

June 14, 2011

Mr. Rod Beckstrom
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Members of the ICANN Board
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RE: National Arbitration Forum comments on Uniform Rapid Suspension System proposal in Applicant Guidebook (30 May 2011)

Dear Members of the ICANN Board:

Thank you for taking into consideration many of our suggestions on the URS. We have continued suggestions that are entirely practical (not substantive). From the standpoint of a current UDRP Provider, there are elements that have just not been addressed from a practical/process perspective. The Forum urges the Board to consider these procedural questions and suggestions.

On the topic of fees, the Forum understands the desire for cost savings. However, the URS process is not significantly abbreviated from a Provider or Panel effort perspective to achieve this result (abbreviation as to the timeline actually makes MORE work for the provider/panel because everyone has to work 2-3 times faster to do the same amount of work). Some suggestions that might enable Providers to reduce fees:

1. require or allow the use of a web-based portal to post/exchange information/documents (or write the rules to permit Provider automation as much as possible).
2. limit faxed/mailed items (to commencement or not at all)

Also, please note that ICANN is requiring trained and experienced Examiners (URS 7.2). Assuming the Providers need to collect minimal fees to operate on at least a cost-neutral basis (for non-profit providers), the payment of an amount significantly less than a trained, experienced attorney would make in private practice to review even 20-40 pages of documents is unlikely to lead to quality Determinations, even if they are short and relatively formulaic and/or likely to be unattractive to the trained, experienced Examiner you are looking for—making it difficult for Providers to comply with URS 7.2.

We also offer comments regarding the various URS Rules listed in the current iteration of the Guidebook.

Summary of specific comments:

	URS Rule	FORUM Comment
1.	URS 1.2	What is meant by Form Complaint? Will this form be created by ICANN or the Provider(s)?
2.	URS 1.2.6 and 1.2.7	<p>There is a word limit for “explanatory text” in 1.2.7 but no word/page limit for the portions required under URS 1.2.6.</p> <p>Additionally, a page limit rather than a word limit are recommended for sections that are limited, as documents sent electronically are sometimes sent in a format in which word counts cannot be determined electronically.</p>
3.	URS 1.2.4	If a copy of the offending website content is unavailable, how will a Complainant prove bad faith use? Either that proof is available or not. If ICANN is expecting the Examiner to visit the website to view the content, please note that you’ve allowed the Registrant to make changes to the site until the Examiner is appointed, so providing screen shots of the use of the website at the time of filing is going to be critical. (See our comment #10.)
4.	URS 4.1 and 4.2 Timelines and Receipt	<p>References to “within 24 hours” implies a 24/7/365 service. Does this rule set require registry operators and providers to support around the clock service? If not, the rules should reference the next “business day”.</p> <p>Furthermore, references to “receipt” are vague. We routinely hear from a registrar that they simply didn’t open an email until today so hence it’s not “received” yet.</p>

	URS Rule	FORUM Comment
5.	URS 4.1 “Notices must be clear and understandable to Registrants located globally. The Notice of Complaint shall be in English and translated by the Provider into the predominant language used in the registrant’s country or territory.”	<p>Is the Registrant’s presumed language the language predominantly used in the country listed in the Whois? What if the Whois has a privacy shield—is the location of the privacy service used?</p> <p>If there is more than one domain name and more than one address is listed in the Whois record(s), which language(s) shall be used? All of them?</p>
6.	URS 4.3 “All Notices to the Registrant...”	<p>All notices under Rule 4 (i.e. commencement)? Or everything a Provider might ever send in the case?</p> <p>For purposes of this rule, the “Registrant” is whatever the Whois said when the Complaint was filed, correct? If the Registrar or Registry has other data, there is no need to serve it?</p>
7.	URS 5.4	A page limit rather than a word limit are recommended for sections that are limited, as documents sent electronically are sometimes sent in a format in which word counts cannot be determined electronically.
8.	URS 5.6 “Once the Response is filed, and the URS Provider determines that the Response is compliant with the filing requirements of a Response (which shall be on the same day), the Complaint, Response and supporting materials will immediately be sent to a qualified Examiner, selected by the URS Provider, for review and Determination. All materials submitted are considered by the Examiner.”	<p>All submissions are forwarded to the Examiner whether they are compliant or not, therefore, a deficiency check of the Response is only needlessly adding time and energy to the process.</p> <p>Additionally, if a Response is submitted at 11:30 pm, how can a Provider determine compliance and appoint the Examiner “on the same day”? Again, we suggest “on the next business day.”</p>

	URS Rule	FORUM Comment
9.	URS 6.2 "...notice of Default...via mail and fax to Registrant."	<p>The Forum doesn't believe mail and fax notifications are necessary. If the case was served with mail and fax notices and there is no Response, sending a notification of default to Respondent via those mechanisms are unlikely to provoke a Response—email should be fine, other methods increase cost and time.</p> <p>For instance, under the UDRP, the Forum sends a Notice of Panel Appointment and merely includes in that notice a statement about if the case has Defaulted or not.</p>

	URS Rule	FORUM Comment
10.	URS 6.2 “During the Default period, the Registrant will be prohibited from changing content found on the site to argue that it is now a legitimate use and will also be prohibited from changing the Whois information.”	<p>This paragraph still contains elements with a strong potential to cause confusion at a minimum and possible abuse of the system at worst.</p> <ol style="list-style-type: none"> 1. “Default” merely means “the response time ran out so now we’re proceeding,” at least under the UDRP; there appears to be no difference here in the URS. 2. There is no “default period” therefore—the next period after “Response period” is “Examination period.” If you are going to reference a “default period,” please specify what this covers and what the impact is...what happens during this time? 3. Who prohibits the Registrant from changing content and why are they permitted to change content <u>before</u> an Examiner is appointed, but not <u>afterwards</u>? In our experience as a Provider, if website content is going to change, it’s changed upon commencement or sooner. (See also our comment #3). 4. According to 4.1 the lock prohibits the changing of Registration Data...so a prohibition against changing the Whois at this point seems a. redundant and b. pointless (any changes to Whois or the website content will doubtlessly be made by this point).
11.	URS 6.4 “The Registrant will be entitled to request an extension of an additional six months...”	<p>A few questions (reference 5.3 where who and under what circumstances “good faith basis” are included):</p> <ol style="list-style-type: none"> 1. Is this an “exceptional circumstances” scenario were the Registrant needs to show why the extension is needed? 2. Is a fee to be included? 3. Should the Panel make the determination or the Provider?
12.	URS 6.5	There are two paragraphs numbered 6.5

	URS Rule	FORUM Comment
13.	URS 6.5 (1) “If a Response is filed after: ... (ii) proper notice is provided in accordance with the notice requirements above, ...”	Proper notice of what and to whom and in accordance with what?
14.	URS 6.5 (2) and URS 9.2 and URS 12 Publication of Determination(s)	If there is a late response does the second Determination replace the first on the Provider’s website or do both remain? URS 12 does not provide for publication of the Appeal Determination... is there no mention of the Appeal on the Provider’s website? If that was an oversight, does the Appeal Determination replace or accompany the previous Determination(s)?
15.	URS 11.8 “A finding that filing of a complaint was abusive or contained a deliberately materially falsehood can be appealed solely on the grounds that an Examiner abused his/her discretion, or acted in an arbitrary or capricious manner.”	Typo: “materially” should be “material” If an Appeal Examiner overrules the “abusive complaint” finding was in error, how is this posted on the provider’s website? What happens to the original Determination as published?

The Forum maintains that, there are still procedural ambiguities in the proposed URS of both practical and significant importance.

We remain available to discuss implementation of the URS before its final approval.

Sincerely,

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