CCPDP-RM – Independent Advice Review (IAR) Mechanism – Final Working document

- **General Objective:**

Develop a review mechanism for IFO decisions that would meet most of the requirements of the CCPDP-RM WG for an independent review except for being binding on the IFO or ICANN.

Such a mechanism would be a logical, independent step following the IFO Customer Service Complaint Resolution Process[1] or IFO mediation and is available before launching a court proceeding.

- **Specific Objective**

Create an optional and independent review mechanism inspired by arbitration, which is non-binding on the IFO or ICANN and will not prevent the Manager from using any other dispute resolution mechanism to address the IFO decision affecting it.

- **Scope:**

  - The Independent Advice Review (Review) is available to ccTLD Managers[2] who are directly impacted by an IFO decision (Decision) for the following processes:

    - Delegations of a new ccTLD:
      - Directly involved parties: Applicants
      - IFO timing: No deadline for the IFO to reach a decision.
      - IFO rejection of an application: Applications are never rejected but usually go away if not accepted over a long period. The IFO has a process for cancelling, as opposed to rejecting, inactive applications.
      - Proposed eligibility for a Review: Limit to All Applicants.
      - Basis for requesting a Review: Delegation by the IFO to another party.
    - Transfers:
      - Directly involved parties: Current Manager and the proposed Manager
      - IFO timing: No deadline for the IFO to reach a decision.

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[1] https://www.iana.org/help/complaint-procedure

[2] Given New ccTLDs do not have a manager, and that it is clearly stated in RFC 1591 that there needs to be an appeal mechanism applicable to the delegation process for new ccTLDs the CCPDP-RM WG believes it is consistent with RFC 1591 that all applicants for a New ccTLD are eligible to request an Independent Advice Review.

- 7IFO Rejection of an application: Applications are never rejected but usually go away if not accepted over a long period. The IFO has a process for cancelling, as opposed to rejecting, inactive applications.
  - Proposed eligibility for a Review: Limit to Current (or incumbent) Manager.
  - Basis for requesting a Review: Rejection of an application for Transfer which never occurs?
- Revocations (A last resort action by the IFO[3]):
  - Directly involved parties: Current Manager[4]
  - IFO timing: No deadline for the IFO to reach a decision.
  - IFO Rejection of an application: N/A
  - Proposed eligibility for a Review: Current Manager.
  - The basis for requesting a Review:
    - Current Manager requesting a Review of a Revocation notice by the IFO.
- Refusal to grant an extension to the retirement deadline per the CCNSO Retirement Policy:
  - Directly involved parties: Current Manager.
  - IFO timing: Per the Retirement Policy the IFO must reply to the application for an extension within 90 days of it being submitted by the Manager.
  - IFO Rejection of an application: Can be rejected by the IFO but per the Retirement Policy "*The approval of an extension request shall not be unreasonably withheld.*"
  - Eligibility for a Review: Per the Retirement Policy the current Manager.
  - Basis for requesting a Review: Rejection of an application for an Extension by the IFO that is being unreasonably withheld.
- Notice of Retirement for 2 letter Latin ccTLD which does not correspond to an ISO 3166-1 Alpha-2 Code Element per the CCNSO Retirement policy:
  - Directly involved parties: Current Manager.
  - IFO timing: None - per the Retirement Policy the IFO must send a Notice of Retirement.
  - Eligibility for a Review: Per the Retirement Policy the current Manager.
  - Basis for requesting a Review: Per the Retirement Policy - *For 2 letter Latin ccTLDs which do not correspond to an ISO 3166-1 Alpha-2 Code Element – The Trigger is the ISO 3166-1 MA making a change (other than*

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[3] How the IFO processes revocation requests from third parties is beyond the scope of this policy. If the IFO decides to revoke a delegation it must notify the Manager and allow it 30 days to apply for an Independent Advice Review. According to the FOI (section 4.7) Revocation is the last resort option for the IFO. Revocation is therefore a matter between the IFO and the ccTLD Manager

[4] The IFO does not have a formally documented process for revocations.

making it an ISO 3166-1 Alpha-2 Code Element) to any of these. For each such Triggering Event the IFO will consider if the change requires deleting that ccTLD. If the ccTLD Manager disagrees with the IFO's decision to initiate the Retirement process it can appeal the decision using the ccTLD Appeals Mechanism.

- o Any other policy developed by the ccNSO and adopted by the ICANN Board which allows ccTLDs to appeal a decision by the IFO.

- The Independent Advice Review (IAR) will only provide advice on whether or not:

  - o There were significant issues with the IFO properly following its procedures and applying these fairly in arriving at its Decision; or
  - o There were significant issues in how the IFO complied with RFC 1591, the CCNSO FOI for RFC1591 as adopted by the ICANN Board, and any other policies developed through a ccNSO policy development process and adopted by the ICANN Board in making its Decision.

- **Administrative objectives:**

  - o Low cost (Registry/Manager fees will be established at implementation but need to take into account the size/ability to pay of the Registry by having variable fees).
  - o Fast – Reviewers to return a decision in less than 90 days from the beginning of their consideration of the case.
  - o Minimize the total time required to review any specific IFO decision which can be reviewed by this mechanism.

- **Process Overview**

  (Note: Once the process is agreed a summary will be kept here, and the details will be moved to an annex)

  - o Prior to applying for an Independent Advice Review (IAR or Review):
    - ▪ Note: The CCPDP-RM will have to decide if an Internal IFO Review and/or IFO Mediation is/are a pre-requisite to apply for an IAR. Regardless of if they are pre-requisites or not, a party who is eligible to apply for an IAR should not be prevented from applying for an IAR because they have passed the 30-day deadline as a result of their choosing to use these other mechanisms first. Details of this requirement will be established in implementation.
  - o The IFO makes a Decision regarding a ccTLD which is eligible for an IAR.

108   o An eligible party for an IAR submits an application (Application) for an IAR to the
109   Administrator.
110   o The Administrator confirms receipt of the Application and requests that the IFO take
111   no further action regarding this decision until advised otherwise by the
112   Administrator[5].
113   o The Administrator evaluates the application (see application requirements in the
114   Applicant/Claimant section):
115   ▪ If the Administrator accepts the Application, it will:
116   • Advise the Applicant (now Claimant) that the Application has been
117   accepted.
118   • Advise the IFO that the Application has been accepted and that
119   the IFO may not proceed further with the Decision until informed
120   otherwise by the Administrator.
121   • Update the IAR website accordingly.
122   • Will request that the Applicant select which type of Review it will
123   opt for (Administrator, 1 Reviewer, 3 Reviewers – see Reviewer
124   section for details) and advise the IFO of this.
125   • The Administrator will work with the Applicant and the IFO to
126   select the Reviewer(s). Once selected the Administrator will
127   launch the review.
128   ▪ If the Administrator rejects the Application, it will:
129   • Advise the Claimant that its application has been cancelled.
130   • Advise the IFO of the rejection and that the IFO may proceed with
131   this Decision.
132   • Close the Application and update the iar website accordingly.
133   o Conducting the Review
134   ▪ The Administrator will manage the Review as the Reviewer(s) consider(s) the
135   case:
136   • The Reviewer(s) may request a presentation by the IFO or ask
137   formal questions of the IFO.
138   ▪ The Reviewer(s) will decide if there were significant issues or not and
139   indicate this in their report (Report)
140   ▪ The Administrator will evaluate the Report and work with the Reviewer(s) to
141   ensure it is consistent with the requirements for such reports.
142   ▪ The Administrator will publish the Report and advise the Claimant.
143   o If the Reviewer(s) did not find any significant issues:
144   ▪ The Administrator will advise the Claimant, close the Review and advise the
145   IFO that it may proceed with its Decision
146   o If the Reviewer(s) did find significant issues:

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[5] Regardless of if the decision required Board approval.

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147			▪	The Administrator will advise the Claimant of the findings and of the possible
148				next steps.
149			▪	The Administrator will contact the IFO asking it to confirm which option it will
150				take vs the Advice – the IFO will have 30 days to advise the Administrator of
151				its decision:
152				• If the IFO responds within the 30-day deadline with one of the
153				following options, the process can continue:
154				o Accepts the Reviewer(s) decision and reverses its original
155				Decision.
156				o Accepts the Reviewer(s) decision but opts to re-do the
157				evaluation of the request which led to the original
158				Decision.
159				o Rejects the Reviewer(s)' decision.
160				• If the IFO does not provide the Administrator with an appropriate
161				response within the 30-day deadline the Administrator will
162				formally advise the ICANN CEO and the ccNSO and request
163				appropriate action.
164		o	If the IFO accepts the Reviewer(s) Advice and reverses its original decision:
165			▪	The Administrator will advise the Claimant and will close the case and
166				update the IAR website.
167			▪	Note: This assumes that IFO Decisions are basically binary in most cases.
168				Transfers, Revocations, requests for an extension in a retirement process,
169				and Retirement of a 2 letter Latin non-ISO 3166-1 ccTLD can only be
170				binary. Delegation of a new ccTLD between 2 contending parties is also
171				binary but is not if there are 3 or more applicants (which should be very
172				exceptional).
173		o	If the IFO rejects the Reviewer(s) decision:
174			▪	If the IFO decision requires Board approval: The Administrator will close
175				the case and work with the IFO to ensure that the Advice is properly
176				included in any IFO recommendation to the ICANN Board on this matter.
177			▪	If the IFO decision does not require Board approval: The Administrator
178				will close the case and advise the ICANN CEO and the ccNSO Council of
179				the situation and request appropriate action.
180		o	If the IFO accepts the Reviewer(s) decision but opts to re-do its process with
181			respect to this Decision:
182			▪	Once the IFO has completed re-doing its process that Decision will be
183				presented to the Claimant.
184			▪	The Administrator will request that the Claimant select one of the two
185				following options and respond within 30 days:
186				• Accept the new Decision.

187   • Apply for a Review of this new decision at the IFO's expense (no
188   charge to the Claimant).
189   ▪ If the Claimant accepts the new decision the Administrator will close the case
190   and update the IAR website.
191   ▪ If the Claimant decides to apply for a new Review the Review process begins
192   anew with the following changes:
193   • If the Application for a Review is accepted the IFO will bear all
194   costs.
195   • If the Review finds significant issues with the new IFO Decision the
196   IFO can only opt to accept the new Review decision and reverse
197   its Decision or reject the Review's findings – the IFO will have 30
198   days to advise the Administrator of its decision.
199   ~~○ If the IFO does not provide the Administrator with its~~
200   ~~decision within the 30-day deadline the Administrator will~~
201   ~~formally advise the ICANN CEO and the ccNSO to request~~
202   ~~appropriate action.~~
203   ▪ If the Review does not find any significant issues the Administrator will advise
204   the Claimant and the IFO and will advise the IFO that it can proceed with its
205   Decision and close the case.
206   ▪ If the Review finds there were significant issues and the IFO reverses its
207   Decision the Administrator will advise the Claimant and close the case.
208   ▪ If the Review finds there were significant issues and the IFO rejects the
209   Advice:
210   ▪ If the IFO decision requires Board approval: The Administrator will close
211   the case and work with the IFO to ensure that the Advice is properly
212   included in any IFO recommendation to the ICANN Board on this matter.
213   ▪ If the IFO decision does not require Board approval: The Administrator
214   will close the case and advise the ICANN CEO and the ccNSO Council.

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216 • **The Administrator - details not included in the process overview:**

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218   ○ The Administrator must be a non-conflicted individual who is an SME with respect to
219   ccTLDs, the IFO and ICANN and who will be responsible for overseeing and managing
220   the Independent Advice system.
221   ▪ Conflict of interest will disqualify anyone with a current "relationship"
222   (business, financial or family) with a ccTLD, a known applicant for a new
223   ccTLD, the IFO or who is pursuing legal action against these same parties.
224   This would be assessed via a Conflict-of-Interest Declaration form
225   (implementation).

226   o   The office of the Administrator will be funded and managed by ICANN.
227   o   General administrative responsibilities of the Administrator:
228   ▪   Maintain an ongoing relationship with the ccNSO, IFO and ICANN.
229   ●   Monitor Decisions by the IFO which have the potential to be
230   reviewed.
231   ▪   Set up and oversee the operation of the website which will include:
232   ●   General information on the Review process.
233   ●   Q&A section.
234   ●   All relevant forms.
235   ●   List of certified Reviewers.
236   ●   List of ongoing cases.
237   ●   List of Review decisions.
238   ●   List of past cases.
239   ▪   Prepare and manage the application of all relevant forms including:
240   ●   Application/contract for a Review.
241   ●   Application to become a certified Reviewer.
242   ●   COI form for specific cases.
243   ●   NDA for certified Reviewers.
244   ●   Review decision form.
245   ●   Fee agreements for Reviewers.
246   ●   Billing forms for Reviewers.
247   ▪   Set up a process to certify and manage Reviewers.
248   ●   Establish criteria for the certification of Reviewers with the ccNSO
249   and the IFO.
250   ●   Manage the recruiting process for potential Reviewers.
251   ●   Certification of Reviewers (validation as a SME, COI, NDA,
252   contract).
253   ●   Creation and management of a list of certified Reviewers.
254   ▪   Manage financial matters including:
255   ●   Review application payments and refunds.
256   ●   Approval of Reviewer billing.
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258   ●   **Reviewer(s) - details not included in the process overview:**
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260   o   All Reviewers will be certified, managed, and supported by the Administrator.
261   o   Reviewers will be paid for by ICANN/IFO.
262   o   Certification requirements will include:
263   ▪   Functional ability to work in English.
264   ▪   CV highlighting that the individual is a Subject Matter Expert (SME) with
265   respect to CCNSO policies, RFC1591 and its FOI as well as IFO procedures.

The minimum qualification will be 10 years of practical experience in all these areas (proposal TBD at implementation in cooperation between the Administrator, the ccNSO and the IFO). Legal experience is also desirable.

- Interview with the Administrator to confirm SME status and ability to work in English.
- Duly executed NDA regarding any non-public information obtained while acting as a Reviewer on any Independent Advice case.
- Duly executed Reviewer contract with ICANN.
- Duly executed COI form which will include certification of no COI with ICANN or the IFO. If selected for a specific case Reviewers will have to provide a formal confirmation that they are impartial with respect to the Claimant.
  - Conflict of interest is defined as a party having a "relationship" (business, financial or family) with another party or who is involved in any formal legal action vs another party.
  - Being a Manager or employee of a ccTLD registry will not be considered a COI vs ICANN or the IFO in this context unless there are significant pending issues between the parties.
- Choice of Reviewers by Claimants - 3 options for a review:
  - Review by the Administrator only. This will be a minimal cost option only requiring the Administrative costs.
  - Review by one Reviewer selected jointly by the IFO and the Claimant from the list of pre-Certified Reviewers managed and maintained by the Administrator. The selection process will be managed by the Administrator and if the parties cannot agree on a single Reviewer within 30 days of the Application being approved, the Administrator will select one from the list. The selected Reviewer will be required to formally confirm that it is impartial with respect to the Claimant.
  - Review by 3 Reviewers.
    - The IFO and the Claimant will each choose a Reviewer. The proposed Reviewers do not have to be from the list of pre-certified Reviewers. If the candidates are not from the list of pre-certified Reviewers, they will have to be certified by the Administrator prior to undertaking any work on the case. Once certified the IFO and Claimant Reviewers will cooperatively pick a third Reviewer from the list of pre-certified Reviewers through a process managed by the Administrator. If the two Reviewers cannot agree on a third within 30 days, the Administrator will nominate the third from the list of pre-certified Reviewers.

- 305   o The IFO and the Claimant must select their Reviewers
- 306   within 30 days of the Application being approved. Failure
- 307   to do so will cause the Administrator to select a Reviewer
- 308   for the party from the list of pre-certified reviewers.
- 309   o If the chosen Reviewer is not pre-certified it will have to be
- 310   Certified by the Administrator within 30 days of being
- 311   named before it can join the proceedings. If the chosen
- 312   Reviewer fails to be certified prior to the deadline the
- 313   party may choose another if still within the original 30-day
- 314   limit to choose a Reviewer.
- 315   • All Reviewers will be required to formally confirm that they are
- 316   impartial with respect to the Claimant.
- 317   • Any decision in a 3 Reviewer system will require the support of at
- 318   least two of the three.
- 319   o Reviewers will only accept supplementary materials from the Claimant or the IFO if
- 320   approved by the Administrator. All such requests to submit additional material must
- 321   be made using the appropriate form (implementation) and submitted to the
- 322   Administrator within 30 days of the request for Independent Advice being approved
- 323   by the Administrator. The Administrator, using his best judgement for the fair
- 324   administration of justice, will consider the following in determining if any new
- 325   material should be accepted and made available to the Panel:
- 326   ▪ Is this material directly and critically relevant to the case?
- 327   ▪ Why was this material not included in the original request to the IFO?
- 328   o Can hold individual teleconference hearings with all the involved parties.
- 329   o Can request a presentation by the IFO on the matter under review. The Panel, at its
- 330   discretion, can also request answers to its questions from the IFO which must
- 331   respond promptly to these (2 business days (TBD at implementation with the IFO)
- 332   California time following the day of the request – this should be included in the IFO
- 333   SLE process statistics).
- 334   o Definition of Significant Issues – Any clearly demonstrable inconsistency or deviation
- 335   by the IFO of properly following its procedures and applying these fairly or how the
- 336   IFO complied with the requirements of RFC 1591, the CCNSO FOI for RFC1591 as
- 337   adopted by the ICANN Board as well as any other policies developed through a
- 338   ccNSO policy development process and adopted by the ICANN Board in making its
- 339   Decision which, in the opinion of the Reviewer(s), could have significantly impacted
- 340   the IFO Decision.
- 341   o The Reviewer(s)' Advice will explain in detail their decision.
- 342   o The Administrator will review the Advice from the Reviewers to ensure it meets all
- 343   the requirements prior to publishing it. The Administrator may work with the
- 344   Reviewer(s) to amend the Advice to ensure it meets the requirements:

345   ▪ The Advice provides all the relevant administrative and background
346   information.
347   ▪ The Advice will clearly indicate if there were any significant issues or not.
348   ▪ If there were issues the Advice clearly indicates what the issues are as
349   well as why they are issues.
350   ▪ Formal sign-off of the Reviewer(s) on the final Advice and a statement of
351   majority opinion if necessary.
352   o Final Independent Advice from the Reviewer(s) cannot be appealed.
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354 • **IFO - details not included in the process overview:**
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356   o Will maintain a good working relationship with the Administrator.
357   o Must amend its procedures to allow concerned parties sufficient time to file for an
358   IAR or other official IFO review mechanisms prior to the IFO implementing or making
359   a recommendation to the ICANN Board regarding the decision which is being
360   challenged (implementation). As such the IFO will advise all directly involved parties
361   of any decisions which can be reviewed under this Policy. Such decisions will be
362   labelled Preliminary Decisions and will advise the concerned parties of their options
363   for Reviewing such decisions.
364   o After reaching a decision on a ccTLD request which can be Reviewed, the IFO will
365   advise those parties who could apply for an IAR of the Decision and of their options
366   for Reviewing the Decision as well as the timeline for doing so.
367   o If a Decision is being Reviewed by the Administrator, the IFO cannot make a
368   recommendation to the ICANN Board on the matter being reviewed prior to the
369   Administrator confirming it can do so.
370   o Will make all relevant internal materials available to the Reviewer(s) who will be
371   under a formal confidentiality agreement. These will include all internal emails on
372   the matter and all communications from all the relevant parties but does not include
373   formal legal advice to the IFO.
374   o Will make itself available to the Reviewer(s) to present details of the case or answer
375   questions.
376   o If the IFO fails to comply with the requirements of the Review policy the
377   Administrator will advise the ICANN CEO and the ccNSO Council of the situation and
378   request that the ICANN CEO promptly correct the situation. In cases where the IFO
379   fails to respond to a request by the Administrator within the delays specified in the
380   policy the review process will be suspended[6] until such time as the IFO properly
381   responds to the request.
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[6] Suspension of the review process does not modify any other obligations of the IFO with respect to the IAR policy. As such the IFO cannot proceed with any actions regarding the IFO decision being reviewed.

383   • **Applicant and Claimant - details not included in the process overview:**
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385   o   Must be a ccTLD Manager except in the case of the delegation of a new ccTLD where
386   any applicant for that new ccTLD is eligible.
387   o   To launch an IAR, the Claimant must submit an application (Application) via the IAR
388   website to the Administrator (in English[7]) within 30 days of the Decision being made
389   except if the Applicant has requested an IFO internal review or IFO Mediation. If the
390   Applicant has used these other mechanisms, within 30 days of the Decision being
391   made, it will be granted 30 days to apply for an IAR after these processes are
392   completed. The Application must also include payment of the Application Fee.
393   ▪   30 days to be calculated as follows – The IFO publishing its Initial Decision
394   will be deemed Day 0. Day 1 will begin 1 minute after 23:59 UTC of Day 0.
395   The opportunity to submit an application for an Independent Advice
396   Review will expire on Day 30 at one minute past 23:59 UTC.
397   o   The evaluation criteria for an IAR Application are:
398   ▪   Be on the properly completed form/contract (TBD)
399   ▪   Be received prior to the 30-day deadline[8].
400   ▪   Clearly indicate which IFO Preliminary Decision is being Reviewed.
401   ▪   Not be for an IFO Internal Review or for an IFO Mediation which has been
402   applied for or is ongoing at the time of the IAR application.
403   ▪   Not be for an IFO Preliminary Decision which has been accepted for an
404   IAR Review, is currently being Reviewed or has already been Reviewed.
405   ▪   Have paid the required fees (fees and details to be finalized at
406   implementation).
407   ▪   Be a party listed in the IFO Decision that is a ccTLD manager listed in the
408   IANA database or in cases related to the delegation of a new ccTLD any
409   parties who applied to be the Manager for that ccTLD.
410   ▪   Clearly indicate the individual the Applicant has delegated to be
411   responsible for the Application including all relevant contact information.
412   ▪   Clearly state why the Claimant believes that:
413   •   That the IFO did not properly follow its procedures or applied
414   these fairly in arriving at its preliminary decision; or
415   •   The IFO decision being reviewed is inconsistent with RFC 1591,
416   the CCNSO FOI for RFC1591 as approved by the ICANN Board, as
417   well as any other policies which apply to CCNSO members and is
418   approved by the ICANN Board.

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[7] All requests, templates, and documentation required for an IAR must be in English. Where accuracy is essential, English documentation and/or English translations of key documents (such as governmental decrees relating to the request) must be notarised or certified as official translations,
[8] With the stated exceptions regarding the IFO Internal Review and IFO Mediation.

419 o For cases where there is a potential for more than one Claimant[9]. Should there be
420   more than on application for the same IFO Preliminary Decision the Administrator will
421   accept the first application which meets all the eligibility criteria. Should there be a tie
422   the Administrator will choose which application will be accepted. In all such cases
423   where the Administrator has approved an Application for a Review, the Reviewer(s)
424   will consider all elements of the IFO Decision for all potential Claimants.
425 o By submitting an Application, the Claimant will agree to the rules for the
426   Independent Advice Review, which will include a clause preventing the Applicant
427   from taking the Administrator, Reviewers, the CCNSO, or ICANN to court with
428   respect to the Independent Advice Review. This in no way prevents the Claimant
429   from taking the IFO or ICANN to a relevant court regarding the Decision by the IFO
430   and any approval of such recommendation by the ICANN Board.
431 o The Administrator may interact with the Claimant's contact person to obtain
432   clarifications on the application (and may allow the Applicant to resubmit).
433 o If the Administrator rejects the application for an Independent Advice Review the
434   Claimant's payment will be refunded minus administrative costs (implementation).
435   There is no mechanism to appeal the Administrator's decision to reject an
436   application however the Administrator will be required to publish its reasons for
437   rejecting the application.

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439 • Reviewing and updating the policy

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441 o Should there be any significant changes to other ccNSO policies which are covered by
442 this policy or to ISO 3166, as decided by the ccNSO, the ccNSO will launch a formal review of
443 this policy to assess if the policy needs to be modified. If the review of the policy finds that
444 the policy needs to be modified the ccNSO will launch a process to accomplish this.

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[9] e.g. a Decision regarding the delegation of a new ccTLD that had three applicants – if the ccTLD is allocated to one of the three, the two others could appeal – obviously a corner case