# NCSG Response to ICANN Board on PICs/RVCs Community Consultation

## Important Background

The recent consultation raises concerns about this process that need to be addressed before moving on to the specific questions. We share our knowledge and concerns in brief below and ask that this fuller history be reflected in the next round of materials.

NCSG submits that historical context is missing and urges ICANN to provide a clearer overview of PICs and RVCs in its next publication on this issue. It should be shared that "Voluntary Public Interest Commitments" (Voluntary PICs) were never part of the policy development process for the First Round of New gTLDs. After applications had already been submitted, then-CEO Fadi Chehade and his Chief Contracting Officer, Alan Grogan, allowed New gTLD Applicants to submit *anything they wanted* into their New gTLD Base Registry Agreement (additions to Specification 11). The two men shared later that they had not even read the new additions.[1]

This process, which is inconsistent with best practices of contractual review, legal editing and our robust Multistakeholder processes, created a mess. The process was roundly criticized in the Community. See below the cited works of NCSG member Kathy Kleiman[2] Mitch Stoltz of the Electronic Frontier Foundation (EFF), [3] and Becky Burr [4]. Horrible PICs that no one should emulate were adopted, including:

- Those that committed to blocking trademarked terms in New gTLDs – a practice expressly rejected by the Multistakeholder Process and for which the extensive and expensive Trademark Clearinghouse and Trademark Claims Notices were created.
- Commitments that allowed the Registry Operator to remove them "in [the applicant's] sole discretion."

Allowing anyone to put anything into their Registry Agreement violates the "Base Registry Agreement" concept that all Registries should follow a common agreement with ICANN and adhere to carefully negotiated policies that balance trademark protection, free expression, and fair use rights. Many PICs and RVCs are not content-oriented at all and ICANN should make this fact clearer.

We note that the Board did some good work. In 2020, it stopped the SubPro Working Group's recommendations that would allow any New gTLD Applicants to submit any PIC/RVC they choose. It upheld a cross-community Minority Statement:

> "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."[6]

The Board stopped the recommendation until the Council amended it, limiting PICs and RVCs to those "enforceable under the ICANN Bylaws and as a practicable matter."

However, there are still concerns about whether ICANN enforcement of RVCs can violate its mission, commitments and core values.

In its 2016 Bylaws, ICANN bound itself to "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)."[8] It is time to honor this commitment.

**As shared by Malcolm Hutty, a member of the Enhancing ICANN Accountability Work Stream 1 Team, at the NCUC Issues Forum Part I in Washington DC, these Bylaws and their Core Values are a "fundamental compact" that ICANN made with the "global Internet Community." To engage in content regulation is for ICANN to violate a "Fundamental Bylaw" and one critically important to the rest of the world.** NCSG member Milton Mueller summarized concerns raised at this Forum in his blog posting, *The Big Question Facing ICANN's Contractual Governance Regime*, for the Internet Governance Project.[7]

Further, in the NCUC Issues Forum Part II in Hamburg, Steve DelBianco in his "*Stress Test #1: False expectations for enforcing safeguards RVCs,*" noted that if ICANN bypasses its limits and allows web content-oriented PICs and RVCs, for example, and if ICANN is challenged and an Independent Review Panel blocks it from enforcing the RVC, then the consequence of this hypothetical might be that: "the GAC advises ICANN that it has not honored its commitment to enforce its safeguard RVCs, and this leads a majority of governments to support a Nov-2025 UN resolution establishing ITU management of the DNS." A cascade of bad effects!

**NCSG submits the best way for the Board to address content-related PICs and RVCs is to make it clear that it will reject them categorically. It should also make it clear that outsourcing the enforcement of content-related PICs and RVCs does not make them consistent with the bylaws.**

A Framework for Evaluation of Non-Content Related PICs and RVCs is Needed. For other types of PICs and RVCs – non-content-related – we agree that a "framework" is needed to evaluate, review and accept or reject them. No RVC or PIC should be accepted without close review by ICANN and the Community using clear guardrails adopted by ICANN. NCSG in Hamburg proposed a set of guardrails and we provide them below in our answer to Question #6.

## Consultation Topic 1

1. In its [Second Clarifying Statement](#), the GNSO Council said that with respect to Registry Voluntary Commitments (RVCs) both ICANN org and the applicant must agree that a proffered commitment is clear, detailed, mutually understood, and sufficiently objective and measurable as to be enforceable.

Question: If ICANN and the applicant cannot agree on final commitment language that both ICANN and the applicant agree is enforceable under the ICANN Bylaws and as a practicable matter, should the application be permitted to move forward without that commitment, particularly in circumstances in which an applicant has proposed a commitment as a means to resolve an objection, Governmental Advisory Committee early warning, etc?

\*

- **<mark>Yes</mark>**
- No

2. Please explain your answer to question 1 above. *

**It is imperative that ICANN allow applicants to move forward without a proposed and contested commitment (RVCs). If ICANN kills all applications that propose a flawed RVC, it encourages special interest groups or GAC to impose arbitrary demands on gTLD applicants, which in turn encourages applicants to make unenforceable, unwise commitments in RVCs. If ICANN does not allow applicants with no RVCs to go forward, it is giving objectors veto power over gTLD applications.**

**NCSG would like the addition of new gTLDs to be governed by uniform, objective standards that apply equally to every applicant and conform to established multistakeholder GNSO policies. The objections and early warning process work against this goal by incentivizing community members to object to applications simply because they don't like the applicant, its business model, the semantics of the name, the type of services that might be offered under the gTLD, or other arbitrary or idiosyncratic reasons. Given the large investments at stake, gTLD applicants have a strong incentive to respond to these objections by making commitments (RVCs) that satisfy the objectors, whether or not they are reasonable and fair, and whether or not they can be enforced. If the applicant and ICANN org discover that the objections cannot be answered without proposing unenforceable RVCs, the application must be allowed to proceed without making those commitments. Otherwise you are giving critics of applications a kind of veto power: they can make unreasonable demands that can only be satisfied by proposing unenforceable RVCs. Applicants will surely do this simply to buy off political opposition.**

**Assuming that all content-related and content-oriented must be stripped out, it is not enough that proposed PICs/RVCs are objective, measurable and enforceable by ICANN and Applicant; they must also open the PICs/RVCs review process to the rest of the Community, using the framework we propose below.**

**We also note that in its role as final approver of gTLDs, if the Board thinks there are serious problems with a New gTLD application, then it can refuse to approve them, as long as its decision is based on criteria within its mission. Some applications may be fundamentally flawed, misleading, or intended for purposes that are one-their-face illegal. If a New gTLD application is fundamentally flawed, then ICANN cannot "make it right" by allowing an array of content-related PICs/RVCs. Instead, ICANN, the GAC and the Community can certainly weigh in to encourage that a New gTLD application be stopped completely.**

**Overall, we cannot allow groups to game the process by threatening applicants that they will lodge fatal objections unless they draft RVCs that conform to their desired policies.**

3.  Should all applicants that propose registry voluntary commitments and community gTLD commitments be required to designate a third party to be charged with monitoring the registry operator's compliance with those commitments, regardless of whether or not the commitments relate to the contents within an applied-for gTLD? *
   - Yes
   - **No**

4.  Please explain your answer to question 3, above. *

**NCSG opposes efforts to outsource contractual compliance to a heterogeneous collection of "third parties," each applying a bespoke set of criteria. This is not only inefficient and confusing, it works against the whole purpose of ICANN's governance role in DNS, which is to develop common, globally applicable policies that ensure the compatibility and operational security of the global DNS. If RVCs are binding part of registry contracts, ICANN and ICANN alone must be responsible for enforcing them.**

**We also note that, again, ICANN is facing the limits of its Mission, Commitments and Core Values in the Bylaws. It cannot outsource what it is not allowed to do under its bylaws. ICANN could outsource domain name disputes to third parties because the UDRP is within the scope and mission of ICANN and the power to create its policies and procedures is considered to be well within ICANN powers.**

**As ICANN does not have the authority to regulate services that use the DNS or the content that DNS services carry or provide, it absolutely cannot outsource compliance for content-oriented or service regulation activities.**

**For other types of PICs and RVCs, the PICDRP should serve as the dispute forum (clearly under ICANN oversight and control). We note that notwithstanding the dozens of New gTLDs for "sensitive strings," the PICDRP has been rarely used and note that the internal oversight system of professions and regulated groups seems to be working.**

5.  Are there any changes that should be made to the proposed implementation framework? *
   - **Yes**
   - No

6. If your answer to question 5 is "yes," what changes should be made, and why?

**We think it is vitally important that Applicants, and the GAC, and the various third parties who are also seeking an array of commitments, understand the ground rules before they start. NCSG has proposed six(6) "Principles for Review and Acceptance of Registry Voluntary Commitments (RVCs):"**

**#1: All RVCs must be submitted for a purpose within the scope and mission of ICANN.**

**#2.  All RVCs must be legal under the laws of the jurisdictions of ICANN and the Registry and consistent with ICANN's Core Values and Fundamental Commitments, (including not discriminatory).**

**#3. All RVCs must show a clear Nexus between proposed RVC(s) and the specific gTLD String applied for. (TLD applicants should not make RVCs that are unrelated to the semantics of the specific string the registry holds. Example: A proposed .TAX should not make RVCs about trademark and domain name protection unless the Intellectual Property Rights in question relate directly to taxes and tax preparers, etc.)**

**#4. RVCs must not contradict or overrule the scope or output of a completed GNSO PDP. (For example, if GNSO has developed a policy regarding the limited disclosure of registrant data in all gTLDs, then an RVC cannot commit ICANN to enforce a policy that would require all registrants to disclose their contact data to anyone making a query in this gTLD.)**

**#5. All RVCs must be enforced by ICANN's PICDRP (Public Interest Commitments Dispute Resolution Procedure) and not by a registry-specified third party dispute provider.  (Contractual compliance is ICANN's primary responsibility, it cannot be outsourced. Compliance resources should be narrowly focused on a small set of general contractual conditions, not dispersed over a gigantic number of bespoke contracts.)**

**#6. A final procedural principle: All RVCs should be put out for public review. Then they should be reviewed and approved in three steps:**

> **a) First, ICANN Legal should review them for legality and consistency with these Principles;**
>
> **b) Second, the GNSO Council should be asked for consensus approval of each RVC; and**
>
> **c) Third, RVCs approved in steps a) and b) above must be sent to the Board to assess whether they meet the Five Principles and merit final approval.NCSG has proposed 6 "Principles for Review and Acceptance of Registry Voluntary Commitments (RVCs):"**

**NCSG submits that ICANN should expand its Framework to include each step above to ensure a) that ICANN can legally enforce the RVC (thus, not content), b) that all groups impacted by the proposed RVC receive notice and ability to comment on the problems such an RVC would create, and c) that the RVC is narrowly-scoped to the New gTLD string and not bypassing the development and implementation of bottom-up consensus-based multistakeholder processes as Bylaws require.**

7.  Are there any specific improvements that should be made to the dispute-resolution processes utilized in the 2012 round (the Public Interest Commitments Dispute-Resolution Procedure and the Registry Restrictions Dispute Resolution Procedure) to ensure that these

processes provide an effective mechanism for the resolution of disputes concerning the relevant commitments? *

- **Yes**
- No

8. If your answer to question 7 is "yes", please explain your answer.

**This should be a separate process. The ICANN Community has little information and has not been provided with a report or analysis of the PICDRP and RRDRP processes and their use in the first round. This question should be tabled until reports are carefully prepared and shared, along with any ICANN-suggested revisions (as these processes were created by ICANN in the first place).**

9. Please provide any further comments you wish to share concerning the proposed implementation framework.

**As above, the proposed Framework, as modified, should only apply to those PICs and RVCs clearly within the scope and mission of ICANN, and not content-related ones.**

## Consultation Topic 2

1. After the launch of the 2012 round of the New gTLD Program, and as part of the 2016 IANA Stewardship Transition, the ICANN Board adopted new community-developed Bylaws that specifically define the scope of ICANN's Mission. The restated Mission could impact ICANN's ability to enter into and enforce content-related registry commitments that are contemplated for inclusion in future Registry Agreements.

The ICANN Board is concerned with proceeding to permit content-related commitments to be negotiated into Registry Agreements if there is significant potential for ICANN's ability to negotiate and enforce those commitments to be challenged as beyond ICANN's Mission.

With this background, the Board seeks your input concerning the scope of content-related Registry Agreement commitments that ICANN should permit registry operators to enter into pursuant to the SubPro PDP Working Group recommendations, taking into account the scope of ICANN's Mission.

**Question:** Are there any types of content restrictions in gTLDs that could be proposed by new gTLD applicants that ICANN must accept for inclusion in future Registry Agreements as a matter of ICANN Consensus Policy?

To facilitate your consideration of this issue, Appendix 2 to the consultation memo includes examples of commitments from 2012 round Registry Agreements so that the community can better understand the types of commitments that could be proposed by new gTLD applicants in the future.
*

- Yes
- **No**

2. Please explain your answer to consultation topic 2, question 1, above.

**The prohibition on content regulation in ICANN's mission is extremely important and very clear. Mission limitations were a critical part of the accountability reforms that were required before ICANN would be released from US government control in 2016. The record of deliberations underlying this mission limitation makes it clear that it was intended to be an across-the-board limitation on ICANN's ability to regulate content and services unrelated specifically to the coordination of DNS. This was an attempt to prevent the centralization of control around the DNS root zone from being expanded into an attempt to regulate and control the Internet or the content and services that can be provided over it. If regulation of content and services is needed, there are many other agencies, legal and governmental, who can act on problems related to content and services.**

**NCSG will mount a legal challenge to any attempt to dilute this part of the mission.**

If your answer to question 1 is "yes", please identify with specificity the types of content-related commitments that you believe must be permitted in future Registry Agreements as a matter of ICANN Consensus Policy.
*

3. Are there any types of content restrictions that ICANN should not enter into in the New gTLD Program: Next Round, considering the scope of ICANN's Mission in relation to Registry Agreements? *
- **Yes**
- No

4. Please explain your answer to consultation topic 2, question 3, above.

**This is a confusing question that involves a double negative. If we understand correctly, then we have already discussed the answer to this question at length above. Overall: ICANN should not enter into any content restrictions, other than those involving the semantics of the domain name itself.**

If your answer to question 3 is "yes", please identify with specificity the types of content-related commitments that you believe should not be permitted in future Registry Agreements.
*

**RAs should not commit ICANN to policing copyrights; restricting political speech of any kind, including speech deemed hateful or objectionable: restricting commercial speech, including fraud; enforcing licenses or certifications of professions. Please note that some Internet content and services can legitimately be regulated, but this can and should occur through TLD Registries' own policies (e.g., a decision to market registrations only to certain types of users), or by governmental agencies within their jurisdiction, both of which (Registries and public authorities) are presumably better suited to understand local standards, doctrines and norms and adapt them in their policies.**

5. In order for ICANN to have the ability to enter into the content-related commitments recommended by the GNSO for the New gTLD Program: Next Round, a Bylaws amendment appears to be required. For example, an amendment could clarify the scope of future content-related commitments that ICANN may enter into and enforce in future Registry Agreements, including reliance on principles evidenced within the framework (as discussed within Consultation Topic 1).

**Question**: Do you agree that ICANN must move forward with a Fundamental Bylaws change to clarify ICANN's contracting remit regarding content-related commitments?

\*

- **No. ICANN should not accept any content-related registry voluntary commitments or community gTLD commitments in the New gTLD Program: Next Round, so no Bylaws amendment is required.**
- No. While ICANN must accept, agree to, enter into, and enforce content-related registry voluntary commitments and community gTLD commitments in the New gTLD Program: Next Round, no clarification to the ICANN Bylaws is required for ICANN to perform this function.
- Yes. ICANN must accept, agree to, enter into, and enforce content-related registry voluntary commitments and community gTLD commitments in the New gTLD Program: Next Round, and ICANN must move forward with a Fundamental Bylaws change to clarify ICANN's contracting and enforcement remit regarding content-related commitments.

6. Please explain your answer to consultation topic 2, question 5, above. \*

**Absolutely not. The prohibition on content regulation in ICANN's mission is extremely important and very clear. The record of deliberations underlying this mission limitation makes it clear that it was intended to be an across-the-board limitation on ICANN's ability to regulate content and services unrelated specifically to the coordination of DNS. This was an attempt to prevent the centralization of control around the DNS root zone from being expanded into an attempt to regulate and control the Internet or the content and services that can be provided over it.**

7. Please provide any additional comments or information not addressed above that you believe are critical to inform this community dialogue concerning content-related registry commitments in future Registry Agreements.

**Overall, there are two types of PICs and RVCs - those within the scope and mission of ICANN and those that are not (content-related commitments). For PICs and RVCs that are within the scope and mission of ICANN, we agree that ICANN needs a framework for evaluation and NCSG has proposed a six-part framework in keeping with the scope, mission, multistakeholder model, and public comment processes of ICANN.**

**NCSG further submits that the best way for the Board to address content-related PICs and RVCs is to reject them categorically. Afterwards, the ICANN Board, with Community input, has a choice:  It can move forward to accept the New gTLD application, or in rare cases, vote to stop and not accept it. At no point should a**

content-related RVC be allowed to save an application and doom the ICANN organization.

NCSG's "Principles for Review and Acceptance of Registry Voluntary Commitments" are designed to ensure that RVCs are clear, measurable, and enforceable. We ask ICANN to incorporate these 6 Principles into its evolving Framework.

**Notes**

[1] Kleiman, "The Sad Story of Private PICs," Circle ID. https://circleid.com/posts/20200311-the-sad-story-of-private-public-interest-commitments-pics#ref7

[2] Ibid

[3] Mitch Stolz, "ICANN can stand against censorship and avoid another Org debacle…" EFF. https://www.eff.org/deeplinks/2020/11/icann-can-stand-against-censorship-and-avoid-another-org-debacle-keeping-content

[4] American University Washington College of Law (2019), Panel 2, https://www.wcl.american.edu/impact/initiatives-programs/pijip/events/icann-and-the-new-top-level-domains/

[5] ICANN46 GAC Beijing Communique, https://gac.icann.org/contentMigrated/icann46-beijing-communique

[6] SubPro Final Report, Minority Statement, pp. 365-370, https://gnso.icann.org/sites/default/files/file/field-file-attach/final-report-newgtld-subsequent-procedures-pdp-02feb21-en.pdf

[7] Milton Mueller, "The big question facing ICANN's contractual governance regime." Internet Governance Project. https://www.internetgovernance.org/2023/06/15/the-big-question-facing-icanns-contractual-governance-regime/

[8] ICANN Bylaws 1.1(c), https://www.icann.org/resources/pages/governance/bylaws-en/#article1