

September 2023 Scorecard: Subsequent Procedures (SubPro PDP)

Board Action - 10 September 2023

This September 2023 Scorecard: Subsequent Procedures (SubPro PDP) (September 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 B "Pending" in the [Scorecard: Subsequent Procedures \(SubPro PDP\)](#) (Scorecard).

- Section A of this September 2023 Scorecard details the Outputs that the Board adopts.
- Section B of this September 2023 Scorecard details the Outputs that the Board adopts with the "[New gTLD Subsequent Procedures Pending Recommendations - GNSO Council Clarifying Statement](#)" transmitted to the Board on 5 September 2023.
- Section C of this September 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 9a, because they are not in the best interests of the ICANN community or ICANN.
- Section D of this September 2023 details the Outputs that remain pending.

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.

Table of Contents

A. Outputs That the Board Adopts	3
Topic 16: Application Submission Period	3
Topic 18: Terms and Conditions	3
Topic 19: Application Queuing	3
Topic 30: GAC Consensus Advice / GAC Early Warning	6
B. Outputs That the Board Adopts With GNSO Council-Approved Clarifications	8
Topic 3: Applications Assessed in Rounds	8
Topic 6: Registry Service Provider Pre-Evaluation	9
Topic 9: Registry Voluntary Commitments / Public Interest Commitments	9
Topic 26: Security and Stability	11
Topic 29: Name Collision	11
Topic 34: Community Applications	12
Topic 35: Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets	12
C. Board Statement pursuant to Bylaws Annex A, Section 9: Recommendations That the Board Does Not Adopt at This Time	16
Topic 9: Registry Voluntary Commitments / Public Interest Commitments	16
Topic 17: Applicant Support	17
Topic 18: Terms & Conditions	18
Topic 22: Registrant Protections	24
Topic 24: String Similarity Evaluations	24
D. Outputs That the Board Is Still Discussing (“Pending”)	28

A. Outputs That the Board Adopts

The Board adopts the Outputs in this section pursuant to Resolutions 2023.09.10.19 - 2023.09.10.24.

Output	Board Input Regarding the Implementation Process
Topic 16: Application Submission Period	
<p>Recommendation 16.1: The Working Group recommends that for the next application window and subsequent application windows, absent “extenuating or extraordinary” circumstances, the application submission period must be a minimum of 12 and a maximum of 15 weeks in length</p>	<p>At this time, the Board does not have specific input about this recommendation regarding the implementation process.</p>
Topic 18: Terms and Conditions	
<p>Recommendation 18.4: Applicants must be allowed some type of refund if they decide to withdraw an application because substantive changes are made to the Applicant Guidebook or program processes and such changes have, or are reasonably likely to have, a material impact on applicants.</p>	<p>After consultation with the GNSO Council, the Board instructs ICANN org to provide, during implementation, details of how the terms ‘substantive change’ and ‘material impact’ are defined in the context of this recommendation.</p> <p>In doing so, ICANN org should consult with the SubPro Implementation Review Team (IRT) as needed, in accordance with the Consensus Policy Implementation Framework, and the IRT Principles and Guidelines.</p>
Topic 19: Application Queuing	
<p>Affirmation 19.1: The Working Group supports the approach ultimately taken to application queuing during the 2012 round, in which ICANN conducted drawings to randomize the order of processing applications within an application window, and therefore</p>	<p>At this time, the Board does not have specific input about this recommendation regarding the implementation process.</p>

Output	Board Input Regarding the Implementation Process
<p>affirms the use of a “prioritization draw” for subsequent procedures. The Working Group acknowledges that there may be possible adjustments or alternatives to the logistics of the prioritization draw used in the 2012 round that either would improve on existing processes or be necessitated under applicable law.¹ The Working Group supports such improvements and provides some examples in Implementation Guidance 19.2. The Working Group notes that in the 2012 round, the implementation of drawings included prioritization of IDN applications. This Affirmation does not address the prioritization of IDNs. Please see below for additional information on this issue. The Working Group acknowledges that continuing to use the randomized drawing approach is contingent upon local law and the ability of ICANN to obtain the necessary license to conduct such drawings, but advises that ICANN must not under any circumstances attempt to create a “skills-based” system like “digital archery” to determine the processing order of applications in subsequent procedures. This affirmation updates and replaces Implementation Guideline D from 2007 which recommended a first-come first served method of processing applications.²</p>	
<p>Recommendation 19.3: All applications must be processed on a rolling basis, based on assigned priority numbers. While the 2012 AGB prescribed batches of 500 applications, ICANN org noticed during that round that moving through the priority list without splitting the applications into batches was more efficient. The Working Group affirms that approach by not recommending batches. However, if the volume of Internationalized Domain Names (IDN) applications received equals or exceeds 125, applications will be</p>	<p>At this time, the Board does not have specific input about this recommendation regarding the implementation process.</p>

¹ One example may be exploring whether the prioritization draw must be in person as opposed to virtual.

² Implementation Guideline D from 2007 stated: “A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. Applications will be time and date stamped on receipt.”

Output	Board Input Regarding the Implementation Process
<p>assigned priority numbers consistent with the formula below.</p> <p>The Working Group recommends that the following formula must be used with respect to giving priority to IDN applications:</p> <ul style="list-style-type: none"> ● <u>First 500 applications</u> <ul style="list-style-type: none"> ○ If there are 125 applications or more for IDN strings that elect to participate in the prioritization draw, the first 25% of applications assigned priority numbers in the first group shall be those applications for IDN strings that elect to participate in the prioritization draw. The remaining 75% of applications in the group shall consist of both IDN and non-IDN applications that elect to participate in the prioritization draw. ○ If there are less than 125 applications for IDN strings that elect to participate in the prioritization draw, then all such applications shall be assigned priority numbers prior to any non-IDN application. ● <u>Each subsequent group of those electing to participate in the prioritization draw</u> <ul style="list-style-type: none"> ○ For each subsequent group, the first 10% of each group of applications must consist of IDN applications until there are no more IDN applications. ○ The remaining applications in each group shall be selected at random out of the pool of IDN and non-IDN applications that remain. ● <u>Processing of applications which do not elect to participate in the prioritization draw</u> 	

Output	Board Input Regarding the Implementation Process
<ul style="list-style-type: none"> ○ When all of the applications that have elected to participate in the prioritization draw have been assigned priority numbers, ICANN shall assign priority numbers to the remaining applications in groups of 500 applications. ○ The first 10% of each group of applications must consist of IDN applications until there are no more IDN applications. ○ The remaining applications in each group shall be selected at random out of the pool of IDN and non-IDN applications that remain. 	
Topic 30: GAC Consensus Advice / GAC Early Warning	
<p>Recommendation 30.4: Section 3.1 of the 2012 Applicant Guidebook states that GAC Consensus Advice “will create a strong presumption for the ICANN Board that the application should not be approved.” Noting that this language does not have a basis in the current version of the ICANN Bylaws, the Working Group recommends omitting this language in future versions of the Applicant Guidebook to bring the Applicant Guidebook in line with the Bylaws language. The Working Group further notes that the language may have the unintended consequence of hampering the ability of the Board to facilitate a solution that mitigates concerns and is mutually acceptable to the applicant and the GAC as described in the relevant Bylaws language. Such a solution could allow an application to proceed. In place of the omitted language, the Working Group recommends including in the Applicant Guidebook a reference to applicable Bylaws provisions that describe the voting threshold for the ICANN Board to reject GAC Consensus Advice.</p>	<p>The Board has noted and reviewed the concerns voiced by some GAC members in the ICANN77 GAC Communiqué. The Board notes the GAC that Bylaws Section 12.2 (a) details all relevant procedures concerning GAC Consensus Advice and that this Bylaws Section, not language in a future Applicant Guidebook, determines how the Board engages with GAC Consensus Advice - regardless of whether it is issued with regard to the Next Round or any other issue.</p> <p>Accordingly, the Board’s adoption of this recommendation does not in any way prejudice or otherwise impact the processes regarding Board consideration of GAC Consensus Advice detailed in the Bylaws Section 12.2 (a).</p>

Output	Board Input Regarding the Implementation Process
<p>Recommendation 30.5: The Working Group recommends that GAC Early Warnings are issued during a period that is concurrent with the Application Comment Period. To the extent that there is a longer period given for the GAC to provide Early Warnings (above and beyond the Application Comment Period), the Applicant Guidebook must define a specific time period during which GAC Early Warnings can be issued.</p>	<p>At this time, the Board does not have specific input about this recommendation regarding the implementation process.</p>
<p>Recommendation 30.6: Government(s) issuing Early Warning(s) must include a written explanation describing why the Early Warning was submitted and how the applicant may address the GAC member’s concerns.</p>	<p>The Board has noted the concerns that the GAC has previously raised on this recommendation, most recently as an issue of concern in the ICANN77 GAC Communiqué.</p> <p>The Board instructs ICANN org to make clear in the Applicant Guidebook that as part of an Early Warning, a GAC member may indicate that its concern can only be addressed by the applicant withdrawing its application.</p> <p>In doing so, ICANN org should consult with the IRT as needed, in accordance with the Consensus Policy Implementation Framework, and the IRT Principles and Guidelines.</p>

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

The Board adopts the Outputs in this section pursuant to Resolutions 2023.09.10.19 - 2023.09.10.24.

Output	GNSO Council-Approved Clarification
Topic 3: Applications Assessed in Rounds	
<p>Affirmation with Modification 3.1: The Working Group affirms Recommendation 13 from the 2007 policy, which states: “Applications must initially be assessed in rounds until the scale of demand is clear.” However, the Working Group believes that the recommendation should be revised to simply read, “Applications must be assessed in rounds.”</p>	<p>The SubPro Final Report recommendation envisions that “the next application procedure should be processed in the form of a round” and “Application procedures must take place at predictable, regularly occurring intervals without indeterminable periods of review”. However, the GNSO Council confirms its willingness to engage with the ICANN Board to explore a shared vision for the long-term evolution of the program, which could be materially different than what is envisioned for the next round of the New gTLD Program in the Topic 3 recommendations.</p>
<p>Recommendation 3.2: Upon the commencement of the next application submission period, there must be clarity around the timing and/or criteria for initiating subsequent procedures from that point forth. More specifically, prior to the commencement of the next application submission period, ICANN must publish either (a) the date in which the next subsequent round of new gTLDs will take place or (b) the specific set of criteria and/or events that must occur prior to the opening up of the next subsequent round.</p>	
<p>Recommendation 3.5: Absent extraordinary circumstances application procedures must take place at predictable, regularly occurring intervals without indeterminable periods of review unless the GNSO Council recommends pausing the program and such recommendation is approved by the Board. Such extraordinary circumstances must be subject to the Predictability Framework under Topic 2 of this Report. Unless and until other procedures are recommended by the GNSO Council and approved by the ICANN Board, ICANN must only use “rounds” to administer the New gTLD Program.</p>	

Output	GNSO Council-Approved Clarification
<p>Recommendation 3.6: Absent extraordinary circumstances, future reviews and/or policy development processes, including the next Competition, Consumer Choice & Consumer Trust (CCT) Review, should take place concurrently with subsequent application rounds. In other words, future reviews and/or policy development processes must not stop or delay subsequent new gTLD rounds.</p>	
<p>Recommendation 3.7: If the outputs of any reviews and/or policy development processes has, or could reasonably have, a material impact on the manner in which application procedures are conducted, such changes must only apply to the opening of the application procedure subsequent to the adoption of the relevant recommendations by the ICANN Board.</p>	
<p>Topic 6: Registry Service Provider Pre-Evaluation</p>	
<p>Recommendation 6.8: The RSP pre-evaluation program must be funded by those seeking pre-evaluation on a cost-recovery basis. Costs of the program should be established during the implementation phase by the Implementation Review Team in collaboration with ICANN org.</p>	<p>The GNSO Council confirms its understanding of the Implementation Review Team (IRT) Principles & Guidelines that state that, “the IRT is convened to assist staff in developing the implementation details for the policy to ensure that the implementation conforms to the intent of the policy recommendations.” The Council therefore recognizes that ICANN org will be responsible for establishing the fees charged for the RSP pre-evaluation program, in consultation with the IRT, as is consistent with the roles and responsibilities captured in the IRT Principles & Guidelines. The language used in Recommendation 6.8 is not intended to alter the respective roles and responsibilities of staff and the IRT.</p>
<p>Topic 9: Registry Voluntary Commitments / Public Interest Commitments</p>	

Output	GNSO Council-Approved Clarification
<p>Recommendation 9.15: The Working Group acknowledges ongoing important work in the community on the topic of DNS abuse³ and believes that a holistic solution is needed to account for DNS abuse in all gTLDs as opposed to dealing with these recommendations with respect to only the introduction of subsequent new gTLDs. In addition, recommending new requirements that would only apply to the new gTLDs added to the root in subsequent rounds could result in singling out those new gTLDs for disparate treatment in contravention of the ICANN Bylaws. Therefore, this PDP Working Group is not making any recommendations with respect to mitigating domain name abuse other than stating that any such future effort must apply to both existing and new gTLDs (and potentially ccTLDs). The Working Group has reached this conclusion after duly considering the DNS abuse related CCT-RT</p>	<p>The GNSO Council confirms that this recommendation does not require any implementation nor create any dependencies for the Next Round of the New gTLD Program.</p>

³ The Working Group did not attempt to define the term “DNS abuse” in the course of its discussions and is not endorsing any particular definition of this term. The Working Group notes, however, that the CCT-RT used the following definition to support its work: “Intentionally deceptive, conniving, or unsolicited activities that actively make use of the DNS and/or the procedures used to register domain names.” See p. 3 of the “New gTLD Program Safeguards Against DNS Abuse: Revised Report” (2016) for additional context on this definition: <https://www.icann.org/news/announcement-2016-07-18-en>. The CCT-RT used the term “DNS Security Abuse” in its Final Report to refer to specific, technical forms of abusive behavior: spam, phishing, and malware distribution in the DNS. The CCT-RT also drew on the Registration Abuse Policies Working Group’s Final Report, which provides additional detail about how abuse has been characterized by the ICANN Community: https://gns0.icann.org/sites/default/files/filefield_12530/rap-wg-final-report-29may10-en.pdf.

Output	GNSO Council-Approved Clarification
<p>Recommendations, which includes 14,⁴ 15,⁵ and 16⁶. Note, however, that at the time of the drafting of this report, the ICANN Board only approved Recommendation 16. Recommendations 14 and 15 remain in a “Pending” status.⁷</p>	
<p>Topic 26: Security and Stability</p>	
<p>Recommendation 26.9: In connection to the affirmation of Recommendation 4 from the 2007 policy, Emoji in domain names, at any level, must not be allowed.</p>	<p>The GNSO Council confirms that the “any level” language referenced in the recommendation should be interpreted to only be in respect of domain names that are allocated by the registry operator.</p>
<p>Topic 29: Name Collision</p>	

⁴ CCT-RT Recommendation 14 states: “Consider directing ICANN org, in its discussions with registries, to negotiate amendments to existing Registry Agreements, or in consideration of new Registry Agreements associated with subsequent rounds of new gTLDs, to include provisions in the agreements to provide incentives, including financial incentives, for registries, especially open registries, to adopt proactive anti-abuse measures.”

⁵ CCT-RT Recommendation 15 states: “ICANN Org should, in its discussions with registrars and registries, negotiate amendments to the Registrar Accreditation Agreement and Registry Agreements to include provisions aimed at preventing systemic use of specific registrars or registries for DNS Security Abuse. With a view to implementing this recommendation as early as possible, and provided this can be done, then this could be brought into effect by a contractual amendment through the bilateral review of the Agreements. In particular, ICANN should establish thresholds of abuse at which compliance inquiries are automatically triggered, with a higher threshold at which registrars and registries are presumed to be in default of their agreements. If the community determines that ICANN org itself is ill-suited or unable to enforce such provisions, a DNS Abuse Dispute Resolution Policy (DADRP) should be considered as an additional means to enforce policies and deter against DNS Security Abuse. Furthermore, defining and identifying DNS Security Abuse is inherently complex and would benefit from analysis by the community, and thus we specifically recommend that the ICANN Board prioritize and support community work in this area to enhance safeguards and trust due to the negative impact of DNS Security Abuse on consumers and other users of the Internet.”

⁶ CCT-RT Recommendation 16 states: “Further study the relationship between specific registry operators, registrars and technical DNS abuse by commissioning ongoing data collection, including but not limited to, ICANN Domain Abuse Activity Reporting (DAAR) initiatives. For transparency purposes, this information should be regularly published, ideally quarterly and no less than annually, in order to be able to identify registries and registrars that need to come under greater scrutiny, investigation, and potential enforcement action by ICANN org. Upon identifying abuse phenomena, ICANN should put in place an action plan to respond to such studies, remediate problems identified, and define future ongoing data collection.”

⁷ See relevant Board scorecards here: <https://www.icann.org/en/system/files/files/resolutions-final-cctrecs-scorecard-01mar19-en.pdf> and here: <https://www.icann.org/en/system/files/files/cct-pending-recsboard-action-22oct20-en.pdf>.

Output	GNSO Council-Approved Clarification
<p>Recommendation 29.1: ICANN must have ready prior to the opening of the Application Submission Period a mechanism to evaluate the risk of name collisions in the New gTLD evaluation process as well as during the transition to delegation phase.</p>	<p>The GNSO Council believes that Recommendation 29.1 can be adopted by the Board on the understanding that it does not need to be acted on until such time any next steps for mitigating name collision risks are better understood out of the Name Collision Analysis Project (NCAP) Study 2.</p>
<p>Topic 34: Community Applications</p>	
<p>Recommendation 34.12: The process to develop evaluation and selection criteria that will be used to choose a Community Priority Evaluation Provider (CPE Provider) must include mechanisms to ensure appropriate feedback from the ICANN community. In addition, any terms included in the contract between ICANN org and the CPE Provider regarding the CPE process must be subject to public comment.</p>	<p>The GNSO Council confirms its recommendation that terms included in the contract between ICANN org and the CPE Provider regarding the CPE process must be subject to public comment. This recommendation however is not intended to require ICANN org to disclose any confidential terms of the agreement between ICANN org and the CPE Provider.</p>
<p>Topic 35: Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets</p>	
<p>Recommendation 35.3: Applications must be submitted with a bona fide (“good faith”) intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.</p> <ul style="list-style-type: none"> • Evaluators and ICANN must be able to ask clarifying questions to any applicant it believes may not be submitting an application with a bona fide intention. Evaluators and ICANN shall use, but are not limited to, the “Factors” described below in their consideration of whether an application was submitted absent bona fide intention. These “Factors” will be taken into consideration and weighed against all of other facts and circumstances surrounding the impacted applicants and applications. The existence of any one or all of the “Factors” 	<p>The GNSO Council confirms that the references to private auctions in Recommendations 35.3 and 35.5 merely acknowledge the existence of private auctions in 2012 and should NOT be seen as an endorsement or prohibition of their continued practice in future rounds of the New gTLD Program. The Council notes that there were extensive discussions on the use of private auctions in the SubPro working group. To the extent that draft recommendations were developed as to private auctions, these did not receive consensus support in the working group but did receive strong support with significant opposition.</p>

Output	GNSO Council-Approved Clarification
<p>may not themselves be conclusive of an application made lacking a bona fide use intent.</p> <ul style="list-style-type: none"> ● Applicants may mark portions of any such responses as “confidential” if the responses include proprietary business information. <p>The Working Group discussed the following potential non-exhaustive list of “Factors” that ICANN may consider in determining whether an application was submitted with a bona fide (“good faith”) intention to operate the gTLD. Note that potential alternatives and additional language suggested by some Working Group members are included in brackets:</p> <ul style="list-style-type: none"> ● If an applicant applies for [four] [five] or more strings that are within contention sets and participates in private auctions for more than fifty percent (50%) of those strings for which the losing bidder(s) receive the proceeds from the successful bidder, and the applicant loses each of the private auctions, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for each of those applications. ● Possible alternatives to the above bullet point: <ul style="list-style-type: none"> ○ [If an applicant participates in six or more private auctions and fifty percent (50%) or greater of its contention strings produce a financial windfall from losing.] ○ [If an applicant receives financial proceeds from losing greater than 49% of its total number of contention set applications that are resolved through private auctions.] ○ [If an applicant: a. Has six or more applications in contention sets; and b. 50% or more of the contention sets are resolved in private auctions; and c. 50% or more of the private auctions produce a financial windfall to the applicant.] 	

Output	GNSO Council-Approved Clarification
<ul style="list-style-type: none"> ○ [If an applicant applies for 5 or more strings that are within contention sets and participated in 3 private auctions for which the applicant is the losing bidder and receives proceeds from the successful bidder it MUST send to the evaluators a detailed reconciliation statement of its auction fund receipts and expenditure immediately on completion of its final contention set resolution. In addition this may be considered a factor by the evaluators and ICANN in determining lack of bona fide intention to operate the gTLD for all of its applications and in doing so might stop all its applications from continuing to delegation.] ● If an applicant’s string is not delegated into the root within two (2) years of the Effective Date of the Registry Agreement, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for that applicant. ● If an applicant is awarded a top-level domain and [sells or assigns] [attempts to sell] the TLD (separate and apart from a sale of all or substantially all of its nonTLD related assets) within (1) year, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for that applicant. ● [If an applicant with multiple applications resolves contention sets by means other than private auctions and does not win any TLDs.] <p>Consideration of whether an application was submitted with a bona fide intention to operate the gTLD must be determined by considering all of the facts and circumstances surrounding the impacted applicants and applications. The above factors may be considered by ICANN in determining such intent provided that there are no other credible explanations for the existence of those Factors.</p>	

Output	GNSO Council-Approved Clarification
Recommendation 35.5: Applicants resolving string contention must adhere to the Contention Resolution Transparency Requirements as detailed below. Applicants disclosing relevant information will be subject to the Protections for Disclosing Applicants as detailed below.	

C. 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 2023.09.10.19 - 2023.09.10.24. The Issue Synopsis and Rationale provide the bases for Board’s action identified in the Scorecard.

Output	Issue Synopsis	Board Action and Rationale
Topic 9: Registry Voluntary Commitments / Public Interest Commitments		
<p>Recommendation 9.2: Provide single-registrant TLDs with exemptions and/or waivers to mandatory PICs included in Specification 11 3(a) and Specification 11 3(b).⁸</p>	<p>The Board expressed its concern in the Scorecard: Subsequent Procedures (SubPro PDP), adopted 16 March 2023, that a waiver to Spec 11 Section 3 (a) and 3 (b) could lead to DNS abuse for second level registrations in a single registrant TLD going undeterred, unobserved and therefore unmitigated.</p> <p>The Board is also concerned that a waiver to Spec 11 Section 3 (a) and 3 (b) could require a change to the Registry Agreement’s Specification 13, which would introduce significant implementation efforts to harmonize current 2012 agreements with future rounds if ICANN org elected to leverage the current agreement for the future rounds.</p>	<p>Specification 11, Section 3(a) of the Registry Agreement requires registry operators to include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting registrants from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name. Further, domain names can be compromised and become a source for DNS abuse in single-registrant TLDs just as they can in TLDs where domain names can be registered to a registrant other than the registry operator.</p>

⁸ For the sake of clarity, this recommendation and the exemption does NOT apply to Specification 11 3(c) or 11 3(d).

		<p>Section 3(b) requires registry operators to periodically conduct a technical analysis to assess whether domains in the TLD are being used to perpetrate security threats and to maintain statistical reports on the number of security threats identified and the actions taken as a result of the periodic security checks.</p> <p>The Board concludes that Recommendation 9.2, if implemented, 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>For these reasons, the Board has determined that its adoption of this Recommendation would not be in the best interests of the ICANN community or ICANN.</p>
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Topic 17: Applicant Support

<p>Recommendation 17.2: The Working Group recommends expanding the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process.</p>	<p>The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over the open-ended nature of these fees as affirmative payments of costs beyond application fees could raise fiduciary concerns for the Board.</p> <p>Note, this concern does not extend to facilitation of <i>pro bono</i> services.</p>	<p>The Board reiterates its previous concerns about Recommendation 17.2, which calls for ICANN to “expand the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process.” As previously noted, the Board is concerned that the expansion of applicant support to affirmative payments of costs beyond application fees could raise fiduciary concerns for the Board. For example, such expansion of support could raise the possibility of inappropriate use of resources (e.g. inflated expenses, private benefit concerns, and other legal or regulatory concerns). For these reasons, 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>The Board recognizes and appreciates, however, that some potential gTLD applicants may need or benefit from these other types of financial assistance. As a result, the Board is conducting ongoing work relating to expanding the scope of financial support.</p>
<p>Topic 18: Terms & Conditions</p>		

<p>Recommendation 18.1: Unless required by specific laws, ICANN Board members’ fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws 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 remains concerned, as previously voiced as part of its comment on the Draft Final Report and in the Scorecard: Subsequent Procedures (SubPro PDP), adopted 16 March 2023, over this recommendation unduly restricting ICANN’s discretion to reject an application in circumstances that fall outside the specific grounds set out in the recommendation.</p>	<p>Recommendation 18.1 states that it constitutes a revision to Section 3 of the Terms and Conditions from the 2012 Applicant Guidebook. Section 3 of the Terms and Conditions in the 2012 Application Guidebook provides that, “Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.”</p> <p>In the Board’s comment on the Draft Final Report, the Board expressed its concern that Recommendation 18.1 may limit the Board’s authority to act as needed, including in unforeseen circumstances. The Board explained that the revision proposed by the PDP WG could bind the Board unless one of the specific conditions is met, and such limitations could lead to unforeseen challenges. In its comment, the Board stated that it would like to understand what problems the PDP Working Group identified</p>
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		<p>with regard to Section 3 of the Terms and Conditions.</p> <p>The language in the SubPro Final Report regarding Recommendation 18.1 does not differ from what was proposed in the Draft Final Report. 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. The purpose of this recommendation is to guard against arbitrary rejection of an application and ensure that there is transparency when rejections occur. To protect the privacy of applicants, the Working Group believes that ICANN should not publish the detailed reason for rejecting an application if that reason is based on confidential information submitted by the applicant."</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,</p>
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		<p>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).”</p> <p>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> <p>ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. Section 2.1 of the Bylaws establishes that “... the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1).” As discussed above, 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), and it may constrain ICANN from acting on</p>
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		<p>an application unless one of the specific conditions is met. Given these reasons, the Board has determined that adoption of Recommendation 18.1 would not be in the best interests of the ICANN community or ICANN.</p>
<p>Recommendation 18.3: In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in the current ICANN Bylaws). This recommendation is in reference to Section 6 of the Terms and Conditions from the 2012 round.</p>	<p>The Board noted in its Scorecard: Subsequent Procedures (SubPro PDP), adopted 16 March 2023 its concern, as previously voiced as part of its comment on the Draft Final Report, over undue legal exposure that would be created by its adoption of this Recommendation.</p> <p>The Recommendation notes that a covenant not to sue must only be included in the Terms of Use “if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program...[.]” The linkage between the covenant not to sue and the implementation of the appeals/challenge mechanisms set forth in Topic 32 would create a risk of challenges.</p> <p>The Board notes that the Topic 32 recommendations remain pending based on its conclusion that the appeals/challenge mechanisms, as recommended in Topic 32, would unduly complicate, extend, and increase the costs associated with the Next Round of the New gTLDs Program.</p> <p>This Recommendation is inextricably linked</p>	<p>The Board’s adoption of this Recommendation would mean that the covenant not to sue could not be included in the Terms of Use unless the Board adopts and ICANN org “introduces” the recommended appeals/challenge mechanism “as set forth” in Topic 32.</p> <p>During the 2012 round of the New gTLD Program, one of the guiding principles in developing the Applicant Guidebook was to address and mitigate risks and costs of ICANN and the global Internet community. (See https://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf). The same is true for the next round. The Board remains cognizant that as a non-profit public benefit organization, ICANN lacks the resources to defend against potentially numerous lawsuits in jurisdictions all over the world that might be initiated by applicants that might want to challenge the results of the community-designed next round of the New gTLD Program. The “covenant not to sue” included in the Terms and Conditions of the 2012 Applicant</p>

	<p>to the appeals/challenge mechanism recommended in Topic 32. While the Recommendations in Topic 32 remain pending, they are unlikely to be adopted in their current form.</p>	<p>Guidebook was one element designed to protect the New gTLD Program from such judicial challenges.</p> <p>In the Board’s comment on the Draft Final Report, the Board stated that it understood the intent behind Recommendation 18.3, but expressed its concern that “dissatisfied applicants or objectors might argue based on this policy recommendation that the covenant not to sue is not valid because they did not like the way the appeals/challenge mechanism was built or operated.”</p> <p>The Board notes that the language in the SubPro Final Report regarding Recommendation 18.3 does not differ from what was proposed in the Draft Final Report. As explained in the Board’s rationale for Recommendation 18.1, ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. 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>The Board has considered Recommendation</p>
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		<p>18.3 and its implications more broadly on the Program and determined that the condition attached to the inclusion of the covenant not to sue in the Program’s Terms of Use creates legal risks that are not in the best interest of the ICANN community or ICANN.</p>
<p>Topic 22: Registrant Protections</p>		
<p>Recommendation 22.7: TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations Instrument (COI) requirements or requirements for the successor to the COI.</p>	<p>As noted in its Scorecard: Subsequent Procedures (SubPro PDP), adopted 16 March 2023, the Board is concerned that an exemption from an COI for Spec 9 applications would have financial impact on ICANN since there would be no fund to draw from if such a registry went into EBERO.</p> <p>Further, not moving a Brand TLD into EBERO might have a security and stability impact, especially if Brands allocate second-level TLDs to customers, partners, or suppliers, such as a car manufacturer providing a second level registration for their cars. The Board also believes that exempting .brand TLDs from a not-yet-known future replacement for the COI is not in the best interest of the ICANN community or ICANN. The mechanics of any successor to the COI should be known before any waivers to it can be considered.</p>	<p>As noted in the issue synopsis, the Board believes that there are scenarios in which .Brand TLDs may have to be moved into EBERO. The Board also believes that it cannot accept a recommendation about a potential successor to the COI without a clear understanding of what that successor looks like, its purpose and its mechanics. Therefore, the Board concludes that the concerns listed in the ‘issue synopsis’ mean that adopting Recommendation 22.7 is not in the best interests of the ICANN community or ICANN.</p>
<p>Topic 24: String Similarity Evaluations</p>		

<p>Recommendation 24.3: The Working Group recommends updating the standards of both (a) confusing similarity to an existing top-level domain or a Reserved Name, and (b) similarity for purposes of determining string contention, to address singular and plural versions of the same word, noting that this was an area where there was insufficient clarity in the 2012 round. Specifically, the Working Group recommends prohibiting plurals and singulars of the same word within the same language/script in order to reduce the risk of consumer confusion. For example, the TLDs .EXAMPLE⁹ and .EXAMPLES may not both be delegated because they are considered confusingly similar. This expands the scope of the String Similarity Review to encompass singulars/plurals of TLDs on a per-language/script basis.</p> <ul style="list-style-type: none"> • An application for a single/plural variation of an existing TLD or Reserved Name will not be permitted if the intended use of the applied-for string is the single/plural version of the existing TLD or Reserved Name. For example, if there is an existing TLD .SPRINGS that is used in connection with elastic objects and a new application for .SPRING that is also intended to be used in 	<p>The Board remains concerned, as previously voiced as part of its comment on the Draft Final Report, over the wording in section (a) and (c) of this Recommendation as they stipulate ‘intended use’ of a gTLD, which implies that ICANN will have to enforce the ‘intended use’ post delegation, which could be challenged as acting outside its mission.</p> <p>In addition, it is the view of the Board that an across-the-board prohibition of singulars / plurals of the same word in the same language or script is not in the best interest of the ICANN community or ICANN.</p>	<p>Recommendations 24.3 and 24.5 extend the Program’s string similarity review to the following three aspects: a visual similarity check; a singular/plural check; an intended use check as relevant for identifying exemptions to the singular/plural check.</p> <p>Based on this, the ICANN Board has identified the following concerns with regard to recommendations 24.3 and 24.5:</p> <ul style="list-style-type: none"> - Not all applied for strings will be lexical words: .mouse/.mice would not be permitted under this recommendation, but .tld and .tlds would be, as the latter is not in a dictionary. - Determining singular/plural forms of words across languages cannot be done predictably nor consistently by a reader: is “bats” plural for “bat” or a declined form of the french verb ‘battre’ (to fight/battle). - Though a gTLD applicant can arbitrarily set the language of a TLD during an application round, a registrant and end-user can only see the script of the TLD string in its practical usage. So the singular/plural determination by the gTLD applicant does not carry onward to the registrant and end
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⁹ .EXAMPLE is used here for illustrative purposes only. The Working Group is aware that technically .EXAMPLE cannot be delegated at all because it is one of the names already reserved from delegation as a Special Use name.

<p>connection with elastic objects, .SPRING will not be permitted.</p> <ul style="list-style-type: none"> • If there is an application for the singular version of a word and an application for a plural version of the same word in the same language/script during the same application window, these applications will be placed in a contention set, because they are confusingly similar. • Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses. For example, .SPRING and .SPRINGS could both be allowed if one refers to the season and the other refers to elastic objects, because they are not singular and plural versions of the same word. However, if both are intended to be used in connection with the elastic object, then they will be placed into the same contention set. Similarly, if an existing TLD .SPRING is used in connection with the season and a new application for .SPRINGS is intended to be used in connection with elastic objects, the new application will not be automatically disqualified. <p>The Working Group recommends using a</p>		<p>user. “auto” can be interpreted as a vehicle or a short form for automatic; “cat” can be read the short of Catalan but also the english-language name for an animal.</p> <ul style="list-style-type: none"> - Even if the intended use is fixed for a registry separately from the singular/plural form, there is no mechanism to determine the intent of the content of a website and thus restrict a registrant to publishing certain content based on such intent. <p>Restricting the use and potentially the content of strings registered in TLDs based on the intended use therefore raises concerns for the Board in light of ICANN’s Bylaws Section 1.1 (c).</p> <p>String similarity evaluation is part of the new gTLD program to protect consumers. The Board believes that this goal continues to be achieved best via the standard of ‘visually confusingly similar’. For any broader perceived similarity issues, string similarity objections can still be used.</p> <p>Therefore, the Board agrees that extending the standard for assessing string similarity beyond visual similarity, as well as the recommended exception with regard to intended use of a TLD is not within the best interest of the ICANN community or ICANN.</p>
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<p>dictionary to determine the singular and plural version of the string for the specific language. The Working Group recognizes that singulars and plurals may not visually resemble each other in multiple languages and scripts globally. Nonetheless, if by using a dictionary, two strings are determined to be the singular or plural of each other, and their intended use is substantially similar, then both should not be eligible for delegation.</p>		
<p>Recommendation 24.5: If two applications are submitted during the same application window for strings that create the probability of a user assuming that they are single and plural versions of the same word, but the applicants intend to use the strings in connection with two different meanings,¹⁰ the applications will only be able to proceed if each of the applicants agrees to the inclusion of a mandatory Public Interest Commitment (PIC) in its Registry Agreement. The mandatory PIC must include a commitment by the registry to use the TLD in line with the intended use presented in the application, and must also include a commitment by the registry that it will require registrants to use domains under the TLD in line with the intended use stated in the application.</p>		<p>See Rationale for Recommendation 24.3 above.</p>

¹⁰ As an example, if the two applicants applied for .SPRING and .SPRINGS, one might intend to use the TLD .SPRING in connection with the season and the other might intend to use the TLD .SPRINGS in connection with the elastic object.

D. Outputs That the Board Is Still Discussing (“Pending”)

The following recommendations remain “pending”, due to the issue synopsis that was approved by the Board, see [Resolutions 2023.03.16.04 – 2023.03.16.15](#) and Scorecard: Subsequent Procedures (SubPro PDP) Section B: 9.1, 9.4, 9.8, 9.9, 9.10, 9.12, 9.13, 30.7, 31.16, 31.17, 32.1, 32.2, 32.10.