

SubPro ODP: Policy Question Set #6 - Implementation Guidance

Policy Question | On “Implementation Guidance”

Page 3 in the Final Report describes the types of New gTLD Subsequent Procedures Working Group outputs contained in the report, including a description of how outputs labeled as Implementation Guidance are to be treated. This description notes, for instance, that “Implementation guidance commonly refers to how a recommendation should be implemented” and “typically uses the term ‘should.’” In Question Set 1, the ODP team asked a question about Implementation Guidance 3.4, which response included the following:

One of the reasons these were classified as “Implementation Guidance” as opposed to a “Recommendation” by the Working Group was to give flexibility to ICANN Org in the implementation of this concept in order to best achieve the purpose behind the recommended action.

Additionally, in Question Set 4, the ODP asked a question about Implementation Guidance 27.20, which response included the following:

...Thus, it understood that like all “implementation guidance” the precise wording of the financial requirements could change from that presented in the Implementation Guidance described in this 27.20....

The ODP team has been working with the general principle that implementation guidance is a strongly recommended action and that if in some circumstances there may be valid reasons not to take such guidance exactly as described, this would remain consistent with the Final Report. However, we wanted to confirm that this assumption remains accurate where the wording of a policy recommendation suggests that implementation must be carried out in a certain way, in order to properly fulfill the recommendation.

Some examples (emphases added) include:

- Recommendation 17.12: ICANN org **must develop a plan for funding the Applicant Support Program, as detailed in the Implementation Guidelines** below.
- Recommendation 27.9: The technical and operational evaluation **must be done in an efficient manner as described in the implementation guidance** below.
- 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.

- 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, as described in the implementation guidance below.**

Question:

- A. Is our understanding correct that the description of Implementation Guidance in the Final Report and in response to Question Sets 1 and 4 applies in such cases as mentioned above, meaning that implementation guidance remains a strong recommendation, rather than a requirement, in all cases?

For context, we recognize that the Final Report anticipates making all efforts to achieve the recommended action, and that if something cannot be implemented exactly as specified in Implementation Guidance, the org would be expected to describe its efforts and rationale for such cases, and to work with the IRT to implement an alternative in line with the purpose behind the recommended action.

The Council agrees with your understanding that “if something cannot be implemented exactly as specified in Implementation Guidance, the org would be expected to describe its efforts and rationale for such cases, and to work with the IRT to implement an alternative in line with the purpose behind the recommended action”. In relation to the GNSO Initiated Applicant Support Guidance Process that has been launched in response to the question posed by the ODP, the Council believes that alternatives to the specified Implementation Guidance should be addressed in the context of that GNSO Guidance Process and would expect the org to work with the Applicant Support Guidance Team to address any required changes to Implementation Guidance.

In short, implementation guidance remains a strong recommendation as opposed to a requirement. As referenced in the Preamble to the Sub Pro Final Report, ICANN should specify any “circumstances where there may be valid reasons not to take such guidance exactly as described...” In such circumstances, Council believes that consultation with the IRT, the Guidance Process Team, or the Council itself (e.g. via a request for GNSO Input) is in order prior to the adoption of alternatives to the specified Implementation Guidance. In all cases, the implementation should be accomplished in a manner that achieves the objectives laid out in the implementation guidance even if the mechanism of implementation differs slightly from that contained in the final report.

That said, in the above examples labeled “Recommendation”, we believe that the predicate of each recommendation is in fact a Recommendation although the details are implementation guidance.

Therefore:

- ***Recommendation 17.12: ICANN org must develop a plan for funding the Applicant Support Program, as detailed in the Implementation Guidelines below.***

The predicate of the Recommendation is that “ICANN org must develop a plan for funding the Application Support Program . . .” That part is the fixed recommendation. The details described below are in fact implementation guidance in furtherance of the recommendation of developing a plan for funding.

- **Recommendation 27.9: The technical and operational evaluation **must be done in an efficient manner as described in the implementation guidance** below.**

The predicate of the Recommendation is that “The technical and operational evaluation must be done in an efficient manner. . . .” That part is the fixed recommendation. The details describing how this can be done should be taken as implementation guidance.

- **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.**

The predicate of the Recommendation is that “. . . clear procedures and rules must be established for challenge / appeal processes. . . .” That part is a fixed recommendation. However, the details described below this recommendation should be taken as implementation guidance.

- **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, as described in the implementation guidance** below.**

The predicate of the Recommendation is that “The limited challenge/appeal process must be designed in a manner that does not cause excessive, unnecessary costs or delays in the application process” That part is a fixed recommendation. However, the details described below this recommendation should be taken as implementation guidance.