

Issue: The Subsequent Procedures Implementation Review Team (SubPro IRT) and ICANN org do not agree on the implementation language proposed in the Next Round Base Registry Agreement (RA) regarding Recommendation 36.4.

SubPro Final Report Recommendation 36.4:

ICANN must add a contractual provision stating that the registry operator will not engage in fraudulent or deceptive practices. In the event that ICANN receives an order from a court that a registry has engaged in fraudulent or deceptive practices, ICANN may issue a notice of breach for such practices and allow the registry to cure such breach in accordance with the Registry Agreement. Further, in the event that there is a credible allegation by any third party of fraudulent or deceptive practices, other than as set forth in above, ICANN may, at its discretion, either commence dispute resolution actions under the Registry Agreement (Currently Article 5 of the Registry Agreement), or appoint a panel under the PICDRP. For the purposes of a credible claim of fraudulent or deceptive practices the reporter (as defined by the PICDRP) must only specifically state the grounds of the alleged non-compliance, but not that it personally has been harmed as a result of the registry operator's act or omission.

Proposed Redlines

The conflict arises from the requirements to add a contractual provision prohibiting registry operators from engaging in fraudulent or deceptive practices, and for ICANN (or ICANN, with the assistance of a PICDRP panel) to make the substantive determinations as to whether a registry operator in fact engaged in fraudulent or deceptive practices?

Issues about fraudulent and deceptive practices are generally handled by governmental authorities and courts. Recognizing that ICANN (or a PICDRP panel) is not a law enforcement or consumer protection agency, and to avoid exceeding the scope of ICANN's mission and bylaws, ICANN proposed crafting the implementation language in the Registry Agreement to factor in the expertise and role of such governmental authorities by requiring a third-party complainant to provide to ICANN a finding by a consumer protection agency or the equivalent that the registry operator engaged in fraudulent or deceptive practices. ICANN also proposed to appropriately define the scope of the behavior that could be the subject of a complaint to fraudulent or deceptive practices in the context of ICANN's Registry Agreement. This was done by stating that the fraudulent and deceptive practices must be in the context of "the provision of registry services". Below is the text last proposed by org to the IRT:

ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) ICANN receives a complaint, or ICANN otherwise becomes aware, that Registry Operator is engaging in fraudulent or deceptive business practices in provision of Registry Services under this Agreement for the TLD; and (ii) such fraudulent or deceptive business practices have resulted in an adverse action or decision and a failure to remediate finding against the Registry Operator by a relevant governmental consumer protection authority or authorities with jurisdiction over the matter, or Registry Operator is the subject of a determination that ICANN reasonably deems as the substantive equivalent

of any of the foregoing; provided that, if ICANN receives a complaint related to the foregoing, all available relevant documentation from such adverse action or decision and a failure to remediate finding must be included as part of the complaint.

With the proposed language, ICANN believes org accurately captured the intent of the Recommendation 36.4, while taking into account ICANN's mission to ensure the stable and secure operation of the DNS. ICANN is not in the position of taking the place of law enforcement, a court of law, or consumer protection authorities to define what constitutes fraudulent or deceptive practices in different jurisdictions.

REDLINES: Preliminary Working Draft

Excerpted Redline of Section 4.3(f)– For Discussion Purposes - Marked Against ICANN's 1 November 2024 Draft

ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) Registry Operator knowingly employs any officer who is convicted of a misdemeanor related to financial activities or of any felony, or is judged by a court of competent jurisdiction to have committed fraud or breach of fiduciary duty, or is the subject of a judicial determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such officer is not terminated within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, (ii) any member of Registry Operator's board of directors or similar governing body is convicted of a misdemeanor related to financial activities or of any felony, or is determined by a court of competent jurisdiction or by an arbitrator to have committed fraud or breach of fiduciary duty, or is the subject of a judicial or arbitral determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing and such member is not removed from Registry Operator's board of directors or similar governing body within thirty (30) calendar days of Registry Operator's knowledge of the foregoing, or (iii) the Registry Operator is determined by a court of competent jurisdiction or by an arbitrator to have committed fraud or deceptive practices [in the provision of Registry Services under this Agreement for the TLD](#), or is the subject of a judicial or arbitral determination that ICANN reasonably deems as the substantive equivalent.

Excerpted Redline of new subsection in Section 4.3 – For Discussion Purposes - Marked Against Version Shared 10 February 2025

ICANN may, upon notice to Registry Operator, terminate this Agreement if (i) ICANN receives a complaint, or ICANN otherwise becomes aware, that Registry Operator is engaging in fraudulent or deceptive business practices ~~in -connection-with-~~ [the operation provision of Registry Services under this Agreement for](#) the TLD; and (ii) such fraudulent or deceptive business practices have resulted in an adverse action or decision and a failure to remediate finding against the Registry Operator by a relevant governmental consumer protection authority or authorities with jurisdiction over the matter, or Registry Operator is the subject of a determination that ICANN reasonably deems as the substantive equivalent of any of the foregoing; provided that, if ICANN receives a complaint related to the foregoing, all available

relevant documentation from such adverse action or decision and a failure to remediate finding must be included as part of the complaint.