

Petillion

Annex 123

Subject: Re: [Reconsideration Request] Reconsideration Request 19-2
Date: Tuesday, August 27, 2019 at 5:18:30 AM Pacific Daylight Time
From: reconsider on behalf of Herb Waye
To: Reconsideration, ombudsman, Dave Marglin
CC: Contact Information Redacted
Attachments: ATT00001.txt

Greetings,

Pursuant to Article 4, Section 4.2(l), I am accepting consideration of Request 19-2.

Best regards Herb

Herb Waye
ICANN Ombudsman

<https://www.icann.org/ombudsman> [icann.org]
<https://www.facebook.com/ICANNombudsman> [facebook.com]
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf> [icann.org]

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en> [icann.org]

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

From: Reconsideration <reconsideration@icann.org>
Date: Friday, August 23, 2019 at 6:38 PM
To: Herb Waye <herb.waye@icann.org>, ombudsman <ombudsman@icann.org>, Dave Marglin
Contact Information Redacted
Cc: Contact Information Redacted
Subject: Reconsideration Request 19-2

Dear Herb,

ICANN recently received [Reconsideration Request 19-2 \[icann.org\]](#), which was submitted on 12 July 2019 by Namecheap, Inc. (Requestor), seeking reconsideration of ICANN organization's renewal of the Registry Agreements with Public Interest Registry and Afilias Limited the .org and .info TLDs, insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .org and .info. The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN's

Commitments and Core Values, and ICANN should reverse this decision for the public good.” (Request 19-2, Sec. 8, Pg. 3). Request 19-2 seeks reconsideration of Board and staff action.

The Board Accountability Mechanisms Committee (BAMC) has determined that Request 19-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)](#) [\[icann.org\]](http://icann.org) states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 19-2 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 19-2 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 19-2.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Petillion

Annex 124

Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2

This substantive evaluation of Request for Reconsideration (“RFR”) 19-2 by the ICANN Ombudsman is required under the Paragraph 4.2(l) of the current ICANN Bylaws (“Bylaws” (as amended July 22, 2017)).

Under ICANN Bylaws 4.2(c), a Requestor can bring a Request for Reconsideration concerning an action or inaction as follows:

Section 4.2. RECONSIDERATION...

(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.

Unpacking the above language, did an action (or inaction—in other words an action that could have been taken which was not taken) contradict or violate ICANN’s Mission or established policy (including the Bylaws and relevant California laws¹)? Or, was an action taken (or not taken) without consideration of material information, or was it the result of reliance on false or inaccurate relevant information? In providing the Board Accountability Mechanism Committee (“BAMC”) and the ICANN Board of Directors a “substantive evaluation” of a Request for Reconsideration, the Ombudsman must look at the substance of what is being requested in the Request, and of course at the actions (or inaction) for which the Requestor seeks Reconsideration.

¹ While laws of a state or country are not mentioned explicitly in Bylaws Section 4.2, the Mission of a California public benefit corporation includes implicitly abiding by the relevant laws: here those are the applicable corporate laws pertinent to the governance of the corporation. If an action or inaction clearly is in violation of California law, it is improper. Similarly, the word “Commitments” suggests the commitment ICANN makes to be law abiding, especially of the laws of the State wherein and whereby it was formed, where it is headquartered, and where much of its operation takes place.

Request for Reconsideration 19-2 was filed by Namecheap, Inc. (“Requestor”) on July 12th, 2019, seeking reconsideration of ICANN organization’s renewal of the Registry Agreements with Public Interest Registry (“PIR”) and Afilias Limited (“Afilias”) for the .org and .info top-level domains (TLDs), respectively (collectively, the .org/.info renewed Registry Agreements are “Renewal Registry Agreements”), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .org and .info. The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”

The Renewal Registry Agreements (RA) (and their Addenda) that are at the heart of this Reconsideration Request can be found here:

<https://www.icann.org/resources/agreement/org-2019-06-30-en> and <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

The history of these RAs (which is detailed on the public comments pages) may be helpful to explain why and how these negotiations came about. [<https://www.icann.org/public-comments/org-renewal-2019-03-18-en> and <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>]

The Registries for these two historic and significant Top-Level Domains (TLDs) are Public Interest Registry (PIR) (for .org) and Afilias (for .info), (the former is a Pennsylvania non-profit corporation and the latter is a Pennsylvania corporation—both are the “Registry Operators”). ICANN and the Registry Operators each bilaterally negotiated Registry Agreement renewals with ICANN org. ICANN and the Registry Operators “agreed to implement the incorporation of unique legacy-related terms of .org (and .info) through an ‘Addendum’ to the Registry Agreement.”

[<https://www.icann.org/resources/agreement/org-2019-06-30-en>]

The initial Registry Agreements for .org and .info were due to expire on June 30th, 2019. In anticipation of that nearing expiration date, ICANN and PIR, and ICANN and Afilias, bilaterally negotiated renewals of their respective Registry Agreements. The proposed renewals were based on ICANN’s current Base gTLD Registry Agreement.

The Addendum allowed the Registry Operator to renew with “unique terms” included via the Addendum. The reasons ICANN and the Registry Operators were willing to renew with unique terms may have to do with the historical nature of these TLDs, their size, and the fact that in the case of .org, a vast number of non-profits and public interest entities are registered thereunder (ICANN itself is icann.org). The .org TLD is currently the third largest TLD, with at present more than 10 million registrants, and .info is the fourth largest (with ~4.65 million registrants as of May 2019).²

² The TLDs .com and .net are the two largest according to the latest statistics on Statista. [<https://www.statista.com/statistics/262947/domain-numbers-of-the-ten-largest-top-level-domains/>]

It's no understatement to note that regarding the history of Internet domains, putting all TLDs in context over the past 30 odd years, the three TLDs .org, .info, and .biz, (plus .com and .net), comprise the most important, most recognized, and just *most*—period.

Viewed separately or together, these TLDs are *the most significant* TLDs; thus, it is not surprising that ICANN would take time and care to treat them differently in terms of their renewals, and be willing to renew them on unique terms. The removal of price controls brings these renewals in line with the current Base gTLD Registry Agreements, creating potential conformity for all (or almost all) TLD agreement terms going forward.

When bilateral renewal negotiations were finished, ICANN org posted the proposed, bilaterally negotiated renewal of the unique .org Registry Agreements for public comment (from March 18th, 2019 through April 29th, 2019).

According to the Staff Report of Public Comment Proceeding (“Staff Report”) which was posted on June 3rd, 2019, ICANN received 3,200+ submissions during the public comment period for .org alone. (The Staff Report is available at <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>).

The Staff Report notes this number of comments is comparable to a prior .org Registry Agreement renewal comment period in 2006, where over 2,000 comments were received. All of the present comments were submitted through an ICANN org public comment portal requiring human interaction; yet many of these comments seem clearly to be computer generated—that is to say, they may be “comments” in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing. A brief search on the Internet identified one source of recurring comments to be: <https://www.internetcommerce.org/comment-org/> (Web page accessed Sept. 7th, 2019).

As far as comments go for ICANN, 3200+ appears to be quite a sizeable number. But, seeing as how the public comments can be filled out and submitted electronically, it is not unexpected that many of the comments are, in actuality, more akin to spam.

After the public comment period closed, ICANN Staff prepared the Staff Report, which was circulated to the ICANN Board, and then subsequently made available to the public at the beginning of June 2019. All Board Directors could access all of the public comments, as could *anyone* (they live online here: <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>). Given the significance of these Legacy TLDs, the Board was briefed about the negotiations in January 2019; subsequently (in June of 2019) the Board was briefed about the public comments and the decision taken by ICANN Staff and the President and CEO (“CEO”) to go ahead with the renewals under the published terms.

Following consultation with the Board, ICANN published correspondence affirming that renewal of TLDs by the CEO and Staff continues to be a proper delegation of authority by the Board to the CEO and Staff.

[\[https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf\]](https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf)

What may not be understood by the Community is that ICANN’s Board delegated such authority to negotiate and renew Registry Agreements to the CEO and Staff long ago, utilizing the executive authority resident in the Chief Executive and its powers:

Section 15.4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

They call these powers “Executive” for a reason: the Staff and the officers under the CEO *execute*—agreements, operations, etc. Indeed, the Board’s delegation of authority to negotiate and enter into contracts is consistent with the Bylaws and the state laws of California, under and by which ICANN is formed as a corporation, as noted in Footnote 1 above (owing to Bylaws Section 4.2 inclusion of ICANN’s “Mission” and “Commitments”).

The most relevant Bylaw, however, is probably Bylaws Section 2.1:

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in [Section 7.1](#)).

The Board of Directors has specifically directed the CEO and Staff to negotiate and execute agreements—especially Registry Agreements. This authority is periodically reaffirmed, as appears to have happened in June 2019. Indeed, *executing* Registry Agreements (and their renewals) are, to an extent, the *raison d’être* and life’s blood of ICANN; it makes total sense that the Board gave and keeps giving this authority and power to the CEO and his Staff.

The Bylaws specifically authorize the CEO’s power to enter into and execute contracts (including, of course, Registry Agreements). Per the Bylaws, Section 21.1:

CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN, and such authority may be general or confined to specific instances.

Following the ICANN 65 Marrakech Policy Meeting in June 2019, the Registry Operators for the .org, .info and .biz TLDs executed their bilaterally negotiated Renewal Registry

Agreements with ICANN (on June 30th, 2019). The choice to include unique terms (or any terms, unique or not) properly belongs to the CEO and Staff, and all the included and proposed terms were bilaterally negotiated by Staff with the respective Registry Operators.

After investigation, it seems apparent to me that the CEO and Staff acted within the scope of the powers given them by the Board. The Board retained oversight, the Board was briefed on the negotiations for the renewals of the Registry Agreements for the Legacy TLDs, and the Board was well aware of the public comments related thereto. The Board could have directed the CEO and Staff *not* to renew under these terms had it thought that warranted. It decided not to do so.

The Board were well aware of the public comments, had been briefed on them by the CEO and Staff, and had been provided with the Staff Report summarizing them; they chose to let Staff go ahead and renew on the terms agreed to with the Registry Operators, and the renewal Registry Agreements were duly and timely executed. Nothing about this seems to me, based on my investigation and understanding of the relevant rules, laws and Bylaws, to be any kind of violation or dereliction of CEO and Staff's normal executive obligations and duties, or of the Mission, Core Values, or Commitments of ICANN.

Ultimately, my substantive evaluation of this Request is that the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws). I have more to say about all this in the "companion" Substantive Evaluation of Reconsideration Request 19-3 (see Annex 1), which relates to other terms of these same renewal Registry Agreements (and which I have submitted per the Bylaws on the same day as I submitted this Evaluation: September 7th, 2019).

What Requestor set forth and requests in Request for Reconsideration 19-2 does not merit a recommendation by me to the BAMC or the Board to take the action Requestor requests, or to take any action at all.

Petillon

Annex 125



Via Email:
correspondence@icann.org
ombudsman@icann.org
herb.waye@icann.org

September 12 2019

Mr. Herb Waye
Ombudsman
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Dear Mr. Waye:

Re: Your Response to Reconsideration Request 19-2

The position of Ombudsman has a crucial role within an organization and requires respect for stakeholders, sound judgment, and neutrality.

On or about September 7, 2019, in your position as ICANN Ombudsman, you issued a “Substantive Evaluation” of NameCheap, Inc.’s Request for Reconsideration wherein you made ill-informed and disparaging comments about members of the ICANN community.

On Page 3 of your “Substantive Evaluation” (“SE”) at Paragraph 6, you stated that “many of the [3200+] comments are, in actuality, more akin to spam”.

You also stated therein at Paragraph 5, that “many of these comments seem clearly to be computer generated—that is to say, they may be ‘comments’ in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing.” You further stated therein that “a brief search on the Internet identified one source of recurring comments to be: <https://www.internetcommerce.org/comment-org/> (Web page accessed Sept. 7th, 2019)”.

Your disparagement of public comments from concerned stakeholders, which were duly submitted through the ICANN comment portal, is deeply concerning, particularly for an Ombudsman. Furthermore, your misrepresentation of facts demonstrates a failure to reasonably inform yourself prior to reaching an ill-advised and incorrect conclusion.

There was an unprecedented groundswell of public opposition to the Proposed .org Renewal Registry Agreement as demonstrated by the 3,200 Comments which were properly submitted. Each of these comments expressed the genuine perspective of the person or organization that submitted the comment. Many of these Comments were from major non-profit organizations, community groups, small associations, religious organizations, environmental groups, academics, and individual registrants. One could reasonably conclude that these Comments are indicative of the tens of thousands of other individuals and organizations with similar concerns that either were not aware of the Comment Period or who did not take the time and trouble to submit a Comment.

You however, attempted to denigrate and dismiss the volume of Comments on the purported basis of many of them being “spam”. You attempted to justify your conclusion on the basis that many of the comments were, according to you, “computer generated” and were “identical, with only the email address of the comment submitter changing.” This is misleading.

As a way to facilitate engagement with ICANN by the millions of .org registrants who would be harmed by the terms of the .org renewal agreement drafted by ICANN staff, and who are largely unfamiliar with ICANN’s public comment procedure and who may be intimidated by what can only be construed as a user *un*-friendly procedure requiring individual email correspondence on complex policy matters, the Internet Commerce Association (“ICA”) established a web page which facilitated a user-friendly and simple way for concerned stakeholders to make their voice heard. Any interested person could use the user-friendly ICA form to send a Comment to ICANN. Hundreds and perhaps thousands of individuals on their own initiative used the comment form as an aid to participating in the ICANN comment process. The vast majority of Commenters who used the ICA web page facility had no affiliation with the ICA and were unknown to the ICA.

The form allowed Commenters to write their own original Comment, or to choose from a selection of possibly applicable comments, or to create a comment from a combination of both. This is something that ICANN itself should have done long ago, and indeed ICANN is currently seeking feedback from stakeholders about changing the current procedure for submitting comments. In the ICANN survey (See; <http://input.icann.org/app/survey/response.jsp>), ICANN asks in part, “Would you (or a group you directly contribute to) respond more often to Public Comments if the consultation included short and precise questions regarding the subject matter in a Survey Monkey or similar format?”

Accordingly, human interaction was present in each and every one of the Comments which were submitted via the ICA user-friendly form. Each person who used the form took the time and effort to submit the form and select the comments that they wished to make or used the form to submit their own comments. All followed the established procedures which do not exclude emails submitted through a user-friendly portal. Most of these Commenters were from outside of

the usual ICANN community of Commenters, as they learned of this important issue from their registrar, from the press, from blogs, from online forums, and from each other.

Furthermore, contrary to your claim that these Comments “only [included] the email address”, and did not otherwise identify the sender, each Comment submitted generally included the Commenter’s name and email address, both of which are normally transmitted by a sender’s own email application as with all correspondence and Comments submitted by email in the usual course. This was not “spam” as you alleged. "Spam" is unwelcome, unsolicited commercial messages sent from an unknown source. Contrary to your mischaracterization, these Comments expressed the genuine opinions of individuals from the community that ICANN purports to serve, and who took the trouble to share their viewpoints to better inform ICANN's decision-making process, only to find their views scorned and disregarded.

Rather than dismiss and effectively disenfranchise thousands of Commenters who duly expressed their views using this method, an Ombudsman should have embraced them and encouraged them. As you yourself admit, an Ombudsman’s job is to listen. You failed to listen or were otherwise determined not to listen. Instead, you dismissed and deprecated legitimate Comments from members of the public and that is a disappointing dereliction of duty for someone in your position. In our view, your mischaracterization of much of the Comments submitted by the public as “spam” ostensibly submitted by spammers, calls into question your ability to fairly and impartially carry out your primary function which is to encourage and respect stakeholders who express themselves to ICANN. Moreover, you failed to conduct any meaningful research prior to reaching your conclusions on the nature of the Comments, other than apparently by visiting a web page. You could have and should have made inquiries of the ICA which would have informed you of the actual nature of its facilitation efforts.

Under the circumstances, we think that it is incumbent upon you to apologize to the numerous people who submitted these Comments and to retract your ill-advised statements. The Ombudsman should seek ways to increase public participation, particularly from those who are underrepresented or unengaged in ICANN's policy development, rather than devaluing and dismissing their contributions to the policy development process.

Yours truly,
INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA

Petillon

Annex 126

Approved Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board – Open Session

This page is available in:

English |

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中文 (<https://www.icann.org/resources/board-material/resolutions-2019-11-03-zh>)

03 Nov 2019

1. **Main Agenda:**

a. **Consideration of Reconsideration Request 19-2**

Rationale for Resolution 2019.11.03.01

b. **Consideration of Reconsideration Request 19-3**

Rationale for Resolution 2019.11.03.02

c. **Independent Review Process Implementation Oversight Team Recomposition**

Rationale for Resolutions 2019.11.03.03 – 2019.11.03.05

d. **Ombudsman FY19 At-Risk payment**

Rationale for Resolutions 2019.11.03.06 – 2019.11.03.07

e. **AOB**

1. Main Agenda:

a. Consideration of Reconsideration Request 19-2

Whereas, Namecheap Inc. (Requestor) filed a reconsideration request (Request 19-2) challenging ICANN (Internet Corporation for Assigned Names and Numbers) organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (collectively, .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.¹

Whereas, the Requestor claims that ICANN (Internet Corporation for Assigned Names and Numbers) org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and Core Values, and ICANN (Internet Corporation for Assigned Names and Numbers) should reverse this decision for the public good."² The Requestor also asserts that ICANN (Internet Corporation for Assigned Names and Numbers) Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.³

Whereas, pursuant to Article 4, Section 4.2(I), the Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board," and that "no rules or duties of corporate governance were violated (including the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws)."⁴

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to

review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (See Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.⁵

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore, the Board is considering Request 19-2 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-2 and all relevant materials and concludes that ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, or procedures, and that ICANN (Internet Corporation for Assigned Names and Numbers) Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Resolved (2019.11.03.01), the Board adopts the [Proposed Determination on Reconsideration Request 19-2 \(/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf\)](#).

Rationale for Resolution 2019.11.03.01

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those

Requests. See Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.⁶ The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore, the Board has considered and issues the Proposed Determination in lieu of a Recommendation by the BAMC.

The Board has carefully considered the merits of Request 19-2 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, or procedures, and that ICANN (Internet Corporation for Assigned Names and Numbers) Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-2 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-2 in accordance with Article 4, Section 4.2(r) of the Bylaws.

This action is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a

process in place by which a person or entity materially affected by an action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

b. **Consideration of Reconsideration Request 19-3**

Whereas, Electronic Frontier Foundation (Requestor) filed a reconsideration request (Request 19-3) challenging ICANN (Internet Corporation for Assigned Names and Numbers) organization's renewal of the Registry Agreement (RA (Registrar)) with Public Interest Registry (PIR) for the .ORG generic top-level domain (gTLD (generic Top Level Domain)) (the .ORG Renewed RA (Registrar)), insofar as the renewal permits PIR to, "at its election, implement additional protections of the legal rights of third parties,' unilaterally and without further consultation with existing .ORG registrants or the ICANN (Internet Corporation for Assigned Names and Numbers) community" and applies the Uniform Rapid Suspension (URS (Uniform Rapid Suspension)) rules to .ORG registrants (collectively, the URS (Uniform Rapid Suspension) Rights Protection Mechanisms or URS (Uniform Rapid Suspension) RPMs).⁷ The Requestor also seeks reconsideration of an alleged Board inaction, insofar as the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors did not vote on the .ORG Renewed RA (Registrar).

Whereas, the Requestor claims that ICANN (Internet

Corporation for Assigned Names and Numbers) org's inclusion of the RPMs in the .ORG Renewed RA (Registrar) "run[s] contrary to ICANN (Internet Corporation for Assigned Names and Numbers)'s bylaws."⁸ The Requestor also claims that the Board's inaction (i.e., that the Board did not vote on the .ORG Renewed RA (Registrar)) was based on the Board's consideration of inaccurate relevant information and the Board's failure to consider material information.⁹

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman accepted Request 19-3 for consideration, and, after investigating, concluded that the selection of terms to include in RAs is "ICANN (Internet Corporation for Assigned Names and Numbers) org's choice to make as directed by the Board—and as such, the actions of the Staff, acting with the authority vested in the CEO by the Bylaws and the Board, do not merit any kind of recommendation from me to the BAMC or the Board under [Request] 19-3."¹⁰ The Ombudsman further concluded that "[i]n action or inaction, the Board did nothing improper in deciding to stay the course, so far as I can see. It heard the Community, it read the public comments (at the very least the comprehensive Staff Report summary), and in the end, it decided that the renewal terms for the Legacy gTLDs (including .org) were acceptable."¹¹

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (See Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹²

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the

BAMC does not have a quorum to consider Request 19-3. Therefore, the Board is considering Request 19-3 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-3 and all relevant materials and concludes that reconsideration is not warranted because ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG Renewed RA (Registrar) was consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN (Internet Corporation for Assigned Names and Numbers) Staff to execute the .ORG Renewed RA (Registrar) without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Resolved (2019.11.03.02), the Board adopts the [Proposed Determination on Reconsideration Request 19-3 \(/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf\)](/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf).

Rationale for Resolution 2019.11.03.02

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. See Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹³ The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance

of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board has considered and issues the Proposed Determination in lieu of a Recommendation by the BAMC.

The Board has carefully considered the merits of Request 19-3 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that reconsideration is not warranted because ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG Renewed RA (Registrar) was consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN (Internet Corporation for Assigned Names and Numbers) Staff to execute the .ORG Renewed RA (Registrar) without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-3 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-3 in accordance with Article 4, Section 4.2(r) of the Bylaws.

This action is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN (Internet

Corporation for Assigned Names and Numbers) Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

c. **Independent Review Process Implementation Oversight Team Recomposition**

Whereas, the Independent Review Process (IRP) is an accountability mechanism established by the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws that allows for third party review of ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff actions (or inactions) alleged by an affected party to be inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation or Bylaws.

Whereas, the Bylaws specify that IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP supplementary rules of procedure for Board consideration and approval, and developing rules for the Cooperative Engagement Process.

Whereas, the Bylaws further specify that an IRP-IOT shall be "established in consultation with the Supporting Organizations (Supporting Organizations) [SOs] and Advisory Committees (Advisory Committees) [ACs]" and that the IRP-IOT shall be "comprised of members of the global Internet community." (See Bylaws, Art. 4, § 4.3(n).)

Whereas, the IRP-IOT was formed during CCWG-Accountability Work Stream 1 (WS1) as a group

envisioned to include seven volunteers of experts in IRPs, arbitration or alternative dispute resolution mechanisms.

Whereas, the IRP-IOT had difficulties in achieving active participation or quorum with its current membership at regularly scheduled meetings.

Whereas, the Board Accountability Mechanisms Committee (BAMC), in its oversight role of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, has undertaken to repopulate the IRP-IOT with members who have the substantive qualifications and time availability to help the IOT conclude its work in a timely fashion.

Whereas, at the request of the BAMC, ICANN (Internet Corporation for Assigned Names and Numbers) organization issued a Call for Expressions of Interest and conducted community outreach seeking new volunteers to join the IRP-IOT.

Whereas, the BAMC specified that volunteers should have the necessary legal or judicial skills and experience in IRPs, arbitrations, or other alternate dispute resolution mechanisms, specific familiarity with ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, and sufficient availability to contribute to the work online.

Whereas, the BAMC has confirmed with the current members of the IRP-IOT who have actively participated in the IRP-IOT since January 2018 that they would like to continue serving on the IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online.

Resolved (2019.11.03.03), the Board delegates to the BAMC the authority in this instance to select the members according to the documentation submitted to the Board, and the Board directs the BAMC to provide a proposal to the Board for the future process of finalizing changes to the composition of the IRP-IOT, if needed.

Resolved (2019.11.03.04), the Board acknowledges the work of the BAMC in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

Resolved (2019.11.03.05), the Board thanks the SOs and ACs for their work in consulting with the BAMC on the recomposition of the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further thanks all candidates who submitted expressions of interest to join the IRP-IOT. The Board further thanks all members of the IRP-IOT for their efforts to date.

Rationale for Resolutions 2019.11.03.03 – 2019.11.03.05

The Independent Review Process (IRP) is an accountability mechanism provided by the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws that allows for third party review of ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff actions (or inactions) alleged by an affected party to be inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation or Bylaws. Per the Bylaws, an IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP Supplementary Procedures for Board approval, and developing rules for the Cooperative Engagement Process (CEP). The Board is taking this action today because it is committed to ensuring that the work of the IRP-IOT is completed in

a timely and efficient manner to bring the IRP in line with the updated Bylaws.

The IRP-IOT's scope of work involves drafting the Updated Supplementary Procedures for Board consideration and approval, developing rules for the CEP, making recommendations of trainings for the IRP standing panel, and developing the rules governing appeals from IRP panel decisions.¹⁴ The current IRP-IOT was formed in late 2015 within CCWG-ACCT WS1 as a group envisioned to include seven volunteers of experts in the IRPs, arbitration or alternative dispute resolution mechanisms, as well as participants from ICANN (Internet Corporation for Assigned Names and Numbers)'s legal department.¹⁵ Over the past several years, the IRP-IOT has experienced difficulties in achieving active participation and quorum from the current membership at regularly scheduled meetings.

The participation level of the IRP-IOT needs to improve dramatically in order to complete the remaining work in the estimated time frame. The Board Accountability Mechanisms Committee (BAMC), as the Board Committee with oversight responsibility of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, identified that as part of re-composing the IRP-IOT and supporting the important role that the IRP has within ICANN (Internet Corporation for Assigned Names and Numbers)'s overall accountability, it is important to focus on bringing the correct mix of skills to the group to complete the work. The BAMC identified those as specific legal or judicial skills and experience in disputes such as IRPs, arbitrations, or other alternate dispute resolution mechanisms, as well as specific familiarity with ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms. In terms of time commitment, the BAMC asked for volunteers who have the time and availability to attend at least a one hour call each week to participate on IRP-IOT

telephonic meetings, as well as sufficient availability to contribute to the work online.

Pursuant to the Bylaws requirement that an IRP-IOT be "established in consultation with the Supporting Organizations (Supporting Organizations) [SOs] and Advisory Committees (Advisory Committees) [ACs]", the process to recompose the IRP-IOT was done in consultation with the SOs and ACs. The BAMC and ICANN (Internet Corporation for Assigned Names and Numbers) org conducted several community outreach efforts, including an issuance of a Call for Expressions of Interest through the Community Leadership Digest in April 2019 and a letter from the BAMC Chair to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) leadership in which the BAMC Chair asked for the help of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) leadership in the recomposition process. ([See Letter from León Sanchez to SO \(Supporting Organization\)/AC \(Advisory Committee; or Administrative Contact \(of a domain registration\)\) leadership dated 26 June 2019 \(/en/system/files/correspondence/sanchez-to-siddiqui-et-al-26jun19-en.pdf\)](#)). The BAMC encouraged the SO (Supporting Organization)/ACs, if interested, to use their own selection processes to provide inputs to the BAMC on candidates. If invited, representatives of ICANN (Internet Corporation for Assigned Names and Numbers) org were available for discussion on the issue.

Following community outreach and a Call for Expressions of Interest, the BAMC then considered whether each of the volunteers that responded to the call for expressions of interest satisfied the substantive qualifications and time requirements sufficient to serve on the IRP-IOT. Some of the volunteers were presented to the BAMC with

endorsement from the Generic Names Supporting Organization (Supporting Organization) Council.

With respect to those IRP-IOT members that have actively participated in the IRP-IOT since January 2018, the BAMC, through ICANN (Internet Corporation for Assigned Names and Numbers) org, sought confirmation from each as to whether they wished to continue serving on the IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online. The full composition from the BAMC also continues the participation from ICANN (Internet Corporation for Assigned Names and Numbers) org's legal department, which brings a practical and important view of how the proposals out of the IRP align in practice as well as potential implications on the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws and resourcing issues. As the ICANN (Internet Corporation for Assigned Names and Numbers) Board has responsibility to make sure that the IRP, envisioned as the "constitutional court" of ICANN (Internet Corporation for Assigned Names and Numbers), operates properly under the Bylaws, the BAMC also recommends that two ICANN (Internet Corporation for Assigned Names and Numbers) Board members are formally identified as members of the IRP-IOT and actively participate in this work. The Board notes that other members of the reconstituted IRP-IOT have been, or anticipate to be, involved as claimants against ICANN (Internet Corporation for Assigned Names and Numbers) in IRPs, and the Board notes that their experience is also extremely valuable when finalizing the procedures and other aspects of an IRP that is fit for purpose. The Board further notes that the BAMC may add new members to the IRP-IOT as appropriate should the need to do so arise, and provided that the new members meet the substantive and time requirements for IRP-IOT membership. The

Board affirms the BAMC's work in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

The BAMC has also recommended that the recomposed IRP-IOT include a leadership refresh as part of reinvigorating and renewing the cadence of the work of the IRP-IOT. The Board agrees with BAMC's recommendation and thanks the IRP-IOT leadership for the work to date.

The Board thanks the SOs and ACs for their work in identifying additional members the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further thanks all candidates who submitted expressions of interest to join the IRP-IOT. The Board further thanks all members of the IRP-IOT for their efforts to date.

This action is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest as part of implementing and achieving the enhanced outcomes of the IRP in accordance with the recommendations of the community. This action is also within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request third-party review of that action or inaction by the Board.

Adopting the BAMC's Recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not

negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. **Ombudsman FY19 At-Risk payment**

Whereas, the Compensation Committee recommended that the Board approve payment to the Ombudsman of his FY19 at-risk compensation.

Resolved (2019.11.03.06), the Board hereby approves a payment to the Ombudsman of his FY19 at-risk compensation component.

Resolved (2019.11.03.07), a portion of this action by the Board shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article 3, section 3.5b of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Rationale for Resolutions 2019.11.03.06 – 2019.11.03.07

Annually the Ombudsman has an opportunity to earn a portion of his compensation based on specific performance goals set by the Board, through the Compensation Committee. This not only provides incentive for the Ombudsman to perform above and beyond his regular duties, but also leads to regular touch points between the Ombudsman and Board members during the year to help ensure that the Ombudsman is achieving his goals and serving the needs of the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Evaluation of the Ombudsman's objectives results from both the Ombudsman self-assessment, as well as review by the Compensation Committee, which lead to a recommendation to the Board with which the

Board agrees.

Evaluating the Ombudsman's annual performance objectives is in furtherance of the goals and mission of ICANN (Internet Corporation for Assigned Names and Numbers) and helps increase the Ombudsman's service to the ICANN (Internet Corporation for Assigned Names and Numbers) community, which is in the public interest.

While there is a fiscal impact from the results of the scoring, that impact was already accounted for in the FY19 budget. This action will have no impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

e. **AOB**

No resolutions taken.

Published on 3 November 2019

¹ Request 19-2, § 3, at Pg. 2.

² *Id.* at § 3.

³ *Id.*

⁴ <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf> ([/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf)).

⁵ See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en> ([/resources/pages/charter-bamc-2017-11-02-en](https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en)).

⁶ See *id.*

⁷ Request 19-3, § 3, at Pg. 2.

⁸ *Id.*, § 8, at Pg. 5.

⁹ *Id.*, § 8, at Pgs. 8-9.

¹⁰ Evaluation by the ICANN (Internet Corporation for Assigned Names and Numbers) Ombudsman of Request for Reconsideration 19-3, at Pg. 3, 7 September 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf> ([/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf)).

¹¹ *Id.*, at Pg. 6.

¹² See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en> ([/resources/pages/charter-bamc-2017-11-02-en](https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en)).

¹³ See *id.*

¹⁴ See Bylaws, Art. 4, § 4.3(j)(i) and 4.3(j)(iii) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4> ([/resources/pages/governance/bylaws-en/#article4](https://www.icann.org/resources/pages/governance/bylaws-en/#article4))).

¹⁵ See <https://community.icann.org/display/IRPIOTI> (<https://community.icann.org/display/IRPIOTI>).

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Annex 127

**PROPOSED DETERMINATION
OF THE ICANN BOARD OF DIRECTORS¹
RECONSIDERATION REQUEST 19-2
3 November 2019**

The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afiliás Limited (Afiliás) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated “the historic price caps” on domain name registration fees for .ORG and .INFO.² The Requestor claims that ICANN org’s “decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN’s Commitments and Core Values, and ICANN should reverse this decision for the public good.”³

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

- (i) ICANN org’s commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”⁴
- (ii) ICANN org’s Core Value of “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”⁵
- (iii) ICANN org’s Public Comment Opportunities page, which states that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential

¹ The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en>. Here, the majority of the BAMC members have recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2 so the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC.

² Request 19-2, § 3, at Pg. 2.

³ *Id.* § 8, at Pg. 3.

⁴ *Id.* § 8, at Pg. 4.

⁵ *Id.* § 8, at Pg. 4.

adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”⁶

- (iv) ICANN org’s statements concerning its call for Public Comment that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”⁷

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.⁸

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs.”⁹

I. Brief Summary.

PIR is the registry operator for the .ORG TLD.¹⁰ ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.¹¹ ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.¹² Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.¹³ Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on

⁶ *Id.* § 8, at Pg. 4.

⁷ *Id.*, § 8, at Pg. 4.

⁸ *Id.*, § 8, at Pg. 10.

⁹ *Id.*, § 9, at Pg. 12.

¹⁰ Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

¹¹ *Id.*

¹² Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), <https://www.icann.org/public-comments/info-renewal-2019-03-18-en>.

¹³ 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

ICANN org’s base generic TLD Registry Agreement updated on 31 July 2017 (Base RA), modified to account for the specific nature of the .ORG and .INFO gTLDs.¹⁴ As a result, the proposed Renewed RAs’ terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.¹⁵ On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would “allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA],” while “tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].”¹⁶

and .INFO agreements.¹⁷ The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights protection mechanisms

¹⁴ See 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. See <https://www.icann.org/resources/agreement/biz-2019-06-30-en>.

¹⁵ Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>. ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG

¹⁶ 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org’s New gTLD Program. See <https://newgtlds.icann.org/en/about/program>. Legacy gTLDs are gTLDs that existed before ICANN org’s New gTLD Program. .ORG and .INFO are legacy TLDs.

¹⁷ Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/report-comments-org-renewal-03jun19-en.pdf>; Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/report-comments-info-renewal-03jun19-en.pdf>.

(RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.¹⁸

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.¹⁹ It concluded that removing the price cap provisions was “consistent with the Core Values of ICANN org as enumerated in the Bylaws,” insofar as removing the price cap provisions would “promote competition in the registration of domain names,” and enabled ICANN org to “depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market.”²⁰ ICANN org also noted that the Base RA protected existing registrants’ pricing by requiring the registry operator to: (1) give registrars six months’ advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.²¹ ICANN Staff then noted that it would “consider the feedback from the community on this issue,”²² “and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”²³

Following consultation with the ICANN Board of Directors and with the Board’s support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.²⁴

¹⁸ Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

¹⁹ ICANN org received some comments supporting removal of the price cap provision because “ICANN org is not and should not be a price regulator,” and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.

²⁰ *Id.*, at Pg. 8.

²¹ *Id.*

²² *Id.*

²³ *Id.*, at Pg. 1.

²⁴ See ICANN org announcements: .ORG Renewed RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO Renewed RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”²⁵ and that “no rules or duties of corporate governance were violated (including the ICANN Bylaws).”²⁶

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org’s execution of the .ORG/.INFO Renewed RAs was consistent with ICANN’s Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

II. Facts.

A. Historic .ORG and .INFO RAs.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.²⁷ ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.²⁸ Both RAs included price caps.²⁹

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.³⁰ However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board’s direction, ICANN org

²⁵ Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>.

²⁶ *Id.*

²⁷ 2019 .ORG RA Public Comment Proceeding; *see also* <https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en>; <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>.

²⁸ 2019 .INFO RA Public Comment Proceeding.

²⁹ 2002 .ORG RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en>; 2001 .INFO RA, <https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en>.

³⁰ 2006 Public Comment of .BIZ, .INFO, .ORG, <https://www.icann.org/news/announcement-3-2006-07-28-en>.

renegotiated the .ORG and .INFO RAs to include price caps.³¹ Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).³²

B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.³³ In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new [gTLDs]."³⁴ Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."³⁵

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.³⁶ Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the

³¹ See Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, <https://www.icann.org/news/announcement-2006-10-24-en>.

³² .ORG RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en>; .INFO RA, 8 December 2006, <https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en>.

³³ <https://newgtlds.icann.org/en/about/program>.

³⁴ GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.

³⁵ <https://newgtlds.icann.org/en/about/program>.

³⁶ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. <https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton>. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.

market for gTLDs] limits or eliminates the suppliers' [*i.e.*, the registry operators'] incentive and ability to act opportunistically."³⁷ He explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."³⁸

Carlton performed his analysis during the Base RA development process.³⁹ That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via a public comment forum.⁴⁰ The Base RA was established in 2013 and aligns with the GNSO's policy recommendations for new gTLDs.⁴¹ Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.⁴² The Base RA does not contain price caps, but it "does contain requirements designed to protect registrants from a price perspective," including requirements that registry operators "provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals."⁴³ In addition, the registry operators must allow registrants

³⁷ *Id.*, at ¶ 12.

³⁸ *Id.*

³⁹ See New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, available for download at <https://newgtlds.icann.org/en/applicants/agb>.

⁴⁰ <https://www.icann.org/public-comments/base-agreement-2013-04-29-en>; see also 26 July 2019 Letter, at Pg. 1.

⁴¹ 26 July 2019 Letter, at Pg. 1; see also GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.

⁴² 26 July 2019 Letter, at Pg. 1.

⁴³ *Id.*

to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.⁴⁴

Using the Base RA for renewed legacy gTLDs without price cap provisions “is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org’s role in domain pricing.”⁴⁵ This promotes ICANN’s Core Values of “introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market.”⁴⁶

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to “designate an emergency interim registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS].”⁴⁷ Additionally, using the Base RA ensures that the Registry will use “uniform and automated processes, which will facilitate operation of the TLD,” and “includes safeguards in the form of public interest commitments in Specification 11.”⁴⁸

The Board has also explained that transitioning legacy gTLDs to the Base RA “will provide consistency across all registries leading to a more predictable environment for end-users.”⁴⁹ The Base RA’s requirement that the registry operator only use ICANN accredited

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*, at Pg. 2.

⁴⁷ Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale>; *see also* Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale>; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale>; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

⁴⁸ Rationale for Board Resolution 2015.09.28.06; *see also* 2019 .ORG RA, Specification 11, at Pgs. 95-96, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf>.

⁴⁹ Rationale for Board Resolution 2015.09.28.06.

registrars that are party to the 2013 Registrar Accreditation Agreement “will provide more benefits to registrars and registrants.”⁵⁰ Finally, the Board has noted that the Base RA “includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,”⁵¹ another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.⁵² Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.⁵³

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org’s Base RA, modified “to account for the specific nature[s]” of each TLD and as a result of negotiations between ICANN and the registry operators.⁵⁴ On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

[i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 2019 .ORG RA Public Comment Proceeding.

⁵³ 2019 .INFO RA Public Comment Proceeding.

⁵⁴ *See* 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.

equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].⁵⁵

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.⁵⁶ During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,⁵⁷ and over 500 submissions in response to its call for comments on the proposed .INFO agreement.⁵⁸ The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.⁵⁹

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.⁶⁰ ICANN org concluded that

[r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.⁶¹

ICANN org also noted that

the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry

⁵⁵ 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

⁵⁶ 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.

⁵⁷ Report of Public Comments, .ORG, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>.

⁵⁸ Report of Public Comments, .INFO, at Pg. 3, <https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf>.

⁵⁹ *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

⁶⁰ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁶¹ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].⁶²

ICANN org explained that it would “consider the feedback from the community on this issue,”⁶³ and then ICANN org would “consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.”⁶⁴

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,⁶⁵ then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.⁶⁶ With support from the Board to proceed with execution of the proposed renewals and pursuant to the [ICANN Delegation of Authority Guidelines](#), on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.⁶⁷

D. The Request for Reconsideration and Ombudsman Report.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.⁶⁸

After investigating, the Ombudsman concluded that “the CEO and Staff acted within the scope of the powers given them by the Board,”⁶⁹ and that “no rules or duties of corporate

⁶² Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁶³ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁶⁴ Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.

⁶⁵ 26 July 2019 Letter, at Pg. 2.

⁶⁶ 26 July 2019 Letter at Pg. 2.

⁶⁷ See ICANN org announcements: .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>; .INFO RA, <https://www.icann.org/resources/agreement/info-2019-06-30-en>.

⁶⁸ <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf>.

⁶⁹ Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.

governance were violated (including the ICANN Bylaws).”⁷⁰ He determined that the “Board were well aware of the public comments” because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.⁷¹ Additionally, the Ombudsman concluded that “the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws).”⁷²

E. Relief Requested.

The Requestor “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.”⁷³

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff’s decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN’s Mission, Commitments, Core Values, or established ICANN policies; and
2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

IV. The Relevant Standards for Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity “may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, at Pg. 5. On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman “made ill-informed and disparaging comments about members of the ICANN community” in the Ombudsman’s evaluation. 12 September 2019 letter from Z. Muskovitch to H. Wayne, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf>. The ICA asked the Ombudsman to “apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements.” *Id.*, at Pg. 3.

⁷³ Request 19-2, § 9, at Pg. 12.

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”⁷⁴

The Board now considers Request 19-2’s request for reconsideration of Staff action⁷⁵ on the grounds that the action was taken in contradiction of ICANN’s Bylaws and without consideration of material information. The Board has reviewed the Request and now makes this proposed determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁷⁶

V. Analysis and Rationale.

A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org’s Commitments.

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Commitment to “seek input from the public, for whose benefit ICANN in all events shall act.”⁷⁷

The Requestor acknowledges that “ICANN [org] requested public comment regarding the changes to the .ORG registry agreement.”⁷⁸ It asserts, however, that ICANN org “reject[ed] all

⁷⁴ Bylaws, Art. 4 §§ 4.2(a) and (c).

⁷⁵ The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and “725 Namecheap customers and internet users.” *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor’s claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board’s consideration is with respect to the Requestor’s challenge to Staff action.

⁷⁶ Bylaws, Art. 4 § 4.2(e).

⁷⁷ Request 19-2, § 8, at Pg. 4.

⁷⁸ *Id.* § 8, at Pg. 3.

of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence,” and as a result, “the public comment process is basically a sham.”⁷⁹ In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs “ignore[d] the public benefit or almost unanimous feedback to the contrary.”⁸⁰

The Requestor does not dispute that ICANN org “review[ed] and consider[ed] all 3,200+ comments received,”⁸¹ and acknowledged that the removal of the price caps was “[a] primary concern voiced in the comments.”⁸² ICANN Staff presented and discussed the “key issues raised in the public comment process and correspondence,” including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.⁸³ Further, as the Ombudsman noted, the Board was “well aware of the public comments.”⁸⁴

The Reports of Public Comment were the result of ICANN Staff’s extensive analysis of the comments; consistent with ICANN Staff’s ordinary process for preparing the Report of Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.⁸⁵ Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances;

⁷⁹ *Id.* § 8, at Pgs. 10, 12.

⁸⁰ *Id.* § 8, at Pg. 12.

⁸¹ 26 July 2019 Letter at Pg. 2.

⁸² Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.

⁸³ 26 July 2019 Letter, at Pg. 2.

⁸⁴ Ombudsman Evaluation of Request 19-2, at Pg. 5.

⁸⁵ *See* Report of Public Comments, .ORG, at Pg. 3 (“This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor.”); Report of Public Comments, .INFO, at Pg. 3 (same).

likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.⁸⁶

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a “sham” or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff’s careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,⁸⁷ demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff’s belief that it was acting for the public benefit by “promot[ing] competition in the registration of domain names,” providing the same “protections to existing registrants” afforded to registrants of other TLDs, and treating “the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].”⁸⁸ There is no support for the Requestor’s assertion that ICANN Staff’s belief in this regard was based upon “conclusory statements not supported by evidence.”⁸⁹ ICANN org considered Professor Carlton’s 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.⁹⁰

⁸⁶ The Board acknowledges the ICA’s disagreement with the Ombudsman’s characterization of certain comments as “spam” and “computer generated.” 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. *See* Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA’s arguments do not change the Board’s determination that reconsideration is not warranted here.

⁸⁷ 26 July 2019 Letter, at Pg. 2.

⁸⁸ Report of Public Comments, .ORG, at Pg. 8.

⁸⁹ Request 19-2, § 8, at Pg. 12.

⁹⁰ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

Finally, ICANN Staff was aware of the Board’s 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.⁹¹

In sum, the Requestor’s conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org’s Core Values.

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org’s Core Value of

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.⁹²

Contrary to the Requestor’s argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above, ICANN org considered the responses and other factors, including its commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,”⁹³ and its Core Values of “depending on market mechanisms to promote and sustain a competitive environment in the DNS market” where “feasible and appropriate,” and “[i]ntroducing and promoting competition in

⁹¹ See Rationale for Board Resolution 2015.09.28.06.

⁹² Request 19-2, § 8, at Pg. 4.

⁹³ Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.

the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”⁹⁴

Moreover, the public comment process is but one of several channels for ICANN’s multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org’s Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN’s various communication channels. Here, ICANN org ultimately determined that ICANN’s Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same “protections to existing registrants” that are afforded to registrants of other TLDs, and treat registry operators equitably.⁹⁵ Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, “was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment.”⁹⁶

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org’s transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by

⁹⁴ Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.

⁹⁵ Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

⁹⁶ 26 July 2019 Letter, at Pg. 1.

migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org’s Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org’s statement on its Public Comment Opportunities page that “Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption,” and is “used to guide implementation work, reviews, and operational activities of the ICANN organization.”⁹⁷ The Requestor asserts that omitting the price caps is inconsistent with ICANN org’s statement that the “purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement.”⁹⁸

Ultimately, ICANN org’s decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to “obtain community input” or “use[]” the public comment “to guide implementation work” of ICANN org.⁹⁹ To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board’s support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).¹⁰⁰ ICANN org’s general description of the purpose of the public comment process is

⁹⁷ Request 19-2, § 8, at Pg. 4.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

not a Commitment, Core Value, established policy, nor part of ICANN org’s Mission.

Accordingly, even if ICANN org’s decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org’s analysis of the proposed removal of price caps “ignores significant information that is contrary to its sweeping conclusions.”¹⁰¹ Specifically, the Requestor asserts that ICANN org’s analysis ignores that:

1. .ORG “is the 3rd largest” TLD, and “additional analysis is needed to determine whether this market share can result in uncompetitive practices,”¹⁰²
2. .ORG “was established in 1985,” “is universally known, associated with nonprofit use, and has an excellent reputation,”¹⁰³
3. It can be “a cumbersome and costly process” for an established entity to change domain name, and “often” leads to “negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).”¹⁰⁴
4. “TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . . and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG.”¹⁰⁵
5. Although some new gTLDs are targeted to nonprofits, “there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG).”¹⁰⁶

¹⁰¹ Request 19-2, § 8, at Pg. 10.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*, at Pg. 10-11.

¹⁰⁵ *Id.*, at Pg. 11.

¹⁰⁶ *Id.*

6. “There are some concerns [that] higher levels of abuse exists in new gTLD domains ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs.”¹⁰⁷
7. “[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.”¹⁰⁸

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters “questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections.”¹⁰⁹ With respect to Item 2, ICANN Staff acknowledged that commentators noted that “.ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations.”¹¹⁰ With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged “concerns about the burden and costs associated with moving [a] web presence to another TLD,” along with comments characterizing .ORG as “the most appropriate registry for a charity or non-profit.”¹¹¹ Accordingly, the Requestor’s argument that the information about these six “concerns” was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor’s assertion that “ICANN’s own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,”¹¹² the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the “domains identified as security threats . . . were in legacy

¹⁰⁷ *Id.* citing <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

¹⁰⁸ *Id.*, at Pg. 11-12.

¹⁰⁹ Report of Public Comments, .ORG, at Pg. 5.

¹¹⁰ *Id.*, at Pgs. 3-4.

¹¹¹ *Id.*, at Pgs. 4-5.

¹¹² *Id.*, citing 31 January 2019 DAAR Report, <https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf>.

[TLDs],” and the remaining 51.89% of the domains identified as threats were in new gTLDs.¹¹³ Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.¹¹⁴ However, the Report also notes that 88% of the new gTLD domains identified as security threats were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.¹¹⁵ The Report further noted that 98% of the domains identified as security threats were hosted by “the 50 most-exploited new [TLDs].”¹¹⁶ Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, “[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor’s] domain name registration business,” insofar as the .ORG/.INFO Renewed RAs create an “uncertainty of price increases.”¹¹⁷ That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently

¹¹³ 31 January 2019 DAAR Report, Executive Summary.

¹¹⁴ *Id.*, at Pg. 5.

¹¹⁵ *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*

¹¹⁶ *Id.*, at Pg. 6.

¹¹⁷ Request 19-2, § 6, at Pg. 2; *see also id.* § 10, at Pg. 13.

stated.¹¹⁸ However, the BAMC’s conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.¹¹⁹ Professor Carlton explained that “a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically.”¹²⁰

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that “additional analysis is needed to determine whether” the removal of price caps in the .ORG RA “can result in uncompetitive practices.”¹²¹ This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton’s expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

¹¹⁸ See Ombudsman Action on Request 19-2, at Pg. 2.

¹¹⁹ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

¹²⁰ *Id.*

¹²¹ Request 19-2, § 8, at Pg. 10.

VI. Proposed Determination.

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Because the BAMC did not have a quorum to consider Request 19-2, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC. Accordingly, the issuance of this Proposed Determination triggers Requestor's right to file a rebuttal consistent with Article 4, Section 4.2(q) of the Bylaws.

Petillon

Annex 128

Minutes | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

This page is available in:

English |

العربية (<https://www.icann.org/resources/board-material/minutes-2019-11-03-ar>) |

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中文 (<https://www.icann.org/resources/board-material/minutes-2019-11-03-zh>).

03 Nov 2019

A Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors was held in person on 3 November 2019 in Montreal, Canada at 10:37 local time.

Cherine Chalaby, Chair, promptly called the meeting to order.

In addition to the Chair, the following Directors participated in all or part of the meeting: Becky Burr, Maarten Botterman, Ronda Silva, Sarah Deutsch, Chris Disspain, Avri Doria, Rafael Lito Ibarra, Danko Jevtovic, Akinori Maemura, Göran Marby (President and CEO), León Sánchez, Matthew Shears, Tripti Sinha, and Nigel Roberts.

The following Directors sent their apologies: Khaled Koubaa.

The following Board Liaisons participated in all or part of the meeting: Harald Alverstrand (IETF (Internet Engineering Task Force) Liaison), Manal Ismail (GAC (Governmental Advisory Committee) Liaison), Merike Kão (SSAC (Security and Stability Advisory Committee) Liaison), and Kaveh Ranjbar (RSSAC (Root Server System Advisory Committee) Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).**1. Main Agenda:****a. Consideration of Reconsideration Request 19-2**

Rationale for Resolution 2019.11.03.01

b. Consideration of Reconsideration Request 19-3

Rationale for Resolution 2019.11.03.02

c. Independent Review Process Implementation Oversight Team Recomposition

Rationale for Resolutions 2019.11.03.03 – 2019.11.03.05

d. Ombudsman FY19 At-Risk payment

Rationale for Resolutions 2019.11.03.06 – 2019.11.03.07

1. Main Agenda:

The Chair introduced the Main Agenda and requested that the shepherd for each agenda item to introduce the item.

a. Consideration of Reconsideration Request 19-2

León Sánchez, the Chair of the Board Accountability Mechanisms Committee (BAMC), introduced the agenda item. Becky Burr, Sarah Deutsch, and Nigel Roberts abstained from consideration of the matter indicating potential or perceived conflicts of interest, or out an abundance of caution.

Léon explained that this matter is before the Board for consideration at this stage in the Reconsideration process because the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 (Request 19-2) due to potential or perceived conflicts, or out an abundance of caution. Because of this, the BAMC does not have a quorum to consider Request 19-2, and the Board is considering Request 19-2 in lieu of a

Recommendation by the BAMC.

Liz Le briefed the Board on Request 19-2, which was submitted by Namecheap, Inc. (Requestor), seeking reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) org's renewal of the registry agreements (RAs) with the .ORG and .INFO top-level domains (TLDs) in so far as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO. The Requestor claims that ICANN (Internet Corporation for Assigned Names and Numbers) org's decision to allegedly ignore public comments to keep price caps in legacy gTLDs contradicts with ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and Core Values. The Requestor also claims that ICANN (Internet Corporation for Assigned Names and Numbers) Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO renewed RAs.

Both renewals went out for public comments. ICANN (Internet Corporation for Assigned Names and Numbers) org reviewed and evaluated all of the 3700 comments received. The comments were discussed in the report of public comments as well through briefing with the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

The Board considered the recommendation to deny Request 19-2 because ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG/.INFO renewed RAs did not contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, or procedures, and ICANN (Internet Corporation for Assigned Names and Numbers) Staff did not fail to consider material information in executing the Agreements. Avri Doria mentioned that the Reconsideration Request rests largely on the number of comments received. She

emphasized that the number of comments received should not be determinative; rather, the Board should endeavor to understand the content of the comments and consider the content as part of its deliberations.

León Sánchez moved, and Maarten Botterman seconded the proposed resolution. After the discussion, the Board took the following action:

Whereas, Namecheap Inc. (Requestor) filed a reconsideration request (Request 19-2) challenging ICANN (Internet Corporation for Assigned Names and Numbers) organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (collectively, .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.¹

Whereas, the Requestor claims that ICANN (Internet Corporation for Assigned Names and Numbers) org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN (Internet Corporation for Assigned Names and Numbers)'s Commitments and Core Values, and ICANN (Internet Corporation for Assigned Names and Numbers) should reverse this decision for the public good."² The Requestor also asserts that ICANN (Internet Corporation for Assigned Names and Numbers) Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.³

Whereas, pursuant to Article 4, Section 4.2(I), the Ombudsman accepted Request 19-2 for consideration, and, after investigating,

concluded that "the CEO and Staff acted within the scope of the powers given them by the Board," and that "no rules or duties of corporate governance were violated (including the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws)."⁴

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (See Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.⁵

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore, the Board is considering Request 19-2 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-2 and all relevant materials and concludes that ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, or procedures, and that ICANN (Internet Corporation for Assigned Names and Numbers) Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Resolved (2019.11.03.01), the Board adopts the **Proposed Determination on Reconsideration Request 19-2**

[\(/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf\)](/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf).

Twelve Directors voted in favor of Resolution 2019.11.03.01. Becky Burr, Sarah Deutsch, and Nigel Roberts abstained. Khaled Koubaa was unavailable to vote. The Resolution carried.

Rationale for Resolution 2019.11.03.01

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. See Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.⁶ The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore, the Board has considered and issues the Proposed Determination in lieu of a Recommendation by the BAMC.

The Board has carefully considered the merits of Request 19-2 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG/.INFO Renewed

RAs did not contradict ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, or procedures, and that ICANN (Internet Corporation for Assigned Names and Numbers) Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-2 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-2 in accordance with Article 4, Section 4.2(r) of the Bylaws.

This action is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

b. Consideration of Reconsideration Request 19-3

León Sánchez, the Chair of the Board Accountability Mechanisms Committee (BAMC), introduced the agenda item. Sarah Deutsch abstained from consideration of the matter indicating potential or perceived conflicts of interest, or out an abundance of caution.

León explained that this matter is before the Board for consideration at this stage in the Reconsideration process because the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 (Request 19-3) due to potential or perceived conflicts, or out an abundance of caution. As a result, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board is considering Request 19-3 in lieu of a Recommendation by the BAMC.

Liz Le briefed the Board on Request 19-3, which was submitted by Electronic Frontier Foundation (Requestor), seeking reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) org's renewal of the registry agreement (RA (Registrar)) with the .ORG top-level domain (TLD (Top Level Domain)). The Requestor challenges the renewal insofar as the renewal permits the registry operator at its election to implement additional protections of legal rights of third parties unilaterally, without further consultation with existing .ORG registrants or the ICANN (Internet Corporation for Assigned Names and Numbers) community, and applies the Uniform Rapid Suspension (URS (Uniform Rapid Suspension)) rules to .ORG registrants. The Requestor claims that the inclusion of this rights protection mechanism is contrary to ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws.

The Requestor also seeks reconsideration of the Board inaction on the basis that the Board did not formally vote on the renewal of the .ORG RA (Registrar) itself. The Requestor asks ICANN (Internet Corporation for Assigned Names and Numbers) org and the Board to amend the renewed agreement to eliminate the section that relates to the addition of the URS (Uniform Rapid Suspension) in the RA (Registrar). Liz presented each of the claims in the Reconsideration Request, and explained that the evidence did not support reconsideration.

The Board considered the recommendation to deny Request 19-3 because ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG renewed RA (Registrar) was consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN (Internet Corporation for Assigned Names and Numbers) Staff to execute the .ORG Renewed RA (Registrar) without voting on it prior to execution.

Ron da Silva noted his support for the recommended action, as well as ICANN (Internet Corporation for Assigned Names and Numbers) org's approach to add some of the additional safeguards and improvements from the new gTLD (generic Top Level Domain) registry agreement into the legacy agreements. He commented that the ongoing GNSO (Generic Names Supporting Organization) policy development process concerning rights protection mechanisms would be the right place to address issues raised in the Reconsideration Request about the potential impacts of rights protection mechanisms on free speech.

After discussion, Tripti Sinha moved, and Becky Burr seconded the proposed resolution, and the Board

took the following action:

Whereas, Electronic Frontier Foundation (Requestor) filed a reconsideration request (Request 19-3) challenging ICANN (Internet Corporation for Assigned Names and Numbers) organization's renewal of the Registry Agreement (RA (Registrar)) with Public Interest Registry (PIR) for the .ORG generic top-level domain (gTLD (generic Top Level Domain)) (the .ORG Renewed RA (Registrar)), insofar as the renewal permits PIR to, "at its election, implement additional protections of the legal rights of third parties,' unilaterally and without further consultation with existing .ORG registrants or the ICANN (Internet Corporation for Assigned Names and Numbers) community" and applies the Uniform Rapid Suspension (URS (Uniform Rapid Suspension)) rules to .ORG registrants (collectively, the URS (Uniform Rapid Suspension) Rights Protection Mechanisms or URS (Uniform Rapid Suspension) RPMs).⁷ The Requestor also seeks reconsideration of an alleged Board inaction, insofar as the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors did not vote on the .ORG Renewed RA (Registrar).

Whereas, the Requestor claims that ICANN (Internet Corporation for Assigned Names and Numbers) org's inclusion of the RPMs in the .ORG Renewed RA (Registrar) "run[s] contrary to ICANN (Internet Corporation for Assigned Names and Numbers)'s bylaws."⁸ The Requestor also claims that the Board's inaction (i.e., that the Board did not vote on the .ORG Renewed RA (Registrar)) was based on the Board's consideration of inaccurate relevant information and the Board's failure to consider material information.⁹

Whereas, pursuant to Article 4, Section 4.2(I), the Ombudsman accepted Request 19-3 for consideration, and, after investigating, concluded that the selection of terms to include in RAs is "ICANN (Internet Corporation for Assigned Names and Numbers) org's choice to make as directed by the Board—and as such, the actions of the Staff, acting with the authority vested in the CEO by the Bylaws and the Board, do not merit any kind of recommendation from me to the BAMC or the Board under [Request] 19-3."¹⁰ The Ombudsman further concluded that "[i]n action or inaction, the Board did nothing improper in deciding to stay the course, so far as I can see. It heard the Community, it read the public comments (at the very least the comprehensive Staff Report summary), and in the end, it decided that the renewal terms for the Legacy gTLDs (including .org) were acceptable."¹¹

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (See Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹²

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board is considering Request 19-3 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-3 and all relevant

materials and concludes that reconsideration is not warranted because ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG Renewed RA (Registrar) was consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN (Internet Corporation for Assigned Names and Numbers) Staff to execute the .ORG Renewed RA (Registrar) without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Resolved (2019.11.03.02), the Board adopts the Proposed Determination on Reconsideration Request. 19-3 (</en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>).

Fourteen Directors voted in favor of Resolution 2019.11.03.02. Sarah Deutsch abstained. Khaled Koubaa was unavailable to vote. The Resolution carried.

Rationale for Resolution 2019.11.03.02

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. See Bylaws, Art. 4, §

4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.¹³ The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board has considered and issues the Proposed Determination in lieu of a Recommendation by the BAMC.

The Board has carefully considered the merits of Request 19-3 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that reconsideration is not warranted because ICANN (Internet Corporation for Assigned Names and Numbers) org's execution of the .ORG Renewed RA (Registrar) was consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN (Internet Corporation for Assigned Names and Numbers) Staff to execute the .ORG Renewed RA (Registrar) without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-3 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-3 in accordance with Article 4, Section 4.2(r) of the Bylaws.

This action is within ICANN (Internet

Corporation for Assigned Names and Numbers)'s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

c. **Independent Review Process Implementation Oversight Team Recomposition**

León Sánchez, the Chair of the Board Accountability Mechanisms Committee (BAMC), introduced the agenda item. He explained that the Independent Review Process Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP supplementary rules of procedure for Board consideration and approval, and developing rules for the Cooperative Engagement Process. The IRP-IOT was formed during CCWG-Accountability Work Stream 1 (WS1) as a group envisioned to include seven volunteers of experts in IRPs, arbitration or alternative dispute resolution mechanisms. Over time, the IRP-IOT had difficulties in achieving active

participation or quorum with its current membership at regularly scheduled meetings. The BAMC, in its oversight role of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, has undertaken to repopulate the IRP-IOT with members who have the substantive qualifications and time availability to help the IOT conclude its work in a timely fashion. This process was done in consultation with the Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). León then read the resolved clauses into the record.

Several Directors remarked on the importance of the proposed resolution. Becky Burr highlighted the importance of this work to bring the IANA (Internet Assigned Numbers Authority) stewardship transition to fruition. She also commented that the Board and the BAMC take this work seriously and acknowledge their responsibility for continuing to move it forward. Sarah Deutsch and León agreed, and commented on the need to move this work forward as soon as possible.

The Board discussed a revision to the proposed resolution to address how to handle future changes to the IRP-IOT and who would be responsible for them. Following discussion, Chris Disspain moved, and Lito Ibarra seconded the proposed resolution. The Board took the following action:

Whereas, the Independent Review Process (IRP) is an accountability mechanism established by the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws that allows for third party review of ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff actions (or inactions) alleged by an affected party to be inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation or Bylaws.

Whereas, the Bylaws specify that IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP supplementary rules of procedure for Board consideration and approval, and developing rules for the Cooperative Engagement Process.

Whereas, the Bylaws further specify that an IRP-IOT shall be "established in consultation with the Supporting Organizations (Supporting Organizations) [SOs] and Advisory Committees (Advisory Committees) [ACs]" and that the IRP-IOT shall be "comprised of members of the global Internet community." (See Bylaws, Art. 4, § 4.3(n).)

Whereas, the IRP-IOT was formed during CCWG-Accountability Work Stream 1 (WS1) as a group envisioned to include seven volunteers of experts in IRPs, arbitration or alternative dispute resolution mechanisms.

Whereas, the IRP-IOT had difficulties in achieving active participation or quorum with its current membership at regularly scheduled meetings.

Whereas, the Board Accountability Mechanisms Committee (BAMC), in its oversight role of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, has undertaken to repopulate the IRP-IOT with members who have the substantive qualifications and time availability to help the IOT conclude its work in a timely fashion.

Whereas, at the request of the BAMC, ICANN (Internet Corporation for Assigned Names and Numbers) organization issued a Call for Expressions of Interest and conducted

community outreach seeking new volunteers to join the IRP-IOT.

Whereas, the BAMC specified that volunteers should have the necessary legal or judicial skills and experience in IRPs, arbitrations, or other alternate dispute resolution mechanisms, specific familiarity with ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, and sufficient availability to contribute to the work online.

Whereas, the BAMC has confirmed with the current members of the IRP-IOT who have actively participated in the IRP-IOT since January 2018 that they would like to continue serving on the IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online.

Resolved (2019.11.03.03), the Board delegates to the BAMC the authority in this instance to select the members according to the documentation submitted to the Board, and the Board directs the BAMC to provide a proposal to the Board for the future process of finalizing changes to the composition of the IRP-IOT, if needed.

Resolved (2019.11.03.04), the Board acknowledges the work of the BAMC in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

Resolved (2019.11.03.05), the Board thanks the SOs and ACs for their work in consulting with

the BAMC on the recomposition of the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further thanks all candidates who submitted expressions of interest to join the IRP-IOT. The Board further thanks all members of the IRP-IOT for their efforts to date.

All members of the Board present voted in favor of Resolutions 2019.11.03.03 – 2019.11.03.05. Khaled Koubaa was unavailable to vote. The Resolutions carried.

Rationale for Resolutions 2019.11.03.03 – 2019.11.03.05

The Independent Review Process (IRP) is an accountability mechanism provided by the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws that allows for third party review of ICANN (Internet Corporation for Assigned Names and Numbers) Board or staff actions (or inactions) alleged by an affected party to be inconsistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation or Bylaws. Per the Bylaws, an IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP Supplementary Procedures for Board approval, and developing rules for the Cooperative Engagement Process (CEP). The Board is taking this action today because it is committed to ensuring that the work of the IRP-IOT is completed in a timely and efficient manner to bring the IRP in line with the updated Bylaws.

The IRP-IOT's scope of work involves drafting the Updated Supplementary Procedures for Board consideration and approval, developing

rules for the CEP, making recommendations of trainings for the IRP standing panel, and developing the rules governing appeals from IRP panel decisions.¹⁴ The current IRP-IOT was formed in late 2015 within CCWG-ACCT WS1 as a group envisioned to include seven volunteers of experts in the IRPs, arbitration or alternative dispute resolution mechanisms, as well as participants from ICANN (Internet Corporation for Assigned Names and Numbers)'s legal department.¹⁵ Over the past several years, the IRP-IOT has experienced difficulties in achieving active participation and quorum from the current membership at regularly scheduled meetings.

The participation level of the IRP-IOT needs to improve dramatically in order to complete the remaining work in the estimated time frame. The Board Accountability Mechanisms Committee (BAMC), as the Board Committee with oversight responsibility of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms, identified that as part of re-composing the IRP-IOT and supporting the important role that the IRP has within ICANN (Internet Corporation for Assigned Names and Numbers)'s overall accountability, it is important to focus on bringing the correct mix of skills to the group to complete the work. The BAMC identified those as specific legal or judicial skills and experience in disputes such as IRPs, arbitrations, or other alternate dispute resolution mechanisms, as well as specific familiarity with ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms. In terms of time commitment, the BAMC asked for volunteers who have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as

sufficient availability to contribute to the work online.

Pursuant to the Bylaws requirement that an IRP-IOT be "established in consultation with the Supporting Organizations (Supporting Organizations) [SOs] and Advisory Committees (Advisory Committees) [ACs]", the process to recompose the IRP-IOT was done in consultation with the SOs and ACs. The BAMC and ICANN (Internet Corporation for Assigned Names and Numbers) org conducted several community outreach efforts, including an issuance of a Call for Expressions of Interest through the Community Leadership Digest in April 2019 and a letter from the BAMC Chair to the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) leadership in which the BAMC Chair asked for the help of the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) leadership in the recomposition process. ([See Letter from León Sanchez to SO \(Supporting Organization\)/AC \(Advisory Committee; or Administrative Contact \(of a domain registration\)\) leadership dated 26 June 2019 \(/en/system/files/correspondence/sanchez-to-siddiqui-et-al-26jun19-en.pdf\)](#)). The BAMC encouraged the SO (Supporting Organization)/ACs, if interested, to use their own selection processes to provide inputs to the BAMC on candidates. If invited, representatives of ICANN (Internet Corporation for Assigned Names and Numbers) org were available for discussion on the issue.

Following community outreach and a Call for Expressions of Interest, the BAMC then considered whether each of the volunteers that

responded to the call for expressions of interest satisfied the substantive qualifications and time requirements sufficient to serve on the IRP-IOT. Some of the volunteers were presented to the BAMC with endorsement from the Generic Names Supporting Organization (Supporting Organization) Council.

With respect to those IRP-IOT members that have actively participated in the IRP-IOT since January 2018, the BAMC, through ICANN (Internet Corporation for Assigned Names and Numbers) org, sought confirmation from each as to whether they wished to continue serving on the IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online. The full composition from the BAMC also continues the participation from ICANN (Internet Corporation for Assigned Names and Numbers) org's legal department, which brings a practical and important view of how the proposals out of the IRP align in practice as well as potential implications on the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws and resourcing issues. As the ICANN (Internet Corporation for Assigned Names and Numbers) Board has responsibility to make sure that the IRP, envisioned as the "constitutional court" of ICANN (Internet Corporation for Assigned Names and Numbers), operates properly under the Bylaws, the BAMC also recommends that two ICANN (Internet Corporation for Assigned Names and Numbers) Board members are formally identified as members of the IRP-IOT and actively participate in this work. The Board notes that other members of the reconstituted IRP-IOT have been, or anticipate to be, involved as claimants against ICANN (Internet

Corporation for Assigned Names and Numbers) in IRPs, and the Board notes that their experience is also extremely valuable when finalizing the procedures and other aspects of an IRP that is fit for purpose. The Board further notes that the BAMC may add new members to the IRP-IOT as appropriate should the need to do so arise, and provided that the new members meet the substantive and time requirements for IRP-IOT membership. The Board affirms the BAMC's work in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

The BAMC has also recommended that the recomposed IRP-IOT include a leadership refresh as part of reinvigorating and renewing the cadence of the work of the IRP-IOT. The Board agrees with BAMC's recommendation and thanks the IRP-IOT leadership for the work to date.

The Board thanks the SOs and ACs for their work in identifying additional members the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further thanks all candidates who submitted expressions of interest to join the IRP-IOT. The Board further thanks all members of the IRP-IOT for their efforts to date.

This action is within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest as part of implementing and achieving the enhanced outcomes of the IRP in accordance with the recommendations of the community.

This action is also within ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest

as it is important to ensure that, in carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request third-party review of that action or inaction by the Board.

Adopting the BAMC's Recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. **Ombudsman FY19 At-Risk payment**

The Chair introduced the agenda item, which was initially intended for a closed Board session. John Jeffrey, the General Counsel and Secretary, explained the process of going from a closed to open Board session, wherein certain portions of the resolution will remain confidential as an "action relating to personnel or employment matters", pursuant to Article 3, section 3.5b of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. The Chair read the resolved clauses into the record.

Following discussion, Ron da Silva moved, and Avri Doria seconded the proposed resolutions. The Board took the following action:

Whereas, the Compensation Committee recommended that the Board approve payment

to the Ombudsman of his FY19 at-risk compensation.

Resolved (2019.11.03.06), the Board hereby approves a payment to the Ombudsman of his FY19 at-risk compensation component.

Resolved (2019.11.03.07), a portion of this action by the Board shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article 3, section 3.5b of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

All members of the Board present voted in favor of Resolutions 2019.11.03.06 and 2019.11.03.07. Khaled Koubaa was unavailable to vote. The Resolutions carried.

Rationale for Resolutions 2019.11.03.06 – 2019.11.03.07

Annually the Ombudsman has an opportunity to earn a portion of his compensation based on specific performance goals set by the Board, through the Compensation Committee. This not only provides incentive for the Ombudsman to perform above and beyond his regular duties, but also leads to regular touch points between the Ombudsman and Board members during the year to help ensure that the Ombudsman is achieving his goals and serving the needs of the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Evaluation of the Ombudsman's objectives results from both the Ombudsman self-assessment, as well as review by the Compensation Committee, which lead to a recommendation to the Board with which the

Board agrees.

Evaluating the Ombudsman's annual performance objectives is in furtherance of the goals and mission of ICANN (Internet Corporation for Assigned Names and Numbers) and helps increase the Ombudsman's service to the ICANN (Internet Corporation for Assigned Names and Numbers) community, which is in the public interest.

While there is a fiscal impact from the results of the scoring, that impact was already accounted for in the FY19 budget. This action will have no impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

The Chair then called the meeting to a close.

Published on 27 January 2020

¹ Request 19-2, § 3, at Pg. 2.

² *Id.* at § 3.

³ *Id.*

⁴ <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf> (</en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>).

⁵ See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en> (</resources/pages/charter-bamc-2017-11-02-en>).

⁶ See *id.*

⁷ Request 19-3, § 3, at Pg. 2.

⁸ *Id.*, § 8, at Pg. 5.

⁹ *Id.*, § 8, at Pgs. 8-9.

¹⁰ Evaluation by the ICANN (Internet Corporation for Assigned Names and Numbers) Ombudsman of Request for Reconsideration 19-3, at Pg. 3, 7 September 2019, <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf> ([/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf)).

¹¹ *Id.*, at Pg. 6.

¹² See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en> ([/resources/pages/charter-bamc-2017-11-02-en](https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en)).

¹³ See *id.*

¹⁴ See Bylaws, Art. 4, § 4.3(j)(i) and 4.3(j)(iii) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4> ([/resources/pages/governance/bylaws-en/#article4](https://www.icann.org/resources/pages/governance/bylaws-en/#article4))).

¹⁵ See <https://community.icann.org/display/IRPIOTI> (<https://community.icann.org/display/IRPIOTI>).

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Annex 129

Approved Board Resolutions | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

This page is available in:

English | العربية (<https://www.icann.org/resources/board-material/resolutions-2020-04-30-ar>) | Español (<https://www.icann.org/resources/board-material/resolutions-2020-04-30-es>) | Français (<https://www.icann.org/resources/board-material/resolutions-2020-04-30-fr>) | Русский (<https://www.icann.org/resources/board-material/resolutions-2020-04-30-ru>) | 中文 (<https://www.icann.org/resources/board-material/resolutions-2020-04-30-zh>)

30 Apr 2020

1. Main Agenda:

a. Public Interest Registry (PIR) Change of Control

[Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02](#)

1. Main Agenda:

After one Board member recused themselves from participation in voting out of an abundance of caution and in compliance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Conflicts of Interest Policy, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took the following action:

a. Public Interest Registry (PIR) Change of Control

Whereas, Public Interest Registry (PIR) is currently a non-profit organization incorporated in the State of Pennsylvania, and serves as the registry operator for seven top-level domains: [.ORG \(/resources/agreement/org-2019-06-30-en\)](#); [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6b1a6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). PIR has a registry agreement with ICANN (Internet Corporation for Assigned Names and Numbers) for each of these seven TLDs (PIR's Registry Agreements).

Whereas, on 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that the Internet Society (ISOC (Internet Society)), PIR's parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital or its affiliated entities (collectively, Ethos Capital) will ultimately acquire PIR and all of its assets from ISOC (Internet Society). On **14 November 2019** ([/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf](#)), PIR formally notified ICANN (Internet Corporation for Assigned Names and Numbers) of a change of control in advance of closing the proposed transaction.

Whereas, Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR have mutually agreed to five extensions of time within which ICANN (Internet Corporation for Assigned Names and Numbers) must respond to the PIR change of control notification. ICANN (Internet Corporation for Assigned Names and Numbers) is obligated to provide PIR a response by 4 May 2020.

Whereas, following ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of formal notice of PIR's Change of Control Request, at the direction of the ICANN (Internet

Corporation for Assigned Names and Numbers) Board, ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted extensive due diligence on the proposed transaction in order to understand whether it would be reasonable under PIR's Registry Agreements for ICANN (Internet Corporation for Assigned Names and Numbers) to either approve or withhold consent to the proposed change of control. ICANN (Internet Corporation for Assigned Names and Numbers) org has on three occasions requested additional information from PIR (on 9 December 2019, 19 February 2020, and 3 April 2020) and in each instance PIR provided written responses to ICANN (Internet Corporation for Assigned Names and Numbers) org. Each of ICANN (Internet Corporation for Assigned Names and Numbers) org's requests is publicly available. PIR's responses have also been made publicly available to the extent that PIR has consented to such public disclosure. The ICANN (Internet Corporation for Assigned Names and Numbers) Board has access to all non-public information provided by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) org.

Whereas, in response to ICANN (Internet Corporation for Assigned Names and Numbers) org's final set of questions, PIR provided ICANN (Internet Corporation for Assigned Names and Numbers) with an updated draft of proposed Public Interest Commitments (PICs) for the .ORG Registry to try to address some of the key commitments being made to the .ORG community and other interested parties. This updated draft PIC was made available on icann.org for public consideration. After consideration of additional input on the PICs, PIR identified that it would be willing to make further modifications in order to support ICANN (Internet Corporation for Assigned Names and Numbers)'s enforcement powers and clarify the role of the proposed "Stewardship Council".

Whereas, in January 2020, the Office of the Attorney General of the State of California (CA-AGO) requested information from ICANN (Internet Corporation for Assigned Names and Numbers) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital in order to "analyze the impact to the nonprofit community including ICANN (Internet Corporation for Assigned Names and Numbers)." ICANN (Internet Corporation for Assigned Names and Numbers) is a California not-for-profit public benefit corporation, and the CA-AGO is responsible for supervising not-for-profit organizations in California.

Whereas, on 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO "urg[ing] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the transfer of control over the .ORG Registry" and advising ICANN (Internet Corporation for Assigned Names and Numbers) that "ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval." The CA-AGO cited numerous factors, including the size of the .ORG registry, the unique nature of the .ORG registry, the CA-AGO's conclusion that many questions remain unanswered by PIR, and the unknown nature of Ethos Capital, its range of proposed subsidiaries and its investors, a lack of transparency regarding Ethos Capital's future plans, and the financial impact of a US\$360 million loan necessary to complete the transaction. The CA-AGO also questioned the financial viability and potential for failure of the .ORG registry in the future. The CA-AGO provided his reasoning for how these factors supported its assessment and how the CA-AGO considered this in light of its understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws. The CA-AGO declared California's public interest in the .ORG registry running as a home for noncommercial entities, and that this public interest would be better served by withholding approval of the change of control. The CA-AGO declared that he would take "whatever action necessary to protect . . . the nonprofit community."

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has been active in its oversight of ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request. The Board has: received regular updates on ICANN (Internet Corporation for Assigned Names and Numbers) org's review of the request as well as the status of the CA-AGO's investigation of ICANN (Internet Corporation for Assigned Names and Numbers); overseen ICANN (Internet Corporation for Assigned Names and Numbers) org in its continued engagement with PIR to obtain additional information; had all of PIR's responses (non-public and public) made available for review; received a petition from protesters outside of ICANN (Internet Corporation for Assigned Names and Numbers)'s Los Angeles offices during the Board's January 2020 Board workshop; engaged with the ISOC (Internet Society) Board of Directors for information

from ISOC (Internet Society)'s perspective; convened a public forum in March 2020 during ICANN67 to hear the ICANN (Internet Corporation for Assigned Names and Numbers) community's concerns; and considered the PICs that PIR proposes for inclusion in the .ORG Registry Agreement and requested ICANN (Internet Corporation for Assigned Names and Numbers) org to make a public notice over the same. The Board has received approximately 30 briefings from ICANN (Internet Corporation for Assigned Names and Numbers) org on this issue, representing over 30 hours of scheduled meetings. Each Board member also devoted substantial time to prepare for these briefings. The collective Board hours devoted in preparation for this decision count at least a thousand hours.

Resolved (2020.04.30.01), the ICANN (Internet Corporation for Assigned Names and Numbers) Board directs ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO to withhold ICANN (Internet Corporation for Assigned Names and Numbers)'s consent to PIR's Change of Control Request pursuant to Section 7.5 of PIR's Registry Agreements, thereby rejecting PIR's request. The Board finds the withholding of consent is reasonable in light of the balancing of all of the circumstances addressed or discussed by the Board.

Resolved (2020.04.30.02), the above decision is without prejudice to PIR to submit a new notice of indirect change of control and entity conversion for consideration if PIR successfully achieves an entity conversion approval in Pennsylvania through the Pennsylvania Court, which the ICANN (Internet Corporation for Assigned Names and Numbers) Board and org will consider when evaluating any new notice.

Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02

The Board's action in withholding consent for the change of control of Public Interest Registry (PIR) pursuant to the terms of PIR's Registry Agreements is both reasonable and in the public interest. The Board was presented with a unique and complex situation – a request to approve a fundamental change of control over one of the longest-standing and largest registries, that also includes a change in corporate form from a viable not-for-profit entity to a for-profit entity with a US\$360 million debt obligation, and with new and untested community engagement mechanisms relying largely upon ICANN (Internet Corporation for Assigned Names and Numbers) contractual compliance enforcement to hold the new entity accountable to the .ORG community. ICANN (Internet Corporation for Assigned Names and Numbers) is being asked to agree to contract with a wholly different form of entity; instead of contracting with the mission-based not-for-profit that has responsibly operated the .ORG registry for nearly 20 years, with the protections for its own community embedded in its mission and status as a not-for-profit entity. If ICANN (Internet Corporation for Assigned Names and Numbers) were to consent, ICANN (Internet Corporation for Assigned Names and Numbers) would have to trust that the new proposed for-profit entity that no longer has the embedded protections that come from not-for-profit status, which has fiduciary obligations to its new investors and is obligated to service and repay US\$360 million in debt, would serve the same benefits to the .ORG community.

While PIR's current parent entity, the Internet Society (ISOC (Internet Society)), would obtain a US\$1 billion endowment to secure its future through the proposed transaction, that is not within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration. The valuation of PIR is notable; in 2002, ISOC (Internet Society) was awarded the ability to operate the .ORG registry through a purpose-built non-profit developed to support the unique nature of the .ORG community. PIR's responsible operation of the .ORG registry since that time created this US\$1 billion value – value that ISOC (Internet Society) is looking to realize through engaging in a transaction that will result in the conversion of PIR into a profit-making entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board has considered the reasonableness of consent to the change of control as it relates to the new form of entity ICANN (Internet Corporation for Assigned Names and Numbers) is asked to contract with for the registry agreements themselves, including in light of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission to support and enhance the security, stability and resiliency of the Internet's unique identifiers. The ICANN (Internet Corporation for Assigned Names and Numbers) Board understands that while technically ICANN (Internet Corporation for Assigned Names and Numbers) will still hold a contract with PIR, the changes in the form of that entity are of meaningful significance to the Board's consideration of the Change of Control Request. On the whole, the ICANN (Internet Corporation for Assigned Names and Numbers) Board determines that the public interest is

better served in withholding consent as a result of various factors that create unacceptable uncertainty over the future of the third largest gTLD (generic Top Level Domain) registry.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action should not be read to provide any commentary on the propriety of for-profit entities operating gTLD (generic Top Level Domain) registries, nor as any prohibition or judgment on the role of private equity firms controlling registry operators. The considerations in front of the Board here are specific to this transaction, particularly in light of the long-standing history of the .ORG registry.

Background

Created in 1985, .ORG is one of the original TLDs in the Domain Name (Domain Name) System (DNS (Domain Name System)). In 2002, through a [competitive bidding process conducted by ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/news/announcement-2002-10-14-en\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) selected a proposal submitted by ISOC (Internet Society) to establish a wholly owned subsidiary, PIR, to serve as the .ORG registry operator, which PIR has been since 2003. ISOC (Internet Society) is the sole member of PIR. Prior to 2003, .ORG was operated by VeriSign, Inc (previously Network Solutions, Inc.), the registry operator of the .COM and .NET gTLDs. PIR is the registry operator for seven gTLDs in total. In addition to .ORG, it operates [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6b1a6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). Since its establishment, PIR has operated as a non-profit organization, incorporated in the State of Pennsylvania.

In winning the bid to operate .ORG, ISOC (Internet Society) purpose-built the not-for-profit entity, PIR, to serve the needs of the .ORG registry and the noncommercial community. PIR represents its mission as "for the benefit of [its] end user consumers and the Internet as a whole". Under U.S. tax regulations, PIR was established as a "Supporting Organization (Supporting Organization)" to ISOC (Internet Society), which has obligated PIR to act in support of ISOC (Internet Society) as well as ISOC (Internet Society)'s mission. PIR contributes a portion of its revenue every year to ISOC (Internet Society); for 2018, the most recent year reported, PIR provided over US\$48 million to ISOC (Internet Society) while also serving PIR's mission through "improv[ing] the stability and security of the .ORG registry and deliver[ing] a robust Education and Outreach program that enlightens non-profits and NGOs". PIR holds itself out as "entrusted by millions to operate in the public interest" and "refus[ing] to compromise [its] ethical standards for the sake of expediency, popularity or profitability." This is the entity that has responsibly served as the registry operator and steward for the .ORG (and other) registries since 2002. PIR's Registry Agreements are between ICANN (Internet Corporation for Assigned Names and Numbers) and PIR. PIR's most recent U.S. tax filing for 2018 report nearly US\$95 million in revenue, with nearly US\$50 million of that revenue distributed as grants in service of PIR's mission.

Timeline of events

On 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that ISOC (Internet Society), its parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital will acquire PIR and all of its assets from ISOC (Internet Society). The proposed transaction would result in PIR converting from a Pennsylvania non-profit corporation to a for-profit Pennsylvania limited liability company and Ethos Capital acquiring 100% ownership of PIR from the Internet Society (ISOC (Internet Society)). Ethos Capital envisions a "new" PIR, which would convert from its historical not-for-profit status to a for-profit entity controlled by a private capital firm. Through the proposed transaction, ISOC (Internet Society) – with which ICANN (Internet Corporation for Assigned Names and Numbers) does not have a contract for any of the registries that PIR operates – would receive US\$1 billion as an endowment for its future. Upon completion of the transaction, PIR would no longer have the obligation to provide support to ISOC (Internet Society) or serve any other charitable purpose, but instead would be subject to a US\$360 million debt obligation to service in support of the Ethos/PIR transaction. PIR

would convert into a new for-profit entity (if authorized by the relevant regulatory authorities) that would be responsible for contracting with ICANN (Internet Corporation for Assigned Names and Numbers) for the operation of the PIR registries. The current iteration of the not-for-profit PIR would no longer exist.

On **14 November 2019** ([/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf](#)), PIR formally submitted to ICANN (Internet Corporation for Assigned Names and Numbers) a "Notice of Indirect Change of Control and Entity Conversion" (Change of Control Request) in advance of closing the proposed transaction between Ethos Capital and ISOC (Internet Society). After review of the information provided by PIR in the 14 November submission, ICANN (Internet Corporation for Assigned Names and Numbers) requested additional information from PIR on 9 December 2019. Additionally, on **9 December 2019** ([/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf](#)), John Jeffrey, ICANN (Internet Corporation for Assigned Names and Numbers) org's General Counsel and Secretary, sent a letter to the CEOs of both PIR and ISOC (Internet Society), requesting both organizations to commit to completing the process in an open and transparent manner, including agreeing to the publication of questions from ICANN (Internet Corporation for Assigned Names and Numbers) org and the responses from PIR. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers) org's request for additional information on 20 December 2019, and later agreed to **publication of PIR's responsive materials, documents** ([/news/announcement-2020-01-11-en](#)) subject to limited redaction by PIR.

As the initial deadline for ICANN (Internet Corporation for Assigned Names and Numbers) org to respond to PIR by either providing or withholding consent to the proposed change of control was 19 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR agreed on **17 January 2020** ([/en/system/files/correspondence/namazi-to-nevett-17jan20-en.pdf](#)) to extend the deadline by 30 days to 17 February 2020. On **14 February 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-14feb20-en.pdf](#)), the deadline was extended again by mutual agreement to 29 February 2020. On **19 February 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf](#)), ICANN (Internet Corporation for Assigned Names and Numbers) org requested additional information from PIR as part of its diligence process, and on **21 February 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-21feb20-en.pdf](#)) agreed with PIR to an extension to 20 March 2020. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers)'s information request on **4 March 2020** ([/en/system/files/correspondence/cimbolic-to-jeffrey-04mar20-en.pdf](#)). On **17 March 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-17mar20-en.pdf](#)), the two organizations agreed to an extension to 20 April 2020, and on 16 April 2020, a final extension was agreed upon, giving ICANN (Internet Corporation for Assigned Names and Numbers) until 4 May 2020 to respond to PIR's request. On 3 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) provided PIR with two sets of questions for additional information. One set of questions are in follow-up to previous ICANN (Internet Corporation for Assigned Names and Numbers) inquiries designed to further understand the proposed transaction and its potential effect on PIR and the .ORG top-level domain (TLD (Top Level Domain)). The second set of questions relate specifically to the PICs proposed by PIR to be included in the .ORG registry agreement. Following receipt of the questions, **PIR submitted an updated proposal for its PICs** ([/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf](#)) on **7 April 2020** ([/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf](#)). On **8 April 2020** ([/news/blog/pir-transaction-and-proposed-public-interest-commitments-update](#)), ICANN (Internet Corporation for Assigned Names and Numbers) posted a public notice that PIR provided an updated proposal. On 12 April 2020, PIR submitted to ICANN (Internet Corporation for Assigned Names and Numbers) responses to the other questions posed on 3 April 2020. While PIR identified many portions of those responses as confidential, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) org could not post those portions on its website, the ICANN (Internet Corporation for Assigned Names and Numbers) Board was provided with access to all materials submitted by PIR.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Evaluation Process

Due to the circumstances of the proposed PIR change of control, including its planned conversion to a for-profit entity, ICANN (Internet Corporation for Assigned Names and Numbers) org requested extensive additional information from PIR, including regarding details of the transaction structure, financing and other funding sources, the parties involved,

the role of the Pennsylvania authorities, information related to financial resources and operational and technical capability, how the "new" PIR would be responsive to the needs of the non-commercial community, what input the .ORG community had provided to PIR on the proposed transaction and how that community input would be reflected in the operations of the "new" PIR. This evaluation of the proposed transaction, which includes the diligence imposed by the ICANN (Internet Corporation for Assigned Names and Numbers)-adopted specification or policy on registry operator criteria in effect, incorporated review of financial resources, operational and technical capabilities, the transaction structure, background screening and other components. This diligence process is part of ICANN (Internet Corporation for Assigned Names and Numbers) org's responsibility in evaluating this proposed Change of Control Request, and the Board has remained apprised of ICANN (Internet Corporation for Assigned Names and Numbers) org's review throughout the process.

ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request was more comprehensive than the evaluation that ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted over other change of control requests. This was necessary under the circumstances and due to the extremely unique nature of the proposed change. This Change of Control Request for PIR's Registry Agreements includes the largest registry to date to be subject to the change of control process, and we understand the proposed transaction is the most complex that has been submitted for review. Hundreds of pages of supporting documentation have been produced by PIR in multiple responses, detailing multiple levels of new entities intended for creation to support the future PIR LLC in operating under PIR's Registry Agreements. Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction. PIR's Registry Agreements also permit ICANN (Internet Corporation for Assigned Names and Numbers) to evaluate the proposed change of control transaction under the totality of the circumstances, including the public interest and the interests of the .ORG community

The Board has deliberated and discussed this issue with ICANN (Internet Corporation for Assigned Names and Numbers) org on approximately 30 separate occasions, receiving current updates and providing ICANN (Internet Corporation for Assigned Names and Numbers) org with direction concerning next steps. ICANN (Internet Corporation for Assigned Names and Numbers) org has devoted countless hours in consideration of all aspects of PIR's request, and the collective hours from Board members devoted to consideration of this issue total in the thousands. This intensive review is required under the circumstances, as ICANN (Internet Corporation for Assigned Names and Numbers) is bound to, and it is in the public interest for ICANN (Internet Corporation for Assigned Names and Numbers) to uphold, the principles that ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder community agreed to include within ICANN (Internet Corporation for Assigned Names and Numbers)'s contracts. ICANN (Internet Corporation for Assigned Names and Numbers) is responsible for conducting a thorough review and evaluation to ensure that a change of control review is more than just an exercise of checking boxes. The ICANN (Internet Corporation for Assigned Names and Numbers) Board and org, in the extensive evaluation of the proposed transaction, returned multiple times to PIR for more information, as well as to ISOC (Internet Society), to understand the impact of the proposed transaction

In reviewing the financial stability of PIR following the consummation of the proposed transaction, the ICANN (Internet Corporation for Assigned Names and Numbers) Board noted that, following the transaction, PIR would have a significant amount of debt, and be obligated to service and ultimately repay a loan in the amount of US\$360 million. The Board noted that the incurrence of this debt was not for the benefit of PIR or the .ORG community, but for the financial interests of ISOC (Internet Society), Ethos Capital and the other investors in the transaction. While PIR has provided financial projections to ICANN (Internet Corporation for Assigned Names and Numbers) org that show the capacity of PIR to generate sufficient cash flow to service the loan and repay the debt at maturity, financial projections are by their nature speculative and generally unreliable, and do not account for unforeseen circumstances. As

such, if PIR's financial projections are materially inaccurate, PIR could potentially fail to generate the cash flow needed to repay the debt at maturity, and there can be no certainty that PIR or Ethos Capital will be able to refinance the debt at maturity if necessary. Accordingly, the ICANN (Internet Corporation for Assigned Names and Numbers) Board believes that burdening PIR with significant debt obligations could create uncertainty as to the long-term financial stability of PIR, particularly in light of the current and likely ongoing economic uncertainty.

Much of the public discourse around the proposed transaction also focused on the question of how the .ORG registrants would be protected and served. Both the ICANN (Internet Corporation for Assigned Names and Numbers) and the PIR/.ORG communities have been very vocal about the proposed transaction. Almost immediately after the transaction was announced by ISOC (Internet Society)/PIR/Ethos Capital, the ICANN (Internet Corporation for Assigned Names and Numbers) org and Board started receiving correspondence related to the matter, with the first letter of concern coming from the Internet Commerce Association on 15 November 2019, just two days after the announcement. In total, ICANN (Internet Corporation for Assigned Names and Numbers) has received over 30 letters regarding this proposed transaction. A full inventory of the correspondence with relevant links to those publicly available on [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s correspondence page \(/resources/pages/correspondence\)](#), is available in [Appendix A to this Rationale \(/en/system/files/files/resolutions-appx-a-org-correspondence-30apr20-en.pdf\)](#). At ICANN67, the ICANN (Internet Corporation for Assigned Names and Numbers) Board dedicated an entire live streamed [public forum \(https://67.schedule.icann.org/meetings/1152519\)](#) to hear from the ICANN (Internet Corporation for Assigned Names and Numbers) community about the proposed PIR transaction, and published both a [transcript of the event \(https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929\)](#), and [answers \(https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880\)](#) to questions that were not addressed in real time during the forum. Many of these communications focus specifically on the fact that, since 2002, PIR has been responsible for operating .ORG in a manner that serves the needs of the .ORG community, and that the information the public could access regarding the impact of the proposed transaction did not support the .ORG community in the same way. Many commenters discussed their concerns with the conversion of PIR to a for-profit entity, as for-profit entities held by private venture firms are understood to have a profit motive. In addition, commenters discussed their concerns with the removal of the protections embedded into PIR's not-for-profit mission of responsiveness to and engagement with its community, and discussed how that could impact the very policies able to be instituted at the registry level. The Board understands these concerns; the .ORG community has relied on PIR's commitments for nearly 20 years, and the proposed transaction fundamentally changes the PIR/.ORG community relationship. The Board must take that history into account, as well as the lack of meaningful engagement with that community in the design of the proposed transaction, as part of the reasonableness of withholding consent to PIR's request.

Part of how ICANN (Internet Corporation for Assigned Names and Numbers) tried to address these community – and ICANN (Internet Corporation for Assigned Names and Numbers)'s – concerns was by continuously urging PIR, ISOC (Internet Society), and Ethos Capital to provide full transparency regarding the proposed transaction. Similarly, ICANN (Internet Corporation for Assigned Names and Numbers) has attempted to provide the maximum amount of transparency possible throughout this process. This has included publishing the requests for information and the answers (subject to requested redaction by PIR for confidentiality reasons) to ICANN (Internet Corporation for Assigned Names and Numbers) org's questions. Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) org has published several blogs and announcements from ICANN (Internet Corporation for Assigned Names and Numbers) to the ICANN (Internet Corporation for Assigned Names and Numbers) community designed to provide updates on the process.

Beginning in December 2019, PIR, ISOC (Internet Society) and Ethos Capital began engaging with the .ORG community. They utilized webinars, blog posts, and press releases among other things in an attempt to listen and assuage concerns from their community related to this proposed transaction. According to PIR and Ethos Capital, "we consistently heard three primary concerns expressed for the transaction: (1) pricing; (2) commitment to free expression; and (3) use of registrant and user data." On 21 February 2020, PIR and Ethos Capital proposed to the .ORG community to voluntarily adopt a legally binding

amendment to the .ORG registry agreement in the form of a **Public Interest Commitment** ("PIC").

(<https://static1.squarespace.com/static/5dd7f6113c431419c139b89d/t/5e4fd13faf4f647b886ca187/1582289215311/20200220+PIC.pdf>) following the closing of the proposed sale of PIR to address concerns voiced by some in the .ORG Community. From 3 March through 13 March 2020, PIR conducted what it called a "Public Engagement Period" where PIR and Ethos Capital collected written feedback about their proposed PIC, and addressed the feedback in a summary on their **website** (<https://www.keypointabout.org/public-engagement>) dedicated to the proposed transaction. PIR submitted a proposed PIC to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration on 16 March 2020. On 7 April 2020, PIR submitted an **updated PIC** ([/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf](https://www.icann.org/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf)) to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration, with **changes addressing certain of the questions ICANN (Internet Corporation for Assigned Names and Numbers) posed** ([/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf](https://www.icann.org/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf)) regarding the 16 March proposal.

The 7 April version of the PIC outlines five primary commitments for PIR:

1. A commitment to restrict price increases based on a specified formula until June 2027 (2 years prior to the end of the term of the current Registry Agreement). This includes a table clearly listing the maximum allowable wholesale price of a .ORG domain name for each of the 8 years.
2. The creation of a Stewardship Council to provide independent advice to the registry operator regarding modifications proposed by PIR to certain registry policies regarding: (x) censorship and freedom of expression; and (y) use of .ORG registrant and user data (the "Designated Policies"). The Stewardship Council would have the binding right to veto any modification to the Designated Policies.
3. To establish a "Community Enablement Fund" (without a specific fund amount) to provide support for initiatives benefiting .ORG registrants.
4. To produce and publish an Annual Report that self-assesses compliance with the PIC. The Annual Report will also include a transparency report disclosing the number of .ORG domain name registrations that were suspended or terminated by Registry Operator during the preceding year under Registry Operator's Anti-Abuse Policy or pursuant to court order.
5. A commitment to allow any subsequent revisions to the PIC to undergo ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment process as part of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of such proposed revisions.

Following ICANN (Internet Corporation for Assigned Names and Numbers) org and Board's review of the proposed PIC, ICANN (Internet Corporation for Assigned Names and Numbers) shared feedback with PIR regarding the commitment related to the Stewardship Council and its role. PIR noted its intention to revise the PIC in line with the concerns identified by ICANN (Internet Corporation for Assigned Names and Numbers), and PIR committed that its PIC could be updated to support the Stewardship Council having powers related to enforcement as well as development of relevant policies, and in a way to make ICANN (Internet Corporation for Assigned Names and Numbers) org's enforcement powers capable of objective application. The Board notes that a majority of the comments received during the public notice period continue to raise concerns and questions about the future commitments for how PIR will continue to serve the .ORG community, as well as about the process within ICANN (Internet Corporation for Assigned Names and Numbers) to reach a decision on PIR's request.

Other than the pricing issues, the items addressed in the proposed PIC are similar to those that are currently embedded within PIR's structure. Whereas PIR today has an **Advisory Council** (<https://thenew.org/org-people/about-pir/team/advisory-council/>) embedded into its structure to serve as an intermediary between end users and PIR, and remaining accountable to that group is within PIR and ISOC (Internet Society)'s control, the "new" PIR would look to ICANN (Internet Corporation for Assigned Names and Numbers) to enforce that community relationship through an untested "Stewardship Council" through the PICs governing PIR's relationship with that Stewardship Council, including on matters of PIR's

internal policies. Although the PICs address some of the accountability concerns, the ICANN (Internet Corporation for Assigned Names and Numbers) Board is not satisfied that ICANN (Internet Corporation for Assigned Names and Numbers) org should be the new backstop for holding PIR accountable to its community as contemplated under the PICs. PIR has operated for nearly 20 years with internal mechanisms to support and protect its community. PIR and Ethos clearly recognize that responsiveness to the .ORG community is an important element for the success of this proposed transaction; it is unreasonable to now expect ICANN (Internet Corporation for Assigned Names and Numbers) to accept that burden of enforcement in order to allow PIR and Ethos' preferred corporate structure to move forward. In addition, while intended to include members who are independent of PIR and Ethos Capital, the membership of the Stewardship Council is subject to the approval of PIR's board of directors and, as a result, could become captured by or beholden to the for-profit interests of PIR's owners and therefore are unlikely to be truly independent of Ethos Capital or PIR's board. The Board's concerns here have also been raised by many people or entities who shared their thoughts with ICANN (Internet Corporation for Assigned Names and Numbers) after public notice was provided on the 7 April 2020 revision to PIR's revised PIC.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also remains concerned with the lack of transparency concerning Ethos Capital's exit strategy for the PIR investment or its plans relating to capital disbursements from PIR's operations to Ethos Capital and the other investors. Ethos Capital has maintained that its investment horizon is 10 years and that it has no current plans to distribute excess PIR capital to investors. ICANN (Internet Corporation for Assigned Names and Numbers) cannot be assured that Ethos Capital's investment horizon will not change (as there is no enforceable commitment in this respect) or the minority investors in the transaction will not pressure Ethos Capital to pursue an exit from PIR prior to 10 years. In addition, while PIR has advised ICANN (Internet Corporation for Assigned Names and Numbers) that there will be certain limitations on PIR's ability to distribute capital to its investors (such as covenants in credits agreements relating to the US\$360 million of debt incurred to help finance the transaction), the Board cannot be assured that such distributions will not be made, which could cause PIR to be drained of its financial resources.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) considered the fact that Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator. While it is anticipated that PIR's existing management team will continue post-closing, there is no guarantee that such management will in fact remain at PIR post-closing for an extended period of time. In addition, the fact that Ethos Capital's founder was a managing partner that led his prior private equity firm's acquisition of Donuts only demonstrates a track record of acquisition and does not demonstrate an ability or track record of successfully operating a registry operator, particularly one of the size of .ORG. Thus, Ethos Capital's lack of experience and success in operating a registry operator is concerning for a registry with over 10.5 million domain name registrations.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the information provided by PIR concerning the investors involved in the transaction, and noted that PIR declined to provide the specific ownership interests of the investors in the transaction (it only provided general categories of ownership levels). In addition, ICANN (Internet Corporation for Assigned Names and Numbers) has not been provided detailed information concerning various minority investors (many of whom are entities, likely with additional investors), including vehicles through which significant minority investors (the apparent second largest investor to Ethos Capital) will make its investment.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the ability of PIR to engage in the business operations and practices that Ethos Capital and PIR argue will benefit the .ORG community solely as a result of the transaction. No evidence has been provided to ICANN (Internet Corporation for Assigned Names and Numbers) that demonstrates that PIR (as a non-profit entity) is not currently able to pursue these valuable business initiatives, which could benefit the .ORG community, without the risks associated with the consummation of the transaction.

Since the time that ISOC (Internet Society), PIR and Ethos Capital announced the proposed transaction, there has been misunderstanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s role. Many have been looking to ICANN (Internet Corporation for

Assigned Names and Numbers) to answer questions that are better posed to ISOC (Internet Society) or to Ethos Capital. Many appear to be looking to ICANN (Internet Corporation for Assigned Names and Numbers) to cure an apparent lack of engagement by ISOC (Internet Society) with ISOC (Internet Society)'s community through engagement with ICANN (Internet Corporation for Assigned Names and Numbers) and the ICANN (Internet Corporation for Assigned Names and Numbers) community, even though many of the decisions made by ISOC (Internet Society) in solicitation and acceptance of Ethos Capital's proposal are outside of the type of decisions that are able to be changed through ICANN (Internet Corporation for Assigned Names and Numbers). However, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has endeavored to, and encouraged and directed ICANN (Internet Corporation for Assigned Names and Numbers) org to, allow for engagement opportunities, such as the public forum highlighted above. The Board is aware of and has considered each of the letters sent to it, and has followed this issue very closely.

Reviews by the California and Pennsylvania Authorities of the Proposed Transaction

California Attorney General

On 23 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a subpoena from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital. The CA-AGO, which by statute supervises the operations of all not-for-profit entities in California, including ICANN (Internet Corporation for Assigned Names and Numbers), states that it is "analyz[ing] the impact to the nonprofit community, including to ICANN (Internet Corporation for Assigned Names and Numbers)." Subsequent to ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of this letter, the CA-AGO requested more time to complete his review. The letter served as one factor in ICANN (Internet Corporation for Assigned Names and Numbers) org requesting more time from PIR to complete the review of the transaction, as the ICANN (Internet Corporation for Assigned Names and Numbers) Board and org had already identified that ICANN (Internet Corporation for Assigned Names and Numbers) needed additional information for its due diligence, and additional time was needed for ICANN (Internet Corporation for Assigned Names and Numbers)'s review.

On 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received another [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO regarding PIR's change of control request. In this letter, the CA-AGO "urge[d] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the [proposed] transfer of control" based on a determination that it "raises serious concerns." Citing ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to pursue the public interest as expressed in its Articles of Incorporation, the CA-AGO opined that, if permitted to purchase PIR, "Ethos Capital . . . will no longer have the unique characteristics that ICANN (Internet Corporation for Assigned Names and Numbers) valued at the time that it selected PIR as the nonprofit to be responsible for the .ORG registry."

The CA-AGO cited concerns such as the uncertainty about Ethos Capital as a brand-new entity, the private investors involved in financing the transaction, and the future operation of the .ORG registry, including the adequacy of PIR's future revenues and a lack of transparency regarding Ethos Capital's future plans. Based on the foregoing, the CA-AGO deemed these risks particularly serious in light of "the unique nature of the .ORG community" and concluded that approval of the transaction "may place at risk the operational stability of the .ORG registry." The CA-AGO also highlighted its concerns with how PIR's need to service debt obligations could impact the continued viability of the .ORG registry. In light of these and other concerns, the CA-AGO concluded that "the .ORG registry and the global Internet community – of which innumerable Californians are a part – are better served if ICANN (Internet Corporation for Assigned Names and Numbers) withholds approval of the proposed sale and transfer of PIR and the .ORG registry to the private equity firm Ethos Capital." The CA-AGO stated that "[i]n light of . . . the objectives stated in ICANN (Internet Corporation for Assigned Names and Numbers)'s articles of incorporation and bylaws . . . ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval."

ICANN (Internet Corporation for Assigned Names and Numbers) is a non-profit public benefit corporation organized under the laws of the state of California. As such, the CA-AGO asserts authority over ICANN (Internet Corporation for Assigned Names and Numbers) in several

relevant respects. Because ICANN (Internet Corporation for Assigned Names and Numbers) is registered as a charitable nonprofit corporation, the CA-AGO asserts regulatory power over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to the California Supervision of Trustees and Fundraisers for Charitable Purposes Act. See, e.g., Cal. Gov. Code section 12596 (authorizing Attorney General to maintain action "to enforce a charitable trust" with respect to covered charitable entities); section 12598(a) (authorizing Attorney General to maintain action "for ensuring compliance with trusts" as to such entities; authorizing Attorney General action "for ensuring compliance with . . . articles of incorporation", and authorizing Attorney General to "protect[] assets held by charitable trusts and public benefits corporations"). The CA-AGO also asserts more general corporate regulatory authority over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to its powers under the California Corporate Code. See, e.g., Cal. Corp. Code section 5250 (authorizing the CA-AGO to address a "fail[ure] to comply with trusts which [a corporation] has assumed" and authorizing the Attorney General to redress a "depart[ure] from the purposes for which [a corporation] is formed").

The CA-AGO explained his understanding of what ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, and the mission defined therein, compel ICANN (Internet Corporation for Assigned Names and Numbers) to do when considering PIR's request. In his authority to speak for the public interest for California, the CA-AGO determined that California's public interest in the .ORG registry running as a home for noncommercial entities, and that the public interest would be better served by ICANN (Internet Corporation for Assigned Names and Numbers) withholding approval of the change of control. As the CA-AGO's letter observes, his determination is buoyed by the significant opposition received from other organizations and politicians, with virtually no counterbalancing support except from the parties involved in the transaction and their advisors.

The Board recognizes that the CA-AGO's 15 April 2020 letter might not reflect all recent information submitted by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) or directly to the CA-AGO in connection with the PIR's request. That, combined with the CA-AGO's closing note that he continues its investigation and will take "whatever action necessary to protect . . . the nonprofit community" support ICANN (Internet Corporation for Assigned Names and Numbers) in its determination that it is reasonable to withhold consent at this time. The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action is also reasonable in light of its consideration of the role of the CA-AGO in overseeing whether ICANN (Internet Corporation for Assigned Names and Numbers) is acting in compliance with its Articles of Incorporation. The Board takes the CA-AGO's inputs seriously both in the substance and in impact. Further, in considering the CA-AGO's letter as part of its overall evaluation process, the Board also considered the statement by the CA-AGO that approval of PIR's change of control request would be in contravention of the CA-AGO's declared public interest, and considered that statement in line with all of the other circumstances of the transaction as available to the Board, and concurs in some of the factors that contribute to the CA-AGO's urged outcome.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board considers the CA-AGO's letter as one aspect of support for the reasonableness of withholding consent from the requested change of control, but the letter does not alone determine or require this outcome. The Board considers all of the aspects of the proposed transaction and the information available to the Board.

Pennsylvania Attorney General

The Pennsylvania Attorney General also has a role in oversight of PIR, and in reviewing the proposed conversion of PIR from a not-for-profit to a for-profit entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board understands that the Pennsylvania process will not be completed prior to 4 May 2020, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) does not know at this time either the PA Attorney General's view on the proposed conversion of PIR to for-profit status, or whether the relevant court in Pennsylvania will authorize the conversion. The Board notes that the lack of approval from the Pennsylvania authorities has remained an area of concern for the Board, and weighs towards the reasonableness of the Board's withholding consent at this time. The Board notes that understanding how the Pennsylvania authorities evaluate Pennsylvania's public interest in considering the proposed conversion is a relevant and missing piece of

information today.

Conclusion

The Board's action is in line with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission because ICANN (Internet Corporation for Assigned Names and Numbers) has performed significant due diligence to comply with its contractual obligation to consider PIR's request, and to meet the responsibility of coordinating the unique identifiers in a responsible manner. ICANN (Internet Corporation for Assigned Names and Numbers)'s actions are thereby in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws' public interest mandates, and are also aligned with how the CA-AGO explained his views of the public interest. Taking this action supports ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to continue performing all aspects of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission. Specifically, as it relates to the operation of the impacted registries, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has no indication that the security and stability of those registries is at risk, or to the unique identifier system, if ICANN (Internet Corporation for Assigned Names and Numbers) does not consent. The public interest is also served on balance through this action, in supporting the multistakeholder model and the contractual principles entrusted to ICANN (Internet Corporation for Assigned Names and Numbers), and in taking the necessary steps to maintain the stability and viability of ICANN (Internet Corporation for Assigned Names and Numbers) as an entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board must take into account all circumstances here. The not-for-profit PIR entity has enjoyed a close and responsible relationship with its community for nearly 20 years. Now that PIR has been a successful entity, growing to US\$1 billion in valuation, ICANN (Internet Corporation for Assigned Names and Numbers) is asked to allow PIR to be sold to an untested private equity firm, removing the protections of the not-for-profit status and burdening the entity with US\$360 million in debt in the midst of current and likely ongoing economic uncertainty. Along with that, when pressed for information on how the sale will continue to serve and bring value to the .ORG community, the solution is for ICANN (Internet Corporation for Assigned Names and Numbers) to take on enforcement responsibility for the PIR/community relationship and for reliance on an untested Stewardship Council model and other PICs. ICANN (Internet Corporation for Assigned Names and Numbers) entrusted to PIR the responsibility to serve the public interest in its operation of the .ORG registry, and now ICANN (Internet Corporation for Assigned Names and Numbers) is being asked to transfer that trust to a new entity without a public interest mandate. This proposed transaction has posed difficult questions to the ICANN (Internet Corporation for Assigned Names and Numbers) Board and the community, and the totality of the circumstances supports a denial in this instance. If PIR is able to provide additional information that resolves the concerns raised by the Board, PIR remains able to re-submit or initiate a new Change of Control Request.

Published on 30 April 2020

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Annex 130

Minutes | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

This page is available in:

English | العربية (<https://www.icann.org/resources/board-material/minutes-2020-04-30-ar>) | Español (<https://www.icann.org/resources/board-material/minutes-2020-04-30-es>) | Français (<https://www.icann.org/resources/board-material/minutes-2020-04-30-fr>) | Русский (<https://www.icann.org/resources/board-material/minutes-2020-04-30-ru>) | 中文 (<https://www.icann.org/resources/board-material/minutes-2020-04-30-zh>)

30 Apr 2020

A Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors was held telephonically on 30 April 2020 at 19:30 UTC.

Maarten Botterman, Chair, promptly called the meeting to order.

In addition to the Chair, the following Directors participated in all or part of the meeting: Becky Burr, Ron da Silva, Sarah Deutsch, Chris Disspain, Avri Doria, Rafael Lito Ibarra, Danko Jevtović, Akinori Maemura, Göran Marby (President and CEO), Mandla Msimang, Ihab Osman, Nigel Roberts, León Sánchez (Vice Chair), Matthew Shears, and Tripti Sinha.

The following Board Liaisons participated in all or part of the meeting: Harald Alvestrand (IETF (Internet Engineering Task Force) Liaison), Manal Ismail (GAC (Governmental Advisory Committee) Liaison), Merike Kão (SSAC (Security and Stability Advisory Committee) Liaison), and Kaveh Ranjbar (RSSAC (Root Server System Advisory Committee) Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).

The following ICANN (Internet Corporation for Assigned Names and Numbers) Executives and Staff participated in all or part of the meeting: Susanna Bennett (SVP, Chief Operations Officer), Xavier Calvez (Chief Financial Officer), Mandy Carver (Senior Vice President for Government and Intergovernmental Organization (IGO (Intergovernmental Organization)) Engagement), Sally Newell Cohen (SVP, Global Communications), Sally Costerton (Sr Advisor to President & SVP, Global Stakeholder Engagement), Sam Eisner (Deputy General Counsel), Jamie Hedlund (SVP, Contractual Compliance & Consumer Safeguard and Managing Director - Washington D.C. Office), John Jeffrey (General Counsel and Secretary), Sheila Johnson (Deputy General Counsel), Vinciane Koenigsfeld (Senior Director, Board Operations), Elizabeth Le (Associate General Counsel), Karen Lentz (Senior Director, Policy Research & Data Services), David Olive (Senior Vice President, Policy Development Support), Erika Randall (Associate General Counsel), Ashwin Rangan (SVP Engineering & Chief Information Officer), Jennifer Scott (Senior Counsel), Amy Stathos (Deputy General Counsel), Theresa Swinehart (Senior Vice President, Multistakeholder Strategy and Strategic Initiatives), Russ Weinstein (Sr. Director, gTLD (generic Top Level Domain) Accounts and Services), and Gina Villavicencio (SVP, Global Human Resources).

1. **Main Agenda:**

a. **Public Interest Registry (PIR) Change of Control**

[Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02](#)

1. Main Agenda:

a. Public Interest Registry (PIR) Change of Control

The Chair introduced the agenda item and called for conflicts of interest. Sarah Deutsch recused herself from participation in voting out of an abundance of caution and in compliance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Conflicts of Interest Policy . The Chair noted that as part of the Board's ongoing deliberations on the proposed change of control request that Public Interest Registry (PIR) submitted to ICANN (Internet Corporation for Assigned Names and Numbers), the Board discussed and considered alternative draft resolutions for potential Board action as part of an earlier briefing. Based on that discussion, the proposed action before the Board is to withhold ICANN (Internet Corporation for Assigned Names and Numbers)'s consent to PIR's requested change of

control.

The Board discussed the proposed final version of the resolutions and reviewed how its prior feedback was reflected in the version being considered for approval. Avri Doria indicated that she would be voting against the resolution and explained her views about how the public interest would be better served by ICANN (Internet Corporation for Assigned Names and Numbers) granting its consent to PIR's request. Following Avri's comments to the Board during the meeting, she provided her written statement, setting out her reasons for voting against the resolutions.

Ihab Osman moved and León Sánchez seconded the proposed resolutions. After discussion, the Board took the following action:

Whereas, Public Interest Registry (PIR) is currently a non-profit organization incorporated in the State of Pennsylvania, and serves as the registry operator for seven top-level domains: [.ORG \(/resources/agreement/org-2019-06-30-en\)](#); [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6b1a6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). PIR has a registry agreement with ICANN (Internet Corporation for Assigned Names and Numbers) for each of these seven TLDs (PIR's Registry Agreements).

Whereas, on 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that the Internet Society (ISOC (Internet Society)), PIR's parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital or its affiliated entities (collectively, Ethos Capital) will ultimately acquire PIR and all of its assets from ISOC (Internet Society). On **14 November 2019 (/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf)**, PIR formally notified ICANN (Internet Corporation for Assigned Names and Numbers) of a change of control in advance of closing the proposed transaction.

Whereas, Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR have mutually agreed to five extensions of time within which ICANN (Internet Corporation for Assigned Names and Numbers) must respond to the PIR change of control notification. ICANN (Internet Corporation for Assigned Names and Numbers) is obligated to provide PIR a response by 4 May 2020.

Whereas, following ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of formal notice of PIR's Change of Control Request, at the direction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted extensive due diligence on the proposed transaction in order to understand whether it would be reasonable under PIR's Registry Agreements for ICANN (Internet Corporation for Assigned Names and Numbers) to either approve or withhold consent to the proposed change of control. ICANN (Internet Corporation for Assigned Names and Numbers) org has on three occasions requested additional information from PIR (on 9 December 2019, 19 February 2020, and 3 April 2020) and in each instance PIR provided written responses to ICANN (Internet Corporation for Assigned Names and Numbers) org. Each of ICANN (Internet Corporation for Assigned Names and Numbers) org's requests is publicly available. PIR's responses have also been made publicly available to the extent that PIR has consented to such public disclosure. The ICANN (Internet Corporation for Assigned Names and Numbers) Board has access to all non-public information provided by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) org.

Whereas, in response to ICANN (Internet Corporation for Assigned Names and Numbers) org's final set of questions, PIR provided ICANN (Internet Corporation for Assigned Names and Numbers) with an updated draft of proposed Public Interest Commitments (PICs) for the .ORG Registry to try to address some of the key commitments being made to the .ORG community and other interested parties. This updated draft PIC was made available on icann.org for public consideration. After consideration of additional input on the PICs, PIR identified that it would be willing to make further modifications in order to support ICANN (Internet Corporation for Assigned Names and Numbers)'s enforcement powers and clarify the role of the proposed "Stewardship Council".

Whereas, in January 2020, the Office of the Attorney General of the State of California (CA-AGO) requested information from ICANN (Internet Corporation for Assigned Names and Numbers) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital in order to "analyze the impact to the nonprofit community including ICANN (Internet Corporation for Assigned Names and Numbers)." ICANN (Internet Corporation for Assigned Names and Numbers) is a California not-for-profit public benefit corporation, and the CA-AGO is responsible for supervising not-for-profit organizations in California.

Whereas, on 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO "urg[ing] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the transfer of control over the .ORG Registry" and advising ICANN (Internet Corporation for Assigned Names and Numbers) that "ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval." The CA-AGO cited numerous factors, including the size of the .ORG registry, the unique nature of the .ORG registry, the CA-AGO's conclusion that many questions remain unanswered by PIR, and the unknown nature of Ethos Capital, its range of proposed subsidiaries and its investors, a lack of transparency regarding Ethos Capital's future plans, and the financial impact of a US\$360 million loan necessary to complete the transaction. The CA-AGO also questioned the financial viability and potential for failure of the .ORG registry in the future. The CA-AGO provided his reasoning for how these factors supported its assessment and how the CA-AGO considered this in light of its understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws. The CA-AGO declared California's public interest in the .ORG registry running as a home for noncommercial entities, and that this public interest would be better served by withholding approval of the change of control. The CA-AGO declared that he would take "whatever action necessary to protect . . . the nonprofit community."

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has been active in its oversight of ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request. The Board has: received regular updates on ICANN (Internet Corporation for Assigned Names and Numbers) org's review of the request as well as the status of the CA-AGO's investigation of ICANN (Internet Corporation for Assigned Names and Numbers); overseen ICANN (Internet Corporation for Assigned Names and Numbers) org in its continued engagement with PIR to obtain additional information; had all of PIR's responses (non-public and public) made available for review; received a petition from protesters outside of ICANN (Internet Corporation for Assigned Names and Numbers)'s Los Angeles offices during the Board's January 2020 Board workshop; engaged with the ISOC (Internet Society) Board of Directors for information from ISOC (Internet Society)'s perspective; convened a public forum in March 2020 during ICANN67 to hear the ICANN (Internet Corporation for Assigned Names and Numbers) community's concerns; and considered the PICs that PIR proposes for inclusion in the .ORG Registry Agreement and requested ICANN (Internet Corporation for Assigned Names and Numbers) org to make a public notice over the same. The Board has received approximately 30 briefings from ICANN (Internet Corporation for Assigned Names and Numbers) org on this issue, representing over 30 hours of scheduled meetings. Each Board member also devoted substantial time to prepare for these briefings. The collective Board hours devoted in preparation for this decision count at least a thousand hours.

Resolved (2020.04.30.01), the ICANN (Internet Corporation for Assigned Names and Numbers) Board directs ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO to withhold ICANN (Internet Corporation for Assigned

Names and Numbers)'s consent to PIR's Change of Control Request pursuant to Section 7.5 of PIR's Registry Agreements, thereby rejecting PIR's request. The Board finds the withholding of consent is reasonable in light of the balancing of all of the circumstances addressed or discussed by the Board.

Thirteen members of the Board voted in favor of Resolution 2020.04.30.01. Avri Doria and Danko Jevtović voted against the Resolution. A [voting statement \(/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf\)](/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf) was provided by Avri. Sarah Deutsch abstained from voting on the Resolution. The Resolution carried.

Resolved (2020.04.30.02), the above decision is without prejudice to PIR to submit a new notice of indirect change of control and entity conversion for consideration if PIR successfully achieves an entity conversion approval in Pennsylvania through the Pennsylvania Court, which the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board and org will consider when evaluating any new notice.

Twelve members of the Board voted in favor of Resolution 2020.04.30.02. Avri Doria, Danko Jevtović, and Ihab Osman voted against the Resolution. A [voting statement \(/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf\)](/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf) was provided by Avri. Sarah Deutsch abstained from voting on the Resolution. The Resolution carried.

Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02

The Board's action in withholding consent for the change of control of Public Interest Registry (PIR) pursuant to the terms of PIR's Registry Agreements is both reasonable and in the public interest. The Board was presented with a unique and complex situation – a request to approve a fundamental change of control over one of the longest-standing and largest registries, that also includes a change in corporate form from a viable not-for-profit entity to a for-profit entity with a US\$360 million debt obligation, and with new and untested community engagement mechanisms relying largely upon [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) contractual compliance enforcement to hold the new entity accountable to the .ORG community. [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) is being asked to agree to contract with a wholly different form of entity; instead of contracting with the mission-based not-for-profit that has responsibly operated the .ORG registry for nearly 20 years, with the protections for its own community embedded in its mission and status as a not-for-profit entity. If [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) were to consent, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) would have to trust that the new proposed for-profit entity that no longer has the embedded protections that come from not-for-profit status, which has fiduciary obligations to its new investors and is obligated to service and repay US\$360 million in debt, would serve the same benefits to the .ORG community.

While PIR's current parent entity, the Internet Society ([ISOC \(Internet Society\)](#)), would obtain a US\$1 billion endowment to secure its future through the proposed transaction, that is not within the scope of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s consideration. The valuation of PIR is notable; in 2002, [ISOC \(Internet Society\)](#) was awarded the ability to operate the .ORG registry through a purpose-built non-profit developed to support the unique nature of the .ORG community. PIR's responsible operation of the .ORG registry since that time created this US\$1 billion value – value that [ISOC \(Internet Society\)](#) is looking to realize through engaging in a transaction that will result in the conversion of PIR into a profit-making entity. The [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board has considered the reasonableness of consent to the change of control as it relates to the new form of entity [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) is asked to contract with for the registry agreements themselves, including in light of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s mission to support and enhance the security, stability and resiliency of the Internet's unique identifiers. The [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board understands that while technically [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) will still hold a contract with PIR, the changes in the form of that entity are of meaningful significance to the Board's consideration of the Change of Control Request. On the whole, the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board determines that the public interest is better served in withholding consent as a result of various factors that

create unacceptable uncertainty over the future of the third largest gTLD (generic Top Level Domain) registry.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action should not be read to provide any commentary on the propriety of for-profit entities operating gTLD (generic Top Level Domain) registries, nor as any prohibition or judgment on the role of private equity firms controlling registry operators. The considerations in front of the Board here are specific to this transaction, particularly in light of the long-standing history of the .ORG registry.

Background

Created in 1985, .ORG is one of the original TLDs in the Domain Name (Domain Name) System (DNS (Domain Name System)). In 2002, through a [competitive bidding process conducted by ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/news/announcement-2002-10-14-en\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) selected a proposal submitted by ISOC (Internet Society) to establish a wholly owned subsidiary, PIR, to serve as the .ORG registry operator, which PIR has been since 2003. ISOC (Internet Society) is the sole member of PIR. Prior to 2003, .ORG was operated by VeriSign, Inc (previously Network Solutions, Inc.), the registry operator of the .COM and .NET gTLDs. PIR is the registry operator for seven gTLDs in total. In addition to .ORG, it operates [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6bla6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). Since its establishment, PIR has operated as a non-profit organization, incorporated in the State of Pennsylvania.

In winning the bid to operate .ORG, ISOC (Internet Society) purpose-built the not-for-profit entity, PIR, to serve the needs of the .ORG registry and the noncommercial community. PIR represents its mission as "for the benefit of [its] end user consumers and the Internet as a whole". Under U.S. tax regulations, PIR was established as a "Supporting Organization (Supporting Organization)" to ISOC (Internet Society), which has obligated PIR to act in support of ISOC (Internet Society) as well as ISOC (Internet Society)'s mission. PIR contributes a portion of its revenue every year to ISOC (Internet Society); for 2018, the most recent year reported, PIR provided over US\$48 million to ISOC (Internet Society) while also serving PIR's mission through "improv[ing] the stability and security of the .ORG registry and deliver[ing] a robust Education and Outreach program that enlightens non-profits and NGOs". PIR holds itself out as "entrusted by millions to operate in the public interest" and "refus[ing] to compromise [its] ethical standards for the sake of expediency, popularity or profitability." This is the entity that has responsibly served as the registry operator and steward for the .ORG (and other) registries since 2002. PIR's Registry Agreements are between ICANN (Internet Corporation for Assigned Names and Numbers) and PIR. PIR's most recent U.S. tax filing for 2018 report nearly US\$95 million in revenue, with nearly US\$50 million of that revenue distributed as grants in service of PIR's mission.

Timeline of events

On 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that ISOC (Internet Society), its parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital will acquire PIR and all of its assets from ISOC (Internet Society). The proposed transaction would result in PIR converting from a Pennsylvania non-profit corporation to a for-profit Pennsylvania limited liability company and Ethos Capital acquiring 100% ownership of PIR from the Internet Society (ISOC (Internet Society)). Ethos Capital envisions a "new" PIR, which would convert from its historical not-for-profit status to a for-profit entity controlled by a private capital firm. Through the proposed transaction, ISOC (Internet Society) – with which ICANN (Internet Corporation for Assigned Names and Numbers) does not have a contract for any of the registries that PIR operates – would receive US\$1 billion as an endowment for its future. Upon completion of the transaction, PIR would no longer have the obligation to provide support to ISOC (Internet Society) or serve any other charitable purpose, but instead would be subject to a US\$360 million debt obligation to service in support of the Ethos/PIR transaction. PIR would convert into

a new for-profit entity (if authorized by the relevant regulatory authorities) that would be responsible for contracting with ICANN (Internet Corporation for Assigned Names and Numbers) for the operation of the PIR registries. The current iteration of the not-for-profit PIR would no longer exist.

On [14 November 2019 \(/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf\)](#), PIR formally submitted to ICANN (Internet Corporation for Assigned Names and Numbers) a "Notice of Indirect Change of Control and Entity Conversion" (Change of Control Request) in advance of closing the proposed transaction between Ethos Capital and ISOC (Internet Society). After review of the information provided by PIR in the 14 November submission, ICANN (Internet Corporation for Assigned Names and Numbers) requested additional information from PIR on 9 December 2019. Additionally, on [9 December 2019 \(/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf\)](#), John Jeffrey, ICANN (Internet Corporation for Assigned Names and Numbers) org's General Counsel and Secretary, sent a letter to the CEOs of both PIR and ISOC (Internet Society), requesting both organizations to commit to completing the process in an open and transparent manner, including agreeing to the publication of questions from ICANN (Internet Corporation for Assigned Names and Numbers) org and the responses from PIR. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers) org's request for additional information on 20 December 2019, and later agreed to [publication of PIR's responsive materials, documents \(/news/announcement-2020-01-11-en\)](#) subject to limited redaction by PIR.

As the initial deadline for ICANN (Internet Corporation for Assigned Names and Numbers) org to respond to PIR by either providing or withholding consent to the proposed change of control was 19 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR agreed on [17 January 2020 \(/en/system/files/correspondence/namazi-to-nevett-17jan20-en.pdf\)](#) to extend the deadline by 30 days to 17 February 2020. On [14 February 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-14feb20-en.pdf\)](#), the deadline was extended again by mutual agreement to 29 February 2020. On [19 February 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) org requested additional information from PIR as part of its diligence process, and on [21 February 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-21feb20-en.pdf\)](#) agreed with PIR to an extension to 20 March 2020. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers)'s information request on [4 March 2020 \(/en/system/files/correspondence/cimbolic-to-jeffrey-04mar20-en.pdf\)](#). On [17 March 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-17mar20-en.pdf\)](#), the two organizations agreed to an extension to 20 April 2020, and on 16 April 2020, a final extension was agreed upon, giving ICANN (Internet Corporation for Assigned Names and Numbers) until 4 May 2020 to respond to PIR's request. On 3 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) provided PIR with two sets of questions for additional information. One set of questions are in follow-up to previous ICANN (Internet Corporation for Assigned Names and Numbers) inquiries designed to further understand the proposed transaction and its potential effect on PIR and the .ORG top-level domain (TLD (Top Level Domain)). The second set of questions relate specifically to the PICs proposed by PIR to be included in the .ORG registry agreement. Following receipt of the questions, [PIR submitted an updated proposal for its PICs \(/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf\)](#) on [7 April 2020 \(/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf\)](#). On [8 April 2020 \(/news/blog/pir-transaction-and-proposed-public-interest-commitments-update\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) posted a public notice that PIR provided an updated proposal. On 12 April 2020, PIR submitted to ICANN (Internet Corporation for Assigned Names and Numbers) responses to the other questions posed on 3 April 2020. While PIR identified many portions of those responses as confidential, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) org could not post those portions on its website, the ICANN (Internet Corporation for Assigned Names and Numbers) Board was provided with access to all materials submitted by PIR.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Evaluation Process

Due to the circumstances of the proposed PIR change of control, including its planned conversion to a for-profit entity, ICANN (Internet Corporation for Assigned Names and

Numbers) org requested extensive additional information from PIR, including regarding details of the transaction structure, financing and other funding sources, the parties involved, the role of the Pennsylvania authorities, information related to financial resources and operational and technical capability, how the "new" PIR would be responsive to the needs of the non-commercial community, what input the .ORG community had provided to PIR on the proposed transaction and how that community input would be reflected in the operations of the "new" PIR. This evaluation of the proposed transaction, which includes the diligence imposed by the ICANN (Internet Corporation for Assigned Names and Numbers)-adopted specification or policy on registry operator criteria in effect, incorporated review of financial resources, operational and technical capabilities, the transaction structure, background screening and other components. This diligence process is part of ICANN (Internet Corporation for Assigned Names and Numbers) org's responsibility in evaluating this proposed Change of Control Request, and the Board has remained apprised of ICANN (Internet Corporation for Assigned Names and Numbers) org's review throughout the process.

ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request was more comprehensive than the evaluation that ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted over other change of control requests. This was necessary under the circumstances and due to the extremely unique nature of the proposed change. This Change of Control Request for PIR's Registry Agreements includes the largest registry to date to be subject to the change of control process, and we understand the proposed transaction is the most complex that has been submitted for review. Hundreds of pages of supporting documentation have been produced by PIR in multiple responses, detailing multiple levels of new entities intended for creation to support the future PIR LLC in operating under PIR's Registry Agreements. Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction. PIR's Registry Agreements also permit ICANN (Internet Corporation for Assigned Names and Numbers) to evaluate the proposed change of control transaction under the totality of the circumstances, including the public interest and the interests of the .ORG community

The Board has deliberated and discussed this issue with ICANN (Internet Corporation for Assigned Names and Numbers) org on approximately 30 separate occasions, receiving current updates and providing ICANN (Internet Corporation for Assigned Names and Numbers) org with direction concerning next steps. ICANN (Internet Corporation for Assigned Names and Numbers) org has devoted countless hours in consideration of all aspects of PIR's request, and the collective hours from Board members devoted to consideration of this issue total in the thousands. This intensive review is required under the circumstances, as ICANN (Internet Corporation for Assigned Names and Numbers) is bound to, and it is in the public interest for ICANN (Internet Corporation for Assigned Names and Numbers) to uphold, the principles that ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder community agreed to include within ICANN (Internet Corporation for Assigned Names and Numbers)'s contracts. ICANN (Internet Corporation for Assigned Names and Numbers) is responsible for conducting a thorough review and evaluation to ensure that a change of control review is more than just an exercise of checking boxes. The ICANN (Internet Corporation for Assigned Names and Numbers) Board and org, in the extensive evaluation of the proposed transaction, returned multiple times to PIR for more information, as well as to ISOC (Internet Society), to understand the impact of the proposed transaction

In reviewing the financial stability of PIR following the consummation of the proposed transaction, the ICANN (Internet Corporation for Assigned Names and Numbers) Board noted that, following the transaction, PIR would have a significant amount of debt, and be obligated to service and ultimately repay a loan in the amount of US\$360 million. The Board noted that the incurrence of this debt was not for the benefit of PIR or the .ORG community, but for the financial interests of ISOC (Internet Society), Ethos Capital and the other investors in the transaction. While PIR has provided financial projections to

ICANN (Internet Corporation for Assigned Names and Numbers) org that show the capacity of PIR to generate sufficient cash flow to service the loan and repay the debt at maturity, financial projections are by their nature speculative and generally unreliable, and do not account for unforeseen circumstances. As such, if PIR's financial projections are materially inaccurate, PIR could potentially fail to generate the cash flow needed to repay the debt at maturity, and there can be no certainty that PIR or Ethos Capital will be able to refinance the debt at maturity if necessary. Accordingly, the ICANN (Internet Corporation for Assigned Names and Numbers) Board believes that burdening PIR with significant debt obligations could create uncertainty as to the long-term financial stability of PIR, particularly in light of the current and likely ongoing economic uncertainty.

Much of the public discourse around the proposed transaction also focused on the question of how the .ORG registrants would be protected and served. Both the ICANN (Internet Corporation for Assigned Names and Numbers) and the PIR/.ORG communities have been very vocal about the proposed transaction. Almost immediately after the transaction was announced by ISOC (Internet Society)/PIR/Ethos Capital, the ICANN (Internet Corporation for Assigned Names and Numbers) org and Board started receiving correspondence related to the matter, with the first letter of concern coming from the Internet Commerce Association on 15 November 2019, just two days after the announcement. In total, ICANN (Internet Corporation for Assigned Names and Numbers) has received over 30 letters regarding this proposed transaction. A full inventory of the correspondence with relevant links to those publicly available on [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s correspondence page \(/resources/pages/correspondence\)](#), is available in [Appendix A to this Rationale \(/en/system/files/files/resolutions-appx-a-org-correspondence-30apr20-en.pdf\)](#). At ICANN67, the ICANN (Internet Corporation for Assigned Names and Numbers) Board dedicated an entire live streamed [public forum \(https://67.schedule.icann.org/meetings/1152519\)](#) to hear from the ICANN (Internet Corporation for Assigned Names and Numbers) community about the proposed PIR transaction, and published both a [transcript of the event \(https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929\)](#), and [answers \(https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880\)](#) to questions that were not addressed in real time during the forum. Many of these communications focus specifically on the fact that, since 2002, PIR has been responsible for operating .ORG in a manner that serves the needs of the .ORG community, and that the information the public could access regarding the impact of the proposed transaction did not support the .ORG community in the same way. Many commenters discussed their concerns with the conversion of PIR to a for-profit entity, as for-profit entities held by private venture firms are understood to have a profit motive. In addition, commenters discussed their concerns with the removal of the protections embedded into PIR's not-for-profit mission of responsiveness to and engagement with its community, and discussed how that could impact the very policies able to be instituted at the registry level. The Board understands these concerns; the .ORG community has relied on PIR's commitments for nearly 20 years, and the proposed transaction fundamentally changes the PIR/.ORG community relationship. The Board must take that history into account, as well as the lack of meaningful engagement with that community in the design of the proposed transaction, as part of the reasonableness of withholding consent to PIR's request.

Part of how ICANN (Internet Corporation for Assigned Names and Numbers) tried to address these community – and ICANN (Internet Corporation for Assigned Names and Numbers)'s – concerns was by continuously urging PIR, ISOC (Internet Society), and Ethos Capital to provide full transparency regarding the proposed transaction. Similarly, ICANN (Internet Corporation for Assigned Names and Numbers) has attempted to provide the maximum amount of transparency possible throughout this process. This has included publishing the requests for information and the answers (subject to requested redaction by PIR for confidentiality reasons) to ICANN (Internet Corporation for Assigned Names and Numbers) org's questions. Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) org has published several blogs and announcements from ICANN (Internet Corporation for Assigned Names and Numbers) to the ICANN (Internet Corporation for Assigned Names and Numbers) community designed to provide updates on the process.

Beginning in December 2019, PIR, ISOC (Internet Society) and Ethos Capital began engaging with the .ORG community. They utilized webinars, blog posts, and press

releases among other things in an attempt to listen and assuage concerns from their community related to this proposed transaction. According to PIR and Ethos Capital, "we consistently heard three primary concerns expressed for the transaction: (1) pricing; (2) commitment to free expression; and (3) use of registrant and user data." On 21 February 2020, PIR and Ethos Capital proposed to the .ORG community to voluntarily adopt a legally binding amendment to the .ORG registry agreement in the form of a **Public Interest Commitment ("PIC")**

(<https://static1.squarespace.com/static/5dd7f6113c431419c139b89d/t/5e4fd13faf4f647b886ca187/1582289215311/20200220+PIC.pdf>)

following the closing of the proposed sale of PIR to address concerns voiced by some in the .ORG Community. From 3 March through 13 March 2020, PIR conducted what it called a "Public Engagement Period" where PIR and Ethos Capital collected written feedback about their proposed PIC, and addressed the feedback in a summary on their [website \(https://www.keypointsabout.org/public-engagement\)](https://www.keypointsabout.org/public-engagement) dedicated to the proposed transaction. PIR submitted a proposed PIC to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration on 16 March 2020. On 7 April 2020, PIR submitted an **updated PIC** (</sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf>) to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration, with **changes addressing certain of the questions ICANN (Internet Corporation for Assigned Names and Numbers) posed** (</en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf>) regarding the 16 March proposal.

The 7 April version of the PIC outlines five primary commitments for PIR:

1. A commitment to restrict price increases based on a specified formula until June 2027 (2 years prior to the end of the term of the current Registry Agreement). This includes a table clearly listing the maximum allowable wholesale price of a .ORG domain name for each of the 8 years.
2. The creation of a Stewardship Council to provide independent advice to the registry operator regarding modifications proposed by PIR to certain registry policies regarding: (x) censorship and freedom of expression; and (y) use of .ORG registrant and user data (the "Designated Policies"). The Stewardship Council would have the binding right to veto any modification to the Designated Policies.
3. To establish a "Community Enablement Fund" (without a specific fund amount) to provide support for initiatives benefiting .ORG registrants.
4. To produce and publish an Annual Report that self-assesses compliance with the PIC. The Annual Report will also include a transparency report disclosing the number of .ORG domain name registrations that were suspended or terminated by Registry Operator during the preceding year under Registry Operator's Anti-Abuse Policy or pursuant to court order.
5. A commitment to allow any subsequent revisions to the PIC to undergo [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s public comment process as part of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s consideration of such proposed revisions.

Following [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) and Board's review of the proposed PIC, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shared feedback with PIR regarding the commitment related to the Stewardship Council and its role. PIR noted its intention to revise the PIC in line with the concerns identified by [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#), and PIR committed that its PIC could be updated to support the Stewardship Council having powers related to enforcement as well as development of relevant policies, and in a way to make [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#)'s enforcement powers capable of objective application. The Board notes that a majority of the comments received during the public notice period continue to raise concerns and questions about the future commitments for how PIR will continue to serve the .ORG community, as well as about the process within [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) to reach a decision on PIR's request.

Other than the pricing issues, the items addressed in the proposed PIC are similar to those that are currently embedded within PIR's structure. Whereas PIR today has an **Advisory Council** (<https://thenew.org/org-people/about-pir/team/advisory-council/>)

embedded into its structure to serve as an intermediary between end users and PIR, and remaining accountable to that group is within PIR and ISOC (Internet Society)'s control, the "new" PIR would look to ICANN (Internet Corporation for Assigned Names and Numbers) to enforce that community relationship through an untested "Stewardship Council" through the PICs governing PIR's relationship with that Stewardship Council, including on matters of PIR's internal policies. Although the PICs address some of the accountability concerns, the ICANN (Internet Corporation for Assigned Names and Numbers) Board is not satisfied that ICANN (Internet Corporation for Assigned Names and Numbers) org should be the new backstop for holding PIR accountable to its community as contemplated under the PICs. PIR has operated for nearly 20 years with internal mechanisms to support and protect its community. PIR and Ethos clearly recognize that responsiveness to the .ORG community is an important element for the success of this proposed transaction; it is unreasonable to now expect ICANN (Internet Corporation for Assigned Names and Numbers) to accept that burden of enforcement in order to allow PIR and Ethos' preferred corporate structure to move forward. In addition, while intended to include members who are independent of PIR and Ethos Capital, the membership of the Stewardship Council is subject to the approval of PIR's board of directors and, as a result, could become captured by or beholden to the for-profit interests of PIR's owners and therefore are unlikely to be truly independent of Ethos Capital or PIR's board. The Board's concerns here have also been raised by many people or entities who shared their thoughts with ICANN (Internet Corporation for Assigned Names and Numbers) after public notice was provided on the 7 April 2020 revision to PIR's revised PIC.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also remains concerned with the lack of transparency concerning Ethos Capital's exit strategy for the PIR investment or its plans relating to capital disbursements from PIR's operations to Ethos Capital and the other investors. Ethos Capital has maintained that its investment horizon is 10 years and that it has no current plans to distribute excess PIR capital to investors. ICANN (Internet Corporation for Assigned Names and Numbers) cannot be assured that Ethos Capital's investment horizon will not change (as there is no enforceable commitment in this respect) or the minority investors in the transaction will not pressure Ethos Capital to pursue an exit from PIR prior to 10 years. In addition, while PIR has advised ICANN (Internet Corporation for Assigned Names and Numbers) that there will be certain limitations on PIR's ability to distribute capital to its investors (such as covenants in credits agreements relating to the US\$360 million of debt incurred to help finance the transaction), the Board cannot be assured that such distributions will not be made, which could cause PIR to be drained of its financial resources.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) considered the fact that Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator. While it is anticipated that PIR's existing management team will continue post-closing, there is no guarantee that such management will in fact remain at PIR post-closing for an extended period of time. In addition, the fact that Ethos Capital's founder was a managing partner that led his prior private equity firm's acquisition of Donuts only demonstrates a track record of acquisition and does not demonstrate an ability or track record of successfully operating a registry operator, particularly one of the size of .ORG. Thus, Ethos Capital's lack of experience and success in operating a registry operator is concerning for a registry with over 10.5 million domain name registrations.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the information provided by PIR concerning the investors involved in the transaction, and noted that PIR declined to provide the specific ownership interests of the investors in the transaction (it only provided general categories of ownership levels). In addition, ICANN (Internet Corporation for Assigned Names and Numbers) has not been provided detailed information concerning various minority investors (many of whom are entities, likely with additional investors), including vehicles through which significant minority investors (the apparent second largest investor to Ethos Capital) will make its investment.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the ability of PIR to engage in the business operations and practices that Ethos Capital and PIR argue will benefit the .ORG community solely as a result of the transaction. No evidence has been provided to ICANN (Internet Corporation for Assigned Names and Numbers) that demonstrates that PIR (as a non-profit entity) is not

currently able to pursue these valuable business initiatives, which could benefit the .ORG community, without the risks associated with the consummation of the transaction.

Since the time that ISOC (Internet Society), PIR and Ethos Capital announced the proposed transaction, there has been misunderstanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s role. Many have been looking to ICANN (Internet Corporation for Assigned Names and Numbers) to answer questions that are better posed to ISOC (Internet Society) or to Ethos Capital. Many appear to be looking to ICANN (Internet Corporation for Assigned Names and Numbers) to cure an apparent lack of engagement by ISOC (Internet Society) with ISOC (Internet Society)'s community through engagement with ICANN (Internet Corporation for Assigned Names and Numbers) and the ICANN (Internet Corporation for Assigned Names and Numbers) community, even though many of the decisions made by ISOC (Internet Society) in solicitation and acceptance of Ethos Capital's proposal are outside of the type of decisions that are able to be changed through ICANN (Internet Corporation for Assigned Names and Numbers). However, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has endeavored to, and encouraged and directed ICANN (Internet Corporation for Assigned Names and Numbers) org to, allow for engagement opportunities, such as the public forum highlighted above. The Board is aware of and has considered each of the letters sent to it, and has followed this issue very closely.

Reviews by the California and Pennsylvania Authorities of the Proposed Transaction

California Attorney General

On 23 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a subpoena from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital. The CA-AGO, which by statute supervises the operations of all not-for-profit entities in California, including ICANN (Internet Corporation for Assigned Names and Numbers), states that it is "analyz[ing] the impact to the nonprofit community, including to ICANN (Internet Corporation for Assigned Names and Numbers)." Subsequent to ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of this letter, the CA-AGO requested more time to complete his review. The letter served as one factor in ICANN (Internet Corporation for Assigned Names and Numbers) org requesting more time from PIR to complete the review of the transaction, as the ICANN (Internet Corporation for Assigned Names and Numbers) Board and org had already identified that ICANN (Internet Corporation for Assigned Names and Numbers) needed additional information for its due diligence, and additional time was needed for ICANN (Internet Corporation for Assigned Names and Numbers)'s review.

On 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received another [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO regarding PIR's change of control request. In this letter, the CA-AGO "urge[d] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the [proposed] transfer of control" based on a determination that it "raises serious concerns." Citing ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to pursue the public interest as expressed in its Articles of Incorporation, the CA-AGO opined that, if permitted to purchase PIR, "Ethos Capital . . . will no longer have the unique characteristics that ICANN (Internet Corporation for Assigned Names and Numbers) valued at the time that it selected PIR as the nonprofit to be responsible for the .ORG registry."

The CA-AGO cited concerns such as the uncertainty about Ethos Capital as a brand-new entity, the private investors involved in financing the transaction, and the future operation of the .ORG registry, including the adequacy of PIR's future revenues and a lack of transparency regarding Ethos Capital's future plans. Based on the foregoing, the CA-AGO deemed these risks particularly serious in light of "the unique nature of the .ORG community" and concluded that approval of the transaction "may place at risk the operational stability of the .ORG registry." The CA-AGO also highlighted its concerns with how PIR's need to service debt obligations could impact the continued viability of the .ORG registry. In light of these and other concerns, the CA-AGO concluded that "the .ORG registry and the global Internet community – of which innumerable Californians are a part – are better served if ICANN (Internet Corporation for Assigned Names and Numbers) withholds approval of the proposed sale and transfer of PIR and the .ORG

registry to the private equity firm Ethos Capital." The CA-AGO stated that "[i]n light of . . . the objectives stated in ICANN (Internet Corporation for Assigned Names and Numbers)'s articles of incorporation and bylaws . . . ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval."

ICANN (Internet Corporation for Assigned Names and Numbers) is a non-profit public benefit corporation organized under the laws of the state of California. As such, the CA-AGO asserts authority over ICANN (Internet Corporation for Assigned Names and Numbers) in several relevant respects. Because ICANN (Internet Corporation for Assigned Names and Numbers) is registered as a charitable nonprofit corporation, the CA-AGO asserts regulatory power over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to the California Supervision of Trustees and Fundraisers for Charitable Purposes Act. See, e.g., Cal. Gov. Code section 12596 (authorizing Attorney General to maintain action "to enforce a charitable trust" with respect to covered charitable entities); section 12598(a) (authorizing Attorney General to maintain action "for ensuring compliance with trusts" as to such entities; authorizing Attorney General action "for ensuring compliance with . . . articles of incorporation", and authorizing Attorney General to "protect[] assets held by charitable trusts and public benefits corporations"). The CA-AGO also asserts more general corporate regulatory authority over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to its powers under the California Corporate Code. See, e.g., Cal. Corp. Code section 5250 (authorizing the CA-AGO to address a "fail[ure] to comply with trusts which [a corporation] has assumed" and authorizing the Attorney General to redress a "depart[ure] from the purposes for which [a corporation] is formed").

The CA-AGO explained his understanding of what ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, and the mission defined therein, compel ICANN (Internet Corporation for Assigned Names and Numbers) to do when considering PIR's request. In his authority to speak for the public interest for California, the CA-AGO determined that California's public interest in the .ORG registry running as a home for noncommercial entities, and that the public interest would be better served by ICANN (Internet Corporation for Assigned Names and Numbers) withholding approval of the change of control. As the CA-AGO's letter observes, his determination is buoyed by the significant opposition received from other organizations and politicians, with virtually no counterbalancing support except from the parties involved in the transaction and their advisors.

The Board recognizes that the CA-AGO's 15 April 2020 letter might not reflect all recent information submitted by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) or directly to the CA-AGO in connection with the PIR's request. That, combined with the CA-AGO's closing note that he continues its investigation and will take "whatever action necessary to protect . . . the nonprofit community" support ICANN (Internet Corporation for Assigned Names and Numbers) in its determination that it is reasonable to withhold consent at this time. The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action is also reasonable in light of its consideration of the role of the CA-AGO in overseeing whether ICANN (Internet Corporation for Assigned Names and Numbers) is acting in compliance with its Articles of Incorporation. The Board takes the CA-AGO's inputs seriously both in the substance and in impact. Further, in considering the CA-AGO's letter as part of its overall evaluation process, the Board also considered the statement by the CA-AGO that approval of PIR's change of control request would be in contravention of the CA-AGO's declared public interest, and considered that statement in line with all of the other circumstances of the transaction as available to the Board, and concurs in some of the factors that contribute to the CA-AGO's urged outcome.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board considers the CA-AGO's letter as one aspect of support for the reasonableness of withholding consent from the requested change of control, but the letter does not alone determine or require this outcome. The Board considers all of the aspects of the proposed transaction and the information available to the Board.

Pennsylvania Attorney General

The Pennsylvania Attorney General also has a role in oversight of PIR, and in reviewing the proposed conversion of PIR from a not-for-profit to a for-profit entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board understands that the

Pennsylvania process will not be completed prior to 4 May 2020, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) does not know at this time either the PA Attorney general's view on the proposed conversion of PIR to for-profit status, or whether the relevant court in Pennsylvania will authorize the conversion. The Board notes that the lack of approval from the Pennsylvania authorities has remained an area of concern for the Board, and weighs towards the reasonableness of the Board's withholding consent at this time. The Board notes that understanding how the Pennsylvania authorities evaluate Pennsylvania's public interest in considering the proposed conversion is a relevant and missing piece of information today.

Conclusion

The Board's action is in line with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission because ICANN (Internet Corporation for Assigned Names and Numbers) has performed significant due diligence to comply with its contractual obligation to consider PIR's request, and to meet the responsibility of coordinating the unique identifiers in a responsible manner. ICANN (Internet Corporation for Assigned Names and Numbers)'s actions are thereby in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws' public interest mandates, and are also aligned with how the CA-AGO explained his views of the public interest. Taking this action supports ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to continue performing all aspects of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission. Specifically, as it relates to the operation of the impacted registries, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has no indication that the security and stability of those registries is at risk, or to the unique identifier system, if ICANN (Internet Corporation for Assigned Names and Numbers) does not consent. The public interest is also served on balance through this action, in supporting the multistakeholder model and the contractual principles entrusted to ICANN (Internet Corporation for Assigned Names and Numbers), and in taking the necessary steps to maintain the stability and viability of ICANN (Internet Corporation for Assigned Names and Numbers) as an entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board must take into account all circumstances here. The not-for-profit PIR entity has enjoyed a close and responsible relationship with its community for nearly 20 years. Now that PIR has been a successful entity, growing to US\$1 billion in valuation, ICANN (Internet Corporation for Assigned Names and Numbers) is asked to allow PIR to be sold to an untested private equity firm, removing the protections of the not-for-profit status and burdening the entity with US\$360 million in debt in the midst of current and likely ongoing economic uncertainty. Along with that, when pressed for information on how the sale will continue to serve and bring value to the .ORG community, the solution is for ICANN (Internet Corporation for Assigned Names and Numbers) to take on enforcement responsibility for the PIR/community relationship and for reliance on an untested Stewardship Council model and other PICs. ICANN (Internet Corporation for Assigned Names and Numbers) entrusted to PIR the responsibility to serve the public interest in its operation of the .ORG registry, and now ICANN (Internet Corporation for Assigned Names and Numbers) is being asked to transfer that trust to a new entity without a public interest mandate. This proposed transaction has posed difficult questions to the ICANN (Internet Corporation for Assigned Names and Numbers) Board and the community, and the totality of the circumstances supports a denial in this instance. If PIR is able to provide additional information that resolves the concerns raised by the Board, PIR remains able to re-submit or initiate a new Change of Control Request.

The Chair called the meeting to a close.

Published on 21 May 2020