1 **CCPDP-RM – Non-Binding Mechanism – Independent Advice Review Mechanism**
2 **- DRAFT**

3 • **General Objective:**

> Commented [BT1]: No change.

4 Develop a review mechanism for IFO decisions that would meet most of the requirements
5 of the CCPDP-RM WG for an independent review except for being binding on the IFO or
6 ICANN.

7 Such a mechanism would be a logical, independent step following the IFO Customer Service
8 Complaint Resolution Process[1] and is available before launching [a binding review] or court
9 proceeding.

10 • **Specific Objective**

> Commented [BT2]: No change.

11

12 Create an optional and independent review mechanism inspired by arbitration, which is
13 non-binding on the IFO or ICANN and will not prevent the Manager from using any other
14 dispute resolution mechanism to address the IFO decision affecting it.

15

16 • **Scope:**

> Commented [BT3]: Significant change to consider who has standing to apply for a Review.

17

18 • The Independent Advice Review (Review) is available to ccTLD Managers[2] who are
19 directly impacted by an IFO decision (Decision) for the following processes:

20

21 o Delegations of a new ccTLD:
22 ▪ Directly involved parties: Applicants
23 ▪ IFO timing: No deadline for the IFO to reach a decision.
24 ▪ IFO rejection of an application: Applications are never rejected but
25 usually go away if not accepted over a long period. The IFO has a process
26 for cancelling, as opposed to rejecting, inactive applications.
27 ▪ Proposed eligibility for a Review: Limit to All Applicants.
28 ▪ Basis for requesting a Review: Delegation by the IFO to another party.
29 o Transfers:
30 ▪ Directly involved parties: Current Manager and the proposed Manager
31 ▪ IFO timing: No deadline for the IFO to reach a decision.

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[1] https://www.iana.org/help/complaint-procedure
[2] Given New ccTLDs do not have a manager, and that it is clearly stated in RFC 1591 that there needs to be an appeal mechanism applicable to the delegation process for new ccTLDs the CCPDP-RM WG believes it is consistent with RFC 1591 that all applicants for a New ccTLD are eligible to request an Independent Advice Review.

32		▪ IFO Rejection of an application: Applications are never rejected but
33		usually go away if not accepted over a long period. The IFO has a process
34		for cancelling, as opposed to rejecting, inactive applications.
35		▪ Proposed eligibility for a Review: Limit to Current (or incumbent)
36		Manager.
37		▪ Basis for requesting a Review: Rejection of an application for Transfer
38		which never occurs?
39	o	Revocations (A last resort action by the IFO[3]):
40		▪ Directly involved parties: Current Manager[4]
41		▪ IFO timing: No deadline for the IFO to reach a decision.
42		▪ IFO Rejection of an application: There is no formal IFO process for
43		revocation.
44		▪ Proposed eligibility for a Review: Current Manager.
45		▪ The basis for requesting a Review:
46		● Current Manager requesting a Review of a Revocation notice by
47		the IFO.
48	o	Refusal to grant an extension to the retirement deadline per the CCNSO
49		Retirement Policy:
50		▪ Directly involved parties: Current Manager.
51		▪ IFO timing: Per the Retirement Policy the IFO must reply to the
52		application for an extension within 90 days of it being submitted by the
53		Manager.
54		▪ IFO Rejection of an application: Can be rejected by the IFO but per the
55		Retirement Policy "*The approval of an extension request shall not be*
56		*unreasonably withheld.*"
57		▪ Eligibility for a Review: Per the Retirement Policy the current Manager.
58		▪ Basis for requesting a Review: Rejection of an application for an
59		Extension by the IFO that is being unreasonably withheld.
60	o	Notice of Retirement for 2 letter Latin ccTLD which does not correspond to an
61		ISO 3166-1 Alpha-2 Code Element per the CCNSO Retirement policy:
62		▪ Directly involved parties: Current Manager.
63		▪ IFO timing: None - per the Retirement Policy the IFO must send a Notice
64		of Retirement.
65		▪ Eligibility for a Review: Per the Retirement Policy the current Manager.
66		▪ Basis for requesting a Review: Per the Retirement Policy - *For 2 letter*
67		*Latin ccTLDs which do not correspond to an ISO 3166-1 Alpha-2 Code*

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[3] How the IFO processes revocation requests from third parties is beyond the scope of this policy. If the IFO decides to revoke a delegation it must notify the Manager and allow it 30 days to apply for an Independent Advice Review. According to the FOI (section 4.7) Revocation is the last resort option for the IFO. Revocation is therefore a matter between the IFO and the ccTLD Manager

[4] The IFO does not have a formally documented process for revocations.

68   *Element – The Trigger is the ISO 3166-1 MA making a change (other than*
69   *making it an ISO 3166-1 Alpha-2 Code Element) to any of these. For each*
70   *such Triggering Event the IFO will consider if the change requires deleting*
71   *that ccTLD. If the ccTLD Manager disagrees with the IFO's decision to*
72   *initiate the Retirement process it can appeal the decision using the ccTLD*
73   *Appeals Mechanism.*
74   o Any other policy developed by the ccNSO and adopted by the ICANN Board
75   which allows ccTLDs to appeal a decision by the IFO.
76

77 • The Independent Advice review will only provide advice whether or not:
78

79   o There were significant issues with the IFO properly following its procedures and
80   applying these fairly in arriving at its Decision; or
81   o There were significant issues in how the IFO complied with RFC 1591, the CCNSO
82   FOI for RFC1591 as adopted by the ICANN Board, and any other policies
83   developed through a ccNSO policy development process and adopted by the
84   ICANN Board in making its Decision.
85

86 • **Administrative objectives:**
87

88   o Low cost (10,000 to 100,000$US maximum including all administrative and
89   Arbitrator(s) costs for both parties).
90   o Fast – Arbitrators to return a decision in less than 90 days from the beginning of
91   their consideration of the case.
92   o Minimize the total time required to review any specific IFO decision which can be
93   reviewed by this mechanism.
94

95 • **Process Overview**
96

97 (Note: Once the process is agreed a summary will be kept here, and the details will be
98 moved to an annex)
99

100   o The IFO makes a Decision that can be reviewed.
101   o An eligible party submits an application (Application) for a Review to the
102   Administrator.
103   o The Administrator evaluates if the Application and requests that the IFO take no
104   further action regarding this decision until advised otherwise by the Administrator.
105   o If the Administrator rejects the Application, it will:

Commented [BT4]: Minor edit to ensure it is clear the decision must be binary.

Commented [BT5]: Upon reflection the original text really did not make sense given the Decision itself is not the issue vs RFC 1591 etc but rather how those requirements were considered in making the Decision. After thinking on this for a while I would propose the following.

Commented [BT6]: Minor edit.

Commented [BT7]: 20220406 - new version of text to address comments at the last meeting.

Commented [BT8]: Per the results of previous CCPDP-RM meetings.

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- ▪ Advise the Applicant and request that the Application fee minus a processing fee be reimbursed to the Applicant (TBD). The Applicant may re-apply if within the 30 day deadline.
  - ▪ Advise the IFO of the rejection and that the IFO may proceed with this Decision.
  - ▪ Close the Application and update the review website accordingly.
- o If the Administrator accepts the Application, it will:
  - ▪ Advise the Applicant (now Claimant) that the Application has been accepted.
  - ▪ Advise the IFO that the Application has been accepted and that the IFO may not proceed further with the Decision until informed otherwise by the Administrator.
  - ▪ Update the Review website accordingly.
  - ▪ Will request that the Applicant select which type of Review it will opt for (Administrator, 1 Arbitrator, 3 Arbitrators – see Arbitrator section for details) and advise the IFO of this.
  - ▪ The Administrator will work with the Applicant and the IFO to select the Arbitrator(s).
- o Conducting the Review
  - ▪ The Administrator will manage the Review as the Arbitrator(s) consider(s) the case:
    - • The Arbitrator(s) may request a presentation by the IFO or ask formal questions of the IFO.
  - ▪ The Arbitrator(s) will decide if there were significant issues or not in their report.
  - ▪ The Administrator will review the Arbitrator(s)' report to ensure it is consistent with the requirements for such reports.
  - ▪ The Administrator will publish the Arbitrator(s) decision and advise the Claimant.
- o If the Arbitrator(s) did not find any significant issues:
  - ▪ The Administrator will advise the Claimant, close the case and advise the IFO that it may proceed with its Decision
- o If the Arbitrator(s) did find significant issues:
  - ▪ The Administrator will contact the IFO asking it to confirm which option it will take vs the Advice (30 days):
    - • Accept the Arbitrator(s) decision and Reverse its original Decision.
    - • Accept the Arbitrator(s) decision but opt to re-do the evaluation of the request which led to the original Decision.
    - • Reject the Arbitrator(s) decision.
- o If the IFO accepts the Arbitrator(s) Advice and reverses its original decision:

- - - The Administrator will advise the Claimant and will close the case and
        update the website.
      - Note: This assumes that IFO Decisions are bascially binary in most cases.
        Transfers, Revocations, request for an extension in a retirement process,
        and Retirement of a 2 letter Latin non-ISO 3166-1 ccTLD can only be
        binary. Delegation of a new ccTLD between 2 contending parties is also
        binary but is not if there are 3 or more applicants (which should be very
        exceptional).
  - If the IFO rejects the Arbitrator(s) decision:
      - If the IFO decision requires Board approval: The Administrator will close
        the case and work with the IFO to ensure that the Advice is properly
        included in any IFO recommendation to the ICANN Board on this matter.
      - If the IFO decision does not require Board approval: The Administrator
        will close the case and advise the ICANN CEO.
  - If the IFO accepts the Arbitrator(s) decision but opts to re-do its process with
    respect to this Decision:
      - Once the IFO has completed re-doing its process that Decision will be
        presented to the Claimant.
      - The Administrator will request that the Claimant select one of the two
        following options (30 days):
          - Accept the new Decision.
          - Apply for a Review of this new decision at the IFO's expense (no
            charge to the Claimant).
  - If the Claimant accepts the new decision the Administrator will close the case
    and update the website.
  - If the Claimant decides to apply for a new Review the Review process begins
    anew with the following changes:
      - If the Application for a Review is accepted the IFO will bear all
        costs.
      - If the Review finds significant issues with the new IFO Decision the
        IFO can only opt to accept the new Review decision and reverse
        its Decision or reject the Review's findings. (30 days).
      - If the Review does not find any significant issues the
        Administrator will advise the Claimant and the IFO and will advise
        the IFO that it can proceed with its Decision and close the case.
  - If the Review finds there were significant issues and the IFO reverses its
    Decision the Administrator will advise the Claimant and close the case.
  - If the Review finds there were significant issues and the IFO rejects the
    Advice:
      -

Commented [BT9]: New limitation to avoid looping.

- If the IFO decision requires Board approval: The Administrator will close the case and work with the IFO to ensure that the Advice is properly included in any IFO recommendation to the ICANN Board on this matter.
- If the IFO decision does not require Board approval: The Administrator will close the case and advise the ICANN CEO.
  - the Administrator will close the case and work with the IFO to include the results of both Reviews in any recommendations the IFO makes to the ICANN Board.

- **The Administrator - details not included in the process overview:**

  - The Administrator must be a non-conflicted individual who is a SME with respect to ccTLDs, the IFO and ICANN and who will be responsible for overseeing and managing the Independent Advice system.
    - Conflict of interest will disqualify anyone with a current "relationship" (business, financial or family) with a ccTLD, known applicant for a new ccTLD, the IFO or who is pursuing legal action against these same parties. This would be assessed via a Conflict-of-Interest Declaration form (TBD).
  - The office of the Administrator will be funded and managed by ICANN.
  - General administrative responsibilities of the Administrator:
    - Maintain ongoing relationship with the ccNSO, IFO and ICANN.
      - Monitor Decisions by the IFO which have a potential to be reviewed.
    - Set up and oversee the operation of the website which will include:
      - General information on the Review process.
      - Q&A section.
      - All relevant forms.
      - List of certified Arbitrators.
      - List of ongoing cases.
      - List of Review decisions.
      - List of past cases.
    - Prepare and manage application of all relevant forms including:
      - Application/contract for a Review.
      - Application to become a certified Arbitrator.
      - COI form for specific cases.
      - NDA for certified Arbitrators.
      - Review decision form.
      - Fee agreements for Arbitrators.
      - Billing forms for Arbitrators.

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224 ▪ Set up process to certify and manage Arbitrators.
225 • Establish criteria for the certification of Arbitrators with the
226 ccNSO and the IFO.
227 • Manage the recruiting process for potential Arbitrators.
228 • Certification of Arbitrators (validation as a SME, COI, NDA,
229 contract).
230 • Creation and management of a list of certified Arbitrators.
231 ▪ Manage financial matters including:
232 • Review application payments and refunds.
233 • Approval of Arbitrator billing.
234 • Billing of Claimant and IFO for Arbitrators.
235
236 • **Arbitrator(s) - details not included in the process overview:**
237
238 o All Arbitrators will be certified, managed, and supported by the Administrator.
239 o Certification requirements will include:
240 ▪ Functional ability to work in English.
241 ▪ CV highlighting that the individual is a Subject Matter Expert (SME) with
242 respect to CCNSO policies, RFC1591 and its FOI as well as IFO procedures.
243 Minimum qualification will be 10 years of practical experience in all these
244 areas (proposal TBD in cooperation between the Administrator, the
245 ccNSO and the IFO). Legal experience is also desirable.
246 ▪ Interview with the Administrator to confirm SME status and ability to
247 work in English.
248 ▪ Duly executed NDA regarding any non-public information obtained while
249 acting as an Arbitrator on any Independent Advice case.
250 ▪ Duly executed Arbitrator contract with ICANN.
251 ▪ Duly executed COI form which will include certification of no COI with
252 ICANN or the IFO. If selected for a specific case Arbitrators will have to
253 provide a formal confirmation that they are impartial with respect to the
254 Claimant.
255 • Conflict of interest is defined as a party having a "relationship"
256 (business, financial or family) with another party or who is
257 involved in any formal legal action vs another party.
258 • Being a Manager or employee of a ccTLD registry will not be
259 considered a COI vs ICANN or the IFO in this context unless there
260 are significant pending issues between the parties.
261 o Choice of Arbitrators by Claimants - 3 options for a review:
262 ▪ Review by the Administrator only. This will be a minimal cost option only
263 requiring the Administrative costs.

7

Commented [BT10]: Given we are proposing two new options with single individuals to reduce Claimant costs it did not make sense to continue using Panel for a single individual. There are other significant changes including proposed certification requirements.

Commented [BT11]: Need to decide if we will include this option which would be very costly for a non-binding decision (also depends on who pays but it is doubtful ICANN would pay for 3 arbitrators under any circumstance - as a reference the average cost for a 3 arbitrator panel for the ICANN IRP is about 100K$ US p[er case)

264   ▪ Review by one Arbitrator selected jointly by the IFO and the Applicant
265   from the list of pre-Certified Arbitrators managed and maintained by the
266   Administrator. The selection process will be managed by the
267   Administrator and if the parties cannot agree on a single Arbitrator within
268   30 days of the Application being approved, the Administrator will select
269   one from the list. The selected Arbitrator will be required to formally
270   confirm that it is impartial with respect to the Claimant. Both parties will
271   share the cost of the selected Arbitrator evenly.
272   ▪ Review by 3 Arbitrators.
273   • The IFO and the Claimant will each choose an Arbitrator. The
274   proposed Arbitrators do not have to be from the list of pre-
275   certified Arbitrators. If the candidates are not from the list of pre-
276   certified Arbitrators, they will have to be certified by the
277   Administrator prior to undertaking any work on the case. Once
278   certified the IFO and Claimant Arbitrators will cooperatively pick a
279   third Arbitrator from the list of pre-certified Arbitrators through a
280   process managed by the Administrator. If the two Arbitrators
281   cannot agree on a third within 30 days, the Administrator will
282   nominate the third from the list of pre-certified Arbitrators.
283   o The IFO and the Claimant must select their Arbitrators
284   within 30 days of the Application being approved. Failure
285   to do so will cause the Administrator to select and
286   Arbitrator for the party from the list of pre-certified
287   arbitrators.
288   o If the chosen Arbitrator is not pre-certified it will have to
289   be Certified by the Administrator within 30 days of being
290   named before it can join the proceedings. If the chosen
291   Arbitrator fails to be certified prior to the deadline the
292   party may chose another if still within the original 30 day
293   limit to choose an Arbitrator.
294   • All Arbitrators will be required to formally confirm that they are
295   impartial with respect to the Claimant.
296   • Each party will pay for its chosen Arbitrator as well as 50% of the
297   costs for the third Arbitrator.
298   • Any decision in a 3 Arbitrator system will require the support of at
299   least two of the three.
300   o Arbitrators will only accept supplementary materials from the Claimant or the IFO if
301   approved by the Administrator. All such requests to submit additional material must
302   be made using the appropriate form (TBD) and submitted to the Administrator
303   within 30 days of the request for Independent Advice being approved by the

304		Administrator. The Administrator, using his best judgement for the fair
305		administration of justice, will consider the following in determining if any new
306		material should be accepted and made available to the Panel:
307		▪ Is this material directly and critically relevant to the case?
308		▪ Why was this material not included in the original request to the IFO?
309	o	Can hold individual teleconference hearings with all the involved parties.
310	o	Can request a presentation by the IFO on the matter under review. The Panel, at its
311		discretion, can also request answers to its questions from the IFO which must
312		respond promptly to these (2 business days (TBD with the IFO) California time
313		following the day of the request – this should be included in the IFO SLE process
314		statistics).
315	o	Definition of Significant Issue – Any clearly demonstrable inconsistency or deviation
316		by the IFO of properly following its procedures and applying these fairly or how the
317		IFO complied with the requirements of RFC 1591, the CCNSO FOI for RFC1591 as
318		adopted by the ICANN Board as well as any other policies developed through a
319		ccNSO policy development process and adopted by the ICANN Board in making its
320		Decision which, in the opinion of the Arbitrator(s), could have significantly impacted
321		the Decision if it had not occurred.
322	o	The Arbitrator(s)' Advice will explain in detail their decision.
323	o	The Administrator will review the Advice from the Arbitrators to ensure it meets all
324		the requirements prior to publishing it. The Administrator may work with the
325		Arbitrator(s) to amend the Advice to ensure it meets the requirements:
326		▪ The Advice provides all the relevant administrative and background
327		information.
328		▪ The Advice will clearly indicate if there were any significant issues or not.
329		▪ If there were issues the Advice clearly indicates what the issues are as
330		well as why they are issues.
331		▪ Formal sign-off of the Arbitrator(s) on the final Advice and a statement of
332		majority opinion if necessary.
333	o	Final Independent Advice from the Arbitrator(s) cannot be appealed.
334		
335	•	**IFO - details not included in the process overview:**
336		
337	o	Will maintain a good working relationship with the Administrator.
338	o	Must amend its procedures to allow concerned parties sufficient time to file for
339		Independent Advice prior to the IFO implementing or making a recommendation to
340		the ICANN Board regarding the decision which is being challenged. As such the IFO
341		will advise all directly involved parties of any appealable decisions. Such decisions
342		will be labelled Preliminary Decisions and will advise the concerned parties of their
343		options for appealing such decisions.

Commented [BT12]: First attempt a defining what a Significant issue is.

Commented [BT13]: Minor updates to align with the updated process.

344 o After reaching a decision on a ccTLD request which can be appealed, the IFO will
345   advise those parties which could apply for a Review of the Decision and of their
346   options for appealing the Decision as well as the timeline for doing so.
347 o If a Decision is being appealed to the Administrator, the IFO cannot make a
348   recommendation to the ICANN Board on the matter being reviewed prior to the
349   Administrator confirming it can do so.
350 o Will make all relevant internal materials available to the Arbitrator(s) who will be
351   under a formal confidentiality agreement. These will include all internal emails on
352   the matter and all communications from all the relevant parties but does not include
353   formal legal advice to the IFO.
354 o Will make itself available to the Arbitrator(s) to present details of the case or answer
355   questions.
356 o If the Review finds there were significant issues and the IFO rejects the Advice the
357   IFO will work with the Administrator to include all Review results in any
358   recommendations on this matter to the ICANN Board.
359
360 • **Applicant and Claimant - details not included in the process overview:**
361
362 o Must be a ccTLD Manager except in the case of the delegation of a new ccTLD where
363   any applicant for that new ccTLD is eligible.
364 o To launch an Independent Advice Review (Review), the Claimant must submit an
365   application (Application) via the website to the Administrator (in English) within 30
366   days of the Decision being made.
367   ▪ 30 days to be calculated as follows – The IFO publishing its Initial Decision
368   will be deemed Day 0. Day 1 will begin 1 minute after 23:59 UTC of Day 0.
369   The opportunity to submit an application for an Independent Advice
370   Review will expire on Day 30 at one minute past 23:59 UTC.
371 o The evaluation criteria for an Independent Advice Review Application are:
372   ▪ Be on the properly completed form/contract (TBD)
373   ▪ Be received prior to the 30 day deadline.
374   ▪ Clearly indicate which IFO Preliminary Decision is being appealed.
375   • An Application for Independent Advice cannot be approved for a
376   Decision which is currently the subject of an Independent Advice
377   Review or was the subject of a completed Independent Advice
378   Review.
379   ▪ Have paid the required fees (fees and details TBD).
380   ▪ Be a party listed in the IFO Decision that is a ccTLD manager listed in the
381   IANA database or in cases related to the delegation of a new ccTLD any
382   parties who applied to be the Manager for that ccTLD.

Commented [BT14]: The Independet Advice process will only consider a given Decision once. See section below concerning multiple potential Claimants for dealing with that issue.

383   ▪ Clearly indicate the individual the Applicant has delegated to be
384   responsible for the Application including all relevant contact information.
385   ▪ Clearly state why the Claimant believes that:
386   ● That the IFO did not properly follow its procedures or applied
387   these fairly in arriving at its preliminary decision; or
388   ● The IFO decision being reviewed is inconsistent with RFC 1591,
389   the CCNSO FOI for RFC1591 as approved by the ICANN Board, as
390   well as any other policies which apply to CCNSO members and is
391   approved by the ICANN Board.

392   ○ For cases where there is a potential for more than one Claimant[5]. In all such cases
393   where the Administrator has approved an Application for a Review, the Arbitrator(s)
394   will consider all elements of the IFO Decision for all potential Claimants.
395   ○ By submitting an Application, the Claimant will agree to the rules for the
396   Independent Advice Review, which will include a clause preventing the Applicant
397   from taking the Administrator, Arbitrators, the CCNSO, or ICANN to court with
398   respect to the Independent Advice Review. This in no way prevents the Claimant
399   from taking the IFO or ICANN to a relevant court regarding the Decision by the IFO
400   and any approval of such recommendation by the ICANN Board.
401   ○ The Administrator may interact with the Claimant's contact person to obtain
402   clarifications on the application (and may allow the Applicant to resubmit).
403   ○ If the Administrator rejects the application for an Independent Advice Review the
404   Claimant's payment will be refunded minus administrative costs (objective 1,000 to
405   5,000$US maximum - TBD). There is no mechanism to appeal the Administrator's
406   decision to reject an application however the Administrator will be required to
407   publish its reasons for rejecting the application.

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> **Commented [BT15]:** Significantly simplified by limiting the consideration of a Decision to a single time – see Application approval criteria above.

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[5] e.g. a Decision regarding the delegation of a new ccTLD that had three applicants – if the ccTLD is allocated to one of the three, the two others could appeal – obviously a corner case