

7 February 2024

Dear NRO EC and RIR Legal Counsel,

On 25 October 2023, the NRO EC, on behalf of the NRO, asked the ASO AC for help with two tasks aimed at strengthening the RIR system:

- (1) **ICP-2 Implementation Procedures:** The NRO indicated that it intended to draft a set of procedures (Implementation Procedures) to be used in validating that RIRs continue to comply with the same requirements for which they were accredited under the Internet Coordination Policy 2 document (ICP-2). The NRO asked the ASO AC to review those draft procedures in consultation with regional communities, once they became available, and to provide feedback on the draft to the NRO.
- (2) **Strengthening ICP-2:** The NRO asked the ASO AC to establish and manage a process to update ICP-2, in consultation with each of the RIR communities, to provide the RIR system with greater accountability to the Internet community. The NRO contemplated that this ICP-2 work should take place in the 2024 / 2025 timeframe.

On 23 January 2024, the NRO provided the ASO AC with a first draft of the Implementation Procedures for the latter's review. On 29-30 January 2024, the ASO AC met in person in Montevideo, Uruguay, as well as remotely, to discuss the draft Implementation Procedures with the NRO EC Chair, certain RIR legal staff, and each other.

The ASO AC has aligned and consolidated its feedback on the draft Implementation Procedures. This letter sets forth that feedback. However, we may provide additional feedback in the future if additional ideas for improvement occur to us, either with respect to the initial draft or subsequent revisions by the NRO.

Feedback

Legitimacy of Implementation Procedures. We note at the outset that some observers of this process may question the legitimacy of the Implementation Procedures if they are ultimately adopted. In particular, some observers might believe that the Implementation Procedures fundamentally add new substance to ICP-2 and that it is therefore necessary to formally amend ICP-2 or develop a new global policy in order to adopt such procedures.

Given this potential concern, we made certain to ask direct questions to the NRO and RIR legal staff about whether the Implementation Procedures would be valid, if adopted, and to play "devil's advocate" by making the strongest case for their invalidity on behalf of potential future critics as a way of representing their interests or arguments. However, we were satisfied with the quality and sufficiency of the NRO's answers to our questions.

In particular, we were satisfied with the NRO's explanation that ICP-2 must implicitly or inherently require RIRs to continue to comply with the requirements of their accreditation. Otherwise, an accredited RIR could simply abandon all of its commitments one day after accreditation, an allowance that was neither intended in the original ICP-2 document nor reasonably interpretable as its meaning when published. We also agreed that the legitimacy of the Implementation Procedures was bolstered by the fact that it neither added any obligations to nor subtracted any obligations from existing RIRs as provided in ICP-2. And we have suggested edits in this letter to Section 2.16 of the Implementation Procedures to clarify that that section is not adding any new obligations. Thus,

we agree that the Implementation Procedures merely clarify and operationalize the substantive commitments that are already established in ICP-2 and that it is not necessary to either amend ICP-2 to add these procedures or to enact a new global policy.

However, we believe it is important for the NRO to address this issue upfront and to allay any concerns some may have about the legitimacy of the Implementation Procedures. We recommend that the NRO update the Introduction to the Implementation Procedures to explain that such procedures merely clarify and operationalize the existing ICP-2 commitments and to note that the procedures neither add to nor subtract from such commitments. The Introduction should also note that the procedures should not be read in isolation but instead in combination with ICP-2.

Terms and Definitions. Section 1.6 of the Implementation Procedures states, “Terms not otherwise defined in this document have the meaning given to them in ICP-2.” Where possible, the Implementation Procedures should use the term “resource holder” rather than “ISP” or “LIR.” However, because that term is not defined in either ICP-2 or the Implementation Procedures, the Implementation Procedures should define the term. Consider also whether the Implementation Procedures should briefly explain why the term is being used and how the meanings of “ISP” and “LIR” have evolved since ICP-2 was published.

Publicity. The Implementation Procedures should specify the conditions under which a Compliance Review will be made public. If ICANN publicly discloses that it is conducting or has conducted a Compliance Review, that disclosure could harm the reputation of the Subject RIR, even if ICANN ultimately determines that the Subject RIR is compliant. Therefore, we recommend that ICANN should not publicly disclose a Compliance Review unless ICANN identifies a material non-compliance. Moreover, the Implementation Procedures do not indicate that any final decision to derecognize an RIR will be made public. We think they should.

Activities. Section 2.16 of the Implementation Procedures states, “An RIR should not be involved in forward domain name assignment or administration.” This language could potentially be construed to prohibit RIRs from engaging in these activities. However, Section 7 of ICP-2 states only that “it is strongly *recommended* that the new RIR should not be involved in forward domain name assignment or administration” (emphasis added). To avoid any risk that Section 2.16 of the Implementation Procedures could be interpreted as adding a new restriction to RIRs, we recommend revising that section to couch this statement merely as a recommendation.

Unresponsiveness. Section 3.7 of the Implementation Procedures states that ICANN may identify a material non-compliance if it reasonably believes “that the Subject RIR is incapable of responding.” We think this wording is unclear as to whether it includes situations where the Subject RIR is technically capable of responding but refuses to do so. We recommend changing this language to explicitly include deliberate non-cooperation.

Derecognition. Section 4.2 could be read to require the Subject RIR to cease all RIR-related activities the moment it is derecognized. However, for purposes of stability, there should be a transition period between any derecognition and the time when the Subject RIR ceases such activities.

Miscellaneous Edits. We offer the remaining minor edits to the Implementation Procedures:

- Section 3.7. Add “as soon as practicable” to the Subject RIR’s obligation “to provide all information and access necessary for ICANN or its delegate to be able to conduct the Compliance Review.”
- Section 3.14. Remove the word “immediately” to improve readability.
- Section 4.1(a). Add “in an orderly fashion.”
- Section 4.1(b). The words “in accordance with ICP-2” are not needed and can be deleted.

Closing Remarks

Please let us know if you have any questions about our feedback. We look forward to continuing to work with the NRO on this important project.

Sincerely,



Herve Clément
On behalf of the ASO AC

