

The Intellectual Property Constituency appreciates this opportunity to comment on the Draft Registrar Disqualification Procedure (see <http://www.icann.org/en/public-comment/#prdp>).

IPC commends ICANN for developing and proposing this procedure. In general, our comments address how this proposed procedure relates to the contractual obligations of accredited registrars, and to the enforcement of those obligations. In some instances, in order for the disqualification procedure to be effective, some changes may be needed to the underlying contractual obligations and ICANN's enforcement processes.

### Triggering Actions

The draft procedure's list of triggering actions may be incomplete, and also includes at least some occurrences of which ICANN might not necessarily become aware.

For example, under 1.2.3, a registrar's material breach of a Registry-Registrar Agreement (RRA) with any gTLD registry, leading to termination of the RRA, is a "triggering action" that should lead to consideration of disqualification. Is either the registry or the registrar obligated to report any such termination to ICANN? If not, and if the registrar does not voluntarily "abandon" working with the Registry in question (see RAA section 5.5), how would the termination necessarily come to the attention of ICANN? Point 1.2.3 is not likely to work as intended in the absence of a clear contractual obligation for all material breaches of the RRA to be reported to ICANN, presumably by the registry.

Notably, although criminal convictions or adjudications of fraud or similar misconduct are grounds for ICANN to refuse to accredit an registrar applicant (Statement of Registrar Accreditation Policy, paragraph I.B.3), under the draft procedure such convictions or adjudications are not "triggering actions" for the purposes of disqualification after accreditation has occurred. Perhaps, in some cases, when ICANN learns of these events, it will demand that the registrar cure the breach (RAA section 5.3.3) by removing the convicted or adjudicated person. If the registrar refuses to do so, then point 1.2.2 would make this a "triggering action." But why require this indirect route to the same end? The list of "triggering actions" should be expanded to include any occurrence listed in paragraph I.B.3 of the Statement of Registrar Accreditation Policy, and the RAA should be amended to require an accredited registrar to report any such occurrence to ICANN. Otherwise, it is quite probable that ICANN will not be aware of such occurrences, and the disqualification procedure will never be invoked.

Finally, ICANN should review the list of "triggering actions" to ensure that it comprehensively covers the range of registrar misconduct that threatens significant harm to registrants. There may well be scenarios in which registrants are harmed by registrar actions that do not constitute a breach of the RAA and do not meet the rather amorphous standard of "threaten[ing] or compromis[ing] the security and stability of the domain name system." Some the actions described in section 3.1 may fit this description. As other commenters have noted, ICANN should not be powerless to disqualify bad actors in these scenarios.

### People and Entities Subject to Disqualification

Once a triggering event occurs, IPC agrees that ICANN should consider (though not necessarily that it should conclude) disqualification of registrar directors and officers, and, in

appropriate cases, of managers, employees, and owners. The question is whether ICANN will know who these people are, and how to contact them? While the registrar accreditation application requires the applicant to list all directors, officers, “relevant managers,” and owners of more than a five percent interest, its obligation to keep this information current, and to provide contact information for these people, is far less clear. It is also unclear whether the application question 9(iv) extends to beneficial owners. In order for the threat of disqualification to be meaningful and thus an incentive to avoid the occurrence of a “triggering action,” registrars should be contractually obligated to inform ICANN of all changes to its directors, officers, owners, and senior managers, and to provide full contact information on each of them (and/or document the consent of each of them for the registrar to accept service upon them of any notification under point 5.1 of the draft procedure).

#### Determination of Disqualification

As some other commenters have noted, point 3.2.3 is ambiguous and should be re-drafted. If a registrar is owned by A during year 1, when a bad act described in section 3.1 occurred, the fact that it sold the registrar to B the next year should not immunize it from disqualification. If, however, the bad act did not occur until year 2, and there is no evidence of A’s involvement in it, A should not be disqualified.

#### Other Comments

The draft procedure describes the circumstances under which it can or must be invoked, but does not say who may invoke it. It is apparently assumed that only ICANN staff can initiate the process leading to disqualification. This should be spelled out. Furthermore, provision should be made for ICANN to receive, consider, and promptly act upon complaints from third parties that a “triggering action” has occurred. The procedure should also spell out ICANN staff’s ability to seek further information from registrars subject to disqualification, and from any third party, in carrying out the disqualification procedure. Finally, as noted by previous commenters, the procedure could benefit from clear definitions of several key terms.

Respectfully submitted,

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