

ICANN organization submits this comment to express its continuing concerns with and opposition to the elimination of a “statute of repose” from the proposed Updated Supplementary Procedures for ICANN’s Independent Review Process (IRP), Rule 4 (Time for Filing). ICANN org’s comment specifically relates to the proposed elimination of any outer time limit for the filing of an IRP. ICANN org offers this comment to reiterate the contributions it made within the IRP Implementation Oversight Team (IOT) as it deliberated on this issue, and to flag that if an outer limit on filing is not provided within the Supplementary Procedures presented to the ICANN Board for approval, the concerns stated within this submission would be raised with the ICANN Board at that time.

In the version of the Draft Updated Supplementary Procedures (Draft Rules) previously posted for comment, Draft Rule 4, Time for Filing provided that a “CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material [e]ffect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.” [Draft Rule 4 \(31 October 2016\)](#). Following receipt of public comments (see <https://www.icann.org/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf>), the IOT discussed the issue of “repose,” which has two components:

1. How long after a person is aware (or reasonably should have been aware) of a material effect of an action or inaction by ICANN giving rise to the dispute must an IRP claim be filed; and
2. How long of a period of time, in total, should pass before it is no longer reasonable for a person to claim he/she became aware of an action or inaction by ICANN that allegedly caused the claimant material harm so as to give rise to a dispute?

The first question was settled amongst the IRP IOT, which agreed that a 120-day period from becoming aware (or reasonably should have been aware) of an action (rather than the previously proposed 45 days in the Draft Rules) is a sufficient time for filing. All participating IOT members, including the ICANN org, agree to this change.

ICANN org’s objection relates to the second question. The new language posted for comment by the IRP IOT **removes** any outer limit from the date of ICANN’s action giving rise to the IRP to the time of the filing of an IRP. This means that an IRP could be filed 2 years, 5 years, even 10 years after the act being challenged, so long as an IRP is filed within 120 days of when the claimant learned of ICANN’s act and the alleged harm caused. This removes any finality to ICANN’s actions, ignores the principles supporting the IRP, and depletes, rather than upholds the principle of accountability. Removing an outer time limit on filing fundamentally changes the nature of the IRP from holding ICANN accountable to its Articles of Incorporation (Articles) or Bylaws into an individualized grievance mechanism for matters that were long thought to be closed. It

also provides an ability to raise challenges to ICANN's actions long past any established statute of limitations that might be available in a court of law.

The use of outside time limits on potential challenges is a concept accepted across legal systems, often referred to as a statute of limitations. When the IRP was first introduced in ICANN's Bylaws, there was no time limit to file. Time limits were introduced in 2012, upon the recommendation of a panel of dispute resolution and corporate governance experts, to bring the IRP more in line with accepted dispute resolution standards. The time limit then put in place was approximately three months from Board action.<sup>1</sup> Even with a time limit of 12 months, as initially recommended by the IOT, the outer limit to file an IRP would be approximately *9 months* longer than claimants have had for the past few years.<sup>2</sup>

### **1. The IRP is a Tool to Hold ICANN Accountable to the Articles of Incorporation and Bylaws**

The IRP is a way to identify if ICANN violated its Articles of Incorporation or Bylaws, and to hold ICANN accountable to those findings. The IRP cannot result in individual damages or awards or relief from ICANN. No one in the ICANN community is benefited by long delays in identifying ICANN's improper actions.

### **2. Placing An Outer Time Limit to File Upholds the Purposes of the IRP**

Placing an outer time limit on how long a claimant can challenge an act of ICANN is consistent with the purposes of the IRP as defined under Article 4, Section 4.3(a)(vii) of the Bylaws, which is to "[s]ecure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes."<sup>3</sup> Through the Enhancing ICANN Accountability Process, the ICANN community agreed that the IRP should be "[t]ransparent, efficient and accessible (both financially and from a standing perspective) [and] [d]esigned to produce consistent and coherent results that will serve as a guide for future actions."<sup>4</sup> One of the purposes of the IRP is to "[r]educe disputes going forward by creating precedent to guide and inform the ICANN Board, staff, Supporting Organizations (SOs) and Advisory Committees (ACs), and the community in connection with policy development and implementation."<sup>5</sup>

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<sup>1</sup> The prior time limitation to file an IRP was 30 days from the posting of the minutes and Board briefing materials of the meeting during which the challenged action occurred.

<sup>2</sup> The Accountability Structures Expert Panel (ASEP), a group of international experts on issues of corporate governance, accountability and international dispute resolution, was convened pursuant to the Accountability and Transparency Review Team's (ATRT1) Recommendations. The ASEP recommended that time limits be introduced for the filing of an IRP. See Report by Accountability Structure Expert Panel (ASEP Report), October 2012, Pg. 35, <https://www.icann.org/en/system/files/files/report-26oct12-en.pdf>.

<sup>3</sup> Bylaws, Art. 4, Section 4.3(a)(vii).

<sup>4</sup> CCWG WS1 Final Report, Annex 7, Paragraph 05.

<sup>5</sup> CCWG WS1 Final Report, Annex 7, Paragraph 07.

Removing any time frame within which one must file an IRP works against these principles. The longer it takes to challenge an action of ICANN, the less consistent or coherent a review of that act will be. Board members, organization personnel, and community members change; memories fade; documentation may no longer be available. Instead of guiding future actions, the outcome of an IRP on an action taken many years prior would be backward looking, and raise bigger questions of how would the community move forward?

In short, allowing an IRP to be brought years after the action in question removes: (1) incentive for the ICANN community to be vigilant in raising issues of ICANN's accountability to its Bylaws and Articles; and (2) any sense of stability or finality to ICANN's actions.

In its deliberations, one of the primary examples that the IOT relied upon to support the removal of a statute of repose is the possibility that a policy recommendation addressing content (and therefore outside of ICANN's mission) came out of the GNSO's policy development process (PDP) and was approved by the ICANN Board. In the example, years later a potential registrant was impacted by the policy approved by the Board and wished to bring an IRP. The suggestion that ICANN should never have finality to its decisions is therefore based upon a presumption that *all parts* of the ICANN community allowed an out-of-mission policy to pass through the PDP (including public comment) and that the Board then approved an out-of-mission policy. Further, once implemented, no one came forward to challenge that action for a matter of years.

This example shows that eliminating any outside time limit on filing encourages participants to *wait* to hold ICANN accountable, as opposed to addressing potential Bylaws violations when they are thought to have occurred. This does not serve accountability or the purposes of the IRP, and is based on a complete breakdown of the multistakeholder model that the IRP is not designed to fix.

### **3. Removing an Outer Time Limit Creates Unprecedented Rights and Destabilizes ICANN**

Removing an outer time limit on filing an IRP removes any certainty from ICANN's authority to enter contracts, including with its registries and registrars. It allows people to come forward, years later, to try to upend binding agreements. ICANN's contracted parties already agree to be bound by consensus policies that can change their obligations mid-agreement, and have agreed with that level of flexibility in contracting with ICANN. This proposed change would remove any certainty in ICANN's authority to enter each of those agreements, and would greatly impair ICANN's ability to perform its mission.

Each of the over 2,500 contracts that ICANN holds with registries and registrars is grounded in law and has legal limitations on when disputes related to that contract may be raised. The suggested removal of time to file an IRP could allow challenge to an

ICANN action taken a decade ago on a contract, or could impair a contract entered into years before the IRP procedures went into effect. In either situation, even if an IRP were filed to challenge ICANN's old actions in relation to a contract and ICANN won, the mere fact that ICANN would allow the IRP rules to be modified in a way that would interfere with these contracts could subject ICANN to legal liability under the law. This would create confusion, uncertainty, and put ICANN at risk of facing staggering costs to address this situation.

ICANN is not aware of any other organization that allows a challenge to be raised against any action at any time. Similarly, the members of the IOT pushing for the removal of time limits to file an IRP have offered no examples of other organizations that open their actions up to challenge at any time. The removal of time limits to file an IRP is unprecedented and puts the entire ICANN model at risk.

#### **4. The Time to File an IRP Runs From Each Individual Action (or Inaction)**

Multiple opportunities exist to challenge ICANN's acts in a timely manner. Every time the ICANN Board or organization take an action, that comes with the possibility that someone might declare that act to be outside of the Articles or Bylaws and allege that act caused material harm. For example, if the ICANN Board approves a policy recommendation, and then the ICANN org implements that policy in a way that is alleged to be outside of the Bylaws or the Articles, the implementation decision is a separate act from the policy approval, and has the potential to give rise to new grounds for an IRP – even if that implementation date was years after the policy approval date. If ICANN org later takes compliance activity related to that policy in a way that is alleged to be outside of the Bylaws or the Articles many years after the policy approval date, that action, too, is a new act of the organization that can be challenged through an IRP. There is no need to draft a procedural rule that allows challenge of the very first act on an issue, no matter when taken, as the IRP can be timely used to challenge the specific act alleged to cause the Articles or Bylaws violation.

#### **5. An Outside Time Limit to File an IRP is Consistent With the Bylaws**

In building its first set of Draft Supplementary Procedures for public comment, the IOT developed the time for filing rule in accordance with its obligations under the Bylaws. The Bylaws state that the Supplementary Procedures must identify “[t]he time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute.”<sup>6</sup> The IOT proposal stated both the 45-day window from becoming aware (or reasonably should have been aware) of the harm caused by the action, as well as the outer limit of 12-months from the date of the action. The CCWG-ACCT deferred the issue of setting a time frame, leaving the issue to the IOT.<sup>7</sup> It is fully within the IOT's power, and in alignment with the

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<sup>6</sup> ICANN Bylaws, Section 4.3(n)(iv)(A).

<sup>7</sup> CCWG WS1 Final Report, Annex 7, Paragraph 19.

Bylaws, to determine that there is a time period after which it would not be reasonable for a claimant to bring an IRP.<sup>8</sup>

ICANN org stands behind and supports the enhanced accountability measures that the CCWG-ACCT recommended, including the expanded IRP. However, each of ICANN's accountability mechanisms need to be viewed in context to make sure they fit with ICANN's work and support the ICANN community. ICANN's actions do not exist in a vacuum: they are actions on community-made policy recommendations; actions that impact ICANN's contracted parties and the business decisions they make; and actions that end-users, registrants and all other parts of the multistakeholder community rely upon. All parts of ICANN rely upon ICANN acting within its Articles of Incorporation and Bylaws, and have an interest in swift action when ICANN is not doing so. The IRP does not exist to provide relief to a single individual or entity; the IRP exists to hold ICANN accountable to its Articles of Incorporation and Bylaws. The ICANN community has every need to bring swift challenges when ICANN has acted improperly. Removing any outer limit on when that act can be challenged only serves to harm accountability across ICANN.

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<sup>8</sup> There has been a suggestion that imposing an outer time limit on the filing of an IRP is against the Bylaws, because the Bylaws use language that says "after a claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the dispute." This analysis was provided by Sidley, which participated in both the development of the CCWG-ACCT report and the ICANN Bylaws, and is not based on anything within the record of the CCWG or the Bylaws development process. Their reading is faulty, is not determinative, and seeks to deprive the ICANN community of identifying what is a reasonable limitation on the use of an accountability mechanism. To be clear, there was *no* discussion within the Bylaws development that would support Sidley's current interpretation. The previous version of the Bylaws allowed only for a fixed period of time for bringing an IRP, measured from the publication of Board minutes. There is nothing in any record that suggests that because the Bylaws faithfully reflected the CCWG-ACCT's decision to defer a discussion on how long claimants would have to file an IRP, that the ICANN Community would be declared to be in violation of the Bylaws when setting reasonable time limits.