

Registries Stakeholder Group Statement



Issue: **Independent Review Process Standing Panel**

Date statement submitted: **15 May 2019**

Registries Stakeholder Group (RySG) comment:

Introduction

The Registries Stakeholder Group (RySG) appreciates the opportunity to provide input on this extremely important topic. The IRP is the principal mechanism for, among other purposes, “ensur[ing] that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws” and “ensur[ing] that ICANN is accountable to the global Internet community and Claimants [as defined in the Bylaws]”. The importance of the IRP has only increased since the IANA Transition and the removal of the perceived oversight by and accountability to the US Government. Even before ICANN amended its Bylaws in connection with the IANA Transition, there was an expectation that ICANN would put into place an IRP standing panel, from which the panelists for an individual IRP could then be drawn. The RySG therefore welcomes this exercise to progress the appointment of a standing panel.

Feedback on the questions

<p><i>Qualifications for Standing Panelists:</i> Are there specific qualifications that should be included? If so, what are they? Anything disqualifying? Should the SOs and ACs recommend qualifications? And if so, how?</p>

Qualifications

Since a number of IRPs have proceeded to decision in the absence of a standing panel, the parties to those proceedings have had to identify their own panelists. As a result, it is possible to review the background qualifications of the panelists in IRP proceedings to help identify the recommended qualifications. A superficial review gives us the following, for example:

- Current and former judges;
- Experienced arbitrators;
- Experience in contract, breach of fiduciary duty, IP, administrative, competition, new technology/internet, and public international law.

The RySG recommends that ICANN staff conduct a thorough review to compile a list of general background qualifications, supplement that list with general background qualifications of panelists from new gTLD objection proceedings and make that list available.

The RySG supports a previous suggestion of creating an overall list of potential qualifications and developing a matrix to ensure that, collectively, the standing panel appointees possess a sufficient breadth and depth of possible qualifications.

Disqualified

Conflicts of interest (COI) (actual or perceived) should be the primary basis for disqualification. It must always be a requirement for a standing panelist who has a specific COI to recuse themselves from a particular IRP, which would be the case whenever a panelist has a financial interest in the IRP's outcome (directly or indirectly, and whether the interest is personal or through an employment or similar relationship). However, because all IRPs involve ICANN Org as one of the parties, then individuals who have (or could be perceived as having) a current or past close relationship with the Organization or interest in the operation of the IRP should not be appointed to the Standing Panel.

In particular:

- Current and former employees and officers of ICANN
- Current and former consultants to ICANN
- Current and former Board members of ICANN
- Current and former external legal advisors who have advised ICANN – would cover both individual lawyers who have actually advised ICANN and any member of a firm which is currently engaged to provide legal advice, irrespective of whether the individual actually works on matters for ICANN
- Persons who have, within the past 5 years, (i) held a leadership position in any ICANN SO, AC or component part; (ii) chaired or co-chaired a PDP WGs, CCWGs or RTs; or (iii) received travel support from ICANN. This 5-year period strikes a reasonable balance in order to limit the prospect that standing panelists must repeatedly recuse themselves from IRPs related to matters they previously had an interest-in by virtue of their leadership role (bearing in mind the fairly long time before matters actually reach an IRP) without unnecessarily excluding otherwise well-qualified candidates.
- Any employee or officer of an entity, or an individual, that has pursued an ICANN accountability mechanism, including an IRP, within the past 5 years.
- Persons having a financial or other interest in the operation and maintenance of the Standing Panel or the IRP dispute resolution provider, or in domain / ICANN disputes generally.
- Persons who would be disqualified by operation of applicable professional conduct rules or rules employed by the IRP Provider.

ICANN Bylaws S 4.3 (q) specifies an *“affirmative obligation to disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding”*. Standing panelists should therefore sign a certificate confirming that none of the above disqualifying criteria apply; that they are independent (and thus, for example, if they are a judge would need to be able to certify that they are able to make independent decisions not subject to the state control of any government); and that they have no other known conflict of interest which would prevent them serving as a standing panelist. This should be renewed at least annually.

Since it is envisaged that there should be a set of criteria, such as the above, which serve as a complete disqualification from appointment to the standing panel, we consider it to be important that there is a process to vet the slate of candidates at appointment, both to identify those with the necessary qualifications and to ensure, so far as possible, that those who are disqualified are removed from consideration. Terms of appointment should also serve contractually to reinforce the

obligation that standing panelists must continually review their qualification and pro-actively resign if a disqualification event occurs, with penalties for failure to do so. Such penalties might include, in addition to removal from the standing panel, repayment of fees, reporting them to their professional overseer (Bar Association or similar), or even action for breach of contract in a really egregious case. Consideration should also be given to re-vetting the standing panelists periodically.

There must also be a mechanism to remove or replace panelists for unavailability, incompetence, or development of a conflict of interest (after appointment to the standing panel).

Yes, SOs and ACs should recommend qualifications. ICANN should conduct a formal public comment period (see our overarching comment below) on the results of this exercise to allow SOs and ACs to recommend qualifications.

Identifying a Slate of Well-Qualified Panelists: We've heard concerns from some members of the ICANN community as to whether the broader community has the appropriate experience and skill for this selection work, and have suggested the possibility that ICANN instead contract with experts to perform this vetting process. Should the community rely on expertise to help vet and recommend a final slate for the standing panel?

The community must be permitted to obtain outside expertise, but should not be required to rely on it. The use of experts should be a support for the SOs/ACs in exercising their responsibility, and not a replacement for them. Thus SOs/ACs should retain control over the selection process and candidates considered, and must have the ability to remove or replace any experts retained to assist in this process.

Expert support for the SO/ACs could be in the form suggested (i.e. an external recruitment firm or one or two jurists) or other reasonable form. The RySG suggests consulting with the International Center for Dispute Resolution (ICDR), the current IRP Provider, about their slates of panelists, process for identifying new panelists, and criteria for those panelists in order to gain further insight, before starting from scratch in the development of a process.

The RySG recommends the creation of a steering committee of SO and AC representatives with relevant expertise, acting on behalf of their SOs and ACs, to be responsible for managing the selection process, rather than an unspecified "community"; in other words a Nom-Com like structure would seem practical and appropriate. Just as the Nom Com is able to use external resources to identify potential candidates for key leadership positions, so too could the steering committee.

Board Approval of Panel Slate – Further Questions: After there is a slate of well-qualified applicants, the Board must confirm the panel. If the Board has questions that might impact its confirmation, to whom should those questions be addressed? If experts are used to develop the slate, should the experts, the SOs and ACs, or some combination thereof be part of that conversation?

The Board should direct questions to the SO/AC Steering Group recommended above, which could consult with any experts involved in the selection of panelists put forward to the Board.

Future Selections: Should the process being designed today be reviewed for effectiveness after the first slating is completed, prior to making it standard operating procedure for future selection rounds?

Yes, the **process** and whether it was effective in identifying and appointing a slate of candidates in a timely manner should be reviewed. It would not be possible or effective to review Standing Panelists until the standing panel has been in place for some time. The RySG also recommends a review in time (perhaps 3-5 years) to determine if the standing panel appeared to be missing key experience, which impacted on ability to seat an appropriately expert panel in any IRP.

It is important that some work be done to establish criteria for what effectiveness would look like prior to the seating of a first panel.

Overarching Comments

Whilst the RySG appreciates this exercise of seeking community input, we are disappointed and concerned that ICANN did not publish this request for input through the standard public comment process. Instead, ICANN chose to do so via a blog – and one published on the first day of the ICANN 64 Kobe meeting, increasing the risk the community would miss or overlook this request and resulting in the deadline for input later being extended by 1 month. Furthermore, collecting comments through a single email address is not as transparent as the use of the standard public comment process, since, although it is published, it is much more difficult to locate the mailing list archive and, consequently, means there is less chance that community members will review and respond to each other's input. This comment collection mechanism is an increasing trend, with similar non-transparent processes having been used recently for comments on the DAAR Methodology, the Draft Technical Model from the Technical Studies Group and the Proposal for a Possible Unified Access Model for Registration Data.

ICANN maintains a public comment section on its website for a reason. It is unhelpful to the community that requests for input on important topics such are not announced and processed through the community's central comment platform and have increasingly been published in decentralized locations not governed by the community comment guidelines.