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BRENDA BREWER:

Good day, everyone. Welcome to the IRP-IOT Meeting #75 on the 31<sup>st</sup> of August 2021 at 19:00 UTC. Today's meeting is recorded. Kindly state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation.

Susan, I'll turn the call over to you. Thank you.

SUSAN PAYNE:

Thanks very much, Brenda. And hello, everyone. It's Susan Payne. For the benefit of our guests, I'm the chair of this small group, the IRP-IOT, which is a cross-community group that is tasked with putting together the rules for the Independent Review Procedure, amongst other things. We do actually have some other tasks on our radar as well that we need to address. But the rules are one of our primary responsibilities and the thing that we're working on at the moment.

So thanks, everyone who has joined. Hopefully we will perhaps get a couple more join us as we're going through the early agenda items. Just to start off, as usual we'll do a quick review of the agenda and updates to SOIs.

And we have a couple of action items noted from a previous meeting, both are with Sam and Liz. The first being to produce some draft language on the repose, particularly to consider the notion of a safety valve as we've discussed on our previous calls. And the second is to look at maximum times for the non-IRP accountability mechanisms to give us collectively an idea of how much time other processes may take up and

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if we were to try to allow time for them in our timing rules, what potentially we are looking at in terms of timing.

Agenda Item 3 is, I think, probably the highlight of this particular meeting. We are very pleased to have Herb Wayne, who is the ICANN Ombuds, join us. And I'll come onto that in a moment, but we have particular questions that we're hoping Herb can answer, and just seeking to get his input generally on the Ombuds process and how it relates with the IRP.

Agenda Item 4 is referring back to one of those action items that we noted above and is a discussion about the times for the non-IRP accountability mechanisms.

And then Agenda Item 5. And this is, somewhat time-permitting, will be a review of our list of other tasks that we have responsibility for handling and that we still have on our plate. And perhaps if, again, time-permitting, considering starting a discussion on how we're going to divide that work up and get it get it moving forward a bit more quickly.

And then finally, the next meeting. Actually, that is something that we will need to take a bit of time to discuss. That September 14<sup>th</sup> day is a problem for me, but we'll come to that at the end of the meeting.

So, coming back up to Agenda Item 1 and just to updates to Statements of Interest. Are there any updates that anyone needs to bring to the attention of the group? If so, please do put your hand up and speak up now. Or if you can't for some reason, then please do make a note in the chat. Okay. I'm not seeing or hearing from anyone, so hopefully that sees us all with up-to-date SOIs. But just the regular reminder to all of us

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to keep our Statements of Interest under review and to update them as necessary.

Okay, Agenda Item 2 then is to just circle back on the couple of outstanding items. And if I could, I will just pass this over to Sam just to see if there is any update on either of these for this call.

SAM EISNER:

Thanks, Susan. This Sam Eisner from ICANN Legal for the record. So our team is concluding on some draft language to look at for repose. We expect to have that for you before the next meeting of this group. So that's our intended work plan on that now that everyone's back from vacation.

In terms of maximum times for the non-IRP accountability mechanisms, I have a short graphic and some slides behind it that we can turn to at the appropriate time during that Agenda Item 4 because I think it fits right into there.

SUSAN PAYNE:

Perfect. Thanks very much, Sam. Okay, all right. So then our next agenda item is our discussion with Herb who has very kindly given up his time to join with us. Herb, I know that Bernard has given you some background on what we're doing, but just for completeness and for the record, the task that we're working on—the overarching task—is that we're working on, as I mentioned, the rules for the Independent Review Procedure. There are some interim rules in place, but we are looking at those again and working to come up with a set of recommendations for a final set of

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rules that could be adopted, assuming that the Board felt it was appropriate.

One of the important issues that we are looking at is around the timing of the IRP, and more specifically the time within which a complainant should file their IRP after the action or inaction in question that they are challenging. This has been the subject of a couple of public comment periods. The last public comment period was some time ago before this group was reconstituted, but we have been obviously looking at that input that we received from the community.

And more than one group in the community had expressed the view that in setting a maximum time period after knowledge of the event in question within which to bring an IRP, had expressed concern that this needed to allow for a complainant to take advantage of or to have access to other non-IRP accountability mechanisms that are also provided for in ICANN's bylaws in order, effectively, that the time for file wasn't effectively removing the access to those other mechanisms.

I wouldn't say we are not finally agreed on this course of action, but certainly that has been the direction of travel. And so, in particular, we are thinking about, at the easiest end of the scale, the Cooperative Engagement Process which is specified in the bylaws as a sort of precursor kind of mediation, if you like, or mediated discussion before one formally launches into an IRP. And so at one end of the scale, there's a very clear correlation between the Cooperative Engagement Process and the IRP and question because it's sort of a part of the process.

But the other mechanisms we've also been discussing have been the Request for Reconsideration, requests for documentary disclosure, and most appropriately for you, a complaint to the Ombuds.

And so I would say that some of our group and some of the public comments felt that it was appropriate to allow some time for a complaint to you. And therefore, the best way to do so—or at least the way we were discussing doing so—was to, where there was an appropriate complaint, that we would toll the time for bringing an IRP to allow for that complaint. And then the time limit would continue from the place at which it was paused after that onboarding process was completed.

Others in our group or less convinced, I think, that that a complaint to the Ombuds is the sort of accountability process for which we need to take into account and for which we need to toll the timing, particularly feeling that it's a different type of process and perhaps dealing with different types of complaints.

And so we're really looking to get your thoughts on this and your input so that we can, as a group, try to come to a conclusion whether we should toll the time for filing an IRP to allow for a complaint to you; and if we should, what might be a suitable time to toll that process, or how might we best account for the complaint to you.

So I think, first off, I had put together a series of questions. I'm hoping others in the group will chip in if they have other questions they want to add as well. And also, I'm obviously hoping that you will comment generally and not feel yourself constrained by the questions we might ask you if you have thoughts on this.

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But first off, in relation, really, to the overarching question of whether a complaint to the Ombuds is the type of complaint for which it's appropriate to pause the timing for bringing of an IRP, we're seeking to understand: is a complaint process to the Ombuds the type of mechanism that might be used to resolve the complaint relating to an issue that's within the scope of an IRP or that might narrow the issues in dispute in an IRP?

So in other words, is it appropriate to use a complaint to you for a concern or a complaint that ICANN or the Board are acting outside of the bylaws or is it really more restricted to resolving frictions between individuals? Is how one of [inaudible] had kind of characterized the Ombuds process.

So I'll pause at that point, but we might then go on and ask some follow-up that relate to that first question if that's okay with you.

HERB WAYE:

Most certainly, Susan. Thank you. I want to shout out to Bernie there. Thank him for supplying me with a few links and resources so that I could take a look at this, which offered me an opportunity to go in onto your Wiki page and read up some of the various documents and catch up to speed with your group.

The very first thing I did was go online and find out what tolling means. It's not a term that was familiar with me. But I now know that it means to pause a process. And so, never too old to learn a new word, I guess.

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Right off the bat, I believe that the issues that are brought to either my office or any of the accountability mechanisms for that matter can be similar. The same issue can be brought to me. Whether it's something that I'm willing to take on or able to take on is that is another issue. I mean, a complaint can be filed regarding any incident that brings about an issue of fairness.

So if somebody comes to the office of the Ombuds with a decision or an action or an inaction that's been taken by the Board or ICANN Org or a constituency group, it will be seriously considered at my end. So there is a connection between IRP, Request for Reconsideration, and my office in that manner.

The biggest, of course, difference is that two of them are formal accountability mechanisms and one of them, my office, is informal. So I think right off the bat, one of the most important parts of that is that I can make recommendations. I can't demand or order any type of remedial action on behalf of anybody.

And I think maybe the other issue that's fairly important is that I am not an appeal mechanism. So my office and my investigations—unless it's something that has gone seriously wrong—generally doesn't look at the decision that was made. I will look at the process. I will make sure that everything was conducted fairly from beginning to end.

And then if there are recommendations to be made regarding whatever might have gone wrong during the process, I can make those recommendations. But my recommendation wouldn't involve,

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necessarily, the end decision that was made by any—either the Board, the Org, or a constituency stakeholder group, or whatever.

So that's probably the biggest difference between my office and an IRP. I mean, it all goes eventually back to the Board, but I am not going to look so much at the decision that was made and whether it was right or wrong.

When we talk about the tolling aspect, my immediate concern is confidentiality in the privileged conversations and discussions that take place within my process. In my opinion, any action taken by my office or a complainant—the action that we would take to inform the IRP mechanism that a delay needed to be imposed—would breach the confidentiality of my office. And that's my biggest concern, I think, at this point. So if somebody does come to the office, then that would be it.

Like I said, if I'm going to take on a complaint and make recommendations regarding something that's gone wrong—whether it be publicly or in a report—then that's one thing. But to actually intervene at some point with another accountability mechanism to advise them that there is an ongoing complaint, that's takes me out of my comfort zone a little bit. [inaudible].

SUSAN PAYNE:

Thanks, Herb. So that was one of the questions that we were going to come on to you, but it's as good a point as any to come on to that now because it was something that had come up in as part of our



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discussions—this question about is there any issue around confidentiality.

Obviously, we are aware that the proceedings before the Ombuds are confidential, certainly once they're underway. Or at least that's my understanding. I am aware that you sometimes will post blogs and the like about proceedings, but I believe that's after the event. But maybe you could touch on that.

HERB WAYE:

Yeah. If I conduct an investigation and it requires a report to go out—a public report—I would submit that report for consideration, but it would only contain recommendations. Depending on who committed the action or inaction or decision, they would be involved in that reporting process and would be offered my recommendations, my suggestions on the matter. That would be, at the end of a process.

And the reporting of an instance like that would involve permission from the parties that are involved, in particular the complainant, to determine whether it's an appropriate ... So it's all done, combined with the parties that are involved in an issue.

SUSAN PAYNE:

Okay. Thanks, Herb. And just come back, then, to this confidentiality concern. And we, by no means, have concluded as a group how this process of tolling would work. But in my mind, my assumption is that it would not be so much a process of you or anyone else needing to notify the IRP panel to pause proceedings because something has been referred to you. But more that if a complainant was seeking redress

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through your office and then concluded that it hadn't narrowed the issue sufficiently or haven't resolved the complaint, they would then at that point be thinking about bringing their IRP.

But it would be part of the process of making their complaint or setting up their complaint in the IRP that they would need to explain why they were not out of time if, indeed, timing was an issue.

So if the time to file an IRP is four months but the complaint through your office has taken four and a half months, on the face of it they're out of time and so it would be at that point that, when they commence their IRP, they would be explaining why they're not out of time—because they have been going through this process with you.

And that, consequently, it would be the complainant themselves who've made the complaint to you who are also bringing the IRP and effectively would be waiving their own confidentiality in so far as they needed to by just, at a bare level, explaining that there's been a procedure before your office.

But it may well be that that still causes some issues of concern for you around the confidentiality. Again, we're really seeking to get your thoughts on this.

HERB WAYE:

And I'll reiterate ... Confidentiality is not something I've invented. It's a standard of practice for the industry. It's part of the International Ombuds Association Standards of Practice in their Rules of Ethics. So to

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say that I would be comfortable with somebody declaring that they've come to my office ...

And I mean, it has happened frequently in the past where it would be trumpeted that, in particular with ... At the very beginning of the gTLD process, there was a there was a lot of back and forth between the various accountability mechanisms, and it was being publicly stated by just about everybody where they were in their process.

Anything that touches on confidentiality and the privilege of the office gives me rise to concern, particularly because it, to a certain element, undermines the credibility and the trust that people have with the office. So if there's an opening up of communication to the public written into a process, it kind of defeats the purpose of the standards that my office is held to.

I mean, the chances of an investigation at my level taking four months to carry out—and simply because of the formality—is not something I've experienced. And I don't believe it's something that either of the former Ombuds have experienced to that extent where something has taken four to six months. I could see a systemic issue that's brought to my attention or that I have filed my own motion for an investigation taking a little bit longer because it would require documentation and interviews and so on.

But for a complaint involved in a ... What I've seen so far that has either gone to or come through reconsideration have not been to the extent where four to six months or a year ... Investigations that are still open, is because there's an ongoing monitoring taking place of an individual or

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of a group because of the behavior and not because of an administrative issue that has been brought to my attention.

I'm really hesitant about offering this ability to use my office as a part of another accountability mechanism in their process. I see absolutely no reason why they couldn't function parallel. If somebody's coming to my office has the intention of going through an IRP or a Request for Reconsideration, there will be a serious conversation held because the minute a formal process is begun, I step back—whether it be litigation, Request for Reconsideration, or an IRP.

If it's going that route, I would much prefer stepping back and allowing the formal process to take place and be completed. Then I can step back in, if necessary, to review the process that has taken place, as I would have with the original complaint, to ensure the that process and not the decision is reviewed.

I hope I'm being understood.

SUSAN PAYNE:

Yes, you absolutely are. Thank you very much. And you were answering a number of our questions before I'm even needing to ask you them.

But I will just circle back on the timing just to cover it off. As I understand it, there isn't a set time for bringing a complaint to you. There's no fixed time limit, if I understand it correctly. But I did read in your procedures that you do have a discretion to decline to hear a complaint if it's filed later than 60 days after the incident being complained of.

And so I wondered if you could touch on that, both whether that declining to act because something is failed after 60 days is something that has happened and if, indeed, it's common; and more generally if, based on your past experiences, is there any kind of usual timing, I suppose? Or is there a period of time after which you would feel it was inappropriate? Someone has come to you too late.

HERB WAYE:

I don't have ... I mean, my framework which is presently under review because it was written back in late 2000 and a lot that's it now is no longer relevant and current. So there are some changes coming.

It's an element of reasonableness that comes into play with each and every complaint that comes in, so I'm not bound by any means to ... If somebody comes to me, 80 days or 61 days, I'm not going to say no. I've dealt with enough people over the years who have had sat on something and stewed about something and had it eat them up inside for years before it finally reaches a point where it breaks out. And that's usually not pretty.

I mean, not so much in the Ombuds world, but when you're dealing with things that touch people's values and core values, then it can become a little bit more of a time issue where they may sit on something for a significant amount of time before finally opening up about it. And that's one of the reasons that I'm very flexible with people.

And I'm also fairly flexible when it comes to whether it's jurisdictional or not. If there is something that needs to be fixed, I'm going to try to fix it

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even if it's outside of my jurisdiction. So I'll do my utmost to help the person, so time doesn't play a major element when it comes to that.

I understand that a lot of organizations and a lot of administrations have rules that they need. I mean, you need to keep things under control. I understand the need to have time limits, so I will always be reasonable and flexible on the side of respecting the person's need to get the problem resolved, and the organization or the Board or the communities' need to put this behind them. So there's no need for any of it to sit and wait, by any means.

So it's going to get done as fast and efficiently as possible, which leaves me the option of doing something that happened 60 days ago or six years ago, still bringing it to the forefront and treating it as if it just happened yesterday.

SUSAN PAYNE:

Thanks, Herb. David, I've seen your comment in the chat. I will come to you in just a few moments. Since we're sort of talking about this timing, I wanted to keep going down this thread.

So I think you commented earlier, Herb, that when I was using four months as an example you felt that it was unlikely or rare for a complaint to you to be running for that kind of length of time. And so I just wanted to, first of all, double check that I understood you correctly. And also to see if you can give us any sense of, generally—if indeed there is such a thing—how long does that complaint it to your office generally take?

HERB WAYE:

If there is any indication that an IRP or a Request for Reconsideration may be invoked, I will take that into consideration in my processing of any complaint. So if a complaint comes to me about two people fighting, it's a complaint about two people fighting.

But if a complaint comes in to me that has the potential and meets this the bar for either a reconsideration request or an IRP, then if the IRP has a set time of 120 days or whatever your group may establish, then that fact is not going to be lost on me and I will deal with the complaint appropriately so that there will be no impact if a person does choose, after having a conversation with me, to either let my process proceed or start the IRP process in whatever time. And there's nothing preventing them from preparing it.

And as Ombuds investigation is ongoing, it would only be reasonable for somebody that's at this level of complaint management to be expecting any outcome that might possibly come from it. But I seriously believe that they can function quite properly and quite professionally and quite responsibly in parallel.

SUSAN PAYNE:

Thanks again, Herb. That, actually, is really helpful. I find that very helpful to understand, that you're very alive to the time limits and that you would [inaudible].

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HERB WAYE: Yeah. The conversation may not come up. But if it's something that is clearly evident that the individual is trying to judge where to place their energy and their resources, then that's something that they will seriously need to take into consideration, whether they are going to expend resources/time with my office or whether they are going to put them all into either a reconsideration or an independent review.

SUSAN PAYNE: Okay. And based on what you're saying, I'm understanding therefore that you certainly have had experiences where a complaint has been brought to you and the party either does have in mind that they might bring a Request for Reconsideration or an IRP, and indeed, potentially, they go on to do so.

HERB WAYE: Yeah. It wouldn't be my job to either guide them or—

SUSAN PAYNE: No, no.

HERB WAYE: —recommend in any way. And I'm not even going to ... To be quite honest, it's not going to be a mandatory or standard question, "Are you going IRP" or whatever. For instance, if I learn about litigation because somebody has either posted it or during one of my investigations, if I learn of that litigation is ongoing, then I will stop. Same way if somebody mentions to me that they plan on going to an IRP, then there would be a



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conversation about, “Well, what are we going to do with this? How are we going to deal with this investigation? Do you want me to step back? Do you want me to pick this up after the IRP?” That's entirely up to the client.

SUSAN PAYNE:

Okay. Thanks very much, Herb. I think we've sort of touched on most of the questions that I had. But I know David has indicated that he's got some questions.

And I'm just noting, Mike Rodenbaugh has noted in the chat that the bylaws in relation to the Request for Reconsideration do also require a review by your office during that Request for Reconsideration process, which is obviously separate to the party in question having come to you but is another part of your role, as I understand it.

HERB WAYE:

Yeah, that's correct. The bylaws were changed two years ago now, I think, to include an independent substantive evaluation of the complaint, of the request.

Now there are a lot of caveats and hoops that need to be jumped through before my office takes on that role of substantive evaluation. And one of them, in the very first, is an internal review to determine whether the issue has been before the office or very similar issue has been before the office in the past; at which point my office would recuse and the normal subset of evaluation would take place as per previously.

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But it's worth considering that an individual who chooses to come to my office or chooses to do a Request for Reconsideration will be taken into consideration whether they want an informal participation of the Ombuds office or whether they want a formal substantial review. And the two are very different, and they're conducted completely differently.

And I will note that this bylaw revision is not a standard or accepted practice for an Ombuds, but it is accepted here in this case because it adds an element of independence to the Request for Reconsideration process. It was very complicated. And when that happened a couple of years ago, there was a lot of conversation and a lot of discussion going on, including how to implement the process without creating any conflicts of interest for either ICANN or my office.

SUSAN PAYNE:

Excellent. Thanks, Herb. Okay, so I've got David McCauley who indicated that he had some questions, and then we may also have Kristina Rosette in the queue as well. But we'll start with David.

DAVID MCAULEY:

Thank you, Susan. Thank you very much, Herb. It's quite interesting to me. I've been focused on IRP since the beginning of the IANA Transition, and it's interesting to hear about another accountability mechanism. So thank you for being here and answering our questions.

As Susan explained, we're looking at whether a complaint to the Ombuds should toll or suspend the clock for the timeliness of an IRP. We're not internally agreed whether what that timeliness might or

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might not be. But my questions are going to go towards the definitiveness with which an IRP panel could be able to tell.

So my first question is, is a complaint to the Ombuds written or oral, or can it be both?

HERB WAYE:

Yeah, it can be multiple. There is an online ticketing system that can be used. I accept e-mails. I accept, verbally, face to face at ICANN meetings. Somebody can drop into the office and file a complaint. Regardless of how the complaint is formulated or lodged, it goes into an independent case management system where it is properly dealt with as an investigative manner. So there is no set standard way.

I've received complaints over Twitter and Facebook, and I asked them to fill out the online form. And others have just dropped me a line on Twitter and complained that way. And it's stayed that way, as a complaint. So there's no limit to how people can reach out to me, as I try to be as open as possible.

DAVID MCAULEY:

Thank you. Is there a rule in your office as to when this matter has to be dropped into the case management system once it's been mentioned initially? What's the time limit between someone saying ...

Let's say we're at an ICANN meeting somewhere in the world, and someone on a Saturday morning comes and says they want to make a

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complaint. When should we expect that your office will ensure that there will be a case management system entry?

HERB WAYE:

Well, I mean it's not ... There are no rules about that. I have access to the case management system and the independent company that houses the servers, their IT team. So it's not like it has to be logged within an hour or whatever. It gets logged when I get a chance. I may be busy during an ICANN meeting and it might not get them for two weeks. But the list will remain, and when they're logged ... The case management system is more for record keeping, for the annual report, and so on.

DAVID MCAULEY:

So in the answer to one of Susan's questions, you said, "If I'm going to take on a complaint ..." So you have discretion to turn complainants away and say, "I'm not going to consider it" or "I can't consider it." Is that right?

HERB WAYE:

If an issue is non-jurisdictional, generally that would result in a referral.

DAVID MCAULEY:

I'm sorry. What do you mean by referral?

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HERB WAYE:

Well, I mean if their issue is non-jurisdictional, if they're coming to me because, for instance, they're having an issue with their registrar or their web designer. That's totally outside of ICANN's remit, so I will suggest they go talk to a local technical support at their local computer store. Or I may guide them towards Contractual Compliance. Or if it's internal to ICANN policy development, then I may suggest that the individual contact the appropriate stakeholder group or constituency.

So it's a guidance at that point. It will get logged as a non-jurisdictional complaint.

DAVID MCAULEY:

Thanks. So the bylaws, Herb, talk about Ombuds providing a fair and impartial dispute resolution service, basically. Do you find, or have you ever found, that the process is sort of a back and forth between complainant and the person being complained about, an attempt to work things out that you're in the middle of?

And the reason I'm asking is that IRP itself has a way for parties to try and work things out called the Cooperative Engagement Process. So I'm wondering if we're duplicating efforts, is what I'm getting at.

So my question to you is, do you ever find yourself in that position where you're in the middle of two sort of antagonistic views? You're [inaudible] work things out. Is that a fair ...? Could you tell us what your experience is there?

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HERB WAYE:

I would say, generally speaking, I try to avoid—what I would call it is mediation. If there's an issue that pops up and something has happened that's unfair to somebody, we'll try to work together to get it resolved. But to help two people come to a mediated agreement is not my role. We have mediators for that. And if it got to that point, I would hire a mediator to do that type of work. But it's time consuming. It's costly.

We're talking about unfairness. Where is “fair” between two people where something may be totally acceptable and somebody else may feel it's totally unfair. Somebody may say, “I’ve done everything right and I’m doing my best,” and the other person, maybe all they want is an apology. So that will happen, but not in a structured, mediation format. I have the training. I don't have the resources and I don't have the environment to do that. So it will be done on a very informal level in hopes of resolving whatever the initial complaint that was brought to the office was.

DAVID MCAULEY:

Thank you.

HERB WAYE:

I hope that answers your question.

DAVID MCAULEY:

It does, it does. Two more brief questions. You said that you'll try and fix things that are outside of your jurisdiction. And I took the implication that you may work a little extra after the case is done, in a sense. And so my question is, in those kinds of cases, is there an objective end date

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that people could ascertain. And I'm sort of looking at, can an IRP panel ascertain with precision—because there may be an argument over individual days.

Can they ascertain with precision when any Ombuds complaint started and when it ended? Both in cases where you don't go beyond the case to fix something that's out of your jurisdiction and when you do.

HERB WAYE:

I'm going to try to answer this. The Standards of Practice that my office operates under do not allow me or my office to be part of—what's the term I'm looking for—notice. So when my office takes in a complaint or when it concludes a complaint, if it's involved in any way with establishing an external timeline, then my office has become some form of notice, either to a review process or to the organization or to whoever may be involved. And I would hesitate before allowing that to happen.

The complaint intake process and the complaint itself—the investigation, however it may begin or end—is part of the privileged part of the conversation that would go on between my office and ...

And when I say my office—because I also have an adjunct and the individuals involved in the complaint—to use the office and the complaint management system and the logging of complaints to establish a timeline, I don't think would be appropriate.

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DAVID MCAULEY: Thanks, Herb. And thanks for being here again. Thanks, Susan. That's it for me.

SUSAN PAYNE: Thanks very much for those really helpful questions. Malcolm, just before I come to you, Kristina had indicated in the chat that she might have some questions and I think she might possibly be in transit and not able to put her hand up. So I'll just pause and see. Kristina, did you have anything you wanted to ask first before we turn to Malcolm?

KRISTINA ROSETTE: I actually still am in transit. Malcolm should go ahead. But if you could come back to me, that would be perfect. Thank you.

SUSAN PAYNE: Okay, lovely. Thanks. Malcolm.

MALCOLM HUTTY: Thank you. And thank you, Kristina. I didn't want to jump in ahead of you, Kristina. Herb, I think you may have just answered this in your last reply, but I'd like to get something quite clearly understood one way or the other on this.

What we're considering is the idea of whether or not it would be appropriate for us to allow someone who brings an IRP case to have additional time to do so on the grounds that they had been spending time with you and that that might have resolved it beforehand. Not in



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any particular case [might not have done], but the possibility of bringing something to you and getting that resolved.

We always think that anything that can resolve things informally and amicably without needing the IRP is better, and the IRP should be the thing of last resorts.

So the questions are—I'm going to be a bit more specific on them—firstly, do you consider that a person that comes to you has a duty of confidence to you or the process or to any other person about the fact that they have come to you and when they did? That's the first question.

HERB WAYE:

Okay. The confidentiality and the privilege belongs to my office. So, yes, I have an expectation that it will be respected. If it is not respected, my office will never confirm or deny that there is an ongoing investigation. If there is a report to be done at the end, it will be published, as required. But if somebody was to come to me and, after divulging that they have been to the office, my office—myself and my staff—would never either confirm or deny that there is an ongoing investigation or has been an investigation taking place.

MALCOLM HUTTY:

Thank you, Herb. That was incredibly helpful. I mean, for me that settles the matter because I don't think we could ever toll time on the basis of the unsupported word of a claimant if you weren't willing to confirm, minimum, "Yes, indeed, this person did come to me and the case was opened on such and such a date." If you would never do that, I think

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that rules tolling out completely. That would be in my own personal view, but I yield the floor.

HERB WAYE: Thank you.

SUSAN PAYNE: Thank you. And, likewise, I did find that answer very helpful and not something that I had previously appreciated. Kristina.

KRISTINA ROSETTE: Thanks very much. Thanks, Herb. This has been very, very useful. Just a couple points that I wanted to get some clarification of, kind of following on the last point that you had made in response to Malcolm's question.

With regard to a report that you prepare and would submit to the Board on a particular matter, obviously in accordance with the bylaws, or a blog post that you would make after a matter has come to a conclusion because you've made a determination on the results of your investigation. Once either of those things happens, that confidentiality is deemed to be no longer active as to the actual, "Was there an investigation and what was the outcome?" Am I understanding that correctly?

HERB WAYE: Kristina, that was a good question. I will do everything in my ultimate power to protect the confidentiality and the identity of anybody that comes to the office. I mean, unless there's an agreement made that this

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has to go public and all the parties agree that, for the benefit of the community or whatever process might be involved, that it should be discussed. Now that hasn't happened yet.

Before I will take the risk of identifying a complainant or a subject to a complaint publicly, I would opt out of publishing a report. If there was even the slightest chance that an individual would be identified in the process. And it all boils down to trust. And if people can't trust the office the Ombudsman to respect that confidentiality and privilege, then you know it would be horribly detrimental.

KRISTINA ROSETTE:

[inaudible]. Let me, if I could, follow up a little bit with regard to how this applies in the context of what I'm going to refer to because I am a lawyer, a legal person, like an actual corporate entity.

Obviously, there are some different considerations at play when you're talking about a natural person, an individual. But if you have a situation where—and I'm sure you know this and there have been some allusions to it by some of the other folks on the group—that an IRP is going to cost a potential complainant at least half a million dollars. Obviously, they have an interest in trying to get a resolution of the issue in a way that a) satisfies them, and b) is more economical than that.

And there may in fact be instances in which it makes sense for that particular legal person—again, we're not talking about individuals—to pursue an Ombuds complaint, have your office perform and complete an investigation, and the outcome of that investigation made public through, say, for example—not hypothetically—a blog.

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Now if that legal person says, “We've really exhausted all of our avenues. We've tried to pursue all the other accountability mechanisms to try and a) make use of them and give them some actual meaning, and b) because, quite frankly, we're looking to avoid having to spend upwards of half million dollars.”

If you've got a blog post and a legal person and you've got the potential complainant itself saying, “I would like credit for the time that we spent pursuing the Ombuds complaint. And we initiated our request on X date, and here's the date of the blog posting,” I'm having trouble understanding why they shouldn't be able to do that. Where is the confidentiality issue there?

If the party that has sought relief through your office is willing to say, “We sought this relief. We didn't get what we were looking for, so we are going to go forward with the IRP,” your office itself has made public a blog posting that summarizes the fact that there was an investigation and what the investigation's outcome was. I'm just having a really difficult time getting my mind around the confidentiality issue there at that point.

HERB WAYE:

Yeah. Not sure how to respond because you're talking about a very specific chain of events that may have happened in the ... Haven't, I don't believe. And maybe you can refresh my memory. Are you talking about a very specific thing that I have done or that the office has done?

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KRISTINA ROSETTE:

Not necessarily you, individually. I'm just saying that—and again, it wasn't really an issue per se because the new tolling rules didn't apply. But there has been, in fact, a case where a legal person came to you. Well, came to the office. The office initiated an investigation. There was a blog. And had the IRP rules been different and it had been necessary, it may have been appropriate for that legal person to say, "We'd like credit for the 45 days, or whatever it was, that the Ombuds Office took to investigate and review the matter because we were trying to pursue that as an additional accountability mechanism."

And there are obviously other considerations at play, but because we seem to really be focusing on the confidentiality, I'm hoping you can help me understand where in that circumstance the confidentiality would still exist.

HERB WAYE:

So you're talking specifically about a situation where ... I'm not sure how we could build a specific rule around that type of situation if ... I don't know. I will have to think about that, but I don't see how ... I mean, if there's been an open investigate—or an Ombuds confidential investigation that resulted in a blog posting that identifies all of the parties ... Yeah, I'm confused. I apologize.

SUSAN PAYNE:

No problem, Herb. I mean, maybe if we have some follow-up questions, maybe we can put them to you in an e-mail.

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HERB WAYE: I understand we're—

SUSAN PAYNE: But in any event, I mean, we will have to weigh up what you've been saying about your process generally when we're thinking about this topic. And I think what I'm hearing you say is that even if that sort of scenario might occur, it, to your mind, seems not the usual procedure; and therefore not how you would anticipate that most of these processes before you would go.

HERB WAYE: Yeah. I know the former Ombuds published blogs regarding investigations. I don't. And if I have published a blog regarding an issue, that may be a little bit different but not necessarily as specific, as a result of a complaint. And that's why I wish I had a little bit of a refresher maybe on what exactly we were talking about.

But, no, I don't see any objection to somebody asking your panel for more time. I don't believe I have a place at that table.

SUSAN PAYNE: Understood. Thank you. Kristina, is that all from you? In which case I'll turn to Kurt before we perhaps wrap this up and let Herb get on his way.

KRISTINA ROSETTE: Yeah, that's fine. Thank you.

SUSAN PAYNE: Super, thank you. Kurt.

KURT PRITZ: Hi. Can you hear me?

HERB WAYE: Hi, Kurt.

KURT PRITZ: Good? All right. Hi, Herb. Thanks very much for this. I'm driving, so it's kind of complicated. I have three comments. One is [inaudible].

SUSAN PAYNE: Kurt, we could hear you and we now can't. Okay. Kurt, are you still with us? Okay. Dear.

HERB WAYE: I guess we shouldn't Zoom and drive.

KURT PRITZ: I understand what you're saying. You try to take an account [inaudible]. Can you hear me now [inaudible]?

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SUSAN PAYNE: Kurt, if that's the end of a question, we lost you for most of what you were saying. You have just popped back into audio, but do you want to try again? Otherwise, we may have to have this also as a follow up.

KURT PRITZ: Yep, excellent. So, Herb, I understood you saying you try to take into account if a controversy might go to an IRP or some other dispute resolution mechanism and take that into account. And I think that's thoughtful and helpful, but I also think it might result in unintended consequences so that it might come across that you're rushing to get to an end.

So I think all complaints to the Ombudsman should be processed as quickly as possible, but as thoroughly as need be. And if you get to a decision in time so somebody can file an IRP, it might be perceived as, "Well, let's hurry up and decline this so that they can get to the IRP." And that's a perception that might happen, so I think that's not the right approach. The right approach is just to take every case on its merits and considering the right amount of time.

So having said that—

HERB WAYE: [inaudible].

KURT PRITZ: No, so I've got three of these. So then you said you want to do that so complainants can pursue an IRP and the Ombuds complaint in parallel.



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But as Kristina just said, for several companies, or many companies, an IRP is sort of like you bet your company or you bet an even more sort of gamble, and it's very desirable to pursue faster/cheaper courses of action. And I think that's why ICANN has them on their menu.

And companies are entities don't have the bandwidth to prepare for an Ombudsman and an IRP in parallel. So I think it's better to be more sensitive than to say, "You can do this in parallel," when, for many people in this situation, it's just not tenable to do that. And then for those reasons ...

And then my final point is, and I might have missed this, but I think I heard you say that you protect the confidentiality of the complainers. So that's admirable, but then to use that as a discussion point for not tolling an IRP seems to be saying, "Well, we're using this benefit we're giving you to deny you an ability to toll." And so all of those things don't seem to hang together to me, those three.

But anyway, I already said them once so I won't say them again. So thanks for listening to me, and I'm happy to put them in writing to make them more coherent for you. Thanks very much for letting me stumble through that.

HERB WAYE:

Thank you, Kurt. Those are very good comments and I appreciate them. The biggest thing I will note is that, as I mentioned at the beginning, the Ombuds process is informal and involves flexibility and respect for all of the times and the timelines that have to be respected.

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But the other two being formal process, as I as I've stated, if they are going to be used, the Office of the Ombudsman will step back and allow them to proceed because they are formal accountability measures, much the same as the office will step back if there's litigation or threat of litigation because it is a completely different method of dealing with the issue. And so a lot of the time consuming and the elements that are involved in a reconsideration request or an Independent Review Process don't necessarily apply. And all of those time-consuming things that happen may not eat up near as much time when dealing with an informal mechanism. So that's the advantage that I have. I can get things done sometimes a lot faster, and also come to a determination a lot faster whether or not I can help. And if it doesn't look like I can help, I'm not going to waste anybody's time and I'm going to let the complainant know that I can't help. That it's beyond my reach, beyond my capabilities as an Ombuds to get what they want. If they want a decision overturned, I can't do that. And it's as simple as that. It doesn't get any more complicated.

If they want me to look at a process, I can do that, and it's very likely not going to take months. It may take a few days, a couple of weeks at the most, because I am much less constricted by rules and regulations and times and the threat of legal actions being taken at the end of my process. So I can come to a determination, I think, a lot faster.

And if that's something that's going to play against an individual who files a complaint, I'm not going to hold that back. I'm going to let them know so that they can move on to whatever steps they may think they need to do to get the help or the result that they want.

SUSAN PAYNE: Thanks very much, Herb. Kurt, your hand's still up. Is that an old one or a follow up?

KURT PRITZ: It's an old one.

SUSAN PAYNE: Okay. Thanks, Kurt. All right. I'm not seeing any other hands. I'm conscious of time. We have spent quite a considerable portion of our call on this discussion, but I'm not apologizing for that. I'm extremely grateful to you, Herb, for coming and joining us and giving us the benefit of your thoughts and explanation of your processes. I certainly have found it incredibly valuable, and I think it will definitely help us in our consideration of what we do on this particular tolling question as it relates to the Ombuds process.

HERB WAYE: Yeah. Please don't hesitate to reach out to me, either through Bernie or whoever. Drop me an e-mail if you have any specific questions, any of you really. I'm more than happy to help you out in this issue any way that I can so that you can put together a proper implementation that's going to work for everybody, including me and my office.

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SUSAN PAYNE: Thank you very much. That's very kind of you. And again, thank you so much for your time this ... Well, I'm not sure it's evening for you. But today. It's been very, very helpful.

HERB WAYE: No, it's the middle of the afternoon. Not true. I'm in your time zone. I'm in the Eastern time zone, so I'm good.

SUSAN PAYNE: Yes.

HERB WAYE: Okay, so I'll let you get back to work, folks.

SUSAN PAYNE: Thank you.

HERB WAYE: Thank you again for having me on your call, and I wish you the best of luck with your work. And I will say good-bye for now.

SUSAN PAYNE: Thank you very much. Bye-bye.

HERB WAYE: [inaudible]. Take care. Bye-bye.

SUSAN PAYNE:

Okay, everyone. I'm really conscious that we don't have that much time left on our call, and I do want to come on to Agenda Item 4. I'm also conscious that some of the people, I think, who are very interested in this topic probably weren't able to be on the call. So we'll allow that discussion to percolate and those who haven't been able to join us to listen to the recording or view the transcript after the event. And hopefully we can circle back after this call, either by e-mail or certainly on our next call. But I think that has been very illuminating.

So moving swiftly on to Agenda Item 4. And this is the timelines for other non-IRP accountability mechanisms which Liz and Sam we're putting together for us to help us when we're considering this question of tolling, and particularly to allow us to have a better grip on if we're proposing to toll for other mechanisms, what kind of timing are we talking about. How much are we talking about delaying proceedings? I think some of our group feel very strongly that we need that information. I think all of us believe it will be helpful information for us.

So, Sam, I'll turn it over to you or, indeed, to Liz if you prefer. And perhaps you can talk us through what you've been able to put together.

SAM EISNER:

Thanks very much, Susan. And it's occurring to me, I shared the document with Bernie but I'm not sure if it's been shared with Brenda. So I just forwarded it to her. Hopefully you can grab it from your [inaudible], Brenda, and post it.

So one of the things that we've been grappling with—and when I say we, I mean me, not imputing that to anyone else from the group—as we've been having this discussion on tolling is, what does it look like in full? What are we intending to do?

And I want to preface this with the idea that ICANN stands in full agreement with the gist that we're hearing from this group, that we want to make sure that the issues ... That there's time to identify of issues remain for an IRP and to make sure that those issues are as narrow as possible. We think that reducing the breadth of IRPs is good, not just for ICANN but also for all participants in the ICANN system.

The IRPs come at a cost, as Kristina noted, to the claimants who participate in them. And there's, of course, the cost of whatever happened that they believe that they need to go to the extent of holding ICANN accountable through an IRP. And we need to keep in mind the seriousness of that issue as well.

But also, ICANN itself—and this is where we're talking about ICANN as the holder of funds from the general Internet community—uses the ICANN resources to fund IRPs in many parts of them. And so we have a collective goal of making sure the IRPs are as efficient and as narrow as possible to preserve funds for other things that we can do within ICANN that serve to benefit the ICANN community and hopefully are not spent fighting about whether or not ICANN has violated its bylaws.

Please listen to everything I say with that in mind, that we share the same goal, but we might have some different ideas of how to get to it.

And Brenda, if you can maybe make it a little bit bigger because it's ... Maybe go to a presentation format on that. What we did here is use some average timing. And while we don't yet have the firm language for when a clock starts on an IRP. We imagine it will come somewhat similarly—and we can talk about this in terms of Board action, right—it comes somewhat similarly to how it does now with the posting of the minutes of an action.

If it's based on Board action, we would say the minutes because minutes also are accompanied by the posting a Board briefing materials which provide a bit more information about the basis of the decision as opposed to just the resolution posting that triggers a reconsideration process.

And so, if you look here, there are a few different colors on the charts. There's blue, there's orange, and there's gray. And so the blue would be the time that we estimate for the time to start, when you'd imagine a clock starting at least to count. Because we know with IRPs—and we would imagine that it would remain the same as we move into the more formal language—that someone's clock doesn't start on filing an IRP on the very day that an action is taken. We actually impute notice to someone on a time after, and that we're assuming this is from the timing of the minutes posting.

And so here, we're assuming that's a 30-day time frame after resolution posting. And there can be some difference between those two. That's different from reconsideration at the bottom because your reconsideration timeframe starts as soon as the resolutions are posted.

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So that's within two business days, the action. So there's really no lead time on that. Right? Reconsideration just starts.

But you can see here that your time [clock] to bring a reconsideration actually expires pretty much around the same time that your clock starts on your IRP. So now with our new bylaws, if you look at the bottom, the gray is the estimate for how long the process takes. So the gray line here reflects the reconsideration process which, under the bylaws that came out of that accountability process, is limited to 135 days. It used to not have a limit, and sometimes it took a long time. Now there is a bylaws limitation 135 days. So that's 135 days you see there in gray.

Now, we put the CEP and the IRP here as two separate items. Of course, a CEP is not a separate right of action for claimants, but the CEP time frames are all based on the IRP time frames, which is why they have the same time to kick off.

Now there's this period of time in orange, but then if you see this line in the second star—so, CEP. The way that it's currently envisioned, and we would imagine that after the CEP rules are reviewed through the IoT, that a similar line will come into place. The CEP filing deadline is 15 days before the end of the window to file an IRP. And we already have totally, of course, with this CEP. So that means once you file your CEP, under current practice you're expected to file that with at least 15 days left in the window. These are of course all last days that we're talking about here. So you're expected to file your CEP with at least 15 days left in that window which means that once that CEP is terminated, the claimant—if they still believe they have an issue to take to the IRP—has at least a 15-day window to file that IRP.



So you see that star here on that second red line. So, "CEP filed, IRP clock stopped." There are 15 days remaining to file.

If we look at that first red line, you see the "reconsideration filed" because it has to be filed at that point or else it's not timely. There are still 120 days remaining in someone's time to file, assuming that the minutes are posted 30 days after the resolution.

And so that's just one way to visualize where these things come in. And I think it's important when we think about that end part of what do we necessarily mean by tolling, and what's the purpose of tolling.

We can then also see the Ombuds. So this was based on the assumption of the 60 days to file the complaint because, as Susan referenced, there's that 60-day window. And we talked to Herb a bit about the fact that he might not hold people true to that. But typically, we would hope, and in an atmosphere where we're trying to encourage people to act accountably, that they're bringing claims and taking advantage of these mechanisms that we have in a timely fashion.

So they have about 60 days to initiate that complaint from the action that they're concerned of. And the gray part is assuming a 90-day resolution of complaint. That's just based on an investigation that might require a couple different areas to submit information to Herb. And under his Work Stream 2 improvements, there's a request for everyone to submit information within 30 days of that request. So that allows for a little bit of time to go in. We're not assuming where that happens, but that's just kind of a general idea of what the Ombudsman complaint

timing could look like. And, of course, these don't have to all run concurrently.

And then on the DIDP, we have a 30-day response window from a DIDP. There's no triggering event for a DIDP. It's whatever the person requesting the additional information chooses to ask for information over. And DIDPs can be filed at any time. Dates aren't fixed. So here we just identified that there could be a 30-day window across any portion of this, just to kind of visualize how that fits.

So this was an attempt that we made just to look at how these things could interact and where something could start and stop. We only have four minutes here, so I don't necessarily want to go on and talk about more.

So Susan, if you can let me know where you want to take this because I don't want to take us over time.

SUSAN PAYNE:

Yeah. Thanks, Sam. I think you're absolutely right. We're asking you to rush through this, or I'm asking you to rush through this, and it's probably not going to be that productive. I think we haven't seen these timings. It was helpful to have you talk through it, although I don't know whether others will feel the same as me. I found that a bit of a whistle stop tour, and so I might go back and look at this again and listen again to the recording on this to properly follow what you've put before us.

But perhaps if you could circulate that to us, it would allow us time to sort of look at it at our leisure, and we could perhaps come back to this

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as perhaps an earlier agenda item on our next call so that we can then take it further and perhaps go on to any of the other points that I'm thinking you probably were intending to make.

SAM EISNER:

Yes, Susan. I have some slides that follow-on, but what I'll do is pull off this graphic. I'll produce a cover that identifies some of the assumptions that were being made, because that was part of why I was speaking so quickly—because we did build in some assumptions here—just so people can understand what they're looking at. It's not one that just lends itself to just picking it up and looking at it and saying, "Aha, I understand what it's showing." But we will get something out to the team within the next couple of days to prepare for further questions.

SUSAN PAYNE:

Thanks, Sam. Yes, I mean I think if it's just in enough time in advance of the next call so that people have had time to properly reflect on it and we can all come in having feeling fully informed and ready for discussing and reviewing further with you. I think that would be really helpful. Thank you.

Okay, I am going to move really swiftly on because now we do just have a couple of minutes left. So the next item, and I did indicate when I was running through the agenda that it was a bit time-permitting. So I just want to note that just a little earlier today, I did circulate a document to everyone that was my attempt to pull together a composite list of the matters outstanding for our work, both the topics relating to the rules

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themselves and then some of the other things that we've been tasked with doing.

And at the end of that document, I noted the various places that I pulled this from which include documents that were circulated early on in our work and also some of the exchanges of e-mails that happened much more recently. So I've tried to pull everything together and circulated it. I would very much appreciate you all casting your eye over it and, [in a sense], checking it and flagging if you think anything is incorrect or indeed missing.

And we will then, I think, come back to how we structure our work to try to move this forward a bit more swiftly when we have the time to review that list. But I'm just flagging, I think, that I'm very conscious that whilst these rules are one of our key pieces of work and that, obviously, the timing issue was very clearly a difficult and complex issue that we knew we were going to be spending a lot of time on, nevertheless I feel we need to pick the pace up. We have a lot to get through and I think we will need to start looking at, perhaps, breaking into some sub-groups to try and power through some of this work. Otherwise, we will never finish our tasks. But more on that when we come back on perhaps our next call.

And so just to wrap up to everyone. As I did sort of flag, I actually am on vacation the 14<sup>th</sup> of September, so I am hoping that we could shift by a week rather than lose two whole weeks. And therefore I'm hoping that we could switch our rotation. But perhaps we'll deal with this by e-mail. But if anyone has real concerns for us going for September the 21<sup>st</sup>

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rather than the fortnight after that September 14<sup>th</sup> date, please do flag it either now or when we seek input on the list.

And I'm now a minute over, so I apologize profusely for running over time. But thank you all for joining. And I do think this has been a really, really helpful discussion with Herb. So I hope you will agree.

Anything anyone wants to raise as a last matter before I let you all go? Okay, I'm not hearing anything so I will call it a day and we can stop the recording, please, Brenda. And thank you all very much for your time and participation.

**[END OF TRANSCRIPT]**