

Next Round: Limited Challenges/Appeals
High-level implementation approach for discussion with the IRT
11 September 2024

On 8 June 2024, the Board [approved](#) the following Supplemental Recommendation concerning Topic 32: Limited Challenges and Appeals in the Final Report on the New gTLD Subsequent Procedures Policy Development Process (the "SubPro Final Report").

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.

The Board noted its approval of this Supplemental 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."

Below for discussion with the SubPro Implementation Review Team, is the proposed high-level approach from ICANN org on how to implement Supplemental Recommendation 32.1. **Table 1** describes some basics of (1) Extended Evaluation, (2) Evaluation Challenge, and (3) an Appeal. **Table 2** lists the key evaluations, reviews, and objections that make up the New gTLD Program, and identifies whether Extended Evaluation, an Evaluation Challenge, or an Appeal would be available to challenge the results, along with an explanation for the proposal.

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".

Table 1. Available Mechanisms to Challenge New gTLD Program Decisions³

	What is it?	Who can invoke it?
Extended Evaluation	<ul style="list-style-type: none"> Extended Evaluation serves as another opportunity, beyond Initial Evaluation and any round Clarifying Questions, for an applicant to provide additional information or further clarify information already submitted to demonstrate to the evaluator that the applicant and/or application meets the required criteria for a specific review or evaluation. Extended Evaluation would be conducted by the same set of evaluators as the Initial Evaluation. At ICANN's discretion, ICANN may consult with additional subject matter experts before finalizing Extended Evaluation decisions. 	An applicant who fails to pass Initial Evaluation elements.
Challenge	<ul style="list-style-type: none"> A Challenge would allow an applicant to dispute an evaluation result based on a claim that the evaluator made a procedural error, and as a result, applicant should have passed the relevant evaluation. The applicant would not be permitted to provide new information. Instead, a different set of evaluators would look at the same information and determine whether a different outcome is warranted. A Challenge would only be available where Extended Evaluation is unavailable. 	An applicant who fails to pass a specific Initial Evaluation review or evaluation.
Appeal	An appeal would allow a party with standing to challenge an Expert Determination issued for a formal objection - String Confusion, Legal Rights, Limited Public Interest, and Community.	Parties with standing to file an objection per the rules established in the Applicant Guidebook.

Table 2. Challenge Mechanism Applicable to Each Review, Evaluation, and Objection

Review/Evaluation/Objection	Available Challenge Mechanism	Explanation/Notes
<u>String Reviews/Evaluations</u>		
1. Blocked Names Identification	Challenge	This review will primarily be an automated review to check whether an applied-for string is on one or more of the lists identified in the Applicant Guidebook that would constitute a string that is not able to be applied for. Given that this review essentially checks the applied-for string against a defined list, the challenge would be limited to an applicant identifying that they believe there is a "bug" in the system for

³ Please note that the mechanisms described in this proposal are not a substitute or replacement for the accountability mechanisms in the ICANN Bylaws.

Review/Evaluation/ Objection	Available Challenge Mechanism	Explanation/Notes
		automatic checking that caused the applicant to fail the review.
2. DNS Stability Review	Challenge	This review will primarily be an automated review to check against the DNS stability rules. An applicant who fails the DNS Stability Review would be to challenge that there is some kind of "bug" or failure in the Root Zone Label Generation Rules.
3. Geographic Names Identification	No additional mechanism proposed.	The Geographic Names Identification step is designed to identify whether an applied-for string is a name listed on one of the defined lists in the Applicant Guidebook. (For example, see Sections 2.2.1.4.1 and 2.2.1.4.2 of the 2012 AGB.) In some cases a string that is identified as a geographic name will not be approved. For other strings identified as a geographic name, an applicant will be required to submit documentation of support or non-objection from the relevant governments or public authorities. The substance of evaluating geographic names would occur as part of the Geographic Names Review noted below in Row #3. The Geographic Names Review includes the ability for Clarifying Questions and an applicant may elect to go to Extended Evaluation if it does not pass the review. As a result, no additional challenge/review mechanism is proposed for this identification step.
4. Geographic Names Review	Extended Evaluation	This is the same approach taken in the 2012 round to provide applicants another meaningful opportunity to provide additional information or clarify existing information to pass Initial Evaluation.
5. Name Collision Review	TBD - Analysis pending based on Board Resolution from 7 September 2024.	TBD
6. Reserved Names Identification	No additional mechanism proposed.	The Reserved Names Identification step will primarily be an automated review to check whether an applied-for string is on one or more of the lists identified in the Applicant Guidebook that would constitute a Reserved Name. The substance of evaluating reserved names would occur as part of the Reserved Names Review noted below in Row #6. The Reserved Names Review includes the ability for Clarifying Questions an applicant may elect to go to Extended Evaluation if it does not pass the review. As a result, no additional challenge/review mechanism is proposed for this identification step.
7. Reserved Names Review	Extended Evaluation	This is the same approach taken in the 2012 round to provide applicants another meaningful opportunity to provide additional information or clarify existing information to pass Initial Evaluation.
8. String Similarity Review	Challenge	An applicant would be able to challenge a determination that its applied-for string is found to be confusingly similar to (1) an existing TLD or any other reserved or blocked name and therefore cannot proceed in the Program, or (2) another applied-for TLD (inclusion in a

Review/Evaluation/ Objection	Available Challenge Mechanism	Explanation/Notes
		<p>contention set). Since the basis for String Similarity Review is only based on visual similarity and there are no supporting arguments or documents to review to conduct the re-evaluation, the proposal is that a challenge would be the method to contest the results on the basis that the evaluator was clearly erroneous in how it applied the criteria.</p> <p>For other outcomes of the String Similarity Review, including for example that an applied-for string is NOT found to be confusingly similar to an applied-for string, then the relevant party could file a String Confusion Objection.</p>
9. Variant Review	TBD	TBD
Applicant Reviews/Evaluations		
10. Background Screening	No additional mechanism proposed.	Background screening is part of general business due diligence and is in place to protect the public interest in the allocation of critical Internet resources. As part of the background screening process, ICANN will have built-in mechanisms to correct for clearly erroneous situations, such as if the background screening information concerns a different person with the same name as a person named in the application. The built-in mechanisms to correct for clearly erroneous situations include the process of issuing Clarifying Questions and allowing for an exchange between the applicant and the relevant background screening evaluator. As a result, no additional challenge mechanisms are proposed.
11. Community Registration Policies Review	No additional mechanism proposed.	As part of the Community Registration Policies Review process, ICANN will have built-in mechanisms to allow for an exchange between the applicant and ICANN to address potential concerns about proposed community registration policies.
12. Financial Evaluation	Extended Evaluation	Allowing for Extended Evaluation is the same approach taken in the 2012 round to provide applicants another meaningful opportunity to provide additional information or clarify existing information to pass Initial Evaluation.
13. Registry Voluntary Commitment Review	No additional mechanism needed.	As part of the Registry Voluntary Commitment (RVC) Review process, ICANN will have built-in mechanisms to allow for an exchange between the applicant and ICANN to address potential concerns about a proposed RVC.
14. Specification 9 (Code of Conduct) Exemption Review	No additional mechanism needed.	As part of the Spec 9 Exemption review process, ICANN will have built-in mechanisms to allow for an exchange between the applicant and ICANN to address potential concerns about a proposed exemption request.

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15. Specification 13 (.BRAND) Review	No additional mechanism needed.	As part of the Spec 13 review process, ICANN will have built-in mechanisms to allow for an exchange between the applicant and ICANN to address potential concerns about a request.
Objections		
16. Community Objection	Appeal	The non-successful party in a Community Objection would have the opportunity to appeal an Expert Determination and such appeal would be considered under a clearly erroneous standard of review as described in the SubPro Final Report. ("Under a clearly erroneous standard of review, the appeals panel must accept the evaluator's or dispute panel's findings of fact unless (1) the panel failed to follow the appropriate procedures or (2) failed to consider/solicit necessary material evidence or information.")
17. Legal Rights Objection	Appeal	The non-successful party in a Legal Rights Objection would have the opportunity to appeal an Expert Determination and such appeal would be considered under a clearly erroneous standard of review as described in the SubPro Final Report. ("Under a clearly erroneous standard of review, the appeals panel must accept the evaluator's or dispute panel's findings of fact unless (1) the panel failed to follow the appropriate procedures or (2) failed to consider/solicit necessary material evidence or information.")
18. Limited Public Interest Objection	Appeal	The non-successful party in a Limited Public Interest Objection would have the opportunity to appeal an Expert Determination and such appeal would be considered under a clearly erroneous standard of review as described in the SubPro Final Report. ("Under a clearly erroneous standard of review, the appeals panel must accept the evaluator's or dispute panel's findings of fact unless (1) the panel failed to follow the appropriate procedures or (2) failed to consider/solicit necessary material evidence or information.")
19. String Confusion Objection	Appeal	The non-successful party in a String Confusion Objection would have the opportunity to appeal an Expert Determination and such appeal would be considered under a clearly erroneous standard of review as described in the SubPro Final Report. ("Under a clearly erroneous standard of review, the appeals panel must accept the evaluator's or dispute panel's findings of fact unless (1) the panel failed to follow the appropriate procedures or (2) failed to consider/solicit necessary material evidence or information.")
Contention Resolution		
20. Community Priority Evaluation	Challenge	The process for evaluating a CPE application already has built-in opportunities for Clarifying Questions and other steps for the applicant to explain and clarify information under review by the evaluator. As a result, the proposal is to include an opportunity for an applicant to

Review/Evaluation/ Objection	Available Challenge Mechanism	Explanation/Notes
		challenge the results of the CPE determination based on a claim that the evaluator(s) made a procedural error, and as a result, the applicant should have passed the evaluation. The applicant would not be permitted to provide new information. Instead, a different set of evaluators would look at the same information and determine whether a different outcome is warranted.