

October 2023 Scorecard: Subsequent Procedures (SubPro PDP)

Board Action - 26 October 2023

This October 2023 Scorecard: Subsequent Procedures (SubPro PDP) (October 2023 Scorecard) is intended to facilitate the Board's consideration of the recommendations, affirmations, affirmations with modification, and implementation guidance (collectively Outputs) contained in the "[Final Report on the New gTLD Subsequent Procedures Policy Development Process](#)" (Final Report) that were listed as in Section D "Pending" in the [September 2023 Scorecard: Subsequent Procedures](#) (September 2023 Scorecard).

- Section A of this October 2023 Scorecard details the Outputs that the Board adopts with the second "[New gTLD Subsequent Procedures Pending Recommendations - GNSO Council Clarifying Statement](#)" transmitted to the Board on 21 October 2023.
- Section B of this October 2023 Scorecard details the Outputs that the Board does not adopt, including a Board statement and rationale for each of the Outputs, per Bylaws Annex A, Section 9, because they are not in the best interests of the ICANN community or ICANN.

General Note

Footnotes in the text of the Outputs were embedded in the original Outputs from the [Final Report](#), but the footnote numbers in this Scorecard may differ from the footnote numbering in the Final Report.

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A. Outputs That the Board Adopts With GNSO Council-Approved Clarifications

The Board adopts the Outputs in this section pursuant to Resolutions 2023.10.26.13 - 2023.10.26.17.

Output	GNSO Council-Approved Clarification	Board Input Regarding the Implementation Process
Topic 9: Registry Voluntary Commitments / Public Interest Commitments		
<p>Recommendation 9.1: Mandatory Public Interest Commitments (PICs) currently captured in Specification 11 3(a)-(d) of the Registry Agreement must continue to be included in Registry Agreements for gTLDs in subsequent procedures. Noting that mandatory PICs were not included in the 2007 recommendations, this recommendation puts existing practice into policy. One adjustment to the 2012 implementation is included in the following recommendation (Recommendation 9.2).</p>	<p>The GNSO Council confirms that any new Public Interest Commitments (PICs) or Registry Voluntary Commitments (RVCs) must be enforceable under the ICANN Bylaws and as a practicable matter. In respect of RVCs, both ICANN org and the applicant must agree that a proffered commitment is clear, detailed, mutually understood, and sufficiently objective and measurable as to be enforceable. And further, the Council observes that among the purposes of PICs / RVCs is to address public comments, in addressing strings deemed highly sensitive or related to regulated industries, objections (whether formal or informal), GAC Early Warnings, and/or GAC Consensus Advice. This clarifying statement is made with the understanding that the ICANN Board will have a community-wide conversation on PICs/RVCs.</p>	<p>The Board directs the ICANN Interim President and CEO, or her designee(s), to initiate and facilitate a Board-level community consultation before starting the implementation process. The purpose of this consultation is to ensure that the framework for implementing these recommendations remains consistent with the ICANN Bylaws. The Board encourages this consultation to be completed no later than ICANN79 so as to not impact the overall implementation timeline for the next round of new gTLDs.</p> <p>This community consultation is expected to inform and aid the work of ICANN org with the SubPro Implementation Review Team on developing the Applicant Guidebook.</p>

Output	GNSO Council-Approved Clarification	Board Input Regarding the Implementation Process
<p>Recommendation 9.4: The Working Group recommends establishing a process to determine if an applied-for string falls into one of four groups defined by the NGPC framework for new gTLD strings deemed to be applicable to highly sensitive or regulated industries. This process must be included in the Applicant Guidebook along with information about the ramifications of a string being found to fall into one of the four groups.</p>	<p>See recommendation 9.1</p>	<p>See recommendation 9.1</p>
<p>Recommendation 9.8: If an applied-for string is determined to fall into one of the four groups of strings applicable to highly sensitive or regulated industries, the relevant Category 1 Safeguards must be integrated into the Registry Agreement as mandatory Public Interest Commitments.</p>	<p>See recommendation 9.1</p>	<p>See recommendation 9.1</p>
<p>Recommendation 9.9: ICANN must allow applicants to submit Registry Voluntary Commitments (RVCs) (previously called voluntary PICs) in subsequent rounds in their applications or to respond to public comments, objections, whether formal or informal, GAC Early Warnings, GAC Consensus Advice, and/or other comments from the GAC. Applicants must be able to submit RVCs at any time prior to the execution of a Registry Agreement; provided, however, that all RVCs submitted after the application submission date shall be considered Application Changes and be subject to the recommendation set forth under topic 20: Application Changes Requests, including, but not limited to, an operational comment period in accordance with ICANN’s standard procedures and timeframes.</p>	<p>See recommendation 9.1</p>	<p>See recommendation 9.1</p>

Output	GNSO Council-Approved Clarification	Board Input Regarding the Implementation Process
Recommendation 9.10: RVCs must continue to be included in the applicant’s Registry Agreement.	See recommendation 9.1	See recommendation 9.1
Recommendation 9.12: At the time an RVC is made, the applicant must set forth whether such commitment is limited in time, duration and/or scope. Further, an applicant must include its reasons and purposes for making such RVCs such that the commitments can adequately be considered by any entity or panel (e.g., a party providing a relevant public comment (if applicable), an existing objector (if applicable) and/or the GAC (if the RVC was in response to a GAC Early Warning, GAC Consensus Advice, or other comments from the GAC)) to understand if the RVC addresses the underlying concern(s).	See recommendation 9.1	See recommendation 9.1
Recommendation 9.13: In support of the principle of transparency, RVCs must be readily accessible and presented in a manner that is usable, as further described in the implementation guidance below.	See recommendation 9.1	See recommendation 9.1
Topic 30: GAC Consensus Advice and GAC Early Warning		
Recommendation 30.7: Applicants must be allowed to change their applications, including the addition or modification of Registry Voluntary Commitments (RVCs, formerly voluntary PICs), to address GAC Early Warnings, GAC Consensus Advice, and/or other comments from the GAC. Relevant GAC members are strongly encouraged to make themselves available during	See recommendation 9.1	See recommendation 9.1

Output	GNSO Council-Approved Clarification	Board Input Regarding the Implementation Process
a specified period of time for direct dialogue with applicants impacted by GAC Early Warnings, GAC Consensus Advice, or comments to determine if a mutually acceptable solution can be found.		
Topic 31: Objections		
Recommendation 31.16: Applicants must have the opportunity to amend an application or add Registry Voluntary Commitments (RVCs) in response to concerns raised in a formal objection. All these amendments and RVCs submitted after the application submission date shall be considered Application Changes and be subject to the recommendations set forth under Topic 20: Application Change Requests including, but not limited to, an operational comment period in accordance with ICANN’s standard procedures and timeframes.	See recommendation 9.1	See recommendation 9.1
Recommendation 31.17: To the extent that RVCs are used to resolve a formal objection either (a) as a settlement between the objector(s) and the applicant(s) or (b) as a remedy ordered by an applicable dispute panelist, those RVCs must be included in the applicable applicant(s) Registry Agreement(s) as binding contractual commitments enforceable by ICANN through the PICDRP.	See recommendation 9.1	See recommendation 9.1

B. Board Statement pursuant to Bylaws Annex A, Section 9: Recommendations That the Board Does Not Adopt at This Time

The Board does not adopt Outputs in this section pursuant to Resolutions 2023.10.26.13 - 2023.10.26.17. The Issue Synopsis and Rationale provide the bases for Board’s action identified in the Scorecard.

Output	Issue Synopsis	Board Action and Rationale	Board comment on possible Supplemental Recommendations, per Bylaws Annex A, Section 9d
Topic 32: Limited Challenge/Appeal Mechanisms			
<p>Recommendation 32.1: The Working Group recommends that ICANN establish a mechanism that allows specific parties to challenge or appeal certain types of actions or inactions that appear to be inconsistent with the Applicant Guidebook. The new substantive challenge/appeal mechanism is not a substitute or replacement for the accountability mechanisms in the ICANN Bylaws that may be invoked to determine whether ICANN staff or Board violated the Bylaws by making or not making a certain decision.</p>	<p>The Board is concerned regarding this recommendation as set out in Operational Design Assessment, at topic 32 (pp. 169-176). In sum, it is not clear that a challenge/appeal mechanism applicable to Initial/Extended Evaluation decisions made by ICANN or third-party providers or challenges concerning conflict of interest of panelists could be designed in a way that does not cause excessive, unnecessary costs or delays in the application process.</p>	<p>The policy recommendations in Topic 32 (32.1, 32.2, and 32.10) call for ICANN to establish a mechanism that allows specific parties to challenge or appeal certain types of actions or inactions that appear to be inconsistent with the Applicant Guidebook, to establish clear procedures and rules for a challenge/appeal mechanism(s), and to design a limited challenge/appeal mechanism(s) in a manner that does not cause excessive, unnecessary costs or delays in the application process.</p> <p>As discussed in the March 2023 iteration of the scorecard, the Board noted its concerns regarding the limited challenge/appeal mechanism(s) proposed in the policy recommendations. Overall, the Board is concerned that such a challenge/appeal</p>	<p>As per the Bylaws Annex A, Section 9d, “...the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation.” Should the Council decide to develop such Supplemental Recommendations, the Board recommends that the Council works with ICANN org, either via the Small Team or any other means, to receive feedback on implementation practicalities which may help with the subsequent Board consideration of any such Supplemental Recommendations that the Council may adopt.</p>

<p>Implementation of this mechanism must not conflict with, be inconsistent with, or impinge access to accountability mechanisms under the ICANN Bylaws. The Working Group recommends that the limited challenge/appeal mechanism applies to the following types of evaluations and formal objections decisions:</p> <p>Evaluation Challenges</p> <ol style="list-style-type: none"> 1. Background Screening 2. String Similarity 3. DNS Stability 4. Geographic Names 5. Technical / Operational Evaluation 6. Financial Evaluation 7. Registry Services Evaluation 8. Community Priority Evaluation 9. Applicant Support 10. RSP Pre-Evaluation <p>Appeals of Formal Objections Decisions</p> <ol style="list-style-type: none"> 1. String Confusion Objection 2. Legal Rights Objection 		<p>mechanism(s) would likely result in excessive, unnecessary costs or delays in the application process.</p> <p>During the Operational Design Phase, ICANN org documented several concerns in the New Generic Top-Level Domain (gTLD) Subsequent Procedures Operational Design Assessment (ODA) about implementing a challenge/appeals mechanism(s) as proposed. (See pp. 169-176.) The challenges highlighted at that time included, but were not limited to the broad scope of the Initial Evaluation reviews, parties who would have standing to file a challenge/appeal, and the proposed arbiters to hear a challenge/appeal. The highlighted areas of concern in the Operational Design Assessment are indications of a more foundational issue - namely, that the recommendations present the potential for open-ended challenge/appeal mechanism(s) which could not be designed in a manner that does not cause excessive, unnecessary costs or delays in the application process. The Board has concerns that while the recommendations could lead to challenge/appeal procedures in theory, they are not feasible to implement without identifying specific mechanisms for corresponding challenges to evaluations and formal objection decisions. The risks of</p>	
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<p>3. Limited Public Interest Objection 4. Community Objection 5. Conflict of Interest of Panelists</p>		<p>moving forward with implementation based on the current recommendations for all of the identified types of evaluations and formal objections decisions might open up the New gTLD Program to claims that ICANN did not implement the community-developed policy as recommended.</p> <p>Given this, the Board cannot evaluate in the abstract whether implementing a challenge/appeal mechanism(s) as proposed in the Final Report would be in the best interest of ICANN or the ICANN community. The Board acknowledges, however, that there could be value in having a well-crafted, tightly-scoped challenge/ appeal process(es) as part of the New gTLD Program and is willing to consider specific mechanisms in specific cases.</p>	
<p>Recommendation 32.2: In support of transparency, clear procedures and rules must be established for challenge/appeal processes as described in the implementation guidance below.</p>	<p>See recommendation 32.1</p>	<p>See recommendation 32.1</p>	
<p>Recommendation 32.10: The limited challenge/appeal process</p>	<p>See recommendation 32.1</p>	<p>See recommendation 32.1</p>	

<p>must be designed in a manner that does not cause excessive, unnecessary costs or delays in the application process, as described in the implementation guidance below.</p>			
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