

*Subsequent Procedures PDP Working Group Minority Statement:
Topic 9: Registry Voluntary Commitments / Private Public Interest Commitments*

The *Final Report on the new gTLD Subsequent Procedures Policy Development Process* (Final Report) fails to fully address questions and concerns raised during the public comment period, including from the ICANN Board, on the draft Final Report. The recommendations of the GNSO New gTLD Subsequent Procedures Working Group (SubPro WG) for private Public Interest Commitments (private PICs) (now renamed Registry Voluntary Commitments/RVCs) lack critical clarification in addressing community and Working Group concerns that the RVCs for new gTLD registry applicants “*should only be permitted if they fall within the scope and mission of ICANN as set out in the New Bylaws.*” (*Rationale for Recommendation 9.9, Final Report*)

In its letter of 30 September 2020, Maarten Botterman, Chair of the ICANN Board raised important questions about RVCs/private PICs and ICANN limitations under its 2016 Bylaws. Specifically, the ICANN Board letter stated:

“The language of the Bylaws [ICANN’s new 2016 Bylaws], however, could preclude ICANN from entering into future registry agreements (that materially differ from the 2012 round version currently in force) that include PICs that reach outside of ICANN’s technical mission as stated in the Bylaws.”

and continued:

“The language of the Bylaws specifically limits ICANN’s negotiating and contacting power to PICs that are ‘in service of its Mission.’ ”

The ICANN Board letter added:

“The Board is concerned, therefore, that the current Bylaws language would create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments.”¹

Unfortunately, these questions went unreviewed, unresearched and unresolved by the SubPro WG, including in its Final Report. Accordingly, we respectfully submit that these questions must go before the ICANN Board or another GNSO PDP to provide the guidance and clarity that ICANN, future new gTLD applicants, and the ICANN Community deserve and need in order to understand the scope and limits of voluntary commitments that new gTLD applicant registries may write into their base registry agreements with ICANN.

Background

When 2012 new gTLD applicants faced challenges by GAC Early Warnings and GAC Consensus Advice, private PICs were created as a mechanism by which applicants could make concessions and agreements and embody their voluntary commitments in their contracts with ICANN.

¹ Letter from Maarten Botterman, Chair, ICANN Board of Directors, to Cheryl Langdon-Orr and Jeff Neuman, Co-Chairs of SubPro WG, <https://www.icann.org/en/system/files/correspondence/botterman-to-langdon-orr-neuman-30sep20-en.pdf>

The vast majority of these GAC requests in the 2012 new gTLD round involved limiting the classes of potential registrants in highly sensitive strings, and expanding registrants to include competitors previously excluded from “Closed Generic” applications.²

The SubPro WG recommendation to allow RVCs in response to Early Warnings and GAC Advice is now embodied in *Topic 30: GAC Consensus Advice and GAC Early Warning* of the Final Report in Recommendation 30.7:

“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 and/or GAC Consensus Advice. Relevant GAC members are strongly encouraged to make themselves available during a specified period of time for direct dialogue with applicants impacted by GAC Early Warnings or GAC Consensus Advice to determine if a mutually acceptable solution can be found.”

Recommendation 30.7 explicitly addresses situations in which an applicant is adding or modifying RVCs specifically in response to GAC requests. This is far different from allowing any new gTLD applicant to insert provisions they choose into the base registry agreement. Proposed recommendations 9.9 and 9.10 offer none of the clear limitations and guidance that the ICANN Board seeks in its September 20th letter cited above. Broadly, Recommendations 9.9 and 9.10 set out:

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, and/or GAC Consensus Advice. 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, public comment in accordance with ICANN’s standard procedures and timeframes.

Recommendation 9.10: RVCs must continue to be included in the applicant’s Registry Agreement.

Implementation Guidance 9.11: The Public Interest Commitment Dispute Resolution Process (PICDRP) and associated processes should be updated to equally apply to RVCs.

Strangely, the Final Report *Rationale for Recommendation 9.9*, suggests that the SubPro WG intended for clearer limits on what provisions new gTLD applicants might insert into their contracts:

*The Working Group notes that in public comment and in Working Group discussions some concern was raised that voluntary PICs made by certain applicants in the 2012 round **violated***

² See GAC Advice, ICANN46 Beijing Communique, <https://gac.icann.org/contentMigrated/icann46-beijing-communicue>

human rights and civil liberties and were not sufficiently subject to review by ICANN org or the community. From this perspective, RVCs in subsequent procedures should be narrowly tailored, should only be allowed to address concerns raised by the GAC or the community, should only be permitted if they fall within the scope and mission of ICANN as set out in the New Bylaws, and should always be subject to public comment. ...” [emphasis added]

The Rationale goes on to say that the WG understands these concerns but believes that the recommended approach “addresses the key concerns raised.” However, as written, **Recommendations 9.9 and 9.10 fail to provide the clear and explicit steps for ICANN Legal and ICANN Org to review the proposed Registry Voluntary Commitments and reject those that would cause ICANN to operate outside its scope and mission as set out in the 2016 Bylaws, Section I: Mission, Commitments and Core Values.**³ Such failure deems the rationale provided false, or misleading at best.

The WG has left such limits and procedures for the GNSO or Board to add, including those that would keep such privately-crafted new contract provisions within the scope and mission of ICANN, and what ICANN can legitimately enforce.

We note the danger of not including such limitations. Without restrictions, a possible future .militia applicant might write RVCs which promise to take down domain names of Black Lives Matter organizations and Holocaust remembrance groups. Similarly, a possible future .spaceindustry gTLD might commit itself to taking down the domain names of competitors to space industry businesses that the registry might own.

Content and competition are clearly areas outside the scope and mission of ICANN under its 2016 Bylaws, yet there is no clear path provided by the Final Report for ICANN to remove RVCs/private PICs that new gTLD applicants might try to place into their registry agreements – and we need a clear path for ICANN Legal, ICANN Org and the ICANN Board to reject such provisions as outside of ICANN’s mission and scope, commitments and core values.

Legitimate Concerns Raised by the ICANN Board Letter, Shared by ICANN Community Members, Yet Unanswered in the Final Report

Concerns raised via public comment by the ICANN Board that the Final Report RVC/private PIC recommendations could “*create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs)*”, and that adopting these recommendations could cause parties to the registry contract to be in violation of the ICANN Bylaws, **are valid and need to be explored and abated before these recommendations are adopted as ICANN policy.**

³ BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation, <https://www.icann.org/resources/pages/governance/bylaws-en>

We note that the Final Report indicates *“The Working Group will respond to the ICANN Board’s specific concerns under separate cover.”* This work has yet to be started at the writing of this statement. Fulsome analysis and conversation on the concerns raised by the Board could produce new ideas or potential solutions which should be considered before the policy is formalized. As Elaine Pruis wrote to the SubPro WG on January 8, in her email of “non-support”: *“The application of PICDRP and associated processes to RVCs introduces profound changes to the balance of rights and obligations in the registry agreement.”*

Topic 9: RVCs/Private PICs should be given the full attention it deserves considering the profound impact it could have on the base registry agreement. The PDP 3.0 guidelines suggest targeted PDPs with narrow scope for such matters. The issues raised in this Minority Statement could be addressed by a tightly focused group of contract experts in order to create a policy that does not put ICANN’s integrity at risk.

As discussed above, questions remain about the scope of Recommendations 9.9 and 9.10 and what they allow applicants to put into their RVCs, as RVCs in response to GAC Early Warnings and GAC Advice are already addressed by Recommendation 30.7. Also, RVCs used to settle Objections such as Community Objections are now handled by Recommendation 31.16.

Absent clear limitations, Recommendations 9.9 and 9.10 could be read (dangerously) as continuing the course of undermining ICANN processes, policies and Bylaws started in 2013 and 2014. We fear such a reading, and such use of RVCs by future applicants, will undermine ICANN’s integrity and independence.

We note that concerns about RVCs and objections to Topic 9, and specifically draft Recommendations 9.9 and 9.10, were raised by George Sadowsky, longtime ICANN Board member. Mr. Sadowsky wrote to the SubPro WG about his opposition to Recommendations 9.9 and 9.10 and also his sense of the WG’s missing “consensus”:

“I do not think these recommendations have consensus without absolute clarity and determination that PICs and RVCs must not and will not violate the scope and mission of ICANN.”

“I share the current Board members worries, and the dilemma that ICANN will be asked to enforce things outside its scope and mission, which it cannot do (directly or through a third party). The Board members who have contributed their views on this are right; we cannot allow this to happen.”

“I do not think these recommendations have consensus to move forward - under any definition of consensus that I know. This certainly would not pass the carefully considered consensus evaluation of RFC 7282, which is in my opinion one of the most careful and considerate studies of the factors that are relevant and important in assessing a degree of consensus.”

We respectfully submit that there is a clear need for research, discussion, review and clarity to Recommendations 9.9 and 9.10.

A Serious Process Failure

The Subsequent Procedures PDP WG leadership did not provide adequate time to deliberate the ramifications of the new 2016 ICANN Bylaws as raised by the Board questions posed during the Draft Final Report public comment period and its letter of September 20th on the proposed recommendations. The following text shows the SubPro WG process breakdown - this text deeply impacts parties to a registry contract, yet it premiered in the Final Report only *after the public comment period on the Draft Final Report* closed. Accordingly, it was not subject to review by anyone outside of the WG and therefore should not be considered part of a consensus recommendation.

Topic 9: Registry Voluntary Commitments/Public Interest Commitments

c. New issues raised in deliberations since publication of the Initial Report, if applicable:

“... In response to the Draft Final Report, the ICANN Board commented that it was concerned that the current ICANN Bylaws language (which differs from that which existed during the 2012 New gTLD round) could “create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs).” It then asked the Working Group whether it had “considered this specific language in ICANN’s Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?”⁴

During subsequent Working Group discussions, the Working Group decided not to alter its recommendations with respect to the PICs or RVCs. The Working Group will respond to the ICANN Board’s specific concerns under separate cover. In short:

- a) To the extent that existing PICs are used as PICs (or RVCs) in subsequent rounds, these are specifically “grandfathered” into the current Bylaws mission.*
- b) The Working Group also agreed that to the extent that RVCs or PICs address eligibility rules for the registration and/or renewal of domain names, these would not involve the need for ICANN to assess and pass judgement on content (as set forth in the Bylaws).*
- c) To the extent that some registries will want to make voluntary commitments in response to public comments, Government Early Warnings, GAC Advice, etc., it is understood by the Working Group that having these commitments reflected in Registry Agreements even if they fall outside of ICANN’s core mission is consistent with the Bylaws where neither ICANN itself nor any third party under ICANN’s control is required to pass judgment on ‘content’. In such cases, it is understood that using an independent third party as an arbiter to determine whether there has been a violation of the commitment would be consistent with ICANN’s mission even if ICANN were ultimately required to rely on that third party decision to enforce a pre-arranged contractual remedy, which could include sanctions and/or termination of the Registry Agreement.*

“In short, the PDP Working Group stands by its recommendations and implementation guidance which envisage the use of PICs / RVCs to resolve issues that arise through the public comments, objections, Government Early Warnings, GAC Advice or other concerns expressed by the community. The commitments must be enforceable through contracts entered into between registry operators and ICANN. The Working Group therefore urges the IRT to work with ICANN

org to implement the recommendations and implementation guidance set forth herein in a manner consistent with ICANN's current Bylaws."

The WG did not have sufficient time to explore this issue fully or develop a consensus solution. Comprehensive and substantial solutions may be possible, such as an accountability mechanism that is not directly included in the registry contract. The recommendations, as written, are unenforceable, unpredictable, undesirable, and untenable. We respectfully submit that the GNSO Council and the ICANN Board will not be able to accept them as written.

We note that the following statement, in section c) above, has neither been tested, nor reviewed by impartial legal experts, as suggested by the chosen language "it is understood", and suggests that ICANN can delegate to others that which it cannot decide itself:

"In such cases, it is understood that using an independent third party as an arbiter to determine whether there has been a violation of the commitment would be consistent with ICANN's mission even if ICANN were ultimately required to rely on that third party decision to enforce a pre-arranged contractual remedy, which could include sanctions and/or termination of the Registry Agreement."

How can ICANN delegate decisions to others which are clearly outside its authority, scope and mission? Speculating about legal obligations makes for bad policy. Outsourcing ICANN's responsibility to enforce contracts does not abdicate ICANN of the responsibilities in the contract. Conclusions to the contrary, as set in the text of the Final Report, were not sent to the Community for any form of public comment and should not be considered part of a consensus recommendation.

We submit this minority statement to draw attention to the substantial risks introduced to ICANN and contracted parties by these immature recommendations – especially 9.9 and 9.10. We urge the ICANN Board and GNSO Council to review them closely. With the appropriate next steps, and pertinent clarifications and limitations, we can fulfill the goals of the SubPro WG and operate within the scope and mission of ICANN. Together we can protect ICANN's integrity and independence by following its 2016 Bylaws and the legitimate limits of ICANN's mission.

Respectfully submitted,

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