

**Comments of the Noncommercial Stakeholders Group (NCSG)
on the
Updated Supplementary Procedures for Independent Review Process (IRP)**

January 24, 2017

The NCSG appreciates the opportunity to comment on the [proposed supplementary rules](#) that have been released by the Implementation Oversight Team.

The IRP is a very important part of ICANN's accountability arrangements. As NCSG, one of our main concerns is that IRP challenges can be used to prevent ICANN from taking actions that exceed its mission. In particular, we want strong protections against ICANN moving into content regulation and other more extensive forms of regulating Internet users and uses that are not required to coordinate the domain name system.

With that in mind, we have several major objections to the proposed rules: statute of limitations, notice, rights of intervention and remedies.

1. Statute of Limitations. The current Supplementary Procedures for IRP provides a very limited time for a user to challenge an ICANN policy as violating the mission. The challenge must be made within 45 days of the time the person becomes aware of the harm caused but — far more important — after one year from its passage, a decision or policy becomes *completely exempt* from any IRP challenge. The proposed supplementary rules time-limit IRP challenges to a maximum of one year after ICANN's action, thereby immunizing it from any subsequent challenges. This is an extraordinary loophole.

It could easily take 2-3 years after a policy is adopted for it to be actually implemented by ICANN and cause harm. Under these proposed supplementary rules, no one could challenge the rule if the harms were caused a year after it was passed.

Making matters worse, these problems were pointed out on the email list of the working group during the ICANN CCWG process. Indeed, there was general agreement that the time limit was a problem and should be changed. But through a series of unfortunate coincidences and bad decisions, those objections were ignored and the Implementation Oversight Team (IOT) pressed ahead with the originally proposed text.

Time limits make sense when one is dealing with commercial contractual disputes, such as disputes between ICANN and a new top level domain applicant or a registrar. Those disputes pertain to specific decisions of ICANN, not to its overall mission and not to consensus policies that might violate the mission or core commitments. Clearly, we don't want commercial actors to be able to hold ICANN in a state of perpetual uncertainty regarding decisions or actions in the

narrow domain that it regulates. But the time limits make no sense at all when applied to disputes over consensus policies that are alleged to transgress mission limitations. The mission limitations are meant to protect fundamental individual rights, and to permanently constrain ICANN's mission. They are not matters of expediency and are not time-dependent. If a policy allows ICANN to expand its mission beyond its intended remit, the actions it takes under that policy should be subject to challenge at any time.

In attempt to downplay the significance of this problem, some have argued that after a policy becomes immune to IRP challenge, if ICANN takes an action *implementing* an ICANN policy that is itself a violation of the mission limitations or bylaws, that is a separate event. Hence the clock would start again, and we would have another year to challenge the implementing action.

There are many flaws in this interpretation. One obvious one is that such an IRP challenge would not be against the *policy itself*, it would only challenge the implementing action. This means that a successful challenge would not prevent any future implementations of the policy that might transgress mission limitations. Furthermore, the immunity of the policy itself from challenge would stack the deck against challengers.

But there is an ever more serious problem with relying on implementation actions to challenge policies. Only ICANN actions can be challenged under the IRP. So if the implementing action is by a Registry, it cannot be challenged under the IRP. This takes us back to the pre-transition position where only Registries are protected by the IRP, and any other "materially affected parties" are not. Registries, who are acted on by ICANN, would always be able to challenge an implementing action by ICANN. But Registrants, who are acted on indirectly through Registries and Registrars, would quickly run out of time to challenge the policy behind the Registry action and cannot challenge the Registry's implementation. As representatives of registrants (non-contracted parties), NCSG finds this unacceptable. Thus, we respectfully but firmly submit that the 12-month hard time limit on IRP challenges to Board policy decisions must be removed from Section 4.

Our second part of this objection is the brevity of the arbitrary 45-day time limit within which a claimant must act after having become aware of a material harm. Here our objection is not philosophical in nature -- we readily acknowledge that some time limit on action is appropriate, as claimants should not be permitted to "sleep on their rights" once aware of their injury. However, from a practical standpoint 45 days is simply too short a time period for claimants. This is particularly true if the potential claimant is a collective body (like the NCSG) where significant public actions need to be coordinated with numerous members and other stakeholders. Add to this the necessity of finding and retaining counsel (not to mention the mechanics of funding the endeavor) and our view is that 45 days is far too short a time frame within which to reasonably expect action. To be candid we would think that 180 days is an appropriate time frame -- after all most judicial systems world-wide have limitations periods that

are measured in years, rather than days or months. In the spirit of constructive compromise, however, we would be satisfied if the limitations period were increased to 90 days.

The NCSG notes that the legal team from Sidley and Austin that is working with the IOT essentially agrees with the criticism of the IRP supplementary rules we have advanced here. The implementation team had an “agreement in principle” that “An action/inaction by ICANN that is facially invalid (i.e. it could not be implemented in a way that did not violate the Articles or Bylaws) could be challenged anytime.” The Sidley-Austin analysis concludes,

As currently drafted, Section 4 of the Draft Supplemental Rules does not capture the Agreement in Principle described above. ...[A]s currently drafted, a facially invalid action or inaction could not be challenged by a claimant if the material impact to the claimant (harm or injury) arose at a time such that the claim could not be filed within 12 months from the ICANN decision that created the facial invalidity.

The Sidley-Austin report goes on to state that:

It may be that the IRP Subgroup has determined that 12 months is the period in which a claimant reasonably should have known of the action or inaction giving rise to the Dispute in all circumstances (or in all circumstances other than where the challenge is on facial invalidity grounds); however, we think such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence knowledge of any injury, had ever arisen.

We believe that the legal advice provided confirms our concerns; moreover, the legal experts concluded that “Exempting facial challenges from the 12-month rule would not create limitless jurisdiction.”

2. Notice

In the real-world, an Appellant seeking to overturn a decision he/she/it lost or a regulation he/she/it does not like must provide notice to the Appellee. It’s a fundamental part of due process to allow everyone directly-involved in an underlying proceeding to come together to participate in its appeal.

But those who lose arbitration decisions, e.g., Community Objections at the International Chamber of Commerce (created as part of the New gTLD procedures) have no such obligation. The losers of such Objections can (and do) file CEP and IRP actions without ever telling the winners that these actions have been filed. Further, it may be weeks before ICANN published the notice telling the world that such challenges have been filed.

It made be further weeks before the filings and pleadings of the IRP proceeding are published by ICANN on its webpage, and such a website is quite obscure and followed by only a handful of parties to begin with. It is likely to be well into the process before Communities (and other directly-impacted parties) have any idea that filings against their claims, winning decisions and interests have even been filed.

The same injustice will arise when a Consensus Policy is challenged (which it may be under the ICANN Bylaws). There is currently no requirement that the Claimant filing an IRP must give notice to the Supporting Organization which created and passed the Consensus Policy. Such lack of notice is a violation of due process - the Supporting Organization and its Stakeholder Groups the right to know that a challenge has been raised -- they have the right to timely and "actual notice."

As discussed above, in a commercial arbitration there are traditionally only two parties, so notice is not an issue. But with the expansion of access to the IRP proceeding - for a range of new types of disputes- actual notice now not only makes sense, it is critical to protection of the fundamental rights of all the parties.

It makes no sense when there are directly-involved additional parties -- such as noncommercial Communities who have fought the high barriers of a Community Objection and prevailed - to be left out of a challenge to their decision when the losing party (the applicant in this case) files an IRP proceeding with ICANN.

It further makes no sense when the IRP is acting as a "Constitutional Court" to review a Consensus Policy that the whole of the Supporting Organization that negotiated that Consensus Policy is left out. ICANN Counsel is outstanding, but it is the Supporting Organization and the ICANN Community that negotiated, wrote and passed the Consensus Policy and they, too, must know when a challenge to that policy is filed.

Actual notice - requiring the Claimant to file copies of its Request for an IRP together with all pleadings, exhibits, appendices, etc, is a standard part of due process in litigation and dispute forums around the world - and as easy as adding appropriate "cc's" to the email filing the claim with ICANN.

3. Right of Intervention

Currently, the IRP *Updated Supplementary Procedures* only have the disgruntled party and ICANN as the parties to the proceedings. All others have to apply to accepted -- and the first argument the Claimant's Counsel makes is "No!" That's not the procedure in any other litigation forum which practices due process. Everywhere else, all parties to the underlying proceeding have the ***right to intervene -- the right to be heard in the challenge to their proceeding.***

Here too, such a Right of Intervention (a material change to Section 7 of these Procedures) must be added.

It only makes sense as ICANN was not a party to the underlying proceeding and does not know the arguments made. Working with ICANN, a winning party or Community must have the right to represent its own interests.

Should the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.

Similarly, for a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work. The negotiation of the PDP in a Working Group takes months and even years. The research done, the negotiations made, the public comment received, and the compromises sought are all part of the record which the Stakeholder Groups will know. No single party, perhaps a company upset with the compromise, should be allowed to unilaterally challenge or seek to renegotiate a Consensus Policy without all other equally-engaged parties being allowed on an equal basis into the “IRP Room.”

3. Emergency Panels and Interim Measures of Protection Must be Openly Heard with All Relevant Parties Present

It is very easy to believe something is an emergency when you only hear one side. IRP Panels and Emergency IRP Panelists are being asked to make major decisions without hearing from all sides who are directly-impacted by a decision.

So an IRP Panel may hear that a Winning Party is seeking to stop the implementation of a Consensus Policy (pending an IRP Proceeding that may take months or longer). What would be the impact of such a delayed implementation -- or implementation actually stopped after having commenced?! ***Clearly, all of those directly impacted by delay of a Consensus Policy (including registries, registrars, and registrants) must be allowed to comment on the impact of that delay. If the Emergency Request impacts contracts already passed, EU Privacy Shields already in place, etc., it is the party directly impacted by the delay or cessation of the policy that will be in the best position to comment on the directly harm of its even temporary cessation.***

The IRP Panel or Emergency Panelist has the right and obligation to hear about the harms from all sides or it cannot properly evaluate “[t]he balance of hardships” as required by the *IRP Supplementary Procedures* in Section 10.

4. Returning a Consensus Policy to the ICANN Board and the Supporting Organization Which Wrote It to be Rewritten

After many months or even years of work, Supporting Organizations produce Consensus Policies. If on review through this new IRP “Constitutional Court” proceeding, the IRP Panel finds that some portion of the Consensus Policy does not comply with ICANN Bylaws or process and needs to be rewritten, who should do that?

In the real world, appellate courts remand such laws and regulations back to the experts who created them -- back to the legislators and regulators. Then, those groups review those portions of the rules that need to be reviewed and rewritten and do so pursuant to their rules -- and with full notice to their Communities.

We’ve stepped into the IRP as a Constitutional Court without adequate consideration of the limitation of their powers. Like appellate courts in countries, the IRP should only be judging what and what is not consistent with ICANN Bylaws. The hard work of rewriting those sections of the Consensus Policy that were invalidated below to the communities that created the rules in the first place.

Accordingly, the IRP Panels should send invalidated portions of Consensus Policies back to the ICANN Board which should send it back to the Supporting Organization that created them. Such must be the rules written into the *IRP Supplementary Procedures* “Standard of Review” (Section 11).

In summary, NCSG expects the supplementary rules to be modified to meet the following criteria:

- The IRP has to protect registrants, not just contracted parties.
- There should be no fixed time limit on the rights of Internet users to challenge a policy that is alleged to take ICANN beyond its mission or otherwise violate the fundamental bylaws.
- IRP challenges need to be able to challenge policies, not just implementations, otherwise registrants are unprotected against registries and registrars.
- While it is reasonable to set a limit on the period in which a registrant is harmed by a policy and files an IRP challenge to the policy, 45 days is too short. Three months is more appropriate given the need for ordinary registrants to consult with lawyers and assess the damage caused by a policy.

We further look forward to the supplementary rules being evaluated and wisely updated to resolve critical due process issues pointed out above and ensure to directly-impacted, materially-affected parties:

- Actual notice,
- Rights of intervention,
- Rights to be heard in emergency proceedings evaluating “interim measures of protection” and “balance of hardships,” and especially
- Remedies of the IRP Panel when a portion of a Consensus Policy is set aside. Clearly the Community must be called upon to rewrite this Consensus Policy together and through its well-established procedures.

We greatly appreciate your upcoming work in these areas.