

# Next Round of New gTLDs / Subsequent Procedures - Registry Voluntary Commitments & their enforceability

## Discussion with the At-Large CPWG

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11 October 2023



# Agenda

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- ⦿ What are RVCs - Registry Voluntary Commitments?
- ⦿ Distinguish from PICs - Public Interest Commitments in Next Round
  - Consensus Policies
  - GAC Category 1 Safeguards Framework
- ⦿ ICANN Board's Question to the ALAC
  - "What is your view on RVCs and its enforceability in line with ICANN's mission?"

# Registry Voluntary Commitments (RVCs)

## ○ What are they?

### *SubPro Rec 9.9*

- Previously, voluntary Public Interest Commitments (voluntary PICs)
- Could be offered in response to public comments, objections, GAC EW, GAC Advise etc

### *SubPro Rec 9.10*

- RVCs must be included in applicant's Registry Agreement - **Per Base RA (30 Apr 2023), Spec 11 clause 2**

*"2. RO to operate TLD in compliance with all commitments, statements of intent, business plans in sections of RO's application as inserted; such obligations shall be enforceable by ICANN and through PICDRP."*

### *SubPro Rec 9.11*

- Also subject to Public Interest Commitment Dispute Resolution Process (PICDRP)

### *SubPro Rec 9.12*

- Applicant must state if RVCs are limited in time, duration and/or scope, also reasons and purposes to be adequately considered

## **Bottom line:**

- **RVCs are DIFFERENT TO mandatory PICs, and may or may not touch on a public interest element**
- **The "voluntary" refers to the fact that the Commitment is volunteered by the RO/Applicant (and NOT whether it will be voluntarily enforced by ICANN)**

# Vs. Public Interest Commitments (PICs)

## ○ Distinguished from PICs in the Next Round

### **A) Per Base RA Spec 11 (30 Apr 2023)**

1. RO to use only ICANN accredited registrars (signed a Registrar Accreditation Agreement (RAA)) approved by ICANN Board

2. RO to operate TLD in compliance with **all commitments, statements of intent, business plans in sections of RO's application as inserted**; such obligations shall be enforceable by ICANN and through PICDRP. (These are the ones designated as RVCs)

3. RO to perform **specific PICs** (if breach not remedied may lead to termination of RA)

- (a) No DNS abuse or other activities contrary to applicable law.
- (b) Periodic security threats analysis – pharming, phishing, malware, and botnets – and maintain reports.
- (c) Clear registration policies
- (d) If operating a “Generic String” TLD, may not impose eligibility criteria for registering names.

### **B) Per GAC Category 1 Safeguards Framework**

*SubPro Affirmation 9.3* adopts GAC safeguards from 2012 round, such that relevant Cat 1 Safeguards will be adopted as contractually binding requirements in RA Spec 11 (as mandatory PICs)

*SubPro Rec 9.4* process to determine if strings fall into the NGPC framework to be established and included in AGB along with info on ramifications.

# ICANN Board's Question to Us

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- **“What is your view on RVCs and its enforceability in line with ICANN’s mission?”**
  1. Should all RVCs be enforceable?
  2. What if a proffered RVC goes beyond ICANN’s mission?
  3. Who enforces an RVC and how?
  4. How to ensure an RVC will be enforceable?

# 1. Should all RVCs be enforceable?

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- Logically, yes !
  - If not, why include it in a Registry Agreement ?!
  - ICANN choose to waive enforcement, but must still be enforceable, otherwise it's of no value.

# ICANN Bylaws, Article 1, Section 1.1(a): Mission

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(a) The **mission of ICANN is to ensure the stable and secure operation of the Internet's unique identifier systems** as described in this Section 1.1(a) (the "Mission"). Specifically, ICANN:

(i) **Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("gTLDs").....**

(ii) **Facilitates the coordination of the operation and evolution of the DNS root name server system.**

(iii) **Coordinates the allocation and assignment at the top-most level of Internet Protocol numbers and Autonomous System numbers** (~ providing registration services and open access for global number registries as requested by IETF and RIRs; and facilitating development of global number registry policies by the affected community and other related tasks as agreed with the RIRs)

(iv) **Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations** (~ providing registration services and open access for registries in the public domain requested by Internet protocol development organizations)

# ICANN Bylaws, Article 1, Section 1.1(b)-(d): Mission

(b) ICANN shall not act outside its Mission.

(c) **ICANN shall not regulate** (i.e., impose rules and restrictions on) **services** that use the Internet's unique identifiers **or the content that such services carry or provide**, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority. ....

(d) **For the avoidance of doubt and notwithstanding the foregoing:** .....

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) ....., and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) **on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers** pursuant to these Bylaws or ICANN's Articles of Incorporation:

(A) (1) **all registry agreements** and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016 [1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(A) (2) **any registry agreement** or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016; ....

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN.

(iv) **ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.**



## 2. What if a proffered RVC goes beyond ICANN's mission?

- ⦿ **Purports to “regulate” content that such services carry or provide**

### School of thought #1

Per Bylaw Section 1.1(c), ICANN cannot regulate content, so any RVC which purports to regulate content, even if included in an RA, can be challenged as in violation of ICANN's Mission and therefore not valid.



### School of thought #2

Per Bylaw Section 1.1(d)(ii) and (d)(iv), so long as an RO has agreed to include an RVC in its RA, it ought to be accepted and will be enforceable.

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Does acceptance by ICANN imply that ICANN is acting outside of its mission?

Should ICANN decline to accept such an RVC?

# Case Study: **.kids**, a Community TLD <sup>1/2</sup>

- ⦿ gTLD from 2012 Round
- ⦿ Registry Agreement dated 2 July 2021
  - **Voluntary PIC per Spec 11 2(c)**
    - ***RO makes a commitment to promote kids-friendly content on the Internet with relevant registration policies and guidelines for the registrants based on the UNCRC***
  - Community Registration Policy per Spec 12
    - Eligibility: 2) **Content, including the domain name itself, and services provided through the .kids domain must be appropriate for children under the age of 18 and must not include any materials related to inducing kids to engage in: gambling, illegal drugs, pornography & obscenity, violence, alcohol, tobacco, criminal activities.**
    - Eligibility: 3) **Illegal content is strictly prohibited** (including but not limited to trafficking, substance abuse, phishing, copyright infringement, and **other illegal content as defined by the laws of the country for which the registrant and/or the sponsoring registrar resides**)
    - Content/User Restrictions: **Mandatory for all .kids registrants to adhere to Guiding Principles – violation whether or not intentionally by registrant, especially if such violation results in the proliferation of materials likely to harm and disturb kids,** will be grounds for cancellation, suspension and takedown of the DN.
    - Enforcement: **To facilitate enforcement of requirements and Guiding Principles, a complaint-response system is implemented by RO through an online portal. Upon receipt of a complaints, a takedown decision will be initiated depending on the type of complaint report filed – “Protection Scheme” – to strike a balance between protecting kids from unwanted materials and FOE online.**

# Stress Test #1

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- Applicant A applies for string “nft” under the following circumstances:
  - nft, as in non-fungible tokens
  - nft may be not recognized in some countries
  - Assume nft isn't caught under GAC Category 1 Safeguards
- Non-sponsored, open TLD
- Not a generic word
- Not a community-TLD (so no registration restrictions, no Spec 12)

## Purpose

To promote adoption, trading of nfts globally

## Proffered RVCs

1. Commits to screening use by nft DN registrants to limit content related to nft purpose only, with full discretion to takedown websites for non-compliance
2. Commits to ensuring nft DN registrants comply with applicable laws of country where the registrant or sponsoring registrar resides

# Stress Test #2

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- Applicant B applies for string “**flubber**” under the following circumstances:
  - Flubber is rubbery polymer formed by cross-linking polyvinyl alcohol with a borate compound, in other words, SLIME.
  - Assume flubber isn’t caught under GAC Category 1 Safeguards
    - Non-sponsored, open TLD
    - Not a generic word
    - Not a community-TLD (so no registration restrictions, no Spec 12)

## Purpose

To promote awareness of flubber globally but especially among flubber enthusiasts

## Proffered RVCs

1. Commits to screening use by flubber DN registrants to limit content to flubber-related content, with full discretion to takedown websites for non-compliance
2. Commits to ensuring flubber DN registrants comply with applicable laws of country where the registrant or sponsoring registrar resides.

### 3. Who currently enforces a PIC and how?

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- How are commitments currently monitored and/or enforced? Per the RA:
  - **Audit** - ICANN Contractual Compliance conducts audits to assess compliance with Spec 11 PICs
  - **Complaints** – ICANN Contractual Compliance checks complaints for relevance, completeness etc; if found to have merit, can empanel a PICDRP to determine if RO violated PIC
  - **PICDRP** - ICANN Contractual Compliance enforces any determination from a PICDRP which rules that an RO has violated a PIC
    - 2 examples: .feedback; .pharmacy
    - Does not proactively track gTLDs with variations of commitment under Spec 11, Clause 2
  - Separately, **RRDRP** - ICANN Contractual Compliance checks complaints against Community Registration Policy (Spec 12) violations for relevance, status etc; if found to have merit and unresolved, can enforce against RO.

## 4. How to ensure an RVC will be enforceable?

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- All RVCs must:
  - Be clearly understood & expressed
    - must state intention, scope, validity period
    - must include objective, assessable criteria - how?
  - Be agreed by applicant/registry and who and how?
    - The ICANN Board / ICANN Org
    - Community input?
    - Applicant/registry response?
  - Spell out consequences of breach – for remedy, and if not remedied, triggers termination of RA
  - What else?