

ICANN BOARD SUBMISSION NO. 2020.05.20.2a

TITLE: **Consideration of Reconsideration Request 20-1**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

The Requestor, Namecheap, Inc., seeks reconsideration of the ICANN Board’s and Staff’s:

(a) alleged lack of transparency insofar as the Requestor alleges that ICANN organization has not disclosed the criteria that it will use to evaluate Public Interest Registry’s (PIR) request for indirect change of control of PIR (Change of Control Request); and (b) alleged failure to apply established policies consistently insofar as the Requestor alleges that ICANN org is not applying recommendations from a 2002 Report of the Domain Name Supporting Organization Dot ORG Task Force (2002 DNSO Recommendations) to the Change of Control Request. The Requestor asserts that the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations contradict: (1) ICANN org’s Commitment to “operate . . . through open and transparent processes”;¹ (2) ICANN org’s Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment”;² and (3) the 2002 DNSO Recommendations.

The Board Accountability Mechanisms Committee (BAMC) evaluated the portion of Reconsideration Request 20-1 (Request 20-1) that the BAMC previously found to be sufficiently stated³ and all relevant materials and concluded that the ICANN Board and Staff did not violate the ICANN organization Commitments on which the Requestor relies or the 2002 DNSO Recommendations. Accordingly, the BAMC recommended that the Board deny Request 20-1.

On 30 April 2020, the ICANN Board “direct[ed] ICANN’s President and CEO to withhold ICANN’s consent to PIR’s Change of Control Request pursuant to Section 7.5 of PIR’s Registry

¹ ICANN Bylaws, Art. 1, § 1.2(a); [Request 20-1](#), § 8, at Pgs. 7-8.

² ICANN Bylaws, Art. 1, § 1.2(a)(v); [Request 20-1](#), § 8 at Pgs. 7-8.

³ See [BAMC Partial Summary Dismissal of Request 20-1](#), at Pg. 6. The Requestor brought three other challenges in Request 20-1; the BAMC summarily dismissed those challenges because each was either untimely or not sufficiently stated. *Id.* at Pgs. 6-7.

Agreement[], thereby rejecting PIR’s request,” and concluded that “the withholding of consent is reasonable in light of the balancing of all the circumstances addressed or discussed by the Board.” ([Board Action on Change of Control Request](#)).⁴

Following the issuance of the [BAMC’s Recommendation on Request 20-1](#) (BAMC Recommendation) and [the Board Action on Change of Control Request](#), the Requestor submitted a rebuttal⁵ to the recommendation ([Rebuttal](#)) in accordance with Article 4, Section 4.2(q) of the Bylaws. As discussed below, the Rebuttal does not raise arguments or facts that support reconsideration.

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECOMMENDATION:**

The BAMC recommended that the portion of Request 20-1 that the BAMC previously found to be sufficiently stated⁶ be denied. The BAMC determined that the Requestor’s claims are unsupported because the ICANN Board and Staff have not violated ICANN’s Commitment to transparency, ICANN’s Commitment to apply documented policies consistently, or ICANN’s established policies in relation to the Change of Control Request (Transparency and Consistency Claims).⁷

PROPOSED RESOLUTION:

Whereas, Namecheap, Inc. (Requestor) submitted Reconsideration Request 20-1 seeking reconsideration of ICANN organization’s: (a) alleged lack of transparency insofar as the Requestor alleges that ICANN organization has not disclosed the criteria that it will use to evaluate Public Interest Registry’s (PIR) request for indirect change of control of PIR (Change of Control Request); and (b) alleged failure to apply established policies consistently insofar as the

⁴ [ICANN Board Resolution 2020.04.30.02](#).

⁵ Article 4, Section 4.2(q) of the ICANN Bylaws permits the requestor to file a rebuttal to the BAMC’s recommendation, provided that the rebuttal is: (i) “limited to rebutting or contradicting the issues raised in the BGC’s recommendation; and (ii) not offer new evidence to support an argument made in the Requestor’s original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.” (Bylaws, [Art. 4, § 4.2\(g\)](#).)

⁶ See [BAMC Partial Summary Dismissal of Request 20-1](#), at Pg. 6. The Requestor brought three other challenges in Request 20-1; the BAMC summarily dismissed those challenges because each was either untimely or not sufficiently stated. *Id.* at Pgs. 6-7.

⁷ [BAMC Recommendation on Request 20-1](#).

Requestor alleges that ICANN org is not applying recommendations from a 2002 Report of the Domain Name Supporting Organization Dot ORG Task Force (2002 DNSO Recommendations) to the Change of Control Request (collectively, the Transparency and Consistency Claims).

Whereas, the Requestor claims that the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations contradict: (1) ICANN org’s Commitment to “operate . . . through open and transparent processes”; (2) ICANN org’s Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment”; and (3) the 2002 DNSO Recommendations.

Whereas, pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws, the Board Accountability Mechanisms Committee (BAMC) reviewed Request 20-1 “to determine if it is sufficiently stated,” and determined that, except for the Transparency and Consistency Claims set forth above, the other three claims in Request 20-1 did not meet the requirements for bringing a reconsideration request and, on that basis, summarily dismissed those claims.⁸

Whereas, the BAMC determined that the Transparency and Consistency Claims are sufficiently stated and sent it to the Ombudsman for consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.⁹

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman considered the Transparency and Consistency Claims and, after investigating, concluded that ICANN organization has been transparent about the information it is considering in its evaluation of the Change of Control Request and that ICANN organization is not required to “apply” the 2002 DNSO Recommendations to the Change of Control Request.¹⁰

Whereas, the BAMC carefully considered the merits of the Transparency and Consistency Claims and all relevant materials and recommended that Request 20-1 be denied because the ICANN Board and Staff have not violated ICANN’s Commitment to transparency, ICANN’s

⁸ [BAMC Partial Summary Dismissal of Request 20-1](#), at Pg. 6-7.

⁹ *Id.* at Pg. 6.

¹⁰ [Evaluation by the ICANN Ombudsman of Reconsideration Request 20-1](#) (“Ombudsman Evaluation”), at Pgs. 13-14.

Commitment to apply documented policies consistently, or ICANN’s established policies in relation to the Change of Control Request.¹¹

Whereas, on 30 April 2020, the [ICANN Board considered](#) “the reasonableness of consent to the change of control as it relates to the new form of entity ICANN [wa]s asked to consent with, . . . including in light of ICANN’s mission to support and enhance the security, stability and resiliency of the Internet’s unique identifiers,”¹² concluded that withholding consent to the Change of Control Request was reasonable in light of the balancing of all the circumstances addressed or discussed by the Board, and therefore directed ICANN’s President and CEO to reject without prejudice the Change of Control Request by withholding ICANN’s consent to PIR’s Change of Control Request.¹³

Whereas, the Requestors submitted a [Rebuttal](#) to the [BAMC’s Recommendation](#) pursuant to Article 4, Section 4.2(q) of the ICANN Bylaws.

Resolved (2020.05.20.XX), the Board adopts the [BAMC Recommendation on Request 20-1](#) and denies Reconsideration Request 20-1.

PROPOSED RATIONALE:

1. Brief Summary and Recommendation

The full factual background is set forth in the [BAMC Recommendation on Request 20-1](#) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 21 April 2020, the BAMC evaluated the portion of Request 20-1 that the BAMC previously found to be sufficiently stated¹⁴ and all relevant materials, and recommended that the Board deny Request 20-1 because the ICANN Board and Staff have not violated ICANN’s Commitment to transparency, ICANN’s Commitment to apply documented policies consistently, or ICANN’s

¹¹ [BAMC Recommendation on Request 20-1](#).

¹² [ICANN Board Resolution 2020.04.30.02](#).

¹³ *Id.*

¹⁴ See [BAMC Partial Summary Dismissal of Request 20-1](#), at Pg. 6. The Requestor brought three other challenges in Request 20-1; the BAMC summarily dismissed those challenges because each was either untimely or not sufficiently stated. *Id.* at Pgs. 6-7.

established policies in relation to its evaluation of the Change of Control Request (Transparency and Consistency Claims).

On 7 May 2020, the Requestor submitted a Rebuttal to the [BAMC Recommendation \(Rebuttal\)](#) pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. The Requestor claims that: (1) Request 20-1 is not mooted by the Board's direction to ICANN org to withhold consent for the Change of Control Request;¹⁵ (2) "ICANN's undue reliance on the formal requirements" of the Reconsideration Request process is unfair; (3) the BAMC Recommendation does not address the Requestor's "concerns regarding the lack of transparency" concerning ICANN organization's consideration of the Change of Control Request; and (4) the 2019 renewals of the registry agreements for .ORG, .BIZ, and .INFO violated ICANN's Bylaws and Articles of Incorporation.¹⁶

The Board has carefully considered the [BAMC's Recommendation](#) and the [Requestor's Rebuttal](#), as well as all relevant materials for Request 20-1, and concludes that Request 20-1 is denied.

2. Issue

The issue as presented by the Requestor is as follows:

Whether the ICANN Board's and Staff's alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations to the Change of Control Request contradict:

- ICANN org's Commitment to "operate . . . through open and transparent processes."
- ICANN org's Commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment."
- The 2002 DNSO Recommendations.

¹⁵ [Rebuttal](#), at Pg. 2.

¹⁶ *Id.* at Pgs. 5-9.

3. Analysis and Rationale

(a) Request 20-1 Is Moot.

The Requestor asserts on Rebuttal that Request 20-1 “is not rendered moot” by the 30 April 2020 [Board Action on Change of Control Request](#).¹⁷ The Board disagrees. The [Board Action on Change of Control Request](#) eliminated the alleged harm that the Requestor asserted in Request 20-1, thereby rendering the Request moot.

The Requestor asserted that “[a]llowing . . . radical changes [to registry operator ownership] in undocumented and/or non-transparent processes . . . have immediate repercussions upon the Requestor’s business, as it significantly affects the level of trust of customers in the domain name industry.”¹⁸ The alleged “radical change”—approving the Change of Control Request—did not happen. Instead, the Board “direct[ed] ICANN’s President and CEO to withhold ICANN’s consent to PIR’s Change of Control Request pursuant to Section 7.5 of PIR’s Registry Agreement[], thereby *rejecting* PIR’s request.”¹⁹ Without the predicate “radical change” that formed the basis for the Requestor’s alleged harm, Request 20-1 is moot.

(b) Neither Request 20-1 Nor The Rebuttal Support Reconsideration of the Transparency and Consistency Claims.

Notwithstanding that Request 20-1 is moot, the Board has considered the Transparency and Consistency Claims, and the Rebuttal, and concludes that they do not support reconsideration.

(i) ICANN Organization’s Evaluation of the Change of Control Request Has Been Open and Transparent.

The Requestor claims that ICANN organization violated its Commitment to transparency by not disclosing “the criteria ICANN intends to use for evaluation” of the Change of Control Request.²⁰ The BAMC concluded, and the Board agrees, that ICANN organization not only took extensive steps to seek additional information from PIR, ISOC, and the public in support of

¹⁷ *Id.*, at Pg. 2.

¹⁸ [Request 20-1](#), § 6, at Pg. 5.

¹⁹ [Board Action on Change of Control Request](#) (emphasis added).

²⁰ [Request 20-1](#), § 8, at Pg. 7.

its consideration of the Change of Control Request, but thoughtfully considered the materials and issues over time and published multiple updates reflecting those considerations.

The Board also agrees with the BAMC and the Ombudsman that ICANN organization's extensive public postings concerning its considerations of the Change of Control Request demonstrate that ICANN organization and the Board did not contradict ICANN's Commitment to transparency.

The [Board Action on Change of Control Request](#) provides even more transparency concerning ICANN organization's evaluation of PIR's Change of Control Request. The Board Action on Change of Control Request highlights the following considerations relevant to the Board's decision to direct ICANN organization to withhold its approval for the Change of Control Request:

- The Change of Control would be “fundamental” and would affect “one of the longest-standing and largest registries.”
- It would “include 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 contractual compliance enforcement to hold the new entity accountable to the .ORG community.”
- “[T]he new proposed for-profit entity . . . 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.”
- “[W]hile technically ICANN 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.”
- “[T]he 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 registry.”²¹

²¹ [Board Action on Change of Control Request](#).

In addition to the above statements, the [Board Action on Change of Control Request](#) contains an entire section titled “ICANN’s Evaluation Process,” which explains that the Board considered the following information in its evaluation of the Change of Control Request:²²

- Public comments “rais[ing] concerns and questions about the future commitments for how PIR will continue to serve the .ORG community.”²³
- The fact that “the ‘new’ PIR would look to ICANN to enforce [the relationship between end users and PIR] through an untested ‘Stewardship Council’ . . . including on matters of PIR’s internal policies.”²⁴
- “[T]he 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.”²⁵
- “[T]he fact that Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator.”²⁶
- “[T]he information provided by PIR concerning the investors involved in the transaction, [including] that PIR declined to provide the specific ownership interests of the investors in the transaction (it only provided general categories of ownership levels).”²⁷
- “[T]he 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.”²⁸
- Each letter sent to the Board concerning its evaluation of the Change of Control Request.²⁹

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

- A 15 April 2020 letter from the California Attorney General’s Office (CA-AGO), “urg[ing] ICANN to reject the [Change of Control Request],” and stating “that approval of PIR’s change of control request would be in contravention of the CA-AGO’s declared public interest.”³⁰
- “[T]he lack of approval from the Pennsylvania [Attorney General].”³¹

In its Rebuttal, the Requestor asserts that it “still . . . challenges the opaque way in which ICANN handled the . . . PIR Change of Control process[.]”³² This assertion ignores the extensive information that ICANN organization and the Board have published concerning their evaluation of the Change of Control Request, including the information addressed in the [BAMC Recommendation](#) and the additional information provided in the [Board Action on Change of Control Request](#).

The Board concludes that ICANN organization has acted consistent with its Commitment to transparency in posting voluminous materials concerning ICANN organization’s evaluation of the Change of Control Request, culminating in the [Board Action on Change of Control Request](#), which sets forth ICANN’s evaluation process.

- (ii) ICANN Organization’s Evaluation of the Change of Control Request Has Adhered to its Commitment to Apply Documented Policies Consistently, Neutrally, Objectively, and Fairly.

The Requestor asserts that “[u]nless the Internet community develops a specific policy for evaluating the [Change of Control Request], the criteria [set forth in the 2002 DNSO Recommendations] should comprise the policy and the evaluation criteria.”³³ The Requestor then claims that because ICANN org is not applying the 2002 DNSO Recommendations, ICANN org’s actions are inconsistent with its Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”³⁴

³⁰ *Id.*

³¹ *Id.*

³² [Rebuttal](#), at Pg. 2.

³³ [Request 20-1](#), § 8, at Pg. 10.

³⁴ ICANN Bylaws, Art. 1, § 1.2(a)(v); [Request 20-1](#), § 8, at Pgs. 8-11.

The BAMC concluded, and the Board agrees, that the 2002 DNSO Recommendations were not adopted as an established ICANN policy as the Requestor is defining them and, therefore, cannot support a reconsideration request alleging violation of ICANN organization's Commitment to apply documented policies consistently. As noted in the BAMC Recommendation, the Board considered the 2002 DNSO Recommendations, adopting only some and rejecting others³⁵; and then defined its own principles and criteria for evaluating and selecting from among the proposals received in 2002 for operating .ORG (ICANN's 2002 Assessment Criteria).³⁶ In addition, it should be noted that none of the eleven proposals received for the operation of .ORG perfectly satisfied all of ICANN's 2002 Assessment Criteria.³⁷

Moreover, ICANN organization is not required to apply the 2002 DNSO Recommendations or ICANN's 2002 Assessment Criteria to a request for indirect change of control in 2020 in the way the Requestor suggests.³⁸ Nonetheless, ICANN organization has made clear that it recognizes the principles found in the ICANN 2002 Assessment Criteria and considered them, along with all relevant information, in its evaluation of the Change of Control Request, as did the Board in coming to its decision on the Change of Control Request.

- (iii) The BAMC's Summary Dismissal of The Requestor's Other Claims is Final.

The Requestor asserts that the BAMC "unduly dismissed part of [Request 20-1]" in the BAMC's Summary Dismissal.³⁹ The Requestor asks the Board to grant reconsideration on the claims that the BAMC summarily dismissed, by "correct[ing] the illicit removal of price caps" in the .ORG, .INFO, and .BIZ registry agreements.⁴⁰

The Board finds that the Requestor's new claims are not properly asserted. The rebuttal shall "be limited to rebutting or contradicting the issues raised in the [BAMC's] final

³⁵ See [ICANN Board Minutes](#), 14 March 2002.

³⁶ [Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals](#), 20 May 2002 (ICANN's 2002 Assessment Criteria).

³⁷ See <https://archive.icann.org/en/tlds/org/final-evaluation-report-23sep02.htm>.

³⁸ ICANN's "Criteria for Assessing Proposals [to operate .ORG]," posted on 20 May 2002. ICANN's 2002 Assessment Criteria "discusses the criteria that ICANN intends to consider in evaluating and selecting from among the proposals that are received" to operate .ORG. [Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals](#), 20 May 2002.

³⁹ [Rebuttal](#), at Pg. 1.

⁴⁰ *Id.* at Pgs. 5, 8-9.

recommendation.”⁴¹ The BAMC’s Partial Summary Dismissal is not an “issue[] raised in the [BAMC’s] final recommendation” and is therefore not properly raised on rebuttal.

The Board also notes that the BAMC is empowered to summarily dismiss claims that fail to meet the requirements for bringing a Reconsideration Request without Board action;⁴² summary dismissal is not part of the Board’s review process in Request 20-1, and therefore is not properly challenged through the Rebuttal.

Notwithstanding the above, and as the BAMC explained in the Partial Summary Dismissal, challenges to the 2019 registry agreement renewals for .ORG, .BIZ, and .INFO are now untimely. Requests for Reconsideration must be submitted “within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.”⁴³ The registry agreement renewals were announced on 30 June 2019 and Request 20-1 was submitted on 8 January 2020, 192 days after the Requestor became aware of the renewals.⁴⁴

The Requestor attempts in the Rebuttal to argue there is no time bar by arguing that “[e]ach day that ICANN fails to reintroduce the price caps and to provide the necessary transparency, ICANN commits a new inaction, *i.e.*, a wrongful act by omitting to correct an ongoing violation, that can be challenged.”⁴⁵ This is an incorrect reading of the time limits for submitting Reconsideration Requests. The Requestor is attempting to challenge ICANN Staff *action*: ICANN Staff’s renewal of the .ORG, .BIZ, and .INFO registry agreements without provisions that the Requestor believes should have been included in the agreements. That action occurred on a date certain, *i.e.*, 30 June 2019, and the time to challenge it commenced on 30 June 2019. The Requestor’s suggestion that an alleged improper action *also* creates a “new inaction” or “wrongful act by omi[ssion]” *every day* thereafter is unsupported and, moreover, is not tenable as it would render meaningless the time requirement for filing a reconsideration request.

⁴¹ ICANN Bylaws, Art. 4, § 4.2(q)(i).

⁴² *Id.*, § 4.2(e)(ii); *id.* § 4.2(k).

⁴³ [BAMC Partial Summary Dismissal](#), at Pg. 7, quoting ICANN Bylaws, Art. 4, § 4.2(g)(i)(B).

⁴⁴ *Id.* at Pgs. 7-8.

⁴⁵ [Rebuttal](#), at Pg. 7.

Finally, challenges to the 2019 .ORG and .INFO registry agreement renewals do not support reconsideration for the reasons set forth in the Board’s Final Determination on Request 19-2, which are incorporated here.⁴⁶

(iv) The Requestor’s New Claims are Not Properly Raised on Rebuttal.

The Requestor makes several new claims in its Rebuttal. These claims are not properly raised on rebuttal, which shall “be limited to rebutting or contradicting the issues raised in the [BAMC’s] final recommendation,” and shall “not offer new evidence to support an argument made in the Requestor’s original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.”⁴⁷

First, the Requestor complains about the Reconsideration Request process, as set forth in the Bylaws, asserting that: (1) “ICANN’s undue reliance on the formal requirements” of the Bylaws provisions concerning the scope of rebuttals is unfair; and (2) the Reconsideration Request process does not provide the Requestor “access to essential documents,” so the Requestor believes that it lacks “a fair opportunity to contest all arguments and evidence adduced by the BAMC.”⁴⁸

The Requestor did not seek reconsideration of these Bylaws provisions in Request 20-1, so they are not properly raised on rebuttal.⁴⁹ Moreover, these Bylaws provisions have been in effect since October 2016.⁵⁰ The Requestor submitted Request 20-1 on 8 January 2020 and submitted the Rebuttal on 7 May 2020—well beyond the 30-day time limit for bringing a Reconsideration Request.⁵¹ As to the Requestor’s complaints about access to ICANN’s documents, the Board notes that the Reconsideration Request process is not designed to provide litigation-style discovery to requestors.⁵²

⁴⁶ [Board Final Determination on Request 19-2](#).

⁴⁷ ICANN Bylaws, Art. 4, § 4.2(q)(i).

⁴⁸ [Rebuttal](#), at Pg. 3.

⁴⁹ ICANN Bylaws, Art. 4, § 4.2(q).

⁵⁰ See [ICANN Bylaws, Art. 4, § 4.2\(q\), 1 October 2016](#).

⁵¹ See ICANN Bylaws, Art. 4, § 4.2(g)(i).

⁵² The Requestor says that it was not given access to “essential documents kept by ICANN” and thus cannot “contest all arguments and evidence adduced by the BAMC” in its Recommendation. [Rebuttal](#), at Pg. 3. However, the [Board Action on Change of Control Request](#) rendered this argument moot when it “direct[ed] ICANN’s President

Second, the Requestor “calls for an investigation regarding the involvement of former ICANN officials in the proposed PIR/Ethos Capital transaction,” and third, the Requestor “calls for clear criteria and processes that should govern major changes to legacy TLDs going forward.”⁵³

These requests were likewise not raised in Request 20-1 and are therefore not properly raised on rebuttal.⁵⁴ Additionally, for the reasons explained above, all of the Requestor’s claims arising out of the 2019 .ORG, .INFO, and .BIZ registry agreement renewals are time-barred.

4. Conclusion.

The Board has considered the merits of the Transparency and Consistency Claims and all relevant materials. The Board adopts the [BAMC Recommendation on Request 20-1](#) because the ICANN Board and Staff have not violated ICANN’s Commitment to transparency, ICANN’s Commitment to apply documented policies consistently, or ICANN’s established policies in relation to the Change of Control Request.

We note that in Request 20-1, the Requestor stated: “In the event that ICANN does not immediately grant [its] request[s in Request 20-1], the Requestor asks that ICANN engage in conversations with the Requestor and that a hearing be organized”; and that, “prior to the hearing,” ICANN provide the Requestor various documents and information.⁵⁵ The Board does not read the Requestor’s request to be heard after “ICANN does not immediately grant” Request 20-1 to be a request pursuant to the Bylaws to be heard *before* the BAMC issues its Recommendation to the Board. Rather, the Requestor asks to be heard only in the event the Board fails to grant (in other word denies) Request 20-1, which the Bylaws do not provide for.

In any event, the Board concludes that a hearing from the Requester is not necessary because Request 20-1 is both moot and does not support reconsideration for the reasons described above.

and CEO to withhold ICANN’s consent to PIR’s Change of Control Request” and set forth all of the information the Board considered in its evaluation of the Change of Control Request (set forth above). [Board Action on Change of Control Request](#). This argument does not support reconsideration.

⁵³ [Rebuttal](#), at Pg. 2. *See also id.* at Pg. 7 (asserting that “ICANN should have already had a policy in place for contract renewals”); *id.* at Pg. 8 (arguing that “ICANN failed to consider the specific nature of the .ORG and the .BIZ and .INFO legacy gTLDs when deciding to renew the registry agreements without maintaining the price caps”).

⁵⁴ *See* ICANN Bylaws, Art. 4, § 4.2(q).

⁵⁵ [Request 20-1](#), § 9, at Pgs. 12-13; *see also* [Rebuttal](#), at Pg. 1 (reiterating request).

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN 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 Board or Staff may request reconsideration of that action or inaction by the Board.

This action should have no financial impact on ICANN 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.

Submitted By: Amy Stathos, Deputy General Counsel
Date Noted: 14 May 2020
Email: amy.stathos@icann.org

Reconsideration Request Form

Version as of 21 September 2018

ICANN's Board Accountability Mechanisms Committee (BAMC) is responsible for receiving requests for reconsideration (Reconsideration Request) from any person or entity that has been adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) 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
- (c) 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.

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please refer to [Article 4, Section 4.2 of the ICANN Bylaws](#) and the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requestor Information

Requestor is:

Name: Namecheap, Inc. (IANA 1068)

Address: Contact Information Redacted

Email: Contact Information Redacted

Requestor is represented by:

Name: Flip Petillion, Jan Janssen, PETILLION

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

On 30 June 2019, ICANN org renewed the registry agreements (“RAs”) for the .ORG, .INFO and .BIZ gTLDs without maintaining the historic price caps, despite universal widespread public comment supporting that the price caps be maintained. This controversial decision goes against the interests of the Internet community as a whole and violates various provisions aimed at protecting those interests set forth in ICANN’s Articles of Incorporation, Bylaws, policies, and the renewal terms of the RAs.

Relatively soon after the renewal of the .org RA between ICANN and PIR, the Internet Society (ISOC) and Public Interest Registry (PIR) announced that PIR was sold to the investment firm Ethos Capital for an undisclosed sum of money. The change of control with PIR in conjunction with the removal of the price caps is particularly damaging to the interests of the Internet community.

ICANN's involvement in the acquisition of PIR by Ethos Capital is unclear at this stage. It is also uncertain whether or not the change of control of PIR has effectuated, and whether or not, and to what extent, ICANN has scrutinized the transaction. On 9 December 2019, ICANN's President and CEO and the ICANN Board Chair declared on ICANN's official website that they want to be transparent about where they are in the process. We learn from this communication that, apparently, PIR notified ICANN of the proposed transaction on 14 November 2019 and that ICANN has asked PIR to provide information related to (i) the continuity of the operations of the .ORG registry, (ii) the nature of the proposed transaction, (iii) how the proposed new ownership structure would continue to adhere to the terms of the current agreement with PIR, and (iv) how they intend to act consistently with their promises to serve the .ORG community with more than 10 million domain name registrations. ICANN submits that it will thoroughly evaluate the responses and then has 30 additional days to provide or withhold its consent to the request. ICANN urged PIR, ISOC, and Ethos Capital to act in an open and transparent manner throughout this process and made clear that it would evaluate the proposed acquisition to ensure that the .ORG registry remains secure, reliable, and stable. While the Requestor applauds ICANN for

acknowledging the concerns that were raised by the Internet community, ICANN's actions are insufficient to ease those concerns and maintain trust in the .ORG community and ICANN's stewardship of the DNS.

4. Date of action/inaction:

The date of the actions and inactions that the Requester is seeking to have reconsidered is unclear. On 9 December 2019, ICANN made clear that PIR had declined ICANN's request to publish PIR's notification relating to the proposed acquisition of PIR. ICANN reiterated its request and expressed the belief that it is imperative that ISOC and PIR commit to completing the "process" in an open and transparent manner, starting with publishing the notification and related material, and allowing ICANN to publish their questions to PIR/ISOC and PIR/ISOC's full responses.

Hence, on 9 December 2019, it became clear that ICANN would not be completely open and transparent about the process *proprio motu*.

5. On what date did you become aware of the action or that action would not be taken?

The Requestor learned about ICANN's actions and inactions on 11 December 2019, *i.e.*, two days after ICANN posted the declaration of its President & CEO and the ICANN Board Chair on its website.

6. Describe how you believe you are materially and adversely affected by the action or inaction:

Requestor is adversely affected by ICANN's failure to act appropriately

upon the (proposed) shift of ownership of the registry operator for .ORG from a non-profit organisation to a for profit investor in conjunction with the removal of price caps in .ORG in. These actions and inactions are likely to have an impact on the Requestor's business.

Even if registrars such as Requestor are given an opportunity to freeze the price for domain name registration renewals by renewing domain names for a period of ten years, this may have an important budgetary impact on Requestor and their customers. Internal budget planning policies of Requestor and its customers may not allow making such long-term decisions and important expenses. Moreover, uncertainty regarding future price increases (including the possibility of increases that exceed historical norms) may cause Requestor's customers not to renew domain names or not to register new domain names in legacy TLDs (.ORG, .INFO and .BIZ).

Allowing individual registry operators to modify key conditions of registry agreements and/or the modification of their ownership leads to far-reaching new rules and non-transparent policies to the sole benefit of a single commercial entity, without granting the Internet community and those entities most affected with a useful and meaningful opportunity to assist in the policy development process. Allowing such radical changes in undocumented and/or non-transparent processes undermines ICANN's multistakeholder model and the GNSO policy development process. These radical changes have immediate repercussions upon the Requestor's business, as it significantly affects the level of trust of customers in the domain name industry. Customer-facing entities, such as the Requestor, are the ones that are most exposed to

the harmful effects of declining levels of trust.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

All domain name registrants, especially those who have domain names in legacy TLDs¹ with longstanding price caps, will be adversely affected if ICANN not only allows legacy TLDs to raise prices outside of previously established norms, but also engages in a non-transparent and largely undocumented process that may lead to fundamental changes in the ownership of the registry operator and the operation of the TLD.

ICANN's failure to take due account of public comments with respect to the renewal of the .ORG registry agreement and to respond appropriately and transparently to PIR/ISOC's request for approval of the proposed acquisition of PIR calls into question ICANN's objectivity and violates the commitment to openness and transparency articulated in ICANN's Bylaws and Affirmation of Commitments. If ICANN allows the process for approving *casu quo* withholding its approval of the proposed acquisition to run in a non-transparent and closed fashion, what is to stop it from keeping all major decisions and considerations behind closed doors? This causes significant material harm to the Internet community as a whole, who will be unsure of ICANN's objectivity or commitment to abide by its own rules and regulations.

¹ Requestor refers to legacy TLDs when referring to the original gTLDs and those gTLD that have been delegated in accordance with the Proof-of Concept round or the 2004 Sponsored TLD round. Non-legacy TLDs are those gTLDs that were delegated in accordance with the New gTLD Program.

8. Detail of Board or Staff Action/Inaction – Required Information

- Failure to meet ICANN's openness and transparency obligations

In its communication to PIR/ISOC, ICANN correctly states that “*transparency is a cornerstone of ICANN and how ICANN acts to protect the public interest while performing its role.*” However, ICANN is not handling its transparency obligations accordingly. Instead of being completely open and transparent about the process for handling PIR’s request relating to the proposed acquisition of PIR and the consequences for the operation of the .ORG registry, ICANN has yet to make public (i) PIR’s request, (ii) ICANN’s communications responding to this request, (iii) the questions ICANN purportedly asked to PIR, ISOC and/or Ethos Capital, (iv) the answers ICANN received to those questions, (v) the criteria ICANN intends to use for evaluation PIR’s request, and (vi) any other materials related to the above.

From its letter of 9 December 2019, it seems that ICANN is asking permission from PIR/ISOC to publish PIR’s request and answer to ICANN’s questions. It even seems that ICANN is asking some sort of commitment by PIR/ISOC that should allow ICANN to publish ICANN’s questions to PIR/ISOC and PIR/ISOC’s full responses.

The Requestor fails to see why ICANN asks, or should ask, any kind of permission to publish these documents. In the assumption that the renewed Registry Agreement for .ORG applies – the unconditional application of this agreement is being challenged by the Requestor and others in parallel proceedings – Section 7.15 of this renewed agreement provides that only information that *is* confidential trade secret, confidential commercial

information or confidential financial information *can* be confidential information to the extent it has been marked as such. Neither the previous Registry Agreement for .ORG, nor the renewed Registry Agreement for .ORG provide for confidentiality in renewal negotiations or in processes related to a proposed change of control.

Questions that ICANN asks to PIR/ISOC by no means qualify as confidential information. ICANN needs no permission from PIR/ISOC or any third party to publish those questions. The contrary is true: ICANN's openness and transparency obligations mandate ICANN to publish its questions, to employ open and transparent processes, and to be open and transparent to the maximum extent feasible.

Hence, instead of expressing its beliefs and instead of simply urging PIR/ISOC to be more transparent, ICANN can – and should – require that PIR/ISOC responds to ICANN's questions publicly.

After all, PIR/ISOC have been delegated the responsibility to operate one of the Internet's crucial assets, the .ORG registry.

- Failure to apply its standards, policies, procedures, and practices equitably and non-discriminatorily, thereby acting in a manner that does not comply with and does not reflect and respect ICANN's Commitments and Core Values

The process for assigning the operation of the .ORG registry to

PIR/ISOC was the result of careful policy development by the DNSO² and an evaluation process to select the registry operator that best met the evaluation criteria, developed by the Internet community. The DNSO created the policy for the reassignment of the .ORG registry and was involved in the evaluation. The policy for the operation of the .org registry required *inter alia* that (i) the registry be “operated for the benefit of the worldwide community of organizations, groups, and individuals engaged in noncommercial communication via the Internet”, (ii) responsibility for the .org administration be “delegated to a non-profit organization that has widespread support from and acts on behalf of that community”, and (iii) registry fee charged to accredited registrars be “as low as feasible consistent with the maintenance of good quality service”.³ The DNSO’s policy on the reassignment and administration of the .ORG registry has never been amended nor revoked.

The abovementioned requirements of the DNSO’s policy have been taken up in the criteria for assessing proposals from organizations that sought to become the operator of the .ORG registry. These evaluation criteria set forth *inter alia* that (i) the registry operator’s policies and practices “should strive to be responsive to and supportive of the noncommercial Internet user community”, (ii) “ICANN will place significant emphasis on the demonstrated ability of the applicant or a member of the proposing team to operate the TLD registry of significant scale in a manner that provides affordable services with

² The DNSO or the “Domain Name Supporting Organization” was one of organizations within ICANN that develop and recommend policies concerning the Internet’s technical management within their areas of expertise. The DNSO developed policies relating to the domain name system (DNS). The DNSO is the precursor of the GNSO or the “Generic Names Supporting Organization”, ICANN’s policy development body for generic top-level domains.

³ See ICANN, Report of the Dot Org Task Force Adopted by the DNSO Names Council 17 January 2002 and accepted as guidance by the ICANN Board on 14 March 2002.

a high degree of service responsiveness and reliability”, (iii) “[d]emonstrated support among registrants in the .org TLD, particularly those actually using .org domain names for noncommercial purposes, will be a factor in evaluation of the proposals”, (iv) “proposals to operate the .org TLD should provide available evidence of support from across the global Internet community”, (v) a “significant consideration will be the price at which the proposal commits to provide initial and renewal registrations and other registry services”; the registry fee should be “as low as feasible consistent with the maintenance of good-quality service”.⁴

Hence the reassignment of .ORG to PIR/ISOC was not open-ended. Clear and unequivocal commitments were made by PIR/ISOC, who received an endowment of US\$ 5 million in exchange to operating as a non-profit and its commitment of making the .ORG registry the “true global home of non-commercial organizations on the Internet.”

ICANN is correct in stating that the Registry Agreement requires a standard of reasonableness to make its determination to provide or withhold its consent to the proposed acquisition of PIR. ICANN announced that it will thoughtfully and thoroughly evaluate the proposed acquisition to ensure that the .ORG registry remains secure, reliable, and stable. However, it is unclear how ICANN will interpret these evaluation criteria. Unless the Internet community develops a specific policy for evaluating the proposed acquisition, the criteria should comprise the policy and the evaluation criteria that were developed for the reassignment of .ORG. “Reliability” includes that the

⁴ ICANN, *Reassignment of .org Top-Level Domain: Criteria for Assessing Proposals*, posted 20 May 2002.

proposed transition does not affect any of the commitments made by PIR/ISOC when they were awarded the stewardship over the .ORG registry. “Stability” implies that registration and renewal prices must remain stable and “as low as feasible consistent with the maintenance of good quality service”. Stability also means that the governance structure of the .ORG registry is not dramatically changed and provides for sufficient mechanisms and participatory processes for .ORG stakeholders to protect their interests. ICANN should seek to it that strong foundations remain for the “global home of non-commercial organizations on the Internet” which the .ORG registry is.

By allowing for the elimination of price caps in .ORG, ICANN has already failed to apply its policies equitably. By removing the price caps, ICANN has allowed for unstable registration and renewal prices and contravenes established policy that these prices must be as low as feasible consistent with the maintenance of good quality service. This policy violation would only be exacerbated if ICANN were to allow PIR be acquired by a for-profit company.

9. What are you asking ICANN to do now?

The Requestor is asking that ICANN reconsider the lack of openness and transparency with respect to the renewal of the .ORG Registry Agreement⁵ and the actions surrounding the (proposed) acquisition of PIR

⁵ As a matter of fact ICANN should reconsider the lack of openness and transparency with respect to the renewal of the Registry Agreements for all legacy TLDs, including .INFO and .BIZ, as was previously asked for, as part of the request that the ICANN Board include or maintain price caps in all legacy TLDs.

and ICANN's approval process. To the extent ICANN's actions and/or inactions lead, have led to, or risk leading to the approval of the change of control, the Requestor is seeking to have those actions and inactions reconsidered with a view to preserving the non-profit character of .ORG, and observing the criteria that have led to the reassignment of the .ORG registry to PIR/ISOC.

Based on the information that is publicly available regarding the proposed acquisition of PIR, the Requester considers that there are sufficient grounds which mandate ICANN to withhold its approval.

The Requestor asks that ICANN reverse its decision to eliminate price caps in the .ORG TLD and that it includes (or maintains) price caps in the .ORG TLD.⁶

The Requestor asks that ICANN ensures that domain name registration and renewal fees in .ORG are "as low as feasible consistent with the maintenance of good quality service". To the extent PIR cannot live up to its commitments made during the reassignment process for the .ORG registry, the Requestor asks that ICANN reassigns the .ORG registry in accordance with the DNSO policy for reassignment (unless the community comes up with an updated policy).

In the event that ICANN does not immediately grant this request, the

⁶ As a matter of fact, ICANN should reverse its decision to eliminate price caps in legacy TLDs and includes (or maintains) price caps in all legacy TLDs (including .ORG, .INFO, and .BIZ). Requestor is aware that this request is currently being discussed in the framework of a cooperative engagement process, but Requestor wants to give the ICANN Board the opportunity to reconsider its decision in view of the recent events with respect to .ORG.

Requestor asks that ICANN engage in conversations with the Requestor and that a hearing be organized. In such event, the Requestor requests that, prior to the hearing, ICANN (i) provides full transparency regarding negotiations pertaining to the reassignment, renewal and amendments of the .ORG, .BIZ and/or .INFO Registry Agreements, (ii) provides full transparency regarding the (proposed) change of control of Public Interest Registry, and (iii) provides the documents requested in today's DIDP request by the Requestor.

10. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.

The Requestor is an ICANN-accredited registrar. As indicated above, the Requestor is adversely affected by the removal of price caps in .ORG in conjunction with ICANN's failure to act appropriately upon the (proposed) shift of ownership of the registry operator for .ORG from a non-profit organisation to a for profit investor. These actions and inactions are likely to have an impact on the business (domain name registration business as well as additional services, such as domain name hosting). More than 700 of the Requestor's customers have submitted public comments stating how they will be harmed by removing the price caps. All of the Requestor's customers, as well as the Internet community as a whole, are harmed by the uncertainty about both (i) possible price increases in legacy TLDs, and (ii) ICANN and the registry operator of .ORG observing the commitments that are made for operating the .ORG registry.

Through its actions and inactions, ICANN is allowing individual registry

operators to modify key aspects of registry agreements and/or their ownership without the necessary openness and transparency. If ICANN fails to remedy this situation, this will inevitably lead to the creation far-reaching new rules and non-transparent policies to the sole benefit of a single commercial entity, without granting the Internet community and those entities most affected with a useful opportunity to assist in the policy development process. Allowing such radical changes in undocumented and/or non-transparent processes undermines ICANN's multistakeholder model and the GNSO policy development process.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?

Yes

No

12a. If yes, please explain why the matter is urgent for reconsideration.

13. Do you have any documents you want to provide to ICANN?

At this stage, all relevant documents are believed to be in ICANN's possession. For ICANN's convenience, we have attached today's DIDP request by the Requestor as **Annex 1**.

Terms and Conditions for Submission of Reconsideration Requests

Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

The BAMC shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The BAMC may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The BAMC's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

Hearings are not required in the Reconsideration Process; however, Requestors may ask for the opportunity to be heard. The BAMC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BAMC's decision on any such request is final.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BAMC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BAMC shall be documented and promptly (i.e., as soon as practicable) posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en> and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Reconsideration Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BAMC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BAMC. The ICANN Board's decision on the BAMC's recommendation is final and not subject to a Reconsideration Request.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#), and agree to abide by the website [Terms of Service](#).

Date: 8 January 2020

A handwritten signature in blue ink that reads "Flip Petillion". The signature is written in a cursive style and is positioned above a solid black horizontal line.

Flip Petillion

A handwritten signature in blue ink that reads "Jan Janssen". The signature is written in a cursive style and is positioned above a solid black horizontal line.

Jan Janssen

14 February 2020

ICANN

Attn: Board, Ms. Amy Stathos, Mr. John Jeffrey
12025 Waterfront Drive, Suite 3000
Los Angeles, CA 90094-2536, USA

**By email: independentreview@icann.org; reconsideration@icann.org;
 didp@icann.org**

Dear Members of the ICANN Board,
Dear Ms. Stathos and Mr. Jeffrey,

**Re: DIDP Request No. 20200108-1, Reconsideration Request 20-1, and
Cooperative Engagement Process on the renewed Registry Agreements
for .org, .info and .biz**

We write you this official letter (which we expect you to publish) on behalf of Namecheap, Inc. (Namecheap), urging you to take immediate action in a pressing matter involving the proposed acquisition of Public Interest Registry (PIR) by Ethos Capital. For the reasons expressed in this letter and other submissions by Namecheap, we request that ICANN withhold its approval for this proposed acquisition.

1. Background

On 8 January 2020, Namecheap submitted Reconsideration Request 20-1 and a request for document production (DIDP Request No. 20200108-1). In both requests, Namecheap asked ICANN to provide the necessary openness and transparency with respect to the renewal of

the .ORG Agreement and the actions surrounding the (proposed) acquisition of PIR and ICANN's approval process.

On 8 February 2020, ICANN provided its initial response (ICANN's Response) to Namecheap's DIDP Request. We observe that ICANN is refusing to produce many of the documents requested, even though there are pressing reasons for disclosure. Namecheap objects to the non-disclosure. We will not go into the details here, as Namecheap expects that the production of documents can be discussed and resolved within the framework of Cooperative Engagement Process (CEP) that is currently ongoing with respect to the renewal of the registry agreements for .ORG, .INFO and .BIZ.

ICANN's Response reveals pressing issues that require your immediate attention.

It appears from the background description in ICANN's Response that ICANN had until 17 February 2020 to provide or withhold its consent to PIR's change of control. Until recently, ICANN has not postponed its deadline.

On 23 January 2020, ICANN received a request from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC to Ethos Capital. On 30 January 2020, ICANN sent a letter to PIR informing PIR about the CA-AGO's request for information and documents. ICANN requested that PIR agrees to extend ICANN's deadline to provide or withhold its consent to PIR's proposed change of control. ICANN claims that PIR's counsel responded to the letter on 30 January 2020. ICANN did not provide a copy of this letter. However, ICANN's Response contains a hyperlink to a letter of 3 February 2020 from PIR's counsel. It is unclear whether ICANN has responded to this letter.

It appears from PIR's counsel's letter of 3 February 2020 that PIR agreed to a postponement of ICANN's deadline to 29 February 2020.

However, unless ICANN rejects PIR's request for a change of control, a postponement to 29 February 2020 will not leave sufficient time to address the concerns expressed by Namecheap in the framework of Reconsideration Requests 19-2 and 20-1, the DIDP Request, and the CEP. Unless PIR's request is rejected, ICANN must adequately address Namecheap's concerns before it can continue with the approval process for PIR's request for an indirect change of control. Therefore, any deadlines in this approval process must be suspended *sine die*.

The point is all the stronger in view of the CA-AGO's request. According to an announcement by ICANN on 30 January 2020, the CA-AGO has asked for more time for its investigation. ICANN estimated that it needed up to 20 April 2020 to conclude both the CA-AGO and ICANN reviews. It is not excluded that ICANN may need time beyond 20 April 2020 if the CA-AGO's investigation takes longer than expected by ICANN and/or if ICANN is not fully transparent about its own review in order to allow Namecheap and the Internet community to check ICANN's compliance with its Articles of Incorporation and Bylaws.

Namecheap, and noticeably the Internet community as a whole, are concerned by the CA-AGO's investigation, as the CA-AGO has stated that a failure to cooperate and to produce requested documents to the CA-AGO can lead to "suspension or revocation of registration". The stability of the Internet would be seriously at risk if ICANN were suspended or its registration revoked and ICANN, albeit temporarily, be withheld to perform its mission.

It is our understanding that ICANN would frustrate the CA-AGO's investigation if it is not fully transparent about the change of control approval process or if it approves the change of control before the investigation is terminated.

In addition, any failure to be fully transparent about the change of control approval process or approval of the change of control without addressing the concerns raised by Namecheap will frustrate the pending Reconsideration Request and CEP. Namecheap is engaging in the CEP in a cooperative manner and in good faith. We expect ICANN to do the same. In this respect, we had expected ICANN to communicate openly about the status of the change of control approval process in conversations with Namecheap, without there being a need for Namecheap to discover, via separate processes, the existence of important documents and self-imposed deadlines.

2. Request

In view of the importance of ICANN's mission and of its commitment to carry out its activities through open and transparent processes, Namecheap requests that the documents submitted with the CA-AGO are made publicly available.

Namecheap also requests that all communications with PIR and/or third parties in relation to the CA-AGO's investigation are shared with Namecheap.

Finally, Namecheap urges ICANN to make clear to PIR that its request for an indirect change of control cannot be processed until (i) the CA-AGO has terminated its investigation and has authorized ICANN to proceed with the process for reviewing the proposed change of control, (ii) all challenges with respect to the renewal of the .ORG registry agreement have been appropriately addressed, (iii) Namecheap and the Internet community are given the necessary transparency with respect to the change of control approval process, and (iv) there are no challenges remaining with respect to the change of control approval process or a possible approval of the change of control by ICANN.

If PIR cannot agree to a suspension of its request for approving the change of control, ICANN should make clear to PIR that such approval is reasonably withheld.

We thank you for your immediate attention to this important matter and we look forward to your response, which we expect to receive at the latest on 18 February 2020.

*

This letter is sent without prejudice and reserving all rights.

Yours sincerely,


Filip Petillion


Jan Janssen*

**PARTIAL SUMMARY DISMISSAL
BY THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 20-1
18 MARCH 2020**

The Requestor, Namecheap, Inc., seeks reconsideration of actions and inactions of the ICANN Board and Staff, which the Requestor asserts contradict ICANN’s Mission, Commitments, and established policies¹:

- The Requestor seeks reconsideration of ICANN org’s renewal of the Registry Agreement with Public Interest Registry (PIR) for the .ORG generic top-level domain (the .ORG RA) in 2019, insofar as the 2019 renewal eliminated limits on the fees that PIR may charge registrars for .ORG domain name registrations.² This claim is untimely.
- The Requestor also seeks reconsideration of ICANN Staff’s lack of transparency, insofar as ICANN Staff did not publish: (i) PIR’s request for indirect change of control of PIR (Change of Control Request); (ii) “ICANN’s communications responding to this request”; (iii) ICANN org’s Request for Additional Information regarding the Change of Control Request (Information Request); (iv) PIR’s response to the Information Request; and (v) “any other materials related to the above.”³ This claim does not meet the requirements for bringing a reconsideration request.
- The Requestor preemptively asks the Board to reconsider any future approval of the Change of Control Request.⁴ This request does not meet the requirements for bringing a reconsideration request.
- The Requestor further seeks reconsideration of the ICANN Board’s and Staff’s lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request and is not applying a 2002 Report of the Dot Org Task Force (the 2002 DNSO Policy Guidelines) to the Change of Control Request. This claim meets the requirements for bringing a reconsideration request.

I. Facts.

A. Background Facts.

¹ Request 20-1, § 8, at Pgs. 7-11.

² *Id.*, § 9, at Pgs. 11-12 & n.6.

³ *Id.* § 8, at Pg. 7. Requestor also challenges ICANN org’s alleged failure to disclose “the criteria ICANN intends to use” to evaluate the Change of Control Request. *Id.* That challenge is discussed in the fourth bullet point above.

⁴ Request 20-1 § 9, at Pg. 12.

PIR, a Pennsylvania non-profit corporation, is the registry operator for .ORG.⁵ PIR operates .ORG pursuant to a Registry Agreement with ICANN org (.ORG RA), which has been renewed periodically since PIR became the .ORG registry operator in 2002.⁶ Most recently, the .ORG RA was set to expire on 30 June 2019. Following consultation with the ICANN Board and consideration of public comments on a draft of the 2019 .ORG RA, and with the Board's support, ICANN org announced the execution of the 2019 .ORG RA on 30 June 2019.⁷

Unlike prior .ORG RAs, which limited the fees that PIR may charge registrars for .ORG domain name registrations (price caps), the 2019 .ORG RA does not include price caps.⁸ On 12 July 2019, the Requestor submitted Reconsideration Request 19-2 (Request 19-2), seeking reconsideration of the 2019 .ORG RA insofar as it did not include price caps.⁹ The Board denied Request 19-2 on 21 November 2019.¹⁰

On 13 November 2019, PIR, its parent entity the Internet Society (ISOC), and Ethos Capital publicly announced Ethos Capital's proposed acquisition of PIR.¹¹ Under the 2019 .ORG RA, PIR must obtain ICANN's prior approval before there can be direct or indirect change of control of the registry operator.¹² Accordingly, on 14 November 2019, PIR sought the requisite approval from ICANN via the Change of Control Request.¹³ Typically, requests to

⁵ <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

⁶ *Id.*

⁷ Staff Report of Public Comment Proceeding, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

⁸ See 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

⁹ Request 19-2, <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-request-redacted-12jul19-en.pdf>.

¹⁰ Board Final Determination on Request 19-2, <https://www.icann.org/resources/board-material/resolutions-2019-11-21-en#1.a>.

¹¹ .ORG Update, <https://www.icann.org/news/blog/org-update>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

¹² *Id.*

¹³ *Id.*

ICANN for approval of a change of control are confidential.¹⁴ In this case, ICANN org asked PIR for permission to publish the Change of Control Request,¹⁵ PIR initially declined.¹⁶

Under the 2019 .ORG RA and ICANN processes for reviewing change of control requests, ICANN org has 30 days to request additional information, including information about the party acquiring control, its ultimate parent entity, and whether the parent meets the ICANN-adopted registry operator criteria (as well as whether they have adequate financial resources and operational and technical capabilities).¹⁷ Accordingly, ICANN org issued the Information Request to PIR.¹⁸

On 9 December 2019, ICANN asked PIR and ISOC to: (1) reconsider publishing the Change of Control Request; and (2) consider publishing the Information Request and PIR's response to the Information Request.¹⁹ On the same day, ICANN org published an update on the .ORG Change of Control Request (.ORG Update), noting that ICANN org sent PIR the Information Request.²⁰

On 20 December 2019, PIR submitted confidential responses to the Information Request.²¹

On 8 January 2020, the Requestor submitted Request 20-1 and a request for documentary information pursuant to ICANN org's Documentary Information Disclosure Policy (DIDP),

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *See* 9 December 2019 letter from J. Jeffrey to A. Sullivan and J. Nevett (9 December 2019 Letter) (asking PIR to reconsider ICANN org's request to publish the Change of Control Request), <https://www.icann.org/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf>.

¹⁷ 2019 .ORG RA, Art. 7, § 7.5; Registry Transition Processes, <https://www.icann.org/resources/pages/transition-processes-2013-04-22-en>.

¹⁸ .ORG Update, <https://www.icann.org/news/blog/org-update>.

¹⁹ 9 December 2019 Letter.

²⁰ .ORG Update.

²¹ Update on Change of Control Request of PIR by Ethos Capital, <https://www.icann.org/news/announcement-2020-01-11-en>.

seeking, among other things, “all documents directly and indirectly relating to the change of control of [PIR].”²² At that time, PIR had not agreed to publish the Information Request and PIR’s Response. On 7 February 2020, ICANN org responded to the Requestor’s DIDP request.²³

On 10 January 2020, ICANN org received a revised version of PIR’s responses to the Information Request (Revised Submission).²⁴ With the agreement of PIR, ISOC, and Ethos Capital, ICANN org published the Revised Submission, along with the Change of Control Request and the Information Request.²⁵

ICANN org and PIR agreed to extend ICANN org’s deadline to provide or withhold consent to the Change of Control Request to 17 February 2020.²⁶ Subsequently, ICANN requested a further extension of the deadline to 20 April 2020, in light of the letter ICANN received from the California Attorney General regarding its review of “the impact to the nonprofit community, including to ICANN, of [the] proposed transfer” of PIR to Ethos Capital;²⁷ PIR initially agreed to a further extension to 29 February 2020,²⁸ and then later agreed to a further extension to 20 March 2020.²⁹

B. Relief Requested.

The Requestor asks the BAMC to:

1. “[R]everse [ICANN org’s] decision to eliminate price caps in legacy TLDs”;

²² Request 20-1, Annex 1, at Pg. 4.

²³ ICANN’s Response to DIDP Request 20200108-1, <https://www.icann.org/en/system/files/files/didp-20200108-1-petillion-response-07feb20-en.pdf>.

²⁴ *See id.*

²⁵ <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

²⁶ 17 January 2020 letter from C. Namazi to J. Nevett, <https://www.icann.org/en/system/files/files/icann-to-pir-17jan20-en.pdf>.

²⁷ 20 January 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-30jan20-en.pdf>.

²⁸ 14 February 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-14feb20-en.pdf>.

²⁹ See <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-21feb20-en.pdf>.

2. “[R]econsider the lack of openness and transparency with respect to the renewal of the .ORG Registry Agreement and the actions surrounding the (proposed) acquisition of PIR and ICANN’s approval process” by providing:
 - a. “full transparency regarding negotiations pertaining to the reassignment, renewal and amendments of the .ORG” RA;
 - b. “full transparency regarding the (proposed) change of control of Public Interest Registry,” and
 - c. “the documents requested in [the] DIDP request by the Requestor”; and
3. Direct ICANN org to withhold its approval—or reconsider its approval—of “the change of control” of PIR, if “ICANN’s actions and/or inactions lead, have led to, or risk leading to the approval of the change of control.”³⁰

II. Issue Presented.

The issue is whether Request 20-1 should proceed through the Reconsideration process or whether summary dismissal is appropriate.

III. 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:

- (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.”³¹

³⁰ Request 20-1, § 9, at Pgs. 11-13.

³¹ ICANN Bylaws, Art. 4 §§ 4.2(a) and (c).

Pursuant to Article 4, Section 4.2(k) of the Bylaws, the BAMC reviews each reconsideration request upon its receipt “to determine if it is sufficiently stated.”³² The BAMC may summarily dismiss a reconsideration request if the BAMC determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) is frivolous.³³ If a reconsideration request is not summarily dismissed, the next step is to send it to the Ombudsman, who shall either recuse himself in accordance with Article 4, Section 4.2(l)(iii) of the Bylaws or shall review and consider the reconsideration request.³⁴ As noted above, this Partial Summary Dismissal only evaluates Request 20-1 to determine if it should proceed through the Reconsideration process.

IV. Analysis and Rationale.

In evaluating whether a reconsideration request is “sufficiently stated,” the BAMC considers the following factors: (1) is the reconsideration request timely; and (2) does the requestor “meet the requirements for bringing a reconsideration request.”³⁵ The BAMC concludes:

- The Requestor’s request for reconsideration of ICANN org’s 2019 renewal of the .ORG RA is not timely; this claim is summarily dismissed.
- The Requestor’s challenge to ICANN Staff’s lack of transparency insofar as ICANN Staff did not publish: (i) the Change of Control Request; (ii) “ICANN’s communications responding to this request”; (iii) the Information Request; (iv) PIR’s response to the Information Request; and (v) “any other materials related to the above”³⁶ does not meet the requirements for bringing a reconsideration request because the Requestor has not sufficiently alleged that it has been adversely affected by this challenged action; this claim is summarily dismissed.

³² *Id.* at § 4.2(k).

³³ *Id.*

³⁴ *Id.* at §§ 4.2(k), (l).

³⁵ ICANN Bylaws, Art. 4, § 4.2(k); *see also id.* § 4.2(e)(ii) (the BAMC has the power to “[s]ummarily dismiss insufficient or frivolous Reconsideration Requests”).

³⁶ Request 20-1 § 8, at Pg. 7. Requestor also challenges ICANN org’s alleged failure to disclose “the criteria ICANN intends to use” to evaluate the Change of Control Request. *Id.* That challenge is discussed in Section IV.C, *infra*.

- The Requestor’s challenge to any *future* ICANN approval of the Change of Control Request does not meet the requirements for bringing a reconsideration request because the Requestor has not identified an action or inaction of the ICANN Board or Staff, and therefore has not sufficiently alleged and cannot allege that it has been adversely affected; this claim is summarily dismissed.
- The Requestor’s challenge to the ICANN Board’s and Staff’s lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request and is not applying the 2002 DNSO Policy Guidelines to the Change of Control Request: (i) was timely filed; (ii) sufficiently identifies the Bylaws provisions and established ICANN policies that ICANN org allegedly violated; and (iii) sufficiently identifies an alleged adverse effect of the challenged conduct.³⁷

Accordingly, the BAMC finds it appropriate to proceed through the Reconsideration process only as to the portion of Request 20-1 challenging the ICANN Board’s and Staff’s alleged lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request and is allegedly not applying the 2002 DNSO Policy Guidelines to the Change of Control Request.³⁸

A. The Requestor’s Challenge to ICANN org’s 2019 Renewal of the .ORG RA Was Not Timely Filed; This Claim is Summarily Dismissed.

The Requestor’s challenge to ICANN org’s 2019 renewal of the .ORG RA—insofar as the 2019 .ORG RA does not include price caps—was not timely filed. Pursuant to ICANN’s Bylaws, a reconsideration request challenging Staff action must be submitted “within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.”³⁹ The Requestor challenges ICANN org’s 2019 renewal of the .ORG RA, which was announced on 30 June 2019. The Requestor stated in Request 19-2 that it

³⁷ Request 20-1, § 6, at Pg. 5.

³⁸ ICANN Bylaws, Article 4, Section 4.2(1).

³⁹ *Id.*, Art. 4, § 4.2(g)(i)(B).

became aware of the renewal of the .ORG RA on 1 July 2019.⁴⁰ Request 20-1 was submitted on 8 January 2020, 192 days after the challenged action.⁴¹

The BAMC summarily dismisses this portion of Request 20-1 because it was not timely filed.⁴²

B. The Requestor’s Challenge to ICANN Staff’s Purported Failure to Disclose Documents Does Not Meet the Requirements for Bringing A Reconsideration Request; This Claim is Summarily Dismissed.

The Requestor claims that ICANN Staff should have published the following documents: (i) the Change of Control Request; (ii) “ICANN’s communications responding to this request”; (iii) the Information Request; (iv) PIR’s response to the Information Request; and (v) “any other materials related to the above.”⁴³ The Requestor asserts that it discovered ICANN’s alleged failure to publish documents relating to the Change of Control Request on 11 December 2019 when, according to the Requestor, the .ORG Update made “clear that ICANN would not be completely open and transparent” about the Change of Control Request.⁴⁴

The Requestor has not sufficiently alleged that it has been adversely affected by the challenged inaction, because the Requestor has not identified any harm to it based on lack of

⁴⁰ Request 19-2, § 5, at Pg. 2.

⁴¹ For the same reasons, the Requestor’s passing references to the 2019 renewals of the .BIZ and .INFO RAs (*see* Request 20-1, § 9, at Pg. 12 n.6) do not state timely challenges to ICANN Staff action as those RA renewals were also announced on 30 June 2019. *See* <https://www.icann.org/resources/agreement/biz-2019-06-30-en>; <https://www.icann.org/resources/agreement/info-2019-06-30-en>. The Requestor also makes a passing reference to “the reassignment” of the .BIZ and .INFO RAs. Request 20-1, § 9, at Pg. 13. The Requestor does not assert that the operators of .BIZ and .INFO have notified ICANN org of any proposed changes of control of those registries, because they have not. Thus, to the extent the Requestor is challenging an unidentified assignment of the .BIZ or .INFO registries, the BAMC summarily dismisses those claims as frivolous per ICANN Bylaws, Art. 4, § 4.2(e)(ii).

⁴² The BAMC additionally notes that the Requestor previously challenged ICANN org’s 2019 renewal of the .ORG RA on 12 July 2019 in Reconsideration Request 19-2, which the Board denied on 21 November 2019. <https://www.icann.org/resources/board-material/resolutions-2019-11-21-en#1.a>. The Requestor has given no reason—and there is none—to revisit the Board’s decision.

⁴³ Request 20-1, § 8, at Pg. 7. The Requestor also challenges ICANN org’s alleged failure to disclose “the criteria ICANN intends to use” to evaluate the Change of Control Request. Request 20-1, § 8, at Pg. 7. That challenge is discussed in Section IV.D, *infra*.

⁴⁴ *Id.* § 4, at Pg. 4. As the Requestor submitted Request 20-1 on 8 January 2020, this portion of Request 20-1 was timely filed. ICANN Bylaws, Art. 4, § 4.2(g)(i)(C).

access to particular documents. Instead, the Requestor asserts harm based on purported actual or potential “radical changes” in the 2019 .ORG RA, but this alleged harm relates to other claims asserted in Request 20-1 (and this harm is addressed in Section IV.D below).⁴⁵ In short, the Requestor has not demonstrated that it has been adversely affected by lack of access to particular documents.⁴⁶

Accordingly, the BAMC summarily dismisses this claim because the Requestor has not sufficiently alleged that it has been adversely affected by the challenged inaction.

C. The Requestor’s Challenge to the ICANN Board’s and/or Staff’s Future Approval (If Any) of the Change of Control Request Does Not Meet the Requirements for Bringing A Reconsideration Request; This Claim is Summarily Dismissed.

The Requestor also asks the BAMC to direct ICANN org to withhold its approval of the Change of Control Request or reconsider any such approval, not because ICANN org *has* taken an action (or inaction) that materially or adversely affected the Requestor, but because ICANN *might* take an action that *could* adversely affect the Requestor. To that end, the Requestor asserts that ICANN org *would* violate its Bylaws *if* it approves the Change of Control Request.⁴⁷ This portion of Request 20-1 does not sufficiently identify an ICANN Staff or Board action or inaction, and therefore it does not and cannot establish any existing material or adverse effect on the Requestor.

⁴⁵ Request 20-1, § 4, at Pg. 4.

⁴⁶ The BAMC additionally notes that two days after the Requestor submitted Request 20-1, ICANN org published the Change of Control Request, the Information Request, and the Revised Submission. <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>. The BAMC also notes that the Requestor submitted a DIDP Request on 8 January 2020 for these and other documents. <https://www.icann.org/en/system/files/files/didp-20200108-1-petillion-request-08jan20-en.pdf>. Any challenges concerning the DIDP Request were not ripe when the Requestor submitted Request 20-1 because ICANN org had not yet responded to the Request (nor had it failed to respond to the DIDP Request within the time allotted). ICANN Bylaws, Art. 4, § 4.2(c); DIDP. ICANN responded to the Requestor’s DIDP request on 7 February 2020. <https://www.icann.org/resources/pages/didp-20200108-1-petillion-request-2020-02-10-en>.

⁴⁷ Request 20-1, § 9, at Pgs. 11-13.

ICANN org has neither approved nor announced that it will approve the Change of Control Request. ICANN org has made no such determination yet. Indeed, the Requestor recognizes that ICANN org has not made its final determination on the Change of Control Request, stating that, *if* “ICANN’s actions . . . lead, have led to, or risk leading to the approval of the change of control,” *then* Requestor seeks reconsideration of those actions (or inactions).⁴⁸ The Requestor is not challenging ICANN Board or Staff action (or inaction); rather, the Requestor is trying to preempt ICANN org’s possible *future* action.⁴⁹

The reconsideration process is not intended to be a mechanism for parties to preserve their right to contest a future action or inaction that may or may not materially affect the parties. To do so would undermine the purpose of the reconsideration process as set forth in Article 4, Section 4.2(a) of the Bylaws, which is to provide “a process by which any person or entity materially affected by *an action or inaction* of the ICANN Board or Staff may request . . . the review or reconsideration of that action or inaction by the Board, . . . to the extent that the Requestor has been *adversely* affected by” Board or Staff action or inaction.⁵⁰

Because ICANN org had not yet taken final action on – i.e., approved or withheld its approval of – the Change of Control Request when the Requestor submitted Request 20-1, there is nothing for the BAMC or Board to *reconsider*. Accordingly, the Requestor has not timely brought Request 20-1 within 30 days *after* an action or inaction. And, the Requestor has not yet been affected—materially, adversely, or otherwise—by a purported challenged action or inaction of the ICANN Board or Staff (because there has been no action or inaction). The Requestor’s

⁴⁸ *Id.*

⁴⁹ Instead, Request 20-1 asserts that ICANN org *would* violate its Bylaws *if* it approved the Change of Control Request. *Id.* § 9, at Pg. 12 (“Based on the information that is publicly available regarding the proposed acquisition of PIR, the Requester considers that there are sufficient grounds which mandate ICANN to withhold its approval.”).

⁵⁰ ICANN Bylaws, Art. 4, § 4.2(a), (c) (emphasis added).

request for review of ICANN org’s future decision on the Change of Control Request does not meet the requirements for bringing a request for reconsideration; therefore, this claim is summarily dismissed.

D. The Requestor’s Challenge to the Board’s and Staff’s Failure to Disclose Evaluation Criteria or Apply Certain Policy Guidelines to the Change of Control Request Meets the Requirements for Bringing a Reconsideration Request.

1. The Challenge is Timely.

The Requestor asserts that it concluded on 11 December 2019, when it reviewed the .ORG Update, that the ICANN Board and Staff would not disclose its criteria for evaluating the Change of Control Request or apply the 2002 DNSO Policy Guidelines to the Change of Control Request.⁵¹ The Requestor submitted Request 20-1 on 8 January 2020, which is timely based on the challenged conduct.⁵²

2. The Challenge Meets the Requirements for Bringing a Reconsideration Request.

The Requestor claims that the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Policy Guidelines to the Change of Control Request contradict:

- ICANN org’s Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”⁵³
- ICANN org’s Commitment to “operate . . . through open and transparent processes.”⁵⁴
- The 2002 DNSO Policy Guidelines.⁵⁵

⁵¹ Request 20-1, § 5, at Pg. 4.

⁵² ICANN Bylaws, Art. 4, § 4.2(g)(i)(C).

⁵³ *Id.*, Art. 1, § 1.2(a)(v); Request 20-1, § 8, at Pgs. 8-11.

⁵⁴ *Id.*, Art. 1, § 1.2(a); Request 20-1, § 8, at Pgs. 7-8.

⁵⁵ <https://archive.icann.org/en/meetings/accra/org-topic htm>; Request 20-1, § 8, at Pgs. 7-11.

This portion of Request 20-1 sufficiently identifies established ICANN policies that the Requestor claims ICANN org violated.

The Requestor also sufficiently identifies an alleged adverse effect due to the ICANN Board's and Staff's purported failure to disclose the criteria it is applying and/or purported failure to apply the 2002 DNSO Policy Guidelines. The Requestor seems to be asserting that the claimed lack of transparency concerning the ICANN Board's and/or Staff's evaluation of the Change of Control Request has "immediate repercussions upon the Requestor's business, as it significantly affects the level of trust of customers in the domain name industry."⁵⁶ Whether there is, in fact, an actual harm or adverse effect on the Requestor due to the challenged actions and inactions is not material to this preliminary procedural evaluation.⁵⁷ For purposes of determining whether these claims procedurally meet the requirements for bringing a reconsideration request, it is sufficient that the Requestor alleged such harm.⁵⁸

Accordingly, the Requestor's challenge to the ICANN Board's and Staff's alleged failure to disclose the criteria that it will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Policy Guidelines to the Change of Control Request shall proceed in accordance with the Reconsideration process.

V. Conclusion.

A substantive review of the merits of the Requestor's claims is beyond the scope of the BAMC's procedural evaluation. The BAMC's conclusion is limited to only the preliminary assessment of whether the Requestor's claims meet the requirements for bringing a

⁵⁶ Request 20-1, § 6, at Pgs. 5-6.

⁵⁷ The BAMC's determination that the Requestor sufficiently identified a material harm for procedural purposes is not a determination that the Requestor was, in fact, materially harmed or, if so, that the challenged action caused such harm. The BAMC takes no position at this point on the merits of the Requestor's claims, including the claim that it has been materially affected by the challenged action.

⁵⁸ ICANN Bylaws, Art. 3 § 3.1.

reconsideration request. For the foregoing reasons, the BAMC concludes that the requests for reconsideration of: (1) ICANN org’s 2019 renewal of the .ORG RA; (2) ICANN Staff’s failure to disclose (i) the Change of Control Request; (ii) “ICANN’s communications responding to this request”; (iii) the Information Request; (iv) PIR’s response to the Information Request; and (v) “any other materials related to the above”; and (3) ICANN org’s potential future decision on the Change of Control Request do not meet the requirements for bringing a reconsideration request and are hereby summarily dismissed.

The BAMC further concludes that the request for reconsideration of the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Policy Guidelines to the Change of Control Request meets the requirements for bringing a reconsideration request. Pursuant to Article 4, Section 4.2(l) of the Bylaws, the next step in the Reconsideration process is to send this claim to the Ombudsman for his review and consideration, or recusal.

Subject: Re: [Reconsideration Request] Reconsideration Request 20-1
Date: Tuesday, March 24, 2020 at 9:42:16 AM Pacific Daylight Time
From: reconsider on behalf of Herb Waye
To: Reconsideration
CC: ombudsman
Attachments: ATT00001.txt

Greetings,

Pursuant to Article 4, Section 4.2(l), I am accepting consideration of Request 20-1.

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, March 20, 2020 at 5:28 PM
To: ombudsman <ombudsman@icann.org>
Subject: Reconsideration Request 20-1

Dear Herb,

ICANN recently received Reconsideration Request 20-1, which was submitted on 8 January 2020 by Namecheap, Inc. (Requestor), seeking reconsideration of: (i) the removal of the price control provisions from the .ORG registry agreement; and (ii) ICANN's conduct with respect to its evaluation of the proposed change of control of Public Interest Registry (Change of Control Request), the registry operator for .ORG.

On 18 March 2020, the Board Accountability Mechanisms Committee (BAMC) issued a Partial Summary Dismissal of Reconsideration Request 20-1. Pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws, the BAMC determined that three of the four claims set forth in Request 20-1 were not sufficiently stated and should be summarily dismissed. The BAMC Partial Summary Dismissal has been posted on the webpage for [Reconsideration Request 20-1 \[icann.org\]](#), and is attached to this email for your reference.

The BAMC concluded that the request for reconsideration of the ICANN Board's and Staff's lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request and is not applying a 2002 Report of the Dot Org Task Force (the 2002 DNSO Policy Guidelines) to the Change of Control Request meets the requirements for bringing a reconsideration request. This was not a determination on the merits.

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 \(l\)](#) 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 the remaining aspect of Request 20-1 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 20-1 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of your receipt of Request 20-1.

Best regards,

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

Substantive Evaluation by ICANN Ombudsman of Request for Reconsideration 20-1

This substantive evaluation by the ICANN Ombudsman of Request for Reconsideration 20-1 (filed by Namecheap, Inc. on January 8th, 2020) is required under the Paragraph 4.2(l) of the current ICANN Bylaws (“Bylaws” (amended July 22, 2017)).

Under current ICANN Bylaws 4.2(c) (“Bylaws”), 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.

Request for Reconsideration (RfR) 20-1 was filed by Namecheap, Inc. (“Namecheap”) who recently (RfR 19-2 in 2019) requested reconsideration of ICANN actions and inaction relating to the 10-year renewal of the Registry Agreement (“RA”) between ICANN and Public Interest Registry (“PIR”), for the generic Top Level Domain (“TLD”) “.org” (I use lowercase .org and uppercase .ORG interchangeably throughout this evaluation—back around 2002 the preference looks to be for .ORG in caps). Namecheap requested reconsideration for four different “actions” / “inactions” by the ICANN Board and Staff: three of these reconsideration requests have been summarily dismissed on procedural grounds by the Board Accountability Mechanisms Committee (“BAMC”).

The first request in RfR 20-1 related to price caps (specifically the alleged removal of price limits in the recently renewed PIR RA) was deemed untimely by the BAMC (this first request relating to the removal of price caps in renewal RAs, was also a part of RfR 19-2 [<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>]).

The second 20-1 request was summarily dismissed by BAMC due to finding that there’s no real adverse effect on Requestor Namecheap, a prerequisite for a Request to proceed.

The third 20-1 request related to future action/inaction by the ICANN Board or Staff—namely the approval (or not) of the change of control (as required of ICANN in PIR’s RA), which is needed if PIR converts from a not-for-profit entity into a for-profit LLC (under the laws of Pennsylvania where PIR is registered)—that approval/disapproval decision is in the process of being made by ICANN at this moment, and as yet there has been no action or inaction that can be reconsidered. Thus, Requestor’s third request relating to future/potential action/inaction was summarily dismissed by the BAMC.

This leaves us with Namecheap’s fourth and final request in RfR 20-1:

The Requestor’s challenge to the ICANN Board’s and Staff’s lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request and is not applying the 2002 DNSO Policy Guidelines to the Change of Control Request: (i) was timely filed; (ii) sufficiently identifies the Bylaws provisions and established ICANN policies that ICANN org allegedly violated; and (iii) sufficiently identifies an alleged adverse effect of the challenged conduct.

March 18th, 2020 PARTIAL SUMMARY DISMISSAL BY THE BOARD
ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECONSIDERATION
REQUEST 20-1 located here:

<https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf>

As seen in the partial summary dismissal above, the fourth request was *not* summarily dismissed by the BAMC:

Accordingly, the BAMC finds it appropriate to proceed through the Reconsideration process only as to the portion of Request 20-1 challenging the ICANN Board’s and Staff’s alleged lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request and is allegedly not applying the 2002 DNSO Policy Guidelines to the Change of Control Request.

Under the relevant ICANN Bylaw:

4.2(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.

And, when the Ombudsman is not recusing himself, which I am not, here:

4.2(1)(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.

My substantive evaluation here is limited to a) an alleged lack of transparency by ICANN's Board and Staff insofar as, according to the Namecheap, ICANN has not disclosed "criteria" they may be using to evaluate the Change of Control request made by PIR under its recently renewed RA; and b) as a subset of the issue of transparency, whether ICANN's Board and/or Staff are "applying" 2002 DNSO Policy Guidelines (the "2002 DNSO Guidelines") relating to the ongoing approve/disapprove decision viz. a Change of Control ("CoC"). It is worth noting that what Namecheap styles in its request as the "2002 DNSO Policy Guidelines" actually refers to a report presented by the Names Council .ORG Divestiture Task Force to the DNSO Council, and not an actual "DNSO policy".

<https://archive.icann.org/en/meetings/accra/org-topic.htm>

As I have noted previously (in my Evaluation of RfR 19-2): "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."

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

Before proceeding to my evaluation, some substantive background seems pertinent.¹

The Renewed Registry Agreement (RA) (and Addenda) contains the "necessary"² Change of Control clause, which change PIR requested of ICANN, here:
<https://www.icann.org/resources/agreement/org-2019-06-30-en>

¹ My Substantive Evaluation of RfR 19-2 sets out on pp. 2-3 some facts and gives a brief background which may provide useful additional context for this evaluation.

[<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>] My Substantive Evaluation of Reconsideration Request 19-3 pertained to other terms in the renewal Registry Agreement for .org (I submitted both of these evaluations to the BAMC on September 7th, 2019; my Analysis of 19-3 is here: <https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf> .

²The current scheduled date by which ICANN will issue in writing the approval or disapproval of the Change of Control has been set as April 20th, 2020: this deadline is mutually agreed on by ICANN and the Public Interest Registry ("PIR").

PIR, the Public Interest Registry is Registrar for the historic and significant Top-Level Domain (TLDs) “.org” (“PIR” or the “Registry Operator”); it is currently a Pennsylvania non-profit corporation. ICANN and PIR bilaterally negotiated a renewal of its Agreement—a ten-year extension of the Agreement that allows it to operate .org (here): <https://www.icann.org/resources/agreement/org-2019-06-30-en>

Currently, .org is the third largest TLD, with upwards of 10 million registrants, a significant number of these are some form of non-profit entity (including ICANN).

The initial Registry Agreement for .org was due to expire on June 30th, 2019. The renewal was based on ICANN’s current base TLD Registry Agreement, and includes the standard RA Change of Control clause (7.5):

Change of Control; Assignment and Subcontracting. Except as set forth in this Section 7.5, neither party may assign any of its rights and obligations under this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld. For purposes of this Section 7.5, a direct or indirect change of control of Registry Operator or any subcontracting arrangement that relates to any Critical Function (as identified in Section 6 of Specification 10) for the TLD (a “Material Subcontracting Arrangement”) shall be deemed an assignment.

In November 2019, ISOC (the “Internet Society”), whose Board to a degree oversees PIR and under whose aegis PIR is the Registry Operator, and the parties PIR and Ethos Capital, publicly announced the deal it had struck for PIR to be converted to a for-profit LLC, and then to become wholly-owned by a Delaware company: in essence, PIR is being purchased by Ethos Capital through the vehicle of a company called Purpose Domains, LLC.³

In a joint Blog Post published on December 9th, 2019, ICANN’s President & CEO Göran Marby and ICANN’s Board Chair Maarten Botterman have set the tone of transparency around the CoC decision:

The proposed acquisition of Public Interest Registry (PIR) by Ethos Capital was announced on 13 November 2019 by the parties and the Internet Society (ISOC). This announcement has raised many questions. In light of this, we want to be transparent about where we are in the process.

<https://www.icann.org/news/blog/org-update>

ISOC is the non-profit that, back in 2002, was reassigned the right to take over operation of the .org TLD from Verisign, Inc. This grant was made following a Report on the .org domain first posted in February 2002 (“Report”); this Report was made by the Dot Org Task Force and adopted by the DNSO Names Council on the 17th of January 2002.

³ I found this piece written by a professor (Benjamin Leff, at the *American University Washington College of Law* helpful in terms of what the proposed transactions are surrounding PIR: <http://infojustice.org/archives/42044> .

<https://archive.icann.org/en/meetings/accra/org-topic.htm>

In its pursuit of the rights to become the Registry Operator for .org, ISOC (in August of 2002) stated it would make certain commitments, based on the Report and selection process ICANN's Board had set forth for reassignment of the Registry Operator for .org.

<https://archive.icann.org/en/tlds/org/applicant-comments/isoc-29aug02.htm>

In the "Internet Society Response to the Preliminary Staff Report on Evaluation of the Proposals for the Reassignment of the .org Registry" available immediately above, ISOC noted that it had been a not-for-profit entity for ten years, and that it would oversee the new non-profit PIR: ISOC stated that if awarded the .org Registry rights, it would "form a new not-for-profit company – the Public Interest Registry (PIR) to run the .ORG registry. PIR's board will be appointed by ISOC, but PIR will be a separate legal entity and isolated from ISOC financially and operationally. PIR (not ISOC) will enter into the registry management agreement with ICANN..." ICANN's Board, at its March 14th, 2002 meeting, made clear, however, that being a "non-profit" was not to be considered as a criteria or "preference" in deciding which entity should become the RA for .org:

Four points emerged as supported by the majority of the Board: (1) the crucial importance of demonstrated technical ability, without unduly restricting the pool of applicants; (2) there should be no restrictions on eligibility for registrations (there were some qualifications to Mr. Abril i Abril's views on this); (3) there should be no explicit mechanism in ICANN's relationship with the registry operator for the use of excess registry revenues for "good works" (although the operator could choose to spend excess funds as it saw fit); and (4) there should be no preference in favor or against not-for-profit applicants.

The resolutions were adopted by a 17-0-0 vote.

<https://www.icann.org/resources/board-material/minutes-2002-03-14-en>

On October 14th, 2002, the ICANN Board voted 11-1 (with three abstaining) to reassign the .org TLD Registry to ISOC and its newly formed, ISOC-controlled, Pennsylvania not-for-profit, PIR. The Board's announcement from that day is worth presenting in full:

ICANN Board Selects New .org Registry Operator

Marina del Rey, California USA (14 October 2002)– The Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors voted 11 to 1 (with three abstentions) today to select the proposal submitted by the Internet Society (ISOC) for a new registry operator of the .org top-level domain, to replace VeriSign.

ISOC has established a new organization, Public Interest Registry (PIR), which will be the registry operator, subject to agreements to be negotiated

between ICANN and PIR. PIR will subcontract with Afilias, the operator of .info – the new gTLD approved by ICANN last year – to provide operational support. ISOC is responsible for appointing the Board of Directors of PIR, which will otherwise operate as a not-for-profit entity separate from ISOC.

Subject to final agreements, PIR will assume operations of the .org registry from VeriSign on 1 January 2003. Stuart Lynn, president of ICANN, noted "ISOC/PIR presented ICANN with a very solid transition plan. Current registrants in .org should notice no interruption of service."

An extensive bid solicitation and evaluation process was launched last April. Eleven bids were received in response to a request for proposals. These bids were analyzed and evaluated by three evaluation teams that operated independently of each other. Lynn thanked all eleven bidders for the excellence of their proposals and for their "commitment and interest through a long and arduous process. It is a shame that we cannot select all eleven, but obviously that is impossible."

As part of the evaluation, two evaluation teams focused on technical issues: one from Gartner, Inc., an international consulting and research organization that specializes in information technologies, and the other a team mainly composed of CIOs of major universities that just participated in the early stages of the evaluation. Another team was provided by ICANN's Non Commercial Domain Name Holders Constituency that focused on the effectiveness of the proposals to address the particular needs of the .org registry. Additional input came from extensive comments by the public and the applicants themselves.

PIR now seeks ICANN's "permission" (written approval) for a Change of Control from its current non-profit status to the new for-profit entity, a Pennsylvania LLC (this change would also seem to be subject to approval by the State of Pennsylvania).⁴ PIR has duly and timely sought ICANN's written approval for the Change of Control.

⁴ Although what the State of Pennsylvania might do is *there* and not *here* with regards to this request, one possibility would be for ICANN to condition its decision on Pennsylvania's approval of the change in PIR's not-for-profit status.

Now, having set forth what I believe to be relevant background facts, my evaluation:

The current RfR seeks two things from ICANN's Board and Staff: transparency, including declarations of what criteria ICANN is using in making the decision to approve or withhold change of control to PIR; and second, in what I take to be a subset of transparency, assurance that ICANN is "applying" the 2002 DNSO Policy Guidelines in making its Change of Control ("CoC") decision. These kinds of decisions (relating to terms and conditions in Registry Agreements) have previously been delegated to ICANN Staff by the Board.⁵

Transparency is "baked in" to ICANN's Bylaws. Article 3 is titled "Transparency."

ARTICLE 3 TRANSPARENCY

Section 3.1. OPEN AND TRANSPARENT

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).

⁵ With regards to ICANN's decisions on terms in Registry Agreements I noted in my evaluation of RfR 19-2: "The choice to include unique terms (or any terms, unique or not) properly belongs to the CEO and Staff..."

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

The Board proposed a determination denying RfR 19-2 (there was not at the moment a BAMC quorum) in which it found: "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."

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

This finding was affirmed by a final determination (on the 21st of November, 2019) by the Board denying the reconsideration sought in RfR 19-2:

<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf>

As part of this evaluation, I investigated, focusing mainly on the question of ICANN's "transparency"⁶— in this case, my investigation did not require vast efforts, because there has been a fair bit of disclosure on the part of ICANN around PIR's CoC request.

The Board has, by all appearances, fully engaged on this issue. First, new Chairman of the Board Maarten Botterman (he became Chair in November of 2019) sent a letter to Gonzalo Camarillo, who is the Chair of ISOC's Board of Trustees (again, ISOC created PIR, and chooses its Board, giving it theoretically at least, some modicum of control over PIR). ICANN's Chairman sought from the Chair of the ISOC additional information about the pending PIR transaction, asking for "complete, truthful, clear facts available for those looking at the broader impacts of the proposed sale. It is in furtherance of our organizations' longstanding relationship that I reach out and seek additional information."

<https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf>

ICANN has now held an entire hours'-long (virtual) public forum on the issues, complete with a question and answer session: most of the answers to questions asked were provided off-line, because the entire six-day ICANN Community Forum, ICANN67, slated for Cancun, Mexico, was instead held virtually, in light of an ongoing coronavirus pandemic.

It was the first virtual public forum ICANN has ever held. The transcript of the public forum is here: <https://67.schedule.icann.org/meetings/1152519>.

John Jeffrey, ICANN's General Counsel (the "GC") and Board Secretary, led off the virtual public forum by laying out a timeline of events since 14 November 2019:

Although much of the activity that has occurred between PIR, ISOC, and ICANN is well documented and publicly available, it is worthwhile to provide a time line of those activities to date.

According to the .ORG Registry Agreement and our processes for reviewing such requests, ICANN org initially had 30 days from 14 November to request additional information about the proposed transaction or provide or withhold consent to PIR's proposed change of control. Because of the public announcements made by PIR, ISOC, and Ethos Capital, and the fact that they contain relevant facts that were not set forth in the request for approval that ICANN received on December 9th, ICANN org -- on December 9th, ICANN org sent PIR an additional information request to ensure that we had a full understanding of the proposed acquisition. PIR was asked to provide information relating to the continuity of the operations of .ORG, the nature of the proposed transaction, how the proposed new ownership structure would continue to

⁶ Indeed, I am not going to evaluate the question of whether and to what extent there is or could be any harm to Namecheap properly stated in this RfR—although I think it might be hard for them to convince the BAMC and the Board that there is any harm from any ICANN actions or inactions relating to the pending Change of Control ("CoC") approval sought by PIR.

adhere to the terms of our current agreement with PIR, how PIR intends to act consistently with its promises to serve the .ORG community with more than 10 million domain registrations.

On 20 December 2019, PIR submitted confidential responses to ICANN's request for additional information regarding the proposed acquisition which in normal circumstances typically would remain confidential. As a result of the questions and concerns being raised and directed to ISOC, PIR, and ICANN relating to the change, ICANN urged PIR, ISOC, and Ethos to act in an open and transparent manner throughout this process to ease those concerns.

We indicated our willingness to publish the request and related materials involved in ICANN's review, including the request for approval, the request for additional information, and PIR's responses.

In response to ICANN's request for transparency, on 10 January, PIR provided ICANN a revised and redacted version of its response to ICANN's additional information request.

That version is also available on icann.org. On 17 January, PIR and ICANN mutually agreed to an extension to 17 February from ICANN's time to review and respond to PIR's submissions.

This allowed us more time to look at it.

On 30 January, ICANN announced that the Office of Attorney General of the State of California had requested information from ICANN regarding the proposed transfer in order to, quote, analyze the impact to the nonprofit community, including ICANN, end quote.

ICANN is a California public benefit nonprofit corporation. Although a global organization, that's how we're structurally and legally organized.

We...we are subject to regulation of the California attorney general and are responsible for responding to requests such as this, which have the force and effect of a subpoena.

The attorney general of California is the responsible acting authority for supervising charitable organizations inside California.

ICANN is fully cooperating with the attorney general's request for information. We have begun the process of sharing the information requested and have had regular contact with the attorney general's office ever since.

In addition to this request for information, the California attorney general asked for more time, surpassing the agreed-to 17 February deadline. Accordingly, ICANN asked PIR to give additional time to 20 April 2020 to

allow both the California attorney general and ICANN more time to conclude their reviews.

PIR initially agreed to a further extension to 29 February 2020.

On the 21st of February, PIR agreed to a new deadline of 20 March. ICANN is working to that 20 March date but continues to seek further time from PIR to allow both our review and the California attorney general's review to complete.

ICANN has continued its diligence in its review of PIR's request to its proposed change of control.

On 19 February, ICANN provided an additional set of PIR and PIR has responded to those questions as of the 4th of March. Those materials are also now available on icann.org in a nearly unredacted fashion.

Recognizing that some questions might be better addressed to ISOC, on 13 February, the chair of the ICANN board sent a letter to the ISOC board chair setting out our questions to ISOC and asking for a response that can be shared publicly. ISOC's chair responded on the 24th of February. And those are also available on icann.org.

Throughout this inquiry, ICANN will continue to conduct thorough due diligence in its consideration of the proposed change of control and related conversion of PIR from a nonprofit to a for-profit.

<https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>

The Written Responses to the questions asked at the public forum (where they are properly directed to and can be answered by ICANN) are below; they're worth reading:

<https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>

The first answer set forth at the above link is particularly telling (I quote in part):

ICANN has asked PIR to provide additional information relating to the continuity of the operations of .ORG, the nature of the proposed transaction, how the proposed new ownership structure would continue to adhere to the terms of our current agreement with PIR, how PIR intends to act consistently with its promises to serve the .ORG community with more than 10 million domain registrations. Mr. Jeffrey stressed that ICANN continues to conduct thorough due diligence in its consideration of the proposed change of control and related conversion of PIR from a nonprofit to a for-profit entity. Please also see the letter dated 13 February 2020 from Jeffrey LeVee (ICANN's outside counsel) to Lauren Boglivi (PIR's outside counsel) which is published on the Correspondence page.

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>

ICANN has made numerous requests for information from PIR (and from the ISOC). Whatever information ICANN can make available it *has* made available. ICANN has published numerous letters back and forth between ICANN, and ICANN’s counsel, and PIR, and their counsel. I count upwards of 30 letters to and from ICANN published since this RfR was filed on January 8th, 2020.

For example, on the 19th of February 2020: ICANN’s GC has 5-pages’ worth of additional requests for information about the proposed PIR transaction (the requested CoC). Whatever information PIR (and ISOC) make available that *can* be posted and made available to the public, is then posted.⁷

There is a lot of transparency here. There is a lot of engagement by ICANN. I can see how, on January 8th, Namecheap didn’t see all this coming—but at this point, after numerous publications, fora, etc., there is no doubt in my mind that ICANN has been acting transparently—both the Board and the Staff.

This approval/ disapproval process and pending decision has garnered quite a bit of attention from all around the world, and particularly in the United States, where ICANN is headquartered (ICANN is a not-for-profit public benefit corporation registered in California.) California Attorney General Xavier Becerra gave notice to ICANN’s Board on January 23rd, 2020, that it is looking into this process to determine the “impact” this CoC would have on the non-profit community (presumably he means the impact on non-profits that use .org TLD domains, as well as ICANN itself), and has requested numerous documents, with which document requests ICANN is in the midst of complying.

<https://www.icann.org/en/system/files/correspondence/ca-ago-to-icann-board-23jan20-en.pdf>

Recently, several US Senators have weighed in, calling on ICANN to disapprove the Change of Control (the letter is to the ICANN leadership from Elizabeth Warren, Senator from Massachusetts, and is signed by her fellow Mass. Senator Ed Markey, as well as Senators Ron Wyden, Richard Blumenthal, and Representative Anna Eshoo).

<https://www.icann.org/en/system/files/correspondence/warren-et-al-to-marby-et-al-18mar20-en.pdf>

Despite the clamor, ICANN has gone about its mission of gathering relevant information, and then making that information as publicly available as possible. Again, I’m not a lawyer myself, but it seems to me that ICANN is required to make a contractual determination based on a reasonableness standard—as to whether or not it is *reasonable* to approve PIR’s requested Change of Control, which will then likely result in its becoming a for-profit that is ultimately acquired by Ethos Capital.⁸ This will be done by the Staff, and when they do make their decision, they will also present their

⁷ PIR at least, and perhaps ISOC as well, have redacted some lines, or refused permission for certain requested and provided information to be made public, including the identities of all the owners of Ethos Capital.

⁸ That, at least, seems to be the position of ICANN’s outside counsel:

<https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>

reasoning. ICANN want information because the mechanisms of ICANN require such for all new Registry Operators, and even, old Registry Operators with new owners.⁹

At the virtual public forum, the ICANN GC, described the present state of affairs regarding the pending Change of Control decision, and noted some of the relevant information ICANN is looking for from PIR/ISOC in making this major decision:

PIR was asked to provide information relating to the continuity of the operations of .ORG, the nature of the proposed transaction, how the proposed new ownership structure would continue to adhere to the terms of our current agreement with PIR, how PIR intends to act consistently with its promises to serve the .ORG community with more than 10 million domain registrations.

<https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>

ICANN by all appearances, and in almost every publicly available statement, appears to be taking account of public feedback, information provided by PIR and ISOC, and acting *as transparently as possible*. I don't see how ICANN could be more transparent.

As for the second part of the Request for Consideration 20-1, which tasks me with evaluating whether or not ICANN is "applying" the 2002 DNSO Guidelines, that inquiry seems pretty straightforward to me. Here is what ICANN has said in its written answers to the questions asked by the Community at the public forum on this issue:

ICANN has stated that it is looking at a variety of factors in its review of the proposed Change of Control and Entity Conversion of PIR. The 2002 criteria were based on relevant principles for the .org TLD including the differentiation of the .org TLD from TLDs intended for commercial purposes. These principles remain important today. Please see the letter dated 13 February 2020 from Jeffrey LeVee (ICANN's outside counsel) to Lauren Boglivi (PIR's outside counsel) which is published on the Correspondence page. [Answer to Question 4 which was asked by Elliot Harmon of the Electronic Frontier Foundation]

<https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>

The LeVee to Boglivi letter that is referred to (both above and below) is found here:

<https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>

⁹ There is a standard published by ICANN relating to technological and operational issues when there is a change of control. You can find it here: <https://www.icann.org/resources/change-of-control> Those resources do not seem so relevant to me with regard to this matter, which has more to do with ownership and structure and commitments that may or may not be made by PIR, rather than the nuts and bolts of actually running and maintaining the .org Registry.

And then again, in ICANN's written answer to Question 5 asked by Bill Woodcock:

The 2002 criteria were based on relevant principles for the .org TLD including the differentiation of the .org TLD from TLDs intended for commercial purposes. These principles remain important today. Please see the letter dated 13 February 2020 from Jeffrey LeVee (ICANN's outside counsel) to Lauren Boglivi (PIR's outside counsel) which is published on the Correspondence page.

<https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>

In its own words, as transparent as can be, ICANN has answered that the "principles set forth" in what it calls the "2002 criteria" (which are based on the 2002 DNSO Guidelines) are important. Thus, they are being considered. Whether they are "applying" said "important" principles to the decision on PIR's requested CoC is not clear. That said, nowhere is it required that ICANN "apply" such principles, or that the application of such principles is paramount, or dispositive. The criteria/principles from 2002 seem to be *a* factor, one among many, being *considered* by ICANN as it makes the CoC decision, under the reasonableness standard called for by its Registry Agreement with PIR.

ICANN Chair Maarten Botterman's recent letter (27 March 2020) to Moez Chakchouk, The Assistant Director-General for Communication and Information United Nations Educational, Scientific and Cultural Organization, underscores these points about transparency and the various factors and information ICANN is utilizing and considering:

Since learning of this proposed transaction, ICANN has consistently and repeatedly urged ISOC, PIR, and Ethos Capital to act in an open and transparent manner throughout this process. ICANN has published several announcements and blogs to update the community, along with the related correspondence. As you noticed, ICANN raised several questions to ISOC and PIR. We expect that these responses will provide a better understanding of the proposed structure, which will help us to evaluate the request, and bring additional transparency to questions raised.

...

You may also be aware that Ethos Capital issued a press release on 21 February 2020, announcing its proposal to the .ORG community to add contractual commitments related to pricing and accountability in the .ORG Registry Agreement. We encourage those interested to communicate their views about the registry operations and/or policies directly to PIR, Ethos Capital, and/or ISOC.

<https://www.icann.org/en/system/files/correspondence/botterman-to-chakchouk-27mar20-en.pdf>

What Requestor set forth and requests in Request for Reconsideration 20-1 merits this:

My recommendation to the BAMC is that ICANN Staff and Board should (as they appear to be) *continue* to be transparent about the information they are using in their process of deciding whether to approve the Change of Control requested by PIR (with or without amendment to PIR's RA). ICANN has urged transparency by PIR, ISOC, and Ethos Capital, and it appears to be nothing less than transparent itself. Additionally, ICANN states it is considering the 2002 DNSO Guidelines (the important "principles" and "criteria" therein) as part of its decision whether or not to approve a Change of Control sought by PIR under its extended RA; there's no reason for ICANN to do more than consider these *important principles*, and by every indication, they have been and at present *are doing* just that.

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 20-1
21 April 2020**

The Requestor, Namecheap, Inc., seeks reconsideration of the ICANN Board’s and Staff’s: (a) alleged lack of transparency insofar as the Requestor alleges that ICANN organization has not disclosed the criteria that it will use to evaluate Public Interest Registry’s (PIR) request for indirect change of control of PIR (Change of Control Request); and (b) alleged failure to apply established policies consistently insofar as the Requestor alleges that ICANN org is not applying recommendations from a 2002 Report of the Domain Name Supporting Organization Dot ORG Task Force (2002 DNSO Recommendations) to the Change of Control Request. The Requestor claims that the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations contradict: (1) ICANN org’s Commitment to “operate . . . through open and transparent processes”;¹ (2) ICANN org’s Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment”;² and (3) the 2002 DNSO Recommendations.

I. Brief Summary.

PIR is the registry operator for the .ORG top-level domain (TLD).³ On 13 November 2019, PIR, its parent entity the Internet Society (ISOC), and Ethos Capital publicly announced

¹ ICANN Bylaws, Art. 1, § 1.2(a); Request 20-1, § 8, at Pgs. 7-8.

² ICANN Bylaws, Art. 1, § 1.2(a)(v); Request 20-1, § 8 at Pgs. 7-8.

³ <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

Ethos Capital’s proposed acquisition of PIR.⁴ PIR has asked ICANN org for approval of the indirect change of control of the registry operator (Change of Control Request).⁵

The Requestor asserts in Request 20-1 that the ICANN Board and Staff are not disclosing the criteria they are using to evaluate the Change of Control Request and are not applying the 2002 DNSO Recommendations to its evaluation of the Change of Control Request.⁶

The Ombudsman has evaluated these claims, and concluded that ICANN org has been transparent about the information it is considering in its evaluation of the Change of Control Request, and ICANN org is not required to “apply” the 2002 DNSO Recommendations to the Change of Control Request.⁷

Based on its extensive review of all relevant materials, the BAMC concludes that the ICANN Board and Staff have not violated the ICANN org Commitments on which the Requestor relies or the 2002 DNSO Recommendations. First, the BAMC agrees with the Ombudsman that ICANN org acted “as transparently as possible” in its evaluation of the Change of Control Request, including by disclosing its process for evaluation and by posting voluminous correspondence and materials to icann.org for public review. Second, ICANN did not adopt the 2002 DNSO Recommendations⁸; rather, ICANN org considered the recommendations and then defined its own principles and criteria for evaluating and selecting from among the proposals received in 2002 for operating .ORG. Moreover, although ICANN org is not required to make the same assessment now, in 2020, ICANN org has explained that it will consider the principles

⁴ .ORG Update, <https://www.icann.org/news/blog/org-update>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

⁵ *Id.*

⁶ Request 20-1, § 5, at Pg. 4.

⁷ Evaluation by the ICANN Ombudsman of Reconsideration Request 20-1 (“Ombudsman Evaluation”), at Pgs. 13-14, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

⁸ The DNSO was tasked with providing *recommendations* to the ICANN Board about how to proceed with selecting a new registry operator of .ORG; those recommendations were not, and are not, an established policy or procedure.

and criteria that ICANN org set forth in 2002, along with all relevant information, when evaluating the Change of Control Request.

II. Facts.

A. The 2002 .ORG Reassignment.

The original registry operator of .ORG was Verisign, Inc., which also was the registry operator for .COM and .NET; and the registry agreement between ICANN and Verisign provided that Verisign’s operation of .ORG would end as of 31 December 2002.⁹ Accordingly, in June 2001, the ICANN Board tasked ICANN’s Domain Name Supporting Organization (DNSO)¹⁰ with developing a recommendation to the Board regarding a new registry operator for .ORG.¹¹ The DNSO created a task force (Dot ORG Task Force) to “prepare a report” and “make[] several recommendations” to the ICANN Board regarding selection of a new .ORG registry operator.¹² After reviewing the report, the ICANN Board was to “consider how to proceed with selecting an entity to succeed VeriSign in operating the .org TLD” at its regularly-convened meeting in March 2002.¹³

The Dot ORG Task Force issued its report and the DNSO adopted it in January 2002, making a number of recommendations to the ICANN Board.¹⁴ The Board considered the

⁹ 2001 .ORG RA, Art. 5, § 5.1, <https://www.icann.org/resources/unthemed-pages/registry-agmt-org-2001-05-25-en>; see also ICANN Accra Meeting Topic Reassignment of the .ORG TLD, <https://archive.icann.org/en/meetings/accra/org-topic htm>.

¹⁰ The DNSO is the precursor to the Generic Names Supporting Organization (GNSO).

¹¹ ICANN Board Minutes, 14 March 2002, <https://www.icann.org/resources/board-material/minutes-2001-06-04-en>.

¹² ICANN Accra Meeting Topic Reassignment of the .ORG TLD, <https://archive.icann.org/en/meetings/accra/org-topic htm>.

¹³ *Id.*

¹⁴ See generally ICANN Accra Meeting Topic Reassignment of the .ORG TLD, Annex E, Dot Org Task Force report to the Names Council, <https://archive.icann.org/en/meetings/accra/org-topic htm>.

DNSO's recommendations, adopting only some and rejecting others.¹⁵ Notably, the Board explicitly did not adopt the recommendation that .ORG be operated by a non-profit entity.¹⁶

On 20 May 2002, ICANN org posted the "Application Instructions for the .ORG [TLD]"¹⁷ and ICANN's "Criteria for Assessing Proposals [to operated .ORG]," which "discusses the criteria that ICANN intends to consider in evaluating and selecting from among the proposals that are received" to operate .ORG (ICANN's 2002 Assessment Criteria).¹⁸ ICANN org made clear that ICANN's 2002 Assessment Criteria was not an exhaustive list of things that it would consider: "The general criteria include those listed below. ICANN expects that additional considerations in the evaluation and selection of proposals may be suggested by analysis and comparison of the proposals received."¹⁹

Notably, ICANN's 2002 Assessment Criteria were materially different from the DNSO's recommendations. For example, applicants to operate .ORG were not limited to non-profit entities (contrary to the DNSO's recommendation);²⁰ and ICANN org did not include the DNSO's recommended language that .ORG "should be operated for the benefit of the worldwide community . . . engaged in noncommercial communication via the Internet."²¹ Rather, ICANN noted that applicants' "policies and practices should strive to be responsive to and supportive of the noncommercial Internet user community."²² Furthermore, ICANN's 2002 Assessment

¹⁵ See ICANN Board Minutes, 14 March 2002, <https://www.icann.org/resources/board-material/minutes-2001-06-04-en>.

¹⁶ *Id.*; see also ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm> ("[T]he nature of the organization that undertakes to run dot ORG does not have to be a not for profit or for profit.").

¹⁷ Application Instructions for the .ORG Top-Level Domain, 20 May 2002, <https://archive.icann.org/en/tlds/org/app-instructions.htm>.

¹⁸ Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, 20 May 2002 (2002 Assessment Criteria) <https://archive.icann.org/en/tlds/org/criteria.htm>.

¹⁹ *Id.*

²⁰ 2002 Assessment Criteria.

²¹ 2002 DNSO Recommendations.

²² 2002 Assessment Criteria.

Criteria were not ICANN policy but rather, simply provided operational guidance to support ICANN in selecting a new registry operator for .ORG.

Through the request for proposals process, the ICANN Board selected PIR to operate .ORG, and ICANN org executed a registry agreement with PIR in December 2002.²³

B. The 2019 .ORG RA.

PIR currently operates .ORG pursuant to the .ORG Registry Agreement (.ORG RA), which has been renewed periodically since 2002.²⁴ Most recently, the .ORG RA was set to expire on 30 June 2019. Following extensive consultation with the ICANN Board and consideration of public comments on a draft of the 2019 .ORG RA, and with the Board's support, ICANN org announced the execution of the 2019 .ORG RA on 30 June 2019.²⁵

C. The Change of Control Request.

On 13 November 2019, PIR, ISOC, and Ethos Capital publicly announced Ethos Capital's proposed acquisition of PIR.²⁶ Under the 2019 .ORG RA, PIR must obtain ICANN org's prior approval before there can be a direct or indirect change of control of the registry operator.²⁷ Accordingly, on 14 November 2019, PIR sought the requisite approval from ICANN org via the Change of Control Request.²⁸ Typically, requests to ICANN org for approval of a

²³ Special Meeting of the Board Minutes, 14 October 2002, <https://www.icann.org/resources/board-material/minutes-2002-10-14-en>; 2002 .ORG Registry Agreement, <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

²⁴ Proposed Renewal of .ORG Registry Agreement, <https://www.icann.org/public-comments/org-renewal-2019-03-18-en>.

²⁵ Staff Report of Public Comment Proceeding, <https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

²⁶ .ORG Update, <https://www.icann.org/news/blog/org-update>; 2019 .ORG RA, <https://www.icann.org/resources/agreement/org-2019-06-30-en>.

²⁷ *Id.*

²⁸ *Id.*

change of control are confidential.²⁹ In this case, ICANN org pressed PIR for permission to publish the Change of Control Request;³⁰ PIR initially declined.³¹

1. ICANN's Requests for Information Relating to the Change of Control Request.

Under the 2019 .ORG RA and ICANN processes for reviewing change of control requests, ICANN org may request additional information, including information about the party acquiring control as well as its ultimate parent entity.³² On 9 December 2019, ICANN org issued a Request for Additional Information regarding the Change of Control Request (Information Request)³³ and, separately, asked PIR and ISOC to: (1) reconsider publishing the Change of Control Request; and (2) consider publishing the Information Request and PIR's response to the Information Request.³⁴ On 20 December 2019, PIR submitted confidential responses to the Information Request.³⁵

On 10 January 2020, ICANN org received a revised version of PIR's responses to the Information Request (Revised Submission).³⁶ With the agreement of PIR, ISOC, and Ethos Capital, ICANN org published the Revised Submission, along with the Change of Control Request and the Information Request.³⁷ ICANN org and PIR agreed to extend ICANN org's deadline to provide or withhold consent to the Change of Control Request to 17 February 2020.³⁸

²⁹ *See id.*

³⁰ *Id.*

³¹ *See* 9 December 2019 letter from J. Jeffrey to A. Sullivan and J. Nevett (9 December 2019 Letter) (asking PIR to reconsider ICANN org's request to publish the Change of Control Request), <https://www.icann.org/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf>.

³² 2019 .ORG RA, Art. 7, § 7.5; Registry Transition Processes, <https://www.icann.org/resources/pages/transition-processes-2013-04-22-en>.

³³ .ORG Update, <https://www.icann.org/news/blog/org-update>.

³⁴ 9 December 2019 Letter.

³⁵ Update on Change of Control Request of PIR by Ethos Capital, <https://www.icann.org/news/announcement-2020-01-11-en>.

³⁶ *See id.*

³⁷ <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

³⁸ 17 January 2020 letter from C. Namazi to J. Nevett, <https://www.icann.org/en/system/files/files/icann-to-pir17jan20-en.pdf>.

On 23 January 2020, ICANN org received a letter from the Office of the Attorney General of the State of California (CA-AGO) seeking information regarding the proposed change in control of PIR “in order for Attorney General to analyze the impact to the nonprofit community, including to ICANN.”³⁹ ICANN is cooperating fully with the Attorney General’s investigation, and has thus far provided numerous links to publicly available information as well as responsive confidential documents.⁴⁰ ICANN org received a second letter from the CA-AGO on 15 April 2020.⁴¹

In light of the Attorney General’s investigation, as well as ICANN’s evaluation of the Change of Control Request, ICANN sought further extensions from PIR regarding the deadline to respond to the request. PIR initially agreed to an extension to 29 February 2020,⁴² later agreed to a further extension to 20 March 2020,⁴³ then to 20 April 2020,⁴⁴ and ultimately has granted ICANN an extension until 4 May 2020.⁴⁵

On 19 February 2020, ICANN org requested additional information and submitted additional questions to PIR related to the Revised Submission (Follow Up Request).⁴⁶ PIR responded to the Follow Up Request on 4 March 2020.⁴⁷

³⁹ 23 January 2020 letter from CA-AGO to ICANN Board,

<https://www.icann.org/en/system/files/correspondence/ca-ago-to-icann-board-23jan20-en.pdf>.

⁴⁰ 31 January 2020 letter from J. Rabkin to CA-AGO, <https://www.icann.org/en/system/files/correspondence/rabkin-to-barrientos-31jan20-en.pdf>.

⁴¹ 15 April 2020 letter from CA-AGO to ICANN Org & Board, <https://www.icann.org/news/announcement-2020-04-16-en>.

⁴² 14 February 2020 letter from J. Jeffrey to J. Nevett,

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-14feb20-en.pdf>.

⁴³ 21 February 2020 letter from J. Jeffrey to J. Nevett,

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-21feb20-en.pdf>.

⁴⁴ 17 March 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-17mar20-en.pdf>.

⁴⁵ 16 April 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-16apr20-en.pdf>.

⁴⁶ 19 February 2020 letter from J. Jeffrey to J. Nevett,

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>.

⁴⁷ 4 March 2020 PIR submission, <https://www.icann.org/en/system/files/correspondence/cimboic-to-jeffrey-04mar20-en.pdf>.

On 3 April 2020, ICANN org posed two sets of additional questions to PIR (Second Follow Up Request): one in follow-up to prior ICANN inquiries, “to further understand the proposed transaction and its potential effect on PIR and the .ORG [TLD]”; and a second set related to updated Public Interest Commitments that PIR proposed adding to the .ORG RA if ICANN org approves the Change of Control Request (Revised PICs).⁴⁸

In furtherance of ICANN’s review and evaluation of the Change of Control Request, the Board also submitted a letter to ISOC’s Board of Trustees on 13 February 2020, containing 18 questions concerning the proposed change of control;⁴⁹ ISOC responded on 24 February 2020.⁵⁰

2. ICANN’s Transparency Regarding the Change of Control Request.

Throughout this process, ICANN org has made every effort to be transparent in its evaluation of the Change of Control Request. While change of control requests are typically confidential, in this instance, ICANN org urged PIR to permit publication of the related materials and, ultimately, ICANN org has published not only the Change of Control Request but also the requests for further information as well as PIR’s responses. These publications, in conjunction with various correspondence, blogs, transcripts and responses to community questions that have been posted, clearly demonstrate what ICANN is considering in its evaluation of the Change of Control Request.

For example, on the day it issued the Information Request, ICANN org published an update on the .ORG Change of Control Request (.ORG Update),⁵¹ disclosing the status of

⁴⁸ PIR Transaction and Proposed Public Interest Commitments Update, ICANN Blog, 8 April 2020 (“8 April .ORG Update”), <https://www.icann.org/news/blog/pir-transaction-and-proposed-public-interest-commitments-update>; see also 3 April 2020 letter from J. Jeffrey to J. Nevett, with attachments, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-03apr20-en.pdf>.

⁴⁹ 13 February 2020 letter from M. Botterman to G. Camarillo, <https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf>.

⁵⁰ 24 February 2020 letter from G. Camarillo to M. Botterman, <https://www.icann.org/en/system/files/correspondence/camarillo-to-botterman-24feb20-en.pdf>.

⁵¹ .ORG Update, <https://www.icann.org/news/blog/org-update>.

ICANN org’s evaluation of the Change of Control Request and explaining that: (1) ICANN org would “thoroughly evaluate” PIR’s responses to the Information Request; (2) the .ORG RA “requires a standard of reasonableness for ICANN’s determination” on the Change of Control Request; and (3) ICANN Org would “thoughtfully and thoroughly evaluate the proposed acquisition to ensure that the .ORG registry remains secure, reliable, and stable.”⁵²

ICANN org posted another update on 8 April 2020.⁵³ ICANN org explained that it was posting the Revised PICs and that it intended to “post PIR’s responses to [the Second Follow Up Request] when they are available, subject to any appropriate requests for confidentiality made by PIR.”⁵⁴ ICANN org also explained that its “follow-up questions to PIR seek to ensure that ICANN has a clear understanding of each commitment within the PICs, such that it could be enforced should the need arise.”⁵⁵ ICANN org invited public feedback on the Revised PICs and noted that because of the “fast-approaching deadline for ICANN to make a decision to approve or withhold consent . . . , the typical 30-day public notice period has been condensed to seven days.”⁵⁶

Additionally, ICANN org’s 13 February 2020 letter to PIR⁵⁷ explains that the “parties’ contracts authorize ICANN to evaluate the reasonableness of the proposed change of control under the totality of circumstances, including the impact on the public interest and the interest of the .ORG community.”⁵⁸ The letter further notes that the “plain terms” of the 2019 .ORG RA

⁵² *Id.*

⁵³ 8 April .ORG Update.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 13 February 2020 letter from J. LeVee to L. Boglivi, <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.

⁵⁸ *Id.* at Pgs. 1-2.

“do[] nothing to confine ICANN’s consideration to any arbitrary subset of criteria.”⁵⁹ ICANN org also explained that, when PIR was selected as the registry operator for .ORG in 2002:

- “ICANN made clear that ‘a key objective’ was ‘differentiating the .org TLD from TLDs intended for commercial purposes’”;⁶⁰
- “[T]he .ORG operator was expected to ‘promote the registry’s operation in a manner that is responsive to the needs, concerns, and views of the noncommercial Internet user community’”;⁶¹
- As a result of ICANN org’s clear directive, PIR committed, in its application, to “institute mechanisms for promoting the registry’s operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community”;⁶² and
- ICANN org and PIR have “long recognized the unique public-interest-focused nature of the .ORG domain, and [its] contractual role in evaluating proposed changes of control relating to .ORG effectuates those longstanding principles.”⁶³

And, in conclusion, ICANN org indicated that it “is reviewing PIR’s request for change of control in light of all of the relevant circumstances.”

ICANN has also engaged with the community regarding this matter, including through publication of the Revised PICs (as noted above) as well as designated time during ICANN67. The first Public Forum of ICANN67 focused entirely on the PIR Change of Control Request process.⁶⁴ The session provided “an opportunity for the ICANN community to ensure that it understands the scope of ICANN’s role in this matter, and to provide feedback.”⁶⁵ At the beginning of the session, held on 9 March 2020, ICANN’s General Counsel and Secretary explained that:

⁵⁹ *Id.* at Pg. 2.

⁶⁰ *Id.* at Pg. 2, quoting 2002 Assessment Criteria.

⁶¹ *Id.* at Pgs. 2-3, quoting 2002 Assessment Criteria.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Transcript, 9 March 2020, at Pg. 10, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

⁶⁵ <https://www.icann.org/news/announcement-2020-03-04-en>.

ICANN's role [with regard to the proposed change of control of PIR] comes from ICANN's authority under the .ORG Registry Agreement with PIR to manage the .ORG registry. Under the terms of the .ORG Registry Agreement, ICANN may only evaluate whether it will permit the change of control over the party to ICANN's agreement, PIR, from ISOC to Ethos.

Information ICANN considers includes the following: Information about the party acquiring control, so information about Ethos; its ultimate parent entity, who controls Ethos, what is the relationship that it has relating to its controls; whether it meets ICANN's adopted registry operator criteria; the financial resources and wherewithal to manage the registry or to operate it; and the operational and technical capabilities.⁶⁶

After the meeting, ICANN org posted a transcript of the meeting and provided additional responses to questions asked at the meeting.⁶⁷

As of the date of this Recommendation, ICANN org has not provided or declined approval of the Change of Control Request.

D. Independent Review Process Proceeding.

On 25 February 2020, Namecheap (the Requestor here in Reconsideration Request 20-1) initiated a request for Independent Review Process (IRP).⁶⁸ The IRP challenges ICANN's decision in June 2019 not to include a price control provision in the most recent version of the registry agreements for .ORG, .INFO, and .BIZ, and challenges ICANN's consideration of the Change of Control Request.⁶⁹ In the IRP proceeding, Namecheap sought emergency relief and asked the Emergency Panelist to, among other things, "stay all actions that further the change of control of the .org registry operator to a for-profit entity during the pendency of the IRP."⁷⁰

⁶⁶ Transcript, 9 March 2020, at Pg. 10,

<https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

⁶⁷ *Id.*; 11 March 2020 Responses to Questions from ICANN67 Public Forum 1,

<https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

⁶⁸ Request for IRP, <https://www.icann.org/en/system/files/files/irp-namecheap-request-26feb20-en.pdf>.

⁶⁹ *Id.* at Pg. 1.

⁷⁰ Procedural Order No. 1 on Request for Emergency Relief, 3 March 2020, at Pg. 3,

<https://www.icann.org/en/system/files/files/irp-namecheap-emergency-relief-03mar20-en.pdf>. In its responsive

On 20 March 2020, the Emergency Panelist denied Namecheap’s request for emergency relief.⁷¹ The Panelist concluded, among other things, that “ICANN has demonstrated that it is engaging in due diligence to evaluate the change of control request,” and that Namecheap had not identified any “express policy requiring that the .ORG Registr[y Operator] be controlled by and operated as a non-profit corporation.”⁷²

E. Request 20-1.

On 8 January 2020, the Requestor submitted Request 20-1 seeking, among other things, reconsideration of the ICANN Board’s and Staff’s: (i) alleged lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the Change of Control Request; and (ii) alleged failure to apply established policies consistently insofar as the Requestor alleges that ICANN org is not applying the 2002 DNSO Recommendations to the Change of Control Request.⁷³

On 18 March 2020, the BAMC reviewed Request 20-1 “to determine if it is sufficiently stated.”⁷⁴ And except for the remaining claim, as set forth above, the BAMC determined that the

brief, ICANN org confirmed, among other things, that “irrespective of whether Ethos Capital becomes the owner of PIR, the 2019 .ORG [RA] will remain in effect. . . . [S]hould Ethos capital become the owner of PIR, PIR will continue to be obligated to comply with all of the covenants in the 2019 .ORG [RA].” ICANN’s Opposition to Namecheap’s Request for Emergency Arbitrator and Interim Measures of Protection, at ¶ 29,

<https://www.icann.org/en/system/files/files/irp-namecheap-icann-opp-interim-measures-protection-11mar20-en.pdf>.
⁷¹ <https://www.icann.org/en/system/files/files/irp-namecheap-emergency-relief-decision-20mar20-en.pdf>.

⁷² *Id.* at ¶¶ 121-22.

⁷³ The Requestor also submitted a letter on 14 February 2020 asking ICANN to provide documents (pursuant to the DIDP) and to deny the Change of Control Request unless certain conditions were met. (See 14 February 2020 letter from F. Petillion to ICANN, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-petillion-Janssen-to-icann-board-redacted-14feb20-en.pdf>.) ICANN org addressed the documentary requests pursuant to its DIDP. (See <https://www.icann.org/en/system/files/files/didp-20200214-1-petillion-response-15mar20-en.pdf>.) The remaining portion of the letter is not part of Request 20-1; moreover it does not identify any actions or inactions by ICANN’s Board or Staff that contravened ICANN’s Bylaws, established policies, or procedures.

⁷⁴ BAMC Partial Summary Dismissal of Request 20-1, at Pg. 6, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf>.

other three claims in Request 20-1 did not meet the requirements for bringing a reconsideration request and, on that basis, summarily dismissed those claims.⁷⁵

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted the sufficiently stated portion of Request 20-1 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.⁷⁶ The Ombudsman concluded that: (1) ICANN org “has been nothing less than transparent” “about the information [it] is using in [its] process of deciding whether to approve the Change of Control requested by PIR”; (2) ICANN org is not “required” to “apply” the 2002 DNSO Recommendations, “or that the application of such principles is paramount, or dispositive”; and (3) even so, ICANN has stated that it is considering the “2002 criteria” and it need not “do more than consider” them.⁷⁷

III. Issues Presented.

The issue as presented by the Requestor is as follows:

1. Whether the ICANN Board’s and Staff’s alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations to the Change of Control Request contradict:
 - a. ICANN org’s Commitment to “operate . . . through open and transparent processes.”⁷⁸

⁷⁵ The Requestor brought three other challenges in Request 20-1; the BAMC summarily dismissed those challenges because each was either untimely or not sufficiently stated. *Id.* at Pgs. 6-7.

⁷⁶ Ombudsman Action Regarding Reconsideration Request 20-1, 24 March 2020, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-ombudsman-action-24mar20-en.pdf>.

⁷⁷ Ombudsman Evaluation, at Pgs. 13-14, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

⁷⁸ ICANN Bylaws, Art. 1, § 1.2(a); Request 20-1, § 8, at Pgs. 7-8.

- b. ICANN org’s Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”⁷⁹
- c. The 2002 DNSO Recommendations.

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:

- (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.”⁸⁰

Request 20-1 seeks reconsideration of ICANN Staff and Board action on the grounds that the action taken contradicted ICANN’s Commitments and the 2002 DNSO Recommendations.

The BAMC has reviewed the Request and now provides a recommendation to the Board.⁸¹

Denial of a Request for Reconsideration of ICANN Staff or Board action 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.⁸²

⁷⁹ ICANN Bylaws, Art. 1, § 1.2(a)(v); Request 20-1, § 8 at Pgs. 7-8.

⁸⁰ ICANN Bylaws, 28 November 2019, Art. 4 § 4.2(a) and (c).

⁸¹ *See id.* at § 4.2(e).

⁸² *Id.*

V. Analysis and Rationale.

The Requestor asserts that ICANN org has not disclosed “the criteria ICANN intends to use for evaluation [of the Change of Control Request],” and has not confirmed that it is following the recommendations in the 2002 DNSO Recommendations.⁸³ The Requestor believes that this contravenes: (1) ICANN org’s Commitment to operate in an open and transparent manner (because it has not disclosed the criteria that ICANN org will use to evaluate the Change of Control Request); (2) ICANN org’s Commitment to apply documented policies consistently (because it has not affirmed that it will apply the 2002 DNSO Recommendations); and (3) the 2002 DNSO Recommendations.⁸⁴

A. ICANN org’s Evaluation of the Change of Control Request Has Been Open and Transparent.

The Requestor asserts that ICANN org has violated its Commitment to transparency by not disclosing “the criteria ICANN intends to use for evaluation” of the Change of Control Request.⁸⁵ However, the Requestor has not demonstrated that ICANN org’s transparency Commitment mandates that ICANN org create or disclose a list of each criteria it will consider in evaluating the Change of Control Request. Indeed, no policy or procedure requires ICANN org to undertake such efforts in the context of a change of control request.

To the contrary, and as the Ombudsman noted in his evaluation, the standard for evaluating the Change of Control Request is set forth in the 2019 .ORG RA: ICANN’s “approval will not be unreasonably withheld.”⁸⁶ ICANN org has confirmed that it is applying

⁸³ Request 20-1, § 8, at Pg. 7.

⁸⁴ *Id.* at Pgs. 7-8.

⁸⁵ *Id.* at Pg. 7.

⁸⁶ 2019 .ORG RA, § 7.5; *see also* Ombudsman Evaluation, at Pg. 11, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

this standard.⁸⁷ To support its evaluation of the reasonableness of the transaction, ICANN org has taken extensive steps to seek additional information from PIR, ISOC, and the public.

ICANN org has published the following materials, which provide insight into ICANN org’s considerations concerning the Change of Control Request:

- The Information Request,⁸⁸ Follow Up Request,⁸⁹ and Second Follow Up Request;⁹⁰
 - The Information Request asked PIR “to provide information relating to the continuity of the operations of .ORG, the nature of the proposed transaction, how the proposed new ownership structure would continue to adhere to the terms of our current agreement with PIR, how PIR intends to act consistently with its promises to serve the .ORG community with more than 10 million domain registrations.”⁹¹
 - The Follow Up Request asked PIR about, among other things, PIR’s “belief that Ethos Capital will be a responsible owner and fully intends to support the public interest and the .ORG community,” and how PIR and Ethos Capital would continue to protect the .ORG community.⁹²
 - The Second Follow Up Request asked additional follow up questions concerning the effect of the indirect change of control on .ORG and the Revised PICs.⁹³
- ICANN org’s 13 February 2020 letter to PIR concerning ICANN’s evaluation of the Change of Control Request,⁹⁴ which indicates that ICANN org is considering:

⁸⁷ 13 February 2020 letter from J. LeVee to L. Boglivi, <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.

⁸⁸ Information Request, at Pgs. 12-21, <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

⁸⁹ 19 February 2020 letter from J. Jeffrey to J. Nevett, with attachment, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>.

⁹⁰ 3 April 2020 letter from J. Jeffrey to J. Nevett, with attachments, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-03apr20-en.pdf>.

⁹¹ Transcript, 9 March 2020, at Pg. 11, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

⁹² 19 February 2020 letter from J. Jeffrey to J. Nevett, with attachment, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>.

⁹³ See 3 April 2020 letter from J. Jeffrey to J. Nevett, with attachments, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-03apr20-en.pdf>.

⁹⁴ 13 February 2020 letter from J. LeVee to L. Boglivi, <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.

- “the reasonableness of the proposed change of control under the totality of circumstances, including the impact on the public interest and the interest of the .ORG community”;⁹⁵
- Whether the .ORG registry operator would continue to “promote the registry’s operation in a manner that is responsive to the needs, concerns, and views of the noncommercial Internet user community”;⁹⁶
- PIR’s commitments to “institute mechanisms for promoting the registry’s operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community”;⁹⁷ and
- The “unique public-interest-focused nature of the .ORG domain.”⁹⁸
- The ICANN Board’s 13 February 2020 letter to Gonzalo Camarillo, Chair of the ISOC Board of Trustees, containing 18 questions to ISOC concerning the Change of Control Request;⁹⁹
- ICANN org’s statements during and after the Public Forum at ICANN67, including that:¹⁰⁰
 - ICANN General Counsel and Secretary John Jeffrey explained the “process that the ICANN Board and the organization is following regarding ICANN’s Registry Agreements with PIR”;¹⁰¹
 - ICANN org’s publicly-posted correspondence with PIR and ISOC “identified relevant information that it is considering” in its evaluation of the Change of Control Request”;¹⁰²
 - The 2002 Assessment Criteria were “based on relevant principles for the .org TLD” that “remain relevant today”;¹⁰³ and
 - “ICANN org and [the] Board have consistently evidenced their consideration of how [ISOC’s] 2002 commitments might impact the Change of Control request. For example, ICANN’s external counsel discussed the 2002 [Assessment C]riteria in a letter to PIR, ICANN org

⁹⁵ *Id.* at Pgs. 1-2.

⁹⁶ *Id.* at Pgs. 2-3 (internal alterations and citations omitted).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 13 February 2020 letter from M. Botterman to G. Camarillo,

<https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf>.

¹⁰⁰ Transcript, 9 March 2020, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>; 11 March 2020 Responses to Questions from ICANN67 Public Forum 1,

<https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

¹⁰¹ Transcript, 9 March 2020, at Pg. 8, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

¹⁰² 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, responses to Questions 15, 16 <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

¹⁰³ *Id.*, responses to Questions 4, 5.

asked PIR additional questions relating to the 2002 commitments, and ICANN’s Chair of the Board asked the ISOC Board questions about the 2002 [Assessment C]riteria. ICANN has long recognized the unique public interest nature of the .ORG domain and the longstanding principles that PIR has upheld in the operation of the .ORG Registry.”¹⁰⁴

- The Board’s 8 April 2020 confirmation to the Governmental Advisory Committee that the Board “will apply a standard of reasonableness in making its determination on” the Change of Control Request, and that the Board would “continue to consider the public interest in all its decision-making using the totality of the information received, including those comments received during the ICANN67 Public Forum.”¹⁰⁵
- ICANN org’s other correspondence and announcements, posted on its website, concerning the Change of Control Request.¹⁰⁶

These documents—particularly the transcript of the ICANN67 Public Forum and written responses to questions from that forum—provide extensive information about ICANN org’s evaluation of the Change of Control Request. Indeed, ICANN org explained that:

Information ICANN considers [in its evaluation of the Change of Control Request] includes the following: Information about the party acquiring control, so information about Ethos; its ultimate parent entity, who controls Ethos, what is the relationship that it has relating to its controls; whether it meets ICANN’s adopted registry operator criteria; the financial resources and wherewithal to manage the registry or to operate it; and the operational and technical capabilities.¹⁰⁷

And that:

ICANN has identified relevant information that it is considering in various correspondence, including the questions posed to PIR and

¹⁰⁴ 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, response to Question 19 <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

¹⁰⁵ 8 April 2020 letter from M. Botterman to M. Ismail, <https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-08apr20-en.pdf>.

¹⁰⁶ ICANN org’s announcements concerning the Change of Control Request are catalogued in Maartin Botterman’s 14 February 2020 letter to Manal Ismail, <https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-14feb20-en.pdf>; additional updates are catalogued in Goran Marby’s 7 March 2020 letter to Mark Surman, <https://www.icann.org/en/system/files/correspondence/marby-to-surman-07mar20-en.pdf>; ICANN org makes available incoming and outgoing correspondence on the ICANN Correspondence page as a matter of course unless there is a compelling reason for confidentiality, <https://www.icann.org/resources/pages/correspondence>.

¹⁰⁷ Transcript, 9 March 2020, at Pg. 10, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>.

ISOC, as well as from ICANN’s outside counsel to PIR’s outside counsel, all of which are posted on icann.org.¹⁰⁸

In addition, consistent with its Commitment to transparency and as the Ombudsman noted in his evaluation,¹⁰⁹ ICANN org has: (1) posted extensive correspondence concerning the Change of Control Request;¹¹⁰ (2) ensured that the Revised Submission, ICANN org’s Information Request and follow-up questions to PIR, and PIR’s responses are publicly available (even though those materials are normally not provided to the public);¹¹¹ and (3) made public statements and sought public input on the Change of Control Request and the Revised PICs.¹¹²

The BAMC acknowledges that many of these documents were not in ICANN org’s possession or did not yet exist—and therefore were not available to the Requestor—when the Requestor submitted Request 20-1.¹¹³ But ICANN org’s various public postings make clear that it is providing transparency to the extent feasible into the information that ICANN org is considering in its evaluation of the Change of Control Request.

¹⁰⁸ 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, response to question 15, <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>.

¹⁰⁹ Ombudsman Evaluation, at Pg. 12 (“ICANN by all appearances, and in almost every publicly available statement, appears to be . . . acting *as transparently as possible*.” (emphasis in original)), <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

¹¹⁰ See <https://www.icann.org/resources/pages/correspondence> (providing links to more than 30 letters concerning the Change of Control Request in 2020); ICANN org catalogued much of this correspondence in response to the Requestor’s DIDP requests. ICANN Response to DIDP Request No. 20200108-1, <https://www.icann.org/en/system/files/files/didp-20200108-1-petillion-response-07feb20-en.pdf>; ICANN Response to DIDP Request No. 20200214-1, <https://www.icann.org/en/system/files/files/didp-20200214-1-petillion-response-15mar20-en.pdf>.

¹¹¹ Revised Submission; Information Request; 19 February 2020 letter from J. Jeffrey to J. Nevett, <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf>; 4 March 2020 PIR submission, <https://www.icann.org/en/system/files/correspondence/cimbolic-to-jeffrey-04mar20-en.pdf>.

¹¹² <https://www.icann.org/news/announcement-2020-03-04-en>; Transcript, 9 March 2020, <https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929>; 11 March 2020 Responses to Questions from ICANN67 Public Forum 1, <https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880>; 8 April .ORG Update, <https://www.icann.org/news/blog/pir-transaction-and-proposed-public-interest-commitments-update>.

¹¹³ See also Ombudsman Evaluation, at Pg. 11 (“I can see how, on January 8th, Namecheap didn’t see all this coming—but at this point, after numerous publications, fora, etc., there is no doubt in my mind that ICANN has been acting transparently—both the Board and the Staff.”) <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf>.

For the above reasons, the Requestor’s arguments concerning transparency do not support reconsideration.

B. ICANN org’s Evaluation of the Change of Control Request Has Adhered To its Commitment to Apply Documented Policies Consistently, Neutrally, Objectively, and Fairly.

The Requestor asserts that “[u]nless the Internet community develops a specific policy for evaluating the [Change of Control Request], the criteria [set forth in the 2002 DNSO Recommendations] should comprise the policy and the evaluation criteria.”¹¹⁴ The Requestor then claims that because ICANN org is not applying the 2002 DNSO Recommendations, ICANN org’s actions are inconsistent with its Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”¹¹⁵ The Requestor’s claims do not support reconsideration.

ICANN org is committed to applying “documented policies consistently.” The Requestor argues that the 2002 DNSO Recommendations are, or should be, considered “policy for the operation of the .org registry,” and “ha[ve] never been amended nor revoked.”¹¹⁶ This is incorrect. As previously discussed, the DNSO (which commissioned the Dot ORG Task Force) was tasked with providing recommendations to the ICANN Board about how to proceed with selecting a new registry operator of .ORG. The Board was clear on this point – repeatedly referring to the report as “recommendations,” “guidance” and/or “advice.”¹¹⁷ As Dr. Cerf said: “Advice is advice, and the Board is making the decisions.”¹¹⁸ And, ultimately, in providing

¹¹⁴ Request 20-1, § 8, at Pg. 10.

¹¹⁵ ICANN Bylaws, Art. 1, § 1.2(a)(v); Request 20-1, § 8, at Pgs. 8-11.

¹¹⁶ Request 20-1, § 8, at Pg. 9.

¹¹⁷ ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm>.

¹¹⁸ *Id.*

direction to the ICANN President regarding the request for proposal (RFP) process for selecting a registry operator for .ORG, the Board specifically did not adopt certain of the DNSO's recommendations.¹¹⁹

The Board carefully considered the 2002 DNSO Recommendations during its 14 March 2002 meeting, adopting some of the recommendations and rejecting others, and ultimately developed the ICANN 2002 Assessment Criteria.¹²⁰ Key here, the Board explicitly did not adopt the recommendation that the registry operator of .ORG must be operated by a non-profit entity.¹²¹ As such, the 2002 DNSO Recommendations were not adopted as an established ICANN policy as the Requester is defining them and, therefore, cannot support a reconsideration request alleging violation of ICANN org's Commitment to apply documented policies consistently.

The Requestor asserts that ICANN org should, in particular, consider three of the DNSO's recommendations in ICANN's evaluation of the Change of Control Request: (i) that .ORG be "operated for the benefit of the worldwide community . . . engaged in noncommercial communication via the Internet"; (ii) that .ORG should be operated by "a non-profit organization that has widespread support from and acts on behalf of the community"; and (iii) that the registry fee should be "as low as feasible consistent with the maintenance of good quality service."¹²² The Requestor also cites ICANN's 2002 Assessment Criteria, asserting that those criteria "t[ook] up" the 2002 DNSO Recommendations.¹²³

¹¹⁹ ICANN Board Minutes, 14 March 2002, <https://www.icann.org/resources/board-material/minutes-2001-06-04-en>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Request 20-1, § 8, at Pg. 9.

¹²³ *Id.*, § 8, at Pg. 9.

First, given the material differences between the DNSO’s recommendations and ICANN’s 2002 Assessment Criteria,¹²⁴ the Requestor is incorrect in assuming that the DNSO’s recommendations were “taken up in the criteria.”¹²⁵

Second, the ICANN Board in 2002 explicitly did not adopt the DNSO’s recommendation that the .ORG registry operator should be a non-profit entity.¹²⁶ The Board was clear that “there should be no preference in favor or against not-for-profit applicants,”¹²⁷ and no such limitation was included in ICANN’s 2002 Assessment Criteria.¹²⁸ As such, there is no basis to include such limitation in ICANN’s evaluation of the Change of Control Request in 2020.

Third, as explained previously, neither the DNSO’s recommendations nor ICANN’s 2002 Assessment Criteria were, or are, adopted policies as the Requester is attempting to describe them.¹²⁹ As such, ICANN is not required to “apply” the 2002 DNSO Recommendations or the ICANN 2002 Assessment Criteria to a request for indirect change of control in 2020 in the way the Requester suggests.¹³⁰

Fourth, ICANN org has made clear that it *is* taking into consideration the principles set forth in ICANN’s 2002 Assessment Criteria, along with all relevant information, in its evaluation of the Change of Control Request.

¹²⁴ See § II.A, *supra*.

¹²⁵ Request 20-1, § 8, at Pg. 9.

¹²⁶ ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm>.

¹²⁷ ICANN Board Discussion of .org Reassignment, Accra, Ghana, 14 March 2002, <https://archive.icann.org/en/tlds/org/board-org-discussion-14mar02.htm>.

¹²⁸ See 2002 Assessment Criteria.

¹²⁹ See § V.B.1, *supra*.

¹³⁰ *Id.* See also, Ombudsman Evaluation, at Pgs. 13-14, <https://www.icann.org/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf> (Ombudsman concluded that ICANN org is not “required” to “apply” the 2002 DNSO Recommendations, “or that the application of such principles is paramount, or dispositive”; and, even so, ICANN has stated that it is considering the “2002 criteria” and it need not “do more than consider” them.)

In sum, ICANN org is not required to apply the 2002 DNSO Recommendations. ICANN org also is not required to apply ICANN's 2002 Assessment Criteria in the way the Requester suggests; nevertheless, ICANN org has made clear that it recognizes the principles found in the assessment criteria and is considering them, along with all relevant information, in its evaluation of the Change of Control Request.¹³¹

VI. Recommendation.

The BAMC has considered the merits of the portion of Request 20-1 that the BAMC found to be sufficiently stated¹³² as well as all relevant information provided and, based on the foregoing, concludes that the ICANN Board and Staff have not violated ICANN's Commitment to transparency, ICANN's Commitment to apply documented policies consistently, or ICANN's established policies in relation to the Change of Control Request. Accordingly, the BAMC recommends that the Board deny Request 20-1.

¹³¹ See Section V.B.1, *supra*.

¹³² The BAMC has not considered the merits of those portions of Request 20-1 that the BAMC previously summarily dismissed as untimely or not sufficiently stated.

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

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/cimboic-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/cimboic-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 \(https://www.keypointsabout.org/public-engagement\)](#) 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 \(https://thenew.org/org-people/about-pir/team/advisory-council/\)](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 \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](/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

Rebuttal to the BAMC Recommendation in Reconsideration Request 20-1

Namecheap (Requestor) submits this Rebuttal to the Board Accountability Mechanisms Committee's ('BAMC') Recommendation on Reconsideration Request (RfR) 20-1 (the 'Recommendation'). The Recommendation concerns Requestor's request that ICANN (i) reconsider the lack of openness and transparency with respect to the renewal of the Registry Agreements for legacy TLDs and the actions surrounding the (proposed) acquisition of PIR and ICANN's approval process, (ii) preserve the non-profit character of .ORG, (iii) observe the criteria that have led to the reassignment of the .ORG registry to PIR/ISOC, (iv) reverse its decision to eliminate price caps in the .ORG, .INFO and .BIZ TLDs and include (or maintain) price caps in these TLDs, (v) ensure that domain name registration and renewal fees in .ORG are "as low as feasible consistent with the maintenance of good quality service", and (vi) to the extent PIR cannot live up to its commitments made during the reassignment process for the .ORG registry, reassign the .ORG registry in accordance with the 2002 Domain Name Supporting Organization's (DNSO) policy and assessment criteria for the reassignment and operation of the .ORG registry (unless the community comes up with an updated policy).

Requestor further asked that, in the event that ICANN did not immediately grant its requests, ICANN engage in conversations with the Requestor and that a hearing be organized. In such event, Requestor requested that, prior to the hearing, ICANN (i) provide full transparency regarding negotiations pertaining to the reassignment, renewal and amendments of the .ORG, .BIZ and/or .INFO Registry Agreements, (ii) provide full transparency regarding the (proposed) change of control of PIR, and (iii) provide the documents requested in the Requestor's DIDP request. The BAMC unduly dismissed part of Namecheap's RfR on 18 March 2020 and now recommends that the ICANN Board deny RfR 20-1 altogether. By this

Rebuttal, Requestor requests that the Board deny the BAMC's Recommendation on the grounds that it is based on both factual errors and on a misrepresentation of Requestor's position and of the applicable rules.

This RfR is not rendered moot by the ICANN Board's recent decision to reject the proposed change of control of the .ORG registry. On 30 April 2020 (*i.e.*, after the BAMC's Recommendation), the ICANN Board directed ICANN's President and CEO to withhold ICANN's consent to PIR's Change of Control Request, thereby rejecting PIR's request.¹ Notably, the ICANN Board decided to withhold consent only after it received a warning letter from the California Attorney General's Office on 15 April 2020.²

While Requestor commends the ICANN Board for – finally – taking this action, the concerns raised by Namecheap remain. Specifically, Requestor still (i) challenges the opaque way in which ICANN handled the price cap removal and PIR Change of Control processes, (ii) calls for an investigation regarding the involvement of former ICANN officials in the proposed PIR/Ethos Capital transaction, and (iii) calls for clear criteria and processes that should govern major changes to legacy TLDs going forward.

A rejection of the BAMC's Recommendation would be consistent with the ICANN Board's decision to withhold its consent to PIR's Change of Control Request. It would also give ICANN the opportunity to correct past errors and enhance ICANN's processes going forward.

¹ ICANN, *Approved Board Resolution 2020.04.30.01 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>; Letter from Russ Weinstein (Sr. Director, gTLD Accounts and Services ICANN) to Public Interest Registry, 1 May 2020, <https://www.icann.org/en/system/files/correspondence/weinstein-to-nevett-01may20-en.pdf>.

² Letter from Xavier Becerra (Attorney General, State of California) to ICANN, 15 April 2020, <https://www.icann.org/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf>.

Finally, Requestor notes that the subject matter of this RfR forms part of the discussions that are currently pending in the IRP initiated by Namecheap (ICDR Case No. 01-20-0000-6787). The present rebuttal by no means constitutes a full statement of facts and legal arguments in view of the procedural imbalance in the present RfR proceedings. Should the ICANN Board, in spite of this Rebuttal, accept the BAMC's summary dismissal and Recommendation, Requestor reserves the right to have this decision reversed by the IRP Panel and to supplement its arguments once Requestor is given access to all information relevant to its requests.

**I. ICANN'S UNDUE RELIANCE ON FORMAL REQUIREMENTS AND ITS REFUSAL TO PRODUCE DOCUMENTS
MAKE THIS PROCEEDING FUNDAMENTALLY UNFAIR**

This rebuttal is submitted in accordance with Article 4(2)(q) of ICANN's Bylaws (the 'Bylaws'). However, ICANN's undue reliance on the formal requirements of Article 4(2)(q) and the circumstances of this case create an unjustified imbalance that prevents Requestor from participating in the reconsideration proceedings in a meaningful way. The imbalance is illustrated by the fact that, for example, ICANN has taken more than two months to prepare its 13-page "summary" dismissal and almost four months to prepare its 23-page Recommendation, whereas Requestor must respond within 15 days to these 36 pages in a 10-page rebuttal.

Critically, Requestor is given no access to essential documents kept by ICANN³ and is therefore not given a fair opportunity to contest all arguments and evidence adduced by the BAMC. For example, as support for its supposed transparency, the Board in its 30 April 2020 Resolutions states that it has received "approximately 30 briefings from ICANN org" on the

³ *E.g.*, ICANN is the only party that has access to all correspondence between ICANN and the registry operators (and their representatives) in relation to the .ORG, .BIZ and/or .INFO Registry Agreements, the requests from registry operators (and their representatives) in relation to the reassignment, renewal of these Registry Agreements, their requests for modifying or removing price caps in these Registry Agreements, exchanges of communication between ICANN and the registry operators as to such renewal, modification, and removal, etc.

Change of Control issue, representing over 30 hours of scheduled meetings,⁴ but none of these briefings or minutes are publicly available. Other documents provided by PIR and Ethos were published in heavily redacted form.⁵ Without access to the underlying documents, Requestor is unable to verify the BAMC's factual arguments regarding the adequacy and transparency of its process.

As a result, this Rebuttal is not intended to be a complete statement of the elements of fact or law relevant to this matter and is sent without prejudice. Requestor is reserving all rights.

II. ICANN MUST PROVIDE FULL TRANSPARENCY ABOUT PIR'S CHANGE OF CONTROL REQUEST

Requestor and others have made it clear that the timing of the removal of price caps and announcement of PIR's Change of Control Request, and the role of former ICANN executives in the proposed transaction between PIR and Ethos, raise suspicion that both transactions were tainted by conflicts of interest from the start. As recognized by the Emergency Arbitrator in the IRP, this is a matter that ICANN is enabled to, and should investigate. Indeed, *"ICANN is clearly obligated to consider both conduct by Ethos and PIR, and persons related to them, for purposes of making its decision on change of control. Any suggestion that Ethos is not a subject of the change of control evaluation because it is not the contract party would be misplaced and constitute a failure on the part of ICANN. [...] Namecheap's suspicions regarding the timing of the announcement and role of former ICANN executives [...] are matters ICANN is enabled to investigate."*⁶ Yet, in this RfR ICANN has stonewalled production of all its communications with PIR and has refused to disclose the steps, if any, it has taken to investigate these issues.

⁴ ICANN, *Approved Board Resolution 2020.04.30.01 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

⁵ E.g., <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

⁶ ICDR Case No. 01-20-0000-6787, *Namecheap v. ICANN*, Decision on Request for Emergency Relief, 20 March 2020, para. 126, fn 21 and 22.

The concerns regarding the lack of transparency about the proposed Change of Control were shared by many, including the Attorney General of California. The ICANN Board now appears to accept these concerns as grounds to withhold ICANN’s consent to PIR’s Change of Control Request. While Requestor commends ICANN for doing so, it should go further. It should disclose the information that was shared between PIR and ICANN. It should also investigate the conduct by Ethos, PIR, persons related to them, the role of ICANN staff and executives in the proposed transaction, and the decision-making process that led to the removal of price caps.

III. ICANN MUST CORRECT THE ILLICIT REMOVAL OF PRICE CAPS

The ICANN Board 30 April 2020 Resolutions underscore the need for the .ORG, .BIZ and .INFO price caps to be restored. When deciding to withhold its consent to PIR’s Change of Control Request, the ICANN Board recognized the specific nature of the .ORG registry and its long-standing history:

“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.”

ICANN also recognized that the 2002 Assessment Criteria that have led to the designation of PIR as the .ORG registry operator “*remain relevant today*”.⁷ In its decision to withhold its consent, the ICANN Board acknowledged that “*the .ORG community has relied on PIR’s commitments for nearly 20 years*”⁸ and it recognized the importance of such reliance. The Board explains that it has “*deliberated and discussed this issue with ICANN org on approximately 30 separate occasions, receiving current updates and providing ICANN org*

⁷ BAMC’s Recommendation, pp. 17-18.

⁸ ICANN, *Approved Board Resolutions 2020.04.30.01-2020.04.30.02 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

with direction concerning next steps. ICANN 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.”⁹

These (alleged) efforts appear to be in sheer contrast with the attention devoted to ICANN's decision to renew the registry agreements for legacy gTLDs without maintaining the price caps. The decision to remove the price caps was at least as important as ICANN's evaluation of PIR's Change of Control Request. In addition, both decisions cannot be considered separately, given that ICANN was dutybound in its evaluation of PIR's request to investigate conduct by Ethos, PIR, persons related to them, the role of ICANN staff and executives.

However, Requestor is given no transparency whatsoever as to whether ICANN engaged in any such investigation, or as to how ICANN came to the decision to remove price caps.

Just like a change of control review is “*more than just an exercise of checking boxes*”¹⁰, the renewal process for legacy registry agreements is a process that requires openness, transparency, and the involvement of those entities most affected. The point is all the stronger when, as here, a major change to the existing conditions is being proposed. The price caps were removed via an undocumented, non-transparent process. In contrast with previous contract renewals, there are no signs that the ICANN Board exercised any oversight over this process. However, the removal of price caps was a clear departure from long-standing practice and policy. With respect to .ORG, the removal of price caps also go against (i) the 2002 Assessment

⁹ ICANN, *Approved Board Resolutions 2020.04.30.01-2020.04.30.02 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

¹⁰ ICANN, *Approved Board Resolutions 2020.04.30.01-2020.04.30.02 – Special Meeting of the Board*, 30 April 2020, <https://www.icann.org/resources/board-material/resolutions-2020-04-30-en>.

Criteria that have led to the designation of PIR as the .ORG registry operator and that “*remain relevant today*”, and (ii) PIR’s commitments on which the .ORG community has relied on for nearly 20 years. These criteria and commitments include the requirement that the .ORG “*registry fee charged to accredited registrars should be as low as feasible consistent with the maintenance of good-quality service*”. Until the latest renewal of the .ORG registry agreement, this requirement has always been enforced via the inclusion of price caps in the registry agreement. ICANN offers no explanation whatsoever as to why it has abandoned these provisions.

In sum, ICANN’s failure to reintroduce the price caps and to provide the necessary transparency about the decision to remove the price caps is a protracted violation of ICANN’s Articles of Incorporation and Bylaws. Each day that ICANN fails to reintroduce the price caps and to provide the necessary transparency, ICANN commits a new inaction, *i.e.*, a wrongful act by omitting to correct an ongoing violation, that can be challenged. Requestor has asked ICANN to engage in corrective action in the framework of RfR 19-2, the cooperative engagement process, the IRP, and this RfR. Nothing prevents ICANN from reintroducing the price caps that were removed in an undocumented, unfair, and non-transparent process, resulting in an unreasoned decision and disparate treatment.

IV. ICANN FAILS TO APPLY DOCUMENTED POLICIES CONSISTENTLY, NEUTRALLY, OBJECTIVELY, AND FAIRLY

ICANN should have already had a policy in place for contract renewals, as instructed by the ICANN Board in 2008. On 23 January 2008, the ICANN Board accepted *inter alia* the GNSO’s policy recommendation on contractual conditions for existing gTLDs that “[t]here

*should be a policy guiding registry agreement renewal*¹¹

Requestor is unaware of any policy guiding registry agreement renewal that ICANN has used for the renewal of the .BIZ, .ORG, and .INFO registry agreements. Requestor has not been given any transparency as to the process that was used to renew these registry agreements. Requestor can only observe that ICANN made radical changes to the registry agreement to the sole benefit of the registry operators and despite strong opposition from an entire cross-section of the Internet community. Any departure from the principle that the price of Registry Services remains unchanged should be thoroughly examined and involve the Internet community as a whole. ICANN has not done so. It did not live up to its commitment to apply documented policies consistently neutrally, objectively, and fairly.

V. ICANN’S FAILURE TO CONSIDER THE SPECIFIC NATURE OF .ORG, .BIZ, AND .INFO WHEN IT REMOVED PRICE CAPS RESULTED IN DISCRIMINATORY TREATMENT

As mentioned above, the ICANN Board in its 30 April 2020 Resolutions recognized the specific nature of the .ORG registry in its decision to withhold its consent to PIR’s Change of Control Request. However, ICANN failed to consider the specific nature of the .ORG and the .BIZ and .INFO legacy gTLDs when deciding to renew the registry agreements without maintaining the price caps.

As Requestor has explained, these TLDs cannot be compared to any new gTLD or so-called sponsored TLD. They all have had a significant number of domain names under management (DUMs) for several years. The number of DUMs in .ORG has been rising consistently since

¹¹ ICANN, *Resolution 2008.01.02 – Minutes for the Special Meeting of the ICANN Board of Directors*, 23 January 2008, <https://www.icann.org/resources/board-material/minutes-2008-01-23-en>; ICANN GNSO, *Council Report to the Board – Policies for Contractual Conditions Existing Registries PDP Feb 06*, 4 October 2007, https://gns0.icann.org/sites/default/files/filefield_5954/council-report-to-board-pdp-feb-06-04oct07.pdf.

the registry was assigned to PIR to reach over 10 million DUMs in 2012. The .ORG registry maintained well over 10 million DUMs between 2012 and 2019. The .BIZ and .INFO registries also benefit from consistent levels of DUMs exceeding 1.6 million for more than a decade. No sponsored TLD comes even close to the levels of DUMs of .ORG, .INFO, and .BIZ. Apart from a handful of low priced new gTLDs, the new gTLDs contain significantly fewer DUMs than .INFO and .BIZ. All are lower than .ORG. The new gTLD market is also fluctuating much more than the market of legacy TLDs. Moreover, the operation of the .ORG registry requires special considerations in view of the nonprofit and non-commercial character of its registrants – a point emphasized by the California Attorney General in his 15 April 2020 letter.¹²

Yet, without any analysis of the particularities of the .ORG, .INFO, and .BIZ legacy TLDs, ICANN decided to remove the price caps. ICANN provided no justification for the disparate treatment of .ORG, .INFO and .BIZ as compared to .COM and .NET. As demonstrated by Section 4.2 of the 2013 registry agreements for .ORG, .INFO, and .BIZ, both ICANN and the registry operators concerned deem that the .ORG, .INFO, and .BIZ legacy TLDs are comparable with each other and with .COM and .NET. Yet, ICANN now treats them differently without any justification. ICANN also provided no justification for its treatment of the .ORG, .INFO, and .BIZ extensions in a similar manner to wholly incomparable new gTLDs when it decided to remove the price caps. ICANN's failure to take these considerations into account contradicts ICANN's mission, commitments, core values and established policies, as well as the principle of non-discrimination. The price caps should therefore be reinstated.

¹² Letter from Xavier Becerra (Attorney General, State of California) to ICANN, 15 April 2020, <https://www.icann.org/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf>

VI. CONCLUSION

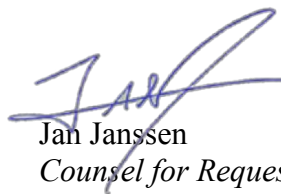
Based on the foregoing and on the reasons expressed in RfR 20-1 and the letters exchanged in relation to this RfR, Requestors request that the Board deny the BAMC Recommendation and grant RfR 20-1.

Respectfully submitted,

7 May 2020



Flip Petillion
Counsel for Requestor



Jan Janssen
Counsel for Requestor

REFERENCE MATERIALS – BOARD SUBMISSION 2020.05.20.2a

Title: **Consideration of Reconsideration Request 20-1**

Documents

The following attachments are relevant to the Board’s consideration of Reconsideration Request 20-1:

Attachment A is [Reconsideration Request 20-1](#), submitted on 8 January 2020; the Annex submitted in support of Reconsideration Request 20-1 is available [here](#).

Attachment B is the [Letter from Flip Petillion and Jan Janssen on behalf of Requestor](#) to ICANN Board and ICANN Org, submitted on 14 February 2020.

Attachment C is the [BAMC Partial Summary Dismissal of Reconsideration Request 20-1](#), issued on 18 March 2020.

Attachment D is the [Ombudsman Action Regarding Request 20-1](#), issued on 24 March 2020.

Attachment E is the [Evaluation by the ICANN Ombudsman of Reconsideration Request 20-1](#), issued on 3 April 2020.

Attachment F is the [BAMC Recommendation on Reconsideration Request 20-1](#), issued on 21 April 2020.

Attachment G is [Board Resolutions 2020.04.30.01-2020.04.30.02](#) (Board Action on PIR’s Change of Control Request), issued on 30 April 2020.

Attachment H is [Requestor’s Rebuttal to the BAMC Recommendation on Reconsideration Request 20-1](#), submitted on 7 May 2020.

Submitted by: Amy Stathos, Deputy General Counsel

Date Noted: 13 May 2020

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