as the middle path that I think Anne and Justine and I see it as. I want to thank Anne and Justine for their help in getting this together. Thanks.

JEFF NEUMAN: Thanks, Paul. I appreciate the work that the three of you did on this. The GAC members that made comments were pretty strong in basically saying that nothing should limit their advice at all. This new language doesn't limit the advice that the GAC can provide but just asks for, with the way I read it, consideration by the Board

of the circumstances that resulted in the timing and the possible detrimental effect.

Let me see if there's anything in the chat. Cheryl is saying, "Provisionally, can we add the text and note it as new proposed text then?" Yeah. Well, let's see how the comments come during this call.

Greg, go ahead.

GREG SHATAN: Thanks. I just wanted to add my support to this formulation. I'd been involved in the [early] [inaudible] and Anne did a great job of finding that path that has the appropriate level of flexibility but also realism with regard to these issues. So I just wanted to put in my additional support for this. Thanks.

JEFF NEUMAN: Thanks, Greg. Karen, go ahead.

KAREN LENTZ: Thank you, Jeff. This is maybe just a small drafting point, but the language on timing has a gap there where it says we want to the GAC to provide the advice before the finalization of the guidebook. But then the next sentence is, "For advice that's issued after the application period has begun." So I'm just noting that there is a space of time in between those. Thanks.

JEFF NEUMAN: Thanks, Karen. Glad you brought that up. That was actually going to be one of my questions. Let me ask Paul first to see if there was any intention to do that. If not, I would ask that we sync those two so that there is no gap in the timing. But do you want it at the finalization of the next Applicant Guidebook or the publishing or in the similar way we've used it in other sections? Or should it be after the opening of the application submission period?

Justine? Great. Please go ahead.

JUSTINE CHEW: Hi. Thanks, Jeff. I'm going to speak obviously on my own behalf. Paul and Anne can corroborate or take the other position. I noted your comment earlier about needing to tidy up things. So this is one of the aspects of that. From where I'm standing, I think it's fine to use what we had originally, which is to ask for GAC action prior to the finalization of the next Applicant Guidebook, and then close the gap to say, once the application period begins or has begun, then the rest of it would apply. Thanks.

JEFF NEUMAN: Thanks, Justine, although you still said two different periods, right? So there's going to be a gap between the publishing of the guidebook and the application submission window opening, right? We say in another section that the guidebook must be published no less than four months prior to the opening of the application submission window, so there's potentially a four-month period which is just this gap. So the next sentence should probably be, "In the event that GAC consensus advice is issued after the

finalization of the next Applicant Guidebook," or the previous sentence should say, "The GAC should provide this advice prior to the opening of the application submission window." So we're just looking for the right one.

There's a couple of comments that talk about how publishing of the AGB makes sense. "To me, if the GAC issues consensus advice before the application submission, applicants can factor such advice in their plans. Creating a gap is counterproductive."

Greg, your hand is up but I'm not sure if that's a new one or an old one.

Okay. Why don't we just put both as the finalization of the next Applicant Guidebook? Actually, I think in other sections we've used the publication of the final Applicant Guidebook or something like that. So we'll put in the same words just to be consistent, but essentially the concept will be at the publication of the final version of the Applicant Guidebook.

Paul says he's okay [with it] so long as Anne and Justine don't object.

Anne, go ahead.

ANNE AIKMAN-SCALESE: Thanks, Jeff. I tend to agree with Justine that it's not fatal if there is such a gap because you're talking about two different sets of circumstances in play, where we want to encourage the GAC to provide the advice before the guidebook is finalized.

Maybe the event we need to look at is the opening of the application window because trying to balance interests when applicants need to know the GAC advice is the time when the application window opens—for the next round, at least—if we don't want any sort of a gap between the two. If the GAC could have reasonable some input or advice in relation to the final AGB … Although I agree with Justine—it's not absolutely necessary to close the gap—I think, if you really, really want to close the gap, then the time period you should focus on is the opening of the application period.

JEFF NEUMAN: Thanks, Anne. One though as well, though, is that, on a number of other areas where we talk about applicants and the community needing to understand, well before the application window opens, all the requirements, whether that's understood through doing translations or whether we're talking about when the rules for dispute resolution processes … This topic of giving advanced notice to applicants has been discussed a number of times in a number of different scenarios. So, to be consistent with all of those discussions, wouldn't we want to say the advice should be in at the time of the publishing of the Applicant Guidebook—just to be consistent with other sections where we've had pretty lengthy discussions on providing as much notice as possible to applicants as well as to the community?

Kathy, go ahead.

KATHY KLEIMAN: Sorry. Coming off mute. I like the new language. I'm not sure the gap is a problem. I think what it's doing, if I understand it correctly, is it's encouraging the GAC to get in as much of its consensus advice as possible before we close the Applicant Guidebook, but part of what the GAC is going to be doing is responding to what it sees. I'm not sure the gap is a problem because I don't think the GAC is going to be issuing much after the rounds open. I think what we're going to do is see them doing something after the [reveal] period. So I don't see a problem with the gap. Thanks.

JEFF NEUMAN: Fair enough. Jamie, go ahead.

JAMIE BAXTER: Thanks, Jeff. I just wanted to point out that I think the finalization of the guidebook is probably a harder target to nail down than the opening of the application window. If I remember from the 2012 round, there were version of the guidebook, but I don't remember there being an advanced-enough notice that the final was coming out on a specific date that would actually give the GAC the deadline that allows them to finish their work, whereas the opening of the window of the application window is a much easier number to track down because we've already identified that there's going to be at least four months' notice to that. So that's something to maybe take into consideration when trying to resolve this. Thanks.

JEFF NEUMAN: Thanks, Jamie. Well, Karen asked the question, but it seems like, at least from the people that have spoken up, there may not be a problem with having this gap. So I don't want to push anymore. If members of the group don't mind and don't see a problem with that gap, we can leave it in there, but we may want to address it, saying that we're doing this knowingly and it's not just an oversight because I can imagine an implementation team taking this and doing something different with it, thinking it might have been an oversight. So, if we keep this gap in, I'd like to make a note that knowingly did so and we didn't think that the gap was having an effect.

Jim asks the question of, "Does it square with the predictability framework language?" The predictability framework language say that, to the … Well, we're going to go over that next week. I think what triggers the framework is the publication of the final Applicant Guidebook, so we can look at something like that next week when we talk about that.

I'm not seeing a definitive answer here, but I do want to move on. We can continue this issue on the list. Just know that we're going to put something in there. If we keep the gap, I would ask that we put in a footnote saying we understand that there's a gap and that that's not unintentional—or probably put it in a better way than that—just so people don't think it's an oversight.

Jim is also making the point that, in theory, the consensus advice should sync with the predictability framework. I think that's all a good point. Perhaps we can address that narrow question when we talk about the predictability framework.

Paul says, “Seems like “keep the gap” has momentum, so I’m fine with that.” Okay.

The next issue—the second issue—in this section, probably of no surprise, is the issue of taking out the language, if you scroll down, about creating a small presumption that a string will be delegated. Yeah, it’s at the top of this page: Rationale 3.

Interestingly enough—this is what I started to say before to the wrong topic—essentially you had the United States, Belgium, and a couple others support the … Well, Belgium didn’t support taking out the language, but Belgium said, if the GAC still wants this presumption in there, it needs to provide a strong public policy justification for keeping it in there. But many governments opposed taking out the strong presumption. The governments in general argued that there is no conflict between the strong presumption and the current bylaws. They acknowledge that there are new bylaws, but these governments state that they would still like the presumption to still be there. Not many of the governments provided an additional rationale, but they say that there was strong consensus within the community per 2012 to have this language in there. Unless there’s strong consensus in the community to take that language out, they would like to see it in there.

I’ll go with Anne. Anne, please go ahead.

ANNE AIKMAN-SCALESE: Thanks, Jeff. I may be stuck on an old point here, but do we not, in the language that we currently have, indicate an acceptance of

the process of early warning? And isn't early warning advice that's rendered after applications are made? So aren't we in fact recognizing that advice comes after the applications are made?

JEFF NEUMAN: The GAC early warnings are not considered GAC consensus advice. GAC early warnings are just that. They can be issued by one or more governments, but they are specifically not GAC consensus advice.

ANNE AIKMAN-SCALESE: Oh, okay. I didn't know they always were just one government. I knew that they could be one government, but I didn't know that they could never constitute consensus advice. Sorry.

JEFF NEUMAN: I mean, it could be more than one government, but it is not the type of thing that is brought to the GAC for a GAC consensus call.

ANNE AIKMAN-SCALESE: So an example from 2012 would be the safeguard advice that was consensus advice and was rendered … Was it not rendered after applications were made?

JEFF NEUMAN: Yeah, absolutely. That was actual advice. That was in the Beijing communique, which was a number of months after the early warnings. Yes, they provided advice. Our new language does not

prohibit the GAC from providing consensus advice. It just asks the Board to consider the timing and the potential detrimental effect on the applicant. So it's not saying that they can't provide it. It's … Well, Paul, do you want to respond?

PAUL MCGRADY: I guess I just wanted to speak on this paragraph generally, so, Jeff, if you want to keep going and come back to me, that's fine.

JEFF NEUMAN: Thanks, Paul. Anne, I think I'd like to close that last subject because I think the way it is seems to work.

ANNE AIKMAN-SCALESE: I'm okay with the gap there, but I think there's an issue if we make that time period earlier. Okay. Thanks.

JEFF NEUMAN: Okay. Go ahead, Paul, on this Rationale 3 section.

PAUL MCGRADY: Thanks, Jeff. We spent a lot of time on this. In my attempt to get something stronger, like a presumption that the Board should reject GAC advice if it came in late, we're all operating under this belief that the new ICANN bylaws say what they mean. The GAC in the workstream process was able to negotiate whatever it could get out of the bylaws in terms of consolidating its voice in the new ICANN. [I think this is] an attempt to try to convince the GNSO

community to keep in this vestige language from the old round under the old bylaws. I get it. I understand why some GAC member countries would want it, but I think we've all come to the understanding that we think that it's from a time that's gone by. I would hate for us to miss an opportunity to not have corresponding protective language for applicants if the GAC are going to insist on this presumption that would make the Board act one way or another. If we can't write a presumption that the Board should act one way or another, then it doesn't make any sense that they'd be able to do that. They should be stuck with whatever they have in the bylaws the same way that we are.

Let's also keep in mind that the letter is not GAC advice—it's comments—and that this will go out for public comment and that the GAC is well within its ability to read the draft report and to issue GAC advice to the Board about the report if they want to do that.

So, again, I'm glad that the governments took the opportunity to comment, but I don't think that that means we have to do undo all of our thinking about the current status of the bylaws and the relationship between the GAC and the Board. Thanks.

JEFF NEUMAN: Thanks, Paul. It is interesting to note that not all of the governments agree with keeping the presumption in. The United States government supports the language not being in there—I should say does not support the strong presumption anymore—and I will also note that Belgium, which was interesting to me, was only one line or two lines and it was a question and it was the only

one that, to me, addressed the point that we try to make here, which is that we think the strong presumption provides a disincentive to come up with other solutions other than rejecting an application outright. The Belgian government asks the question, but it does so in an affirmative way. It says that they believe that it does indeed. "[Would the language … will create a strong presumption for the ICANN Board to the application … should not be approved …] not indeed have the consequence of hampering direct dialogue or at least some form of communication with the applicant and thus the ability to reach a mutually acceptable solution. If GAC wants to maintain this language, it should provide the PDP working group a strong rationale for this presumption." It surprised me that a government would make that comment, but I acknowledge that that is in the minority of the governments that responded. But Canada and the United States agree with the notion of not necessarily having the presumption in there. But, as you can see, you have the European Commission supported by Greece, Denmark, France, Finland, Iran—if you go onto the next page there—and some others, like the Netherlands and Luxemburg. So there's a lot of countries, a lot of governments, that do not agree with the removal of that language.

But, as Paul said, this is individual government comments, and the working group has worked on this issue and has already known those comments, so we don't have to move at all on this. We could keep it the way we have it here, which also includes the revised language, [and would] include the reference to the applicable bylaw provisions. So this is all up to the working group.

Cheryl says, “I personally believe that the bylaws are the currency now. However it’s up to the SubPro Working Group.”

Justine says, “I personally think we should just let the bylaws take over and leave out all reference to presumptions.”

So it seems to have support. I just wanted to make sure we covered what the governments said. And we can put a reference in the rationale that we discussed the additional government comments so that they know that it’s not that we’ve ignored it.

Kathy is saying, “Perhaps it’s best to factor in the governments’ requests now.”

Kathy, I’m not sure what you mean there, so can you just explain that?

KATHY KLEIMAN: Thanks, Jeff. If I understand correctly, we’re not going to be factoring in what was said by a number of those governments in the letter? Or we did find a way to factor it in? I may have missed it. It sounds like we’re trying to bypass some of the informal advice we’ve been given. Since we’re only operating on informal advice, I think we should consider it—informal advice from everyone who participates.

JEFF NEUMAN: Thanks, Kathy. We certainly have already considered it over the years. I don’t think any of those governments said anything new that wasn’t already in the record. What’s interesting to note,

though, is that there is a split within the governments as to whether they … Geez, I used so many negatives—double/triple negatives. There's a split within the government as to whether the presumption should remain. Granted, there are more individual governments supporting the notion that the presumption remain, but there's sizeable governments that do not believe the presumption should remain. So I don't think we're ignoring it at all.

Does anyone disagree with that?

Right. Rubens points out that, because not all of the governments agree, they would not be able to achieve consensus on this. Fair enough.

Those are the only two parts of this particular subject that the governments really had comments on, again, on these two subjects. There's lots of other comments on applicant support and on other topics. We'll weave those comments in as we talk about those particular subjects.

Steve has a quick hand on the previous item. Okay, Steve, go ahead.

STEVE CHAN: Thanks, Jeff. I realized I forgot to raise it. I wanted to point out that, in the evolution of this text on this recommendation here, it had been proposed, I think, originally when Paul originally revised the text to make it a recommendation rather than implementation guidance. So we just wanted to confirm which way the working group prefers it to be. I have a feeling, with the way it's written, of

how it is better applied, but I thought I'd open it up to the working group to see which makes more sense. Thanks.

JEFF NEUMAN: Sorry, Steve. You're saying, with the way it's written, it's better to be what? Implementation guidance or recommendation?

STEVE CHAN: I was trying not to make a suggestion, but it seems like it should be implementation guidance, given that it's not binding.

JEFF NEUMAN: Thanks, Steve. I think that makes sense. And Cheryl is making the suggestion. Given that we shave the "shoulds" in there instead of the "musts," I think it would be taken perhaps as a slap in the face of governments if we say that it was a recommendation and use the "must" language. I think this strikes the appropriate balance, but let me just ask everyone else.

Paul, go ahead.

PAUL MCGRADY: Thanks, Jeff. What happens to implementation guidance? I've been on council, so I know we vote recommendations … So, on this implementation guidance, the IRT can take it or leave it? Or are they stuck with it and they actually have to implement it? Thanks.

JEFF NEUMAN: Good question because you're right that generally the GNSO Council looks at recommendations. I think, when we write the preamble to this, we would say that the working group strongly believes that the implementation guidance must be implemented unless implementing that would not be feasible. Or, if there were another way to implement the same concept perhaps in a little bit different way, that might be okay. I'm talking off the top [of my head] here, not the actual language. But we are not saying that implementation guidance is optional. We're saying you really should implement this unless it's not feasible.

Cheryl, you could probably say it much better than I just did, so go ahead.

CHERYL LANGDON-ORR: No, no. You've said plenty. I popped a little bit in the chat, but I just wanted to remind people that there's also the loop that, if it's deemed a substantive change—if an implementation team is unable to implement as it is guided to, if you make minor course adjustments in little bits and pieces—or a great variation, which is one of the reasons why implementation guidance is so important—it makes it really clear what the expectations are—then it has to loop back to another work group process, albeit perhaps a shorter one than a full-blown PDP. There's some options there. There's some diagrams that go with that explanation if you want to delve into it.

The only thing that might be worthwhile noting is that one could also put in as implementation guidance—I'd encourage this group to seriously consider it—that some form of shepherding should be

formally established into the implementation team because, that way, you've got a clear linkage from a knowledgeable individual or set of individuals from this working group that is a resource for the implementation team to work with. I hope that's helpful.

JEFF NEUMAN: As usual, Cheryl, you said it better than I could. Paul, go ahead.

PAUL MCGRADY: Thanks. So I don't know. This is an important piece of applicant safety. Do you know what I mean? So I guess I'm trying to understand why it wouldn't be a recommendation and why we would downgrade it and put into the category of "We hope that it's implemented and, if it's not, we're going to have to resurrect the working group." What's the harm in saying, "Yeah, this is what we want. This makes sense"? We encourage the GAC to get it in before the Applicant Guidebook and, if they don't and they issue GAC advice after the application period ups, the Board really should think through the harms that that could cause to applicants. I don't think that that's a radical notion. So I think it should be a recommendation. Thanks.

JEFF NEUMAN: Thanks, Paul. Why don't we sit on this one? Because I do want to get on to the auctions topic. We'll reflect in the action items that we need to make a decision as to whether this is implementation guidance or a recommendation and we'll put that out to the list. Of course, we will revisit this as one of the outstanding issues.

PAUL MCGRADY: Jeff, I'm so sorry. If it's implementation guidance, why does it implement … So, yay, thank you for bracketing it for me because I do think we should really think through it, but, assuming that the implementation guidance route gets the momentum, what is it implementing? Is it implementing the paragraph directly above? Because I think the paragraph directly above is about the early warning.

JEFF NEUMAN: Yeah. We can look at the placement because it has evolved. I think there's also the affirmation. We have two concepts in that first affirmation. One is the affirmation of GAC advice, and the second one is the affirmation of the early warning mechanism. So it is one of the implementation notes for the GAC advice. That's why it's under that affirmation.

PAUL MCGRADY: Okay. Jeff, thanks so much. Before we move on, I just want to note in the chat that Donna and Rubens both think that it's more recommendation than implementation guidance. So, just when we go back and think about it, I don't want to be the only voice since I wasn't. Thank you.

JEFF NEUMAN: Thanks, Paul. Anne, go ahead quickly because I do want to go on to the auction stuff and we've acknowledged that this is an open issue. But go ahead, Anne.

ANNE AIKMAN-SCALESE: It's not on this issue. It's on the later one—the issue that Kathy raised about addressing the input that we've received from various GAC countries. I agreed with the modification that Paul and Justine made to the current language. So I certainly don't object to the current language, but I think Kathy has a point in that having this timely input from the GAC—there are several countries having made that observations—I wonder if, rather than deleting the words "strong presumption," we should suggest a rewrite, such as was put in the chat, that would say to the applicant that, if there's GAC advice against an application, that creates circumstances where the ICANN Board may reject the application in accordance with the bylaws—just a really simple statement that is not a deletion but, once again, does refer directly to the bylaws.

JEFF NEUMAN: That section already refers to the bylaws. It says, "In place of the omitted language, the working group recommends including, in the Applicant Guidebook, a reference to the applicable bylaw provisions that describe the voting threshold for the ICANN Board to reject GAC consensus advice." So I don't think there's a reference in the bylaws to talk about rejection of an application, so it would be a little misplaced to say that ICANN rejects an application in accordance with the bylaws.

[Right]. So let's think about that one for a little bit.

Anne, did you want to respond? Sorry. Your hand is up.

ANNE AIKMAN-SCALESE: I think that probably the purpose in 2012 was to let applicants know that there's risk associated with applications where the Board might accept that GAC advice. I'm really, though, only looking for some kind of revision in the language that represents a compromised position with the comments from a number of the countries that we noted in the chart that the GAC provided by just trying to create some language that is in recognition of the process that the Board may go through that doesn't use the words "strong presumption."

JEFF NEUMAN: Does anyone else have any thoughts? I see that Kathy agrees with that.

Okay. I want to move on to auctions. I'm not seeing any overwhelming support for any other language. But, if you want to try to get that support, Anne, you could put that on the list and we'll see if there's support to do that.

Justine is asking for clean and redline versions of the text. This text is always there. It's in this working document. It'll be there after this call, so, if you want to come back and look at this language, you'll see it. I think there may be some notes in here that Steve or others weren't able to do the wordsmithing immediately, but, within 24 hours, that language would be there.

Justine, go ahead.

JUSTINE CHEW: Thanks, Jeff. I tend to agree with you in principle. It's just that I got a little bit thrown off by the fact that I was working on wordsmithing on a different copy. So I think there's a number of copies around, so I'm not quite sure which one we should be looking at now. It's just to note that point. That's all. Thanks.

JEFF NEUMAN: This document that's on the screen right now is, at this point, until we put the final package together when we send out those draft finals, the authoritative version. Nothing else out there is authoritative. This is it right now.

What we will do is … Actually, sorry. Go back. We're going to take this and put it into he same document that we've been using, which is the working document. So this text here will be lifted from here and be put into the working document, and that working document will be—that's the same one for all the other sections—the authoritative version.

Steve, do I have that right?

STEVE CHAN: Thanks. We actually haven't done that, but I think it's actually a good idea to start unifying the two documents. So I guess, to answer your question, no, that is not currently what we do, but we probably should.

JEFF NEUMAN: Okay. Well, I will say we will do it now. Check back within 24 hours. I'll give you guys, Steve, 24 hours. The language that will be in the working document will be the authoritative language, which we'll just lift exactly as is here to that document.

Okay. Thanks, Justine. It was a good question. We'll try to be better with making sure that the authoritative version is in the same draft.

Going to auctions, where the authoritative version is not in the working document yet, primarily because there's still some concepts that we're hammering out on the auctions, we discussed the beginning part of this that was the two options that we did spend a lot of time talking about. Then we came up with—sorry. Can you just scroll up for a second? I just want to refresh everyone's recollection. So we defined the problem. We presented originally two options. Spent a lot of time talking about these two options—really good conversation. We had presented a proposal on the May 4th call. That's here, so we still have it documented.

What I'm going to ask everyone to do now is to scroll down. What we did is we took all of the discussions that we had on the proposal and the options and have now revised it to reflect this hybrid proposal, which we'll talk about, as the evolved version of where we think we are after that call.

We heard the comments that the way we had everything worded prior was in a very negative context and that we wanted to encourage creative and innovative solutions that didn't involve a financial benefit for losing a private auction. So what we've put in here is a overview note that we want to ensure that the then-

current—so the next—version of the Applicant Guidebook reflects that applicants will be permitted to create partnerships or other forms of joint ventures that would allow two or more applicants within a contention set to jointly run and/or operate the applied-for string if that joint venture ultimately is otherwise qualified to operate and administer the registry in accordance with the rules set out in the Applicant Guidebook. All partnerships and other joint ventures created after the application of submissions must follow the application change process set forth in"—then we'll cite the section—"and shall be considered material changes and may require reevaluation of some or all of the new resulting applications. This also includes a new public comment period on the changes, as well as a new period to file objectives, provided, however, that objections provided during this new period must be of then type that arise due to the changing circumstances of the application and not nearly the type of objection that could have been filed against one or all of the applications in the contention set during the initial objection filing period."

I'm going to stop there and see if that's understood, if that reflects the discussions—to put this is a much more positive light.

Donna, go ahead.

DONNA AUSTIN: Thanks, Jeff. I was reading back through some stuff today and I just want to ask a question. Are private auctions now off the table? Because, in my mind, they're still on the table, but I just want to be clear whether that is the case or not the case.

JEFF NEUMAN: Well, in looking at the bulk of the comments, the letter from the Board, and the previous work, it seems like there is much more support for not going forward with allowing private auctions than there is support for keeping them. So we have certainly understood that not everyone agrees with that, but that, in trying to weigh the comments and the groups submitting them, it seemed to the leadership team that there was certainly more support for not allowing that.

I'll also just refer you to the problem statement, which it seems like we had agreement on during the last call, towards the beginning of this document, which would address those problems.

Donna, I don't know if that answers your question.

DONNA AUSTIN: I think there's still a slim possibility that private auctions are still a possibly. That's the way I interpret what you just said. I understand that people have problems with people in theory losing auctions, and there are some other challenges associated. But I still think there was discussion the mailing list as well as conversations we've had here, and I think there are some reason why private auctions should still be on the conversation.

JEFF NEUMAN: Okay. Let me go to Paul. Paul, go ahead.

PAUL MCGRADY: Thanks. This won't come as a surprise: that I support Donna's position, that I think that private auctions should remain on the table. There's quite a few comments in favor of private auctions as well. Frankly, the elimination of private auctions seems to be a cure in search of a disease. Again, no one has ever been really able to explain what the harm is, other than that ICANN doesn't get the money, and I'm actually not sure that that's a problem.

So, ultimately what we want to do is that, when consensus call time comes, we can all get behind. But, if the voices that don't have a problem with the private auction process aren't really heard, we're just setting ourselves up for failure.

So I'd like for us to put it back on the table and, at the same time, work through this document and see if maybe, instead of banning them, identifying what the perceived harms are and trying to fix something about them that's bothering somebody … Thank you.

JEFF NEUMAN: Thanks, Paul. There is a lot of information already out there as to the perceived harms. I understand that not everyone agrees with that, but I don't think it's fair to say there's no information or there's nothing out there about the harms. We do have this, again, problem statement here.

Can you help us understand, other than "It should be back on the table" … If you look at this problem statement, are there elements of this problem statement you disagree with? That would be, I think, a better way to go because I think, if we just say that private auctions are allowed, then we would be ignoring a substantial

amount of comments, including from the Board itself. So we would need to still address their concerns.

I'm going to Greg and then back to Paul.

GREG SHATAN: Thanks. In my view, private auctions should be on the table and should continue to exist, but certainly at this point it should at least be on the table. I know the problem statement doesn't state what the Board's problems are, so I can't come up with a suggestion as to how we would resolve whatever their concerns were. The concerns that are mentioned here—that some applicants "leverage" funds from private auctions "lost" for financial positioning in the resolution, whether a contention set—maybe is a perceived harm, but this is not a harm. This is stated as an actual fact, but it's more of an accusation. Use of the term "leveraged" is clearly subjective. I guess it means to use something to maximum advantage. It clearly doesn't mean they borrowed the funds. That's the only other meaning of "leveraged." The idea that somehow this is going to become a playground for losers in the next round is just crystal-ball gazing. If we want to think about some more narrow ways to deal with gaming the issue, rather than just "Get rid of the whole process," the question is whether, by and large, it worked or didn't work. Putting aside this one perception, I think [it's] still very much on the table. Since money is fungible, how do we actually know that applicants leverage funds for financial positioning in the resolution of other contention sets? If we have some study that we can't point to or a confession that this was their program and that they're intending to do it again and do it bigger and better and that this is some form of roulette, I just

don't see that this is the harm that requires the entire shutting down of this process, if it even really exits as opposed to … Whether the money—obviously, it came in and went out … I don't know. To say the strategy is going to prevent—

JEFF NEUMAN: Thanks, Greg. Sorry. Just for time purposes. I think you should go back and read the discussions we had on this, as well as what Jim puts into the chat, because we spent some time reviewing filings from publicly-traded companies, where they absolutely talked about leveraging then auctions to go after the strings that they thought were more important to them.

So if I could just ask people to not use the terms "This is like guessing of what happened," and "Crystal-ball gazing." I think that's not fair. You may not think that that's a problem, and that's a perfectly fair option to have, but I'm going to just ask that we not make comments of "Well, how do we know what happened?" and, "Is there a study or confessions"? because, yes, there are confessions out there, although, again, it's not a confession in the sense of a negative thing. I'll leave it to the group to decide whether there's connotations, but I don't think it's fair to say that we're just guessing that it happened because that's not accurate.

I'm going to go to Paul. Please.

PAUL MCGRADY: Thanks, Jeff. I'd like to take you up on your offer to actually look at the problem statement to see if it's a problem. And it makes sense to walk through it. "In 2012, some applicants resolved their

contentions by mutually agreeing to participate in private auctions where the auction price, which in some cases were the second-highest bid amount, was equally divided by the losing bidders minus an admin fee for the auction provider."

That's put down here as a problem, but there's nothing illegal about that. And ICANN is meant to be the private marketplace, not the government. So, again, it's put down as a problem, but there's no problem there. It's simply labeled a problem.

"Some applicants that applied for multiple TLDs called portfolio applicants leveraged funds from private auctions lost through financial positioning [of] the resolution of other contention sets."

Again, it's the private market. This bullet seems to be a complaint that some parties were more sophisticated than other parties in this process, but again, I'm not sure that's a problem.

JEFF NEUMAN: Paul, can I just intervene with one quick thing? I don't think this was intended to list individual problems. I think the statement as a whole, once you get to the end, describes the one problem. So I agree with you: if you looked at each bullet point itself, they're not each problems. Maybe this is just a drafting thing. But look at the whole section rather than dissecting each bullet point if that's okay.

PAUL MCGRADY: Well, Jeff, I think you're asking me to do something that I just have not been trained to do. If we're going to read it, we should read it. I

think it's important because the premises leading to a conclusion matter. If you want me to only go to the conclusion and not read the premises, I can do that, but I've not analyzed it.

JEFF NEUMAN: Oh, no, no, no. Sorry. I misunderstood. Sorry. Those are premises. I thought, when you were going through your discussion, that you were saying that each individual bullet was a separate problem. Those are premises, and it's good to go through those. But the problem itself is not really spelled out until the bottom of this.

Go ahead. Sorry. Didn't mean to interrupt.

PAUL MCGRADY: No problem. I don't want to spend working group time doing what you don't want me to do, but I thought that's what we had been invited to do. So I'm just reading through these, trying to find the problem.

Now we're on the second bullet, where we say that not everybody agrees that it's a problem. There is community concern about the practice of applying for top-level domains for the purpose of financial gain. Well, of course, almost everybody applies for top-level domain names for the purpose of some sort of financial gain, including from the ICANN Board. Gently and kindly and with great respect, I would like to point out that the ICANN Board is an interested party in this because, if private auctions go away, they don't get to keep the money. This includes the utilization of proceeds from lost auctions towards future auctions. So, again,

this is meant, I guess, Jeff, to be a premise of some sort that leads us to the problem because, again, I'm not seeing a problem yet.

New bullet point. "In the future, if there are no impediments put in place, both former 2012 applicants as well as potential new applicants who [are aware] of what took place in 2012 would likely leverage past actions in future rounds."

Again, I'm not sure that there's a problem here. What we're saying –at least what I'm saying is—is that so far we've not encountered a problem, but there seems to be some worry that people will do the same thing, even though there's not unanimous agreement that it's problematic in effect. There's public comments from various constituencies and such saying it wasn't a problem.

Now onto the sub-bullet points. "With no changes expected to the refund structure and the known possibility to gain financially from participating in private auctions even while losing, the risk profile for submitting an application appears reduced."

That's interesting. I'd like to know what that means. Does that mean that, if I'm going to pay $185,000 and, if I file enough of those, I'm going to end up in enough auction profiles to get my money back and then some? Yeah, maybe, but again, that's playing the roulette board. We can talk about that. I don't know what it means fully, but maybe there's something there.

A second bullet point: "If the risk is reduced, there is likely to be more applications submitted, with some of those being of a speculative nature."

All of these are of a speculative nature because the Applicant Guidebook is not straightforward and there's lots of places where your application could flunk out. So nothing is a sure thing in this process, for sure.

"While there is not unanimous agreement"—again, second recognition—"that private auctions are problematic, the working group has considered several options[/]factors to address the perceived problem."

Again, we cemented here that it's a perceived problem, even though we've not really identified one.

"The working group considers two options that focus on [inaudible]." Then we go on from there into the solution for the problem we've [not] identified.

So, again, I don't mean to be unkind, but, taking a look at the entire thing, now that I've read through it like that, it appears that the problem is that some people are unhappy that other people were better at participating in private auctions than they were. And some people appear to unhappy that ICANN didn't get all the money—only $350 million or whatever they got. They could have gotten a lot more. So, again, I'm not sure that I'm saying what the major problem is that would pull an [entire mechanism] off the table. I think it should be on the table. Thanks.

JEFF NEUMAN: Understood. Thanks, Paul. Let me go to Anne.

ANNE AIKMAN-SCALESE: I guess I'm going to have to agree with the summary here. I think that what I want to suggest to Paul and others is that, in the whole, for example, domain name arena, when you file a UDRP—you find evidence, for example, that the domain name was purchased for the purpose of resale—that's considered bad faith. I think that, when we talk about speculative nature or when we talk about applying solely for the purpose of the potential financial gain, we're talking about a similar thing, where it's just not out of the realm of possibility that you figure out some string that you know that in particular the portfolio applicants are going to maybe want to apply for and you say, "Hey, this works great. I'll follow the same strategy I've used before, in connection with buying up multiple domain names that'll they'll have to buy from me. I'll get it financed by people who are as easily convinced of the appropriate risk as I am because the possible gains are quite large. What we'll do is we'll just apply in bath faith. We don't really want to run a TLD. We just want the cash"—

JEFF NEUMAN: Thanks, Anne. There's lots of discussion going on in the list. There's not enough time to read all the stuff in the chat, but there's certainly comments from some talking about the harm or the perceived harms. Paul has responded about that it's only bad faith if there's a brand involved. Elaine says this proposal is [inaudible] attempt to address the Board's direction and make an allowance for private resolution."

One of the other things I would make a point of—then I'll go to Greg—is that, Paul, when you were reading it, you used the term "roulette" several times, which, to me, implies a gaming

connotation. I don't think we want the assignment of top-level domains to be associated with the gaming process, where those that know how to play the game better are the ones that get the TLDs. I think, if you look at it from the that viewpoint, when you're allocating a public resource, that's the type of thing where perceived reputational damages could come into play. That's why some of those groups made those comments—

PAUL MCGRADY: Am I allowed to respond, since you called me out?

JEFF NEUMAN: Yeah, you're in the queue—

PAUL MCGRADY: Well, you called me out specifically, so I can respond specifically?

JEFF NEUMAN: Yeah, absolutely. I was just going to ask Greg to do that. Go ahead.

PAUL MCGRADY: If I said that, I didn't mean to. I was referring to the entire New gTLD Program as being a bit of a roulette wheel, which is a game of chance, not a game of skill, because the Applicant Guidebook has so many ifs and caveats and "how about this?" and GAC advice that, when you put in your application, is not a sure thing to get it all the way through. But I think that's different in concept

than saying what I think the problem statement is. I think the problem is that people aren't upset about roulette wheels. I think they're upset about poker, which is a game of skill and chance. I think some people are upset that there will applicants who simply were able to navigate then private auction process and get better outcomes from themselves and the other people participating it, rather than just defaulting to the ICANN mechanisms which added funds to the ICANN bank account.

So, if I gave you the misimpression that I was for roulette wheels, I'm absolutely against them. I'm all about predictability. But I don't want to have you accidentally conflate my comments about the entire New gTLD Program being a bit of a roulette wheel with me somehow promoting the idea that gaming is a good thing. Thanks.

JEFF NEUMAN: Thanks, Paul. Thank you for that response. I appreciate that. Go ahead, Greg.

GREG SHATAN: Thanks. I did a little boning up in the interim but not completely. So it seems to me that the first bullet point under the first bullet point refers at least in large part to .web, since we're not being hypothetical here. I think, in terms of trying to deal with that, shadow bidders should be prohibited. That goes, I think, to Anne's good-faith point. Perhaps another idea is that any money that comes in a private auction set should be essentially held in escrow or somehow hived off from any other pot of money so that there isn't the chance to, in essence, grow you point by losing.

Some companies are just going to be better funded than others. That's something that, unless we get away from private auctions entirely, we're not going to be able to deal with.

In terms of games of chance and skill, I'm looking at what we've proposed. One of my concerns is that the blind auction is at least very much a game of chance, especially being proposed to come as early as it does and the lack of information to be truly blind.

So maybe the thing to do is to take, in essence, an idea from that and to have each company declare its total pot or something along those lines. But it just seems to me that, if the particular problem was essentially reusing money and subterfuge, we deal with those points in particular. The best thing to my mind would be to give it to the best qualified operator, but we got away very quickly from the idea of having applicants do, say, supplemental submissions to actually determine who would actually come up with the best and who knows what the best means, etc., etc. So we're left with some form of unsatisfactory results. So trying to get just get what's most unsatisfactory out of the private auctions would be my approach. Thanks.

JEFF NEUMAN: Thanks, Greg. Certainly, if we do allow private auctions, there would be elements, I'm sure, that this group would recommend be addressed.

So we obviously need some more discussion on this topic. I am going to discuss this with the leadership team as to when we can continue the conversation on this. For the record, we're going to

continue on—today is the third; yeah—Monday with the scheduled topic as opposed to continuing on this discussion. I think we need some time away from this subject just to digest and see if there's some more thoughts on the list as opposed to getting back to this topic again on Monday. So, on Monday, we will start with the predictability framework and then go to—sorry, I'm without the workplan in front of me; I'm trying to do this from memory; thank you—to closed generics.

I do want [people to] talk about predictability. We're going to try to frame the discussion as to what we think we all agree on and the specific elements that we don't yet have agreement on. We often use the term "predictability model," and there are some that say, "Well, we're not convinced that the predictability model is the right way to go." I think what's actually meant as [inaudible] element to the predictability model that some people don't agree with, but let's now throw out the whole model simply because there are some elements that we can work on.

With that, the next call is on Monday, May 11th at 15:00 UTC. 90 minutes.

Anne, I'm not sure if that's a new hand. I apologize for not looking. Did you want to say something quick.

ANNE AIKMAN-SCALESE: Yeah. Super quick, Jeff. I just don't want to lose the idea that Ruben put in the chat that it's actually a good idea for when the contention sets are revealed for the type of application to be identified because it's pretty hard to submit bids. If you know

there's a community application, your bid is different from if you don't know there's a community application. We didn't really discuss that, but Rubens put it in the chat. I think it's a good idea.

JEFF NEUMAN: Thanks, Anne. I think "things being revealed" was intended to be the reveal of the whole application, which does indicate type it is. So we'll go back and look and make sure that's incorporated into the concept of reveal. I don't think it was just the string that's revealed but the application itself. Or are you … Oh, I see where it could be an issue: in one of the options of the timing when we notify the contention set only that there are X number of applications to also reveal what the type of applications are.

ANNE AIKMAN-SCALESE: Correct. And that's what Rubens has suggested.

JEFF NEUMAN: I see it now, yeah. So we will add that as an issue. Sorry for being a little slow on that one. I got it.

Thanks, everyone, for staying a couple extra minutes, especially some where it's really late. So thank you. Good conversation. I just want to say that I do believe that everyone here is operating in good faith and trying to make the process better regardless of which side of any issue you stand on. So I'm still optimistic about that. Thanks, everyone. Talk to you all on Monday.

[END OF TRANSCRIPTION]