

June 2024 Scorecard: Subsequent Procedures Supplemental Recommendations

Board Action - 8 June 2024

This June 2024 Scorecard: Subsequent Procedures (SubPro PDP) Supplemental Recommendations (Supplemental Recommendations Scorecard) is intended to facilitate the Board's consideration of the [GNSO Council-approved Supplemental Recommendations](#), per the procedure detailed in Annex A, Section 9d of the Bylaws.

- Section A of this Supplemental Recommendations Scorecard details the Supplemental Recommendations that the Board adopts.
- Section B of this Supplemental Recommendations Scorecard details the Supplemental Recommendations that the Board does not adopt, including a rationale.

General Note

Footnotes in the text of the Supplemental Recommendations were embedded in the Council-approved Supplemental Recommendations, but the footnote numbers in this Supplemental Recommendations Scorecard may differ from the footnote numbering in the Council-approved document.

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A. Supplemental Recommendations That the Board Adopts

The Board adopts the Outputs in this section pursuant to Resolutions 2024.06.08.11 - 2024.06.08.14

Output	Board Input Regarding the Implementation Process
Topic 17: Applicant Support	
<p>Supplemental Recommendation 17.2: The GNSO Council recommends expanding the scope of Applicant Support provided to Applicant Support Program beneficiaries beyond the application fee to provide access to an array of resources useful for the capacity building, planning, application, evaluation, pre-delegation and post-delegation phases of the lifecycle of the application. For the avoidance of doubt, this recommendation does not obligate ICANN to provide support for all phases of the lifecycle of the application process as well as the registry.</p>	<p>The Board adopts this recommendation with the understanding that the services listed are examples. Implementing this recommendation requires providing additional services beyond a reduction to the application fee but do not have to cover all phases of an application's lifecycle.</p>
Topic 32: Limited Challenges and Appeals	
<p>Supplemental Recommendation 32.1: The GNSO Council recommends that as set forth in Annex F¹, where feasible and implementable, ICANN establish a mechanism that allows specific parties² to, on a limited and one-time basis: (i) challenge evaluation results for which Extended Evaluation is unavailable, or (ii) appeal formal objection results, where such evaluation results or dispute resolution results 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. Implementation of this mechanism must not conflict with, be inconsistent with, or impinge access to accountability mechanisms under the ICANN Bylaws.</p>	<p>The Board adopts this recommendation with the understanding that the evaluations identified may be excluded if Extended Evaluation is available. Therefore, the topics in Annex F of the Final Report should be considered excluded and that other topics for which Extended Evaluation is available also will not require additional challenges/appeal mechanisms.</p>

¹ As a result of limiting the challenge mechanism to only evaluation elements where Extended Evaluation is unavailable, Annex F should be considered to exclude these specific evaluation areas: Geographic Names, Technical & Operations, Financial, Registry Services, and RSP Pre-Evaluation.

² In Annex F, “specific parties” refers to the column titled “Parties with standing”.

Output	Board Input Regarding the Implementation Process
<p>Supplemental Recommendation 32.2: In support of transparency, clear procedures and rules must be established for challenge/appeal processes generally aligned with the principles in the implementation guidance below.</p>	
<p>Supplemental Recommendation 32.10: The limited challenge/appeal process must be designed in a manner that does not cause excessive, unnecessary costs or delays in the application process, generally aligned with the principles in the implementation guidance below.</p>	

B. Supplemental Recommendations That the Board Does Not Adopt

The Board does not adopt these Supplemental Recommendations pursuant to Resolutions 2024.06.08.11-- 2024.06.08.14

Output	Board Rationale
Topic 9: Registry Voluntary Commitments / Public Interest Commitments	
<p>Supplemental Recommendation 9.2: TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for specification 13, may be granted, upon a successful application for a waiver, an exemptions from either or both the mandatory PICs included in Specification 11 3(a) and Specification 11 3(b), provided that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator, or its Affiliates, for the exclusive use of Registry Operator or its Affiliates, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate or Registry Operator, and (iii) in the case of Spec 11 (3)(b), Registry Operator demonstrates that it takes or will take other effective steps to identify and mitigate domains in the TLD perpetrating DNS Abuse, but which may not constitute periodical technical analysis as envisaged under the Registry Agreement.</p>	<p>The Board has reviewed the Supplemental Recommendation and appreciates the Council’s work. However, the Board continues to believe that Spec 11 should apply to all registries and is concerned that creating bespoke steps to address DNS Abuse, as detailed in the Supplemental Recommendation, may lead to inconsistencies across the gTLD space.</p> <p>If implemented, Recommendation 9.2 could lead to DNS abuse for second-level registrations in a single-registrant TLD going undeterred, unobserved, and unmitigated. While DNS abuse in many single-registrant TLDs may be unlikely to impact users beyond the registrant, this may not always be the case. In circumstances in which parties other than the registrant use the TLD in some fashion, waivers to mandatory PICs included in Specification 11, Section 3(a) and Specification 11, Section 3 (b) could expose those users to undetected and unmitigated DNS abuse.</p> <p>Therefore, the Board has determined that its rationale for not adopting the original Recommendation 9.2, further detailed in the September 2023 Scorecard: Subsequent Procedures, still holds true, and the Board has determined that its adoption of this Recommendation would not be in the best interests of the ICANN community or ICANN.</p>

Output	Board Rationale
Topic 18: Terms and Conditions	
<p>Supplemental Recommendation 18.1: ICANN may only reject an application in accordance with the Applicant Guidebook, ICANN Board members’ fiduciary duties, the ICANN Bylaws, or applicable laws. In the event an application is rejected, ICANN org must cite with specificity the reason(s) in accordance with the above for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.</p>	<p>The Board has reviewed the Supplemental Recommendation and appreciates the Council’s work. However, the Board continues to believe that this Recommendation may unduly restrict ICANN’s discretion to reject an application in circumstances that fall outside the specific grounds set out in the recommendation.</p> <p>In the SubPro Final Report, the Working Group provided its rationale supporting Recommendation 18.1. The Working Group said, “...it must be clear to the applicant why an application was rejected and that any rejection must be justified under provisions of the Applicant Guidebook unless required by specific laws, ICANN Board members’ fiduciary duties, or the ICANN Bylaws.”</p> <p>As stated in the Working Group’s rationale, “[t]he purpose of this recommendation is to guard against arbitrary rejection of an application and ensure that there is transparency when rejections occur.” The Board takes note of the Working Group’s rationale and notes that these concerns are already addressed by the Bylaws. Article 3, Section 3.1 of the Bylaws requires that, “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness...,” and that, “ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN’s constituent bodies (including the detailed explanations discussed above).” Additionally, Article 2, Section 2.3 mandates that, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”</p>

Output	Board Rationale
	<p>The Bylaws already seem to address the concerns noted by the Working Group, and the Board remains concerned that if it adopts Recommendation 18.1, it may unduly limit ICANN’s discretion to reject an application in yet-to-be-identified future circumstance(s).</p> <p>Therefore, the Board has determined that its rationale for not adopting the original Recommendation 18.1, further detailed in the September 2023 Scorecard: Subsequent Procedures, still holds true, and the Board has determined that its adoption of this Recommendation would not be in the best interests of the ICANN community or ICANN.</p>
<p>Supplemental Recommendation 18.3 In subsequent rounds, there must be mechanisms in place whereby Applicants have the ability to have evaluation decisions and objection decisions substantively reviewed. This may be satisfied by implementing challenge and appeal mechanisms described generally under Topic 32. If there are challenge and appeal mechanisms or other processes whereby those decisions can be substantively reviewed, ICANN may continue to have Terms and Conditions that contain a covenant not to sue. This recommendation is in reference to Section 6 of the Terms and Conditions from the 2012 round.</p>	<p>The Board has reviewed the Supplemental Recommendation and appreciates the Council’s work. However, the Board continues to believe that it may cause undue legal exposure should it be adopted. If adopted, Recommendation 18.3 could weaken the covenant not to sue by placing conditions on whether it could be included in the Program. This would lead to a level of risk that the Board is unwilling to accept. Additionally, providing funds for these increased legal risks would have an impact on application fees for the next round, which would not be consistent with the intent of this recommendation.</p> <p>Therefore, the Board has determined that its rationale for not adopting the original Recommendation 18.3, as detailed in the September 2023 Scorecard: Subsequent Procedures, still holds true, and the Board has determined that its adoption of this Recommendation would not be in the best interests of the ICANN community or ICANN.</p> <p>Although the Board has determined that the adoption of this recommendation is not in the best interest of the ICANN community</p>

Output	Board Rationale
	<p>or ICANN, it has adopted (with this scorecard) Recommendations 32.1, which recommends that “The GNSO Council recommends that as set forth in Annex F³, where feasible and implementable, ICANN establish a mechanism that allows specific parties⁴ to, on a limited and one-time basis: (i) challenge evaluation results for which Extended Evaluation is unavailable, or (ii) appeal formal objection results, where such evaluation results or dispute resolution results 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. Implementation of this mechanism must not conflict with, be inconsistent with, or impinge access to accountability mechanisms under the ICANN Bylaws.”</p>

³ As a result of limiting the challenge mechanism to only evaluation elements where Extended Evaluation is unavailable, Annex F should be considered to exclude these specific evaluation areas: Geographic Names, Technical & Operations, Financial, Registry Services, and RSP Pre-Evaluation.

⁴ In Annex F, “specific parties” refers to the column titled “Parties with standing”.