



Arif Ali
(202) 624-2888
AALi@crowell.com

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Re: COMMENTS FROM ICM REGISTRY AND CROWELL & MORING ON
ICANN'S PROPOSED REVISIONS TO THE BYLAWS GOVERNING
BOARD ACCOUNTABILITY

This comment is submitted by ICM Registry, LLC and Crowell & Moring LLP, counsel for ICM. Crowell & Moring represented ICM in the first, and to-date the only, ICANN Independent Review Process. Although we welcome ICANN's efforts to continue to improve Board accountability, we are emphatically opposed to the current proposal for revision to the Bylaws relating to Board accountability, and specifically to those proposing alterations in the Independent Review Process (IRP). We are concerned that the proposed changes to the Bylaws will only serve to further insulate the ICANN Board from accountability. We suggest that (1) ICANN refrain from acting on the current set of proposals until the results of the recently concluded Independent Review Process between ICM and ICANN can be reviewed and analyzed; and (2) ICANN engage in appropriate consultation with experts and the ICANN community before undertaking reform.

**I. ICANN SHOULD ANALYZE THE RECENT INDEPENDENT
REVIEW PROCESS AND CONSULT WITH PARTICIPANTS
BEFORE PROCEEDING WITH REFORMS**

The recently concluded IRP between ICM and ICANN was the first, and to-date the only, opportunity to test the functionality of the rules governing the IRP. Yet ICANN has utterly disregarded any of the lessons that could be gleaned from this process, instead proposing reforms while the process was still on-going. During that process, ICANN's own witnesses represented to the Independent Review Panel that ICANN was grateful for the opportunity to test the process, and invited the Panel to provide ICANN with comments and advice regarding the functionality and benefits of the IRP. For example, Dr. Paul Twomey told the Panel he hoped they would "provide ICANN with any observations [they] might have about how we can make this process better than it might be today." (Hearing Transcript, Page 797, Lines 8-11). The panelists, all respected and experienced arbitrators, having been explicitly invited to provide ICANN with their views on the process, are likely to provide valuable insight, which will be beneficial to any reform efforts. ICANN

should therefore postpone any reforms until the panelists have the opportunity to render a decision and to provide their analysis and comments on the IRP.

Not only has ICANN failed to provide the panelists with an opportunity to comment on the IRP, ICANN has also failed to engage with ICM or ICM's counsel to obtain any information or insight into the conduct of the Independent Review Proceedings. Regardless of the substance of the ICM dispute, the experience of the (first and only) complainant in independent review proceedings is highly relevant to any evaluation of the benefits and flaws of such proceedings. Moreover, ICM's counsel, as experienced practitioners in the fields of domestic and international dispute resolution, could no doubt provide significant benefit to any reform of the IRP. ICANN has just expended significant effort and resources in engaging in the IRP, and yet is ignoring all of the benefits that could be gleaned from reviewing and analyzing that process and the resulting decision, and is instead proceeding with reforms as if the proceedings had never occurred.

II. ICANN SHOULD ENGAGE IN EXPERT AND COMMUNITY CONSULTATION BEFORE PROCEEDING WITH REFORMS

In addition to engaging with the participants in the recent IRP, ICANN should also seek additional expert advice and consult with the broader ICANN community regarding reforms to the IRP. Revision of the rules governing the IRP is sufficiently important that full consultation is necessary. Not only is the IRP supposed to serve as "the final method of accountability" for ICANN, decisions made in IRPs will likely have broad effects on ICANN policy and ICANN community members beyond the specific disputes. Experts in the practice of dispute resolution, especially arbitrators and arbitration counsel, could provide important insight into how to design the process to be efficient, effective, and accessible, and to ensure that the process integrates into the overall functioning and obligations of ICANN. Without the advice of such experts, ICANN cannot be sure that the proposed changes will be improvements on the existing rules.

Moreover, in revising the rules governing the IRP, ICANN should follow its principles of bottom-up coordination and community participation. Sufficient community participation requires more than simply allowing comments after a closed drafting process is completed. Community members certainly have an interest in the design of the process both because of the effect that decisions of the IRP are likely to have on ICANN policy generally, and because of the need to ensure that the process is accessible, affordable, and expeditious in the event they become involved in a dispute. The revision process should not be rushed, especially at the expense of soliciting valuable insight and input from experts and the ICANN community.

III. CONCLUSIONS AND RECOMMENDATIONS

ICM believes that ICANN should delay the process of revising the Bylaws regarding Board accountability to include the lessons learned from the recent IRP initiated by ICM. Additionally, ICANN should empanel a team of dispute resolution and accountability experts to propose improvements to the IRP rules based on their knowledge and expertise, and their analysis of the recently concluded IRP. In conducting such consultations and seeking expert advice, ICANN should consider, among other issues:

- Ensuring that all provisions of the Articles of Incorporation and Bylaws, especially the substantive obligations in certain provisions, can be enforced under any revised rules for Independent Review proceedings; and
- Ensuring that independent review proceedings are accessible and available to all impacted stakeholders, even for parties with limited means.

Arif H. Ali
Alexandre de Gramont
John L. Murino
Emily Alban

Crowell & Moring LLP
Counsel for ICM Registry, LLC,
Claimant in ICM v. ICANN,
ICDR Case No. 50 117 T 00224 08