

## Board statement

When adopting the consensus policy recommendations concerning Public Interest Commitments (PICs) and Registry Voluntary Commitments (RVCs) on 26 October 2023, the ICANN Board directed the ICANN Interim President and CEO, or her designees, to initiate and facilitate a Board-level community consultation before starting the implementation process. The purpose of this consultation is to ensure that the framework for implementing these recommendations remains consistent with the ICANN Bylaws.

To that end, your group is asked to (a) review the proposed implementation framework document, which proposes a path for implementing these commitments in the New gTLD Program: Next Round; and (b) answer the questions below. Your response to these questions is requested by 23 February 2024, to support a plenary session on PICs/RVCs at ICANN79 Puerto Rico from 02-07 March 2024.

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### Below is the BC response to Board questions on RVC/PIC policies

This response is based on this [Google Form](#) provided by the board.

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### 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?

- Yes
- No

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

Your answer

ICANN's authority enables it to enforce contractual terms regardless of whether the other party to the contract agrees that it is enforceable. ICANN has the ability to seek judicial interpretation of any term in its contract if it is uncertain, and ICANN should do so when confronted with a contracted party that is in breach of its commitments to ICANN.

The BC does not agree that ICANN's enforcement powers can be limited in the manner suggested by the question, and encourages ICANN to create bold enforcement programs even where there is not a detailed, mutually understood and sufficiently objective and measurable

commitment. ICANN's risk-averse approach to contract compliance should be re-examined and updated with new approaches, including seeking judicial interpretation when appropriate, for key terms such as PICs and RVCs.

We would be very concerned if an applicant is unable to get ICANN to agree that its commitment is "clear, detailed, mutually understood, and sufficiently objective and measurable as to be enforceable," – if that application were still allowed to proceed. This would be patently unfair to potential applicants who chose **not** to apply because they were unwilling or unable to commit to enforceable RVCs that were requested by GAC, individual governments, or regulatory authorities.

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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.\*

ICANN is charged with responsibility to act in the public interest and therefore must retain control over compliance with RVCs and PICS, and not hand it off to a third party. There is nothing to stop ICANN from seeking appropriate third party experts to supplement its understanding as appropriate to ensure robust and fair compliance of RVCs and PICS.

As we propose in response to Consultation topic 2, we do believe that there is a strong interpretation permitting ICANN to enforce compliance with a voluntary commitment undertaken by an applicant. This does not amount to ICANN regulating content, but merely enforcing an undertaking of specific, objective and measurable procedures, that a registry operator has promised to implement specifically to uphold their commitments. We understand the difficulty raised regarding the consideration of the RVC at application stage. However, ICANN can, as proposed in the framework, leave the substantive decision as to the outcome of the RVC between the applicant and the objectors. ICANN's decision should be limited to an assessment (including input from both applicant and objector) as to the sufficiency of the process to achieve the outcome, regardless as to the merits of that outcome itself. The latter is simply something that the community and applicant should agree, and ICANN can defer any subjective deliberation on the RVC itself to reasonable outcomes / conclusions of that process. This appears to be supported in the framework proposed.

However, we appreciate the Board may not interpret their bylaws in a similar manner. As a fallback, we believe that the use of a wholly independent third party (not necessarily an auditor) to assess and monitor the implementation of the specific RVC might be workable with safeguards to ensure the viability of this process, including but not limited to:

- a) Chosen third party providers must not be under a direct ownership, or are under a co-ownership of a parent entity, or are member of the same Family of Companies, as the applicant.

b) Ideally, ICANN should seek to provide an approved list of sufficiently established and skilled monitoring organisations who undertake to review, monitor and make periodic determinations as to implementation of the specific, measurable, and objective processes agreed to in the acceptance of the RVC relating to content. This determination must be free from direct influence of both applicant and ICANN in the specific reviews of the RVC processes and implementation themselves. Such a list should be compiled as per the usual ICANN RFP process, and ideally, with due regard to the complexity of the RVC and processes to enforce, should encompass a spectrum of cost effective solutions, being mindful of ensuring equitable access for all registry providers existing and incumbent, with a specific emphasis on supporting providers in underserved regions. It is further submitted that ICANN should undertake regular/periodic monitoring of those providers, for review of the impartiality as well as the efficacy of the processes and procedures of the providers themselves. We do not believe such quality assurance would amount to any regulating of content, merely ensuring the suitability and ability of the provider to perform the expected objectives.

c) Third Party Providers should be contractually free from any suit / reprisal by applicant (or subsequently an approved registry operator) for the competent performance of their provision of the service, especially where such a review is negative, and where such a review may have a material impact to the applicant/registry operator in question (e.g. Breach of RA etc.). Such an immunity from suit however should be necessarily subject to reasonable limitations regarding misconduct, negligence or similar considerations in the conduct of reviews. This shall ensure ongoing impartiality. The immunity would not apply to ICANN.

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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?

ICANN should consider issuing advisories, FAQs and Educational materials that describe the best way to implement enforceable RVCs. This would support applicants in creating enforceable, specific and measurable processes and procedures for their proposed and agreed RVCs.

Applicants should propose commitments that include a detailed process to ensure that they are specific, measurable, realistic, properly resourced and trackable, along with details for how these would be achieved. Having this agreed would reduce the compliance burden on ICANN.

If ICANN nevertheless believes that it cannot enforce a content-related RVC in accord with its bylaw, we propose, as per our answer to Q4, a process of approved providers being added to the implementation framework.

ICANN's role in ensuring compliance can be strengthened by adding a follow-up obligation that the registries "shall enforce" the terms of the PIC that may be included in the registry's policies or the registrar's registry agreement, and that if the registry fails to do so, ICANN has the right and ability to enforce them in court.

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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.

The original PICDRP, in concept, is sound. Change is needed regarding a complainant's ability to prove any failure to make good on PICs or VPICS was not clearly established. The PICDRP can benefit from additional clarity, specifically to support a complaint that the agreed enforcement of the ICANN approved specific process, is not, or does not achieve the expected or intended outcome. The panel would be empowered to review the process and procedures undertaken, and can assess, by way of an objective standard, whether the policies, procedures etc achieved the desired outcome. ICANN compliance should be then limited to implementation of the decision of the PICDR . i.e. the proposed processes to achieve the intended benefit of the RVC have been found to be lacking, and as such in absence of a means to measure/test/implement the RVC, may be considered a breach of a material provision of the RA itself.

As such, there may be a necessity to include a modification to the process to ensure PICDRP can consider, by way of substantive evidence based complaints, the process and procedures for enforcing the RVC . The panel must be empowered to also come to the conclusion that the application of the agreed processes and procedures (when ICANN accepted the RVC), nonetheless resulted in a clearly evidenced and observed material impact, for which the RVCs and those processes were intended to prevent. In this instance, a further remedy should be available whereby the panel permits changes to those previously agreed processes and procedures, which were fundamental to the RVC acceptance. This is clearly only where the panel believes the remedy proposed cures the issue. From ICANN's point of view, this should again absolve any consideration as to the merit of the intended outcome of the RVC, merely that via the DRP, a new set of processes and procedures have been agreed.

ICANN must retain input as to enforceability, ensuring any new agreed processes and procedures remain specific, measurable and achievable (as intended by the framework). Where an outcome is not considered achievable, or the RVCs not met, ICANN should then be empowered to bring enforcement proceedings, as per established procedure for potential breach of the contract. In such a case, ICANN's role would also be merely playing its proper role as implementer of that DRP decision, not as the decision maker of the substantive and content related matters.

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

Your answer

ICANN should expect to set aside funding for legal advice or or expect advice associated with seeking judicial interpretation of the PICS.

In addition, the proposed implementation framework for PICS should include additional DNS abuse related commitments such as those proposed by the BC in its recent comment at <https://www.icann.org/en/public-comment/proceeding/amendments-base-gtld-ra-raa-modify-dns-abuse-contract-obligations-29-05-2023/submissions/icann-business-constituency-bc-20-07-2023>

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## **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. 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.

Anything that is grandfathering in from the prior round, such as the Spec 11.3(a)., and anything that is consistent with them.

Anything that addresses DNS abuse, phishing, and fraud, and anything specifically mentioned in the Bylaws, such as Annex G-2.

Nothing in the proposed RVCs requires ICANN to impose or dictate the specifics of the RVC, merely that applicant provides sufficient detail and undertake a clear means by which they would achieve the processes and procedures proposed. All types of content related commitments that the applicant proposes should be allowed. The bylaws state:

“ 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.”

We believe that there remains a strong interpretation which permits the enforcement, by ICANN, of a voluntary commitment undertaken by an applicant, however without ICANN pressure or expectation in the commitment itself. We submit this does not amount to ICANN regulating content, merely enforcing an undertaking of specific, objective and measurable processes and procedures, that a registry operator has promised to implement specifically to enforce their RVC. We understand the difficulty raised regarding the consideration of the RVC at application stage, however ICANN can, and should, as proposed in the framework, leave the substantive decision as to the outcome of the RVC between the applicant and the objectors. ICANN's decision should be limited to an assessment (including input from both applicant and objector) as to the sufficiency of the process and procedures to achieve the outcome, regardless as to the merits of that outcome itself. The latter is simply something that the community and applicant should agree, and ICANN can defer any subjective deliberation on the RVC itself to reasonable outcomes / conclusions of that process. This appears to be supported in the framework proposed.

Section 1.1(d) of the ICANN bylaws grandfathers the terms and conditions of the documents of **all** registry and registrar contracts in force on 1 Oct 2016. It states that those terms may not be challenged on the basis that such terms conflict with ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers under the Bylaws.

The Bylaws specifically reference “any registry agreement or registrar accreditation agreement not encompassed by such RY/RR agreements 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. **This means that so long as the new PICS are consistent with old PICS, ICANN is assured that the obligations are enforceable and are able to be included in future PICS.**

As a result, ICANN should create a table of all PICS previously adopted to serve as a guideline for what types of content related commitments can be included in future rounds.

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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. 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.

There may be types of content restrictions that might be problematic, as described in the Stress Tests we provide in response to question 7 below.

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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.\*

There is a difference between ICANN requiring specific PIC language related to content, versus ICANN allowing those restrictions to be included in the applicant's voluntary commitments.

As ICANN does not propose RVC's, there is no pressure or expectation on these voluntary commitments. This does not amount to ICANN regulating content, but merely enforcing an undertaking of specific, objective and measurable processes and procedures, that a registry operator has promised to implemented specifically to enforce their RVC therefore not impacting bylaws



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.

Your answer

## Stress Tests for ICANN enforcement of Registry Voluntary Commitments (RVCs)

The Subsequent Procedures PDP Working Group (SubPro) considered the scope and limits of voluntary commitments made by new gTLD applicants as part of their registry agreements with ICANN.

In its 30-Sep- 2020 letter, the ICANN Board noted,

“The language of the 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.”

“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.”

The SubPro final report of Feb-2021 did not recommend specific mechanisms and policies to address the board’s questions, noting that RVCs “should only be permitted if they fall within the scope and mission of ICANN as set out in the New Bylaws.”

All of this prompted a [Minority Statement on Topic 9](#): Registry Voluntary Commitments / Private Public Interest Commitments. That statement called for additional research and review of how ICANN could enforce PICs and RVCs that might exceed the limited scope and mission in ICANN’s 2016 bylaws.

**The BC believes that ICANN Org, Board, and SubPro need to finish their work on RVCs, to include specific policy guidelines for approval and enforcement.**

Absent that work, governments & GAC reasonably assume that ICANN compliance will continue its prior practice of enforcing contractual obligations of registries – including registry voluntary commitments (RVCs). That will lead some governments to remove their objections to a new gTLD application after the applicant promises to honor the RVC. Registries, Registrants, GAC and governments need to be clear about the scope of ICANN Org’s enforcement obligations for RVCs and PICs.

Also the BC believes that ICANN Compliance may sometimes need to consider content on resolved domains – in order to determine the sufficiency of the processes and procedures to enforce the RVCs and PICs related to conduct, are not being violated.

### **Can Stress Testing be useful in evaluating procedures for further expansions of gTLDs?**

‘Stress Testing’ is a simulation exercise where plausible—*not necessarily probable* – hypothetical scenarios are used to gauge how certain events will affect an entity or system. In the financial industry, for example, ‘stress testing’ is used to evaluate the financial strength of banks facing plausible scenarios of external crises.

In 2014-17, the ICANN community used stress testing to evaluate recommendations to improve ICANN’s accountability after the IANA contract was transitioned from the NTIA. In those stress tests,



improvements in accountability were evaluated by comparing ICANN’s accountability mechanisms before and after the IANA transition.

In the case of PICs and RVCs, stress testing could be helpful to expose risks and evaluate the adequacy of current policy recommendations.

**Stress Test #1: *False expectations about enforcement of safeguards RVCs***

Absent specific policy guidelines for RVCs, governments & GAC reasonably assume that ICANN compliance will continue its prior practice of enforcing contractual obligations of registries – including registry voluntary commitments (RVCs). That leads several governments to remove their objections to a new gTLD application after the applicant promises to remove registrants whose resolving website fails to prevent illegal sale of drugs.

After delegation, those governments & GAC complain that the gTLD operator is not following its promised safeguard policy and advises ICANN to find the registry operator in breach of their agreement. ICANN compliance issues a breach notice to the registry.

That prompts an Independent Review Panel (IRP) challenge claiming that *web content resolving on domains is outside the scope of ICANN*. The IRP decision blocks ICANN from enforcing all safeguards that involve consideration of web content resolved from domain names.

**Consequence:** 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.

Now, let us assume that the threshold Stress Test above establishes the necessity for ICANN to complete development of explicit policies before opening the gTLD round and accepting formal objections, which was the recommendation of the Minority Statement on Topic 9: Registry Voluntary Commitments / Private Public Interest Commitments <sup>[2]</sup>.

Below are Stress Tests to help guide that policy development process:

**Stress Test #2: *Application for gTLD that proposes an RVC to restrict eligibility of domain holders***

Absent specific policy guidelines for RVCs, governments & GAC assume that ICANN will continue enforcing contractual obligations of registries – including registry voluntary commitments (RVCs). That leads several governments to remove their objections to a new gTLD application after the applicant promises to restrict eligibility for registrants to licensed professionals.

Before this RVC is accepted as part of the gTLD contract, ICANN legal reviews the RVC in accord with approved RVC enforcement guidelines. ICANN determines that the eligibility of registrants may involve some consideration of content on resolving domains, but only to determine whether the registrant has met eligibility criteria, and says ICANN Compliance could enforce this RVC.

**Consequence:** Governments and GAC are aware that ICANN Compliance would evaluate compliance with this RVC, and therefore remove objections on that expectation.

**Stress Test #3: *Application for .CHATBOT with an output-based RVC***

An applicant for .CHATBOT would allow registrations from entities offering generative AI chatbot applications. Based on public comments and warnings from the GAC about harmful AI applications, the gTLD applicant offers an RVC committing to prevent any .CHATBOT resolving domains from spreading harmful or biased messages. The US government supports this RVC since President Biden secured commitments from US-based AI companies in Jul-2023 to avoid “societal harms” in generative AI responses.

Before this RVC is accepted as part of the gTLD contract, ICANN legal reviews the RVC in accord with approved RVC enforcement guidelines. ICANN determines that the content of chatbot responses on resolved domains is outside of ICANN’s scope and informs the applicant and objecting governments that ICANN cannot enforce this proposed RVC.

**Consequence:** Governments and GAC are made aware that this RVC cannot be part of the registry contract and cannot be enforced by ICANN, and this informs their decision on how to resolve their objection.

**Stress Test #4: Application for .大中国 gTLD (IDN) with a content-based RVC**

An applicant for this IDN gTLD targets Chinese-reading internet users everywhere with domains providing news and other content. China's GAC representative issues an early warning objecting to the gTLD because the proposer is not based in China and does not have the approval of the Chinese government. To remove this objection, the applicant proposes an RVC that commits it to suspend or delete any domains resolving to website content that “hurts the feelings of the Chinese people,” according to a public security law proposed in China.

Before this RVC is accepted as part of the gTLD contract, ICANN legal reviews the RVC in accord with approved RVC enforcement guidelines. ICANN determines that the content on resolved domains is outside of ICANN’s scope and informs the applicant and objecting governments that ICANN cannot enforce this proposed RVC.

**Consequence:** Governments and GAC are made aware that this RVC cannot be part of the registry contract and cannot be enforced by ICANN, and this informs their decision on how to resolve their objection.

**Stress Test #5: Application for .ENTERTAINMENT gTLD with a content-based RVC**

An applicant for this gTLD targets domains resolving to websites that provide online entertainment, including images, video, and gaming. Copyright and trademark interests object to the gTLD unless the applicant adopts measures to protect copyrighted material. The applicant proposes an RVC that commits, in response to a legal challenge by a validated copyright holder, to publish all registrant contact data and to temporarily suspend the domain pending resolution of the copyright claim.

Before this RVC is accepted as part of the gTLD contract, ICANN legal reviews the RVC in accord with approved RVC enforcement guidelines. ICANN determines that the content on resolved domains is outside of ICANN’s scope and informs the applicant and objecting governments that ICANN cannot enforce this proposed RVC.

**Consequence:** Governments and GAC are made aware that this RVC cannot be part of the registry contract and cannot be enforced by ICANN, and this informs their decision on how to resolve their objection.

**Stress Test #6: *Application for .THERAPY gTLD that proposes an RVC to restrict eligibility of registrants***

A new gTLD applicant for .THERAPY encounters government objections after the applicant promises to restrict registrations to only licensed professional therapists.

Before this RVC is accepted as part of the gTLD contract, ICANN reviews the RVC in accord with approved RVC enforcement guidelines. ICANN determines that the eligibility of registrants may involve some consideration of content on resolving websites, but only to determine whether the registrant has met eligibility criteria. ICANN therefore flags this RVC as one that ICANN could enforce.

After delegation, however, RVCs on eligibility are not followed when eligible registrations are subsequently transferred to other registrants where there is no secondary validation of eligibility. GAC advises ICANN to enforce compliance. ICANN Compliance refuses to enforce the eligibility restriction beyond the original qualification of a registrant.

**Consequence:** The GAC advises ICANN that it has not honored its commitment to enforce this registrant eligibility RVC, and this leads a majority of governments to support a Nov-2025 UN resolution establishing ITU management of the DNS.

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[1] See Minority Statement for [SubPro Final Report](#), at pages 365-370, submitted by:

Elaine Pruis, Senior Director Naming Operations & Policy, Verisign

Jessica Hooper, Senior Manager, Project Management, Verisign

Kathryn Kleiman, Professor, Glushko-Samuelson Intellectual Property Law Clinic, American University

George Sadowsky, former ICANN Board Member, 2009-2018

Jim Prendergast, President, The Galway Strategy Group

[2] See Minority Statement for [SubPro Final Report](#), at pages 365-370.