

Repose: possible areas for compromise from previous discussions

Assuming there continues to be a repose of some period of time, to be determined

- Allow for concept of prolongation or waiver/exception to the repose:
 - Possible circumstances suggested: justifiable lack of awareness (KA); clearly demonstrable injustice (KP)
 - Requires justification and proof
 - Decision to be made by IRP Panel (KA); ICANN Board acting in good faith (KP)
 - N.B. at applicable time, there is no IRP Panel: decision for interim panelist drawn from Standing Panel?
- Exclude from application of repose those who were not eligible until now?
 - Bylaws 4.3(b)(i): Claimant is materially affected by the Dispute, i.e. has suffered injury or harm directly and causally connected
 - Substantial public comment input concerned at being excluded before a potential Claimant is even eligible
 - Would this be a “clearly demonstrable injustice” as above
 - Limit this to personal disputes as opposed to challenge to the underlying policy?
 - Carve out those who made themselves eligible in full knowledge of the relevant policy/rule, e.g. a new registrar who became accredited after a policy is in place should not then be able to challenge it out of time
- Clarification on start of the clock:
 - Publication on ICANN website
 - Should there be wider publication of adopted policies to bring greater visibility?

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What might be the time limit for the repose:

- Substantial opposition in the public comments to a repose, but also various comments that, if there is to be a repose, 12 months is too short:
 - 1st PC: BC, INTA, Karl Auerbach
 - 2nd PC: IPC, RySG, Verisign

Interplay with other accountability mechanisms:

- 2nd PC: IPC suggest tolling for all; RySG suggest two options:
 - 36 month repose, tolled for time spent on CEP or RFR
 - 24 month repose, tolled for time spend on CEP, RFR, Ombuds, 2xDIDP requests

Identify and address uncertainties in when a potential Claimant “becomes aware or reasonably should have become aware” of the action/inaction under prong 1

- 2nd PC: INTA: term overly vague. “include a test for identifying when a claimant is deemed to be under inquiry notice injury and the clock begins to run. Such tests have been devised under U.S. jurisprudence and there may be other jurisdictions that apply similar tests.”