

Next Round of New gTLDs

ICANN Board Community Consultation on Implementation Framework for Content-Related Registry Commitments

Fourth Discussion with the At-Large CPWG - Draft ALAC Comment

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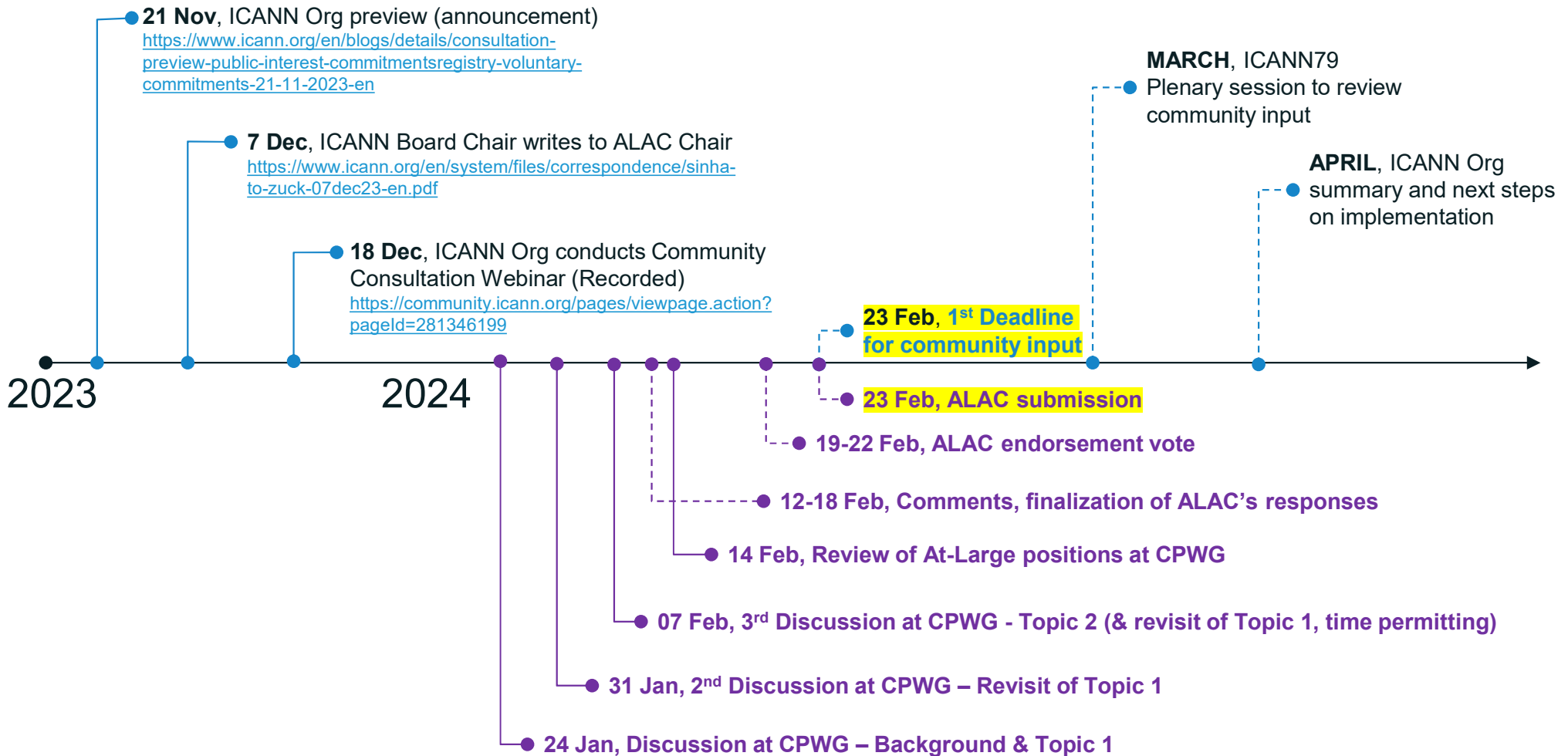


Agenda

- Timetable for Consultation & Input
- Preparing ALAC's input to the ICANN Board
 - **Consultation Topic 1 – Proposed Implementation Framework for Content-Related Registry Commitments**
 - **Consultation Topic 2 – Scope of Content-Related Registry Commitments in light of ICANN's Mission**
- Draft ALAC input
 - Board-given Googleform
https://docs.google.com/document/d/11SCDjxo9rWh5Lj7sPg_pqpqm8Sm-T6XZZsln9aZYUTE/edit?usp=sharing

Timetable for Consultation & Input

ICANN Board & ICANN Org



ALAC & CPWG

CONSULTATION TOPIC 1

Proposed Implementation Framework for Content-Related Registry Commitments

SUMMARY of ICANN Board's Consultation Topic 1

○ Highlights of Proposed Implementation Framework for Content-Related Registry Commitments

PUBLIC INTEREST COMMITMENTS	REGISTRY VOLUNTARY COMMITMENTS	COMMUNITY gTLD COMMITMENTS
<p>[1] 2012 Round Mandatory PICs, applicable to all gTLDs → RA</p>	<p>[3] RVCs in response to comments, objections, early warnings possible (i) during community comment period or (ii) up to contracting; may trigger Application Change Request procedure.</p>	<p>[4] Community gTLD Commitments</p> <ul style="list-style-type: none"> • Likely, includes possible restrictions on use and content • Will be evaluated • If does not pass evaluation, cannot be counted for scoring as part of CPE, and cannot be included in RA even if application succeeds
<p>[2] 2012 Round Safeguard PICs assessed after community comment to determine whether needed for RA</p>	<p>Requirements for RVCs:</p> <p>i) clear, objective, process-oriented approach for implementing & administering specific restrictions or requirements</p> <p>ii) independent third party approved by ICANN to periodically audit compliance and certify such compliance to ICANN.</p> <p>iii) If limited in time, duration and/or scope – must be clearly set out, using objective criteria for transparency and enforcement</p>	
<p>Enforcement: Contractual Compliance</p>	<p>Applicant-ICANN must agree on RVC language, else not approved</p>	<p>Enforcement: RRDRP, Contractual Compliance</p>
	<p>Enforcement: PICDRP, Contractual Compliance</p>	

At-Large Position Development

Q1. If ICANN and applicant cannot agree on final RVC language that is enforceable under the ICANN Bylaws and as a practicable matter, should the application be allowed to move forward without that RVC, even though the RVC was proposed as means to resolve an objection, GAC Early Warning etc?

- Yes or no?

Q2. Why yes or why no?

NO for Objection

1. Application **CANNOT** move forward without *satisfactorily* addressing an **Objection**.

2. Why? Objection is a formal process requiring substantiation / reason(s) for disapproval, so unlikely to be menial / frivolous

3. If RVC does not address Objection to ICANN's satisfaction in consultation with objector, then Objection procedure acts as "final arbiter"

But, YES for others ...

4. Application **CAN** move forward without RVC if rejected RVC language aimed at **a comment or a GAC Early Warning**.

5. Why? A comment does not have weight of an objection, could be menial / frivolous; could still lead to Objection if meritorious

6. Why? GAC Early Warning (unlike GAC Consensus Advice) serves as mere warning; could be resolved inter-partes, or if not, there's scope for an Objection

NOTES

ICANN must agree to RVC language – irrelevant whether applicant has good intentions – contract law practice – ICANN won't include things it does not intend to enforce.

Final arbiter of RVC acceptability & "practicable" – Board, ICANN Legal, Compliance

At-Large Position Development

Q3. Should all applicants that propose RVCs and Community gTLD commitments be required to designate a third party to monitor compliance, regardless of whether or not the commitments relate to the contents within an applied-gTLD?

○ Yes or no?

Q4. Why yes or why no?

YES

1. Too subjective to determine if something is content-related or not, hence easier to have **blanket practice for requiring** applicant proposing RVC to also “designate” third party compliance monitor

2. **Needed for Community gTLD commitments** – these will invariably have “content use and restriction” as part of application anyway

3. Blanket practice may still preserve not forcing ICANN to monitor compliance or regulate content. How?

BUT ...

4. Subjectivity ... too general to conclude every RVC requires a third party monitor, ... possibly unfair, too demanding.

5. Too hard to establish community-wide standard as arbiter

6. So, propose that:

- (a) All applicants be required to **identify (and possibly designate) third party monitor** for any RVC; and
- (b) **Contractual Compliance be asked to say whether monitoring of an RVC is beyond them, with ICANN Board as final arbiter on use of designated third party monitor**

7. Some concerns on “reliability” of applicant-proposed third party, even though ICANN-approved, since paid by applicant;
an alternative: appoint well regarded, non-ICANN paid community members for role?

At-Large Position Development

Q5. Are there changes that should be made to proposed implementation framework?

- Yes or no?

Q6. If yes, what changes should be made, and why?

YES, 1st CHANGE: FLEXIBILITY

1. Require applicants to **identify (and possibly designate)** third party monitor for any proposed RVC

2. But retain flexibility for ICANN to determine whether a third party monitor is required by examining the RVC and deciding whether Contractual Compliance has capacity and capability to monitor so long as not regulating content and minimizing risk of losing an IRP etc.

YES, 2nd CHANGE: CREDIBILITY

3. How would ICANN org assess and approve a third party monitor – credibility, reliability?

YES, 2nd CHANGE: PRESERVATION

4. Must be a way to disallow / prevent an RVC which gets into RA from being changed / eroded by applicant, RO or successor, to disregard “issue” it sought to address, esp. if “issue” is still live eg a moratorium

5. Application Change Request procedures, RA amendment public comment proceedings are community-resource intensive – is there a better way?

6. Ultimately, ability to change RVC has to make sense - balancing public interest vs commercial feasibility.

An cursory analysis of **PICDRP** & RRDRP ^{1/3}

Public Interest Commitment Dispute Resolution Procedure - PICDRP

- **Process in place** – prevailing procedure dated 1 Feb 2020

<https://newgtlds.icann.org/sites/default/files/picdrp-01feb20-en.pdf>

Highlights of PICDRP

- B.1.1 – person or entity that believes they have been harmed (Reporter) due to an RO's act or omission in operating TLD not in compliance with PICs
- B.1.2 – **Reporter must** specifically identify which PIC and state grounds of alleged non-compliance & **detail how it has been harmed**....
- B.2 – Report-RO conference to resolve complaint within 30 days
- B.3 – Conference failure → ICANN action: request for explanation - compliance investigation either itself or invoke PICDRP.
- B5 – Repeat Offenders
- Only 2 filed to-date: **.feedback** and **.pharmacy**, both on violation of RA Spec 11 3(c) – failure to operate TLD with clear registration policies

Registry Restrictions Dispute Resolution Procedure – RRDRP

- **Process in place** – prevailing procedure dated 4 Jun 2012
<https://newgtlds.icann.org/sites/default/files/rrdrp-04jun12-en.pdf>

Highlights of RRDRP

- Limited to **harmed established institution** (Complainant) and RO. **ICANN not party.**
- “Established institutions associated with defined communities are eligible to file a community objection.”
- “Defined community” must be community related to the string in the gTLD application.
- Locus standi: Complainant must prove “established institution” status, has ongoing relationship with defined community.
- Standard for claims, must prove that:
 - Community invoked by the objector is a defined community
 - Strong association between community invoked and gTLD label or string
 - TLD RO violated terms of community-based restrictions in RA
 - **Measurable harm to Complainant and the community named by objector**
- Filing fee applies, acts as deterrent against frivolous complaints
- None filed to-date

Current monitoring, enforcement of PICs/RVCs 3/3

- How are commitments currently monitored and/or enforced? Per the RA:
 - **Audit** - ICANN Contractual Compliance conducts audits, requests evidence of how RO validated registration eligibility per Spec 12 for a sample of domains
 - **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/RVC
 - 2 examples: .feedback; .pharmacy
 - 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
 - No RRDRPs filed to-date

At-Large Position Development

Q7. Are there specific improvements to be made to the PICDRP and RRDRP to ensure their effectiveness as dispute resolution mechanism for PICs and Community gTLD Commitments?

- Yes or no?

Q8. If yes, why?

YES TO PICDRP	YES TO RRDRP?	QUESTIONS
1. Currently, PICDRP requires that the person filing the dispute must show they have been measurably harmed . That may render a PIC/RVC effectively unenforceable / rather useless.	3. More clarity in certain terms used in RRDRP would be beneficial – consider references or hyperlinks. <ul style="list-style-type: none">• “Established institutions”• “Defined community”	Awareness
2. PICDRP should be modified to also allow complaints against any alleged PIC/RVC violation on the ground of foreseeable harm to complainant or to third parties .	4. Should RRDRP be modified to also allow complaints against any alleged RR violation on the ground of foreseeable harm to complainant or to communities?	Reviews – how, when?

Q9. Any further comments on the proposed implementation framework?

CONSULTATION TOPIC 2

Scope of Content-Related Registry Commitments in light of ICANN's Mission

ICANN Board's Consultation Topic 2 ^{1/2}

Q1. Are there types of content restrictions in gTLDs that could be proposed by applicants that ICANN must accept as a matter of ICANN Consensus Policy?

○ Yes or no

Q2. Why yes or why no? If yes, identify with specificity, types of content-related commitments that we believe must be permitted.

YES

1. Where applicable content restrictions are formulated to implement the **Category 1 Safeguards for strings deemed to be applicable to highly sensitive or regulated industries** per NGPC Framework and SubPro Recommendation 9.4.

2. Where ICANN org and an applicant agrees on language of a commitment as being enforceable and as a practicable matter, **provided that ICANN is not required to adjudicate whether the applicant / registry operator is in compliance or not.**

3. Community gTLD commitments will naturally involve possible restrictions on use and content since that is an inherent nature of community management, and the **practice of having appropriate third party monitors for compliance should continue.**

4. ICANN does not exist in vacuum – global nature means still impacted by extra-territorial laws; court orders; laws trumps Bylaws.

5. In all, as long as these content restrictions **do not require ICANN to adjudicate compliance and ICANN is in a position to enforce the outcome of any arms length third party adjudication.**

ICANN Board's Consultation Topic 2 ^{1/2}

Q3. Are there any types of content restrictions that ICANN should not enter into, considering scope of ICANN's Mission?

○ Yes or no

Q4. Why yes or why no? If yes, identify with specificity, types of content-related commitments that we believe should not be permitted.

YES

1. Any type of content restrictions that the ICANN Board deems as requiring ICANN to adjudicate whether the applicant / registry operator is in compliance or not.

ICANN Board's Consultation Topic 2 _{2/2}

Q5. Do we agree that ICANN must move forward with a Fundamental Bylaws change to clarify ICANN's contracting remit regarding content-related commitments?

- a. **No.** ICANN should not accept any content-related RVCs or Community gTLD commitments, so no Bylaws amendments required
- **b. No.** While ICANN must accept, agree to, enter into and enforce content-related RVCs or Community gTLD commitments, no clarification to the Bylaws is required for ICANN to perform this
- c. **Yes.** ICANN must accept, agree to, enter into and enforce RVCs or Community gTLD commitments, and ICANN must move forward with a Fundamental Bylaws change to clarify its contracting and enforcement remit regarding content-related commitments

Q6. Explain choice of answer in Q5.

Choose option b

1. Alluded to several types of content-related commitments in answer to Question #2 above which necessitate their acceptance and enforcement by ICANN.

2. As long as ICANN Board deems a content-related commitment as NOT requiring ICANN to **adjudicate whether the applicant / registry operator is in compliance or not**, then not running afoul of ICANN Bylaws, hence no Fundamental Bylaws change needed.

Q7. Any additional comments or info that's critical to inform this community dialogue concerning content-related commitments?

RESOURCE SLIDES

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

(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:** [GRANDFATHER PROVISION]

(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.**

2023 Base Registry Agreement – 2 Sources of PICs ^{1/2}

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 Voluntary PICs)**
3. Per **GAC Advice**, RO to perform specific PICs (unremedied breach 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

4. NGPC – GAC Beijing Communique – **Framework of 10 Safeguards for 4 groups of sensitive/regulated strings** (see: <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>)

1. Regulated Sectors/Open Entry Requirements in Multiple Jurisdictions: Cat 1 Safeguards 1-3
 - eg *.kids, .eco, .med, .finance, .care, .mba, .game, engineer, .law, .capital, .weather*
2. Highly-Regulated Sectors/Closed Entry Requirements in Multiple Jurisdictions: Cat 1 Safeguards 1-8
 - eg *.pharmacy, .bank, .casino, .charity, .university, .lawyer, .llc*
3. Potential for Cyber Bullying/Harassment: Cat 1 Safeguards 1-9
 - eg *.fail, .gripe, .sucks, .wtf*
4. Inherently Governmental Functions: Cat 1 Safeguards 1-8 and 10
 - eg *.army, .navy, .airforce*

There is to be a process (“*Community Action Period*”) to determine if strings fall into the NGPC framework, this will be included in AGB along with info on ramifications.

GAC Category 1 Safeguards: Examples of safeguards

	gTLD & Cat 1 Safeguards	Provision in the Registry Agreement
1	.eco: Safeguards 1-3	<p>RO to include in RRA requiring Rr to include in Registration Agreement:</p> <ul style="list-style-type: none"> • 1- 3(e) requirement for registrants to comply with all applicable laws • 2- 3(f) that Rr notifies registrants of 3(e) at time of registration • 3- 3(g) requirement for registrants who collect & maintain sensitive health and financial data implement reasonable, appropriate security measures, as defined by applicable law.
2	.bank, Safeguards 1-3 & 4-8	<p>In addition to 3(e) – 3(g), RO has to:</p> <ul style="list-style-type: none"> • 4- 3(h) proactively create a pathway to working relationship with relevant regulatory or industry self-regulatory bodies for specified purposes • 7- 3(k) consult with relevant national supervisory authorities regarding authenticity if RO receives a complaint expressing doubt on that <p>Also RO to include in the RRA requiring Rr to include in Registration Agreement requiring:</p> <ul style="list-style-type: none"> • 5- 3(i) registrants to provide up-to-date contact info, for notification of complaints / reports of registration abuse etc • 6- 3(j) registrant to represent it possesses any necessary authorization, charter, licence, credentials for participation in the sector associated with the TLD • 8- 3(l) registrants to report any material changes to validity of registrants' authorizations, charters, licenses, credential etc for continued conformance
3	.sucks, Safeguards 1-3 & 4-8 & 9	<p>In addition to 3(e) – 3(l), RO has to:</p> <ul style="list-style-type: none"> • 9- 3(m) RO to develop, publish registration policies to min risk of cyber bullying and/or harassment
4	.army, Safeguards 1-3 & 4-8 & 10	<p>In addition to 3(e) – 3(l), RO has to in RRA requiring Rr to include in Registration Agreement:</p> <ul style="list-style-type: none"> • 10- 3(m) requiring registrants' representation to take step to ensure against misrepresentation or falsely implying by one or more country's or government's military forces if such affiliation, sponsorship or endorsement does not exist.

An Example of Community TLD RVCs: .kids

- ⦿ 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.**