

1 **CCPDP-RM – Independent Advice Review (IAR) Mechanism – Final Working**
2 **document**

3 • **General Objective:**

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 Process¹ and is available before launching [a binding review] or court
9 proceeding.

10 • **Specific Objective**
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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.

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16 • **Scope:**
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- 18 • The Independent Advice Review (Review) is available to ccTLD Managers² who are
19 directly impacted by an IFO decision (Decision) for the following processes:
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- 21 ○ 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 ○ Transfers:
 - 30 ▪ Directly involved parties: Current Manager and the proposed Manager
 - 31 ▪ IFO timing: No deadline for the IFO to reach a decision.

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.

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- IFO Rejection of an application: Applications are never rejected but usually go away if not accepted over a long period. The IFO has a process for cancelling, as opposed to rejecting, inactive applications.
 - Proposed eligibility for a Review: Limit to Current (or incumbent) Manager.
 - Basis for requesting a Review: Rejection of an application for Transfer which never occurs?
 - Revocations (A last resort action by the IFO³):
 - Directly involved parties: Current Manager⁴
 - IFO timing: No deadline for the IFO to reach a decision.
 - IFO Rejection of an application: N/A
 - Proposed eligibility for a Review: Current Manager.
 - The basis for requesting a Review:
 - Current Manager requesting a Review of a Revocation notice by the IFO.
 - Refusal to grant an extension to the retirement deadline per the CCNSO Retirement Policy:
 - Directly involved parties: Current Manager.
 - IFO timing: Per the Retirement Policy the IFO must reply to the application for an extension within 90 days of it being submitted by the Manager.
 - IFO Rejection of an application: Can be rejected by the IFO but per the Retirement Policy *“The approval of an extension request shall not be unreasonably withheld.”*
 - Eligibility for a Review: Per the Retirement Policy the current Manager.
 - Basis for requesting a Review: Rejection of an application for an Extension by the IFO that is being unreasonably withheld.
 - Notice of Retirement for 2 letter Latin ccTLD which does not correspond to an ISO 3166-1 Alpha-2 Code Element per the CCNSO Retirement policy:
 - Directly involved parties: Current Manager.
 - IFO timing: None - per the Retirement Policy the IFO must send a Notice of Retirement.
 - Eligibility for a Review: Per the Retirement Policy the current Manager.
 - Basis for requesting a Review: Per the Retirement Policy - *For 2 letter Latin ccTLDs which do not correspond to an ISO 3166-1 Alpha-2 Code Element – The Trigger is the ISO 3166-1 MA making a change (other than*

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 *making it an ISO 3166-1 Alpha-2 Code Element) to any of these. For each*
69 *such Triggering Event the IFO will consider if the change requires deleting*
70 *that ccTLD. If the ccTLD Manager disagrees with the IFO's decision to*
71 *initiate the Retirement process it can appeal the decision using the ccTLD*
72 *Appeals Mechanism.*

- 73 ○ Any other policy developed by the ccNSO and adopted by the ICANN Board
74 which allows ccTLDs to appeal a decision by the IFO.

- 75 • The Independent Advice Review (IAR) will only provide advice on whether or not:
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- 77 ○ There were significant issues with the IFO properly following its procedures and
78 applying these fairly in arriving at its Decision; or
- 79 ○ There were significant issues in how the IFO complied with RFC 1591, the CCNSO
80 FOI for RFC1591 as adopted by the ICANN Board, and any other policies
81 developed through a ccNSO policy development process and adopted by the
82 ICANN Board in making its Decision.

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- 85 • **Administrative objectives:**

- 86 ○ Low cost (Registry/Manager fees will be established at implementation but need to
87 take into account the size/ability to pay of the Registry by having variable fees).
- 88 ○ Fast – Reviewers to return a decision in less than 90 days from the beginning of their
89 consideration of the case.
- 90 ○ Minimize the total time required to review any specific IFO decision which can be
91 reviewed by this mechanism.
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- 94 • **Process Overview**

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

- 98 ○ Prior to applying for an Independent Advice Review (IAR or Review):
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 - 100 ■ Note: The CCPDP-RM will have to decide if an Internal IFO Review and/or
101 IFO Mediation is/are a pre-requisite to apply for an IAR. Regardless of if
102 they are pre-requisites or not, a party who is eligible to apply for an IAR
103 should not be prevented from applying for an IAR because they have
104 passed the 30-day deadline as a result of their choosing to use these
105 other mechanisms first. Details of this requirement will be established in
106 implementation.
- 107 ○ The IFO makes a Decision regarding a ccTLD which is eligible for an IAR.

- 108 ○ An eligible party for an IAR submits an application (Application) for an IAR to the
 109 Administrator.
 110 ○ The Administrator confirms receipt of the Application and requests that the IFO take
 111 no further action regarding this decision until advised otherwise by the
 112 Administrator⁵.
 113 ○ The Administrator evaluates the application (see application requirements in the
 114 Applicant/Claimant section):
- 115 ▪ If the Administrator accepts the Application, it will:
 - 116 • Advise the Applicant (now Claimant) that the Application has been
 117 accepted.
 - 118 • Advise the IFO that the Application has been accepted and that
 119 the IFO may not proceed further with the Decision until informed
 120 otherwise by the Administrator.
 - 121 • Update the IAR website accordingly.
 - 122 • Will request that the Applicant select which type of Review it will
 123 opt for (Administrator, 1 Reviewer, 3 Reviewers – see Reviewer
 124 section for details) and advise the IFO of this.
 - 125 • The Administrator will work with the Applicant and the IFO to
 126 select the Reviewer(s). Once selected the Administrator will
 127 launch the review.
 - 128 ▪ If the Administrator rejects the Application, it will:
 - 129 • Advise the Claimant that its application has been cancelled.
 - 130 • Advise the IFO of the rejection and that the IFO may proceed with
 131 this Decision.
 - 132 • Close the Application and update the iar website accordingly.
- 133 ○ Conducting the Review
- 134 ▪ The Administrator will manage the Review as the Reviewer(s) consider(s) the
 135 case:
 - 136 • The Reviewer(s) may request a presentation by the IFO or ask
 137 formal questions of the IFO.
 - 138 ▪ The Reviewer(s) will decide if there were significant issues or not and
 139 indicate this in their report (Report)
 - 140 ▪ The Administrator will evaluate the Report and work with the Reviewer(s) to
 141 ensure it is consistent with the requirements for such reports.
 - 142 ▪ The Administrator will publish the Report and advise the Claimant.
- 143 ○ If the Reviewer(s) did not find any significant issues:
- 144 ▪ The Administrator will advise the Claimant, close the Review and advise the
 145 IFO that it may proceed with its Decision
- 146 ○ If the Reviewer(s) did find significant issues:

Commented [BT1]: Will there be a prerequisite to an IAR?
 Internal IFO Review and/or Mediation?

⁵ Regardless of if the decision required Board approval.

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- The Administrator will advise the Claimant of the findings and of the possible next steps.
 - The Administrator will contact the IFO asking it to confirm which option it will take vs the Advice – the IFO will have 30 days to advise the Administrator of its decision:
 - If the IFO responds within the 30-day deadline with one of the following options, the process can continue:
 - Accepts the Reviewer(s) decision and reverses its original Decision.
 - Accepts the Reviewer(s) decision but opts to re-do the evaluation of the request which led to the original Decision.
 - Rejects the Reviewer(s)' decision.
 - If the IFO does not provide the Administrator with an appropriate response within the 30-day deadline the Administrator will formally advise the ICANN CEO and the ccNSO and request appropriate action.
 - If the IFO accepts the Reviewer(s) Advice and reverses its original decision:
 - The Administrator will advise the Claimant and will close the case and update the IAR website.
 - Note: This assumes that IFO Decisions are basically binary in most cases. Transfers, Revocations, requests 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 Reviewer(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 and the ccNSO Council of the situation and request appropriate action.
 - If the IFO accepts the Reviewer(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 and respond within 30 days:
 - Accept the new Decision.

- 187 • Apply for a Review of this new decision at the IFO's expense (no
188 charge to the Claimant).
- 189 ▪ If the Claimant accepts the new decision the Administrator will close the case
190 and update the IAR website.
- 191 ▪ If the Claimant decides to apply for a new Review the Review process begins
192 anew with the following changes:
 - 193 • If the Application for a Review is accepted the IFO will bear all
194 costs.
 - 195 • If the Review finds significant issues with the new IFO Decision the
196 IFO can only opt to accept the new Review decision and reverse
197 its Decision or reject the Review's findings – the IFO will have 30
198 days to advise the Administrator of its decision.
 - 199 ○ If the IFO does not provide the Administrator with its
200 decision within the 30-day deadline the Administrator will
201 formally advise the ICANN CEO and the ccNSO to request
202 appropriate action.
- 203 ▪ If the Review does not find any significant issues the Administrator will advise
204 the Claimant and the IFO and will advise the IFO that it can proceed with its
205 Decision and close the case.
- 206 ▪ If the Review finds there were significant issues and the IFO reverses its
207 Decision the Administrator will advise the Claimant and close the case.
- 208 ▪ If the Review finds there were significant issues and the IFO rejects the
209 Advice:
 - 210 ▪ If the IFO decision requires Board approval: The Administrator will close
211 the case and work with the IFO to ensure that the Advice is properly
212 included in any IFO recommendation to the ICANN Board on this matter.
 - 213 ▪ If the IFO decision does not require Board approval: The Administrator
214 will close the case and advise the ICANN CEO and the ccNSO Council.

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- 216 • **The Administrator - details not included in the process overview:**
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 - 218 ○ The Administrator must be a non-conflicted individual who is an SME with respect to
219 ccTLDs, the IFO and ICANN and who will be responsible for overseeing and managing
220 the Independent Advice system.
 - 221 ▪ Conflict of interest will disqualify anyone with a current "relationship"
222 (business, financial or family) with a ccTLD, a known applicant for a new
223 ccTLD, the IFO or who is pursuing legal action against these same parties.
224 This would be assessed via a Conflict-of-Interest Declaration form
225 (implementation).

- 226 ○ The office of the Administrator will be funded and managed by ICANN.
- 227 ○ General administrative responsibilities of the Administrator:
- 228 ▪ Maintain an ongoing relationship with the ccNSO, IFO and ICANN.
- 229 • Monitor Decisions by the IFO which have the potential to be
- 230 reviewed.
- 231 ▪ Set up and oversee the operation of the website which will include:
- 232 • General information on the Review process.
- 233 • Q&A section.
- 234 • All relevant forms.
- 235 • List of certified Reviewers.
- 236 • List of ongoing cases.
- 237 • List of Review decisions.
- 238 • List of past cases.
- 239 ▪ Prepare and manage the application of all relevant forms including:
- 240 • Application/contract for a Review.
- 241 • Application to become a certified Reviewer.
- 242 • COI form for specific cases.
- 243 • NDA for certified Reviewers.
- 244 • Review decision form.
- 245 • Fee agreements for Reviewers.
- 246 • Billing forms for Reviewers.
- 247 ▪ Set up a process to certify and manage Reviewers.
- 248 • Establish criteria for the certification of Reviewers with the ccNSO
- 249 and the IFO.
- 250 • Manage the recruiting process for potential Reviewers.
- 251 • Certification of Reviewers (validation as a SME, COI, NDA,
- 252 contract).
- 253 • Creation and management of a list of certified Reviewers.
- 254 ▪ Manage financial matters including:
- 255 • Review application payments and refunds.
- 256 • Approval of Reviewer billing.
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- 258 • **Reviewer(s) - details not included in the process overview:**
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- 260 ○ All Reviewers will be certified, managed, and supported by the Administrator.
- 261 ○ Reviewers will be paid for by ICANN/IFO.
- 262 ○ Certification requirements will include:
- 263 ▪ Functional ability to work in English.
- 264 ▪ CV highlighting that the individual is a Subject Matter Expert (SME) with
- 265 respect to CCNSO policies, RFC1591 and its FOI as well as IFO procedures.

266 The minimum qualification will be 10 years of practical experience in all
267 these areas (proposal TBD at implementation in cooperation between the
268 Administrator, the ccNSO and the IFO). Legal experience is also desirable.
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- 270 ■ Interview with the Administrator to confirm SME status and ability to
271 work in English.
- 272 ■ Duly executed NDA regarding any non-public information obtained while
273 acting as a Reviewer on any Independent Advice case.
- 274 ■ Duly executed Reviewer contract with ICANN.
- 275 ■ Duly executed COI form which will include certification of no COI with
276 ICANN or the IFO. If selected for a specific case Reviewers will have to
277 provide a formal confirmation that they are impartial with respect to the
278 Claimant.
 - 279 • Conflict of interest is defined as a party having a “relationship”
280 (business, financial or family) with another party or who is
281 involved in any formal legal action vs another party.
 - 282 • Being a Manager or employee of a ccTLD registry will not be
283 considered a COI vs ICANN or the IFO in this context unless there
284 are significant pending issues between the parties.

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- 286 ○ Choice of Reviewers by Claimants - 3 options for a review:
 - 287 ■ Review by the Administrator only. This will be a minimal cost option only
288 requiring the Administrative costs.
 - 289 ■ Review by one Reviewer selected jointly by the IFO and the Claimant
290 from the list of pre-Certified Reviewers managed and maintained by the
291 Administrator. The selection process will be managed by the
292 Administrator and if the parties cannot agree on a single Reviewer within
293 30 days of the Application being approved, the Administrator will select
294 one from the list. The selected Reviewer will be required to formally
295 confirm that it is impartial with respect to the Claimant.
 - 296 ■ Review by 3 Reviewers.
 - 297 • The IFO and the Claimant will each choose a Reviewer. The
298 proposed Reviewers do not have to be from the list of pre-
299 certified Reviewers. If the candidates are not from the list of pre-
300 certified Reviewers, they will have to be certified by the
301 Administrator prior to undertaking any work on the case. Once
302 certified the IFO and Claimant Reviewers will cooperatively pick a
303 third Reviewer from the list of pre-certified Reviewers through a
304 process managed by the Administrator. If the two Reviewers
cannot agree on a third within 30 days, the Administrator will
nominate the third from the list of pre-certified Reviewers.

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- The IFO and the Claimant must select their Reviewers within 30 days of the Application being approved. Failure to do so will cause the Administrator to select a Reviewer for the party from the list of pre-certified reviewers.
 - If the chosen Reviewer is not pre-certified it will have to be Certified by the Administrator within 30 days of being named before it can join the proceedings. If the chosen Reviewer fails to be certified prior to the deadline the party may choose another if still within the original 30-day limit to choose a Reviewer.
 - All Reviewers will be required to formally confirm that they are impartial with respect to the Claimant.
 - Any decision in a 3 Reviewer system will require the support of at least two of the three.
 - Reviewers will only accept supplementary materials from the Claimant or the IFO if approved by the Administrator. All such requests to submit additional material must be made using the appropriate form (implementation) and submitted to the Administrator within 30 days of the request for Independent Advice being approved by the Administrator. The Administrator, using his best judgement for the fair administration of justice, will consider the following in determining if any new material should be accepted and made available to the Panel:
 - Is this material directly and critically relevant to the case?
 - Why was this material not included in the original request to the IFO?
 - Can hold individual teleconference hearings with all the involved parties.
 - Can request a presentation by the IFO on the matter under review. The Panel, at its discretion, can also request answers to its questions from the IFO which must respond promptly to these (2 business days (TBD at implementation with the IFO) California time following the day of the request – this should be included in the IFO SLE process statistics).
 - Definition of Significant Issues – Any clearly demonstrable inconsistency or deviation by the IFO of properly following its procedures and applying these fairly or how the IFO complied with the requirements of RFC 1591, the CCNSO FOI for RFC1591 as adopted by the ICANN Board as well as any other policies developed through a ccNSO policy development process and adopted by the ICANN Board in making its Decision which, in the opinion of the Reviewer(s), could have significantly impacted the IFO Decision.
 - The Reviewer(s)' Advice will explain in detail their decision.
 - The Administrator will review the Advice from the Reviewers to ensure it meets all the requirements prior to publishing it. The Administrator may work with the Reviewer(s) to amend the Advice to ensure it meets the requirements:

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- The Advice provides all the relevant administrative and background information.
 - The Advice will clearly indicate if there were any significant issues or not.
 - If there were issues the Advice clearly indicates what the issues are as well as why they are issues.
 - Formal sign-off of the Reviewer(s) on the final Advice and a statement of majority opinion if necessary.
- Final Independent Advice from the Reviewer(s) cannot be appealed.
- **IFO - details not included in the process overview:**
 - Will maintain a good working relationship with the Administrator.
 - Must amend its procedures to allow concerned parties sufficient time to file for an IAR or other official IFO review mechanisms prior to the IFO implementing or making a recommendation to the ICANN Board regarding the decision which is being challenged (implementation). As such the IFO will advise all directly involved parties of any decisions which can be reviewed under this Policy. Such decisions will be labelled Preliminary Decisions and will advise the concerned parties of their options for Reviewing such decisions.
 - After reaching a decision on a ccTLD request which can be Reviewed, the IFO will advise those parties who could apply for an IAR of the Decision and of their options for Reviewing the Decision as well as the timeline for doing so.
 - If a Decision is being Reviewed by the Administrator, the IFO cannot make a recommendation to the ICANN Board on the matter being reviewed prior to the Administrator confirming it can do so.
 - Will make all relevant internal materials available to the Reviewer(s) who will be under a formal confidentiality agreement. These will include all internal emails on the matter and all communications from all the relevant parties but does not include formal legal advice to the IFO.
 - Will make itself available to the Reviewer(s) to present details of the case or answer questions.
 - If the IFO fails to comply with the requirements of the Review policy the Administrator will advise the ICANN CEO and the ccNSO Council of the situation and request that the ICANN CEO promptly correct the situation.
 - **Applicant and Claimant - details not included in the process overview:**
 - Must be a ccTLD Manager except in the case of the delegation of a new ccTLD where any applicant for that new ccTLD is eligible.

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- To launch an IAR, the Claimant must submit an application (Application) via the IAR website to the Administrator (in English) within 30 days of the Decision being made except if the Applicant has requested an IFO internal review or IFO Mediation. If the Applicant has used these other mechanisms, within 30 days of the Decision being made, it will be granted 30 days to apply for an IAR after these processes are completed. The Application must also include payment of the Application Fee.
 - 30 days to be calculated as follows – The IFO publishing its Initial Decision will be deemed Day 0. Day 1 will begin 1 minute after 23:59 UTC of Day 0. The opportunity to submit an application for an Independent Advice Review will expire on Day 30 at one minute past 23:59 UTC.
 - The evaluation criteria for an IAR Application are:
 - Be on the properly completed form/contract (TBD)
 - Be received prior to the 30-day deadline.
 - Clearly indicate which IFO Preliminary Decision is being Reviewed.
 - Not be for an IFO Preliminary Decision which has been accepted for a Review, is currently being Reviewed or has already been Reviewed.
 - Have paid the required fees (fees and details to be finalized at implementation).
 - Be a party listed in the IFO Decision that is a ccTLD manager listed in the IANA database or in cases related to the delegation of a new ccTLD any parties who applied to be the Manager for that ccTLD.
 - Clearly indicate the individual the Applicant has delegated to be responsible for the Application including all relevant contact information.
 - Clearly state why the Claimant believes that:
 - That the IFO did not properly follow its procedures or applied these fairly in arriving at its preliminary decision; or
 - The IFO decision being reviewed is inconsistent with RFC 1591, the CCNSO FOI for RFC1591 as approved by the ICANN Board, as well as any other policies which apply to CCNSO members and is approved by the ICANN Board.
 - For cases where there is a potential for more than one Claimant⁶. In all such cases where the Administrator has approved an Application for a Review, the Reviewer(s) will consider all elements of the IFO Decision for all potential Claimants.
 - By submitting an Application, the Claimant will agree to the rules for the Independent Advice Review, which will include a clause preventing the Applicant from taking the Administrator, Reviewers, the CCNSO, or ICANN to court with respect to the Independent Advice Review. This in no way prevents the Claimant

⁶ 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

421 from taking the IFO or ICANN to a relevant court regarding the Decision by the IFO
422 and any approval of such recommendation by the ICANN Board.
423 ○ The Administrator may interact with the Claimant's contact person to obtain
424 clarifications on the application (and may allow the Applicant to resubmit).
425 ○ If the Administrator rejects the application for an Independent Advice Review the
426 Claimant's payment will be refunded minus administrative costs (implementation).
427 There is no mechanism to appeal the Administrator's decision to reject an
428 application however the Administrator will be required to publish its reasons for
429 rejecting the application.

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