

ICANN BOARD SUBMISSION NO. 2013.04.11.1h

TITLE: Accountability Structures Bylaws Effective Date
PROPOSED ACTION: For decision

EXECUTIVE SUMMARY:

ICANN convened the Accountability Structures Expert Review Panel (ASEP) to perform the review of ICANN's accountability structures called for in Recommendations 23 and 25 of the Accountability and Transparency Review Team (ATRT) Recommendations. The ASEP produced a report in October 2012 that was posted for public comment along with proposed Bylaws revisions to implement the ASEP's recommended changes to ICANN's Reconsideration and Independent Review processes (IRP). At the Board's 20 December 2012 meeting, the Board adopted the Bylaws revisions, but directed staff to proceed with implementation work and notify the Board at its Beijing meeting as to the date that the Bylaws should be effective.

During implementation, consideration was given to public comment relating to the potential concern of comprising a standing panel. Accordingly, minor revisions were made to the Bylaws to address public comment. With those minor revisions, the recommendation is that the Bylaws be made effective as of 11 April 2013.

BGC RECOMMENDATION:

The Board Governance Committee (BGC) recommends that the Board deem 11 April 2013 the effective date for the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board on 20 December 2012. The BGC also recommends that the Board approve the further minor revisions to Article IV, Section 3 of the ICANN Bylaws addressing the standing panel issue for the Independent Review process.

PROPOSED RESOLUTION:

Whereas, the Accountability and Transparency Review Team's Recommendations 23 and 25 recommended that ICANN retain independent experts to review ICANN's accountability structures and the historical work performed on those structures.

Whereas, ICANN convened the Accountability Structures Expert Panel (ASEP), comprised of three international experts on issues of corporate governance, accountability and international dispute resolution, which after research and review of ICANN's Reconsideration and Independent Review processes and multiple opportunities for public input, produced a report in October 2012.

Whereas, the ASEP report was posted for public comment, along with proposed Bylaws revisions to address the recommendations within the report.

Whereas, after ASEP and Board review and consideration of the public comment received, on 20 December 2012 the Board approved Bylaws revision to give effect to the ASEP's recommendations, and directed additional implementation work to be followed by a staff recommendation for the effective date if the revised Bylaws.

Whereas, as contemplated within the Board resolution, and as reflected in public comment, further minor revisions are needed to the Bylaws to provide flexibility in the composition of a standing panel for the Independent Review process (IRP).

Resolved (2013.12.20.xx), the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board and subject to a minor amendment to address public comments regarding the composition of a standing panel for the IRP, shall be effective on 11 April 2013.

PROPOSED RATIONALE:

The Board's action in accepting the report of the Accountability Structures Expert Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of the Board's commitment to act on the recommendations of the Accountability and Transparency Review Team (ATRT). The ASEP's work was called for in ATRT Recommendations 23 and 25, and the work performed, including a review of the recommendations from the President's Strategy Committee's work on Improving Institutional Confidence, is directly aligned with the ATRT requested review.

The adoption of the ASEP's work represents a great stride in ICANN's commitment to accountability to its community. The revised mechanisms adopted today will bring easier access to the Reconsideration and Independent Review processes through the implementation of forms, the institution of defined terms to eliminate vagueness, and

the ability to bring collective requests. A new ground for Reconsideration is being added, which will enhance the ability for the community to seek to hold the Board accountable for its decisions. The revisions are geared towards instituting more predictability into the processes, and certainty in ICANN's decision making, while at the same time making it clearer when a decision is capable of being reviewed. The Bylaws as further revised also address a potential area of concern raised by the community during the public comments on this issue, regarding the ability for ICANN to maintain a standing panel for the Independent Review proceedings. If a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists.

The adoption of these recommendations will have a fiscal impact on ICANN, in that there are anticipated costs associated with maintaining a Chair of the standing panel for the Independent Review process and potential costs to retain other members of the panel. However, the recommendations are expected to result in less costly and time-consuming proceedings, which will be positive for ICANN, the community, and those seeking review under these accountability structures. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms. This decision is not expected to have any impact on the security, stability or resiliency of the DNS.

This is an Organizational Administrative Function of the Board for which the Board received public comment.

Submitted by: Amy Stathos, Deputy General Counsel (Amy.stathos@icann.org);
Samantha Eisner, Senior Counsel (Samantha.eisner@icann.org)

Date: 8 April 2013

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BACKGROUND:

Immediate Adoption Is Important for Scalability

Now that initial evaluation results for new gTLD applications are being released, it is of utmost importance that the enhanced Reconsideration and Independent Review processes be put into place. The ASEP recommendations provide more clarity for the community on scope and standing, and will allow for more scalability in proceedings, the ability for summary disposition of claims, the consolidation of proceedings where appropriate, the institution of page limitations, and more predictability on timing. To the extent that decisions arising out of the New gTLD Program result in initiation of Reconsideration or Independent Review proceedings, having the new Bylaws in place will provide consistency to those seeking reconsideration or independent review.

Bylaws Updates – Background

In Resolution 2012.12.20.18, the Board approved the Bylaws amendments to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as posted for public comment. The Board further requested that staff report in Beijing on the status of implementation and provide a recommendation for an effective date for the Bylaws. The resolution noted that there may be implementation issues regarding the creation of a standing panel for the IRP, and that minor revisions to the Bylaws could be made to the Board prior to the effective date. Implementation work has proceeded sufficiently now to allow for the Bylaws to be effective as of the 11 April 2013.

Independent Review Process – Creation of Standing Panel

ICANN has coordinated with the current IRP Provider, the International Centre for Dispute Resolution (ICDR) to determine how to best create the standing panel. The ICDR is in the process of recommending a fee structure that can help mitigate costs within the proceedings. As the ICDR is working to identify panelists for ICANN consideration, and finalizing fee structure recommendations, we recommend that the Bylaws can now be implemented. Per the 20 December 2012 resolution, additional

language relating to the standing panel will provide flexibility to use either the standing panel OR individually selected panelists for any proceeding initiated when a standing panel is not comprised. The revised language is provided as Exhibit A to these Reference Materials. Because the standing panel issue was specifically identified in the public comment forum as a topic for potential change, the Bylaws should be made effective without further public comment.

ICANN continues to work diligently with the ICDR on the standing panel member selection so that IRP proceedings are administered in conformity with the new Bylaws regime as soon as possible.

Reconsideration Process – Further Enhancements to ICANN’s Accountability

The work towards implementation of the revised Reconsideration process required far less effort than the IRP, and we are ready for those revised Bylaws to become effective.

Submitted by: Amy Stathos, Deputy General Counsel (Amy.stathos@icann.org);
Samantha Eisner, Senior Counsel (Samantha.eisner@icann.org)

Date: 8 April 2013

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?;
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such

evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.
7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN.
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
 - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
 - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
 - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
 - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
 - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.
13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.
15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in

the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.
19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.
20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.