**RECOMMENDATION**
**OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)**
**RECONSIDERATION REQUEST 16-8**
**14 DECEMBER 2018**

The Requestor, CPA Australia Ltd., seeks reconsideration of the Community Priority Evaluation (CPE) of its community-based application for the .CPA generic top-level domain (gTLD), and ICANN organization's acceptance of the CPE Report.[1]  Specifically, the Requestor claims that the independent provider that conducted the CPE (CPE Provider) violated established CPE procedures by misapplying CPE Criterion 2 (Nexus between Proposed String and Community) in connection with the Requestor's application.

## I.    Brief Summary.

The Requestor submitted a community-based application for .CPA (Application), which was placed in a contention set with five other .CPA applications.[2]  The Requestor participated in CPE but did not prevail.  On 18 September 2015, the Requestor challenged the CPE Provider's evaluation of its Application in Reconsideration Request 15-16 (Request 15-16).  On 26 June 2016, the Board Governance Committee (BGC)[3] denied Request 15-16 for failure to state proper grounds for reconsideration.[4]  On 15 July 2016, the Requestor submitted Request 16-8 once again challenging the CPE Provider's evaluation of its Application (CPE Report).[5]

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[1] Request 16-8, § 3, at Pg. 2.

[2] https://gtldresult.icann.org/applicationstatus/applicationdetails/414.

[3] Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests.  *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e) (https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests.  *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), (https://www.icann.org/resources/pages/governance/bylaws-en/#article4).

[4] BGC Determination on Request 15-16 (https://www.icann.org/en/system/files/files/reconsideration-15-16-cpa-australia-bgc-determination-26jun16-en.pdf).

[5] Request 16-8 (https://www.icann.org/en/system/files/files/reconsideration-16-8-cpa-australia-request-with-annexures-redacted-15jul16-en.pdf).

While Request 16-8 was pending, the ICANN Board and BGC directed ICANN org to undertake a review of certain aspects of the CPE process (CPE Process Review). The CPE Process Review: (i) evaluated the process by which ICANN org interacted with the CPE Provider; (ii) evaluated whether the CPE criteria were applied consistently throughout and across each CPE report; and (iii) compiled the research relied upon by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.[6] The BGC determined that the pending Reconsideration Requests relating to the CPE process, including Request 16-8, would be placed on hold until the CPE Process Review was completed.[7]

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).[8]

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11, which accepted the findings in the CPE Process Review Reports; declared the CPE Process Review complete; concluded that, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.[9]

Subsequently, the BAMC invited the Requestor to provide a telephonic presentation to the BAMC in support of Request 16-8. The BAMC also invited the Requestor to submit

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[6] https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a;
https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.
[7] https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.
[8] *See* https://www.icann.org/news/announcement-2017-12-13-en.
[9] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

additional written materials in response to the CPE Process Review Reports.[10]  The Requestor

declined both invitations from the BAMC.[11]

The BAMC has considered Request 16-8 and all relevant materials.  Based on its

extensive review of all relevant materials, the BAMC finds that reconsideration is not warranted

because the CPE Provider correctly applied the CPE criteria, and ICANN org's acceptance of the

CPE Provider's Report complied with established policies and procedures.

## II.      Facts.

### A.       The CPE Provider's Evaluation of the Requestor's Application.

The Requestor submitted a community-based application for .CPA, which was placed in

a contention set with five other .CPA applications.[12]  The Requestor participated in CPE and did

not prevail.[13]  CPE is a method of resolving string contention; an applicant must receive at least

14 points out of a possible 16 points to prevail in CPE.[14]  The Requestor received 12 points.[15]

Specifically, the CPE Provider determined that the Requestor earned four out of four possible

points for Criterion 1: Community Establishment; zero out of four possible points for Criterion 2:

Nexus between Proposed String and Community; four out of four possible points for Criterion 3:

Registration Policies; and four out of four possible points for Criterion 4:  Community

Endorsement.[16]  Criterion 2 is at issue here, and is discussed in detail in Part V, Analysis and

Rationale, below.

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[10] Attachment 1 to BAMC Recommendation.
[11] *Id.*
[12] https://gtldresult.icann.org/applicationstatus/applicationdetails/414.
[13] One other applicant for .CPA, the American Institute of Certified Public Accountants (AICPA), applied for Community Priority.  *See* https://newgtlds.icann.org/en/applicants/cpe.  The AICPA did not prevail in CPE.  *See* https://newgtlds.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf.
[14] Guidebook, Module 4, §§ 4.2, 4.2.1 (https://newgtlds.icann.org/en/applicants/agb).
[15] *See* CPE Report (https://newgtlds.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf).
[16] *Id.*, at Pg. 1.

### B. The Requestor's Challenges to the CPE Report.

#### 1. Request 15-16.

On 18 September 2015, the Requestor submitted Request 15-16, seeking reconsideration of the CPE Report.[17] The Requestor argued that: (1) documents such as the CPE Frequently Asked Questions (FAQ) page were promulgated after the Guidebook was released; (2) the CPE Report is purportedly inconsistent with CPE results for other community-based applications; (3) the CPE Provider did not give enough weight to the American Institute of Certified Public Accountants (AICPA) letter of support; (4) the CPE Provider did not conduct what the Requestor views as sufficient independent research or ask enough clarifying questions; and (5) ICANN staff changed the "Contention Resolution Status" of the Application to "Active" after the CPE Report was issued.[18]

On 26 June 2016, the BGC issued the Determination on Request 15-16, finding that Request 15-16 should be denied.[19]

#### 2. Request 16-8.

The Requestor submitted Request 16-8 on 15 July 2016, once again challenging the results of its CPE.[20] Request 16-8 asserted that the CPE Provider improperly "neglect[ed] to consider the endorsement of CPA Australia's application by AICPA" when it evaluated Criterion 2: Nexus between Proposed String and Community.[21]

### C. The CPE Process Review.

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[17] Request 15-16 (https://www.icann.org/en/system/files/files/reconsideration-request-15-16-cpa-australia-with-annexure-18sep15-en.pdf).
[18] *Id.*
[19] Determination on Request 15-16 (https://www.icann.org/en/system/files/files/reconsideration-15-16-cpa-australia-bgc-determination-26jun16-en.pdf).
[20] Request 16-8 (https://www.icann.org/en/system/files/files/reconsideration-16-8-cpa-australia-request-with-annexures-redacted-15jul16-en.pdf).
[21] *Id.*

On 17 September 2016, the Board directed ICANN org to undertake a review of the "process by which ICANN [org] interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (Scope 1).[22] The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.[23]

The BGC later determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).[24] Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the pending Requests relating to CPEs, including Request 16-8, would be on hold until the CPE Process Review was completed.[25]

FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. On 13 December 2017, ICANN org published FTI's reports issued in connection with the CPE Process Review (the CPE Process Review Reports).[26]

With respect to Scope 1, FTI concluded:

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[22] https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a.
[23] *Id.*
[24] https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.
[25] https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.
[26] *See* https://www.icann.org/news/announcement-2017-12-13-en.

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process[27];

FTI also concluded that "ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report," and reported that the "CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization's comments."[28]

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."[29]

For Scope 3, FTI compiled the research relied upon by the CPE Provider for the evaluations which are the subject of the pending Reconsideration Requests relating to CPE.[30]  In the specific instance of the Requestor's CPE, FTI observed that the CPE Provider included a citation in the CPE Report for each reference to research.[31]  The detailed results of Scope 3 of the CPE Process Review are set forth in the CPE Process Review Reports, and are not relevant to the issues raised in Request 16-8.[32]

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process

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[27] Scope 1 Report, at Pg. 2 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf).
[28] *Id.*, at Pg. 9, 15.
[29] Scope 2 Report, at Pg. 2 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf).
[30] Scope 3 Report, at Pgs. 3-4 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf).
[31] *Id.* at Pg. 11.
[32] *See id.*

Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.[33]

In adopting the 2018 Resolutions, the Board noted that CPA Australia and the other requestors with pending reconsideration requests relating to CPEs

> each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.[34]

Accordingly, the Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),[35] and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).[36] As part of the Transition Process, the BAMC invited the Requestor to "submit additional information relating to Request 16-8, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports" by 2 April 2018.[37] The BAMC also invited the Requestor to "make a telephonic oral presentation to the BAMC in support of" Request 16-8.[38] The BAMC requested "that any such

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[33] https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.
[34] 2018 Resolutions.
[35] *Available at* https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf.
[36] 2018 Resolutions. *See also* Roadmap, *available at* https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf.
[37] Attachment 1 to BAMC Recommendation.
[38] *Id.*

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presentation be limited to providing additional information that is relevant to the evaluation of Request 16-3 and that is not already covered by the written materials."[39]

**D.      The Requestor's Response to the CPE Process Review.**

The Requestor rejected the BAMC's invitations to make a presentation or file additional submissions in support of Request 16-8.[40]

**E.      Relief Requested.**

The Requestor asks the BAMC to "award CPA Australia at least 2 points for Criterion 2 of the CPE in light of AICPA's endorsement of CPA Australia's application and the nexus it creates between CPA Australia and the CPA community, inclusive of Certified Public Accountants."[41]

**III.    Issues Presented.**

The issues are as follows:

1. Whether the CPE Provider adhered to the Guidebook in its application of criterion 2, Nexus between Proposed String and Community, in the CPE Report; and

2. Whether ICANN org complied with applicable policies and procedures when it acknowledged and accepted the findings set forth in the CPE Report.

**IV.    The Relevant Standards for Reconsideration Requests and CPE.**

**A.      Reconsideration Requests.**

Article IV, Section 2.1 and 2.2 of ICANN's Bylaws[42] provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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[39] *Id.*
[40] *See id.*
[41] Request 16-8, at § 9, Pg. 7.
[42] The BAMC has considered Request 16-8 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestor submitted Request 16-8).

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(a) One or more Staff actions or inactions that contradict established ICANN policy(ies);

(b) One or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

(c) One or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.[43]

Here, Request 16-8 seeks reconsideration of staff action. Accordingly, the BAMC has reviewed the request and now provides a recommendation to the Board, consistent with the operative version of the Bylaws.[44] Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.[45]

## B.     The CPE Criteria and Procedures.

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.[46] The standards and CPE process are defined in Module 4, Section 4.2 of the Guidebook. Community-based applications that elect to participate in CPE are evaluated by the following criteria: Criterion 1: Community Establishment; Criterion 2: Nexus Between the Proposed String and Community; Criterion 3: Registration Policies; and Criterion 4: Community Endorsement.[47] Pursuant to the Guidebook, the sequence of the criteria reflects the order in which they will be assessed by the CPE Provider. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria,

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[43] ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.
[44] *See* ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.
[45] *Id.*
[46] *See* Guidebook, Module 4, § 4.2 at Pg. 4-7 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf). *See also* https://newgtlds.icann.org/en/applicants/cpe.
[47] *Id.* at Module 4, § 4.2 at Pg. 4-7 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf).

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each of which is worth a maximum of four points.  An application that prevails in CPE

"eliminates all directly contending standard applications, regardless of how well qualified the

latter may be."[48]

CPE will occur only if a community-based applicant selects CPE and after all

applications in the contention set have completed all previous stages of the gTLD evaluation

process.[49]  CPE is performed by an independent panel composed of two evaluators who are

appointed by the CPE Provider.[50]  The CPE Provider's role is to determine whether the

community-based application fulfills the four community priority criteria set forth in Module 4,

section 4.2.3 of the Guidebook.[51]

In addition to the Guidebook, the CPE Provider's supplementary guidelines (CPE

Guidelines) provide more detailed scoring guidance, including scoring rubrics, definitions of key

terms, and specific questions to be scored.[52]  The CPE Guidelines accompany the Guidebook and

do not alter the CPE criteria established by the Guidebook.[53]  Rather, the CPE Guidelines were

intended to increase transparency, fairness, and predictability around the assessment process by

explaining the methodology that the CPE Provider undertook to evaluate each criterion.[54]  The

CPE Provider also published the CPE Panel Process Document explaining the CPE evaluation

process as described in the Guidebook and discussed in the CPE Guidelines.[55]

## V.    Analysis and Rationale.

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[48] *Id.* at Module 4, § 4.2.3, Pg. 4-9.
[49] Guidebook, Module 4, § 4.2.
[50] *Id*. Module 4, § 4.2.2.
[51] *Id.* at Module 4, §§ 4.2.2 and 4.2.3., at Pgs. 4-8 and 4-9, (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf).
[52]  *See* CPE Guidelines (https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf).
[53] *Id.* at Pg. 2.
[54] *See id.*
[55]  *See* CPE Panel Process Document (http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf).

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### A.      Request 16-8 is Untimely.

Request 16-8 was submitted almost 10 months after the CPE Provider issued the CPE

Report.[56]  The Bylaws in effect when the Requestor submitted Request 16-8 required that the

Requestor submit its request within 15 days after "the date on which the party submitting the

request became aware of, or reasonably should have become aware of, the challenged staff

action."[57]  According to Request 16-8, the Requestor became aware of the challenged action on 4

September 2015.[58]  Accordingly, Request 16-8 is untimely.

Nonetheless, the BAMC has considered the Requestor's arguments in Request 16-8 and

concludes that they do not support reconsideration, regardless of the timeliness of the Request.

### B.      The CPE Provider's Application of Criterion 2 was Consistent with Applicable Policies and Procedures.

The sole issue in Request 16-8 is the CPE Provider's findings on Criterion 2, for which

the Requestor's Application received zero points.  Criterion 2 evaluates "the relevance of the

string to the specific community that it claims to represent."[59]  It is measured by two sub-

criterion:  Sub-criterion 2-A-Nexus; and Sub-criterion 2-B-Uniqueness.[60]  Sub-criterion 2-A is

worth a maximum of three points and sub-criterion 2-B is worth a maximum of one point, for a

total of four points.

To obtain three points for sub-criterion 2-A, the applied-for string must "match the name

of the community or be a well-known short-form or abbreviation of the community."[61]  For a

score of two, the applied-for string should "closely describe the community or the community

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[56] *See* CPE Report (https://newgtlds.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf).

[57] ICANN Bylaws, 11 February 2016, Art. IV, § 2.5.b.

[58] Request 16-8, § 5, Pg. 2.

[59] *See* Guidebook, Module 4, § 4.2.3 at Pg. 4-13 (https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf).

[60] *Id.* at Pgs. 4-12-4-13.

[61] *Id.*

members, without overreaching substantially beyond the community."[62]  The Guidebook

explains the scoring rubric for sub-criterion 2-A as follows:

> As an example, a string could qualify for a score of 2 if it is a noun
> that the typical community member would naturally be called in
> the context.  If the string appears excessively broad (such as, for
> example, a globally well-known but local tennis club applying for
> ".TENNIS") then it would not qualify for a 2.[63]

Zero points are awarded if the string "does not fulfill the requirements for a score of 2."[64]  It is

not possible to obtain a score of one for this sub-criterion.

To obtain one point for sub-criterion 2-B, the applied-for string must have no other

significant meaning beyond identifying the community described in the application.[65]  An

application that does not qualify for two or three points for sub-criterion 2-A will not qualify for

a score of one for sub-criterion 2-B.[66]

The Requestor challenges the CPE Provider's analysis of sub-criterion 2-A, for which it

received zero of three possible points.  The Requestor does not challenge the CPE Provider's

analysis of sub-criterion 2-B.[67]

Concerning sub-criterion 2-A, the CPE Provider determined that the applied-for string

(.CPA) did not "identify or match the name of the community as defined in the application, nor

is it a well known short-form or abbreviation of the community."[68]  As noted by the CPE

Provider, according to the Guidebook, "identify means that the applied[-]for string closely

describes the community or the community members, without over-reaching substantially

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[62] *Id.* at Pg. 4-12.
[63] *Id.*
[64] *Id.*
[65] *Id.* at Pg. 4-13.
[66] *Id.* at Pg. 4-14.
[67] *See* Request 16-8, § 8, at Pg. 6.
[68] CPE Report, at Pg. 4.

beyond the community" and the applied-for string must at least identify the community for full

or partial credit.[69]

The community as defined by the Requestor's Application consists of

> an exact match to CPA Australia's globally recognised and
> respected "CPA" Program and "CPA" designation. The fast-
> growing CPA Australia community is one of the leading global
> accounting communities with nearly 140,000 CPA members in 114
> countries and an international network of accountants and young
> professionals. The term "CPA" originates from CPA Australia and
> CPAs are globally recognised as belonging to the CPA Australia
> community… As such, a CPA working in one of the world's
> leading business hubs, such as Sydney, Hong Kong, Shanghai,
> London and New York, is clearly identified as a member of the
> CPA Australia community. The new .cpa gTLD is synonymous
> with the CPA Australia community, the identification of members
> of CPA Australia community, and CPA Australia's globally
> recognised professional accountancy program and designation.[70]

The CPE Provider determined that the applied-for string is over-reaching substantially

beyond the community and cannot identify the community as required for credit under sub-

criterion 2-A.  The CPE Provide concluded that

> [A] CPA working in one of the world's leading business hubs is
> not necessarily identified as a member of the CPA Australia
> Community . . . because the term "CPA" in the context of
> accounting is often used to mean Certified Public Accountant and
> to identify an individual who has passed a CPA exam, often in
> reference to the Uniform CPA Examination used in the US and
> elsewhere. Indeed, there are estimated to be about 650,000
> Certified Public Accountants (i.e., individuals who have passed the
> Uniform CPA Examination) in the United States. The vast majority
> of these individuals are not included in the applicant's defined
> community (which has a size of about 150,000 individuals), but the
> applied-for string nevertheless refers to them.  The Panel has
> determined, therefore, that the string is "over-reaching
> substantially beyond the community."[71]

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[69] Guidebook, Module 4, § 4.2.3 at Pg. 4-13.
[70] CPE Report, at Pg. 4.
[71] *Id.*, at Pgs. 4-5 (internal references omitted).

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Accordingly, the CPE Provider determined that the Requestor did not meet the requirements for sub-criterion 2-A and awarded zero points.

The Requestor asserts that the CPE Provider erred when it concluded that the string "over-reach[ed] substantially beyond the community"[72] defined in the Application, because, in the Requestor's view, the AICPA's endorsement of the Application "makes the nexus between CPA Australia and the CPA community at large explicitly clear."[73]  Along the same lines, the Requestor asserts that the string is "strongly and specifically related to the community."[74]  This argument does not support reconsideration.

The CPE Provider acknowledged receipt of a letter from the AICPA in support of CPA Australia's application and took the letter into consideration as part of its evaluation of sub-criterion 2-A.[75]  The AICPA's letter stated that, "[t]ogether with CPA Australia, we have been submitting bids for the .CPA gTLD. . . . We are therefore looking forward to jointly operate this extension."[76]  It went on to note that "we strongly believe that both of our organizations are able to provide for a single and trustworthy identifier for our members as well as members of our sister CPA member organizations all over the globe."[77]  "Therefore," the letter concluded,

> we would hereby like to express our explicit endorsement for CPA
> Australia's application for the .CPA gTLD, . . .  which, when
> combined with the efforts we have put in developing and
> promoting our own applications for this extension, will provide
> CPAs all over the world with a unique reference point on the
> Internet.[78]

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[72] Guidebook, Module 4, § 4.2.3, at Pg. 4-13.
[73] Request 16-8, § 8, at Pg. 6.
[74] *Id.* (citing Guidebook Module 1, § 1.2.3.1).
[75] *Id.*, at Pg. 4 n.9.
[76] 2 December 2014 Letter from B. Melancon to ICANN, Request 16-8 Annexure 2, (https://www.icann.org/resources/pages/reconsideration-16-8-cpa-australia-request-2016-07-18-en).
[77] *Id.*
[78] *Id.*

The CPE Provider explained that "despite the letter, the substance of CPA Australia's application, in particular its sections on [sub-criterion 1-A-]Delineation and [sub-criterion 2-A-]Nexus, is unchanged."[79]  Further, the CPE Provider found that it "[could] not, per [CPE] guidelines, credit the letter in any way other than as support for the applicant."[80]

The CPE Provider adhered to applicable policies and procedures when it determined that the Requestor's community definition did not include American CPAs and therefore the string substantially over-reached the defined community.  The AICPA's letter "express[ed the AICPA's] explicit endorsement" for the Application[81] (which the CPE Provider acknowledged); it did *not* change the community definition set forth in the Application, which did not include American CPAs.[82]  The letter repeatedly referenced the *separate* applications submitted by the AICPA and the Requestor, and the *two* communities that the entities represented—the "150,000 accounting, finance and business professionals across 121 countries" represented by CPA Australia, and the "more than 400,000 individuals and firms" who are members of the AICPA.[83] The AICPA's letter made no reference to the Application's community definition, nor did it suggest that any aspect of the Application is inaccurate.[84]

Indeed, the Requestor cites no policy or procedure mandating that the CPE Provider accept revisions of the defined community based on third party submissions.  As the CPE Report properly noted, it lacked authority to "credit the letter in any way other than as support for [the Requestor]."[85]  This is because the Guidelines only instruct the CPE Provider to consider letters

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[79] CPE Report, at Pg. 4 n.9.
[80] *Id.*
[81] AICPA Letter, Request 16-8, Annexure 2.
[82] *See* CPE Report, at Pg. 2, 4, 4 n.9; Guidebook, Module 4, § 4.2.3, at Pg. 4-13 (explaining that the Nexus criterion "evaluates the relevance of the string to the specific community that it *claims to represent*." (emphasis added)).
[83] AICPA Letter, Request 16-8, Annexure 2.
[84] *See id.*
[85] CPE Report, Pg. 4 n.9.

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under Criterion 4: Support and Opposition.[86]  By affirmatively discussing letters from third parties in context of Criterion 4 and not the other criteria, the Guidebook indicates that such letters should not be considered elsewhere—otherwise, the Guidebook could have stated that letters from third parties *could* be considered with respect to the other criteria, something it did not do.  Similarly, the Guidebook and CPE Panel Process Document only discuss letters in the context of Support and Opposition and do not include provisions for awarding points under Criterion 2 based on letters from third parties.[87]

Therefore, based on the Application's community definition, which the AICPA's letter did not and could not change, the CPE Provider appropriately concluded that the community excluded American CPAs, and therefore the string substantially over-reached because the community only included 150,000 out of *at least* 800,000 CPAs worldwide (roughly 19% of CPAs) (and this figure does not include CPAs in countries other than Australia, Canada, Europe, Ireland, Hong Kong, India, Malaysia, Singapore, and the United States).

Accordingly, in light of the community definition set forth in the Application, the AICPA's letter does not support reconsideration.

### C.     ICANN Org's Acceptance of the CPE Report was Consistent with Applicable Policies and Procedures.

The Requestor also states that:

> It is CPA Australia's view that the Panel's findings were not guided by adherence to the community nexus and uniqueness criterion, but were part of a strategy of obfuscation on ICANN's part to deny delegation rights to community applicants, in favor of commercial applicants.  Inevitably, the financial gains from a

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[86] *See* CPE Guidelines (https://newgtlds.icann.org/en/applicants/cpe).
[87] *See* Guidebook, Module 4, § 4.2.3; CPE Panel Process Document (https://newgtlds.icann.org/en/applicants/cpe#resources).

public auction would be far greater than the gains made from a community based award.[88]

The Requestor offers no support for this conclusory and baseless allegation.  As explained above, the CPE Provider's evaluation of the Application was consistent with the Guidebook and with applicable policies and procedures.  Additionally, ICANN org has accepted the findings of the CPE Provider for other CPE applicants that *prevailed* in CPE.

With respect to the Requestor's bald assertion that ICANN org's acceptance of the CPE Report was motivated by some sort of financial incentive, there is no indication that ICANN org will benefit from auction proceeds.  In fact, there is no certainty that the contention set will be resovled through an ICANN Auction of last resort.  Further, "Auction proceeds will be reserved and earmarked until the Board determines a plan for the appropriate use of the funds through consultation with the community."[89]  This argument does not support reconsideration.

Finally, Request 16-8 was placed on hold pending completion of the CPE Process Review, which was conducted to evaluate claims, like the Requestor's, that the CPE Provider inconsistently applied the CPE criteria.  FTI considered those issues, and concluded, among other things, that there was "no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."[90]  For this additional reason, the Requestor's argument that the CPE Provider incorrectly applied Criterion 2: Nexus between Proposed String and Community does not support reconsideration.

For all of the reasons discussed above, reconsideration is not warranted.

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[88] Request 16-8, § 8, at Pg. 6.
[89] https://newgtlds.icann.org/en/applicants/auctions/proceeds.
[90] Scope 2 Report, at Pg. 2 (https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf).

## VI.     Recommendation

The BAMC has considered the merits of Request 16-8 and, based on the foregoing, concludes that ICANN org (and the CPE Provider) acted consistent with the Guidebook and did not violate applicable policies or procedures when the CPE Provider determined that the Application did not satisfy the requirements for Community Priority and ICANN org accepted the CPE Report.  Accordingly, the BAMC recommends that the Board deny Request 16-8.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical.  To satisfy the thirty-day deadline, the BGC would have to have acted by 14 August 2016.  However, Request 16-8 was placed on hold pending completion of the CPE Process Review.  The Requestor was then provided an opportunity to supplement its arguments in light of the CPE Process Review results, which the Requestor declined.  Accordingly, the first opportunity that the BAMC has to make a recommendation on Request 16-8 is 14 December 2018.