

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR CASE NO. 01-19-0004-0808

FEGISTRY, LLC, MINDS + MACHINES GROUP, LTD., RADIX DOMAIN SOLUTIONS
PTE. LTD., AND DOMAIN VENTURES PARTNERS PCC LIMITED

(Claimants)

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

(Respondent)

**INDEX TO DOCUMENTS SUBMITTED WITH ICANN’S MOTION FOR SUMMARY ADJUDICATION
OF CERTAIN CLAIMS THAT ARE BARRED BY THE STATUTE OF LIMITATIONS**

EXHIBIT	DESCRIPTION
1	gTLD Applicant Guidebook (4 June 2012).
2	HTLD Community Priority Evaluation Report (11 June 2014).
3	CPE Process Review Scope 1 Report (13 December 2017).
4	CPE Process Review Scope 2 Report (13 December 2017).
5	CPE Process Review Scope 3 Report (13 December 2017).
6	Approved Board Resolutions Regular Meeting of the ICANN Board (15 March 2018).
7	Claimants’ Request for Independent Review Process (16 December 2019).
8	Decision on Request for Interim Measure of Protection (7 August 2020).
9	Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 2 June 2022).
10	Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 February 2016).
11	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP), Adopted 5 October 2018.
12	Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 1 October 2016).
13	Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 22 July 2017).
14	Approved Board Resolutions Regular Meeting of the ICANN Board (27 January 2019).

Exhibit 1

RESPONDENT'S EXHIBIT

gTLD Applicant Guidebook

Version 2012-06-04



4 June 2012

Preamble

New gTLD Program Background

New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS.

Currently the namespace consists of 22 gTLDs and over 250 ccTLDs operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. The gTLDs are served by over 900 registrars, who interact with registrants to perform domain name registration and other related services. The new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market. When the program launches its first application round, ICANN expects a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe.

The program has its origins in carefully deliberated policy development work by the ICANN community. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations. Representatives from a wide variety of stakeholder groups—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008. A thorough brief to the policy process and outcomes can be found at <http://gnso.icann.org/issues/new-gtlds>.

ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval. This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook. In parallel, ICANN has established the resources needed to successfully launch and operate the program. This process concluded with the decision by the ICANN Board of Directors in June 2011 to launch the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to <http://www.icann.org/en/topics/new-gtld-program.htm>.



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 1

4 June 2012

Module 1

Introduction to the gTLD Application Process

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required, and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the stages of the application life cycle.

Prospective applicants are encouraged to read and become familiar with the contents of this entire module, as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

For the complete set of the supporting documentation and more about the origins, history and details of the policy development background to the New gTLD Program, please see <http://gnso.icann.org/issues/new-gtlds/>.

This Applicant Guidebook is the implementation of Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.

1.1 Application Life Cycle and Timelines

This section provides a description of the stages that an application passes through once it is submitted. Some stages will occur for all applications submitted; others will only occur in specific circumstances. Applicants should be aware of the stages and steps involved in processing applications received.

1.1.1 Application Submission Dates

The user registration and application submission periods open at **00:01 UTC 12 January 2012**.

The user registration period closes at **23:59 UTC 29 March 2012**. New users to TAS will not be accepted beyond this

time. Users already registered will be able to complete the application submission process.

Applicants should be aware that, due to required processing steps (i.e., online user registration, application submission, fee submission, and fee reconciliation) and security measures built into the online application system, it might take substantial time to perform all of the necessary steps to submit a complete application. Accordingly, applicants are encouraged to submit their completed applications and fees as soon as practicable after the Application Submission Period opens. Waiting until the end of this period to begin the process may not provide sufficient time to submit a complete application before the period closes. Accordingly, new user registrations will not be accepted after the date indicated above.

The application submission period closes at **23:59 UTC 12 April 2012**.

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the close of the application submission period.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

ICANN has gone to significant lengths to ensure that the online application system will be available for the duration of the application submission period. In the event that the system is not available, ICANN will provide alternative instructions for submitting applications on its website.

1.1.2 Application Processing Stages

This subsection provides an overview of the stages involved in processing an application submitted to ICANN. Figure 1-1 provides a simplified depiction of the process. The shortest and most straightforward path is marked with bold lines, while certain stages that may or may not be

applicable in any given case are also shown. A brief description of each stage follows.

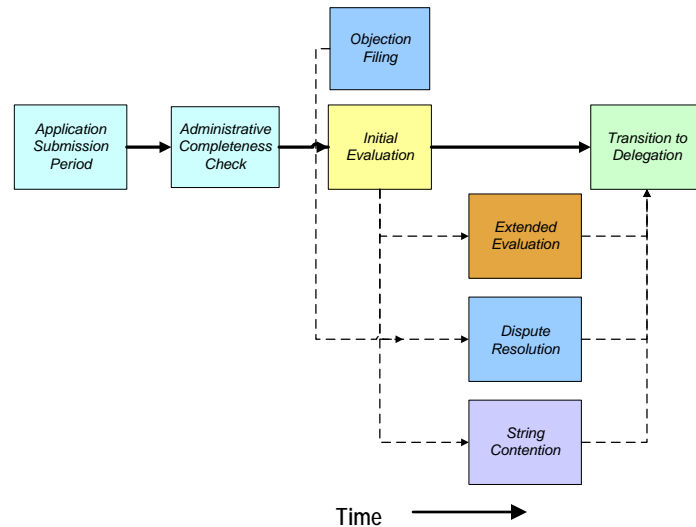


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

1.1.2.1 Application Submission Period

At the time the application submission period opens, those wishing to submit new gTLD applications can become registered users of the TLD Application System (TAS).

After completing the user registration, applicants will supply a deposit for each requested application slot (see section 1.4), after which they will receive access to the full application form. To complete the application, users will answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability. The supporting documents listed in subsection 1.2.2 of this module must also be submitted through the online application system as instructed in the relevant questions.

Applicants must also submit their evaluation fees during this period. Refer to Section 1.5 of this module for additional information about fees and payments.

Each application slot is for one gTLD. An applicant may submit as many applications as desired; however, there is no means to apply for more than one gTLD in a single application.

Following the close of the application submission period, ICANN will provide applicants with periodic status updates on the progress of their applications.

1.1.2.2 Administrative Completeness Check

Immediately following the close of the application submission period, ICANN will begin checking all applications for completeness. This check ensures that:

- All mandatory questions are answered;
- Required supporting documents are provided in the proper format(s); and
- The evaluation fees have been received.

ICANN will post the public portions of all applications considered complete and ready for evaluation within two weeks of the close of the application submission period. Certain questions relate to internal processes or information: applicant responses to these questions will not be posted. Each question is labeled in the application form as to whether the information will be posted. See posting designations for the full set of questions in the attachment to Module 2.

The administrative completeness check is expected to be completed for all applications in a period of approximately 8 weeks, subject to extension depending on volume. In the event that all applications cannot be processed within this period, ICANN will post updated process information and an estimated timeline.

1.1.2.3 Comment Period

Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.

ICANN will open a comment period (the Application Comment period) at the time applications are publicly posted on ICANN's website (refer to subsection 1.1.2.2). This period will allow time for the community to review and submit comments on posted application materials

(referred to as “application comments.”) The comment forum will require commenters to associate comments with specific applications and the relevant panel. Application comments received within a 60-day period from the posting of the application materials will be available to the evaluation panels performing the Initial Evaluation reviews. This period is subject to extension, should the volume of applications or other circumstances require. **To be considered by evaluators, comments must be received in the designated comment forum within the stated time period.**

Evaluators will perform due diligence on the application comments (i.e., determine their relevance to the evaluation, verify the accuracy of claims, analyze meaningfulness of references cited) and take the information provided in these comments into consideration. In cases where consideration of the comments has impacted the scoring of the application, the evaluators will seek clarification from the applicant. Statements concerning consideration of application comments that have impacted the evaluation decision will be reflected in the evaluators’ summary reports, which will be published at the end of Extended Evaluation.

Comments received after the 60-day period will be stored and available (along with comments received during the comment period) for other considerations, such as the dispute resolution process, as described below.

In the new gTLD application process, all applicants should be aware that that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. Anyone may submit a comment in a public comment forum.

Comments and the Formal Objection Process: A distinction should be made between application comments, which may be relevant to ICANN’s task of determining whether applications meet the established criteria, and formal objections that concern matters outside those evaluation criteria. The formal objection process was created to allow a full and fair consideration of objections based on certain limited grounds outside ICANN’s evaluation of applications on their merits (see subsection 3.2).

Public comments will not be considered as formal objections. Comments on matters associated with formal objections will not be considered by panels during Initial Evaluation. These comments will be available to and may

be subsequently considered by an expert panel during a dispute resolution proceeding (see subsection 1.1.2.9). However, in general, application comments have a very limited role in the dispute resolution process.

String Contention: Comments designated for the Community Priority Panel, as relevant to the criteria in Module 4, may be taken into account during a Community Priority Evaluation.

Government Notifications: Governments may provide a notification using the application comment forum to communicate concerns relating to national laws. However, a government's notification of concern will not in itself be deemed to be a formal objection. A notification by a government does not constitute grounds for rejection of a gTLD application. A government may elect to use this comment mechanism to provide such a notification, in addition to or as an alternative to the GAC Early Warning procedure described in subsection 1.1.2.4 below.

Governments may also communicate directly to applicants using the contact information posted in the application, e.g., to send a notification that an applied-for gTLD string might be contrary to a national law, and to try to address any concerns with the applicant.

General Comments: A general public comment forum will remain open through all stages of the evaluation process, to provide a means for the public to bring forward any other relevant information or issues.

1.1.2.4 GAC Early Warning

Concurrent with the 60-day comment period, ICANN's Governmental Advisory Committee (GAC) may issue a GAC Early Warning notice concerning an application. This provides the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.

The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process.

A GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities. A GAC Early Warning may be issued for any reason.¹ The GAC may then send that notice to the Board – constituting the GAC Early Warning. ICANN will notify applicants of GAC Early Warnings as soon as practicable after receipt from the GAC. The GAC Early Warning notice may include a nominated point of contact for further information.

GAC consensus is not required for a GAC Early Warning to be issued. Minimally, the GAC Early Warning must be provided in writing to the ICANN Board, and be clearly labeled as a GAC Early Warning. This may take the form of an email from the GAC Chair to the ICANN Board. For GAC Early Warnings to be most effective, they should include the reason for the warning and identify the objecting countries.

Upon receipt of a GAC Early Warning, the applicant may elect to withdraw the application for a partial refund (see subsection 1.5.1), or may elect to continue with the application (this may include meeting with representatives from the relevant government(s) to try to address the concern). To qualify for the refund described in subsection 1.5.1, the applicant must provide notification to ICANN of its election to withdraw the application within 21 calendar days of the date of GAC Early Warning delivery to the applicant.

To reduce the possibility of a GAC Early Warning, all applicants are encouraged to identify potential sensitivities in advance of application submission, and to work with the relevant parties (including governments) beforehand to mitigate concerns related to the application.

1.1.2.5 Initial Evaluation

Initial Evaluation will begin immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation. At the beginning of this period, background screening on the applying entity and the individuals named in the application will be conducted. Applications

¹ While definitive guidance has not been issued, the GAC has indicated that strings that could raise sensitivities include those that "purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive)" and "those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse."

must pass this step in conjunction with the Initial Evaluation reviews.

There are two main elements of the Initial Evaluation:

1. String reviews (concerning the applied-for gTLD string). String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS, including problems caused by similarity to existing TLDs or reserved names.
2. Applicant reviews (concerning the entity applying for the gTLD and its proposed registry services). Applicant reviews include a determination of whether the applicant has the requisite technical, operational, and financial capabilities to operate a registry.

By the conclusion of the Initial Evaluation period, ICANN will post notice of all Initial Evaluation results. Depending on the volume of applications received, such notices may be posted in batches over the course of the Initial Evaluation period.

The Initial Evaluation is expected to be completed for all applications in a period of approximately 5 months. If the volume of applications received significantly exceeds 500, applications will be processed in batches and the 5-month timeline will not be met. The first batch will be limited to 500 applications and subsequent batches will be limited to 400 to account for capacity limitations due to managing extended evaluation, string contention, and other processes associated with each previous batch.

If batching is required, a secondary time-stamp process will be employed to establish the batches. (Batching priority will not be given to an application based on the time at which the application was submitted to ICANN, nor will batching priority be established based on a random selection method.)

The secondary time-stamp process will require applicants to obtain a time-stamp through a designated process which will occur after the close of the application submission period. The secondary time stamp process will occur, if required, according to the details to be published on ICANN's website. (Upon the Board's approval of a final designation of the operational details of the "secondary timestamp" batching process, the final plan will be added as a process within the Applicant Guidebook.)

If batching is required, the String Similarity review will be completed on all applications prior to the establishment of evaluation priority batches. For applications identified as part of a contention set, the entire contention set will be kept together in the same batch.

If batches are established, ICANN will post updated process information and an estimated timeline.

Note that the processing constraints will limit delegation rates to a steady state even in the event of an extremely high volume of applications. The annual delegation rate will not exceed 1,000 per year in any case, no matter how many applications are received.²

1.1.2.6 Objection Filing

Formal objections to applications can be filed on any of four enumerated grounds, by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications as described in subsection 1.1.2.2, and will last for approximately 7 months.

Objectors must file such formal objections directly with dispute resolution service providers (DRSPs), not with ICANN. The objection filing period will close following the end of the Initial Evaluation period (refer to subsection 1.1.2.5), with a two-week window of time between the posting of the Initial Evaluation results and the close of the objection filing period. Objections that have been filed during the objection filing period will be addressed in the dispute resolution stage, which is outlined in subsection 1.1.2.9 and discussed in detail in Module 3.

All applicants should be aware that third parties have the opportunity to file objections to any application during the objection filing period. Applicants whose applications are the subject of a formal objection will have an opportunity to file a response according to the dispute resolution service provider's rules and procedures. An applicant wishing to file a formal objection to another application that has been submitted would do so within the objection filing period, following the objection filing procedures in Module 3.

Applicants are encouraged to identify possible regional, cultural, property interests, or other sensitivities regarding TLD strings and their uses before applying and, where

² See "Delegation Rate Scenarios for New gTLDs" at <http://icann.org/en/topics/new-gtlds/delegation-rate-scenarios-new-gtlds-06oct10-en.pdf> for additional discussion.

possible, consult with interested parties to mitigate any concerns in advance.

1.1.2.7 Receipt of GAC Advice on New gTLDs

The GAC may provide public policy advice directly to the ICANN Board on any application. The procedure for GAC Advice on New gTLDs described in Module 3 indicates that, to be considered by the Board during the evaluation process, the GAC Advice on New gTLDs must be submitted by the close of the objection filing period. A GAC Early Warning is not a prerequisite to use of the GAC Advice process.

If the Board receives GAC Advice on New gTLDs stating that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved. If the Board does not act in accordance with this type of advice, it must provide rationale for doing so.

See Module 3 for additional detail on the procedures concerning GAC Advice on New gTLDs.

1.1.2.8 Extended Evaluation

Extended Evaluation is available only to certain applicants that do not pass Initial Evaluation.

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not pass Initial Evaluation and does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for an additional exchange of information between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An application may be required to enter an Extended Evaluation if one or more proposed registry services raise technical issues that might adversely affect the security or stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such a review is required by the end of the Initial Evaluation period.

Evaluators and any applicable experts consulted will communicate the conclusions resulting from the additional review by the end of the Extended Evaluation period.

At the conclusion of the Extended Evaluation period, ICANN will post summary reports, by panel, from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next relevant stage. If the application does not pass the Extended Evaluation, it will proceed no further.

The Extended Evaluation is expected to be completed for all applications in a period of approximately 5 months, though this timeframe could be increased based on volume. In this event, ICANN will post updated process information and an estimated timeline.

1.1.2.9 Dispute Resolution

Dispute resolution applies only to applicants whose applications are the subject of a formal objection.

Where formal objections are filed and filing fees paid during the objection filing period, independent dispute resolution service providers (DRSPs) will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been submitted to ICANN. Dispute resolution service providers serve as the fora to adjudicate the proceedings based on the subject matter and the needed expertise. Consolidation of objections filed will occur where appropriate, at the discretion of the DRSP.

As a result of a dispute resolution proceeding, either the applicant will prevail (in which case the application can proceed to the next relevant stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). In the event of multiple objections, an applicant must prevail in all dispute resolution proceedings concerning the application to proceed to the next relevant stage. Applicants will be notified by the DRSP(s) of the results of dispute resolution proceedings.

Dispute resolution proceedings, where applicable, are expected to be completed for all applications within approximately a 5-month time frame. In the event that volume is such that this timeframe cannot be accommodated, ICANN will work with the dispute resolution service providers to create processing procedures and post updated timeline information.

1.1.2.10 String Contention

String contention applies only when there is more than one qualified application for the same or similar gTLD strings.

String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage. In the absence of resolution by the contending applicants, string contention cases are resolved either through a community priority evaluation (if a community-based applicant elects it) or through an auction.

In the event of contention between applied-for gTLD strings that represent geographic names, the parties may be required to follow a different process to resolve the contention. See subsection 2.2.1.4 of Module 2 for more information.

Groups of applied-for strings that are either identical or similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable.

To illustrate, as shown in Figure 1-2, Applicants A, B, and C all apply for .EXAMPLE and are identified as a contention set. Applicants A and C pass Initial Evaluation, but Applicant B does not. Applicant B requests Extended Evaluation. A third party files an objection to Applicant C’s application, and Applicant C enters the dispute resolution process. Applicant A must wait to see whether Applicants B and C successfully complete the Extended Evaluation and dispute resolution phases, respectively, before it can proceed to the string contention resolution stage. In this example, Applicant B passes the Extended Evaluation, but Applicant C does not prevail in the dispute resolution proceeding. String contention resolution then proceeds between Applicants A and B.

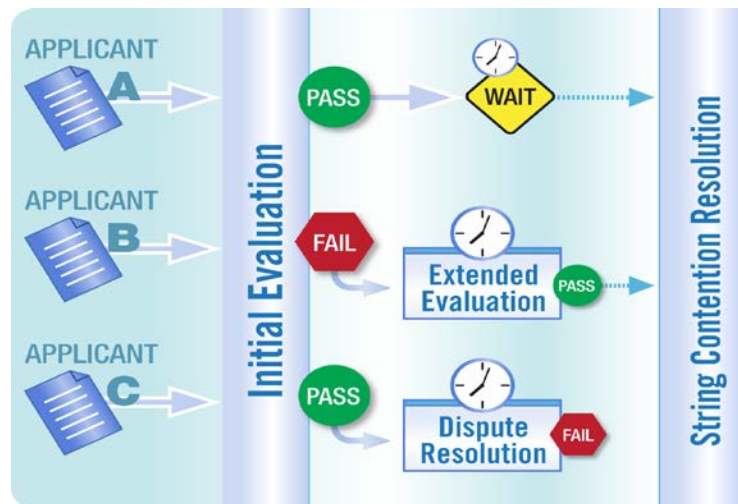


Figure 1-2 – All applications in a contention set must complete all previous evaluation and dispute resolution stages before string contention resolution can begin.

Applicants prevailing in a string contention resolution procedure will proceed toward delegation of the applied-for gTLDs.

String contention resolution for a contention set is estimated to take from 2.5 to 6 months to complete. The time required will vary per case because some contention cases may be resolved in either a community priority evaluation or an auction, while others may require both processes.

1.1.2.11 Transition to Delegation

Applicants successfully completing all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps before delegation of the applied-for gTLD into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application.

Following execution of a registry agreement, the prospective registry operator must complete technical set-up and show satisfactory performance on a set of technical tests before delegation of the gTLD into the root zone may be initiated. If the pre-delegation testing requirements are not satisfied so that the gTLD can be delegated into the root zone within the time frame specified in the registry agreement, ICANN may in its sole and absolute discretion elect to terminate the registry agreement.

Once all of these steps have been successfully completed, the applicant is eligible for delegation of its applied-for gTLD into the DNS root zone.

It is expected that the transition to delegation steps can be completed in approximately 2 months, though this could take more time depending on the applicant’s level of preparedness for the pre-delegation testing and the volume of applications undergoing these steps concurrently.

1.1.3 Lifecycle Timelines

Based on the estimates for each stage described in this section, the lifecycle for a straightforward application could be approximately 9 months, as follows:

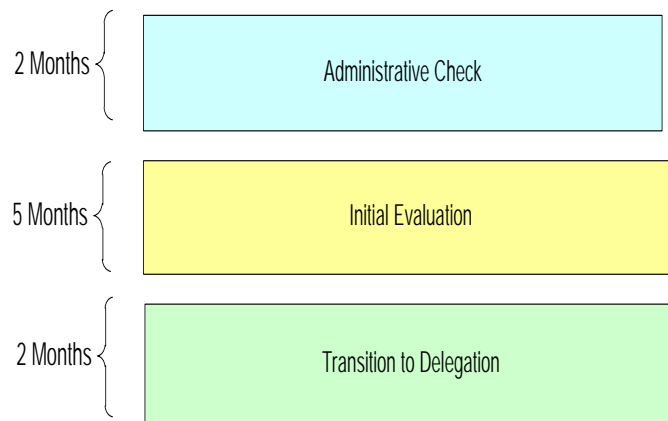


Figure 1-3 – A straightforward application could have an approximate 9-month lifecycle.

The lifecycle for a highly complex application could be much longer, such as 20 months in the example below:

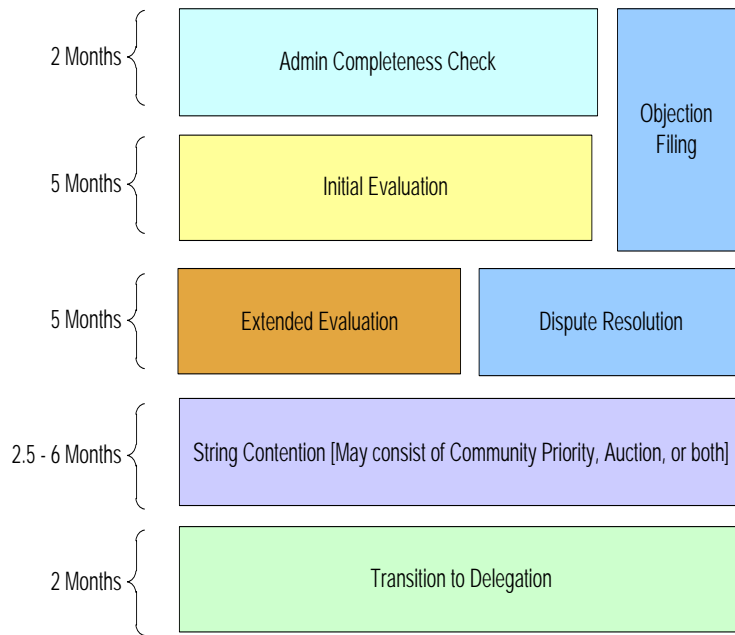


Figure 1-4 – A complex application could have an approximate 20-month lifecycle.

1.1.4 Posting Periods

The results of application reviews will be made available to the public at various stages in the process, as shown below.

Period	Posting Content
During Administrative Completeness Check	Public portions of all applications (posted within 2 weeks of the start of the Administrative Completeness Check).
End of Administrative Completeness Check	Results of Administrative Completeness Check.
GAC Early Warning Period	GAC Early Warnings received.
During Initial Evaluation	Status updates for applications withdrawn or ineligible for further review. Contention sets resulting from String Similarity review.

Period	Posting Content
End of Initial Evaluation	Application status updates with all Initial Evaluation results.
GAC Advice on New gTLDs	GAC Advice received.
End of Extended Evaluation	Application status updates with all Extended Evaluation results. Evaluation summary reports from the Initial and Extended Evaluation periods.
During Objection Filing/Dispute Resolution	Information on filed objections and status updates available via Dispute Resolution Service Provider websites. Notice of all objections posted by ICANN after close of objection filing period.
During Contention Resolution (Community Priority Evaluation)	Results of each Community Priority Evaluation posted as completed.
During Contention Resolution (Auction)	Results from each auction posted as completed.
Transition to Delegation	Registry Agreements posted when executed. Pre-delegation testing status updated.

1.1.5 Sample Application Scenarios

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process. The table that follows exemplifies various processes and outcomes. This is not intended to be an exhaustive list of possibilities. There are other possible combinations of paths an application could follow.

Estimated time frames for each scenario are also included, based on current knowledge. Actual time frames may vary depending on several factors, including the total number

of applications received by ICANN during the application submission period. It should be emphasized that most applications are expected to pass through the process in the shortest period of time, i.e., they will not go through extended evaluation, dispute resolution, or string contention resolution processes. Although most of the scenarios below are for processes extending beyond nine months, it is expected that most applications will complete the process within the nine-month timeframe.

Scenario Number	Initial Evaluation	Extended Evaluation	Objection(s) Filed	String Contention	Approved for Delegation Steps	Estimated Elapsed Time
1	Pass	N/A	None	No	Yes	9 months
2	Fail	Pass	None	No	Yes	14 months
3	Pass	N/A	None	Yes	Yes	11.5 – 15 months
4	Pass	N/A	Applicant prevails	No	Yes	14 months
5	Pass	N/A	Objector prevails	N/A	No	12 months
6	Fail	Quit	N/A	N/A	No	7 months
7	Fail	Fail	N/A	N/A	No	12 months
8	Fail	Pass	Applicant prevails	Yes	Yes	16.5 – 20 months
9	Fail	Pass	Applicant prevails	Yes	No	14.5 – 18 months

Scenario 1 – Pass Initial Evaluation, No Objection, No Contention – In the most straightforward case, the application passes Initial Evaluation and there is no need for an Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. As there is no contention for the applied-for gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD. Most applications are expected to complete the process within this timeframe.

Scenario 2 – Extended Evaluation, No Objection, No Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. As with Scenario 1, no objections are filed

during the objection period, so there is no dispute to resolve. As there is no contention for the gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 3 – Pass Initial Evaluation, No Objection, Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. No objections are filed during the objection period, so there is no dispute to resolve. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the application prevails in the contention resolution, so the applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Scenario 5 – Pass Initial Evaluation, Lose Objection – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, multiple objections are filed by one or more objectors with standing for one or more of the four enumerated objection grounds. Each objection is heard by a dispute resolution service provider panel. In this case, the panels find in favor of the applicant for most of the objections, but one finds in favor of the objector. As one of the objections has been upheld, the application does not proceed.

Scenario 6 – Fail Initial Evaluation, Applicant Withdraws – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant decides to withdraw the application rather than continuing with Extended Evaluation. The application does not proceed.

Scenario 7 – Fail Initial Evaluation, Fail Extended Evaluation -- In this case, the application fails one or more aspects of the Initial Evaluation. The applicant requests Extended Evaluation for the appropriate elements. However, the

application fails Extended Evaluation also. The application does not proceed.

Scenario 8 – Extended Evaluation, Win Objection, Pass Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the applicant prevails over other applications in the contention resolution procedure, the applicant can enter into a registry agreement, and the application can proceed toward delegation of the applied-for gTLD.

Scenario 9 – Extended Evaluation, Objection, Fail Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing. The objection is heard by a dispute resolution service provider that finds in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, another applicant prevails in the contention resolution procedure, and the application does not proceed.

Transition to Delegation – After an application has successfully completed Initial Evaluation, and other stages as applicable, the applicant is required to complete a set of steps leading to delegation of the gTLD, including execution of a registry agreement with ICANN, and completion of pre-delegation testing. Refer to Module 5 for a description of the steps required in this stage.

1.1.6 Subsequent Application Rounds

ICANN's goal is to launch subsequent gTLD application rounds as quickly as possible. The exact timing will be based on experiences gained and changes required after this round is completed. The goal is for the next application round to begin within one year of the close of the application submission period for the initial round.

ICANN has committed to reviewing the effects of the New gTLD Program on the operations of the root zone system after the first application round, and will defer the delegations in a second application round until it is determined that the delegations resulting from the first round did not jeopardize root zone system security or stability.

It is the policy of ICANN that there be subsequent application rounds, and that a systemized manner of applying for gTLDs be developed in the long term.

1.2 Information for All Applicants

1.2.1 Eligibility

Established corporations, organizations, or institutions in good standing may apply for a new gTLD. Applications from individuals or sole proprietorships will not be considered. Applications from or on behalf of yet-to-be-formed legal entities, or applications presupposing the future formation of a legal entity (for example, a pending Joint Venture) will not be considered.

ICANN has designed the New gTLD Program with multiple stakeholder protection mechanisms. Background screening, features of the gTLD Registry Agreement, data and financial escrow mechanisms are all intended to provide registrant and user protections.

The application form requires applicants to provide information on the legal establishment of the applying entity, as well as the identification of directors, officers, partners, and major shareholders of that entity. The names and positions of individuals included in the application will be published as part of the application; other information collected about the individuals will not be published.

Background screening at both the entity level and the individual level will be conducted for all applications to confirm eligibility. This inquiry is conducted on the basis of the information provided in questions 1-11 of the application form. ICANN may take into account information received from any source if it is relevant to the criteria in this section. If requested by ICANN, all applicants will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct background screening activities.

ICANN will perform background screening in only two areas: (1) General business diligence and criminal history; and (2) History of cybersquatting behavior. The criteria used for criminal history are aligned with the "crimes of trust" standard sometimes used in the banking and finance industry.

In the absence of exceptional circumstances, applications from any entity with or including any individual with convictions or decisions of the types listed in (a) – (m) below will be automatically disqualified from the program.

- a. within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that ICANN deems as the substantive equivalent of any of these;
- b. within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of the funds of others;
- c. within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities;
- d. within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative;
- e. has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes;
- f. has ever been convicted of any crime involving the use of a weapon, force, or the threat of force;
- g. has ever been convicted of any violent or sexual offense victimizing children, the

elderly, or individuals with disabilities;

- h. has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988³;
- i. has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols)^{4,5};
- j. has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes above (i.e., within the past 10 years for crimes listed in (a) - (d) above, or ever for the crimes listed in (e) - (i) above);
- k. has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents), within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (a) - (d) above, or ever for the crimes listed in (e) - (i) above);
- l. is the subject of a disqualification imposed by ICANN and in effect at the time the application is considered;
- m. has been involved in a pattern of adverse, final decisions indicating that the applicant

³ <http://www.unodc.org/unodc/en/treaties/illicit-traffic.html>

⁴ <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>

⁵ It is recognized that not all countries have signed on to the UN conventions referenced above. These conventions are being used solely for identification of a list of crimes for which background screening will be performed. It is not necessarily required that an applicant would have been convicted pursuant to the UN convention but merely convicted of a crime listed under these conventions, to trigger these criteria.

or individual named in the application was engaged in cybersquatting as defined in the Uniform Domain Name Dispute Resolution Policy (UDRP), the Anti-Cybersquatting Consumer Protection Act (ACPA), or other equivalent legislation, or was engaged in reverse domain name hijacking under the UDRP or bad faith or reckless disregard under the ACPA or other equivalent legislation. Three or more such decisions with one occurring in the last four years will generally be considered to constitute a pattern.

- n. fails to provide ICANN with the identifying information necessary to confirm identity at the time of application or to resolve questions of identity during the background screening process;
- o. fails to provide a good faith effort to disclose all relevant information relating to items (a) – (m).

Background screening is in place to protect the public interest in the allocation of critical Internet resources, and ICANN reserves the right to deny an otherwise qualified application based on any information identified during the background screening process. For example, a final and legally binding decision obtained by a national law enforcement or consumer protection authority finding that the applicant was engaged in fraudulent and deceptive commercial practices as defined in the Organization for Economic Co-operation and Development (OECD) Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders⁶ may cause an application to be rejected. ICANN may also contact the applicant with additional questions based on information obtained in the background screening process.

All applicants are required to provide complete and detailed explanations regarding any of the above events as part of the application. Background screening information will not be made publicly available by ICANN.

Registrar Cross-Ownership -- ICANN-accredited registrars are eligible to apply for a gTLD. However, all gTLD registries

⁶ http://www.oecd.org/document/56/0,3746,en_2649_34267_2515000_1_1_1_1.00.html

are required to abide by a Code of Conduct addressing, *inter alia*, non-discriminatory access for all authorized registrars. ICANN reserves the right to refer any application to the appropriate competition authority relative to any cross-ownership issues.

Legal Compliance -- ICANN must comply with all U.S. laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN List). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption. ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. In any given case, however, OFAC could decide not to issue a requested license.

1.2.2 Required Documents

All applicants should be prepared to submit the following documents, which are required to accompany each application:

1. **Proof of legal establishment** – Documentation of the applicant's establishment as a specific type of entity in accordance with the applicable laws of its jurisdiction.
2. **Financial statements** – Applicants must provide audited or independently certified financial statements for the most recently completed fiscal year for the applicant. In some cases, unaudited financial statements may be provided.

As indicated in the relevant questions, supporting documentation should be submitted in the original language. English translations are not required.

All documents must be valid at the time of submission. Refer to the Evaluation Criteria, attached to Module 2, for additional details on the requirements for these documents.

Some types of supporting documentation are required only in certain cases:

1. **Community endorsement** – If an applicant has designated its application as community-based (see section 1.2.3), it will be asked to submit a written endorsement of its application by one or more established institutions representing the community it has named. An applicant may submit written endorsements from multiple institutions. If applicable, this will be submitted in the section of the application concerning the community-based designation.

At least one such endorsement is required for a complete application. The form and content of the endorsement are at the discretion of the party providing the endorsement; however, the letter must identify the applied-for gTLD string and the applying entity, include an express statement of support for the application, and supply the contact information of the entity providing the endorsement.

Written endorsements from individuals need not be submitted with the application, but may be submitted in the application comment forum.

2. **Government support or non-objection** – If an applicant has applied for a gTLD string that is a geographic name (as defined in this Guidebook), the applicant is required to submit documentation of support for or non-objection to its application from the relevant governments or public authorities. Refer to subsection 2.2.1.4 for more information on the requirements for geographic names. If applicable, this will be submitted in the geographic names section of the application.
3. **Documentation of third-party funding commitments** – If an applicant lists funding from third parties in its application, it must provide evidence of commitment by the party committing the funds. If applicable, this will be submitted in the financial section of the application.

1.2.3 Community-Based Designation

All applicants are required to designate whether their application is **community-based**.

1.2.3.1 Definitions

For purposes of this Applicant Guidebook, a **community-based gTLD** is a gTLD that is operated for the benefit of a clearly delineated community. Designation or non-

designation of an application as community-based is entirely at the discretion of the applicant. Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. Additional information may be requested in the event of a community priority evaluation (refer to section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
4. Have its application endorsed in writing by one or more established institutions representing the community it has named.

For purposes of differentiation, an application that has not been designated as community-based will be referred to hereinafter in this document as a **standard application**. A standard gTLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. A standard applicant may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions. Standard simply means here that the applicant has not designated the application as community-based.

1.2.3.2 Implications of Application Designation

Applicants should understand how their designation as community-based or standard will affect application processing at particular stages, and, if the application is successful, execution of the registry agreement and subsequent obligations as a gTLD registry operator, as described in the following paragraphs.

Objection / Dispute Resolution – All applicants should understand that a formal objection may be filed against any application on community grounds, even if the applicant has not designated itself as community-based or

declared the gTLD to be aimed at a particular community. Refer to Module 3, Objection Procedures.

String Contention – Resolution of string contention may include one or more components, depending on the composition of the contention set and the elections made by community-based applicants.

- A **settlement between the parties** can occur at any time after contention is identified. The parties will be encouraged to meet with an objective to settle the contention. Applicants in contention always have the opportunity to resolve the contention voluntarily, resulting in the withdrawal of one or more applications, before reaching the contention resolution stage.
- A **community priority evaluation** will take place only if a community-based applicant in a contention set elects this option. All community-based applicants in a contention set will be offered this option in the event that there is contention remaining after the applications have successfully completed all previous evaluation stages.
- An **auction** will result for cases of contention not resolved by community priority evaluation or agreement between the parties. Auction occurs as a contention resolution means of last resort. If a community priority evaluation occurs but does not produce a clear winner, an auction will take place to resolve the contention.

Refer to Module 4, String Contention Procedures, for detailed discussions of contention resolution procedures.

Contract Execution and Post-Delegation – A community-based applicant will be subject to certain post-delegation contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation. Material changes to the contract, including changes to the community-based nature of the gTLD and any associated provisions, may only be made with ICANN's approval. The determination of whether to approve changes requested by the applicant will be at ICANN's discretion. Proposed criteria for approving such changes are the subject of policy discussions.

Community-based applications are intended to be a narrow category, for applications where there are

unambiguous associations among the applicant, the community served, and the applied-for gTLD string. Evaluation of an applicant's designation as community-based will occur only in the event of a contention situation that results in a community priority evaluation. However, any applicant designating its application as community-based will, if the application is approved, be bound by the registry agreement to implement the community-based restrictions it has specified in the application. This is true even if there are no contending applicants.

1.2.3.3 Changes to Application Designation

An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing.

1.2.4 Notice concerning Technical Acceptance Issues with New gTLDs

All applicants should be aware that approval of an application and entry into a registry agreement with ICANN do not guarantee that a new gTLD will immediately function throughout the Internet. Past experience indicates that network operators may not immediately fully support new top-level domains, even when these domains have been delegated in the DNS root zone, since third-party software modification may be required and may not happen immediately.

Similarly, software applications sometimes attempt to validate domain names and may not recognize new or unknown top-level domains. ICANN has no authority or ability to require that software accept new top-level domains, although it does prominently publicize which top-level domains are valid and has developed a basic tool to assist application providers in the use of current root-zone data.

ICANN encourages applicants to familiarize themselves with these issues and account for them in their startup and launch plans. Successful applicants may find themselves expending considerable efforts working with providers to achieve acceptance of their new top-level domains.

Applicants should review <http://www.icann.org/en/topics/TLD-acceptance/> for background. IDN applicants should also review the material concerning experiences with IDN test strings in the root zone (see <http://idn.icann.org/>).

1.2.5 Notice concerning TLD Delegations

ICANN is only able to create TLDs as delegations in the DNS root zone, expressed using NS records with any corresponding DS records and glue records. There is no policy enabling ICANN to place TLDs as other DNS record types (such as A, MX, or DNAME records) in the root zone.

1.2.6 Terms and Conditions

All applicants must agree to a standard set of Terms and Conditions for the application process. The Terms and Conditions are available in Module 6 of this guidebook.

1.2.7 Notice of Changes to Information

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.

1.2.8 Voluntary Designation for High Security Zones

An ICANN stakeholder group has considered development of a possible special designation for "High Security Zone Top Level Domains" ("HSTLDs"). The group's Final Report can be found at <http://www.icann.org/en/topics/new-gtlds/hstld-final-report-11mar11-en.pdf>.

The Final Report may be used to inform further work. ICANN will support independent efforts toward developing voluntary high-security TLD designations, which may be available to gTLD applicants wishing to pursue such designations.

1.2.9 Security and Stability

Root Zone Stability: There has been significant study, analysis, and consultation in preparation for launch of the

New gTLD Program, indicating that the addition of gTLDs to the root zone will not negatively impact the security or stability of the DNS.

It is estimated that 200-300 TLDs will be delegated annually, and determined that in no case will more than 1000 new gTLDs be added to the root zone in a year. The delegation rate analysis, consultations with the technical community, and anticipated normal operational upgrade cycles all lead to the conclusion that the new gTLD delegations will have no significant impact on the stability of the root system. Modeling and reporting will continue during, and after, the first application round so that root-scaling discussions can continue and the delegation rates can be managed as the program goes forward.

All applicants should be aware that delegation of any new gTLDs is conditional on the continued absence of significant negative impact on the security or stability of the DNS and the root zone system (including the process for delegating TLDs in the root zone). In the event that there is a reported impact in this regard and processing of applications is delayed, the applicants will be notified in an orderly and timely manner.

1.2.10 Resources for Applicant Assistance

A variety of support resources are available to gTLD applicants. Financial assistance will be available to a limited number of eligible applicants. To request financial assistance, applicants must submit a separate financial assistance application in addition to the gTLD application form.

To be eligible for consideration, all financial assistance applications must be received by **23:59 UTC 12 April 2012**. Financial assistance applications will be evaluated and scored against pre-established criteria.

In addition, ICANN maintains a webpage as an informational resource for applicants seeking assistance, and organizations offering support.

See <http://newgtlds.icann.org/applicants/candidate-support> for details on these resources.

1.2.11 Updates to the Applicant Guidebook

As approved by the ICANN Board of Directors, this Guidebook forms the basis of the New gTLD Program. ICANN reserves the right to make reasonable updates and

changes to the Applicant Guidebook at any time, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process. Any such updates or revisions will be posted on ICANN's website.

1.3 Information for Internationalized Domain Name Applicants

Some applied-for gTLD strings are expected to be Internationalized Domain Names (IDNs). IDNs are domain names including characters used in the local representation of languages not written with the basic Latin alphabet (a - z), European-Arabic digits (0 - 9), and the hyphen (-). As described below, IDNs require the insertion of A-labels into the DNS root zone.

1.3.1 IDN-Specific Requirements

An applicant for an IDN string must provide information indicating compliance with the IDNA protocol and other technical requirements. The IDNA protocol and its documentation can be found at <http://icann.org/en/topics/idn/rfcs.htm>.

Applicants must provide applied-for gTLD strings in the form of both a **U-label** (the IDN TLD in local characters) and an **A-label**.

An A-label is the ASCII form of an IDN label. Every IDN A-label begins with the IDNA ACE prefix, "xn--", followed by a string that is a valid output of the Punycode algorithm, making a maximum of 63 total ASCII characters in length. The prefix and string together must conform to all requirements for a label that can be stored in the DNS including conformance to the LDH (host name) rule described in RFC 1034, RFC 1123, and elsewhere.

A U-label is the Unicode form of an IDN label, which a user expects to see displayed in applications.

For example, using the current IDN test string in Cyrillic script, the U-label is <испытание> and the A-label is <xn--80akhbyknj4f>. An A-label must be capable of being produced by conversion from a U-label and a U-label must be capable of being produced by conversion from an A-label.

Applicants for IDN gTLDs will also be required to provide the following at the time of the application:

1. Meaning or restatement of string in English. The applicant will provide a short description of what the string would mean or represent in English.
2. Language of label (ISO 639-1). The applicant will specify the language of the applied-for gTLD string, both according to the ISO codes for the representation of names of languages, and in English.
3. Script of label (ISO 15924). The applicant will specify the script of the applied-for gTLD string, both according to the ISO codes for the representation of names of scripts, and in English.
4. Unicode code points. The applicant will list all the code points contained in the U-label according to its Unicode form.
5. Applicants must further demonstrate that they have made reasonable efforts to ensure that the encoded IDN string does not cause any rendering or operational problems. For example, problems have been identified in strings with characters of mixed right-to-left and left-to-right directionality when numerals are adjacent to the path separator (i.e., the dot).⁷

If an applicant is applying for a string with known issues, it should document steps that will be taken to mitigate these issues in applications. While it is not possible to ensure that all rendering problems are avoided, it is important that as many as possible are identified early and that the potential registry operator is aware of these issues. Applicants can become familiar with these issues by understanding the IDNA protocol (see <http://www.icann.org/en/topics/idn/rfcs.htm>), and by active participation in the IDN wiki (see <http://idn.icann.org/>) where some rendering problems are demonstrated.

6. **[Optional]** - Representation of label in phonetic alphabet. The applicant may choose to provide its applied-for gTLD string notated according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>). Note that this information will not be evaluated or scored. The information, if provided, will be used as a guide to ICANN in responding to inquiries or speaking of the application in public presentations.

⁷ See examples at <http://stupid.domain.name/node/683>

1.3.2 IDN Tables

An IDN table provides the list of characters eligible for registration in domain names according to the registry's policy. It identifies any multiple characters that are considered equivalent for domain name registration purposes ("variant characters"). Variant characters occur where two or more characters can be used interchangeably.

Examples of IDN tables can be found in the Internet Assigned Numbers Authority (IANA) IDN Repository at <http://www.iana.org/procedures/idn-repository.html>.

In the case of an application for an IDN gTLD, IDN tables must be submitted for the language or script for the applied-for gTLD string (the "top level tables"). IDN tables must also be submitted for each language or script in which the applicant intends to offer IDN registrations at the second or lower levels.

Each applicant is responsible for developing its IDN Tables, including specification of any variant characters. Tables must comply with ICANN's IDN Guidelines⁸ and any updates thereto, including:

- Complying with IDN technical standards.
- Employing an inclusion-based approach (i.e., code points not explicitly permitted by the registry are prohibited).
- Defining variant characters.
- Excluding code points not permissible under the guidelines, e.g., line-drawing symbols, pictographic dingbats, structural punctuation marks.
- Developing tables and registration policies in collaboration with relevant stakeholders to address common issues.
- Depositing IDN tables with the IANA Repository for IDN Practices (once the TLD is delegated).

An applicant's IDN tables should help guard against user confusion in the deployment of IDN gTLDs. Applicants are strongly urged to consider specific linguistic and writing system issues that may cause problems when characters are used in domain names, as part of their work of defining variant characters.

⁸ See <http://www.icann.org/en/topics/idn/implementation-guidelines.htm>

To avoid user confusion due to differing practices across TLD registries, it is recommended that applicants cooperate with TLD operators that offer domain name registration with the same or visually similar characters.

As an example, languages or scripts are often shared across geographic boundaries. In some cases, this can cause confusion among the users of the corresponding language or script communities. Visual confusion can also exist in some instances between different scripts (for example, Greek, Cyrillic and Latin).

Applicants will be asked to describe the process used in developing the IDN tables submitted. ICANN may compare an applicant's IDN table with IDN tables for the same languages or scripts that already exist in the IANA repository or have been otherwise submitted to ICANN. If there are inconsistencies that have not been explained in the application, ICANN may ask the applicant to detail the rationale for differences. For applicants that wish to conduct and review such comparisons prior to submitting a table to ICANN, a table comparison tool will be available.

ICANN will accept the applicant's IDN tables based on the factors above.

Once the applied-for string has been delegated as a TLD in the root zone, the applicant is required to submit IDN tables for lodging in the IANA Repository of IDN Practices. For additional information, see existing tables at <http://iana.org/domains/idn-tables/>, and submission guidelines at <http://iana.org/procedures/idn-repository.html>.

1.3.3 IDN Variant TLDs

A variant TLD string results from the substitution of one or more characters in the applied-for gTLD string with variant characters based on the applicant's top level tables.

Each application contains one applied-for gTLD string. The applicant may also declare any variant strings for the TLD in its application. However, no variant gTLD strings will be delegated through the New gTLD Program until variant management solutions are developed and implemented.⁹ Declaring variant strings is informative only and will not imply any right or claim to the declared variant strings.

⁹ The ICANN Board directed that work be pursued on variant management in its resolution on 25 Sep 2010, <http://www.icann.org/en/minutes/resolutions-25sep10-en.htm#2.5>.

When a variant delegation process is established, applicants may be required to submit additional information such as implementation details for the variant TLD management mechanism, and may need to participate in a subsequent evaluation process, which could contain additional fees and review steps.

The following scenarios are possible during the gTLD evaluation process:

- a. Applicant declares variant strings to the applied-for gTLD string in its application. If the application is successful, the applied-for gTLD string will be delegated to the applicant. The declared variant strings are noted for future reference. These declared variant strings will not be delegated to the applicant along with the applied-for gTLD string, nor will the applicant have any right or claim to the declared variant strings.

Variant strings listed in successful gTLD applications will be tagged to the specific application and added to a "Declared Variants List" that will be available on ICANN's website. A list of pending (i.e., declared) variant strings from the IDN ccTLD Fast Track is available at <http://icann.org/en/topics/idn/fast-track/string-evaluation-completion-en.htm>.

ICANN may perform independent analysis on the declared variant strings, and will not necessarily include all strings listed by the applicant on the Declared Variants List.

- b. Multiple applicants apply for strings that are identified by ICANN as variants of one another. These applications will be placed in a contention set and will follow the contention resolution procedures in Module 4.
- c. Applicant submits an application for a gTLD string and does not indicate variants to the applied-for gTLD string. ICANN will not identify variant strings unless scenario (b) above occurs.

Each variant string declared in the application must also conform to the string requirements in section 2.2.1.3.2.

Variant strings declared in the application will be reviewed for consistency with the top-level tables submitted in the application. Should any declared variant strings not be

based on use of variant characters according to the submitted top-level tables, the applicant will be notified and the declared string will no longer be considered part of the application.

Declaration of variant strings in an application does not provide the applicant any right or reservation to a particular string. Variant strings on the Declared Variants List may be subject to subsequent additional review per a process and criteria to be defined.

It should be noted that while variants for second and lower-level registrations are defined freely by the local communities without any ICANN validation, there may be specific rules and validation criteria specified for variant strings to be allowed at the top level. It is expected that the variant information provided by applicants in the first application round will contribute to a better understanding of the issues and assist in determining appropriate review steps and fee levels going forward.

1.4 Submitting an Application

Applicants may complete the application form and submit supporting documents using ICANN's TLD Application System (TAS). To access the system, each applicant must first register as a TAS user.

As TAS users, applicants will be able to provide responses in open text boxes and submit required supporting documents as attachments. Restrictions on the size of attachments as well as the file formats are included in the instructions on the TAS site.

Except where expressly provided within the question, all application materials must be submitted in English.

ICANN will not accept application forms or supporting materials submitted through other means than TAS (that is, hard copy, fax, email), unless such submission is in accordance with specific instructions from ICANN to applicants.

1.4.1 Accessing the TLD Application System

The TAS site will be accessible from the New gTLD webpage (<http://www.icann.org/en/topics/new-gtld-program.htm>), and will be highlighted in communications regarding the opening of the application submission period. Users of TAS will be expected to agree to a standard set of terms of use

including user rights, obligations, and restrictions in relation to the use of the system.

1.4.1.1 User Registration

TAS user registration (creating a TAS user profile) requires submission of preliminary information, which will be used to validate the identity of the parties involved in the application. An overview of the information collected in the user registration process is below:

No.	Questions
1	Full legal name of Applicant
2	Principal business address
3	Phone number of Applicant
4	Fax number of Applicant
5	Website or URL, if applicable
6	Primary Contact: Name, Title, Address, Phone, Fax, Email
7	Secondary Contact: Name, Title, Address, Phone, Fax, Email
8	Proof of legal establishment
9	Trading, subsidiary, or joint venture information
10	Business ID, Tax ID, VAT registration number, or equivalent of Applicant
11	Applicant background: previous convictions, cybersquatting activities
12	Deposit payment confirmation and payer information

A subset of identifying information will be collected from the entity performing the user registration, in addition to the applicant information listed above. The registered user could be, for example, an agent, representative, or

employee who would be completing the application on behalf of the applicant.

The registration process will require the user to request the desired number of application slots. For example, a user intending to submit five gTLD applications would complete five application slot requests, and the system would assign the user a unique ID number for each of the five applications.

Users will also be required to submit a deposit of USD 5,000 per application slot. This deposit amount will be credited against the evaluation fee for each application. The deposit requirement is in place to help reduce the risk of frivolous access to the online application system.

After completing the registration, TAS users will receive access enabling them to enter the rest of the application information into the system. Application slots will be populated with the registration information provided by the applicant, which may not ordinarily be changed once slots have been assigned.

No new user registrations will be accepted after **23:59 UTC 29 March 2012**.

ICANN will take commercially reasonable steps to protect all applicant data submitted from unauthorized access, but cannot warrant against the malicious acts of third parties who may, through system corruption or other means, gain unauthorized access to such data.

1.4.1.2 Application Form

Having obtained the requested application slots, the applicant will complete the remaining application questions. An overview of the areas and questions contained in the form is shown here:

No.	Application and String Information
12	Payment confirmation for remaining evaluation fee amount
13	Applied-for gTLD string
14	IDN string information, if applicable
15	IDN tables, if applicable

16	Mitigation of IDN operational or rendering problems, if applicable
17	Representation of string in International Phonetic Alphabet (Optional)
18	Mission/purpose of the TLD
19	Is the application for a community-based TLD?
20	If community based, describe elements of community and proposed policies
21	Is the application for a geographic name? If geographic, documents of support required
22	Measures for protection of geographic names at second level
23	Registry Services: name and full description of all registry services to be provided
	Technical and Operational Questions (External)
24	Shared registration system (SRS) performance
25	EPP
26	Whois
27	Registration life cycle
28	Abuse prevention & mitigation
29	Rights protection mechanisms
30(a)	Security
	Technical and Operational Questions (Internal)
30(b)	Security
31	Technical overview of proposed registry
32	Architecture

33	Database capabilities
34	Geographic diversity
35	DNS service compliance
36	IPv6 reachability
37	Data backup policies and procedures
38	Escrow
39	Registry continuity
40	Registry transition
41	Failover testing
42	Monitoring and fault escalation processes
43	DNSSEC
44	IDNs (Optional)
	Financial Questions
45	Financial statements
46	Projections template: costs and funding
47	Costs: setup and operating
48	Funding and revenue
49	Contingency planning: barriers, funds, volumes
50	Continuity: continued operations instrument

1.4.2 Customer Service during the Application Process

Assistance will be available to applicants throughout the application process via the Applicant Service Center (ASC). The ASC will be staffed with customer service agents

to answer questions relating to the New gTLD Program, the application process, and TAS.

1.4.3 Backup Application Process

If the online application system is not available, ICANN will provide alternative instructions for submitting applications.

1.5 Fees and Payments

This section describes the fees to be paid by the applicant. Payment instructions are also included here.

1.5.1 gTLD Evaluation Fee

The gTLD evaluation fee is required from all applicants. This fee is in the amount of USD 185,000. The evaluation fee is payable in the form of a 5,000 deposit submitted at the time the user requests an application slot within TAS, and a payment of the remaining 180,000 submitted with the full application. ICANN will not begin its evaluation of an application unless it has received the full gTLD evaluation fee by **23:59 UTC 12 April 2012**.

The gTLD evaluation fee is set to recover costs associated with the new gTLD program. The fee is set to ensure that the program is fully funded and revenue neutral and is not subsidized by existing contributions from ICANN funding sources, including generic TLD registries and registrars, ccTLD contributions and RIR contributions.

The gTLD evaluation fee covers all required reviews in Initial Evaluation and, in most cases, any required reviews in Extended Evaluation. If an extended Registry Services review takes place, an additional fee will be incurred for this review (see section 1.5.2). There is no additional fee to the applicant for Extended Evaluation for geographic names, technical and operational, or financial reviews.

Refunds -- In certain cases, refunds of a portion of the evaluation fee may be available for applications that are withdrawn before the evaluation process is complete. An applicant may request a refund at any time until it has executed a registry agreement with ICANN. The amount of the refund will depend on the point in the process at which the withdrawal is requested, as follows:

Refund Available to Applicant	Percentage of Evaluation Fee	Amount of Refund
Within 21 calendar days of a GAC Early	80%	USD 148,000

Refund Available to Applicant	Percentage of Evaluation Fee	Amount of Refund
Warning		
After posting of applications until posting of Initial Evaluation results	70%	USD 130,000
After posting Initial Evaluation results	35%	USD 65,000
After the applicant has completed Dispute Resolution, Extended Evaluation, or String Contention Resolution(s)	20%	USD 37,000
After the applicant has entered into a registry agreement with ICANN		None

Thus, any applicant that has not been successful is eligible for at least a 20% refund of the evaluation fee if it withdraws its application.

An applicant that wishes to withdraw an application must initiate the process through TAS. Withdrawal of an application is final and irrevocable. Refunds will only be issued to the organization that submitted the original payment. All refunds are paid by wire transfer. Any bank transfer or transaction fees incurred by ICANN, or any unpaid evaluation fees, will be deducted from the amount paid. Any refund paid will be in full satisfaction of ICANN's obligations to the applicant. The applicant will have no entitlement to any additional amounts, including for interest or currency exchange rate changes.

Note on 2000 proof-of-concept round applicants -- Participants in ICANN's proof-of-concept application process in 2000 may be eligible for a credit toward the evaluation fee. The credit is in the amount of USD 86,000 and is subject to:

- submission of documentary proof by the applicant that it is the same entity, a successor in interest to the same entity, or an affiliate of the same entity that applied previously;
- a confirmation that the applicant was not awarded any TLD string pursuant to the 2000 proof-of-concept application pursuant round and that the applicant has no legal claims arising from the 2000 proof-of-concept process; and
- submission of an application, which may be modified from the application originally submitted in 2000, for the same TLD string that such entity applied for in the 2000 proof-of-concept application round.

Each participant in the 2000 proof-of-concept application process is eligible for at most one credit. A maximum of one credit may be claimed for any new gTLD application submitted according to the process in this guidebook. Eligibility for this credit is determined by ICANN.

1.5.2 Fees Required in Some Cases

Applicants may be required to pay additional fees in certain cases where specialized process steps are applicable. Those possible additional fees¹⁰ include:

- **Registry Services Review Fee** – If applicable, this fee is payable for additional costs incurred in referring an application to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review. Applicants will be notified if such a fee is due. The fee for a three-member RSTEP review team is anticipated to be USD 50,000. In some cases, five-member panels might be required, or there might be increased scrutiny at a greater cost. The amount of the fee will cover the cost of the RSTEP review. In the event that reviews of proposed registry services can be consolidated across multiple applications or applicants, ICANN will apportion the fees in an equitable manner. In every case, the applicant will be advised of the cost before initiation of the review. Refer to subsection 2.2.3 of Module 2 on Registry Services review.

¹⁰ The estimated fee amounts provided in this section 1.5.2 will be updated upon engagement of panel service providers and establishment of fees.

- **Dispute Resolution Filing Fee** – This amount must accompany any filing of a formal objection and any response that an applicant files to an objection. This fee is payable directly to the applicable dispute resolution service provider in accordance with the provider’s payment instructions. ICANN estimates that filing fees could range from approximately USD 1,000 to USD 5,000 (or more) per party per proceeding. Refer to the appropriate provider for the relevant amount. Refer to Module 3 for dispute resolution procedures.
- **Advance Payment of Costs** – In the event of a formal objection, this amount is payable directly to the applicable dispute resolution service provider in accordance with that provider’s procedures and schedule of costs. Ordinarily, both parties in the dispute resolution proceeding will be required to submit an advance payment of costs in an estimated amount to cover the entire cost of the proceeding. This may be either an hourly fee based on the estimated number of hours the panelists will spend on the case (including review of submissions, facilitation of a hearing, if allowed, and preparation of a decision), or a fixed amount. In cases where disputes are consolidated and there are more than two parties involved, the advance payment will occur according to the dispute resolution service provider’s rules.

The prevailing party in a dispute resolution proceeding will have its advance payment refunded, while the non-prevailing party will not receive a refund and thus will bear the cost of the proceeding. In cases where disputes are consolidated and there are more than two parties involved, the refund of fees will occur according to the dispute resolution service provider’s rules.

ICANN estimates that adjudication fees for a proceeding involving a fixed amount could range from USD 2,000 to USD 8,000 (or more) per proceeding. ICANN further estimates that an hourly rate based proceeding with a one-member panel could range from USD 32,000 to USD 56,000 (or more) and with a three-member panel it could range from USD 70,000 to USD 122,000 (or more). These estimates may be lower if the panel does not call for written submissions beyond the objection and response, and does not allow a hearing. Please

refer to the appropriate provider for the relevant amounts or fee structures.

- **Community Priority Evaluation Fee** – In the event that the applicant participates in a community priority evaluation, this fee is payable as a deposit in an amount to cover the cost of the panel's review of that application (currently estimated at USD 10,000). The deposit is payable to the provider appointed to handle community priority evaluations. Applicants will be notified if such a fee is due. Refer to Section 4.2 of Module 4 for circumstances in which a community priority evaluation may take place. An applicant who scores at or above the threshold for the community priority evaluation will have its deposit refunded.

ICANN will notify the applicants of due dates for payment in respect of additional fees (if applicable). This list does not include fees (annual registry fees) that will be payable to ICANN following execution of a registry agreement.

1.5.3 Payment Methods

Payments to ICANN should be submitted by **wire transfer**. Instructions for making a payment by wire transfer will be available in TAS.¹¹

Payments to Dispute Resolution Service Providers should be submitted in accordance with the provider's instructions.

1.5.4 Requesting a Remittance Form

The TAS interface allows applicants to request issuance of a remittance form for any of the fees payable to ICANN. This service is for the convenience of applicants that require an invoice to process payments.

1.6 Questions about this Applicant Guidebook

For assistance and questions an applicant may have in the process of completing the application form, applicants should use the customer support resources available via the ASC. Applicants who are unsure of the information being sought in a question or the parameters for acceptable documentation are encouraged to communicate these questions through the appropriate

¹¹ Wire transfer is the preferred method of payment as it offers a globally accessible and dependable means for international transfer of funds. This enables ICANN to receive the fee and begin processing applications as quickly as possible.

support channels before the application is submitted. This helps avoid the need for exchanges with evaluators to clarify information, which extends the timeframe associated with processing the application.

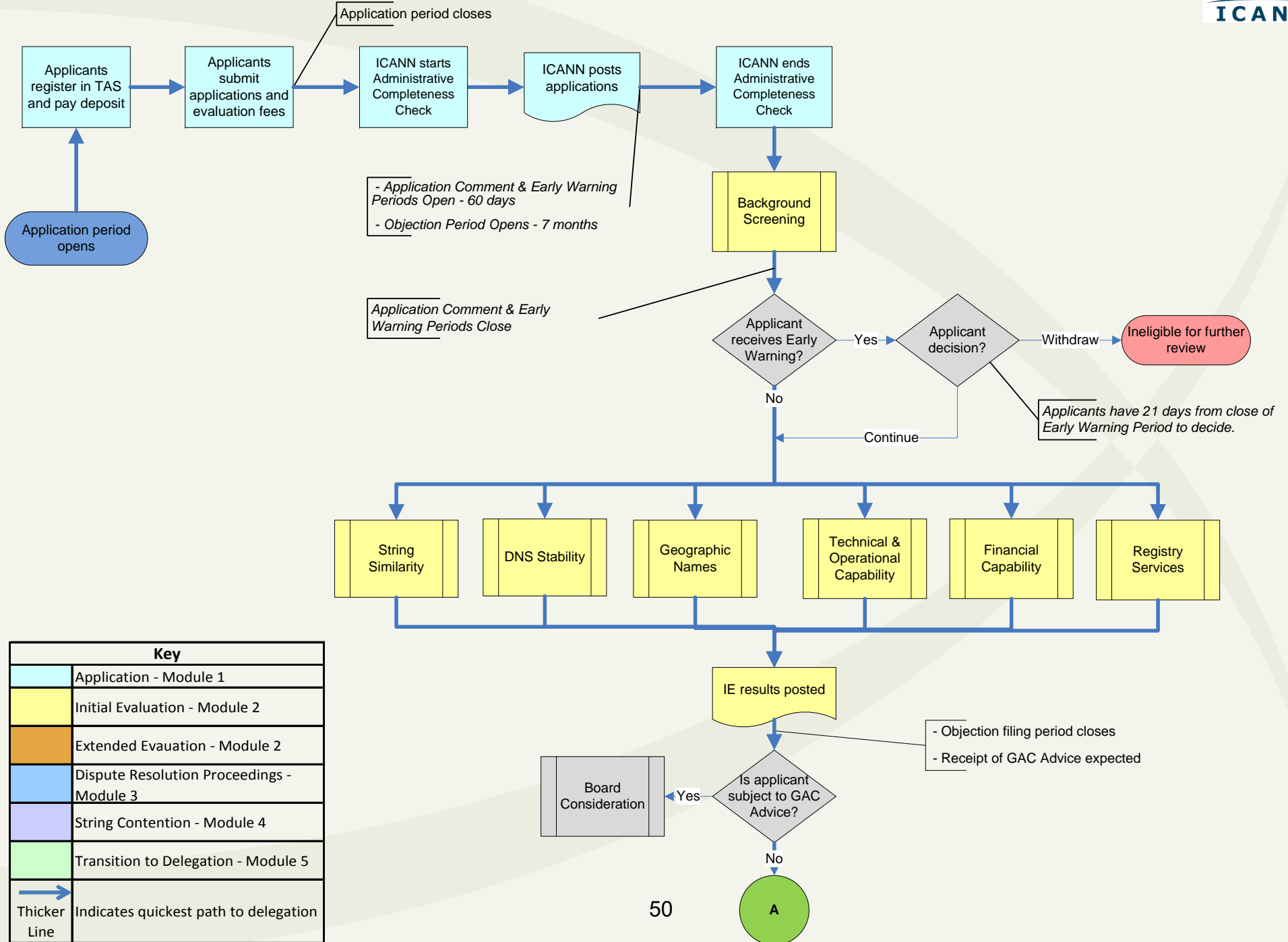
Currently, questions may be submitted via <newgtld@icann.org>. To provide all applicants equitable access to information, ICANN will make all questions and answers publicly available.

All requests to ICANN for information about the process or issues surrounding preparation of an application must be submitted to the ASC. ICANN will not grant requests from applicants for personal or telephone consultations regarding the preparation of an application. Applicants that contact ICANN for clarification about aspects of the application will be referred to the ASC.

Answers to inquiries will only provide clarification about the application forms and procedures. ICANN will not provide consulting, financial, or legal advice.



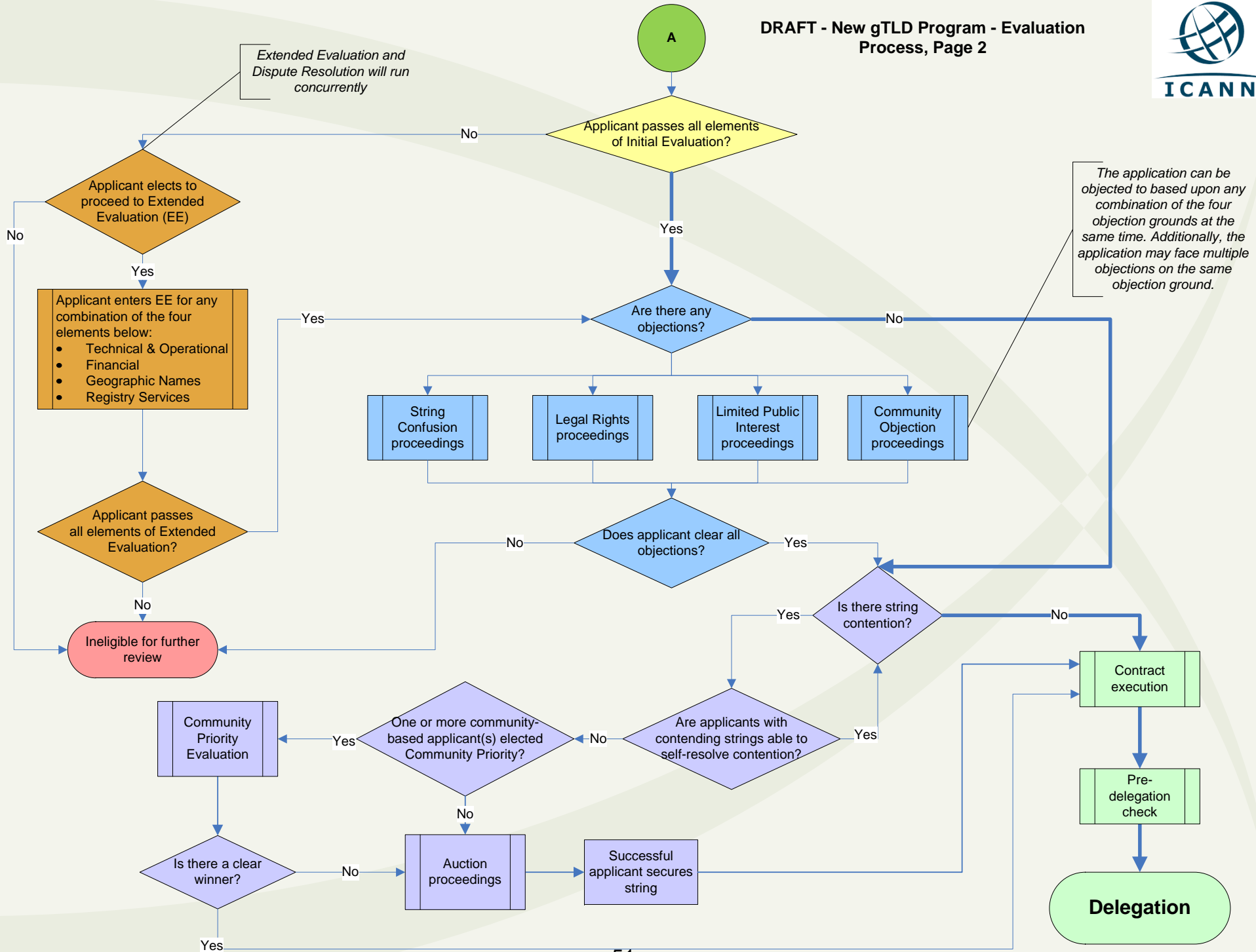
DRAFT - New gTLD Program - Evaluation Process



Key	
	Application - Module 1
	Initial Evaluation - Module 2
	Extended Evaluation - Module 2
	Dispute Resolution Proceedings - Module 3
	String Contention - Module 4
	Transition to Delegation - Module 5
	Indicates quickest path to delegation
	Thicker Line



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gTLD Applicant Guidebook

(v. 2012-06-04)

Module 4

4 June 2012

Module 4

String Contention Procedures

This module describes situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

(In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant IDN table. That is, two or more applicants whose applied-for strings or designated variants are variant strings according to an IDN table submitted to ICANN would be considered in direct contention with one another. For example, if one applicant applies for string A and another applies for string B, and strings A and B are variant TLD strings as defined in Module 1, then the two applications are in direct contention.

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or similar to one another. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. The example that follows explains direct and indirect contention in greater detail.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.

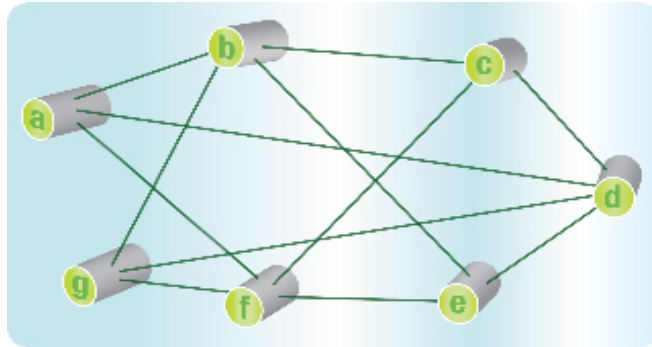


Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.

While preliminary contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process stages have concluded. This is because any application excluded through those processes might modify a contention set identified earlier.

A contention set may be augmented, split into two sets, or eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding. The composition of a contention set may also be modified as some applications may be voluntarily withdrawn throughout the process.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.

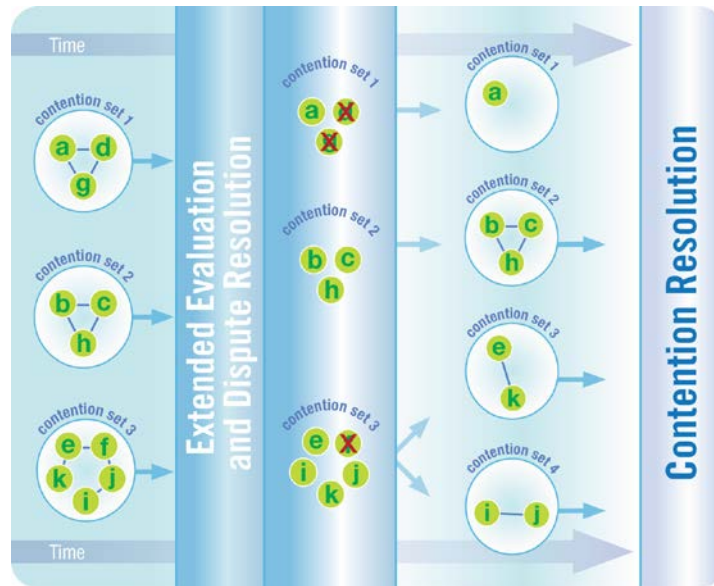


Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.

The remaining contention cases must then be resolved through community priority evaluation or by other means, depending on the circumstances. In the string contention resolution stage, ICANN addresses each contention set to achieve an unambiguous resolution.

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

4.1.2 *Impact of String Confusion Dispute Resolution Proceedings on Contention Sets*

If an applicant files a string confusion objection against another application (refer to Module 3), and the panel finds that user confusion is probable (that is, finds in favor of the objector), the two applications will be placed in direct contention with each other. Thus, the outcome of a dispute resolution proceeding based on a string confusion objection would be a new contention set structure for the relevant applications, augmenting the original contention set.

If an applicant files a string confusion objection against another application, and the panel finds that string

confusion does not exist (that is, finds in favor of the responding applicant), the two applications will not be considered in direct contention with one another.

A dispute resolution outcome in the case of a string confusion objection filed by another applicant will not result in removal of an application from a previously established contention set.

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention. However, material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.

4.1.4 Possible Contention Resolution Outcomes

An application that has successfully completed all previous stages and is no longer part of a contention set due to changes in the composition of the contention set (as described in subsection 4.1.1) or self-resolution by applicants in the contention set (as described in subsection 4.1.3) may proceed to the next stage.

An application that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.

In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, consider a case where string A is in contention with B, and B is in contention with C, but C is not in contention with A. If A wins the contention resolution procedure, B is eliminated but C can proceed since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

4.2 Community Priority Evaluation

Community priority evaluation will only occur if a community-based applicant selects this option. Community priority evaluation can begin once all applications in the contention set have completed all previous stages of the process.

The community priority evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the community priority evaluation. Each application participating in the community priority evaluation begins with a score of zero.

4.2.1 Eligibility for Community Priority Evaluation

As described in subsection 1.2.3 of Module 1, all applicants are required to identify whether their application type is:

- Community-based; or
- Standard.

Applicants designating their applications as community-based are also asked to respond to a set of questions in the application form to provide relevant information if a community priority evaluation occurs.

Only community-based applicants are eligible to participate in a community priority evaluation.

At the start of the contention resolution stage, all community-based applicants within remaining contention sets will be notified of the opportunity to opt for a community priority evaluation via submission of a deposit by a specified date. Only those applications for which a deposit has been received by the deadline will be scored in the community priority evaluation. Following the evaluation, the deposit will be refunded to applicants that score 14 or higher.

Before the community priority evaluation begins, the applicants who have elected to participate may be asked to provide additional information relevant to the community priority evaluation.

4.2.2 Community Priority Evaluation Procedure

Community priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications. The panel's role is to determine whether any of the community-based applications fulfills the community priority criteria. Standard applicants within the contention set, if any, will not participate in the community priority evaluation.

If a single community-based application is found to meet the community priority criteria (see subsection 4.2.3 below), that applicant will be declared to prevail in the community priority evaluation and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as follows:

- In the case where the applications are in indirect contention with one another (see subsection 4.1.1), they will both be allowed to proceed to the next stage. In this case, applications that are in direct contention with any of these community-based applications will be eliminated.
- In the case where the applications are in direct contention with one another, these applicants will proceed to an auction. If all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. This is a one-time option; ICANN will grant no more than one such request for each set of contending applications.

If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction.

Results of each community priority evaluation will be posted when completed.

Applicants who are eliminated as a result of a community priority evaluation are eligible for a partial refund of the gTLD evaluation fee (see Module 1).

4.2.3 Community Priority Evaluation Criteria

The Community Priority Panel will review and score the one or more community-based applications having elected the community priority evaluation against four criteria as listed below.

The scoring process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). This calls for a holistic approach, taking multiple criteria into account, as reflected in the process. The scoring will be performed by a panel and be based on information provided in the application plus other relevant information available (such as public information regarding the community represented). The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.

It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.

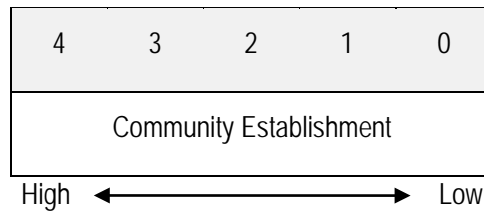
The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any “double-counting” - any negative aspect found in assessing an application for one criterion

should only be counted there and should not affect the assessment for other criteria.

An application must score at least 14 points to prevail in a community priority evaluation. The outcome will be determined according to the procedure described in subsection 4.2.2.

Criterion #1: Community Establishment (0-4 points)

A maximum of 4 points is possible on the Community Establishment criterion:



As measured by:

A. Delineation (2)

2	1	0
Clearly delineated, organized, and pre-existing community.	Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.	Insufficient delineation and pre-existence for a score of 1.

B. Extension (2)

2	1	0
Community of considerable size and longevity.	Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.	Community of neither considerable size nor longevity.

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not

considered here, but taken into account when scoring Criterion #2, "Nexus between Proposed String and Community.")

Criterion 1 Definitions

- "Community" - Usage of the expression "community" has evolved considerably from its Latin origin – "communitas" meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be:
(a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.
- "Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.
- "Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.
- "Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.
- "Extension" relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.
- "Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."

- "Longevity" means that the pursuits of a community are of a lasting, non-transient nature.

Criterion 1 Guidelines

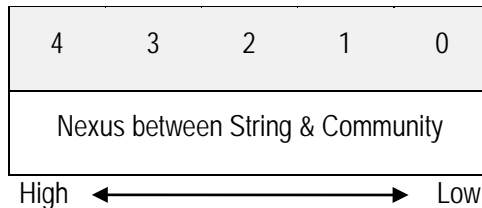
With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."

With respect to "Delineation," if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.

With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.

Criterion #2: Nexus between Proposed String and Community (0-4 points)

A maximum of 4 points is possible on the Nexus criterion:



As measured by:

A. Nexus (3)

3	2	0
The string matches the name of the community or is a well-known short-form or abbreviation of the community	String identifies the community, but does not qualify for a score of 3.	String nexus does not fulfill the requirements for a score of 2.

3	2	0
name.		

B. Uniqueness (1)

1	0
String has no other significant meaning beyond identifying the community described in the application.	String does not fulfill the requirement for a score of 1.

This section evaluates the relevance of the string to the specific community that it claims to represent.

Criterion 2 Definitions

- "Name" of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.
- "Identify" means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.

Criterion 2 Guidelines

With respect to "Nexus," for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.

With respect to "Nexus," for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not qualify for a 2.

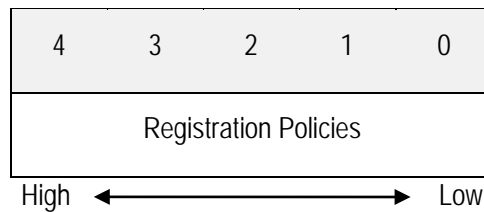
With respect to "Uniqueness," "significant meaning" relates to the public in general, with consideration of the community language context added.

"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores 2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies (0-4 points)

A maximum of 4 points is possible on the Registration Policies criterion:



As measured by:

A. Eligibility (1)

1	0
Eligibility restricted to community members.	Largely unrestricted approach to eligibility.

B. Name selection (1)

1	0
Policies include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

C. Content and use (1)

1	0
Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.	Policies do not fulfill the requirements for a score of 1.

D. Enforcement (1)

1	0
Policies include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.	Policies do not fulfill the requirements for a score of 1.

This section evaluates the applicant's registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Criterion 3 Definitions

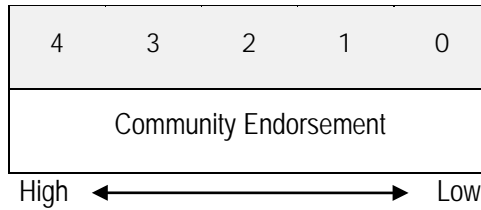
- "Eligibility" means the qualifications that entities or individuals must have in order to be allowed as registrants by the registry.
- "Name selection" means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.
- "Content and use" means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.
- "Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

Criterion 3 Guidelines

With respect to "Eligibility," the limitation to community "members" can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant's physical address is within the boundaries of the location.

With respect to "Name selection," "Content and use," and "Enforcement," scoring of applications against these sub-criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Criterion #4: Community Endorsement (0-4 points)



As measured by:

A. Support (2)

2	1	0
Applicant is, or has documented support from, the recognized community institution(s)/ member organization(s) or has otherwise documented authority to represent the community.	Documented support from at least one group with relevance, but insufficient support for a score of 2.	Insufficient proof of support for a score of 1.

B. Opposition (2)

2	1	0
No opposition of relevance.	Relevant opposition from one group of non-negligible size.	Relevant opposition from two or more groups of non-negligible size.

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed as stated in the application, with due regard for the communities implicitly addressed by the string.

Criterion 4 Definitions

- "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by

the community members as representative of the community.

- "Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied-for string would be considered relevant.

Criterion 4 Guidelines

With respect to "Support," it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.

Also with respect to "Support," the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.

The applicant will score a 1 for "Support" if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on "Support" if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.

When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed

in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for “Opposition.” To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

An auction will not take place to resolve contention in the case where the contending applications are for geographic names (as defined in Module 2). In this case, the applications will be suspended pending resolution by the applicants.

An auction will take place, where contention has not already been resolved, in the case where an application for a geographic name is in a contention set with applications for similar strings that have not been identified as geographic names.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching the auction stage. However, there is a possibility that significant funding will accrue to ICANN as a result of one or more auctions.¹

¹ The purpose of an auction is to resolve contention in a clear, objective manner. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status.

Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

4.3.1 Auction Procedures

An auction of two or more applications within a contention set is conducted as follows. The auctioneer successively increases the prices associated with applications within the contention set, and the respective applicants indicate their willingness to pay these prices. As the prices rise, applicants will successively choose to exit from the auction. When a sufficient number of applications have been eliminated so that no direct contentions remain (i.e., the remaining applications are no longer in contention with one another and all the relevant strings can be delegated as TLDs), the auction will be deemed to conclude. At the auction's conclusion, the applicants with remaining applications will pay the resulting prices and proceed toward delegation. This procedure is referred to as an "ascending-clock auction."

This section provides applicants an informal introduction to the practicalities of participation in an ascending-clock auction. It is intended only as a general introduction and is only preliminary. The detailed set of Auction Rules will be available prior to the commencement of any auction proceedings. If any conflict arises between this module and the auction rules, the auction rules will prevail.

For simplicity, this section will describe the situation where a contention set consists of two or more applications for identical strings.

All auctions will be conducted over the Internet, with participants placing their bids remotely using a web-based software system designed especially for auction. The auction software system will be compatible with current versions of most prevalent browsers, and will not require the local installation of any additional software.

Auction participants ("bidders") will receive instructions for access to the online auction site. Access to the site will be password-protected and bids will be encrypted through SSL. If a bidder temporarily loses connection to the Internet, that bidder may be permitted to submit its bids in a given auction round by fax, according to procedures described

The amount of funding resulting from auctions, if any, will not be known until all relevant applications have completed this step. Thus, a detailed mechanism for allocation of these funds is not being created at present. However, a process can be pre-established to enable community consultation in the event that such funds are collected. This process will include, at a minimum, publication of data on any funds collected, and public comment on any proposed models.

in the auction rules. The auctions will generally be conducted to conclude quickly, ideally in a single day.

The auction will be carried out in a series of auction rounds, as illustrated in Figure 4-3. The sequence of events is as follows:

1. For each auction round, the auctioneer will announce in advance: (1) the start-of-round price, (2) the end-of-round price, and (3) the starting and ending times of the auction round. In the first auction round, the start-of-round price for all bidders in the auction will be USD 0. In later auction rounds, the start-of-round price will be its end-of-round price from the previous auction round.

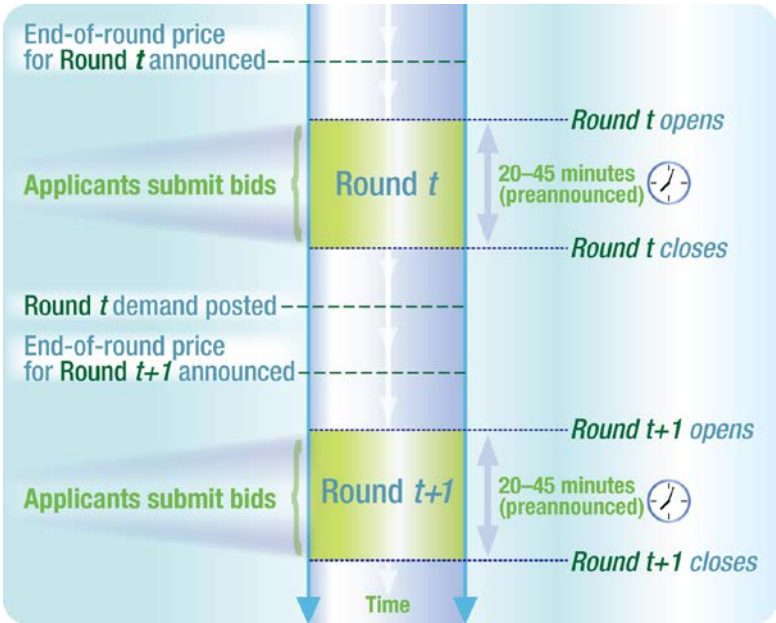


Figure 4-3 – Sequence of events during an ascending-clock auction.

2. During each auction round, bidders will be required to submit a bid or bids representing their willingness to pay within the range of intermediate prices between the start-of-round and end-of-round prices. In this way a bidder indicates its willingness to stay in the auction at all prices through and including the end-of-auction round price, or its wish to exit the auction at a price less than the end-of-auction round price, called the exit bid.
3. Exit is irrevocable. If a bidder exited the auction in a previous auction round, the bidder is not permitted to re-enter in the current auction round.

4. Bidders may submit their bid or bids at any time during the auction round.
5. Only bids that comply with all aspects of the auction rules will be considered valid. If more than one valid bid is submitted by a given bidder within the time limit of the auction round, the auctioneer will treat the last valid submitted bid as the actual bid.
6. At the end of each auction round, bids become the bidders' legally-binding offers to secure the relevant gTLD strings at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction rules. In later auction rounds, bids may be used to exit from the auction at subsequent higher prices.
7. After each auction round, the auctioneer will disclose the aggregate number of bidders remaining in the auction at the end-of-round prices for the auction round, and will announce the prices and times for the next auction round.
 - Each bid should consist of a single price associated with the application, and such price must be greater than or equal to the start-of-round price.
 - If the bid amount is strictly less than the end-of-round price, then the bid is treated as an exit bid at the specified amount, and it signifies the bidder's binding commitment to pay up to the bid amount if its application is approved.
 - If the bid amount is greater than or equal to the end-of-round price, then the bid signifies that the bidder wishes to remain in the auction at all prices in the current auction round, and it signifies the bidder's binding commitment to pay up to the end-of-round price if its application is approved. Following such bid, the application cannot be eliminated within the current auction round.
 - To the extent that the bid amount exceeds the end-of-round price, then the bid is also treated as a proxy bid to be carried forward to the next auction round. The bidder will be permitted to change the proxy bid amount in the next auction round, and the amount of the proxy bid will not constrain the bidder's ability to submit any valid bid amount in the next auction round.

- No bidder is permitted to submit a bid for any application for which an exit bid was received in a prior auction round. That is, once an application has exited the auction, it may not return.
 - If no valid bid is submitted within a given auction round for an application that remains in the auction, then the bid amount is taken to be the amount of the proxy bid, if any, carried forward from the previous auction round or, if none, the bid is taken to be an exit bid at the start-of-round price for the current auction round.
8. This process continues, with the auctioneer increasing the price range for each given TLD string in each auction round, until there is one remaining bidder at the end-of-round price. After an auction round in which this condition is satisfied, the auction concludes and the auctioneer determines the clearing price. The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price.

Figure 4-4 illustrates how an auction for five contending applications might progress.

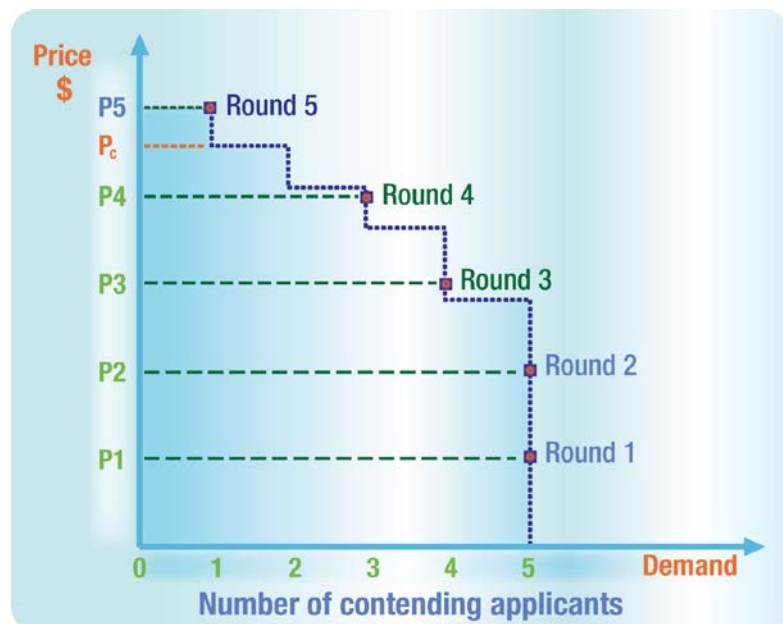


Figure 4-4 – Example of an auction for five mutually-contending applications.

- Before the first auction round, the auctioneer announces the end-of-round price P_1 .
- During Auction round 1, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_1 . Since the aggregate demand exceeds one, the auction proceeds to Auction round 2. The auctioneer discloses that five contending applications remained at P_1 and announces the end-of-round price P_2 .
- During Auction round 2, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_2 . The auctioneer discloses that five contending applications remained at P_2 and announces the end-of-round price P_3 .
- During Auction round 3, one of the bidders submits an exit bid at slightly below P_3 , while the other four bidders submit bids of at least P_3 . The auctioneer discloses that four contending applications remained at P_3 and announces the end-of-round price P_4 .
- During Auction round 4, one of the bidders submits an exit bid midway between P_3 and P_4 , while the other three remaining bidders submit bids of at least P_4 . The auctioneer discloses that three contending applications remained at P_4 and announces the end-of-auction round price P_5 .
- During Auction round 5, one of the bidders submits an exit bid at slightly above P_4 , and one of the bidders submits an exit bid at P_c midway between P_4 and P_5 . The final bidder submits a bid greater than P_c . Since the aggregate demand at P_5 does not exceed one, the auction concludes in Auction round 5. The application associated with the highest bid in Auction round 5 is deemed the successful application. The clearing price is P_c , as this is the lowest price at which aggregate demand can be met.

To the extent possible, auctions to resolve multiple string contention situations will be conducted simultaneously.

4.3.1.1 Currency

For bids to be comparable, all bids in the auction will be submitted in any integer (whole) number of US dollars.

4.3.1.2 Fees

A bidding deposit will be required of applicants participating in the auction, in an amount to be determined. The bidding deposit must be transmitted by wire transfer to a specified bank account specified by ICANN or its auction provider at a major international bank, to be received in advance of the auction date. The amount of the deposit will determine a bidding limit for each bidder: the bidding deposit will equal 10% of the bidding limit; and the bidder will not be permitted to submit any bid in excess of its bidding limit.

In order to avoid the need for bidders to pre-commit to a particular bidding limit, bidders may be given the option of making a specified deposit that will provide them with unlimited bidding authority for a given application. The amount of the deposit required for unlimited bidding authority will depend on the particular contention set and will be based on an assessment of the possible final prices within the auction.

All deposits from non-defaulting losing bidders will be returned following the close of the auction.

4.3.2 Winning Bid Payments

Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins (i.e., if its application is approved), and to enter into the prescribed registry agreement with ICANN— together with a specified penalty for defaulting on payment of its winning bid or failing to enter into the required registry agreement.

The winning bidder in any auction will be required to pay the full amount of the final price within 20 business days of the end of the auction. Payment is to be made by wire transfer to the same international bank account as the bidding deposit, and the applicant's bidding deposit will be credited toward the final price.

In the event that a bidder anticipates that it would require a longer payment period than 20 business days due to verifiable government-imposed currency restrictions, the bidder may advise ICANN well in advance of the auction and ICANN will consider applying a longer payment period to all bidders within the same contention set.

Any winning bidder for whom the full amount of the final price is not received within 20 business days of the end of an auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that receipt of full payment is imminent.

Any winning bidder for whom the full amount of the final price is received within 20 business days of the end of an auction retains the obligation to execute the required registry agreement within 90 days of the end of auction. Such winning bidder who does not execute the agreement within 90 days of the end of the auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that execution of the registry agreement is imminent.

4.3.3 Post-Default Procedures

Once declared in default, any winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price. The same default procedures and penalties are in place for any runner-up bidder receiving such an offer.

Each bidder that is offered the relevant gTLD will be given a specified period—typically, four business days—to respond as to whether it wants the gTLD. A bidder who responds in the affirmative will have 20 business days to submit its full payment. A bidder who declines such an offer cannot revert on that statement, has no further obligations in this context and will not be considered in default.

The penalty for defaulting on a winning bid will equal 10% of the defaulting bid.² Default penalties will be charged against any defaulting applicant's bidding deposit before the associated bidding deposit is returned.

² If bidders were given the option of making a specified deposit that provided them with unlimited bidding authority for a given application and if the winning bidder utilized this option, then the penalty for defaulting on a winning bid will be the lesser of the following: (1) 10% of the defaulting bid, or (2) the specified deposit amount that provided the bidder with unlimited bidding authority.

4.4 Contention Resolution and Contract Execution

An applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step. (Refer to section 5.1 of Module 5.)

If a winner of the contention resolution procedure has not executed a contract within 90 calendar days of the decision, ICANN has the right to deny that application and extend an offer to the runner-up applicant, if any, to proceed with its application. For example, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time. If the winning applicant can demonstrate that it is working diligently and in good faith toward successful completion of the steps necessary for entry into the registry agreement, ICANN may extend the 90-day period at its discretion. Runner-up applicants have no claim of priority over the winning application, even after what might be an extended period of negotiation.

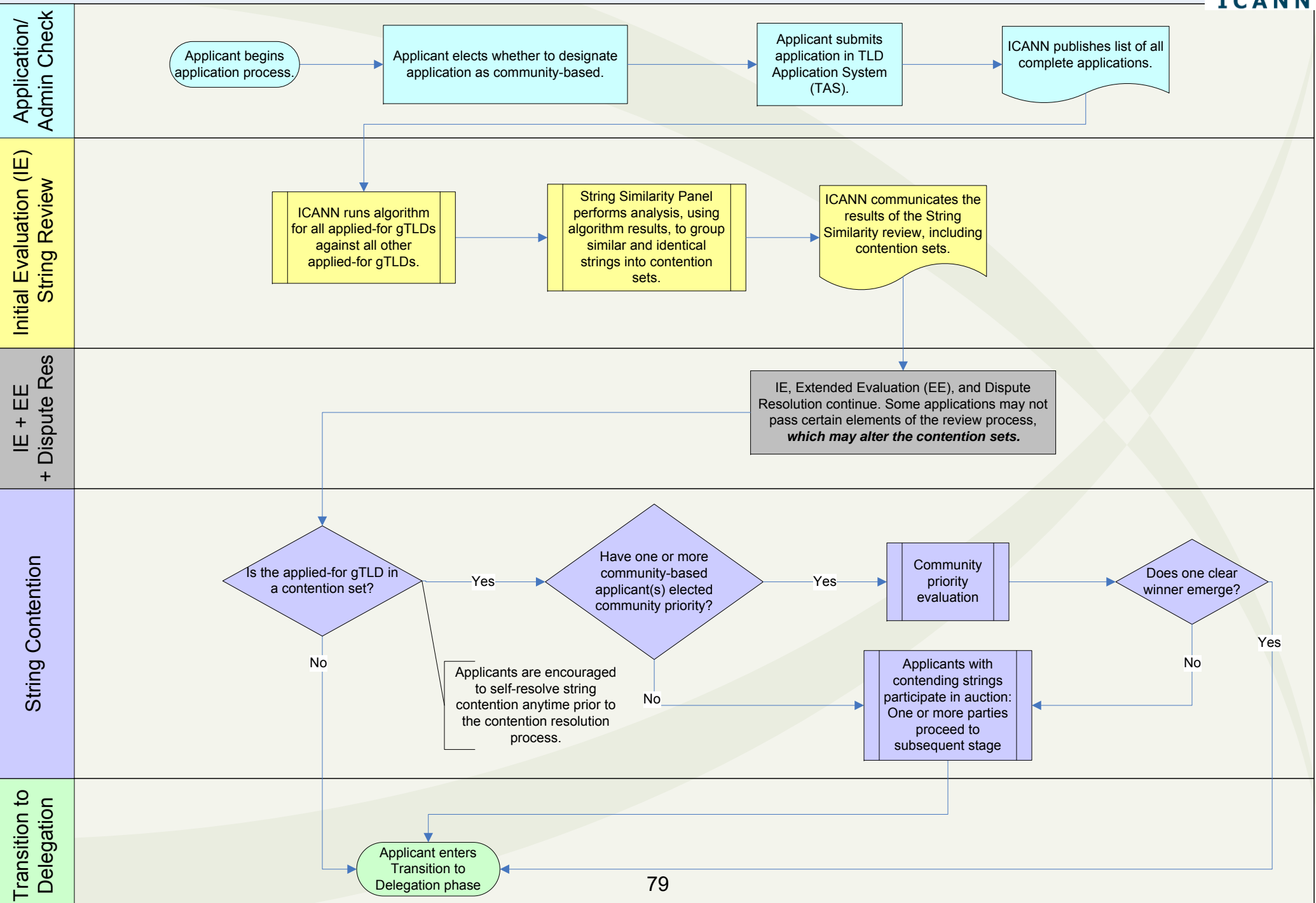


Exhibit 2

RESPONDENT'S EXHIBIT



New gTLD Program
Community Priority Evaluation Report

Report Date: 11 June 2014

Application ID:	1-1032-95136
Applied-for String:	HOTEL
Applicant Name:	HOTEL Top-Level-Domain s.a.r.l

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Prevailed
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application met the requirements specified in the Applicant Guidebook. Your application prevailed in Community Priority Evaluation.</p>	

Panel Summary

Overall Scoring	15 Point(s)	
<u>Criteria</u>	<u>Earned</u>	<u>Achievable</u>
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	3	4
#3: Registration Policies	4	4
#4: Community Endorsement	4	4
Total	15	16
Minimum Required Total Score to Pass 14		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p> <p>The community defined in the application (“HOTEL”) is:</p>	

The .hotel namespace will exclusively serve the global Hotel Community. The string “Hotel” is an internationally agreed word that has a clear definition of its meaning: According to DIN EN ISO 18513:2003, “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Therefore only entities which fulfil this definition are members of the Hotel Community and eligible to register a domain name under .hotel. .hotel domains will be available for registration to all companies which are member of the Hotel Community on a local, national and international level. The registration of .hotel domain names shall be dedicated to all entities and organizations representing such entities which fulfil the ISO definition quoted above:

1. Individual Hotels
2. Hotel Chains
3. Hotel Marketing organizations representing members from 1. and/or 2.
4. International, national and local Associations representing Hotels and Hotel Associations representing members from 1. and/or 2.
5. Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2.

These categories are a logical alliance of members, with the associations and the marketing organizations maintaining membership lists, directories and registers that can be used, among other public lists, directories and registers, to verify eligibility against the .hotel Eligibility requirements.

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel. Furthermore, association with the hotel sector can be verified through membership lists, directories and registers.

In addition, the community as defined in the application has awareness and recognition among its members. This is because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Delineation.

Organization

Two conditions need to be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

The community as defined in the application has at least one entity mainly dedicated to the community. There are, in fact, several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA), among others. According to the application,

Among those associations the International Hotel and Restaurant Association (IH&RA) is the oldest one, which was founded in 1869/1946, is the only global business organization representing the hotel industry worldwide and it is the only global business organization representing the hospitality industry (hotels and restaurants) worldwide. Officially recognized by United Nations as the voice of the private sector globally, IH&RA monitors and lobbies all international agencies on behalf of this industry. Its members represent more than 300,000 hotels and thereby the majority of hotels worldwide.

The community as defined in the application has documented evidence of community activities. This is confirmed by detailed information on IH&RA’s website, as well as information on other hotel association websites.

The Community Priority Evaluation panel determined that the community as defined in the application

satisfies both the conditions to fulfill the requirements for Organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. Hotels have existed in their current form since the 19th century, and the oldest hotel association is IH&RA, which, according to the entity’s website, was first established in 1869 as the All Hotelmen Alliance. The organization has been operating under its present name since 1997.

The Community Priority Evaluation panel determined that the community as defined in the application fulfills the requirements for Pre-existence.

1-B Extension

2/2 Point(s)

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates considerable size and longevity for the community. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .HOTEL as defined in the application is large in terms of the number of members. According to the applicant, “the global Hotel Community consists of more than 500,000 hotels and their associations”.

In addition, the community as defined in the application has awareness and recognition among its members because the community is defined in terms of association with the provision of hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .HOTEL community are of a lasting, non-transient nature.

In addition, the community as defined in the application has awareness and recognition among its members because the community is defined in terms of association with the provision of hotel services.

The Community Priority Evaluation panel determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for Longevity.

Criterion #2: Nexus between Proposed String and Community

3/4 Point(s)

2-A Nexus

2/3 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Nexus as

specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string identifies the name of the community, without over-reaching substantially beyond the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. "Identify" means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.HOTEL) identifies the name of the community. According to the applicant,

The proposed top-level domain name, "HOTEL", is a widely accepted and recognized string that globally identifies the Hotel Community and especially its members, the hotels.

The string nexus closely describes the community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels). However, the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community. Therefore, the string identifies the community, but does not over-reach substantially beyond the community, as the general public will generally associate the string with the community as defined by the applicant.

The Community Priority Evaluation panel determined that the applied-for string identifies the name of the community as defined in the application. It therefore partially meets the requirements for Nexus.

2-B Uniqueness *1 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string .HOTEL must have no other significant meaning beyond identifying the community described in the application. The Community Priority Evaluation panel determined that the applied-for string satisfies the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies **4/4 Point(s)**

3-A Eligibility *1 / 1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility, as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by restricting eligibility to the narrow category of hotels and their organizations as defined by ISO 18513, and verifying this association through membership lists, directories and registries. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that eligible applicants will be entitled to register any domain name that is not reserved or registered at the time of their registration submission. Furthermore, the registry has set aside a list of domain names that will be reserved for the major hotel industry brands and sub-brands. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.</p>	
3-C Content and Use	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by specifying that each domain name must display hotel community-related content relevant to the domain name, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.</p>	
3-D Enforcement	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures as well as appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant's registry will establish a process for questions and challenges that could arise from registrations and will conduct random checks on registered domains. There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies both conditions to fulfill the requirements for Enforcement.</p>	
Criterion #4: Community Endorsement	
<i>4/4 Point(s)</i>	
4-A Support	<i>2/2 Point(s)</i>
The Community Priority Evaluation panel determined that the application fully met the criterion for Support	

specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the applicant had documented support from the recognized community institution(s)/member organization(s). The application received a maximum score of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed.

The Community Priority Evaluation panel determined that the applicant was not the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from the recognized community institution(s)/member organization(s), and this documentation contained a description of the process and rationale used in arriving at the expression of support. These groups constitute the recognized institutions to represent the community, and represent a majority of the overall community as defined by the applicant. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.

4-B Opposition

2/2 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received relevant opposition from, at most, one group of non-negligible size. According to the Applicant Guidebook, “To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant”. “Relevance” and “relevant” refers to the communities explicitly and implicitly addressed.

The application received letters of opposition, which were determined not to be relevant, as they were either from groups of negligible size, or were from entities/communities that do not have an association with the applied for string. The Community Priority Evaluation Panel determined that these letters therefore were not relevant because they are not from the recognized community institutions/member organizations, nor were they from communities/entities that have an association with the hotel community. In addition, some letters were filed for the purpose of obstruction, and were therefore not considered relevant. The Community Priority Evaluation Panel determined that the applicant satisfies the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Exhibit 3

RESPONDENT'S EXHIBIT

13 DECEMBER 2017

COMMUNICATIONS BETWEEN ICANN ORGANIZATION AND THE CPE PROVIDER

PREPARED FOR JONES DAY



13 DECEMBER 2017

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I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he

¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 1 of the CPE Process Review and specifically details FTI's evaluation and findings regarding ICANN organization's interactions with the CPE Provider with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI's review of the written communications and documents described in Section III below and FTI's interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.

III. Methodology

FTI followed the international investigative methodology, which is a methodology codified by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally and which grants certification to members who meet the ACFE's standards of professionalism.⁹ This methodology is used by both law enforcement and private investigative companies worldwide. This methodology begins with the formation of an investigative plan which identifies documentation, communications, individuals and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation. Then, investigators interview individuals who, based upon the preceding review of relevant documents, may have potentially relevant information. Investigators then analyze all the information collected to arrive at their conclusions.

Here, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:

⁹ www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2): <https://newgtlds.icann.org/en/applicants/agb>;
2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
3. CPE Panel Process
Document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
4. CPE Guidelines
document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
7. CPE results and reports:
<https://newgtlds.icann.org/en/applicants/cpe#invitations>;
8. Preparing Evaluators for the New gTLD Application Process:
<https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest:
<https://www.icann.org/news/announcement-2009-02-25-en>;
10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
11. Evaluation Panels Selection Process:
<https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;
12. Application Comments:
<https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request:
<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests:
<https://www.icann.org/resources/pages/accountability/reconsideration-en>;

16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1:
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;
26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;

29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016: <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and
 30. New gTLD Program Implementation Review Report: <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman: <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN organization that were responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel

- Interviewed relevant CPE Provider personnel
- Compared the information obtained from both ICANN organization and the CPE Provider.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹⁰ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹¹ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹²

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹³ In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁴ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.¹⁵ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.

¹⁰ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹¹ See *id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹² *Id.*

¹³ <https://newgtlds.icann.org/en/applicants/agn>.

¹⁴ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁵ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁶

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁷

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant Guidebook and CPE Guidelines. According to the CPE Provider interviewees, each evaluator separately presented his/her findings in a database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated

¹⁶ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁷ *Id.*

that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer questions that arose during the review.¹⁸ The core team would then deliberate and come up with a consensus as to scoring. FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.¹⁹

ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report. Once the CPE Provider completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization. ICANN organization provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls.

V. Analysis

FTI undertook its analysis after carefully studying the materials described above and evaluating the substance of the interviews conducted. The materials and interviews provided FTI with a solid understanding of CPE. The interviews in particular provided FTI with an understanding of the mechanics of the CPE process as well as the roles

¹⁸ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁹ See Applicant Guidebook §4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.").

undertaken both separately and together by ICANN organization personnel and the CPE Provider during the process.

FTI proceeded with its investigation in four parts, which are separately detailed below: (i) analysis of email communications among relevant ICANN organization personnel and between relevant ICANN organization personnel and the CPE Provider (including email attachments); (ii) interviews of relevant ICANN organization personnel; (iii) interviews of relevant CPE Provider personnel; and (iv) analysis of draft CPE reports.

A. ICANN Organization's Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.

In an effort to ensure the comprehensive collection of relevant materials, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that "hit" on a search term. The search terms were designed to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation. In FTI's experience, it is a best practice to begin with a broader collection and then refine the search for relevant materials as the investigation progresses. As a result, the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. FTI's Technology Practice worked with ICANN organization to ensure that the materials were collected in a forensically sound manner. In total, ICANN organization provided FTI with 100,701 emails, including attachments, in native format. The time period covered by the emails received dated from 2012 to March 2017.

An initial review of emails produced to FTI confirmed FTI's expectation that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI's investigation. As a result, FTI performed a targeted key word search to

identify emails pertinent to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. FTI developed and tested these additional terms using FTI Technology's Ringtail eDiscovery platform, which employs conceptual analysis, duplicate detection, and interactive visualizations to assist in improving search results by grouping documents with similar content and highlighting those that are more likely to be relevant.

Based on FTI's review of email communications provided by ICANN organization, FTI found no evidence that ICANN organization had any undue influence on the CPE reports or engaged in any impropriety in the CPE process. FTI found that the vast majority of the emails were administrative in nature and did not concern the substance or the content of the CPE results. Of the small number of emails that did discuss substance, none suggested that ICANN acted improperly in the process.

1. The Vast Majority of the Communications Were Administrative in Nature.

The email communications that FTI reviewed and which were provided by ICANN organization were largely administrative in nature, meaning that they concerned the scheduling of telephone calls, CPE Provider staffing, timelines for completion, invoicing, and other similar logistical issues. Although FTI was not able to review the CPE Provider's internal emails relating to this work, as indicated above, FTI did interview relevant CPE Provider personnel, and each confirmed that any internal email communications largely addressed administrative tasks.

2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.

Of the email communications reviewed by FTI, only a small number discussed the substance of the CPE process and specific evaluations. These emails generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports. In these communications, however, FTI observed no instances

where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached. Instead, ICANN organization personnel asked the CPE Provider to clarify language contained in draft CPE reports in an effort to avoid misleading or ambiguous wording. In this regard, ICANN organization's correspondence to the CPE Provider largely comprised suggestions on a particular word to be used to capture a concept clearly. FTI observed no instances where ICANN dictated or sought to require the CPE Provider to use specific wording or make specific scoring decisions.

Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation. Based on a plain reading, ICANN organization's questions were clearly intended to ensure that the CPE Provider had engaged in a robust discussion on each CPE criterion in the CPE report.

The third category comprised emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.²⁰

Across all three categories, FTI observed instances where the CPE Provider and ICANN organization engaged in a discussion about using the correct word to capture the CPE Provider's reasoning. ICANN organization also advised the CPE Provider that the CPE Provider's conclusions, as stated in draft reports, at times were not supported by sufficient reasoning, and suggested that additional explanation was needed. However, ICANN organization did not suggest that the CPE Provider make changes in final scoring or adjust the rationale set forth in the CPE report.

Throughout its review, FTI observed instances where ICANN organization and the CPE Provider agreed to discuss various issues telephonically. Emails would then follow

²⁰ The CPE Provider may, at its discretion, provide a clarifying question (CQ) to be issued via ICANN organization to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

these telephone calls and note that the latest drafts reflected the telephone discussions that had occurred. FTI reviewed the drafts as noted in these communications and compared them with prior versions of the draft reports that were exchanged and confirmed that there was no evidence of undue influence or impropriety by ICANN organization, as described further below.

Ultimately, the vast majority of ICANN organization's emails were administrative in nature. FTI found no email communications that indicated that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE Process.

B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

In March 2017, FTI met with several ICANN organization employees in order to learn more about their interactions with the CPE Provider. FTI interviewed the following individuals who interacted with the CPE Provider over time regarding CPE.

- Chris Bare
- Steve Chan
- Jared Erwin
- Cristina Flores
- Russell Weinstein
- Christine Willett

Each of the ICANN organization personnel that FTI interviewed confirmed that the interactions between ICANN organization and the CPE Provider took place via email (including attachments which were primarily comprised of draft reports with comments in red line form) and conference calls.

The interviewees explained that the initial draft reports received from the CPE Provider (particularly for the first four reports) were not particularly detailed, and, as a result,

ICANN organization asked the CPE Provider a lot of “why” questions to ensure that the CPE Provider’s rationale was sufficiently conveyed. The interviewees stated that they emphasized to the CPE Provider the importance of remaining transparent and accountable to the community in the CPE reports. Based on a plain reading of ICANN organization’s comments to draft CPE reports, none of ICANN organization’s comments were mandatory, meaning that ICANN organization never dictated that the CPE Provider take a specific approach. FTI observed no instances where ICANN organization endeavored to change the scoring or outcome of any CPE. This was confirmed by both ICANN organization personnel and CPE Provider personnel in FTI’s interviews. If changes were made in response to ICANN organization’s comments, they usually took the form of the CPE Provider providing additional information to explain its scoring decisions and conclusions.

The CPE reports became more detailed over time. The ICANN organization personnel who were interviewed noted that, over time, the majority of communications took place via weekly conference calls. Most of ICANN organization’s interaction with the CPE Provider consisted of asking for supporting citations to the CPE Provider’s research or that more precise wording be used. ICANN organization personnel noted that they observed robust debate among CPE Provider personnel concerning various criteria, but that the CPE Provider strictly evaluated the applications against the criteria outlined in the Applicant Guidebook and the CPE Guidelines. The interviewees confirmed that ICANN organization never questioned or sought to alter the CPE Provider’s conclusions.

C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI asked to interview relevant CPE Provider personnel involved in the CPE process. The CPE Provider stated that only two CPE Provider staff members remained. In June 2017, FTI interviewed the two remaining staff members, who were members of the core team for all CPEs that were conducted. During the interview, in addition to understanding the CPE process described above, see section IV above, FTI

endeavored to understand the interactions between the CPE Provider and ICANN organization.

The interviewees confirmed that ICANN organization was not involved in scoring the criteria or the drafting of the initial reports, but rather the CPE Provider independently scored each criterion. The interviewees stated that they were strict constructionists and used the Applicant Guidebook as their “bible”. Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

The CPE Provider also stated that ICANN organization provided guidance as to whether or not a particular report sufficiently detailed the CPE Provider’s reasoning. The CPE Provider stated that it never changed the scoring or the results based on ICANN organization’s comments. The only action the CPE Provider took in response to ICANN organization’s comments was to revise the manner in which its analysis and conclusions were presented (generally in the form of changing a word or adding additional explanation). The CPE Provider stated that it also received guidance from ICANN organization with respect to whether a proposed Clarifying Question was permissible under applicable guidelines.

In short, the CPE Provider confirmed that ICANN organization did not impact the CPE Provider’s scoring decisions.

D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI requested and received from the CPE Provider all draft CPE reports, including any drafts that reflected feedback from ICANN organization. ICANN organization provided feedback in redline form. Some draft reports had very few or no comments, while others had up to 20 comments. In some drafts, the comments were just numbered and not attributed to a particular person. As such, at times it was difficult to discern which

comments were made by ICANN organization versus the CPE Provider.²¹ Of the comments that FTI can affirmatively attribute to ICANN organization, all related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions. This is consistent with the information provided by ICANN organization and the CPE Provider during their interviews and in the email communications provided by ICANN organization.

For example, FTI observed comments from ICANN organization personnel suggesting that the CPE Provider include more detailed explanation or explicitly cite resources for statements that did not appear to have sufficient factual or evidentiary support. In other instances, the draft reports reflected an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey. It is clear from the exchanges that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another.

In general, it was not uncommon for the CPE Provider to make revisions in response to ICANN organization's comments. As noted above, these revisions generally took the form of additional information to add further detail to the stated reasoning. However, none of these revisions affected the scoring or results. At other times, the CPE Provider did not make any revisions in response to ICANN organization's comments.

Overall, ICANN organization's comments generally were not substantive, but rather reflected ICANN organization's suggestion that a revision could make the CPE report clearer. Based on FTI's investigation, there is no evidence that ICANN organization ever suggested that the CPE Provider change its rationale, nor did ICANN organization dictate the scoring or CPE results.

²¹ Some comments to draft CPE reports followed verbal conversations between CPE Provider staff and ICANN organization; the CPE Provider stated that it did not possess notes documenting these conversations.

VI. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI found no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider. As such, FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE process.

Exhibit 4

RESPONDENT'S EXHIBIT

13 DECEMBER 2017

ANALYSIS OF THE APPLICATION OF THE COMMUNITY PRIORITY EVALUATION (CPE) CRITERIA BY THE CPE PROVIDER IN CPE REPORTS

PREPARED FOR JONES DAY





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I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the "process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the New gTLD Program.¹ The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 2 of the CPE Process Review and specifically details FTI's evaluation of whether the CPE Provider consistently applied the CPE criteria throughout each CPE.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (Applicant Guidebook)⁹ and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI's review of the written communications and documents and FTI's interviews with the relevant personnel described in Section III below.

Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.

III. Methodology

A. FTI's Investigative Approach.

In Scope 2 of the CPE Process Review, FTI was tasked with evaluating whether the CPE Provider applied the CPE criteria consistently throughout each CPE. This type of evaluation is commonly referred to in the industry as a "compliance investigation." In a compliance investigation, an investigator analyzes applicable policies and procedures and evaluates whether a person, corporation, or other entity complied with or properly applied those policies and procedures in carrying out a specific task. Here, FTI

⁹ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 to 4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

employed the aforementioned compliance-focused investigative methodology and strategy in connection with Scope 2 of the CPE Process Review.

FTI also incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE).¹⁰ This international investigative methodology is used by both law enforcement and private investigative companies worldwide.

These types of investigations begin with the formation of an investigative plan which identifies documentation, communications, individuals, and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation, including applicable procedures, materials, and communications pertaining to the subject of the investigation. After gaining a comprehensive understanding of the relevant background facts, investigators then interview relevant individuals deemed to have knowledge pertinent to the subject being investigated.

Investigators then re-review relevant documents and materials, compare information contained in those materials to the information obtained in interviews, identify any gaps, inconsistencies, or contradictions within the information gathered, and ascertain any need for additional information. This step also frequently results in follow-up interviews in order to either confirm or rule out any gaps, inconsistencies, or contradictions. Follow-up interviews also may be conducted to re-confirm with interviewees certain facts or ask for elaboration on certain issues.

Investigators then re-analyze all relevant documentation to prepare for writing the investigative report.

¹⁰ THE ACFE is the largest and most prestigious anti-fraud organization globally; it grants certification to members who meet its standards of professionalism. See www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

B. FTI's Investigative Steps for Scope 2 of the CPE Process Review.

Consistent with the above-described methodology, FTI undertook the following process to evaluate whether the CPE criteria were applied consistently throughout each CPE.

Specifically, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:
 1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2):
<https://newgtlds.icann.org/en/applicants/agb>;
 2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
 3. CPE Panel Process document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
 4. CPE Guidelines document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
 5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
 6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
 7. CPE results and reports: <https://newgtlds.icann.org/en/applicants/cpe#invitations>;
 8. Preparing Evaluators for the New gTLD Application Process: <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
 9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest: <https://www.icann.org/news/announcement-2009-02-25-en>;
 10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
 11. Evaluation Panels Selection Process: <https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;

12. Application Comments:
<https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request:
<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests:
<https://www.icann.org/resources/pages/accountability/reconsideration-en>;
16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1,
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;

26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
 27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
 28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;
 29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016:
<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>;
 30. New gTLD Program Implementation Review Report,
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman, <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN Organization that were

responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel.
- Interviewed relevant CPE Provider personnel.
- Compared the information obtained from both ICANN organization and the CPE Provider.

FTI understands that various applicants requested that they be interviewed in connection with the CPE Process Review. FTI determined that such interviews were not necessary or appropriate because FTI's task is to evaluate whether the CPE Provider consistently applied the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, and neither of those governing documents provide for applicant interviews. Further, in keeping with the Applicant Guidebook and CPE Guidelines, the CPE Provider did not interview applicants during its evaluation process; accordingly, FTI determined that it was not warranted to do so in connection with Scope 2 of the CPE Process Review. FTI did obtain an understanding of applicants' concerns through a comprehensive review and analysis of the materials described above, including claims raised in all relevant Reconsideration Requests and IRP proceedings.

In the context of Scope 2 of the CPE Process Review, FTI examined all aspects of the CPE Provider's evaluation process in evaluating whether the CPE Provider consistently applied the CPE criteria throughout each CPE. Specifically, FTI's investigation included the following steps:

1. FTI formulated an investigative plan and, based on that plan, collected potentially relevant materials (as described above).
2. FTI analyzed all relevant materials (as described above) to ensure that FTI had a solid understanding of the CPE process and specifically the guidelines pertaining to the scoring of the CPE criteria.

3. With that foundation, FTI then evaluated the materials and email communications (including attachments) provided by ICANN organization and the CPE Provider (as described above). FTI also analyzed drafts and final versions of the CPE reports, as well materials submitted in relevant Reconsideration Requests and IRP proceedings challenging CPE outcomes. These documents were particularly relevant to Scope 2 of the CPE Process Review because they reflect the manner in which the CPE Provider applied the CPE criteria to each application and the concerns raised by various applicants regarding the CPE process.
4. FTI then interviewed relevant ICANN organization personnel separately. FTI asked each individual to describe the CPE process and his/her role in that process. FTI also asked each individual to explain his/her interaction with the CPE Provider and his/her understanding of the steps the CPE Provider undertook in order to perform CPE.
5. FTI then interviewed two members of the CPE Provider's staff and asked each to explain in detail his/her understanding of the CPE guidelines. As noted in FTI's report addressing Scope 1 of the CPE Process Review, these two individuals were the only two remaining personnel who participated in the CPE process (both were also part of the core team for all 26 evaluations). Each explained in detail his/her understanding of the CPE criteria. The interviewees also explained the evaluation process the CPE Provider undertook to perform CPE.
6. FTI then analyzed the CPE Provider's working papers associated with each evaluation, including documents capturing the evaluators' work, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, and every draft of each CPE report including the final report as published by ICANN organization.
7. FTI engaged in follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided.
8. FTI then re-analyzed the Reconsideration Requests and materials submitted in IRP proceedings pertaining to CPE with a specific focus on identifying any claims that the CPE Provider inconsistently applied the CPE criteria.
9. FTI then reviewed the written materials produced by ICANN organization and the CPE Provider and prepared this report for Scope 2 of the CPE Process Review.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹¹ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹² CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹³

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹⁴ The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their "bible." Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁵ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics,

¹¹ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹² *Id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³ *Id.*

¹⁴ <https://newgtlds.icann.org/en/applicants/agb>.

¹⁵ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

definitions of key terms, and specific questions to be scored.¹⁶ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. As discussed in further detail below, the CPE Guidelines set forth the methodology that the CPE Provider undertook to evaluate each criterion.

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁷

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁸

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant

¹⁶ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹⁷ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁸ *Id.*

Guidebook and CPE guidelines. During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, "Is the community clearly delineated?"; the same question appears in the CPE Guidelines. The Answer section had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a "yes" or "no" response. In the Evidence section, the evaluator provided his/her reasoning for his/her answer. In the Source section, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including but not limited to, the application (or sections thereof), reference material, or letters of support or opposition. The same questions were asked and the same criteria were applied to every application, and the responses and resulting evaluations formed the basis for the evaluators' scoring decisions.

According to the CPE Provider interviewees, each evaluator separately presented his/her findings in the database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' answers to the Question section in the database and summarizing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer

questions that arose during the review.¹⁹ The core team would then deliberate and coming up with a consensus as to scoring.

The process of drafting a CPE report would then commence. Each sub-criterion and the scoring rationale were addressed in each relevant section of the draft report. As discussed in further detail in FTI's report relating to Scope 1 of the CPE Process Review, ICANN organization had no role in the evaluation process and no role in the writing of the initial draft CPE report. Based upon FTI's investigation, the CPE Provider followed the same evaluation process in each CPE.²⁰ The CPE Provider's role was to determine whether the community-based application fulfilled the four community priority criteria set forth in Section 4.2.3 of the Applicant Guidebook. As discussed in detail below, the four criteria include: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement. The sequence of the criteria reflects the order in which they will be assessed by the panel.²¹ To prevail in CPE, an application must receive at least 14 out of 16 points on the scoring of the foregoing criteria, each of which is worth a maximum of four points.²² The CPE criteria is discussed further below.

A. Criterion 1: Community Establishment.

The Community Establishment criterion evaluates "the community as explicitly identified and defined according to statements in the application."²³ The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, "Delineation;" and (ii) 1-B, "Extension."²⁴

¹⁹ *Id.*

²⁰ See Report Re: Scope 1 of CPE Process Review.

²¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

²² *Id.* at Pg. 4-10.

²³ *Id.*

²⁴ *Id.*

An application may receive a maximum of four points on the Community Establishment criterion, including up to two points for each sub-criterion, which are Delineation and Extension. To obtain two points for Delineation, the community must be "clearly delineated, organized, and pre-existing."²⁵ One point is awarded if a community is a "clearly delineated and pre-existing community" but does not fulfill the requirements for a score of 2.²⁶ Zero points are awarded if there is "insufficient delineation and pre-existence for a score of 1."²⁷

To obtain two full points for Extension, the community must be "of considerable size and longevity."²⁸ One point is awarded if the community is "of either considerable size or longevity, but not fulfilling the requirements for a score of 2."²⁹ Zero points are awarded if the community is "of neither considerable size nor longevity."³⁰

For sub-criterion 1-A, Delineation, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community clearly delineated?³¹
- Is there at least one entity mainly dedicated to the community?³²
- Does the entity have documented evidence of activities?³³
- Has the community been active since at least September 2007?³⁴

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

The CPE Guidelines provide additional guidance on factors that can be considered when evaluating these four questions.³⁵

For sub-criterion 1-B, Extension, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community of considerable size?³⁶
- Does the community demonstrate longevity?³⁷

B. Criterion 2: Nexus between Proposed String and Community.

The Nexus criterion evaluates "the relevance of the string to the specific community that it claims to represent."³⁸ The Nexus criterion is measured by two sub-criterion: (i) 2-A, "Nexus"; and (ii) 2-B, "Uniqueness."³⁹

An application may receive a maximum of four points on the Nexus criterion, including up to three points for Nexus and one point for Uniqueness. To obtain three points for Nexus, the applied-for string must "match the name of the community or be a well-known short-form or abbreviation of the community."⁴⁰ For a score of 2, the applied-for string should closely describe the community or the community members, without overreaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not

³⁵ *Id.* at Pgs. 3-5.

³⁶ *Id.* at Pg. 5.

³⁷ *Id.*

³⁸ See Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³⁹ *Id.* at Pgs. 4-12-4-13.

⁴⁰ *Id.*

qualify for a 2.⁴¹ Zero points are awarded if the string "does not fulfill the requirements for a score of 2."⁴² It is not possible to receive a score of one for this sub-criterion.

To obtain one point for Uniqueness, the applied-for string must have "no other significant meaning beyond identifying the community described in the application."⁴³ Uniqueness will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for Uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrase "beyond identifying the community" in the score of 1 for Uniqueness implies a requirement that the string does identify the community, i.e. scores 2 or 3 for Nexus, in order to be eligible for a score of 1 for Uniqueness.⁴⁴ It should be noted that Uniqueness is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."⁴⁵ Zero points are awarded if the string "does not fulfill the requirements for a score of 1."⁴⁶

For sub-criterion 2-A, Nexus, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.⁴⁷

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at Pg. 4-13.

⁴⁴ *Id.* at Pgs. 4-13-4-14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See CPE Guidelines at Pg. 7 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

For sub-criterion 2-B, Uniqueness, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?⁴⁸

C. Criterion 3: Registration Policies.

The Registration Policies criterion evaluates the registration policies set forth in the application on four elements: (i) 3-A, "Eligibility"; (ii) 3-B, "Name Selection"; (iii) 3-C, "Content and Use"; and (iv) 3-D, "Enforcement."⁴⁹ An application may receive a maximum of four points on the Registration Policies criterion, including one point for each of the four sub-criterion stated above.

For sub-criterion 3-A, Eligibility, one point is awarded if "eligibility is restricted to community members."⁵⁰ If there is a "largely unrestricted approach to eligibility," zero points are awarded.⁵¹

For sub-criterion 3-B, Name Selection, one point is awarded if the policies set forth in an application "include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD."⁵²

For sub-criterion 3-C, Content and Use, one point is awarded if the policies set forth in an application "include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD."⁵³

For sub-criterion 3-D, Enforcement, one point is awarded if the policies set forth in an application "include specific enforcement measures (e.g., investigation practices,

⁴⁸ *Id.* at Pgs. 9-10.

⁴⁹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵⁰ *Id.* at Pg. 4-14.

⁵¹ *Id.*

⁵² *Id.* at Pg. 4-15.

⁵³ *Id.*

penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms."⁵⁴

For sub-criterion 3-A, Eligibility, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Is eligibility for being allowed as a registrant restricted?⁵⁵

For sub-criterion 3-B, Name Selection, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Do the policies set forth in the application include name selection rules?⁵⁶
- Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?⁵⁷

For sub-criterion 3-C, Content and Use, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the policies set forth in the application include content and use rules?⁵⁸
- If yes, are the content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?⁵⁹

For sub-criterion 3-D, Enforcement, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the enforcement policies set forth in the application include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?⁶⁰

⁵⁴ *Id.*

⁵⁵ See CPE Guidelines at Pg. 11 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁵⁶ *Id.* at Pg. 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at Pg. 13.

⁵⁹ *Id.*

⁶⁰ *Id.* at Pg. 14.

D. Criterion 4: Community Endorsement.

The Community Endorsement criterion evaluates community support for and/or opposition to an application.⁶¹ The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, "Support"; and (ii) 4-B, "Opposition."⁶² An application may receive a maximum of four points on the Community Endorsement criterion, including up to two points for each sub-criterion.

To obtain two points for the Support sub-criterion, an applicant must be the recognized community institution/member organization or have documented support from the recognized community institution/member organization, or have otherwise documented authority to represent the community.⁶³ "Recognized" community institutions are those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.⁶⁴ In cases of multiple institutions/organizations, there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.⁶⁵ To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.⁶⁶

One point is awarded if the applicant has submitted documented support with its application from at least one group with relevance,⁶⁷ but does not have documented support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent

⁶¹ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at Pgs. 4-17-4-18.

⁶⁵ *Id.* at Pg. 4-18.

⁶⁶ *Id.*

⁶⁷ *Id.* at Pg. 4-17.

the community with its application.⁶⁸ Zero points are awarded if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community.⁶⁹

To obtain two points for the Opposition sub-criterion, there must be "no opposition of relevance" to the application.⁷⁰ One point is awarded if there is "relevant opposition from one group of non-negligible size."⁷¹ Zero points are awarded if there is "relevant opposition from two or more groups of non-negligible size."⁷² When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.⁷³

For sub-criterion 4-A, Support, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the applicant the recognized community institution or member organization?⁷⁴
- Does the applicant have documented support from the recognized community institution(s)/member organization(s) to represent the community?⁷⁵

⁶⁸ *Id.* at Pg. 4-18.

⁶⁹ *Id.*

⁷⁰ *Id.* at Pg. 4-17.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at Pgs. 4-18-4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁷⁴ See CPE Guidelines at Pgs. 16-17 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁷⁵ *Id.*

- Does the applicant have documented authority to represent the community?⁷⁶
- Does the applicant have support from at least one group with relevance?⁷⁷

For sub-criterion 4-B, Opposition, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the application have any opposition that is deemed relevant?⁷⁸

V. The CPE Provider Applied The CPE Criteria Consistently In All CPEs.

FTI assessed whether the CPE Provider consistently followed the same evaluation process in all CPEs, and whether the CPE Provider applied the CPE criteria on a consistent basis throughout the evaluation process. FTI found that the CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE. In particular, as explained in detail below, the CPE Provider evaluated each application in the same way. While some applications received full points, others received partial points, and others received zero points for any given criterion, the scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI also evaluated whether the CPE Provider was consistent in the use of Clarifying Questions, and concludes that a consistent approach was employed.

FTI's investigation was informed by the concerns raised in the Reconsideration Requests, IRP proceedings and correspondence submitted to ICANN organization related to the CPE process. Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at Pg. 19.

BGC.⁷⁹ Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC's recommendations and/or determinations, as well as the Board's actions associated with these requests.⁸⁰ Several requestors made claims that are of particular relevance to Scope 2 of the CPE Process Review. Specifically, FTI observed several claims that certain CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports, particularly with respect to the Community Establishment and Nexus criteria. FTI also reviewed claims raised by various claimants in IRP proceedings challenging CPE outcomes. FTI factored the CPE-related claims raised in both the Reconsideration Requests and the IRPs into its investigation. It is noted, however, that FTI's task is to evaluate whether the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines were applied consistently throughout each CPE.⁸¹ FTI was not asked to re-evaluate the applications. Ultimately, as detailed below, FTI found no evidence of inconsistent or disparate treatment by the CPE Provider.

A. The Community Establishment Criterion (Criterion 1) was Applied Consistently in all CPEs.

To assess whether the Community Establishment criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Delineation and Extension. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and

⁷⁹ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN organizations Bylaws, 1 October 2016, ART. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN organization Bylaws, 22 July 2017, 4, § 4.2 (e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁸⁰ *Id.*

⁸¹ See <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; see also <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

corresponding rationale for each sub-criterion for Community Establishment for each report and compared all reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Community Establishment criterion is measured by two sub-criterion: (i) Delineation (worth two points); and (ii) Extension (worth two points).⁸² While some applications received full points for the Community Establishment criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on its investigation, FTI concludes that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-criterion 1-A: Delineation

To receive two points for Delineation, the Applicant Guidebook and CPE Guidelines require that the community as defined in the application be clearly delineated, organized, and pre-existing.⁸³ FTI observed that all 26 CPE reports revealed that the CPE Provider methodically evaluated each element across all 26 CPEs. As reflected in twelve CPE reports, the relevant applications received the maximum two points;⁸⁴ as

⁸² Applicant Guidebook, Module 4.2.3 at Pg. 4-10 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸³ *Id.* See also CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁸⁴ Twelve CPE reports recorded the maximum two points. See OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

shown in one CPE report, the relevant application received one point;⁸⁵ and as noted in 13 CPE reports, the relevant applications received zero points.⁸⁶

a. Clearly Delineated

Two conditions must be met for a community to be clearly delineated: (i) there must be a clear, straightforward membership definition; and (ii) there must be awareness and recognition of a community as defined by the application among its members.⁸⁷

FTI observed that "a clear and straightforward membership" definition was deemed to be sufficiently demonstrated where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).⁸⁸ This was the case even if the CPE Provider found the community definition to be

⁸⁵ One CPE report recorded one point. See RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

⁸⁶ Thirteen CPE reports recorded zero points. See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

⁸⁷ Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸⁸ The CPE Provider determined that six of the 13 applications that received zero points for the Delineation sub-criterion were not "clearly delineated" because they did not demonstrate "a clear and straightforward membership." See ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>), GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

broad.⁸⁹ On the other hand, the CPE Provider determined that a community definition did not demonstrate a "clear and straightforward membership" if it was too broadly defined in the application and could not be determined through formal registration, or was "unbound and dispersed" because the community may not resonate with all stakeholders that it seeks to represent.⁹⁰ The CPE Provider also determined that a community definition showed a clear and straightforward membership where the membership was dependent on having a clear connection to a defined geographic area.⁹¹

FTI observed that the CPE Provider determined that there was "awareness and recognition of a community as defined by the application among its members" where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).⁹² On the other hand, the CPE Provider determined that the community as defined in the application did not have awareness and recognition among its members if the affiliated businesses and sectors had only a tangential relationship with the core community. In those instances, the CPE Provider found that the affiliated businesses and sectors would not associate

⁸⁹ See, e.g., TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

⁹⁰ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁹¹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>).

⁹² See, e.g., MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

themselves with the community as defined.⁹³ The CPE Provider also determined that commonality of interest was not enough to satisfy the "awareness and recognition of a community" element because it did not provide substantive evidence of what the Applicant Guidebook defines as "cohesion."⁹⁴

The applications underlying the 12 CPE reports that recorded two points, and the one CPE report that recorded one point satisfied both aspects of the clearly delineated prong of the Delineation sub-criterion: the applications demonstrated a "clear and straightforward membership" of community and an "awareness and recognition of a community as defined by the application among its members."⁹⁵ Of the applications underlying the 13 CPE reports that recorded zero points for the clearly delineated prong of the Delineation sub-criterion, six did not satisfy either element for the clearly delineated prong.⁹⁶ The applications underlying the seven CPE reports that recorded

⁹³ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); and LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁹⁴ See, e.g., ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>).

⁹⁵ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

⁹⁶ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report ([26](https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-</p>
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zero points for the clearly delineated prong were determined to have demonstrated a "clear and straightforward membership" of community, but failed to demonstrate an "awareness and recognition of a community as defined by the application among its members."⁹⁷ The applications underlying all 13 of the CPE reports that recorded zero points failed to satisfy the "awareness" element of the clearly delineated prong of the Delineation sub-criterion.

b. Organization

Two conditions must be met to fulfill the requirements for organization: (i) there must be at least one entity mainly dedicated to the community; and (ii) there must be documented evidence of community activities.⁹⁸

FTI observed that, where the CPE Provider determined that there was not "at least one entity mainly dedicated to the community," then the existing entities did not represent a majority of the community as defined in the application.⁹⁹ If the CPE Provider determined that an application failed to satisfy either prong under the "clearly delineated" analysis (*see infra*), then the CPE Provider also determined that there was not "at least one entity mainly dedicated to the community" as defined in the application.¹⁰⁰ All applications that received two points for the Delineation sub-criterion

46695-en.pdf); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

⁹⁷ TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

⁹⁸ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁹⁹ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁰⁰ See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840->

were determined to have "at least one entity mainly dedicated to the community."¹⁰¹ Of the applications underlying the 13 CPE reports that recorded zero points and the one report that recorded one point for the Delineation sub-criterion, all were deemed to lack "at least one entity mainly dedicated to the community" as defined.¹⁰²

With respect to the "documented evidence of community activities" prong, FTI observed that an application was deemed to have satisfied this condition where community

en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁰¹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁰² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

activities were documented through formal membership or registration.¹⁰³ On the other hand, if the CPE Provider determined that an application was unable to demonstrate that there existed at least one entity mainly dedicated to the community as defined, then that application did not satisfy this prong. Of the applications underlying the 12 CPE reports that recorded two points for the Delineation sub-criterion, all satisfied the "documented evidence of community activities" prong.¹⁰⁴ All of the applications underlying the 14 CPE reports that were deemed to lack "at least one entity mainly dedicated to the community" as defined in the application, were also deemed to lack "documented evidence of community activities."¹⁰⁵

¹⁰³ See, e.g., HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

¹⁰⁴ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁰⁵ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

c. Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).¹⁰⁶

Thirteen applications failed to satisfy the pre-existence prong;¹⁰⁷ twelve applications satisfied this prong.¹⁰⁸

FTI observed that, if the community as defined in the application was determined by the CPE Provider to be a "construed" community,¹⁰⁹ then the CPE Provider also found that the community did not exist prior to September 2007, even if its constituent parts may have been active prior to September 2007.¹¹⁰ Further, if the CPE Provider determined

¹⁰⁶ Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁰⁷ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁰⁸ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁰⁹ Applicant Guidebook, Module 4.2.3 at Pg. 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹¹⁰ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>).

that an application failed to satisfy either prong under the "clearly delineated" analysis (see *infra*), then the CPE Provider also determined that the application did not satisfy the requirements for pre-existence.¹¹¹ Each of the applications underlying the 13 CPE reports that recorded zero points for the Delineation sub-criterion were deemed by the CPE Provider to set forth a "construed community."¹¹² Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion were determined to have demonstrated pre-existence prior to September 2007.¹¹³

18840-en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

¹¹¹ See Applicant Guidebook, Module 4.2.3 at Pg. 4-10

(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹¹² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹¹³ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

2. Sub-Criterion 1-B: Extension

The Applicant Guidebook and CPE Guidelines require a community of considerable size and longevity to receive full points for the Extension sub-criterion.¹¹⁴

a. Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members. The CPE Provider determined that all community applicants defined communities of considerable size.¹¹⁵ FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the

¹¹⁴ See Applicant Guidebook, Module 4.2.3 at Pg. 4-10, (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also CPE Guidelines at Pg. 5 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹¹⁵ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the size requirements could not be met.¹¹⁶ All of the applications underlying the 13 CPE Reports that recorded zero points for the "clearly delineated" prong failed to demonstrate awareness of a community among its members.¹¹⁷ Therefore, despite the fact that the CPE provider concluded that these 13 applications demonstrated communities of considerable size, all 13 that received zero points for the "clearly delineated" prong could not satisfy the size requirements.¹¹⁸ Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the clearly delineated prong.¹¹⁹ Consequently, each of the applications

¹¹⁶ See, e.g., MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (application failed to satisfy size requirements because it did not satisfy the awareness requirement of the "clearly delineated" prong); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (application failed to satisfy size requirements because it did not satisfy either the clear and straightforward membership requirement or the awareness requirement of the clearly delineated prong).

¹¹⁷ IMMO (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹¹⁸ See *id.*

¹¹⁹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>);

underlying the 13 CPE reports that recorded points for Delineation also satisfied the awareness requirement for size.¹²⁰

b. Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.¹²¹ FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the longevity requirement could not be met. Of the 13 CPE Reports that recorded zero points for the "clearly delineated" prong, all 13 corresponding applications failed to demonstrate awareness of a community among its members.¹²² Therefore, each of the applications underlying the 13 CPE reports that recorded zero points for the "clearly delineated" prong could not satisfy the longevity requirements. Because each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the "clearly delineated" prong as well as the pre-existence prong, each of the

and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁰ See *id.*

¹²¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11-4-12 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

applications that received points for Delineation satisfied both requirements for longevity.¹²³

The CPE Guidelines state that if an application obtains zero points for Delineation, an application will receive zero points for Extension.¹²⁴ Accordingly, the 13 applications that received zero points for Delineation also received zero points for Extension.

One application received three out of a possible four points for the Community Establishment criterion.¹²⁵ For the Delineation sub-criterion, the application received one point because the CPE Provider determined that there was not one entity mainly dedicated to the community as defined in the application, and therefore the community as defined in the application was deemed not sufficiently organized.¹²⁶ The application received the full two points on the Extension sub-criterion.

Twelve applications received full points on the Community Establishment criterion. Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community

¹²³ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁴ See Applicant Guidebook, Module 4.2 at Pg. 4-12, (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²⁵ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁶ *Id.* at Pgs. 2-3.

Establishment criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

B. The Nexus Criterion (Criterion 2) was Applied Consistently in all CPEs.

To assess whether the Nexus criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Nexus and Uniqueness. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Nexus for each report and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Nexus criterion is measured by two sub-criterion: (i) Nexus (worth three points); and (ii) Uniqueness (worth one point).¹²⁷ While some applications received full points for the Nexus criterion and others did not,¹²⁸ the CPE Provider's

¹²⁷ Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²⁸ Of the 26 CPE reports, the CPE Provider determined that 19 applications received zero points for Nexus. SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); SHOP CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); MUSIC (.music LLP) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085->

findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-Criterion 2-A: Nexus

To receive a partial score of two points for Nexus,¹²⁹ the applied-for string must identify the community. According to the Applicant Guidebook, "'Identify' means that the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community."¹³⁰ In order to receive the maximum score of three points, the applied-for string must: (i) "identify" the community; and (ii) match the name of the community or be a well-known short-form or abbreviation of the community.

FTI observed that the CPE Provider determined that the applications underlying 19 CPE reports received zero points for the Nexus sub-criterion because, in the CPE Provider's determination, the applications failed to satisfy both of the requirements described above. First, for the applications underlying 11 of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider determined that the applied-for string did not identify the community because it substantially overreached the

en.pdf); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

¹²⁹ The Applicant Guidebook does not provide for one point to be awarded for the Nexus sub-criterion. An application only may receive two points or three points for the Nexus sub-criterion.

¹³⁰ Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community.^{131, 132}

Second, for the applications underlying eight of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider found that the applied-for string did not match the name of the community or was not a well-known short form or abbreviation. In this regard, the CPE Provider determined that, although the string identified the name of the core community members, it failed to match or identify the peripheral industries and entities included in the definition of the community set forth in the application. Therefore, there was a misalignment between the proposed string and the proposed community.¹³³ In several cases, the CPE Provider's conclusion that the

¹³¹ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

¹³² See Applicant Guidebook, Module 4.2.3 Criterion 2 definitions and Criterion 2 guidelines at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹³³ GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>) ("While the string identifies the name of the core community members (i.e. companies with the legal form of a GmbH), it does not match or identify the regulatory authorities, courts and other institutions that are included in the definition of the community as described in Criterion 1-A."); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>) (where community is defined to include tangentially related industries, applied-for string name of "TAXI" fails to match or identify the peripheral industries and entities that are included in the defined community); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (applied for string identifies only the name of the core community members (primary and secondary real estate members), but fails to identify peripheral industries and entities described as part of the community by the applicant and does not match the defined community); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>) ("While the string identifies the name of the core community members (i.e. artists and organized members of the arts community) it does not match or identify the art supporters that are included in the definition of the community as described in Criterion 1-A" such as "audiences, consumers, and donors"); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>) (concluding that although applied-for string identifies the core community members—kids—it fails to closely describe other community members such as parents, who are not commonly known as "kids"); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>) (applied

string did not identify the entire community was the consequence of the CPE Provider's finding that the proposed community was not clearly delineated because it described a dispersed or unbound group of persons or entities.¹³⁴ Without a clearly delineated community, the CPE Provider concluded that the one-word string could not adequately identify the community.

Five CPE reports recorded two points for the Nexus sub-criterion.¹³⁵ FTI observed that these CPE reports recorded partial points because the CPE Provider determined that the underlying applications satisfied only the two-point requirement for Nexus: the applied-for string must identify the community.¹³⁶ The CPE Provider determined that, although the applied-for string identified the proposed community as defined in the application, it did not "match" the name of the community nor constitute a well-known short-form or abbreviation of the community name.¹³⁷ Specifically, the CPE Provider concluded that, for the applications underlying these five CPE reports, the community definition encompassed individuals or entities that were tangentially related to the proposed community as defined in the application and therefore, the general public may

for string is over inclusive, identifying more individuals than are included in the defined community); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>) (applied-for string "GAY" is commonly used to refer to men and women who identify as homosexual but not necessarily to others in the defined community).

¹³⁴ See, e.g., KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

¹³⁵ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹³⁶ Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³⁷ See, e.g., ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own).

not necessarily associate all of the members of the defined community with the string.¹³⁸ Thus, for these applications, there was no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus.¹³⁹ For all CPE reports that did not record the full three points for the Nexus sub-criterion, the CPE Provider's rationale was based on the definition of the community as defined in the application.

Two CPE reports recorded the full three points for the Nexus sub-criterion.¹⁴⁰ The CPE Provider determined that the applied-for string in the applications underlying these two CPE reports was closely aligned with the community as defined in the application,¹⁴¹

¹³⁸ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>) (applied-for string "HOTEL" identifies core members of the defined community but is not a well-known name for other members of the community such as hotel marketing associations that are only related to hotels); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (concluding that because the community defined in the application is a collection of many categories of individuals and organizations, there is no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus, but that partial points may be awarded because the string "MUSIC" identifies all member categories, and successfully identifies the individuals and organizations included in the applicant's defined community); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (applied-for string "ART" identifies defined community, but, given the subjective meaning of what constitutes art, general public may not associate all members of the broadly defined community with the applied-for string); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>) (applied-for string "RADIO" identifies core members of the defined community but is not a well-known name for other members of the community such as companies providing specific services that are only related to radio).

¹³⁹ See, e.g., MUSIC (DotMusic Limited) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁴⁰ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁴¹ SPA CPE Report at Pg. 4 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); and OSAKA CPE Report at Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

and/or was the established name by which the community is commonly known by others.¹⁴²

2. Sub-Criterion 2-B: Uniqueness

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application.¹⁴³ According to the Applicant Guidebook and CPE Guidelines, if an application did not receive at least two points for the Nexus sub-criterion, it could not receive the one point available for the Uniqueness sub-criterion.¹⁴⁴ Therefore, the CPE Provider determined that the applications underlying the 19 CPE reports that recorded zero points for Nexus were ineligible for a score of one for Uniqueness. Each of the applications underlying the five CPE reports that recorded two points for Nexus,¹⁴⁵ as well as the applications underlying the two CPE reports that recorded three points for Nexus,¹⁴⁶ received one point for Uniqueness. For each of the applications underlying these seven CPE reports, the CPE Provider determined that the applied-for string had no other significant meaning beyond identifying the community described in the application.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Nexus

¹⁴² SPA CPE Report at Pgs. 4-5 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁴³ Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹⁴⁴ See CPE Guidelines at Pgs. 9-10, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). See also Applicant Guidebook, Module 4.2.3 at Pg. 4-14 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹⁴⁵ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (efflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁴⁶ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Nexus criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

C. The Registration Policies Criterion (Criterion 3) was Applied Consistently in all CPEs.

To assess whether the Registration Policies criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Eligibility, (ii) Name Selection, (iii) Content and Use; and (iv) Enforcement. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Registration Policies for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Registration Policies criterion is measured by four sub-criterion: (i) Eligibility; (ii) Name Selection; (iii) Content and Use; and (iv) Enforcement, each of which is worth one point.¹⁴⁷ While some applications received full points for the Registration Policies criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

¹⁴⁷ Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

1. Sub-Criterion 3-A: Eligibility

To fulfill the requirements for Eligibility, the registration policies set forth in the application must restrict the eligibility of prospective registrants to community members.¹⁴⁸ All applications received one point for Eligibility. The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point for Eligibility for all applications that underwent CPE because each application restricted eligibility to community members only, as required by the Applicant Guidebook.¹⁴⁹

In particular, the CPE Provider found that each application contained a registration policy that restricted eligibility in one of the following ways: (i) by requiring registrants to be verifiable participants in the relevant community or industry;¹⁵⁰ (ii) by listing the professions that are eligible to apply;¹⁵¹ (iii) by requiring proof of affiliation through licenses, certificates of registration or membership, official statements from

¹⁴⁸ *Id.* at Pg. 4-14.

¹⁴⁹ *Id.*

¹⁵⁰ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC CPE Report (.music LLC) (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); CPA (AICPA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁵¹ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

superordinate authorities, or owners of trademarks;¹⁵² (iv) by requiring registrants to be members of specified organizations linked to or involved in the functions relating to the applied-for community;¹⁵³ (v) by requiring that the registered domain name be "accepted as legitimate; and beneficial to the cause and values of the radio industry; and commensurate with the role and importance of the registered domain name; and in good faith at the time of registration and thereafter."¹⁵⁴

2. Sub-Criterion 3-B: Name Selection

To fulfill the requirements for Name Selection, the application's registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD.¹⁵⁵

In the sub-criterion for Name Selection, five CPE reports recorded zero points.¹⁵⁶ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to these five applications because each failed to satisfy a required element of the CPE Guidelines, including: (i) the name selection rules were too vague to be consistent with the purpose of the community;¹⁵⁷ (ii) there were no comprehensive name selection rules;¹⁵⁸ (iii) there were no restrictions or

¹⁵² TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>);

¹⁵³ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); and GmbH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁵⁴ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁵⁵ See Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁵⁶ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

¹⁵⁷ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

¹⁵⁸ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

guidelines for name selection;¹⁵⁹ (iv) the rules did not refer to the community-based purpose;¹⁶⁰ and (v) the applicant had not finalized name selection criteria.¹⁶¹

Twenty-one CPE reports recorded one point for Name Selection.¹⁶² The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the applications set forth registration policies for name selection that were consistent with the articulated community-based purpose of the applied-for gTLD, as required by the Applicant Guidebook.¹⁶³

The CPE Provider determined that the applications demonstrated adherence to the Name Selection sub-criterion by: (i) outlining a comprehensive list of name selection

¹⁵⁹ MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

¹⁶⁰ SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

¹⁶¹ MERCK (RH) CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

¹⁶² TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁶³ Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

rules;¹⁶⁴ (ii) outlining the types of names that may be registered, while the name selection rules were consistent with the purpose of the gTLD;¹⁶⁵ (iii) specifying that naming restrictions be specifically tailored to meet the needs of registrants while maintaining the integrity of the registry, and ensuring that domain names meet certain technical requirements;¹⁶⁶ (iv) specifying that the associated boards use their corporate name or an acronym, while foreign affiliates will also have to include geographical modifiers in their second level domains;¹⁶⁷ (v) specifying that the registrant's nexus with the community and use of the domain must be commensurate with the role of the registered domain, and with the role and importance of the domain name based on the meaning an average user would reasonably assume in the context of the domain name;¹⁶⁸ (vi) specifying that eligible registrants are entitled to register any domain name that is not reserved or registered at the time of registration submission while setting aside a list of domain names that will be reserved for major brands;¹⁶⁹ and (vii) outlining

¹⁶⁴ TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/llp-cpe-1-880-35508-en.pdf>).

¹⁶⁵ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁶⁶ TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

¹⁶⁷ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

¹⁶⁸ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁶⁹ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

restrictions on reserved names as well as a program providing special provisions for trademarks and other rules.¹⁷⁰

3. Sub-Criterion 3-C: Content and Use

To fulfill the requirements for Content and Use, the registration policies set forth in the application must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD.¹⁷¹

In the sub-criterion for Content and Use, six CPE reports recorded zero points.¹⁷² The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying six of the CPE reports for one of three reasons: (i) the rules for content and use for the community-based purpose were too general or vague;¹⁷³ (ii) there was no evidence in the application of requirements, restrictions, or guidelines for content and use that arose out of the community-based purpose of the application;¹⁷⁴ or (iii) the policies for content and use were not finalized.¹⁷⁵

¹⁷⁰ ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

¹⁷¹ Applicant Guidebook, Module 4.2.3 at Pg. 4-16 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁷² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁷³ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (eflux) CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁷⁴ MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

¹⁷⁵ MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

Twenty CPE reports recorded one point for Content and Use. FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications included registration policies for content and use that were consistent with the articulated community-based purpose of the applied-for gTLD. The CPE Provider found this to be the case when the application: (i) set forth specific registration policies for content and use that were tailored to the community-based purpose of the gTLD;¹⁷⁶ (ii) had policies that stated that content or use could not be inconsistent with the mission/purpose of the gTLD;¹⁷⁷ or (iii) had prohibitions on certain types of content and/or abuse.¹⁷⁸

4. Sub-Criterion 3-D: Enforcement

Two conditions must be met to fulfill the requirements for Enforcement: (i) the registration policies set forth in the application must include specific enforcement

¹⁷⁶ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹⁷⁷ TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁷⁸ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

measures constituting a coherent set; and (ii) the application must set forth appropriate appeal mechanisms.¹⁷⁹

In the sub-criterion for Enforcement, 14 CPE reports recorded zero points.¹⁸⁰ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying 13 CPE reports because each of the relevant applications lacked appeal mechanisms.¹⁸¹ The remaining CPE report recorded zero points because the corresponding application did not outline specific enforcement measures constituting a coherent set.¹⁸² A coherent set refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with

¹⁷⁹ Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁸⁰ INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

¹⁸¹ INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁸² ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants.¹⁸³

Twelve CPE reports recorded one point.¹⁸⁴ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications set forth appeal mechanisms and outlined specific enforcement measures constituting a coherent set.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Registration Policies criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Registration Policies criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

¹⁸³ See CPE Guidelines at Pg. 14 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹⁸⁴ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

D. The Community Endorsement Criterion (Criterion 4) Was Applied Consistently in all CPEs.

To assess whether the Community Endorsement criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Support and (ii) Opposition. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Community Endorsement for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.¹⁸⁵

As noted above, the Community Endorsement criterion is measured by two sub-criterion: (i) Support; and (ii) Opposition, each worth two points. While some applications received full points for the Community Endorsement criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-Criterion 4-A: Support

To receive two points for Support: (i) the applicant must be the recognized community institution/member organization; (ii) the application has documented support from the recognized community institution(s)/member organization(s); or (iii) the applicant has

¹⁸⁵ In its investigation, FTI observed that the CPE Provider engaged in the following process to evaluate the Community Endorsement criterion. The CPE Provider sent verification emails to entities that submitted letters of support or opposition in order to attempt to verify their authenticity. The CPE Provider's evaluators then logged the results into a database. Separate correspondence tracker spreadsheets also were maintained by the CPE Provider for each applicant. FTI reviewed all of these materials in the course of its investigation. See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>; and <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>.

documented authority to represent the community.¹⁸⁶ To receive one point for Support, the application must have documented support from at least one group with relevance.¹⁸⁷ Zero points are awarded if the application has "insufficient proof of support for a score of 1."¹⁸⁸

All 26 CPE reports recorded at least one point for Support. Of those, 17 CPE reports recorded only one point.¹⁸⁹ Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the CPE Provider determined that each application had sufficient documented support from at least one group with relevance, but could not receive a full score of two points because the applicant was not the recognized community institution/member organization, the applicant did not have documented support from the recognized community institution/member organization, nor did the applicant have documented authority to represent the community, as required by the Applicant Guidebook.¹⁹⁰ In each instance, the entity(ies) expressing support for the application was not deemed by the CPE Provider to constitute the recognized institutions that represent the community as

¹⁸⁶ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>)

¹⁹⁰ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

defined in the application.¹⁹¹ In some cases, this meant that, although the supporting entity was dedicated to the community, the supporting entity lacked reciprocal recognition from community members as the entity authorized to represent them.¹⁹² In others, the supporting entity did not "represent" the community because the supporting entity was limited in geographic or thematic scope and, therefore, did not represent the entire community as defined in the application.¹⁹³

Nine CPE reports recorded the full two points for Support. Of the applications underlying these nine CPE reports, FTI observed that four applications received two points because the CPE Provider determined that the applications had documented support from the recognized community institution/member organization.¹⁹⁴ For the other applications that received two points, the CPE Provider determined that the applicant was the recognized community institution/member organization with the authority to represent the community.¹⁹⁵ Whether the applicant or the supporting entity

¹⁹¹ See 204, *supra*.

¹⁹² See, e.g., GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (concluding that supporting entity is clearly dedicated to the community and it serves the community and its members in many ways, but is not the "recognized" community institution because it lacked reciprocal recognition by community members of the organization's authority to represent it as required by the Applicant Guidebook).

¹⁹³ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (relevant groups providing support do not constitute the recognized institutions to represent the community because they are limited in geographic and thematic scope); and ART (eFlux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (*same*).

¹⁹⁴ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁹⁵ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

constituted the recognized community institution was determined based upon consistent application of the Applicant Guidebook's definition of "recognized."¹⁹⁶

2. Sub-Criterion 4-B: Opposition

To receive two points for Opposition, an application must have no opposition of relevance.¹⁹⁷ To receive one point, an application may have relevant opposition from no more than one group of non-negligible size.¹⁹⁸

Nine CPE reports recorded one point for Opposition.¹⁹⁹ In each instance, the CPE Provider determined that the underlying applications received relevant opposition from no more than one group of non-negligible size. Opposition was deemed relevant on several grounds: (i) opposition was from a community not identified in the application but had an association to the applied-for string;²⁰⁰ (ii) the application was subject to a legal rights objection (LRO);²⁰¹ or (iii) opposition was not made for any reason forbidden by the Applicant Guidebook, such as competition or obstruction.²⁰²

¹⁹⁶ Applicant Guidebook, Module 4.2.3 at Pgs. 4-17 and 4-18 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁹⁷ *Id.* at Pg. 4-17.

¹⁹⁸ *Id.*

¹⁹⁹ MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>). No CPE reports recorded zero points for Opposition.

²⁰⁰ LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

²⁰¹ MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

²⁰² GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

Seventeen CPE reports recorded the full two points for Opposition.²⁰³ The CPE Provider determined that the applications corresponding to 17 CPE reports did not have any letters of relevant opposition.²⁰⁴

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Community Endorsement criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community Endorsement criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

1830-1672-en.pdf); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

²⁰³ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

²⁰⁴ *Id.*

VI. The CPE Provider's Use of Clarifying Questions Did Not Evidence Disparate Treatment.

Throughout the CPE process, the CPE Provider had the option to ask Clarifying Questions of the applicant about the relevant application.²⁰⁵ Clarifying Questions were not intended to permit an applicant to introduce new material or otherwise amend an application, but rather were a means for the applicant to make its application more clear and free from ambiguity.²⁰⁶ The CPE Provider composed the Clarifying Questions and sent them to ICANN organization, which would transmit the Clarifying Questions to the applicants. FTI observed that ICANN organization would review the wording of Clarifying Questions prior to sending them to the applicants. The CPE Provider confirmed that was done to ensure that the wording of the question was appropriate insofar as it did not contravene the Applicant Guidebook's guideline that responses to Clarifying Questions may not be used to introduce new material or amend the application.²⁰⁷ ICANN organization did not comment on the substance of any Clarifying Question.

Based on FTI's investigation, it was observed that the CPE Provider posed Clarifying Questions seven times in the CPE process. Based on a plain reading, five of the seven were framed to clarify information in the applications. For example, the CPE Provider asked a Clarifying Question where it found part of an application to be unclear or internally inconsistent insofar as the community was defined by the applicant differently in two different sections of the application.

Two Clarifying Questions related to letters of support. In one application, letters of support were referenced, but were not submitted with the application materials. Accordingly, the CPE Provider issued a Clarifying Question identifying the

²⁰⁵ See CPE Frequently Asked Questions at Pg. 4 (<https://newgtlds.icann.org/en/applicants/cpe/faqs-13aug14-en.pdf>).

²⁰⁶ *Id.* at Pgs. 4-5. See also Board Determination, at Pgs. 15-16 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>).

²⁰⁷ *Id.*

administrative error. In the other, the applicant submitted multiple letters of support, but the CPE Provider was unable to verify the nature and relevance of the support that the applicant received because the CPE Provider's verification attempts were unsuccessful. As a result, the CPE Provider issued a Clarifying Question; this application ultimately received the full two points for the Support sub-criterion.

Based on FTI's investigation, the CPE Provider did not issue Clarifying Questions on an inconsistent basis; nor did the CPE Provider's use of Clarifying Questions reflect disparate treatment of any applicant.

VII. The CPE Provider's Use of Outside Research.

FTI understands that "certain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted."²⁰⁸ This is the subject of Scope 3 of the CPE Process Review, where FTI will compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations that are the subject of pending Reconsideration Requests.

VIII. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI concludes that the CPE Provider consistently applied the CPE criteria throughout all Community Priority Evaluations.

²⁰⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

Exhibit 5

RESPONDENT'S EXHIBIT



13 DECEMBER 2017

COMPILATION OF THE REFERENCE MATERIAL RELIED UPON BY THE CPE PROVIDER IN CONNECTION WITH THE EVALUATIONS WHICH ARE THE SUBJECT OF PENDING RECONSIDERATION REQUESTS

PREPARED FOR JONES DAY



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I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization to conduct the CPE Process Review.

¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

This report addresses Scope 3 of the CPE Process Review. FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),⁹ 14-32 (.INC),¹⁰ 14-33 (.LLP), 16-3 (.GAY),¹¹ 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

II. Executive Summary

In connection with Scope 3, FTI analyzed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation. The CPE Provider's working papers were comprised of information inputted by the CPE Provider into a database, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, reference material,¹² and every draft of each CPE report.

In the course of its review and investigation, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in

⁹ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

¹⁰ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

¹¹ After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as "GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

¹² The CPE Provider's working papers associated with some evaluations contained the actual reference material relied upon by the CPE Provider, as compared to citations to reference material that appeared in the other working papers.

the CPE Provider's working papers to the extent that such material was not otherwise cited in the final CPE report.

Of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI's investigation, FTI finds that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider's working papers associated with the first .GAY evaluation.

Ultimately, FTI observed that the CPE Provider routinely relied upon reference material in connection with the CPE Provider's evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4). Each example of the reference material identified by FTI is attached to this report in Appendix A. FTI observed no citations to reference material in connection with the CPE Provider's

evaluation of the Registration Policies criterion (Criterion 3) for any of the eight relevant evaluations.¹³

III. Methodology

In Scope 3 of the CPE Process Review, FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),¹⁴ 14-32 (.INC),¹⁵ 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the BGC.¹⁶ Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC recommendations and/or determinations, as well as the Board's actions associated with these requests.¹⁷

¹³ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁴ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

¹⁵ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

¹⁶ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

¹⁷ *Id.*

Several requestors made claims that are relevant to Scope 3 of the CPE Process Review.

In particular, as noted in Mr. Disspain's letter of 26 April 2017:

[C]ertain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE Provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs.¹⁸

To complete its investigation, FTI first reviewed publicly available documents pertaining to CPE to gain a comprehensive understanding of the relevant background facts concerning CPE. The publicly available documents reviewed by FTI, and which informed FTI's investigation for Scope 3, are identified in FTI's reports addressing Scope 1 and Scope 2 of the CPE Process Review. FTI also interviewed relevant ICANN organization and CPE Provider personnel. These interviews are described in further detail in FTI's reports addressing Scopes 1 and 2 of the CPE Process Review.

In the context of Scope 3, following FTI's review of relevant background materials and interviews of relevant personnel, FTI reviewed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation.

FTI then identified each instance where the CPE Provider referenced research and provided a citation to that research in the eight relevant evaluations. FTI also identified each instance where the CPE provider referenced research but did not include citations to such research in the final CPE report. Finally, FTI identified each additional instance where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. For each reference material

¹⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified, FTI catalogued the CPE criterion and sub-criterion with which the reference material was associated.

In instances where the CPE Provider's final CPE report referenced research but did not provide a supporting citation, FTI undertook a review of the CPE Provider's working papers to determine if the referenced research was reflected in those materials. For example, if the final CPE report referenced research without providing a supporting citation in connection with sub-criterion 2-A, Nexus, FTI then reviewed the working papers for the relevant evaluation and determined if those materials reflected research associated with sub-criterion 2-A, Nexus. If the working papers provided citations to research undertaken in connection with the sub-criterion at issue, i.e., Nexus in this example, then FTI determined that the citations corresponded to the research referenced without citation in the final CPE report.¹⁹

FTI did not rely upon the substance of the reference material. Nor did FTI assess the propriety or reasonableness of the research undertaken by the CPE Provider. Both analyses are beyond the purview of Scope 3.

FTI defined "reference material" in a manner consistent with the CPE Panel Process Document.²⁰ Specifically, according to the CPE Panel Process Document, the CPE

¹⁹ The reference materials that were recorded in the working papers are URLs to websites that the CPE Provider visited or the URLs of research queries conducted by the CPE Provider. The working papers did not include a static rendering of webpages as they existed at the time of access by the CPE Provider. At times, FTI observed that some URLs cited in the CPE Provider's working papers were no longer active, which is not surprising because FTI received the CPE Provider's working papers long after the CPE Provider had completed the CPE process. As a result, FTI is not able to determine if the links were not active at the time they were accessed by the CPE Provider or if they were de-activated after the CPE Provider's evaluation process concluded. Similarly, in some instances, FTI observed that the URLs cited in the working papers contained typographical errors; however, FTI is not able to determine if the typographical errors appeared in the URLs at the time that the URLs were accessed by the CPE Provider or if they were incorrectly cited by the CPE Provider.

²⁰ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>). The CPE Panel Process Document explains that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions. The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including

Provider's evaluators provided individual evaluation results based on their assessment of the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, application materials, and "secondary research without any influence from core team members."²¹ Further, "[i]f the core team so decides, additional research may be carried out to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures."²² FTI considered both the evaluators' "secondary research" and any "additional research" conducted at the request of the core team to be within scope.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.²³ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.²⁴ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all

scoring rubrics, definitions of key terms, and specific questions to be scored. See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. The methodology that the CPE Provider undertook to evaluate the CPE criteria is further detailed in FTI's report addressing Scope 2 of the CPE Process Review.

²¹ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

²² *Id.*

²³ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

²⁴ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).²⁵

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.²⁶ The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their “bible.” Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, “Is the community clearly delineated?”; the same question appears in the CPE Guidelines. The “Answer” field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a “yes” or “no” response. In the “Evidence” field, the evaluator provided his/her reasoning for his/her answer. In the “Source” field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition.

FTI observed that reference material was cited in the “Source” field of the database, spreadsheets generated by the Project Coordinator and core team for each evaluation and which reflect the scoring decisions, memoranda drafted by the evaluators, draft

²⁵ *Id.*

²⁶ <https://newgtlds.icann.org/en/applicants/agb>.

reports, and in the final CPE reports. FTI observed that the Project Coordinator at times requested that the member of the core team responsible for drafting the CPE report incorporate citations to the evaluator(s)' reference material into the draft report to strengthen the rationale with respect to a particular point.

FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.²⁷ Further, FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider.

V. The CPE Provider Performed Research in the Eight Evaluations Which are the Subject of Pending Reconsideration Requests.

With respect to the eight evaluations which are the subject of pending Reconsideration Requests, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider's working papers to the extent such materials were not otherwise cited in the final CPE report.

²⁷ See Applicant Guidebook Module 4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.")
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

The following chart provides the total number of citations to research or reference material in the final CPE report and working papers for each of the eight relevant evaluations, broken down by relevant CPE criterion:

String	<u>Criterion 1:</u> Community Establishment	<u>Criterion 2:</u> Nexus between Proposed String and Community	<u>Criterion 3:</u> Registration Policies	<u>Criterion 4:</u> Community Endorsement	Additional Research Materials Associated with String	Total
.LLC	18	5	0	11	2	36
.INC	13	4	0	6	0	23
.LLP	21	8	0	9	1	39
.GAY (Reevaluation)	27	51	0	9	1	88
.MUSIC (DotMusic Ltd.)	20	2	0	1	0	23
.CPA (Australia)	26	18	0	2	0	46
.HOTEL	42	3	0	12	6	63
.MERCK KGaA	6	8	0	2	0	16
Total	173	99	0	52	10	334

Below, FTI lists each reference material relied upon by the CPE Provider for the eight relevant evaluations, organized by criterion and sub-criterion. By comparing the final CPE reports to the CPE Provider's working papers, FTI determined that some of the reference material that the CPE Provider relied upon during the CPE process was not cited in the final CPE report, but instead was only reflected in the CPE Provider's working papers. As a result, below FTI identifies the reference material reflected in the final CPE reports as well as the reference material reflected in the working papers associated with those evaluations.

As detailed below, of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL,

and .MERCCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance, in the second .GAY final CPE report, FTI observed that while the final report referenced research, the citations supporting such research were not included in the final report or the working papers for the second .GAY evaluation. However, based on FTI's review of the CPE Provider's working papers associated with the first .GAY evaluation, FTI finds that the citations supporting the research referenced in the second .GAY final CPE report may have been cited in those materials.

Brief Note on CPE Criteria Definitions

FTI's report addressing Scope 2 of the CPE Process Review extensively details the CPE criteria and FTI incorporates that discussion for purposes of this report. For the reader's benefit, the following summary is provided:

- **Criterion 1: Community Establishment.** The Community Establishment criterion evaluates "the community as explicitly identified and defined according to statements in the application."²⁸ The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, "Delineation;" and (ii) 1-B, "Extension."²⁹

²⁸ *Id.*

²⁹ *Id.*

- **Criterion 2: Nexus between Proposed String and Community.** The Nexus criterion evaluates “the relevance of the string to the specific community that it claims to represent.”³⁰ The Nexus criterion is measured by two sub-criterion: (i) 2-A, “Nexus”; and (ii) 2-B, “Uniqueness.”³¹
- **Criterion 3: Registration Policies.** The Registration Policies criterion evaluates the registration policies set forth in the application on four elements, each of which is worth one point: (i) 3-A, “Eligibility”; (ii) 3-B, “Name Selection”; (iii) 3-C, “Content and Use”; and (iv) 3-D, “Enforcement.”³²
- **Criterion 4: Community Endorsement.** The Community Endorsement criterion evaluates community support for and/or opposition to an application.”³³ The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, “Support”; and (ii) 4-B, “Opposition.”³⁴

CPE Reports Subject to Pending Reconsideration Requests

As noted above, the following evaluations are the subject of Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),³⁵ 14-32 (.INC),³⁶ 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). The analysis below addresses each evaluation in the foregoing

³⁰ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³¹ *Id.* at Pgs. 4-12 and 4-13.

³² See *id.* at Pgs. 4-14-4-15.

³³ See *id.* at Pgs. 4-17.

³⁴ *Id.*

³⁵ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>

³⁶ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

order, which is the order in which the relevant Reconsideration Requests were submitted.

A. .LLC

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-A, Delineation.³⁷ The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel’s research, there is no evidence of LLCs from different sectors acting as a community.³⁸

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”³⁹

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

³⁷ .LLC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

³⁸ *Id.*

³⁹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise reflected in the final CPE report: 1) the Wikipedia page for “Limited Liability Company,”⁴⁰ 2) the “LLC” webpage on www.sba.com,⁴¹ and 3) the “corporation” webpage on www.sba.com.⁴² Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion, 1-A, Delineation, that were not otherwise cited in the final CPE report.⁴³

⁴⁰ http://en.wikipedia.org/wiki/Limited_liability_company. According to Wikipedia: About, “Anyone with Internet access can write and make changes to Wikipedia articles, except in limited cases where editing is restricted to prevent disruption or vandalism.” See <https://en.wikipedia.org/wiki/Wikipedia:About>. Further, “Unlike printed encyclopedias, Wikipedia is continually created and updated.” *Id.* For purposes of this report, FTI referenced Wikipedia pages as they appear now and not as they may have appeared at the time of review by the CPE Provider.

⁴¹ <http://www.sba.com/legal/llc/>.

⁴² <http://www.sba.gov/content/corporation>.

⁴³ They are:

http://en.wikipedia.org/wiki/Limited_liability_company;

<http://www.sba.com/legal/llc/>;

<http://www.sba.gov/content/corporation> (cited two times);

<http://dotregistry.org/>;

<http://dotregistry.org/about/who-is-dot-registry>;

<http://dotregistry.org/corporate-tlds/llc-domains> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nass-committees/nassbusiness-services-committee/> (cited two times and referenced as “Nass Business Services Committee website” one time without providing the URL) (This is no longer an active link); and

<http://www.llc-reporter.com/16.htm> (This is no longer an active link).

1-B Extension

The final CPE report makes two references to the Panel's research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-B, Extension.⁴⁴ The final report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel's research, there is no evidence of LLCs from different sectors acting as a community.⁴⁵

Although this statement appears in both the "Size" and "Longevity" sub-sections of the CPE Panel's discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel's reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider's working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for "Limited Liability Company,"⁴⁶ 2) the "LLC" webpage on

⁴⁴ .LLC CPE Report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁴⁵ *Id.*

⁴⁶ http://en.wikipedia.org/wiki/Limited_liability_company.

www.sba.com,⁴⁷ and 3) the “corporation” webpage on www.sba.com.⁴⁸ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that were not otherwise cited in the final CPE report.⁴⁹

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report makes one reference to the Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 2-A, Nexus.⁵⁰ The final report states—without indicating the source of the information—that “[w]hile the string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in other jurisdictions

⁴⁷ <http://www.sba.com/legal/llc/>.

⁴⁸ <http://www.sba.gov/content/corporation>.

⁴⁹ They are:

<http://www.llc-reporter.com/16.htm> (This is no longer an active link); and

<http://www.sba.gov/content/limited-liability-companyllc> (This is no longer an active link).

⁵⁰ .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>). FTI understands that in Reconsideration Request 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), the Requestor made the following claim: “The Panel also states that its decision to not award any points to the .LLC Community Application for 2-A Nexus is based on “[t]he Panel’s research [which] indicates that while other jurisdictions use LLC as a corporate identifier, their definitions are quite different and there are no other known associations or definitions of LLC in the English language.” Reconsideration Request 14-30 (<https://www.icann.org/en/system/files/files/request-dotregistry-redacted-25jun14-en.pdf>), Pg. 7. The language the Requestor quoted from the CPE report is contained in a block quote that the CPE report states came from the “application documentation,” and drafts of the report indicate that the block quote originally said “Our research indicates that” .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf> and drafts). FTI therefore finds it reasonable to conclude that the statement references the *applicant’s* research, not the Panel’s research.

(outside the US).⁵¹ The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”⁵² This requirement is a component of sub-criterion 2-A, Nexus.⁵³

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion. Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Wikipedia page for LLCs,⁵⁴ 2) a “Web search on [REDACTED],” and 3) the “International equivalents” sub-page for the Wikipedia page for LLCs.⁵⁵ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

⁵¹ .LLC CPE Report Pg. 5 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁵² See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵³ See *id.*

⁵⁴ http://en.wikipedia.org/wiki/Limited_liability_company.

⁵⁵ http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

Including the citations listed above, the working papers reflect three references to research or reference material for this sub-criterion, which may be related to the research discussed in the final CPE report.⁵⁶

2-B Uniqueness

The final CPE report does not contain any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.⁵⁷

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

⁵⁶ They are:

http://en.wikipedia.org/wiki/Limited_liability_company; and

http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”); this document may relate to the statement in the final CPE report that LLC “is used in other jurisdictions (outside the US).”

FTI notes that the CPE Provider referenced a “Web search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

⁵⁷ The working papers cite:

http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents in a discussion of Uniqueness (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not contain any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect ten references to research or reference material for this sub-criterion.⁵⁸

4-B Opposition

The final CPE report does not contain any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers reflect one reference to research or reference material for this sub-criterion.⁵⁹

Additional Research Materials Associated with .LLC

The working papers include two documents not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLC CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.⁶⁰

⁵⁸ They are:

http://icannwiki.com/index.php/Dot_Registry_LLC;

Six references to <http://dotregistry.org/> or to the “Applicant website” without providing the full URL. FTI included each reference to the “Applicant website” as one of the ten references to research in this sub-criterion.

FTI notes that the CPE Provider made three references to “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for these searches. FTI included each of these searches as one of the ten references to research in this sub-criterion.

⁵⁹ FTI notes that the CPE Provider referenced the “Applicant website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as the one reference to research in this sub-criterion.

⁶⁰ The documents are:

A one-page Adobe PDF file named “businessRegisterStatisticsFeb2014.pdf” containing weekly data for the month of February, 2014 concerning registrations, liquidations, and dissolutions of companies

B. .INC

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.⁶¹ The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community.⁶²

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”⁶³

Because the final CPE report does not provide citations supporting the CPE Provider’s research, FTI analyzed the CPE Provider’s working papers in an effort to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider’s working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following

in the United Kingdom. This document may relate to the CPE Provider’s assertion, in sub-criterion 2-A, that “[t]he [LLC] corporate identifier is used in other jurisdictions (outside the US).”

A Microsoft Excel file named “Orbis_Export_1 (LLC).xls” containing data about the number of companies and their operating revenue in each of over 100 countries for the “last avai[able] year.”

⁶¹ .INC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

⁶² *Id.*

⁶³ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the “corporation” page for the United States Small Business Association,⁶⁴ and 2) the website for the National Association of Secretaries of State.⁶⁵ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers reflect eight references to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.⁶⁶

1-B Extension

The final CPE report makes two references to the CPE Panel’s research, but does not provide citations or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.⁶⁷ The final CPE report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research

⁶⁴ <http://www.sba.gov/content/corporation>.

⁶⁵ <http://www.nass.org/>.

⁶⁶ They are:

<http://www.companieshouse.gov.uk/links/usaLink.shtml> (cited three times);

<http://www.sba.gov/content/corporation> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nasscommittees/nass-business-servicescommittee/> (This is no longer an active link).

FTI notes that the CPE Provider referenced “[t]he NASS website . . . section on corporate registration” in the working papers. The working papers do not provide a full citation or identify the URL for the website. FTI included this website as one of the eight references to research in this sub-criterion.

⁶⁷ .INC CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel's research, there is no evidence of INCs from different sectors acting as a community.⁶⁸

Although this statement appears in both the "Size" and "Longevity" sub-sections of the CPE Panel's discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel's reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the referenced research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider's working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the "corporation" page for the United States Small Business Association,⁶⁹ and 2) the website for the National Association of Secretaries of State.⁷⁰ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.⁷¹

⁶⁸ *Id.*

⁶⁹ <http://www.sba.gov/content/corporation>.

⁷⁰ <http://www.nass.org/>.

⁷¹ They are:
<http://www.companieshouse.gov.uk/links/usaLink.shtml>; and

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain two citations to research or reference material.⁷²

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material relating to this sub-criterion.⁷³

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

<http://en.wikipedia.org/wiki/Corporation>.

⁷² They are:

http://en.wikipedia.org/wiki/Types_of_business_entity; and
<http://en.wikipedia.org/wiki/Inc>.

⁷³ They are:

http://en.wikipedia.org/wiki/Types_of_business_entity; and
<http://en.wikipedia.org/wiki/Inc>.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain six citations to research or reference material for this sub-criterion.⁷⁴

4-B Opposition

Neither the final CPE report nor the working papers reflect any reference to research or reference material for sub-criterion 4-B, Opposition.

C. .LLP

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the Panel's research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.⁷⁵ The final report states that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on

⁷⁴ <http://www.companieshouse.gov.uk/links/usaLink.shtml>;
http://icannwiki.com/index.php/Dot_Registry_LLC;
<http://dotregistry.org/> (cited three times); and
<https://www.cscglobal.com/global/web/csc/home>.

⁷⁵ .LLP CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

the Panel's research, there is no evidence of LLPs from different sectors acting as a community.⁷⁶

The CPE Provider is referring to the Applicant Guidebook's requirement that the community demonstrate "an awareness and recognition of a community among its members."⁷⁷

Because the final CPE report does not provide citations supporting the CPE Provider's research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider's working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for "Limited Liability Partnership" (specifically, the sub-page for "United States"),⁷⁸ and 2) the "LLP" webpage on www.sba.com.⁷⁹ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain eleven citations to research or reference material for this sub-criterion.⁸⁰

⁷⁶ *Id.*

⁷⁷ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁷⁸ http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States.

⁷⁹ <http://www.sba.com/legal/llp/>.

⁸⁰ They are:

<http://www.nass.org/nass-committees/nass-business-servicescommittee/> (cited two times) (This is no longer an active link);

<http://dotregistry.org/about/who-is-dot-registry> (cited two times);

<http://dotregistry.org/>;

1-B Extension

The final CPE report makes two references to the Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.⁸¹ The final report states twice that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on the Panel’s research, there is no evidence of LLPs from different sectors acting as a community.⁸²

Although this statement appears in both the “Size” and “Longevity” sub-sections of the CPE Panel’s discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel’s reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were

<http://www.biztree.com/company/>;
http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States (cited two times);
http://en.wikipedia.org/wiki/Limited_liability_partnership;
<http://www.sba.com/legal/llp/>; and
<http://dotregistry.org/corporate-tlds/llp-domains>.

⁸¹ .LLP CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

⁸² *Id.*

not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Partnership” (specifically, the sub-page for “United States,”⁸³ and 2) the “LLP” webpage on www.sba.com.⁸⁴ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain seven citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.⁸⁵

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not directly reference any research or reference material for sub-criterion 2-A, Nexus, but it states—without indicating the source of the information—that “[t]he applied-for-string (.LLP) over-reaches substantially . . . [because it] captures a wider geographical remit than the community has, as the corporate identifier is used in Poland, the UK, Canada and Japan, amongst others.”⁸⁶ The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching

⁸³ http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States.

⁸⁴ <http://www.sba.com/legal/llp/>.

⁸⁵ They are:

http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States (cited two times);

http://en.wikipedia.org/wiki/Limited_liability_partnership;

<http://www.sba.com/legal/llp/> (cited two times);

<http://www.biztree.com/?a=biztree&s=google&c=ustop&gclid=CJPnqb6SwL0CFUNo7Aodtl8A8g>; and <https://www.google.com/search> Confidential Business Information

⁸⁶ .LLP CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

substantially beyond the community.”⁸⁷ This requirement is a component of sub-criterion 2-A, Nexus.⁸⁸

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Applicant’s website,⁸⁹ 2) the Wikipedia page for LLPs (cited three times),⁹⁰ 3) a British government webpage answering Frequently Asked Questions about LLPs,⁹¹ and 4) a Google search for **Confidential Business Information**.⁹² Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

⁸⁷ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

⁸⁸ See *id.*

⁸⁹ <http://dotregistry.org/corporate-tlds/llp-domains>.

⁹⁰ http://en.wikipedia.org/wiki/Limited_liability_partnership.

⁹¹ <http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>.

⁹² <https://www.google.com/search> **Confidential Business Information**

Including the citations listed above, the working papers contain six citations to research or reference material for this sub-criterion.⁹³

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.⁹⁴

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect nine references to research or reference material.⁹⁵

⁹³ They are:

http://en.wikipedia.org/wiki/Limited_liability_partnership (cited three times);

<http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>;

<https://www.google.com/search> Confidential Business Information

and

<http://dotregistry.org/corporate-tlds/llp-domains>.

⁹⁴ One working paper cites http://en.wikipedia.org/wiki/Limited_liability_partnership in its consideration of this sub-criterion.

⁹⁵ They are:

<http://dotregistry.org/#http://dotregistry.org/about>;

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, opposition.

Additional Research Materials Associated with .LLP

The working papers include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLP CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.⁹⁶

FTI notes that the CPE Provider referenced a “Google search” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion;

FTI notes that the CPE Provider referenced three “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion; and

FTI notes that the CPE Provider made four references to the “Applicant[’s] website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

⁹⁶ The document is a one-page Adobe PDF file named “BusinessRegisterStatistics.pdf” containing weekly data for the month of February 2014 concerning registrations, liquidations, and dissolutions of companies in the United Kingdom.

D. Second .GAY Evaluation⁹⁷

1. Criterion 1: Community Establishment

1-A Delineation

The second final CPE report contains ten citations to research or reference material for sub-criterion 1-A, Delineation.⁹⁸

The working papers contain ten citations to research or reference material for this sub-criterion that are not otherwise cited in the second final CPE report.⁹⁹

⁹⁷ After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as ".GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

⁹⁸ They are:
<http://www.hrc.org/campaigns/coming-out-center>;
http://www.lalgbtcenter.org/coming_out_support;
<http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>;
<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>;
<http://community.pflag.org/page.aspx?pid=539> (This is no longer an active link);
<http://www.apa.org/topics/lgbt/orientation.pdf> (the CPE report notes that the applicant cited this as well);
<http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>;
<http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>;
http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html; and
 a reference to "ILGA's website" without specifying the URL or a webpage within the website.

⁹⁹ They are:
<http://dotgay.com>;
<http://ilga.org/about-us/>;
<http://ilga.org/what-we-do/>;
http://en.wikipedia.org/wiki/International_Lesbian,_Gay,_Bisexual,_Trans_and_Intersex_Association;

1-B Extension

The second final CPE report contains two citations to research or reference material for sub-criterion 1-B, Extension.¹⁰⁰

Additionally, the second final CPE report makes one reference to the CPE Provider’s verification of data submitted by the Applicant but does not contain a corresponding citation in the report. The second final CPE report states: “The Panel has verified the applicant’s estimates of the defined community’s size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally.”¹⁰¹ The CPE Provider is referring to the Applicant Guidebook’s requirement that the community be of considerable size.¹⁰² Size is a component of sub-criterion 1-B, Extension.¹⁰³

Because the second final CPE report does not provide a citation in support of the referenced research conducted by the CPE Provider to verify and compare the referenced estimates,¹⁰⁴ FTI analyzed the CPE Provider’s working papers for the second .GAY evaluation to determine if the working papers reflected such research.

http://en.wikipedia.org/wiki/Gay_and_Lesbian_International_Sport_Association;
http://en.wikipedia.org/wiki/International_Gay_and_Lesbian_Travel_Association;
<http://en.wikipedia.org/wiki/Gay>;
<http://en.wikipedia.org/wiki/LGBT>;
http://en.wikipedia.org/wiki/LGBT_history; and
http://en.wikipedia.org/wiki/Timeline_of_LGBT_history.

¹⁰⁰ They are:

Haggerty, George E. “Global Politics.” In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000; and
<http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>.

¹⁰¹ .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹⁰² See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁰³ *Id.*

¹⁰⁴ .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

Based on FTI's investigation, FTI observed that the CPE Provider's working papers did not reflect research undertaken in connection with the Extension sub-criterion for the second .GAY evaluation. Specifically, with respect to sub-criterion 1-B, Extension, the database contains the following: "Question 1.2.1: Is the community of considerable size?" FTI observed no references to research or reference material in the corresponding "Source" field for this question.

However, because the CPE Provider performed two evaluations for the .GAY application, out of an abundance of caution, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the referenced research was reflected in those materials. Based upon FTI's investigation, FTI finds that the supporting research may have been cited in the working papers associated with the first .GAY evaluation. FTI observed in the working papers for the first .GAY evaluation that the CPE Provider recorded two references in the database's "Source" field for Question 1.2.1.¹⁰⁵ Both citations addressed the size of the gay community nationally and worldwide, which may have been used by the CPE Provider to verify the size of the community defined in the application. Based on the similarity between the two evaluations, FTI finds it reasonable to conclude that the research referenced without citation in the second .GAY evaluation may have been the same research that was cited in the working papers associated with the first .GAY evaluation.

Finally, the working papers associated with the second .GAY evaluation contain four citations to research or reference material for this sub-criterion that were not otherwise cited in the second final CPE report.¹⁰⁶

¹⁰⁵ They are:

www.census.gov/popclock (This is no longer an active link. The correct link to the United States Census Bureau U.S. and World Population Clock is <https://www.census.gov/popclock/>);
<http://en.wikipedia.org/wiki/InterPride>.

¹⁰⁶ They are:

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The second final CPE report contains 14 citations to research or reference material for sub-criterion 2-A, Nexus.¹⁰⁷

Additionally, the second final CPE report makes one reference to the CPE Panel’s research and four references to the Panel’s “survey” or “review of representative samples” of media and news articles, but does not provide the corresponding citation to the media, articles, and research reviewed.¹⁰⁸ These references are contained in three excerpts of the second final CPE report, each of which addresses whether the proposed

<http://en.wikipedia.org/wiki/Gay>;
<http://en.wikipedia.org/wiki/LGBT>;
http://en.wikipedia.org/wiki/LGBT_history; and
http://en.wikipedia.org/wiki/Timeline_of_LGBT_history.

¹⁰⁷ They are:

“gay, adj., adv., and n.” OED Online. Oxford University Press, June 2015. Web. 19 August 2015;
<http://time.com/135480/transgender-tipping-point/>;
<http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>;
<http://transgenderlawcenter.org/>;
<http://srlp.org/>;
<http://transequality.org/>;
<http://transequality.org/issues/resources/transgender-terminology>;
<http://oii-usa.org/1144/ten-misconceptions-intersex>;
http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter (This is no longer an active link);
<http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;
<http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>;
<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;
<http://www.glaad.org/transgender/transfaq>; and
<http://www.glaad.org/about/history>.

¹⁰⁸ .GAY 2 CPE report Pgs. 5-8 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

string identifies all members of the identified community. Because the references relate to the same sub-criterion, FTI analyzed all three excerpts together for this review.

First, the second final CPE report states:

The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant's defined community, in particular transgender, intersex, and ally individuals. According to the Panel's own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider "gay" to be their "most common" descriptor, as the applicant claims. These groups are most likely to use words such as "transgender," "trans," "intersex," or "ally" because these words are neutral to sexual orientation, unlike "gay".¹⁰⁹

In a footnote to the above text, the Panel added that: "While a comprehensive survey of the media's language in this field is not feasible, the Panel has relied on both the data in the applicant's own analysis as well as on the Panel's own representative samples of media."¹¹⁰

Second, the second final CPE report states that: "organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor 'gay,' preferring one of the more inclusive terms."¹¹¹ The supporting footnote states: "While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes."¹¹²

¹⁰⁹ *Id.* at Pgs. 5-6.

¹¹⁰ *Id.* at Pg. 6 n.10. This footnote is repeated at page 7, note 19.

¹¹¹ *Id.* at Pg. 6.

¹¹² *Id.* at Pg. 6 n.12.

Third, the second final CPE report states that “researching sources from the same periods as the applicant’s analysis for the terms ‘transgender’ or ‘intersex’ shows again that these terms refer to individuals and communities not identified by ‘gay.’”¹¹³ The supporting footnote states: “[t]he Panel reviewed a representative sample of articles from the same time periods” as LexisNexis search results provided by the applicant.¹¹⁴

As noted, each of these references relates to whether the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”¹¹⁵ The CPE Provider is referring to the requirement that “the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.”¹¹⁶

Because the second final CPE report does not provide citations for the Panel’s research, FTI analyzed the CPE Provider’s working papers for the second .GAY evaluation to determine if the working papers reflected such research. Based on FTI’s investigation, FTI observed that the CPE Provider’s working papers reflect the research referenced in the final report.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) a Google search on [REDACTED]; (2) the Wikipedia page for “Coming out”; (3) a Google search on

¹¹³ *Id.* at Pgs. 7-8.

¹¹⁴ *Id.* at Pg. 8 n.22.

¹¹⁵ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (cited in .GAY 2 CPE report Pg. 5) (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹¹⁶ See *id.* at Module 4.2.3 at Pgs. 4-13.

██████; (4) a second Google search on ██████ which included; (5) the Wikipedia page for “GAY” (cited two times).

Accordingly, FTI finds it reasonable to conclude that the research referenced in the second final CPE report refers to the research reflected in the working papers for the second .GAY evaluation identified above.

FTI observed 23 references to research or reference materials in a working paper entitled, “nexus research notes,” which also addresses this sub-criterion, that were not otherwise cited in the second final CPE report.¹¹⁷

¹¹⁷ They are:

- <http://www.glaad.org/reference/transgender;>
- [http://www.transpeoplespeak.org/trans-101/;](http://www.transpeoplespeak.org/trans-101/)
- <http://www.out.com/news-opinion/2015/6/29/watch-john-olivers-breakdown-how-far-trans-rights-still-have-go;>
- <http://www.lambdalegal.org/issues/transgender-rights;>
- <https://www.aclu.org/issues/lgbt-rights/transgender-rights;>
- http://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html?_r=1;
- <http://www.newrepublic.com/article/politics/magazine/90519/transgender-civil-rights-gay-lesbian-lgbtq;>
- https://en.wikipedia.org/wiki/LGBT_community;
- [http://www.tgijp.org/;](http://www.tgijp.org/)
- <http://transgenderlawcenter.org/about/mission.>

FTI notes that the CPE Provider referenced six “NYTimes” searches in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ in year 2010: 16 results, ██████ Year 2014: 311 results, ██████ 2014: 106 results, “Gay community” 2010: 51 results, ██████ 2010: 4 results, “LGBT community” 2014: 88 results. The working papers do not provide a full citation for the searches. FTI included the six searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the Washington Post in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ (174 results in past 12 months, 529 results since 2005), ██████ (77 results in past 12 months, 632 results since 2005). The working papers do not provide a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the “UK Guardian” in the working papers. The CPE provider described the searches in the working papers as follows: ██████ (7160 results) and ██████ (6120 results). The working papers do not provide

2-B Uniqueness

The second final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect three references to research or reference material for this sub-criterion.¹¹⁸

3. Criterion 3: Registration Policies

Neither the second final CPE report nor the working papers for the second .GAY evaluation reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced “HRC” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider made one reference to the “Trans Advocacy Network” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion; and

FTI further notes that the CPE Provider stated in the working papers that “The Panel’s research shows that there is a robust network of advocacy, support, and general organizations addressing issues specific to the intersex and transgender communities themselves.” The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion.

¹¹⁸ They are:

<http://en.wikipedia.org/wiki/Gay> (cited two times).

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

4. Criterion 4: Community Endorsement

4-A Support

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers for the second .GAY evaluation reflect six references to research or reference material for this sub-criterion.¹¹⁹

4-B Opposition

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers for the second .GAY evaluation contain three citations to research or reference material for this sub-criterion.¹²⁰

Additional Research Materials Associated with .GAY

The working papers for the second .GAY evaluation include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have collected in the course of its evaluation process. Based on its examination, FTI could not discern

¹¹⁹ They are:

<http://www.spimarketing.com/team>;

<http://dotgay.com/faq/>; and

<http://dotgay.com/endorsements/> (This is no longer an active link) (cited three times).

FTI notes that the CPE Provider made one reference to “Organisation websites, including ILGA: <http://ilga.org/about-us/>” in the working papers. The working papers do not provide full citations or identify the URLs for the “Organisation websites” other than ILGA. FTI treated this reference as one of the six references to research in this sub-criterion.

¹²⁰ They are:

<http://www.pdxqcenter.org/about/>;

<http://www.pdxqcenter.org/interim-board-appointed-to-stabilize-q-center-engage-community-about-centers-future/>; and

<http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355>.

if the CPE Provider intended this document to pertain to any particular criterion or sub-criterion.¹²¹

E. .MUSIC (DotMusic Ltd.)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report reflects one citation to reference material for sub-criterion 1-A, Delineation.¹²²

Additionally, the final CPE report makes three references to the CPE Panel's research, but does not provide citations to, or otherwise indicate the nature of, that research.¹²³

First, the final CPE report states: "The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the [Applicant Guidebook] calls 'cohesion.'"¹²⁴ The CPE Provider is referring to the Applicant Guidebook's requirement that a "community" demonstrate "more of cohesion than a mere commonality of interest."¹²⁵

¹²¹ The document is a copy of an article titled "They do: Same-sex couples are choosing marriage over civil partnership," *The Economist*, 27 June 2015, <http://www.economist.com/news/britain/21656197-same-sex-couples-are-choosing-marriage-over-civil-partnership-they-do2/> (This link does not lead to the *Economist* article cited by the CPE Provider).

¹²² The CPE report cites "Oxford dictionaries" for the definition of "cohesion." .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

¹²³ .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹²⁴ *Id.*

¹²⁵ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations supporting the “further research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such “further research.” FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

Specifically, as noted above, the database sets forth questions for each CPE sub-criterion. With respect to sub-criterion 1-A, Delineation, the database contains the following: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the U.S. Census Bureau’s North American Industry Classification System (NAICS) codes;¹²⁶ (2) the United Nations International Standard Industrial Classification (ISIC) system;¹²⁷ and (3) the Wikipedia page for “Music.”¹²⁸ Accordingly, FTI finds it reasonable to conclude that the “further research” referenced in the final CPE report refers to the research reflected in the working papers.

Second, the final CPE report states:

based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.¹²⁹

The final CPE report also states: “based on . . . the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories

¹²⁶ <http://www.census.gov/eos/www/naics/>.

¹²⁷ http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf.

¹²⁸ <https://en.wikipedia.org/wiki/Music>.

¹²⁹ .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

explicitly defined.”¹³⁰ In both instances, the CPE Provider is referring to the Applicant Guidebook’s requirement that a community be organized, which the Applicant Guidebook defines to mean that “there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”¹³¹ Organization is a component of Delineation,¹³² and this reference to “the Panel’s research” is noted in the final CPE report’s sub-section on “[o]rganization.”¹³³

Because the final CPE report does not provide citations supporting the “Panel’s research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the referenced research. FTI observed that the CPE Provider’s working papers reflect research undertaken in connection with the organization prong of the Delineation sub-criterion. Specifically, the database contains the following question: “Question 1.1.2: Is there at least one entity mainly dedicated to the community?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the website for the International Federation of Arts Councils and Culture Agencies (IFACCA);¹³⁴ (2) the Wikipedia page for “Music;”¹³⁵ (3) the Wikipedia page for “Recording Industry Association of America;”¹³⁶ and (4) the Wikipedia page for “American Federation of

¹³⁰ *Id.*

¹³¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³² *Id.*

¹³³ .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹³⁴ http://www.ifacca.org/vision_and_objectives/ (This is no longer an active link).

¹³⁵ <https://en.wikipedia.org/wiki/Music>.

¹³⁶ https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America.

Musicians.”¹³⁷ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹³⁸

1-B Extension

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain three citations to research or reference material for this sub-criterion.¹³⁹

¹³⁷ https://en.wikipedia.org/wiki/American_Federation_of_Musicians.

¹³⁸ They are:

<https://en.wikipedia.org/wiki/Music> (cited three times);

<http://www.census.gov/eos/www/naics/>;

http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf;

https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America (cited two times);

https://en.wikipedia.org/wiki/American_Federation_of_Musicians (cited two times);

http://www.ifacca.org/vision_and_objectives/ (This is no longer an active link);

http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf;

http://www.ifacca.org/ifacca_events/ (This is no longer an active link); and

https://en.wikipedia.org/wiki/History_of_music.

¹³⁹ They are:

https://en.wikipedia.org/wiki/History_of_music (cited two times); and

http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf.

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 2-A, Nexus.

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁴⁰

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain one citation to research or reference material for this sub-criterion.¹⁴¹

¹⁴⁰ They are:
https://en.wikipedia.org/wiki/Definition_of_music; and
Oxford English Reference Dictionary.

¹⁴¹ It is: <http://music.us/about/>.

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

F. .CPA (Australia)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report contains four citations to research or reference material in sub-criterion 1-A, Delineation.¹⁴²

The working papers contain 14 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴³

¹⁴² They are:

<https://www.cpaaustralia.com.au/member-services/fees/australia>;
<https://www.cpaaustralia.com.au/training-and-events>;
<https://www.cpaaustralia.com.au/training-and-events/conferences>; and
<https://www.cpaaustralia.com.au/about-us/ourhistory/archives> (This is no longer an active link).

¹⁴³ They are:

<http://www.cpaaustralia.com.au/> (cited three times);
<https://www.cpaaustralia.com.au/about-us> (cited two times);
<https://www.cpaaustralia.com.au/about-us/ourhistory> (This is no longer an active link);
<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link);
<https://www.cpaaustralia.com.au/member-services>;
<http://www.cpaaustralia.com.au/member-services/renew-my-membership>;
http://en.wikipedia.org/wiki/CPA_Australia (cited three times); and
<http://www.cimaglobal.com/Members/Membershipinformation/> (identified as the result of “A web search on [REDACTED]” (This is no longer an active link).

1-B Extension

The final CPE report contains three citations to research or reference material in sub-criterion 1-B, Extension.¹⁴⁴

The working papers contain five citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴⁵

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report contains two citations to research or reference material in sub-criterion 2-A, Nexus.¹⁴⁶

The working papers contain seven citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴⁷

¹⁴⁴ They are:

<https://www.cpaaustralia.com.au/about-us>; and

http://docs.employment.gov.au/system/files/doc/other/2211accountantaus_1.pdf (cited two times)
(This is no longer an active link).

¹⁴⁵ They are:

http://en.wikipedia.org/wiki/CPA_Australia (cited two times);

<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link); and

<https://www.cpaaustralia.com.au/training-andevents/conferences> (This is no longer an active link).

¹⁴⁶ They are:

<http://www.forbes.com/sites/peterjreilly/2013/06/26/enrolled-agents-deserve-more-respect/>; and

<http://nasba.org/blog/2010/01/07/january-2010-nasba-addresses-aicpa-sec-conference/>.

¹⁴⁷ They are:

<http://www.cpaaustralia.com.au/about-us>;

<http://www.cpaaustralia.com.au/become-a-cpa/about-the-program> (This is no longer an active link);

http://en.wikipedia.org/wiki/CPA_Australia;

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for criterion 2-B, Uniqueness, but the working papers reflect nine references to research or reference material for this sub-criterion.¹⁴⁸

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

<http://www.cimaglobal.com/Members/Membershipinformation/Global-alliances/CIMA-into-CPA/> (This is no longer an active link);

<http://www.aicpa.org/Pages/default.aspx>;

<http://www.acpa.org.uk>; and

<http://www.aicpa.org/About/Pages/About.aspx/> (This is no longer an active link).

¹⁴⁸ They are:

<http://www.cpahq.org/cpahq/Main/Home/Main/Home.aspx?hkey=98e6b3f2-25d9-4d37-8f03-9ac0745ce845>;

<http://www.cpa.org.au/>;

<https://www.cdnpay.ca/> (This is no longer an active link);

<http://www.cpa-acp.ca/>;

<http://www.cpa.gov.cy/CPA/page.php?pageID=31&langID=0>;

<http://www.cpa.de/en/products.htm> (This link does not lead to the “Products” page of CPA SoftwareConsult GmbH’s website);

http://en.wikipedia.org/wiki/Certified_Public_Accountant; and

<http://en.wikipedia.org/wiki/CPA>;

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in one of the working papers. The working paper does not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁴⁹

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

G. .HOTEL

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report reflects one reference to research or reference material in sub-criterion 1-A, Delineation.¹⁵⁰ Additionally, the final CPE report states that the Panel observed documented evidence of community activities on the International Hotel and Restaurant Association (“IH&RA”) website and “information on other hotel association websites,” without identifying the websites referenced. The CPE Provider is addressing the Applicant Guidebook’s provision that states that “‘organized’ implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”¹⁵¹

¹⁴⁹ They are:

<http://www.aicpa.org/Pages/default.aspx>; and

http://www.aicpa.org/about/leadership/pages/melancon_bio.aspx.

¹⁵⁰ The final CPE report references “International Hotel & Restaurant Association’s website.” International Hotel & Restaurant Association’s website is <http://ih-ra.com>, and is cited three times in the working papers.

¹⁵¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations for the “other hotel association websites,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the “other hotel association websites.” FTI observed that the CPE Provider’s working papers reflect research concerning hotel association websites in connection with the Delineation sub-criterion.

Specifically, with respect to sub-criterion 1-A, Delineation, FTI observed that the database contains the following: “Question 1.1.3: Does the entity . . . have documented evidence of community activities?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the Applicant’s website;¹⁵² (2) a webpage on the IH&RA website;¹⁵³ (3) four websites for HOTREC,¹⁵⁴ which the working papers identify as an organization of European hotels and restaurants; (4) a press release from the United Nations World Tourism Organization about its Memorandum of Understanding with IH&RA;¹⁵⁵ (5) a webpage from ETurbo news¹⁵⁶ which, according to the working papers, indicates that HOTREC signed a Memorandum with IH&RA; (6) the Hotel News Resource website;¹⁵⁷ and (7) the website for Green Hotelier,¹⁵⁸ which the working papers indicate is the

¹⁵² <http://www.dothotel.info/>.

¹⁵³ <http://ih-ra.com/achievements-in-advocacy/>.

¹⁵⁴ They are:

<http://www.hospitalitynet.org/news/4064407.html>;

<http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-signmemorandum-of-understanding.aspx> (This is no longer an active link);

<http://www.hotrec.eu/policy-issues/tourism.aspx>; and

<http://www.hotrec.eu/publications-positions.aspx>.

¹⁵⁵ <http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-signmemorandum-Understanding>.

¹⁵⁶ <http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandumunderstanding> (This is no longer an active link).

¹⁵⁷ <http://www.hotelnewsresource.com/article70606.html>.

¹⁵⁸ <http://www.greenhotelier.org/category/our-destinations/>.

magazine for the International Tourism Partnership. Accordingly, FTI finds it reasonable to conclude that the “other hotel association websites” referenced in the final CPE report refer to the websites listed in the working papers.

Including the citations listed above, the working papers contain 29 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁵⁹

¹⁵⁹ They are:

<http://ehotelier.com/directory/?associations> (cited two times)
<http://www.gha.com/> (cited three times)
http://www.theindependents.co.uk/en/hotel/location/united_kingdom (cited two times)
<http://hotel-tld.de/> (cited two times)
http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association (cited two times)
[http://ih-ra.com/who-are-our-members/;](http://ih-ra.com/who-are-our-members/)
[http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding;](http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding)
[http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandum-understanding;](http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandum-understanding)
[http://www.hotelnewsresource.com/article70606.html;](http://www.hotelnewsresource.com/article70606.html)
[http://www.greenhotelier.org/category/our-destinations/;](http://www.greenhotelier.org/category/our-destinations/)
<http://www.dothotel.info/> (cited three times);
[http://ih-ra.com/ihra-today/;](http://ih-ra.com/ihra-today/)
[http://www.hospitalitynet.org/organization/17000749.html;](http://www.hospitalitynet.org/organization/17000749.html)
[http://ih-ra.com/achievements-in-advocacy/;](http://ih-ra.com/achievements-in-advocacy/)
[http://www.hospitalitynet.org/news/4064407.html;](http://www.hospitalitynet.org/news/4064407.html)
[http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-sign-memorandum-of-understanding.aspx;](http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-sign-memorandum-of-understanding.aspx)
[http://www.hotrec.eu/policy-issues/tourism.aspx;](http://www.hotrec.eu/policy-issues/tourism.aspx)
[http://www.hotrec.eu/publications-positions.aspx;](http://www.hotrec.eu/publications-positions.aspx)
[http://ih-ra.com/ihra-history/;](http://ih-ra.com/ihra-history/)
<http://en.wikipedia.org/wiki/Hotel#History>; and
<http://en.wikipedia.org/wiki/Hotel>.

1-B Extension

The final CPE report did not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain ten citations to research or reference material for this sub-criterion.¹⁶⁰

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain one citation to research or reference material for this sub-criterion.¹⁶¹

¹⁶⁰ They are:

<http://www.dothotel.info/> (cited two times);

<http://hotel-tld.de/>;

<http://ih-ra.com/ihra-today/>;

http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association;

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>;

http://wiki.answers.com/Q/How_many_hotels_exist_in_the_world?#slide=1;

<http://travel.usatoday.com/hotels/post/2012/04/worldwide-hotel-rooms-2012-smith-travel-research/677093/1> (This is an active link to the website of USA Today, but it leads directly to the publication's "Travel" section, rather than to hotel-related content); and

<http://en.wikipedia.org/wiki/Hotel>.

¹⁶¹ The working papers cite <http://hotel-tld.de/>.

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect two references to research or reference material for this sub-criterion.¹⁶²

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect 12 references to research or reference material for this sub-criterion.¹⁶³

¹⁶² They are:

<http://en.wikipedia.org/wiki/Hotel>; and

FTI notes that the CPE Provider stated in the working papers that an “Internet search on [REDACTED] and [REDACTED] turns up mainly sites discussing the domain name and actual hotels, hotel chains etc[.]” The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the two references to research in this sub-criterion.

¹⁶³ They are:

<http://www.dothotel.info/> (cited three times);

<http://ih-ra.com/ihra-today/>;

<http://domainincite.com/10101-big-hotel-chains-pick-a-side-in-hotel-gtld-fight>;

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association;

<http://ih-ra.com/message-from-the-ihra-president/>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>; and

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

Additional Research Materials Associated with .HOTEL

The working papers provided to FTI by the CPE Provider include six documents that were not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its evaluation of the Hotel application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.¹⁶⁴

<http://www.otusco.com/Otus%20Hotel%20Analyst%20Size%20and%20Structure%201.pdf>.

FTI notes that the CPE Provider referenced two “web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the searches. FTI included these searches as two of the 12 references to research in this sub-criterion.

¹⁶⁴ The documents are five Adobe PDF files and one Microsoft Excel file:

A report by Mintel Group Limited: Hotel Trends – TTA. No. 1 February 2014;

A printout of www.marketline.com’s report on “Global Hotels & Motels October 2012”;

A printout of www.marketline.com’s report on “Global Hotels, Resorts & Cruise Lines July 2013”;

A printout of <http://www.eturbonews.com/22544/nepal-host-international-hotelioers-meets>, “International Hotel and Restaurant Association World Congress: Nepal to Host International Hoteliers’ Meets,” April 28, 2011 (This link does not lead to the article entitled Nepal’s hosting of international hoteliers);

A page which appears to be from a book published by the American Hotel and Lodging Association describing the history and current status of that association; and

A Microsoft Excel spreadsheet named “20140521 hotels research.xls” containing market information about the global and national hotel businesses.

H. .MERCK (KGaA)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-A, Delineation, but the working papers contain three citations to research or reference material for this sub-criterion.¹⁶⁵

1-B Extension

The final CPE report reflects two references to research or reference material for sub-criterion 1-B, Extension.¹⁶⁶

The working papers contain one citation to research or reference material for this sub-criterion that is not otherwise cited in the final CPE report.¹⁶⁷

¹⁶⁵ The working papers cite <http://www.merckgroup.com/en/index.html> three times under this sub-criterion.

¹⁶⁶ They are:

http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA_v3_tcm2252_143783.pdf?Version=; and

“Applicant’s website.”

¹⁶⁷ It is: www.who.int/trade/glossary/story073/en/ (This is no longer an active link).

FTI notes that the working papers also reflect one reference to Merck KGaA’s “company website,” which FTI understands to be synonymous with the “Applicant’s website” referenced in the final CPE report. Because the final CPE report references Merck KGaA’s website, FTI included that citation in its analysis of the final CPE report (even though the Panel did not include the URL in the final report); therefore, this reference to the company website was referenced in the final CPE report.

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain four citations to research or reference material for this sub-criterion.¹⁶⁸

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain four citations to research or reference material for this sub-criterion.¹⁶⁹

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

¹⁶⁸ They are:

https://en.wikipedia.org/wiki/Merck_%26_Co (cited two times);
https://en.wikipedia.org/wiki/Merck_Group; and
<http://www.merckgroup.com/en/index.html>.

¹⁶⁹ They are:

<http://www.bloomberg.com/news/articles/2014-02-10/a-tale-of-two-mercks-as-protesters-takeonwrong-company> (This is no longer an active link);
https://en.wikipedia.org/wiki/Merck_%26_Co;
https://en.wikipedia.org/wiki/Merck_Group; and
<http://www.merck.com/index.html>.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁷⁰

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

VI. Conclusion

FTI observed that of the eight relevant CPE reports, two (.CPA and .MERCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced

¹⁷⁰ They are:
www.merckgroup.com/; and
https://en.wikipedia.org/wiki/Merck_Group.

was cited in the CPE Provider's working papers associated with the first .GAY evaluation.

Exhibit 6

RESPONDENT'S EXHIBIT

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

This page is available in:

English |

العربية (<http://www.icann.org/resources/board-material/resolutions-2018-03-15-ar>) |

Español (<http://www.icann.org/resources/board-material/resolutions-2018-03-15-es>) |

Français (<http://www.icann.org/resources/board-material/resolutions-2018-03-15-fr>) |

Русский (<http://www.icann.org/resources/board-material/resolutions-2018-03-15-ru>) |

中文 (<http://www.icann.org/resources/board-material/resolutions-2018-03-15-zh>)

15 Mar 2018

1. **Consent Agenda:**

a. **Approval of Board Meeting Minutes**

b. **Outsource Service Provider Zensar Contract Approval**

Rationale for Resolutions 2018.03.15.02 - 2018.03.15.03

c. **New GNSO (Generic Names Supporting Organization) Voting Thresholds to address post-transition roles and responsibilities of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community - Proposed Changes to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws**

Rationale for Resolution 2018.03.15.04

d. **Initiating the Second Review of the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization))**

Rationale for Resolutions 2018.03.15.05 - 2018.03.15.06

e. **Transfer of the .TD (Chad) top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC)**

Rationale for Resolution 2018.03.15.07

- f. **Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**
- g. **Thank you to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**
- h. **Thank you to Interpreters, ICANN (Internet Corporation for Assigned Names and Numbers) org, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

2. **Main Agenda:**

- a. **Next Steps in Community Priority Evaluation Process Review**
Rationale for Resolutions 2018.03.15.08 - 2018.03.15.11
- b. **Further Consideration of the Gulf Cooperation Council Independent Review Process Final Declarations**
Rationale for Resolutions 2018.03.15.12 - 2018.03.15.14
- c. **Consideration of the Asia Green IT System Independent Review Process Final Declaration**
Rationale for Resolutions 2018.03.15.15 - 2018.03.15.17
- d. **Appointment of the Independent Auditor for the Fiscal Year Ending 30 June 2018**
Rationale for Resolution 2018.03.15.18
- e. **AOB**

1. **Consent Agenda:**

- a. **Approval of Board Meeting Minutes**
Resolved (2018.03.15.01), the Board approves the minutes of the 4 February 2018 Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.
- b. **Outsource Service Provider Zensar Contract Approval**

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization's Engineering and Information Technology department has a need for continued third-party development, quality assurance and content management support.

Whereas, Zensar has provided good services in software engineering, quality assurance and content management over the last several years.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) org conducted a full request for proposal, the results of which led ICANN (Internet Corporation for Assigned Names and Numbers) org to determine that Zensar is still the preferred vendor.

Resolved (2018.03.15.02), the Board authorizes the President and CEO, or his designee(s), to enter into enter into, and make disbursement in furtherance of, a new Zensar contract for a term of 24 months with total cost not to exceed [REDACTED FOR NEGOTIATION PURPOSES]. These costs are based on the current Zensar RFP response and are under negotiation.

Resolved (2018.03.15.03), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, Section 3.5(b) and (d) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2018.03.15.02 - 2018.03.15.03

ICANN (Internet Corporation for Assigned Names and Numbers) org's Engineering & IT (E&IT) department has used Zensar to support development, quality assurance and content management needs since November 2014. This relationship has been beneficial to ICANN (Internet Corporation for Assigned Names and Numbers) org and, overall has been a success.

The current three-year contract expired in November 2017 and was extended through March 2018 to allow ICANN (Internet

Corporation for Assigned Names and Numbers) org to perform a full request for proposal (RFP).

Eleven vendors were included in the RFP of which six responded. Of these, two were cheaper and three more expensive than Zensar.

The RFP identified that Zensar rates are on par with others that may be interested in supporting this project.

The RFP team estimated that transition costs to move to another vendor would be at least 25% for a period of six months. More expensive vendors were therefore eliminated.

Zensar and the two less expensive applicants were asked to present their proposals and answer questions from the ICANN (Internet Corporation for Assigned Names and Numbers) org team. During the presentations, it was identified that both other applicants did not have sufficient existing resources to support this project for ICANN (Internet Corporation for Assigned Names and Numbers) org and would need to engage additional staff if they were awarded the contract. Staffing up would take time, causing delays. Quality of new staff would be an unknown.

While the RFP was in progress, ICANN (Internet Corporation for Assigned Names and Numbers) org undertook the FY19 budget process and identified the need for reduction in the services contemplated in the RFP to meet future targets. This resulted in a reduction of 2/3 (43 to 15 people) of the outsource contract. This reduction changes ICANN (Internet Corporation for Assigned Names and Numbers) org's needs and hence the services that would be provided by the outsource provider. While Zensar, being the incumbent would accept these reductions, the changes would require additional negotiation with the other RFP responders.

Zensar has three years of ICANN (Internet Corporation for Assigned Names and Numbers) knowledge. Retaining Zensar as the preferred provider ensures continuity in support.

Taking this step is in the fulfilment of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and in the public

interest to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) org is utilizing the right third party providers, and to ensure that it is maximizing available resources in a cost efficient and effective manner.

This action will have a fiscal impact on the organization, but that impact has already been anticipated and is covered in the FY18 and FY19 budget. This action will not impact the security, stability and resiliency of the domain name system.

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

c. New GNSO (Generic Names Supporting Organization) Voting Thresholds to address post-transition roles and responsibilities of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community - Proposed Changes to ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws

Whereas, during its meeting on 30 January 2018, the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) Council resolved

(<https://community.icann.org/display/gnsocouncilmeetings/Motions+30+January+2018> (<https://community.icann.org/display/gnsocouncilmeetings/Motions+30+January+2018>))

to recommend that the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors adopt proposed changes to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to reflect new GNSO (Generic Names Supporting Organization) voting thresholds which are different from the current threshold of a simple majority vote of each House (see

<https://www.icann.org/en/system/files/files/proposed-revisions-bylaws-article-11-gnso-redline-19jun17-en.pdf> (</en/system/files/files/proposed-revisions-bylaws-article-11-gnso-redline-19jun17-en.pdf>) [PDF, 39 KB]).

Whereas, the addition of voting thresholds to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers)

Bylaws as proposed by the GNSO (Generic Names Supporting Organization) would constitute a "Standard Bylaw Amendment" under Section 25.1 of the Bylaws (/resources/pages/governance/bylaws-en/#article25).

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws requires that Standard Bylaw Amendments be published for public comment prior to the approval by the Board.

Whereas, after taking public comments into account, the Board will consider the proposed Bylaws changes for adoption.

Resolved (2018.03.15.04), the Board directs the President and CEO, or his designee(s), to post for public comment for a period of at least 40 days the Standard Bylaw Amendment reflecting proposed additions to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to establish additional GNSO (Generic Names Supporting Organization) voting thresholds. The proposed new voting thresholds are different from the current threshold of a simple majority vote of each House to address all the new or additional rights and responsibilities in relation to participation of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community.

Rationale for Resolution 2018.03.15.04

The action being approved today is to direct the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, or his designee, to initiate a public comment period on proposed changes to section 11.3.i of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws to reflect additional GNSO (Generic Names Supporting Organization) voting thresholds. The revised voting thresholds are different from the current threshold of a simple majority vote of each House, which is the default GNSO (Generic Names Supporting Organization) Council voting threshold. The revisions are made to address the new or additional rights and responsibilities in relation to participation of the GNSO (Generic Names Supporting Organization) as a Decisional Participant in the Empowered Community. The Board's action is a first step to consider the

unanimous approval by the GNSO (Generic Names Supporting Organization) Council of the proposed changes.

The Board's action to initiate a public comment period on this Standard Bylaw Amendment serves the public interest by helping to fulfill ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to operate through open and transparent processes. In particular, posting Bylaws amendments for public comment is necessary to ensure full transparency and opportunity for the broader community to comment on these proposed changes prior to consideration or adoption by the ICANN (Internet Corporation for Assigned Names and Numbers) Board. If the Board approves this Standard Bylaw Amendment after public comment period, the Empowered Community will have an opportunity to consider rejecting the Amendment in accordance with the Bylaws. This action is also consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it in support of one of the policy development bodies that help ICANN (Internet Corporation for Assigned Names and Numbers) serve its mission.

There is no anticipated fiscal impact from this decision, which would initiate the opening of public comments, and no fiscal impact from the proposed changes to the Bylaws, if adopted. Approval of the resolution will not impact the security, stability and resiliency of the domain name.

The interim action of posting the proposed Bylaws amendments for public comment is an Organizational Administrative Action not requiring public comment.

d. **Initiating the Second Review of the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization))**

Whereas, Article 4, Section 4.4. of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws state that "[t]he Board "shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee

(Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee (as defined in Section 8.1) by an entity or entities independent of the organization under review."

Whereas, as part of the first Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) Review, the ccNSO (Country Code Names Supporting Organization) Review Working Group submitted its Final Report to the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 4 March 2011, and per Resolution 2017.09.23.05, the Board resolved to defer the second ccNSO (Country Code Names Supporting Organization) Review until August 2018.

Resolved (2018.03.15.05), the Board hereby initiates the second ccNSO (Country Code Names Supporting Organization) Review and directs ICANN (Internet Corporation for Assigned Names and Numbers) organization to post a Request for Proposal to procure an independent examiner to begin the review as soon as practically feasible.

Resolved (2018.03.15.06), the Board encourages the ccNSO (Country Code Names Supporting Organization) to prepare for an independent examiner to begin work on the second ccNSO (Country Code Names Supporting Organization) Review in August 2018 by organizing a Review Working Party to serve as a liaison during the preparatory phase and throughout the review, and to conduct a self-assessment prior to August 2018.

Rationale for Resolutions 2018.03.15.05 - 2018.03.15.06

Why the Board is addressing the issue now?

This action is taken to provide a clear and consistent approach towards complying with ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws' mandate to conduct reviews. Moreover, the Board is addressing this issue because the Bylaws stipulate organizational reviews take place every five years. Following an initial deferral due to the IANA (Internet Assigned Numbers Authority) Stewardship Transition, the ICANN

(Internet Corporation for Assigned Names and Numbers) Board had deferred the Country Code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) Review in 2017 to commence in 2018. The Board is now initiating the second Review of the ccNSO (Country Code Names Supporting Organization) to prepare for an independent examiner to begin work in August 2018.

Which stakeholders or others were consulted?

No consultation took place as this action is in line with the guidelines and provisions contained in Article 4, Section 4.4 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, and Resolution 2017.09.23.05.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) org (strategic plan, operating plan, and budget); the community; and/or the public?

Timely conduct of organizational reviews is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic and operating plans. The budget for the second ccNSO (Country Code Names Supporting Organization) Review has been approved as part of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual budget cycle and the funds allocated to the ccNSO (Country Code Names Supporting Organization) Review are managed by the ICANN (Internet Corporation for Assigned Names and Numbers) organization team responsible for these reviews. No additional budgetary requirements are foreseen at this time and separate consideration will be given to the budget impact of the implementation of recommendations that may result from the review.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

There are no security, stability or resiliency issues relating to the DNS (Domain Name System) as the result of this action.

This action is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and serves the public interest by supporting the effectiveness and ongoing improvement of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability and governance structures.

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

e. **Transfer of the .TD (Chad) top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC)**

Resolved (2018.03.15.07), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Naming Function Contract with ICANN (Internet Corporation for Assigned Names and Numbers), Public Technical Identifiers (PTI) has reviewed and evaluated the request to transfer the .TD country-code top-level domain (ccTLD (Country Code Top Level Domain)) to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Rationale for Resolution 2018.03.15.07

Why is the Board addressing this issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Naming Function Contract, PTI has evaluated a request for ccTLD (Country Code Top Level Domain) transfer and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

What is the proposal being considered?

The proposal is to approve a request to transfer the country-code top-level domain .TD and assign the role of manager to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC).

Which stakeholders or others were consulted?

In the course of evaluating this transfer application, PTI consulted with the applicant and other significantly interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

The Board reviewed the following evaluations:

- The domain is eligible for transfer, as the string under consideration represents Chad that is listed in the ISO (International Organization for Standardization) 3166-1 standard;
- The relevant government has been consulted and does not object;
- The incumbent manager consents to the transfer;
- The proposed manager and its contacts agree to their responsibilities for managing these domains;
- The proposal has demonstrated appropriate significantly interested parties' consultation and support;
- The proposal does not contravene any known laws or regulations;
- The proposal ensures the domains are managed locally in the country, and are bound under local law;
- The proposed manager has confirmed they will manage the domains in a fair and equitable manner;
- The proposed manager has demonstrated appropriate operational and technical skills and plans to operate the

domains;

- The proposed technical configuration meets the technical conformance requirements;
- No specific risks or concerns relating to Internet stability have been identified; and
- ICANN (Internet Corporation for Assigned Names and Numbers) org has provided a recommendation that this request be implemented based on the factors considered.

These evaluations are responsive to the appropriate criteria and policy frameworks, such as "Domain Name (Domain Name) System Structure and Delegation" (RFC (Request for Comments) 1591) and "GAC (Governmental Advisory Committee) Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains".

As part of the process, Delegation and Transfer reports are posted at <http://www.iana.org/reports> (<http://www.iana.org/reports>).

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which ccTLDs are designated to serve, and responsive to obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of ccTLDs within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

f. **Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

The Board wishes to extend its thanks to the Hon. Ricardo Roselló Nevares, Governor of Puerto Rico; Oscar R. Moreno de Ayala, President of Puerto Rico Top Level Domain; Pablo Rodriguez, Vice President of Puerto Rico Top Level Domain; Carla Campos Vidal, Director of Puerto Rico Tourism Company; and the local host organizer, Puerto Rico Top Level Domain (.PR).

g. **Thank you to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 61 Meeting**

The Board wishes to thank the following sponsors: Verisign, Claro, Liberty, Canadian Internet Registration Authority (CIRA), Afiliás plc, Public Interest Registry and Uniregistry.

h. **Thank you to Interpreters, ICANN (Internet Corporation for Assigned Names and Numbers) org, Event and Hotel Teams of ICANN (Internet**

Corporation for Assigned Names and Numbers) 61 Meeting

The Board expresses its deepest appreciation to the scribes, interpreters, audiovisual team, technical teams, and the entire ICANN (Internet Corporation for Assigned Names and Numbers) org team for their efforts in facilitating the smooth operation of the meeting. The Board would also like to thank the management and staff of Puerto Rico Convention Center for providing a wonderful facility to hold this event. Special thanks are extended to Margaret Colon, Director of Sales & Marketing; Vivian E. Santana, Director of Events; Gianni Agostini Santiago, Senior Catering Sales Manager; Carlos Rosas, IT Manager; and Wilson Alers from Media Stage Inc.

2. Main Agenda:

a. Next Steps in Community Priority Evaluation Process Review

Whereas, the Board directed the President and CEO or his designees to undertake a review of the "process by which ICANN (Internet Corporation for Assigned Names and Numbers) [organization] interacted with the [Community Priority Evaluation (CPE)] Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider".

Whereas, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report; and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (collectively, the CPE Process Review). (See <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en> (/resources/board-material/minutes-bgc-2016-10-18-en).)

Whereas, the BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30,¹ 14-32,² 14-33,³ 16-3, 16-5, 16-8, 16-11, and 16-12. (See

<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>
(</en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>) [PDF, 405 KB].)

Whereas, the CPE Process Review was conducted by FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice.

Whereas, on 13 December 2017 (</news/announcement-2017-12-13-en>), ICANN (Internet Corporation for Assigned Names and Numbers) organization published the three reports on the CPE Process Review (the CPE Process Review Reports).

Whereas, the Board Accountability Mechanisms Committee (BAMC) has considered the CPE Process Review Reports (the conclusions of which are set forth in the rationale below) and has provided recommendations to the Board of next steps in the CPE Process Review.

Whereas, the Board has considered the three CPE Process Review Reports and agrees with the BAMC's recommendations.

Resolved (2018.03.15.08), the Board acknowledges and accepts the findings set forth in the three CPE Process Review Reports.

Resolved (2018.03.15.09), the Board concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD (generic Top Level Domain) Program is necessary.

Resolved (2018.03.15.10), the Board declares that the CPE Process Review has been completed.

Resolved (2018.03.15.11), the Board directs the Board Accountability Mechanisms Committee to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (</en/system/files/files/reconsideration->

[responsibilities-transition-bgc-to-bamc-05jan18-en.pdf](#)) [PDF, 42 KB] document.

Rationale for Resolutions 2018.03.15.08 - 2018.03.15.11

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.⁴ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.⁵ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD (generic Top Level Domain) evaluation process. CPE is performed by an independent provider (CPE Provider).

The Board directed the President and CEO or his designees to undertake a review of the "process by which ICANN (Internet Corporation for Assigned Names and Numbers) [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD (generic Top Level Domain) Program (Scope 1).⁶ The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.

Thereafter, the Board Governance Committee (BGC) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).⁷ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review.

The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),⁸ 14-32 (.INC),⁹ 14-33¹⁰ (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

On 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) organization published three reports on the CPE Process Review.

For Scope 1, "FTI conclude[d] that there is no evidence that ICANN (Internet Corporation for Assigned Names and Numbers) organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.... While FTI understands that many communications between ICANN (Internet Corporation for Assigned Names and Numbers) organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN (Internet Corporation for Assigned Names and Numbers) organization." (Scope 1 Report (/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf) [PDF, 160 KB], Pg. 4)

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner." (Scope 2 Report (/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf) [PDF, 313 KB], Pg. 3.)

For Scope 3, "[o]f the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE

reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the reports. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI's investigation, FTI finds that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider's working papers associated with the first .GAY evaluation." ([Scope 3 Report \(/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf\)](/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf)) [PDF, 309 KB], Pg. 4.)

The Board notes that FTI's findings are based upon its review of the written communications and documents described in the three Reports. The Board Accountability Mechanisms Committee (BAMC) considered the CPE Process Review Reports as part of its oversight of accountability mechanisms and recommended that the Board take the foregoing actions related to the CPE Process Review. The Board agrees. In particular, the BAMC is ready to re-start its review of the remaining reconsideration requests that were put on hold. To ensure that the review of these pending Reconsideration Requests are conducted in an efficient manner and in accordance with the "[Transition Process of Reconsideration Responsibilities from the BGC to the BAMC \(/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf\)](/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf)" [PDF, 42 KB], the BAMC has developed a [Roadmap \(/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf\)](/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf) [PDF, 30 KB] for the review of the pending Reconsideration Requests.

The Board acknowledges receipt of the letters to the ICANN (Internet Corporation for Assigned Names and Numbers) Board from dotgay LLC on 15 January 2018 (</en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>) [PDF, 238 KB] and 20 January 2018 (</en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>) [PDF, 130 KB], and from DotMusic Limited on 16 January 2018 (</en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>) [PDF, 49 KB], regarding the CPE Process Review Reports. Both dotgay LLC and DotMusic Limited claim that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough, and ask that the ICANN (Internet Corporation for Assigned Names and Numbers) Board take no action with respect to the conclusions reached by FTI, until the parties have had an opportunity to respond to the FTI Report and to be heard as it relates to their pending reconsideration requests. (See <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf> (</en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>) [PDF, 238 KB]; <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf> (</en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>) [PDF, 130 KB]; and <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf> (</en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>) [PDF, 49 KB].) The Board has considered the arguments raised in the letters. The Board notes that dotgay LLC and DotMusic Limited (among other requestors) each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.

The Board also acknowledges receipt of the letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board from dotgay LLC on 31 January 2018 (</en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>) [PDF, 2.32 MB], which attached the Second Expert Opinion of Professor William N. Eskridge, Jr., addressing FTI's Scope 2 Report and Scope 3 Report on the CPE Process

Review.

(<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf> (</en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>) [PDF, 2.32 MB].) The Board has considered the arguments raised in the letter and accompanying Second Expert Opinion, and finds that they do not impact this Resolution, but instead will be addressed in connection with dotgay LLC's pending Reconsideration Request 16-3.

First, and as an initial matter, the Board does not accept dotgay LLC's assertion that "a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind."

(<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf> (</en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>) [PDF, 2.32 MB], at Pg. 1.) Neither dotgay LLC nor Professor Eskridge offers any support for this baseless claim, and there is none.

(<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf> (</en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>) [PDF, 2.32 MB].) Second, dotgay LLC urges the Board to entirely "reject the findings made by FTI in the FTI Reports", but dotgay LLC has submitted no basis for this outcome. All dotgay LLC offers is Professor Eskridge's Second Expert Opinion, which, at its core, challenges the merits of the report issued by the CPE Provider in connection with dotgay LLC's community application for the .GAY gTLD (generic Top Level Domain). (See Response to dotgay LLC at <https://www.icann.org/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf> (</en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf>) [PDF, 122 KB]; see also Response from dotgay LLC at <https://www.icann.org/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf> (</en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf>) [PDF, 226 KB].) Dotgay LLC will have the opportunity to include such claims in that regard and if it does, the claims will be addressed in connection with their reconsideration request that is currently pending.

The Board also acknowledges the 1 February 2018 letter (</en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>) [PDF, 537 KB] from

applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding "Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11).") These applicants that submitted Request 16-11 claim that the CPE Process Review lacked transparency or independence, and ask that the Board address the inconsistencies to "ensure a meaningful review of the CPE regarding .hotel."

<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf> (</en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>) [PDF, 537 KB].), Pg. 4.)

The Board understands the arguments raised in the letter, and again reiterates that the individual requestors with reconsideration requests that were placed on hold pending completion of the CPE Process Review will have the opportunity to submit additional information in support of those reconsideration requests, including the requestors that filed Reconsideration Request 16-11.

The Board acknowledges receipt of DotMusic Limited's submission to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, on 2 February 2018 (</en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>) [PDF, 1.02 MB], regarding the CPE Process Review Reports. First, and as an initial matter, the Board does not accept DotMusic Limited's assertions that FTI's "objective was to exonerate ICANN (Internet Corporation for Assigned Names and Numbers) and the CPE panel", that "the intent of the investigation was to advocate in favor of ICANN (Internet Corporation for Assigned Names and Numbers) and [the CPE Provider]", and that "ICANN (Internet Corporation for Assigned Names and Numbers) carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself."

<https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf> (</en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>) [PDF, 1.02 MB], ¶ 109, Pg. 65, ¶ 69, Pg. 48, ¶ 74, Pg. 49, ¶ 76, Pg. 49.) DotMusic Limited offers no support for these baseless claims, and there is none. (See Response to DotMusic Limited,

<https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf>
(</en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf>) [PDF, 126 KB]; see *a/so* Responses from DotMusic Limited,
<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-jones-day-07mar18-en.pdf>
(</en/system/files/correspondence/ali-to-icann-board-jones-day-07mar18-en.pdf>) [PDF, 227 KB].) DotMusic Limited otherwise reiterates the claims made in its 16 January 2018
(</en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>) [PDF, 49 KB] letter to the ICANN (Internet Corporation for Assigned Names and Numbers) Board, namely that the CPE Process Review lacked transparency and was too narrow. DotMusic Limited asserts that it would be unreasonable for the ICANN (Internet Corporation for Assigned Names and Numbers) Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. The Board has considered the arguments raised in DotMusic Limited's submission, and finds that they do not impact this Resolution. As noted above, DotMusic Limited (among other Requestors) will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to its pending Reconsideration Request 16-5, such that any claims DotMusic Limited might have related to the FTI Reports can be addressed then, and then ultimately will be considered in connection with the determination on Reconsideration Request 16-5.

The Board also acknowledges the 22 February 2018 letter
(</en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf>) [PDF, 516 KB] from applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding "Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11).") These applicants that submitted Request 16-11 reiterate their claim that the CPE Process Review lacked transparency, and further assert that ICANN (Internet Corporation for Assigned Names and Numbers) organization continues to be "non-transparent about the CPE deliberately" insofar as ICANN (Internet Corporation for Assigned Names and Numbers)

organization has not published a preliminary report of the BAMC's 2 February 2018 meeting, which these applicants claim is required pursuant to Article 3, Section 3.5(c) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf> (</en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf>) [PDF, 516 KB], Pg. 2.) First, the Board notes that Article 3, Section 3.5 relates to Minutes and Preliminary Reports of meetings of the Board, the Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations). (See Article 3, Section 3.5(a).) In this regard, the timing requirements relative to the publication of preliminary reports provided by Article 3, Section 3.5(c) of the Bylaws relates to the publication of "any actions taken by the Board" after the conclusion a Board meeting, not Board Committees meetings. In either case, the minutes of the BAMC's 2 February 2018 meeting have been published and reflect that the BAMC considered the recent letters to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding the CPE Process Review. (See <https://www.icann.org/resources/board-material/minutes-bamc-2018-02-02-en> (</resources/board-material/minutes-bamc-2018-02-02-en>).) Second, the Board did timely publish, in accordance with Article 3, Section 3.5(c), a preliminary report regarding "Next Steps in Community Priority Evaluation Process Review – UPDATE ONLY", which reflected the Board's discussion of the CPE Process Review, including the fact that "the Board has received letters from a number of applicants ... [, that] the BAMC [has] taken the letters and reports into consideration as part of its recommendation to the Board, [and that] the proposed resolution has been continued to the Board's next meeting in Puerto Rico to allow the Board members additional time to consider the new documents." (Preliminary Report | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, *available* at: <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en> (</resources/board-material/prelim-report-2018-02-04-en>)). Third, the Board understands the arguments raised in the letter, and again reiterates that the individual requestors with reconsideration requests that were placed on hold pending completion of the

CPE Process Review will have the opportunity to submit additional information in support of those reconsideration requests, including the requestors that filed Reconsideration Request 16-11.

The Board acknowledges receipt of a letter from the Head of Institutional Relations at the European Broadcasting Union (EBU) to dotgay LLC, with a copy to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding its "disappointing experience with the Community Priority Evaluation (CPE) process."

<https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>

[\(/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf\)](#) [PDF, 154 KB], Pg. 1.) The EBU raised very generalized concerns about the CPE process but did not provide any level of specificity about those concerns. Because the letter lacks specificity and does not detail the EBU's precise concerns, the Board regards the letter as support for the positions expressed by dotgay LLC and will be considered as part of the Board's evaluation of dotgay LLC's pending Reconsideration Request.

The Board also acknowledges receipt of letters from SERO and the National LGBT Chamber of Commerce on 18 February 2018 [\(/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf\)](#) [PDF, 371 KB] and 1 March 2018 [\(/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf\)](#) [PDF, 1.16 MB], respectively, expressing support for dotgay LLC's community application. These letters will be considered as part of the Board's evaluation of dotgay LLC's pending Reconsideration Request.

Taking this action is in the public interest and consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments and Core Values as it will provide transparency and accountability regarding the CPE process and the CPE Process Review. This action also ensures that ICANN (Internet Corporation for Assigned Names and Numbers) operates in a manner consistent with the Bylaws by making decisions that apply documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.

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

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

b. Further Consideration of the Gulf Cooperation Council Independent Review Process Final Declarations

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization received the Final Declaration in the Gulf Cooperation Council (GCC) v. ICANN (Internet Corporation for Assigned Names and Numbers) Independent Review Process (IRP) and the Final Declaration As To Costs (Costs Declaration) in the IRP.

Whereas, among other things, the IRP Panel declared that "the GCC is the prevailing Party," and ICANN (Internet Corporation for Assigned Names and Numbers) "shall reimburse the GCC the sum of \$107,924.16 upon demonstration by [the] GCC that these incurred costs have been paid." (Final Declaration at pg. 45; Costs Declaration at pg. 6, V.2.)

Whereas, the Panel recommended that the "Board take no further action on the '.persiangulf' gTLD (generic Top Level Domain) application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the '.persiangulf' gTLD (generic Top Level Domain)." (Final Declaration at pg. 44, X.2.)

Whereas, in accordance with Article IV, section 3.21 of the applicable version of the Bylaws, the Board considered the Final Declaration and the Costs Declaration at its meeting on 16 March 2017, and determined that further consideration and analysis was needed.

Whereas, the Board Accountability Mechanisms Committee (BAMC) conducted the requested further consideration and analysis, and has recommended that: (i) the Board treat the

Exhibit 7

RESPONDENT'S EXHIBIT

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GLOSSARY

AGB	gTLD Applicant Guidebook
BAMC formerly known as BGC	Board Accountability Mechanisms Comm. Board Governance Committee
DNS	Domain Name System
EIU	Economist Intelligence Unit
gTLD	Generic Top-Level Domain
FTI	FTI Consultants
ICANN	Respondent, Internet Corporation for Assigned Names and Numbers
ICDR	International Center for Dispute Resolution
ICDR Rules	International Arbitration Rules
Interim Rules	ICANN Interim Supplemental Rules of Procedure for IRP
IRP	Independent Review Process

I. IDENTIFICATION OF THE PARTIES

Claimants each effectively own and/or control independent applications to ICANN to own and operate the generic top-level domain (“gTLD”) .HOTEL.

Respondent is ICANN, a California “public benefit corporation” responsible for governing much of the global domain name system (“DNS”), including whether and how to add new gTLDs to the root zone of the DNS. For example, whether, through whom, and on what terms to allow “.hotel” domain names such as hilton.hotel, best.hotel, austin.hotel, etc., to be registered and used on the internet for commerce, comment or any other legitimate purpose.

II. EXECUTIVE SUMMARY

Preliminarily, Claimants should get Ombudsman review of its RFRs as called for in the Bylaws -- something other than a sham RFR process. And ICANN should get an IRP Standing Panel and Rules of Procedure in place, after six years of minimal progress since required by the Bylaws. Meanwhile, ICANN should be forced to preserve and produce CPE documents as they produced in the *DotRegistry* IRP, and other documents re the CPE Process Review, Portal Configuration investigation and Afiliast deal. Only then can Claimants fairly address the BAMC's arguments.

Then, in light of all critical evidence, the following issues must be substantively reviewed by the IRP panel: ICANN subversion of the .HOTEL CPE and first IRP (*Despegar*), ICANN subversion of FTI's CPE Process Review, ICANN subversion of investigation into HTLD theft of trade secrets, and ICANN allowing a domain registry conglomerate to takeover the “community-based” applicant HTLD. The falsely 'independent' CPE processes were in fact subverted by ICANN in violation of Bylaws, HTLD stole trade secrets from at least one

competing applicant, and Afilias is not a representative of the purported community. Thus, this Panel is respectfully requested to declare that ICANN has violated its Bylaws, just as the IRP panel did in the virtually identical *DotRegistry* case, and should take consistent remedial measures now.

III. SUMMARY OF BACKGROUND FACTS AND PROCEDURAL HISTORY

From 2006 to 2012, ICANN and hundreds of DNS community volunteers and industry stakeholders created the authoritative Applicant Guidebook containing the exhaustive rules for ICANN's New gTLD Program ("AGB"). It was adopted by the Board as ICANN policy, and was relied upon by all applicants in assessing their investments in new gTLDs. It included thorough rules to address multiple applications for the same TLD string, such as .HOTEL which had seven applicants in 2012. Whichever satisfied the voluminous and onerous criteria of the AGB, typically would go to an auction to determine the winner of the contract with ICANN.

One way to avoid such a "contention set" and likely a very costly auction, was to file a "Community-based Application" per the terms of the AGB. If the applicant could satisfy ICANN's purportedly rigorous test, scoring at least 14 out of 16 available "points," then that Applicant would get "Community Priority". That means they would win the TLD, and all the others would lose virtually their entire investment -- including \$150,000 in application fees paid to ICANN, and at least that much more in consulting and service provider fees required to satisfy ICANN's incredibly onerous application requirements.

The CPE rules were expressly developed for the purpose to prevent "undue priority [being given] to an application that refers to a 'community' construed merely to get a

sought-after generic word as a gTLD string.”¹ Still, with such strong incentive to do so, at least one applicant gamed the system. A new newly formed LLC, known as HTLD, convinced several hotel chains and associations to support its bid publicly. It is unknown what promises HTLD made in order to secure the support of these commercial entities. None of them explained their support in any detail,² and HTLD has never been forced to provide any such information.

Yet, with just that scant and superficial demonstration of so-called “community support,” HTLD managed to create the sham facade that there is such a thing as a global “hotel community”; at least, sufficiently to fool ICANN’s purportedly “independent evaluators” hired solely to conduct Community Priority Evaluations (“CPE”).³ The “independent evaluators” are meant to substantively review the applications and come to a decision completely independent from ICANN influence. Only that would be consistent with the terms of the AGB, including other AGB resolution methods such as Legal Rights Objections determined by WIPO, and Community Objections determined by ICDR.

The CPE Provider hand-picked by ICANN was the Economist Intelligence Unit (“EIU”), despite it having no relevant experience. In June 2014, the EIU found that HTLD passed the CPE and should be awarded Community Priority.⁴ Effectively, HTLD would be handed the .HOTEL gTLD despite six other fully paid applications, including Claimants’. There was great public outcry against that decision, and other CPE results as well.⁵ The results seemed wildly

¹ Exhibit A, AGB, Module 4.2.3, p.4-9.

² See Exhibit B (Letters of Support for HTLD application -- all virtually identical).

³ Exhibit A, AGB, Module 4.2, p.4-7 (“The community priority evaluation is an independent analysis.”); see also Exhibit C (Community Priority Evaluation website: “The evaluation itself is an independent analysis . . .”).

⁴ Exhibit D, EIU CPE Report re .HOTEL.

⁵ Exhibit E, examples of experts discussing and/or expressing dismay at CPE results, including comprehensive Navigant Economics report commissioned by dotRegistry.

inconsistent, both to casual observers and within the DNS policy community that had developed the AGB and the CPE rules -- including from the former Chair of the BGC and ICANN Board.⁶ A number of Requests for Reconsideration (“RFR”) were filed to challenge the CPE results, including by Claimants. The denial of their first RFR was subject of an IRP proceeding, styled *Despegar v. ICANN*, with a Final Declaration issued in February 2016.⁷

While that IRP was pending, it was revealed that ICANN had misconfigured access rights to gTLD applicants’ (including Claimants’) highly sensitive financial and commercial data, supplied by Claimants to ICANN in confidence under a non-disclosure agreement. ICANN ultimately revealed that HTLD’s personnel were the only people in the ICANN community identified to have accessed competitors’ secret data.⁸ Claimants brought it to the attention of the IRP Panel, which found “a number of serious allegations arising from a portal configuration issue, which ICANN has admitted occurred.”^{9/10} But ICANN said it would complete its investigation and then decide on the request to disqualify HTLD’s application. The Panel concluded this “should remain open to be considered at a future IRP should one be commenced in respect of this issue.”¹¹

Meanwhile, HTLD had also been bought by an industry conglomerate, Afilius, with no apparent ties to the purported “Hotel Community” interests that HTLD had promised they

⁶ Exhibit F - Letter memorializing webinar in which former ICANN chair Cherine Chalaby admitted “In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE.”

⁷ Exhibit G, *Despegar v. ICANN*, Final Declaration.

⁸ Exhibit H, ICANN Board Resolutions.

⁹ *Despegar*, #131.

¹⁰ Exhibit I, ICANN announcements.

¹¹ *Despegar*, #138.

would represent as the .HOTEL TLD operator. Claimants seek review as to why ICANN did not require Afilias to satisfy another CPE, nor make any promises regarding the Community.

In RFR 16-11,¹² Claimants sought review of ICANN Board Resolutions¹³ that ordered ICANN staff to move forward with processing HTLD's application. The circumstances leading to that RFR and to those Resolutions are discussed at length, *infra*. The main rationale for the BAMC denial of that RFR was incredibly flimsy:

Without evidence that the confidential information was shared, Mr. Krischenowski's corporate holdings alone are not sufficient to demonstrate that HTLD received any of the information that Mr. Krischenowski accessed and/or that HTLD gained some "unfair advantage" from Mr. Krischenowski's access to the information.

And indeed, the unanimous IRP Panel starkly questioned this rationale, bluntly labeling "specious" ICANN's argument that it could not violate its Bylaws by allowing HTLD's application to proceed under the circumstances preliminarily revealed by ICANN as of that time.¹⁴

Six months after the *Despegar* decision, another IRP Panel issued its Final Declaration upon review of another CPE case, and found ICANN had violated its Bylaws in several critical ways. Much more evidence was provided in that case than in the *Despegar* matter, including a sworn Declaration from the EIU stating at the outset: "We are not a gTLD decision-maker but

¹² Exhibit J.

¹³ Exhibit H.

¹⁴ *Despegar*, # 124-138:

130. ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN's Articles of Incorporation or Bylaws.

131. In the context of the clear problems caused by ICANN's portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

simply a consultant to ICANN.”¹⁵ That was quite a different story than what ICANN had trumpeted all along,¹⁶ and which ICANN had told the *Despegar* panel¹⁷ -- that EIU was an “independent” provider “whose determinations are presumptively final.”

Fortunately, ICANN and the EIU’s disingenuous arguments fell on deaf ears, and the unanimous *DotRegistry* panel required ICANN to turn over all relevant internal correspondence and correspondence with the EIU,¹⁸ which ICANN had denied to the *Despegar* panel had even existed. ICANN had also refused to provide its contract with EIU to the *Despegar* Claimants, but was forced to turn it over in this case, including the provision that “ICANN will be free in its complete discretion to decide whether to follow [EIU's]' determination and to issue a decision on that basis or not.”¹⁹ Again, the opposite of what ICANN represented to the *Despegar* panel as to EIU’s purportedly “presumptive” decision-making authority.

The *DotRegistry* Panel decision is discussed in detail, *infra*, as well as ICANN’s responsive actions. So also discussed *infra* are Claimants’ RFRs 16-11 and 18-6,²⁰ the BAMC and ICANN

¹⁵ Exhibit K, EIU Declaration, para. 3, and ICANN’s letter to the IRP Panel re same.

¹⁶ See, e.g., AGB, Module 4.2, p.4-7 - 4-8; Exhibit C (“The evaluation itself is an independent analysis conducted by a panel . . .”).

¹⁷ *Despegar*, para. 59:

In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows: i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.

¹⁸ Exhibit L, *DotRegistry v. ICANN*, Proc. Order No. 3; see also, Exhibit M, *DotRegistry*., Final Decl., para. 29 -33.

¹⁹ *Exhibit M, DotRegistry*, Final Decl., para. 16.

²⁰ Exhibit J (RFR 16-11) and Exhibit N (RFR 18-6) .

actions in response,²¹ and how those actions have differed despite the substantial similarity of the two cases.

In 2016, the ICANN Board put all of those RFRs “on hold” as it commissioned a purportedly independent review of the CPE administration by ICANN and EIU. ICANN hand-picked a consulting firm called FTI to do that “CPE Process Review.” Their half-hearted, predetermined investigation is discussed at length, *infra*. FTI asked for critical documents, which EIU and ICANN refused to disclose. FTI did not have access to the vast majority of CPE evaluators, as they had already left EIU. Of the interviews that FTI did manage, ICANN has refused to turn over notes or transcripts or even the identity of anyone that was interviewed. ICANN has also refused to disclose either the agreement with FTI, the identity of any of their investigators, or any correspondence with ICANN other than FTI’s final reports.

Meanwhile, FTI’s willfully hamstrung CPE Process Review “investigation” unsurprisingly concluded in December 2017, by finding that ICANN had done nothing to influence EIU’s CPE decisions. This was directly contrary to the *DotRegistry* IRP findings, yet the ICANN Board did not require anything further, accepted the FTI findings, and resolved for the BAMC to then hear the RFRs it had put on hold, including Claimants’.²² The BAMC conducted no independent investigation of its own despite the mandate of the *DotRegistry* decision and the noted failure by FTI to obtain critical evidence from EIU and ICANN staff. Thus, unsurprisingly, the BAMC again rejected Claimant’s RFRs with no new rationale or justification, and no new disclosure of any highly relevant information in ICANN’s control, as ICANN had been ordered to produce and did produce in the *DotRegistry* case.

²¹ Exhibit O (BAMC Response 16-11) and Exhibit P (BAMC Response 18-6).

²² Exhibit Q (Letter from BGC Chair Chris Disspain).

Thus, Claimants have been forced to file this IRP Complaint, in order to have real discovery, and real review of ICANN's actions and inactions with respect to the .HOTEL CPE, the CPE Process Review, the HTLD breach, and the sale of HTLD to Afilias.

IV. STANDARD OF REVIEW

Section 11 of the Interim Supplemental Rules states (emphasis added):

Standard of Review. Each IRP Panel shall conduct an objective, *de novo* examination of the Dispute.

a. With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated ICANN'S Articles or Bylaws.

b. All Disputes shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

V. COVERED ACTIONS OR INACTION TO BE REVIEWED

The stated purposes of the IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).²³ ICANN mouths a boldface "Commitment" in Sec. 1.2(a)(vi) of its Bylaws to "Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness."

²³ These include: (i) Ensure that ICANN ... complies with its Articles of Incorporation and Bylaws. (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)). (iii) Ensure that ICANN is accountable to the global Internet community and Claimants. ... (vi) Reduce Disputes by creating precedent to guide and inform the Board, ... (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes. (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in a court with proper jurisdiction. (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

But it only pays them lip service, having failed to implement key protections for six years, and administering a sham RFR process resulting in no real reconsideration of anything, until an IRP is filed.

1. Preliminary Procedural Issues to Be Decided in this IRP

Claimants intend to promptly seek Interim Measures of Protection pursuant to Section 10 of the Interim Rules, specifically requiring ICANN to: A) immediately appoint an ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6, as required by the Bylaws; B) meanwhile, appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Rules, from which any IRP Panel shall be selected per Section 3 of the Interim Rules, and to which Claimants might appeal, *en banc*, any IRP Panel Decisions per Section 14 of the Interim Rules; and, C) meanwhile, preserve and direct HTLD, EIU, FTI and Afiliac to preserve all potentially relevant information for review in this matter.

2. Important Substantive Issues to Be Decided in this IRP

A. *Claimants seek review whether ICANN had undue influence over the EIU with respect to its CPE decisions, and over FTI with respect to the CPE Process Review.*

ICANN admits to having documented conversations with EIU, purporting not to have influenced or interfered in any way, but only that:

These types of communications instead demonstrate that ICANN org protected EIU's independence by focusing on ensuring that EIU's conclusions were clear and well-supported, rather than directing EIU to reach a particular conclusion.

Yet of course, ICANN has refused to disclose them to Claimants, arguing that they promised to EIU that they would not, and EIU expressly has threatened to sue ICANN if they do so.

That is an incredibly inappropriate rationale, as ICANN could control whether they agreed to confidentiality with EIU. What was the public interest in that? Is there any remaining

public interest in that, years later? The EIU's CPE processes, as well as the FTI CPE Process Review, were supposed to be open and independent of ICANN influence. EIU could have no trade secrets in their CPE administration, and nobody has claimed that they did. ICANN has offered no plausible explanation as to how confidentiality of these documents is in the global public interest, or in anyone's interest. They surely cannot withhold them from scrutiny of this IRP. Such documents can fairly be disclosed in this proceeding subject to the protections of a protective order as was the case in *Dot Registry, LLC v. ICANN*²⁴ (requiring that confidential documents exchanged by the parties could not be used for any other purpose and could not be referenced or used in publicly posted documents without appropriate redactions).

a. ICANN's and EIU's Communications Are Critical, But Have Been Kept Secret.

ICANN admits unequivocally to helping to write the EIU's CPE decisions, purportedly in order to "protect" the EIU's "independence." It is unclear how that serves ICANN's public service mission, or how that could be a true reason. If ICANN had wanted to protect EIU's independence, it would not have interfered in the CPE Evaluation process. That process was supposed to be independent of any ICANN influence. Yet, the communications and edits appear to have been voluminous and at least in some cases, very substantive. ICANN expects the world to accept their word that they didn't actually "direct" the EIU to make any particular decision. That is an incredibly grey line they want to straddle, and only the relevant documents and interviews can elucidate whether they are being truthful.

²⁴ Exhibit L -- *DotRegistry*, Procedural Order No. 3; see also, Exhibit R, *id.*, Procedural Order No. 2 (ordering ICANN to produce "all non-privileged communications and other documents within its possession, custody or control" concerning the EIUs engagement in the CPE process and the work done by the EIU on complainant's RFR).

But even the ICANN Board has never seen those documents, because ICANN's cherry-picked CPE Review consultant, FTI, was not provided them from EIU or ICANN staff. FTI reported²⁵ that it requested the EIU to provide 1) "internal emails among relevant [EIU] personnel, including evaluators, relating to the CPE process," and 2) "external emails between relevant [EIU] personnel and relevant ICANN personnel related to the CPE process. Yet, astonishingly, "FTI did not receive documents from [EIU] in response to Items 1 or 2."

FTI says that ICANN provided responsive information as to Item 2, though EIU did not. But any reasonable investigator would get the documents from both sides, in particular to see if either side is trying to hide something. And because each side could have different comments and internal distribution. Indeed, FTI acknowledged that it "compared the information obtained from both [ICANN and EIU]" -- at least that very limited information that was provided.

It is inexcusable for FTI's investigation to not have reviewed EIU internal correspondence, which would likely be the best evidence of whether EIU was unduly influenced by ICANN as it would indicate the evaluators' perceptions in real time. Moreover, FTI conducted interviews of "relevant" ICANN and EIU personnel, but no transcripts, notes or summaries of those interviews have been disclosed. Remarkably, it seems that most evaluators had left EIU before FTI started the CPE Process Review. Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process. Surely they could have made a few calls.

²⁵ Exhibit S, FTI Report re Communications, p.XX, XX.

Instead, incredibly, ICANN has admitted that EIU threatens to sue ICANN:²⁶

ICANN organization endeavored to obtain consent from [EIU] to disclose certain information relating to the CPE Process Review, but [EIU] has not agreed to ICANN organization's request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations.²⁷ ICANN organization's contractual commitments must be weighed against its other commitments, including transparency.

²⁸

The Board, at a minimum, ought to want to know what EIU has been hiding from FTI, which still is being hidden from Claimants, and thus which is shielded from any meaningful consideration by the Board, or any Independent Review as required to be available per the Bylaws. Which EIU is threatening to sue to keep secret. In what public interest?

The Board, at a minimum, should have forced EIU and ICANN's lawyers to disclose those documents, and at least for the FTI and the Board itself to consider them, before accepting FTI's report and declaring that nothing bad ever happened. The Board could not have made an

²⁶ Exhibit T, p.9 (ICANN Response to DIDP Request).

²⁷ The contractual argument is dubious, at best. The Board stated in its last Resolution:

FTI requested additional materials from [EIU] such as the internal correspondence between the CPE Provider's personnel and evaluators, but [EIU] refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN, it was only required to produce CPE working papers, and internal and external emails were not "working papers."

Really, it is ludicrous for ICANN -- or any party contracting with ICANN -- to publicly posit that any reasonable definition of "working papers" would not include email.

²⁸ *But see, e.g.,* Exhibit M, *DotRegistry*, Final Decl., #89:

[T]he contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations.

informed decision about the CPE Process Review unless that information was disclosed and considered. At minimum now, for there to be any truly independent review of that Board inaction and action, the Ombudsman, Claimants and the Panel must be able to see EIU internal correspondence relating to the .HOTEL application, referring or relating to ICANN's comments or questions as to EIU's drafts, ICANN staff's work on the CPE and CPE Process Review, as well as all relevant excerpts from the interviews that FTI conducted. FTI's agreement with ICANN also has never been revealed, despite having been repeatedly requested. Only once these documents are disclosed can there be any meaningful review.

b. *DotRegistry IRP and FTI's report reveals a lack of independence of EIU*

The *DotRegistry* IRP Panel reviewed correspondence between EIU and ICANN which was denied to the *Despegar* Claimants, and held:²⁹

EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports,

The *DotRegistry* Panel then further held:³⁰

Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

The Panel then explained how ICANN violated its Bylaws duties of transparency, and due diligence upon reasonable investigation -- by failing to review precisely the information the

²⁹ Exhibit M, *DotRegistry*, Final Decl., #93; *see also*, #94-99, discussing one egregious example.

³⁰ *Id.*, *DotRegistry*, Final Decl. #111-113 ("An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry RFRs....").

Despegar Claimants had requested, but which the *DotRegistry* Panel forced ICANN to disclose.³¹

The Panel then explained how ICANN violated its Bylaws duty of independent judgment, again by failing to disclose documents which could have shown such judgment.³² Instead:

The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.³³

The Panel concluded its analysis by declaring “that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws.”³⁴

Claimants in this IRP have made exactly the same claims to ICANN, and have repeatedly cited this precedential decision. Yet, ICANN has continually refused to provide any information to Claimants, nor to review its RFR decisions in light of the evidentiary requirements of the *DotRegistry* rulings. That ruling is binding and precedential per the Bylaws.³⁵ Yet ICANN ignores it’s obvious relevance to Claimant’s similarly situated RFRs subject to review in this IRP. This Panel must consider that precedent per the Bylaws’ “Standard of Review” quoted *supra*.

³¹ *Id.*, #114-125 (concluding: “It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.”).

³² *Id.*, # 126-150 (concluding: “And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC ..., the BGC has put itself in contravention of Bylaws ... requiring that ICANN staff work on which it relies be made public.”)

³³ *Id.*, #128.

³⁴ *Id.*, #151.

³⁵ Bylaws, Art. IV, Sec. 4.3(a)(vi) and (viii) (purposes of the IRP: “Reduce Disputes by creating precedent to guide and inform the Board” and “Lead to binding, final resolutions”).

Furthermore, FTI's report reveals that abundant phone calls were made between EIU and ICANN to discuss "various issues".³⁶ It also reveals that ICANN advised at times that EIU's conclusions were not supported by sufficient reasoning.³⁷ FTI's report shows (i) that ICANN made extensive comments on the draft reports prepared by EIU, (ii) that those drafts were discussed at length between EIU and ICANN, and (iii) that the working of EIU and ICANN became intertwined to such extent that it became "difficult to discern which comments were made by ICANN organization versus EIU".³⁸ It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or EIU.

The abundant phone calls between ICANN and EIU, and ICANN's influence on EIU's drafting and rationale demonstrate that EIU was not free from external influence from ICANN. One can only conclude from these findings that EIU was not independent from ICANN. Any influence by ICANN in the CPE was contrary to settled ICANN policy, and therefore undue. FTI's report confirms ICANN's intimate involvement in the CPE, as found by the *DotRegistry* Panel. It also confirms the fact that the *Despegar* IRP Panel was given incomplete and false information by ICANN which was material to its decision.

c. *ICANN Materially Misled Claimants and the Despegar IRP Panel.*

The *Despegar* IRP Panel's conclusion that the inconsistencies of the CPE process did not amount to a violation of ICANN's Bylaws and core values was based upon the false premise that the EIU was not mandated to apply ICANN's core values, and upon the false premise that the

³⁶ The report makes mention of weekly conference calls between ICANN and EIU. Exhibit S, FTI Scope 1 Report, p. 12-14.

³⁷ *Id.*, p. 12.

³⁸ *Id.*, pp. 15-16.

EIU's determinations are presumptively final and are made independently by the EIU, without ICANN's active involvement.

In this respect, ICANN 'informed' Claimants and the IRP Panel that "[b]ecause of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring of any individual CPE"-- and the Panel concluded: "That is a clear and comprehensive statement that such documentation does not exist".³⁹ The IRP Panel proceeded upon this premise. However, as the *Dot Registry* IRP Declaration has clearly shown, this turned out to be false.

Indeed, the findings in the *Dot Registry* IRP Declaration reveal that ICANN staff was "intimately involved in the CPE" and "in the production of the CPE [result]," and that "ICANN staff supplied continuing and important input on the CPE reports."⁴⁰ As the CPE reports identify the scoring of CPEs, ICANN did have communications with the evaluators that identify the scoring of individual CPEs. That is also clear from the examples of such communications referenced in the *DotRegistry* Final Declaration. So, ICANN lied in writing to the Panel.

Moreover, ICANN's description in the *Despegar* IRP of the EIU as the independent evaluator, making "presumptively final" determinations was false. The EIU contract, finally divulged in the *DotRegistry* IRP after ICANN refused to divulge it to Claimants, proved otherwise as discussed *supra*. The findings of the *Dot Registry* IRP Panel reveal that the EIU -- by its own measure -- was "simply a consultant to ICANN", and that ICANN had agreed with the EIU that the EIU "would operate largely in the background, and that ICANN would be solely responsible

³⁹ *Despegar*, #95.

⁴⁰ *DotRegistry*, #93, 101.

of all legal matters pertaining to the application process".⁴¹ ICANN was "solely responsible to applicants ... for the decisions it decide[d] to issue", and "each decision [had to] be issued by ICANN in its own name only."⁴²

Moreover, the fact that material information was hidden from Claimants and the *Despegar* Panel is a violation of ICANN's obligations to conduct its operations in a transparent matter. Claimants specifically and repeatedly asked for all communications, agreements between ICANN and the CPE Panel and the CPE Review Panel. Claimants and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was non-existent and/or could not be disclosed. That was wrong.

The *DotRegistry* IRP Panel forced ICANN to reveal that it did possess all of that information, and to turn it over to the Panel and to DotRegistry. Claimants had explicitly asked for and been denied this information, and the *Despegar* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Claimants and the Panel at that time -- or since -- that it had disclosed such material information to DotRegistry and to that IRP Panel.

Instead, Claimants and their prior IRP Panel always were denied access to essential documents kept by ICANN, such as for example, communications between ICANN and HTLD with respect to the Community Application, between ICANN and EIU with respect to the CPE Evaluation, and between ICANN and FTI with respect to the CPE Process Review. Claimants have not been given anywhere near a fair opportunity to contest the arguments and evidence

⁴¹ *Id.*, #91.

⁴² *Id.*, #92.

adduced by the BAMC, because Claimants have been denied the underlying documents core to most of the BAMC's factual arguments.

Claimants and this Panel have every reason to be suspicious, as ICANN has materially and plainly lied about the existence of these documents, directly to the prior IRP Panel. Indeed, ICANN made a clear and comprehensive statement that it did not have any communications with the evaluators that identify the scoring of any individual CPE.⁴³ However, both the *DotRegistry* IRP and the FTI report revealed that ICANN had frequently been commenting on and questioning the reasoning behind assigning one score or another and provided feedback to EIU's draft reports.⁴⁴ ICANN could not have made such comments without access to communications that identify the scoring of individual CPEs.

Certainly, a principal even "questioning" a contractor's reasoning about a score can be seen at least as implicit "direction" to change that score, or at least to consider changing it. Such direction could even be quite explicit from the context and/or content of the "questioning." Without full transparency about the CPE and CPE Review, as ordered by the *DotRegistry* panel and desired by ICANN's own FTI Consultants, we cannot know. The ICANN Board also does not know, because it failed to meet its Bylaws obligations of transparency, due diligence upon reasonable investigation, and independent judgment by not requiring disclosure by EIU and ICANN Staff, to Claimants and the *Despegar* Panel. Now, such disclosure is required to provide opportunity for any meaningful review by this Panel and Claimants herein.

B. Claimants seek review whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL, even per RFRs after DotRegistry.

⁴³ *Despegar*, #95.

⁴⁴ Exhibit S, FTI Report, Scope 1.

Bylaws, Sec. 1.2(a)(v) require ICANN to:

Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).

A previous IRP Panel has explained:⁴⁵

The requirement for discrimination is not that it was malicious or even intentional, Rather, the requirement for discrimination is that a party was treated differently from others in its situation without “substantial and reasonable” justification. The IRP Panel does find that this standard was met.

Claimants were discriminated against in the CPE, as argued in its first RFR which was subject to the *Despegar* IRP. That was proved by the *DotRegistry* IRP after appropriate discovery, as argued in both of Claimants’ RFRs since. ICANN provides almost no rationale in support of its position that they were not. The Bylaws clearly prohibit discrimination among similarly situated parties. ICANN’s weak effort to explain this part of their decision must be reviewed by the IRP Panel.

In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.”⁴⁶ Yet as it turned out, EIU did not employ any comparative process as to their decisions, and had no relevant experience making any such decisions. And ICANN was constantly interfering with comments and “questions” about EIU draft decisions, which its

⁴⁵ Exhibit U, *Corn Lake LLC v. ICANN*, Final Decl. #8.65.

⁴⁶ Exhibit V, CPE Guidelines, at 22.

“contractor” EIU had no power to ignore. So, there was significant inconsistency in the CPE decisions, as shown by many commentators and an expert economist hired by DotRegistry.⁴⁷

ICANN has not disputed this, but instead has tried to hide the ball, saying they didn’t make the decisions. But in fact, they had ultimate control such that their contractor could not be independent, they heavily influenced some of those “presumptive” decisions, and have hidden information that would be relevant to explain why. The *DotRegistry* IRP proved that, because the CPE results in fact were unduly influenced by ICANN staff, which conduct the BGC could and should have investigated before rubber-stamping its own prior decision to approve the CPE results. That certainly leads to an inference that they have exercised undue influence in the .HOTEL CPE -- discriminating against Claimants.

The Board has not looked at the issue because it did not require EIU to provide it, nor ICANN staff to publicize its work. That violated ICANN’s Bylaws as to the *DotRegistry* claimants and equally as to these Claimants. Same as re the sham RFR process, whereby the BAMC thoughtlessly “reconsidered” ICANN’s own prior decisions to accept purportedly independent CPE results in both cases, without doing any reasonable investigation of the claims of inconsistency and undue influence.⁴⁸ Those failures also violated ICANN’s Bylaws as to the *DotRegistry* claimants and equally as to these Claimants.

Yet, the ICANN Board has fully addressed the violations of its Bylaws in the CPE for Dot Registry, but not for Claimants.⁴⁹ The ICANN Board agreed to refund Dot Registry's IRP costs of

⁴⁷ See *supra*, note 5.

⁴⁸ See Exhibit W (“Specifically, the BGC is only authorized to determine if any policies or processes were violated during CPE. The BGC has no authority to evaluate whether the CPE results are correct.”).

⁴⁹ Exhibit H (ICANN Board Resolutions 2016.08.09.11 - 2016.08.09.12).

more than \$200,000 -- as the IRP Panel had ordered. The ICANN Board also ordered the BGC to reconsider the DotRegistry RFRs in light of the IRP Final Declaration. The BGC refused to provide any additional information to Claimants or do any further due diligence or reasonable investigation, by which it could make any independent judgment. Instead they summarily denied the RFR, and forced Claimants to file this IRP in order to get any real review.

Claimants suffered from the same violations as the *DotRegistry* claimants, and the *DotRegistry* IRP decision is a binding precedent. However, ICANN refuses to produce any documents to these Claimants, and refuses any other remedy to Claimants. It must be forced to produce now, so that there can be a meaningful review in this case as there was in that case. ICANN has not and cannot provide any justification why it treats Claimants differently, although they are and always have been situated similarly to the *DotRegistry* claimants. Claimants request that ICANN take the necessary steps to ensure a meaningful review of the CPE regarding .hotel, and of these Claimants' RFRs -- at least to ensure consistency of approach with its handling of the *Dot Registry* case.

ICANN also provided a completely new CPE for an applicant for .gay, merely because of a "procedural error" whereby some of its letters of support were not 'verified' by EIU, even though they were still considered in their scoring. The BAMC Recommendation re RFR 14-44 concluded for that flimsy reason that "the CPE Panel Report shall be set aside, and EIU shall identify two different evaluators to perform a new CPE".⁵⁰ Again that was clearly discriminatory because Claimants have raised much more substantial issues and been rebuffed.

C. Claimants seek review of ICANN's "Portal Configuration" investigation and refusal to penalize HTLD's willful accessing of Claimant's confidential, trade secret info.

⁵⁰ Exhibit X, p. 2.

Clearly the *Despegar* IRP Panel left this issue open for future scrutiny, and found ICANN's early defensive argument "specious".⁵¹ As explained in Claimant's later RFRs and letters to ICANN, HTLD's theft of competitor Claimants' private trade secret data was unique and stunning. And deserving not only of thorough investigation as ICANN purported to do, but also of some consequence to HTLD once the scope, frequency and significance of its misconduct was revealed. ICANN refused to produce key information underlying its reported bare conclusions, couching each with equivocal language such as "at a minimum," etc.

This purported "rationale" for BAMC denial of RFR 16-11 is facially flimsy, particularly in light of the *Despegar* Panel's statements on this issue⁵² which question it:

Without evidence that the confidential information was shared, Mr. Krischenowski's corporate holdings alone are not sufficient to demonstrate that HTLD received any of the information that Mr. Krischenowski accessed and/or that HTLD gained some "unfair advantage" from Mr. Krischenowski's access to the information.

There is little doubt under US law that such misdeeds of any major shareholder or other decision maker would be imputed to their closely held corporation that benefitted therefrom.⁵³ This is hornbook law in the Ninth Circuit, for example. *CITES*. Katrin Otrin (at least) was also a shareholder in Krischenowski's shareholding company, and she also had access to the confidential competitive data, so their collective holdings were closer to 50% and controlling

⁵¹ *See supra*

⁵² *Despegar*, #124-138.

⁵³ *See e.g., Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996) ("Moreover, "[a] corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf".").

interest – further supporting the argument to impute their actions to HTLD.⁵⁴ Therefore, the Board action to ignore such facts and law is a violation of Bylaws.

It is also self-evident that ICANN and HTLD, in conducting their investigation, were each embarrassed parties with strong incentive to find nothing wrong with HTLD's conduct. In other words, it can be inferred that either of them would have said anything -- or hid anything -- to save themselves from further embarrassment. At minimum, that circumstance should require further discovery in the IRP, of all documents concerning ICANN's investigation of HTLD's breach. ICANN has no privilege or other valid reason for withholding those documents to date, and ought not be allowed to stymie Independent Review of its decision by withholding any such documents now. It violates the duty of transparency to withhold them. To the extent the BAMC and/or Board failed to have such information before deciding to ignore HTLD's breach, that violated their duty of due diligence upon reasonable investigation, and their duty of independent judgment.

D. Claimants seek review of ICANN's decision to approve sale of the .HOTEL Community-based Applicant to a domain registry conglomerate, without requiring the new Applicant to pass CPE.

In 2016, the purported "Community Applicant" HTLD was purchased by one of the largest gTLD registry operators, Afilias, which per their website operates no less than 25 TLDs including .info, .global, .asia, .vegas and .adult.⁵⁵ None of the letters of support reviewed by the CPE panel were in support of Afilias owning the .HOTEL gTLD.⁵⁶ They were in support of an entirely different, single-TLD operator with purported ties to the so-called, obviously contrived

⁵⁴Exhibit H (ICANN Board Resolutions).

⁵⁵ Exhibit Y - Afilias Products and Services.

⁵⁶ See *supra*, note 2.

“Hotel Community”. They contained little detail as to the reasons for their superficial expression of support, in particular as to what they were assured from HTLD in exchange.

And it was that sole operator, HTLD -- the only one among hundreds of applicants -- that had violated the trust of the ICANN community by accessing its competitors’ confidential, trade secret information, repeatedly. The only people in the entire ICANN community to access that sort of private information -- in a universe of hundreds of persons having access to the data -- were principals of HTLD.

That was clearly embarrassing for ICANN to have permitted anyone, let alone each and every one of the hundreds of applicants’ representatives, to access private trade secret data for weeks on end -- which it had explicitly promised to keep strictly confidential. Yet just one company took advantage of that ill-begotten access, causing a lot of further embarrassment and expense to ICANN.⁵⁷ HTLD took the extraordinary step of writing to ICANN to admit to Krischenowski’s misconduct, while purporting to distance from it.⁵⁸ While ICANN and Afiliias may be very happy to be rid of Mr. Krischenowski from HTLD, what about the rights of the so-called “Hotel Community” which supported HTLD’s bid, not Afiliias’ bid? What about the rights of the six other applicants for the .HOTEL gTLD, including Claimants?

Claimants in RFR 16-11 argued that ICANN gave “undue priority to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.” When did ICANN approve assignment of the HTLD application to Afiliias, and on what terms? Was there any public comment period, outreach to the other .HOTEL applicants, and/or the purported “Hotel

⁵⁷ See, e.g., Exhibit Z (articles discussing data breach and HTLD misconduct).

⁵⁸ Exhibit ZZ (Afiliias letter to ICANN re Krischenowski).

Community” at all? Why did ICANN not recognize HTLD as an “unreliable applicant”, when they were the only one of many hundreds of applicants who cheated the ICANN system and stole its competitors’ secret information? Did ICANN analyze whether Afilias would be any more “reliable”? Did ICANN analyze whether the Afilias purchase would be in the global public interest? What was the Board Resolution that approved that transaction, transparently, with due diligence upon reasonable investigation, and in exercise of its independent judgment?

Those are all questions that ICANN must answer in discovery in this IRP. As otherwise it appears that the transaction did not get Board review or approval, and there was no public comment or outreach either to competing applicants or the purported “Hotel Community”. The Board should demand full disclosure of all relevant documents related to the transaction, and that the public interest is served by it. Claimants aver that HTLD’s application should be denied, or at least its purported Community Priority relinquished, as a consequence not only for HTLD’s spying on its competitors’ secret information, but also because HTLD is no longer the same company that applied for the .HOTEL TLD. It is now just a registry conglomerate with no ties to the purported, contrived “Community” that it claims entitled to serve. So it should not benefit from Community Priority over six other fully qualified, fully paid applicants -- e.g. Claimants.

VI. CONCLUSION

For all of the foregoing reasons, an honorable IRP Panel should 1) grant the Interim Measures sought by Claimants; 2) order appropriate discovery from ICANN; 3) independently review ICANN’s actions and inactions as aforesaid; 4) render a Final Declaration that ICANN has violated its Bylaws, and 5) require that ICANN provide appropriate remedial relief.

RESPECTFULLY SUBMITTED,

DATED: December 16, 2019

By: 

Mike Rodenbaugh
RODENBAUGH LAW

Attorneys for Claimants

Exhibit 8

RESPONDENT'S EXHIBIT

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC, Minds + Machines Group, Ltd.,)	
Radix Domain Solutions Pte. Ltd., and Domain)	
Ventures Partners PCC Limited)	
)	
Claimants,)	
)	ICDR CASE NO. 01-19-0004-0808
)	
and)	
)	
)	
Internet Corporation for Assigned Names and)	
Numbers (“ICANN”))	
)	
Respondent.)	

DECISION ON REQUEST FOR
INTERIM MEASURES OF PROTECTION

August 7, 2020

Emergency Panelist:
Christopher S. Gibson

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. This is the Decision on a Request for Interim Measures of Protection in this Independent Review Process (“IRP”) case, administered by the International Centre for Dispute Resolution (“ICDR”) under its International Arbitration Rules, amended and effective June 1, 2014 (“ICDR Rules”), as supplemented by the Interim Supplementary Procedures for Internet

Corporation for Assigned Names and Numbers Independent Review Process, adopted October 25, 2018 ("Interim Supplementary Procedures").

2. Claimants are Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited ("Claimants"). Claimants state that they each effectively own and/or control independent applications to own and operate the generic top-level domain ("gTLD"), .HOTEL.¹ Mike Rodenbaugh and Marie Richmond of Rodenbaugh Law appeared on behalf of the Claimants.
3. Respondent Internet Corporation for Assigned Names and Numbers ("Respondent" or "ICANN") is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community.² Jeffrey A. LeVee and Sarah Podmaniczky McGonigle of Jones Day appeared on behalf of ICANN. Amy Stathos, Deputy General Counsel for ICANN, and Cassandra Furey, Associate General Counsel for ICANN, attended the telephonic hearing on June 3, 2020.
4. The Emergency Panelist, Christopher S. Gibson, was duly appointed by the ICDR in accordance with the ICDR Rules (Article 6) and the Interim Supplementary Procedures (Rule 10) to consider Claimants' request for interim measures. The ICDR formalized the appointment of the Emergency Panelist, notified all parties of the appointment, and gave the parties an opportunity to object to the appointment in writing. No objection was made, and the appointment was duly finalized.
5. Claimants' IRP questions whether ICANN breached its Articles of Incorporation ("Articles"), Bylaws and internal policies and procedures through actions or inactions by ICANN's Board of Directors ("Board") in relation to the community-based application of Hotel Top-Level Domain S.a.r.l ("HTLD") for the .HOTEL gTLD, which was submitted to ICANN under the New gTLD Program and given "Community Priority" status over the other .HOTEL applications.

¹Request for Independent Review Process by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated December 16, 2019 ("IRP Request"), p.4.

² ICANN'S Response to Request for Independent Review Process, dated February 3, 2020 ("ICANN's IRP Response"), ¶ 1.

6. In a prior related IRP, *Despegar et al. v. ICANN* (the “*Despegar* IRP”),³ the claimants there previously requested review of whether ICANN had breached its Articles, Bylaws and the Applicant Guidebook (“Guidebook”) in relation to HTLD's application for .HOTEL. Those claimants requested, among other things, that ICANN should reject the decision that HTLD's application for .HOTEL be granted Community Priority over the claimants’ applications.⁴ The IRP panel in the *Despegar* IRP denied the claimants’ requests and designated ICANN as the prevailing party, while raising several issues of concern, as discussed below.⁵
7. The present IRP concerns decisions (“actions or failures to act”) taken by ICANN’s Board *after* the *Despegar* IRP – including the Board’s decisions on Claimants’ Reconsideration Request 16-11 (“Request 16-11”)⁶ and Reconsideration Request 18-6 (“Request 18-6”)⁷ – both of which concern HTLD’s community-based application to operate the .HOTEL gTLD. Claimants have also brought a Request for Interim Measures of Protection in this IRP, which is the impetus for this Decision.

II. PROCEDURAL BACKGROUND

8. On December 19, 2019, following a failed Cooperative Engagement Process (“CEP”)⁸ with ICANN, Claimants submitted a Request for Independent Review Process (“IRP Request”), with supporting exhibits, in relation to ICANN's treatment of the gTLD string, .HOTEL.
9. On 30 December 2019, ICANN notified the ICDR Administrator that, consistent with ICANN’s standard practice and “as Claimants are aware, without emergency measures of protection, ICANN will proceed with the contracting phase for the prevailing .HOTEL application, after which the gTLD will move to the delegation phase.”⁹

³ *Despegar et al. v. ICANN*, Final Declaration, ICDR Case No. 01-15-0002-80-61, dated February 11, 2016 (“*Despegar* IRP Declaration”), at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

⁴ *Id.*, ¶ 41.

⁵ *Id.*, ¶¶ 154, 155 & b 158.

⁶ Reconsideration Request 16-11 (“Request 16-11”), dated August 25, 2016 seeking reconsideration of the ICANN Board’s August 2016 Resolutions.

⁷ Reconsideration Request 18-6 (“Request 18-6”), dated April 14, 2018, at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

⁸ The CEP was commenced on October 2, 2018. See Ex. R-34 (Cooperative Engagement and Independent Review Processes Status Update (Dec. 23, 2019)).

⁹ Ex. RE-2.

10. On January 30, 2020, Claimants submitted their Request for Interim Measures of Protection (“Claimants’ IM Request”), with supporting exhibits, “essentially under protest”¹⁰ pursuant to the Interim Supplementary Procedures, Article 10 (Interim Measures of Protection). Among the interim measures sought, Claimants request that ICANN be required maintain the *status quo* as to the .HOTEL gTLD (i.e., keep it out of the delegation phase) during the pendency of this IRP.
11. On February 3, 2020, ICANN submitted its Response to Request for Independent Review Process (“ICANN’s IRP Response”), with supporting exhibits.
12. The Emergency Panelist convened a telephonic preparatory conference call with the parties on April 7, 2020 for the purpose of discussing the dispute between them and related organizational matters, including a timetable for further written submissions and oral arguments.
13. On April 24, 2020, Claimants submitted their Brief in Support of Request for Interim Measures (“Claimants’ Brief”), with supporting exhibits.¹¹
14. On May 12, 2020, ICANN submitted its Opposition to Claimants’ Amended Request for Emergency Measures (“ICANN’s Opposition”), with supporting exhibits.
15. On May 20, 2020, Claimants submitted their Reply in Support of Request for Interim Measures (“Claimants’ Reply”), with supporting exhibits.
16. The Emergency Panelist conducted a telephonic hearing with the parties on May 26, 2020. Shortly before the hearing, on May 26th ICANN submitted a copy of a PowerPoint slide deck to be used in support of its presentation at the hearing. Claimants objected to use of the slide deck. Having heard the parties, and with their agreement, the Emergency Panelist issued Procedural Order No. 2 scheduling a further telephonic hearing with the parties on June 3, 2020, and providing a schedule for the submission of slide decks to be used in support of the parties’ respective hearing presentations.

¹⁰ Request for Interim Measures of Protection by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated January 30, 2020 (“Claimants’ IM Request”), p.2.

¹¹ Brief in Support of Request for Interim Measures by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated April 24, 2020 (“Claimants’ Brief”).

17. On June 1, 2020, Claimants submitted their slide deck in support of their interim measures request (“Claimants’ Slide Deck”).
18. On June 2, 2020, ICANN submitted its revised slide deck in support of ICANN’s opposition to Claimants’ request for interim measures (“ICANN’s Slide Deck”).
19. The Emergency Panelist conducted a telephonic hearing with the parties on June 3, 2020 (the “June 3rd Hearing”), at which the parties’ representatives made their substantive submissions. An audio recording of this hearing was made with the agreement of the parties and the Emergency Panelist.
20. During the hearing on June 3rd, counsel for ICANN provided an undertaking on behalf of ICANN that it had already sent letters to The Economist Intelligence Unit (“EIU”) and FTI Consulting, Inc. (“FTI”) requesting that they preserve relevant documents related to this IRP case.¹² The Emergency Panelist requested that ICANN supply copies of these letters. On June 4, 2020, ICANN submitted copies of the letters that it had sent to EIU and FTI, each dated May 22, 2020. The letters are discussed below in Part VI, Section C(2) below.
21. On June 11, 2020, ICANN submitted a letter in response to a question that had been posed by the Emergency Panelist during the June 3, 2020 hearing. At the hearing, the Emergency Panelist asked counsel for ICANN why should ICANN not be required to cover the administrative costs of this IRP, as provided by ICANN’s Bylaws Article 4, § 4.3(r) (providing that “ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members”), despite the fact that the Standing Panel has not yet been constituted? ICANN’s June 11th letter is discussed in Part VI, Section C(6) below.
22. On June 15, 2020, the Emergency Panelist acknowledged receipt of ICANN’s June 11th letter and directed a further question to ICANN. During ICANN’s presentation at the June 3rd hearing, counsel had stated “that the claimants have never addressed [ICANN’s] repeated point that about three-quarters of their claims are time-barred, and not time-barred by a day or two, time barred by months and in some instances, two years.” The Emergency Panelist thus asked,

¹² See ICANN’s Slide Deck, slide 29.

“Can you please clarify this point by identifying which claims ICANN considers are time barred, and which claims, if any, may not be time barred?”

23. On June 16, 2020, Claimants submitted an email in which they stated their position on the issue of the IRP administrative costs. Claimants’ email is discussed in Part VI, Section C(6) below.
24. On June 16, 2020, ICANN submitted a letter responding to the Emergency Panelist’s question (in the Emergency Panelist’s email of June 15th), requesting that ICANN clarify which of Claimants’ claims ICANN considers to be time barred. In its letter, ICANN provided a chart (included in Part VI, Section B(1) below) with detailed explanations addressing ICANN’s position on whether or not the various challenges brought by Claimants in this IRP are time-barred.¹³
25. On June 17, 2020, the Emergency Panelist acknowledged receipt of ICANN’s June 16th letter and declared the hearing closed, while reserving the right to ask further questions of the parties.
26. On June 18, 2020, ICANN sent a letter to Claimant, while copying the Emergency Panelist, in which ICANN responded to the questions in Claimant’s email of June 16th concerning the IRP administrative costs. ICANN’s June 18th letter is discussed in Part VI, Section C(6) below.

III. BACKGROUND

A. Prior Related Proceedings and ICANN Board Decisions

27. ICANN oversees the technical coordination of the DNS on behalf of the Internet community. To that end, ICANN contracts with entities that operate gTLDs, that is, the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG.”¹⁴ ICANN’s launched a New gTLD Program for the expansion of the DNS, with the adoption of the Guidebook in June 2011 to facilitate implementation of the Program and the opening of applications for new gTLDs in January 2012.

¹³ ICANN Counsel’s Letter dated June 16, 2020.

¹⁴ ICANN’s IRP Response, ¶ 1.

28. The final version of the Guidebook was published on June 4, 2012, setting out detailed instructions to gTLD applicants and procedures for evaluating new gTLD applications.¹⁵ The Guidebook provides that applicants may designate their applications as either “standard” or “community-based”, with the latter to be “operated for the benefit of a clearly delineated community.”¹⁶ Various entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. The New gTLD Program has thus far resulted in the introduction of over 1,200 new gTLDs into the DNS.¹⁷
29. The relevant history related to the applications, challenges, and ICANN’s processes and decisions pertaining to the .HOTEL gTLD extends for almost eight years, and the early background is set forth in the *Despegar* IRP Declaration.¹⁸ That history adds a degree of complexity to this IRP case and to this Decision on Claimants’ request for interim measures of protection.
30. ICANN received seven applications for the .HOTEL gTLD – six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD, a non-party to this IRP case. Only one applicant can be awarded a particular gTLD, so the seven applications were placed into a contention set pursuant to the procedures in the Guidebook.
31. If a community-based application is made for a gTLD, such as HTLD’s application for .HOTEL, that applicant is invited to elect to proceed to Community Priority Evaluation (“CPE”), whereby its application is evaluated by a CPE Panel in order to establish whether the application met the CPE criteria.¹⁹ If an applicant prevails in CPE, it will proceed to the next

¹⁵ *Despegar* IRP Declaration, ¶ 17.

¹⁶ Guidebook § 1.2.3.1.

¹⁷ ICANN’s IRP Response, ¶ 2.

¹⁸ *Despegar* IRP Declaration, ¶¶ 16-40.

¹⁹ *Id.*, ¶ 19. The Guidebook, § 1.2.3.1 (Definitions) provides in relevant part:

“Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. Additional information may be requested in the event of a community priority evaluation (refer to section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.

stage of evaluation and the other standard applications for the same gTLD will not proceed; the community-based application will be considered to have achieved Community Priority.²⁰ ICANN appointed an external provider, the Economic Intelligence Unit (“EIU”), to act as the CPE Panel to evaluate CPEs.

32. On June 11, 2014, the EIU found that HTLD’s .HOTEL application should be awarded Community Priority, meaning that HTLD’s application, as a community-based application, would be given priority over the other .HOTEL applications.²¹
33. In 2014, certain of the applicants for .HOTEL submitted Reconsideration Requests (“RFR”) 14-34 and 14-39 challenging (i) the CPE result awarding HTLD’s application Community Priority, and (ii) ICANN’s response to requests for documents relating to the CPE,²² respectively. Both RFRs were denied by the Board Governance Committee (“BGC”).²³ Thereafter, some of the applicants for the .HOTEL gTLD filed an IRP in March 2015 (the *Despegar* IRP) challenging the BGC’s decisions on the Reconsideration Requests. The Final Declaration for the *Despegar* IRP was issued in February 2016.²⁴

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3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
 4. Have its application endorsed in writing by one or more established institutions representing the community it has named.”

The CPE Panel can award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points, the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).

²⁰ *Despegar* IRP Declaration, ¶ 19 (citing Guidebook § 4.2.2).

²¹ IRP Request, p.6, n.4 (Ex. D).

²² ICANN has a Documentary Information Disclosure Policy (“DIDP”), which permits requests to be made to ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody or control.” *Despegar* IRP Declaration, ¶ 22. In response to the document requests, “ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.” *Id.*, ¶ 32.

²³ On 22 July 2017, ICANN’s Bylaws were amended re-designating the responsibilities for Reconsideration Requests from the BGC to the Board Accountability Mechanisms Committee (“BAMC”). The Board confirmed this shift and adopted the revised charters for the BCG and BAMC in its September 2017 Resolution. Board Resolution 2017.09.23.12 – 2017.09.23.14, dated September 23, 2017, at <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en>.

²⁴ *Despegar et al. v. ICANN* Final Declaration, ICDR Case No. 01-15-0002-80-61, dated February 11, 2016, at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

34. While the *Despegar* IRP was pending, the claimants in that case added a claim that HTLD’s application should be rejected because individuals associated with HTLD allegedly exploited the privacy configuration of ICANN’s new gTLD applicant portal to access confidential data of other applications, including data of the other applicants for the .HOTEL (the “Portal Configuration issue”).²⁵
35. The IRP panel in the *Despegar* IRP Declaration declared ICANN to be the prevailing party,²⁶ stating:

“Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIOP [Documentary Information Disclosure Policy] Process in rejecting the Claimants' DIOP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.”²⁷

36. As to the CPE process, the *Despegar* IRP panel observed that

“Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by EIU in considering community based applications, and the provisions of the Guidebook. However, *the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.*

Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.”²⁸

37. While recognizing that the New gTLD Program was near its end and that “there is little or nothing that ICANN can do now,” the IRP panel recommended that a system should be put in place to ensure that CPE evaluations are conducted “on a consistent and

²⁵ In February 2015, ICANN discovered that the privacy settings for the new gTLD applicant and related portals had been misconfigured, which resulted in authorized users of the portals (New gTLD Program applicants and new gTLD registry operators) being able to see information belonging to other users without permission. See Portal Configuration Notice (<https://www.icann.org/news/announcement-2015-03-01-en>); New gTLD Applicant and GDD Portals Q&A (<https://www.icann.org/en/system/files/files/new-gtld-applicant-portal-qa-rysg-20aug15-en.pdf>).

²⁶ *Despegar* IRP Declaration, ¶ 154.

²⁷ *Id.*, ¶ 155.

²⁸ *Id.*, ¶¶ 143-144 (italics added).

predictable basis by different individual evaluators,”²⁹ and that ICANN's core values “flow through...to entities such as the EIU.”³⁰

38. With respect to the Portal Configuration issue, the *Despegar* IRP panel found that “serious allegations”³¹ had been made and that the “approach taken by the ICANN Board *so far* in relation to this issue does not, in the view of the Panel, comply with [Article III(1) of ICANN’s Bylaws]”³² in effect at that time, providing that “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.”³³ However, the *Despegar* IRP panel also noted that “at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board,”³⁴ and that ICANN “also gave an undertaking... that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.”³⁵ The *Despegar* IRP panel thus declined to make a finding on the Portal Configuration issue, indicating “that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.”³⁶
39. On March 10, 2016, ICANN’s Board (the “Board”) accepted the findings in the *Despegar* IRP Declaration and directed, among other things, that ICANN:
- (i) “ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations” and
 - (ii) “complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation.”³⁷

²⁹ Id., ¶ 147.

³⁰ Id., ¶ 150.

³¹ Id., ¶ 131.

³² Id., ¶ 134 (italics added).

³³ ICANN Bylaws, Art. III.1, as amended July 30, 2014.

³⁴ *Despegar* IRP Declaration, ¶ 135.

³⁵ Id., ¶ 137.

³⁶ Id., ¶ 138.

³⁷ ICANN Board Resolutions 2016.03.10.10 –2016.03.10.11, at <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

40. ICANN conducted a forensic investigation of the Portal Configuration issues and the related allegations by the *Despegar* IRP claimants. ICANN’s Portal Configuration investigation found, among other things, that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted between March and October 2014 using a limited set of user credentials issued to Dirk Krischenowski, Katrin Ohlmer and Oliver Süme.³⁸
41. On August 9, 2016, the Board passed two resolutions (“August 2016 Resolutions”) concluding, among other things, that the cancellation of HTLD’s .HOTEL application was not warranted, and directing ICANN to move forward with processing HTLD’s application.³⁹ In particular, the Board concluded that “ICANN has not uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD’s application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s application to prevail in CPE.”⁴⁰
42. Request 16-11: On August 25, 2016, Claimants submitted a Reconsideration Request 16-11 seeking reconsideration of, among other things, the August 2016 Resolutions.⁴¹ Request 16-11 claimed, among other things, that ICANN violated its Articles, Bylaws and policies “by giving undue priority to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.”⁴² Request 16-11 was placed on hold by ICANN for more than a year while a review was conducted of the CPE process and the related interactions of ICANN’s staff with the CPE provider.

³⁸ ICANN’s IRP Response, ¶ 24. See Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>); ICANN Board Resolutions 2016.08.09.14 –2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

³⁹ ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (“August 2016 Resolutions”), at <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en>.

⁴⁰ Id.

⁴¹ Reconsideration Request 16-11 (“Request 16-11”), dated August 25, 2016, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

⁴² Id.

43. On January 27, 2019, the Board accepted the Board Accountability Mechanisms Committee’s (“BAMC”) recommendation to deny Request 16-11 (“January 2019 Resolution”).⁴³ While Claimants in Request 16-11 had requested reconsideration of the Board’s August 2016 Resolutions concerning the Portal Configuration issues because ICANN had allegedly failed to properly investigate those issues, the January 2019 Resolution found that the Board had adopted August 2016 Resolutions after considering all material information and without reliance on false or inaccurate material information.⁴⁴ Further, the January 2019 Resolution found that any claims with respect to the *Despegar* IRP Declaration were time-barred, or alternatively, that statements made by one IRP panel (e.g., in the *Dot Registry* IRP Declaration) cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP.⁴⁵
44. Request 16-11 and the Board’s January 2019 Resolution 11 are discussed in detail in Part VI, Section B(2)(a) below.
45. Request 18-6: While Request 16-11 was pending, in September 2016 the Board directed ICANN “to undertake an independent review of the process by which ICANN staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider”⁴⁶ The BGC further determined that the review should include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report; and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (“CPE Process Review”).⁴⁷ FTI’s Global Risk and Investigations Practice and Technology Practice were retained by counsel for ICANN to conduct the CPE Process Review.⁴⁸ Meanwhile, the BGC also decided that pending Reconsideration Requests

⁴³ Ex. R-29; ICANN Board Resolution 2019.01.27.23 (“January 2019 Resolution”), § 2(f), at <https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f.rationale>.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ ICANN Board Resolution 2016.09.17.01, at <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

⁴⁷ See <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁴⁸ See Recommendation of BAMC dated June 14, 2018, at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf>.

relating to CPEs, including Request 16-11, would be placed on hold until the CPE Process Review was completed.⁴⁹

46. On December 13, 2017, ICANN published three reports on the CPE Process Review (“CPE Process Review Reports”).⁵⁰ On March 15, 2018, the Board passed several resolutions (“March 2018 Resolutions”), which accepted the findings in the CPE Process Review Reports; declared the CPE Process Review complete; concluded that there would be no overhaul or change to the CPE process for the current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.⁵¹
47. On April 14, 2018, several of the applicants for .HOTEL submitted Request 18-6, challenging the Board’s March 2018 Resolutions.⁵²
48. On May 19, 2018, Request 18-6 was sent to the Ombudsman for review and consideration. The Ombudsman recused himself from this matter on May 23, 2018 pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.⁵³
49. On July 18, 2018, the Board denied Request 18-6 (“July 2018 Resolution”), concluding that the Board considered all material information and that the Board’s March 2018 Resolutions concerning the CPE Process Reviews are consistent with ICANN’s mission, commitments, core values, and policies.⁵⁴
50. Request 18-6 and the Board’s July 2018 Resolution are discussed in detail in Part VI, Section B(2)(b) below.

⁴⁹ BGC Letter dated April 26, 2017, at <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn), 14-32 (.INC) (withdrawn), 14-33 (.LLP) (withdrawn), 16- 3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁵⁰ See <https://www.icann.org/news/announcement-2017-12-13-en>.

⁵¹ ICANN Board Resolutions 2018.03.15.08 - 2018.03.15.11, at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁵² Request 18-6, dated April 14, 2018, at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

⁵³ See Ex. R-37 (email chain of ICANN’s request to ICANN’s Ombudsman Herb Waye and Mr. Waye’s response dated May 23, 2018), at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

⁵⁴ ICANN Board Resolution 2018.07.18.09, at <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g> (“July 2018 Resolution”).

B. Overview of Claimants' IRP Claims and ICANN's Responses

51. The standards for granting interim measures of protection under Rule 10 of the Interim Supplementary Procedures (discussed in Parts V and VI below) require that a claimant establish, *inter alia*, a “likelihood of success on the merits” or “sufficiently serious questions related to the merits.” Both parties refer to their submissions in the underlying IRP case,⁵⁵ including Claimants' IRP Request, ICANN's IRP Response, and the respective accompanying exhibits, all of which were provided to the Emergency Panelist. Moreover, the issues in the underlying IRP were discussed at the June 3rd Hearing. As a preliminary point, the Emergency Panelist acknowledges ICANN's arguments that Claimants' briefs in support of their request for interim measures give meagre attention to the underlying merits of this IRP. Claimants argued that there needs to be further briefing and discovery, which would take place in the main IRP proceedings.⁵⁶ However, the materials, submissions and arguments presented to the Emergency Panelist, including those submissions in the underlying IRP and those targeted to Claimants' request for interim measures, are sufficient to enable the Emergency Panelist to apply the standards of Rule 10.
52. A summary of the parties' claims and arguments in the IRP is provided below.

1) Claimants' Submissions

53. Claimant's IRP Request states that the following issues must be substantively reviewed: (i) “ICANN subversion of the .HOTEL CPE and first IRP (*Despegar*)”; (ii) “ICANN subversion of FTI's CPE Process Review”; (iii) “ICANN subversion of investigation into HTLD theft of trade secrets”; and (iv) “ICANN allowing a domain registry conglomerate to takeover the ‘community-based’ applicant HTLD.”⁵⁷ Claimants make references to Request 16-11 and Request 18-6 in their IRP Request and briefs, and confirmed during the June 3rd Hearing that their focus is on these Reconsideration Requests, and on the Board's action (or failure to act)

⁵⁵ See Claimants Reply, p. 11 (“Claimants' rely upon their IRP Complaint and the voluminous evidence presented thus far, to raise sufficient questions in this IRP to permit the interim relief that they request”); Claimants' Slide Deck, slides 5-8; ICANN Opposition, ¶ 23 (“As discussed in detail in ICANN's IRP Response, dated 3 February 2020, Claimants literally ignore the key question in this IRP: were any of the Board's actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? As set forth in the ICANN's IRP Response, the answer is a categorical ‘no’.”); ICANN's Slide Deck, slides 8-15.

⁵⁶ June 3rd Hearing, audio transcript (2:11:30 – 2:12:50; 2:17:12 – 2:17:27).

⁵⁷ IRP Request, p. 4.

in accepting the BAMC's recommendations concerning these requests.⁵⁸ The allegations in Claimants' IRP Request align, at least in large part (excluding (iv) concerning the sale of HTLD to Afiliás), with issues addressed in the Board's July 2018 Resolution and January 2019 Resolution, accepting the BAMC's recommendations in each case and denying, respectively, Claimants' Request 18-6 and Request 16-11.

54. Claimants also submit that they should be entitled to Ombudsman review of Request 16-11 and Request 18-6 as called for in the Bylaws,⁵⁹ that "ICANN should get an IRP Standing Panel and Rules of Procedure in place, after six years of minimal progress since required by the Bylaws," and that "ICANN should be forced to preserve and produce CPE documents as they produced in the *Dot Registry* IRP, and other documents re [sic] the CPE Process Review, Portal Configuration investigation and Afiliás deal. Only then can Claimants fairly address the BAMC's arguments."⁶⁰ These last points are also the subject of Claimants' request for interim relief.

55. Claimants have stated the following specific claims in their IRP Request:

(a) Claimants seek review of whether ICANN had undue influence over the EIU with respect to EIU's CPE decisions, and over FTI with respect to the CPE Process Review, alleging that (i) ICANN's and EIU's communications are critical to this inquiry, but have been kept secret; (ii) the *Dot Registry* IRP Declaration and FTI's report reveal a lack of independence of the EIU, and relevant documents have not been disclosed; and (iii) ICANN materially misled Claimants and the *Despegar* IRP panel in relation to these issues, (iv) that the Board has failed to meet Bylaws obligations of transparency, due diligence upon reasonable investigation, and independent judgment by not requiring disclosure of relevant documents to Claimants to provide opportunity for any meaningful review by this IRP Panel and Claimants.⁶¹

(b) Claimants seek review whether they were discriminated against in violation of Bylaws, as ICANN allegedly reconsidered other CPE results but not those for the .HOTEL. Claimants

⁵⁸ June 3rd Hearing, audio transcript (2:14:20 – 2:15:05).

⁵⁹ Id., pp. 4 & 12.

⁶⁰ Id., p. 4.

⁶¹ IRP Request, pp. 12-21.

allege the Board addressed the violations of its Bylaws in the CPE for *Dot Registry*, but not for Claimants. Claimants request that ICANN be required to take the necessary steps to ensure a meaningful review of the CPE regarding .HOTEL, and of the Claimants' RFRs – at least to ensure consistency of approach with ICANN's handling of the *Dot Registry* IRP case.⁶²

(c) Claimants seek review of ICANN's Portal Configuration investigation and refusal to penalize HTLD's willful accessing of Claimants' confidential, trade secret information. Claimants contend, among other things, that the alleged misdeeds of a major shareholder or other decision makers should be imputed to their closely held corporation, and this argument supports imputing to HTLD the actions of those persons affiliated with HTLD who accessed Claimants' private trade secret data. Claimants allege ICANN refused to produce key information underlying its reported conclusions in the investigation, and it violates the duty of transparency to withhold them. Claimants claim the Board action to ignore such facts and law is also violation of Bylaws. At minimum, Claimants contend the circumstances require further discovery in this IRP of all documents concerning ICANN's Portal Configuration investigation of the data breach. Further, to extent the BAMC and/or Board failed to have such information before deciding to ignore HTLD's breach, that violated their duty of due diligence upon reasonable investigation, and their duty of independent judgment.⁶³

(d) Claimants seek review of ICANN's decision to approve the sale of HTLD, the .HOTEL community-based applicant, to Afilias, a domain registry conglomerate (operating no less than 25 TLDs including .INFO, .GLOBAL, .ASIA, .VEGAS and .ADULT), without requiring Afilias to satisfy a new CPE nor make any promises regarding the community. Claimants contend HTLD is no longer the same company that applied for the .HOTEL; instead, it is now a registry conglomerate with no ties to the purported, contrived community that it claims to serve.⁶⁴

⁶² Id., pp. 21-24.

⁶³ Id., pp. 24-26.

⁶⁴ Id., pp. 26-28.

56. Claimants aver that HTLD's .HOTEL application should be denied, or at least its Community Priority relinquished, as a consequence not only for HTLD's alleged spying on competitors' secret information, but also because HTLD is no longer the same company that applied for the .HOTEL gTLD. Claimants requests the following relief in the IRP:

- grant the interim measures of protection sought by Claimants;
- order appropriate discovery from ICANN;
- independently review ICANN's actions and inactions as set out in Claimants' IM Request;
- render a Final Declaration that ICANN has violated its Bylaws; and
- require that ICANN provide appropriate remedial relief.⁶⁵

2) ICANN's Submissions

57. ICANN has submitted the following contentions in opposition to Claimants' IRP Request:

- (a) ICANN states that this IRP proceeding calls for a determination of whether ICANN complied with its Articles, Bylaws and internal policies and procedures in evaluating Claimants' Reconsideration Requests concerning HTLD's community-based application to operate the .HOTEL gTLD.⁶⁶ ICANN argues that Claimants want to force an auction for control of .HOTEL, even though HTLD's application properly prevailed under the terms of the Guidebook.⁶⁷
- (b) ICANN contends that Claimants' arguments suffer from a systemic problem – they do not identify what was wrong with the BAMC's Recommendations or the Board's actions on Request 16-11 and Request 18-6. ICANN claims that Claimants ignore the key question: were any of the Board's actions on Request 16-11 and Request 18-6 inconsistent with the Articles, Bylaws or Guidebook?⁶⁸

⁶⁵ Id., p. 28.

⁶⁶ ICANN's IRP Response, ¶ 3.

⁶⁷ Id., ¶ 4.

⁶⁸ Id., ¶ 38.

- (c) ICANN contends that the Board's actions on Request 16-11 complied with ICANN's Articles, Bylaws and established policies and procedures, which is why Claimants are attempting to re-litigate time-barred disputes and cast unfounded aspersions on ICANN.
- (d) ICANN contends that Claimants requests for an Ombudsman to be assigned in relation to Request 16-11 and 18-6 are untimely and baseless. While Claimants seek Ombudsman review of the BAMC's decision on Request 16-11, ICANN contends that neither the current Bylaws nor the Bylaws that governed Request 16-11 require the Ombudsman to review BAMC recommendations on RFRs. Further, the Ombudsman does not investigate complaints that are simultaneously being addressed by one of the other formal accountability mechanisms.⁶⁹ In addition, the Bylaws in effect when the BAMC and Board acted on Request 18-6, which are the same Bylaws in effect today in all relevant aspects, did not require the Ombudsman to review the BAMC's recommendation or the Board's action, and the Ombudsman does not investigate complaints subject to other pending accountability mechanisms, such as this IRP.⁷⁰ The issues concerning appointment of an Ombudsman for Request 16-11 and 18-6 are subject to Claimants' request for interim measures of protection, addressed below.
- (e) ICANN states that Claimants' challenge to the Board's resolutions accepting the *Despegar* IRP Declaration is untimely and lacks merit. Claimants' challenge to the Board's action accepting the *Despegar* IRP Declaration was untimely when Claimants submitted Request 16-11. Further, ICANN contends that Claimants have not identified any incorrect statement or conclusion regarding the *Despegar* IRP issues in the Board's denial of (or the BAMC's Recommendation to deny) Request 16-11. As to Claimants' argument that ICANN should have produced the documents Claimants sought in the *Despegar* IRP because they were the same documents ultimately produced in the *Dot Registry* IRP, ICANN states that the key difference is that the panel in the *Dot Registry* IRP ordered ICANN to produce the requested documents, while the panel in the *Despegar* IRP did not.⁷¹

⁶⁹ Id., ¶¶ 40-41.

⁷⁰ Id., ¶ 63.

⁷¹ Id., ¶¶ 42-49.

- (f) ICANN contends it did not discriminate against Claimants by reviewing other CPE results but not reviewing the .HOTEL CPE result. While Claimants suggest this was a violation of ICANN's commitment to make decisions by applying documented policies consistently without singling out any particular party for discriminatory treatment, ICANN responds that Claimants are not similarly situated to the *Dot Registry* IRP claimants. ICANN evaluated the different circumstances of the cases and acted differently according to those circumstances, including that the *Dot Registry* IRP panel found in favor of the claimant there, while the panel in the *Despegar* IRP did not.⁷²
- (g) ICANN contends that it handled the Portal Configuration investigation and consequences in a manner fully consistent with the Articles, Bylaws, and established policies and procedures. The Portal Configuration investigation shows that ICANN investigated the issues with efficiency, operating with transparency by providing regular updates to the public.⁷³
- (h) ICANN claims that the Board's action on Request 18-6 complied with ICANN's Articles, Bylaws and established policies and procedures. ICANN states that while Claimants argue ICANN should have reconsidered Board resolutions concerning the CPE Review because FTI was unable to review the EIU's internal correspondence, Claimants do not challenge any of the Board's (or BAMC's) conclusions in response to Request 18-6. Further, while ICANN did not produce documents in response to Claimants' document request in the *Despegar* IRP, ICANN has been contractually barred from disclosing these documents and no Article, Bylaws provision, policy or procedure requires ICANN to breach its contractual duties. Further, contrary to the *dicta* in the *Dot Registry* IRP Declaration, the EIU affirmed that it never changed the scoring or results of a CPE based on ICANN's comments, and FTI concluded that ICANN (i) never questioned or sought to alter the EIU conclusions; and (ii) never dictated that the EIU take a specific approach to a CPE. Moreover, the Board was entitled to accept FTI's conclusion that it had sufficient information for its review. Finally, Claimants' requests for FTI and EIU documents are premature.⁷⁴

⁷² Id., ¶¶ 50-57.

⁷³ Id., ¶¶ 58-61.

⁷⁴ Id., ¶¶ 62-78.

- (i) ICANN contends that the challenges to ICANN’s inaction concerning HTLD’s ownership are untimely and without merit. These claims are time-barred as Claimants waited for over three years before bringing them; and they are meritless because no Article, Bylaws provision, or policy required the Board to approve the transaction or to submit it for public comment.⁷⁵
- (j) ICANN submitted a chart (see Part VI, Section B(1) below) in response to the Emergency Panelist’s request, in which it acknowledged that challenges to the Board’s decisions to deny Request 16-11 and Request 18-6 are timely, but claimed that Claimants’ challenges to the following points are untimely: (a) that ICANN should re-evaluate the HTLD CPE result; (b) that ICANN’s Board should not have accepted the *Despegar* IRP Declaration; (c) that ICANN should have taken action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration; (d) that the Ombudsman should have reviewed Request 16-11 and Request 18-6, respectively. Further, ICANN indicated in the chart that Claimants’ request that ICANN should produce FTI’s and the CPE Provider’s (EIU) documents is premature.

IV. CLAIMANTS’ REQUESTED INTERIM MEASURES OF PROTECTION

58. Claimants in their IM Request have requested (i) as a preliminary matter, that the ICDR must recuse itself due to an alleged conflict of interest, and (ii) *six* interim measures of protection. Claimants demands can be grouped into *three* categories as to which it appears that the requests in categories I and III raise issues of first impression, in that this type of relief has never before been requested in other IRPs or by means of interim relief:
59. **I – Request ICDR’s recusal due to alleged conflict of interest:**
- (i) Claimants object to the ICDR’s administrative role in this IRP, alleging a conflict of interest, and request that the “ICDR must therefore recuse itself, and the parties must agree upon another forum for adjudication of this request.”⁷⁶ At minimum, Claimants

⁷⁵ Id., ¶¶ 79-88.

⁷⁶ Claimants’ Brief, p.7.

request that the ICDR and ICANN must “fully disclose the terms of their financial relationship”⁷⁷ so that the issue can be properly considered and resolved.

60. **II – Request protective measures for the main IRP proceedings:**

Claimants request that ICANN be required:

- (ii) to “not change the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP”⁷⁸;
- (iii) to “preserve, and direct HTLD, EIU, FTI and Afiliias to preserve, all potentially relevant information for review”⁷⁹ in this IRP;

61. **III – Request that ICANN be ordered to implement procedural rights as allegedly required by ICANN’s Bylaws:**

Claimants request that ICANN be required:

- (iv) to “appoint an independent ombudsman to review the BAMC’s decisions in RFRs 16-11 and 18-6”,⁸⁰
- (v) to “appoint and train a Standing Panel of at least seven members as defined in the Bylaws and [Interim Supplementary Procedures], from which any IRP Panel shall be selected...and to which Claimants might appeal, *en banc*, any IRP Panel Decisions per Section 14 of the [Interim Supplementary Procedures]”;⁸¹
- (vi) to “adopt final Rules of Procedure”;⁸² and
- (vii) to “pay all costs of the Emergency Panel and of the IRP Panelists.”⁸³

V. STANDARDS FOR REVIEW

62. The Interim Supplementary Procedures, as adopted on October 25, 2018, provide in their introductory paragraph that “[t]hese procedures apply to all independent review process

⁷⁷ Id., p.5.

⁷⁸ Id., p.7.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id.

proceedings filed after 1 May 2018.” Further, these procedures, in Rule 2 (Scope), provide in relevant part that

“[i]n the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.”

63. Claimants filed their IRP Request on December 19, 2019. At that time, the Interim Supplementary Procedures of October 25, 2018 were in effect – they apply to the proceedings in this IRP, including Claimants’ request for interim measures of protection.
64. The applicable Articles for purposes of this IRP are ICANN’s current Articles, as approved by the Board’s on August 9, 2016, and filed with the California Secretary of State on October 3, 2016. The Articles provide in Article III, as follows:

“The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.”

65. The applicable Bylaws for this IRP – necessary to consider, *inter alia*, the merits of Claimants’ substantive claims in this IRP (e.g., whether the Board’s action or failure to act breached any Articles, Bylaws or other policies or commitments in effect at the relevant time) as directed by Rule 10 of the Interim Supplementary Procedures (discussed below) – may be determined by reference to the date on which Claimants submitted their challenges to ICANN’s Board decisions (e.g., through Reconsideration Requests). For example, issues related to Request 16-11 are assessed under ICANN’s Bylaws of February 11, 2016 in effect at the time when Request 16-11 was submitted in August 2016. Similarly, ICANN’s Bylaws of July 22, 2017 were in effect when Claimants submitted Request 18-6 in April 2018. Questions concerning whether Claimants’ IRP claims are timely are also considered, for purposes of completeness, under both the Bylaws and the Interim Supplementary Procedures, in effect for this case.

66. The standards for assessing whether to grant interim measures of protection in an IRP are set out expressly in Rule 10 of the Interim Supplementary Procedures and in the ICANN Bylaws.⁸⁴ The parties agree that Rule 10 applies,⁸⁵ although Claimants – by referencing *interchangeably* the words “harm” and “hardships” from the Rule 10 standard in their briefing and by citing several previous IRP cases where interim relief was sought – at times assert standards that might not be fully consistent with the current Rule 10 standards. The Emergency Panelist confirms, in any event, that in accordance with Rule 2 of the Interim Supplementary Procedures,⁸⁶ the standards set forth in Rule 10 apply.

67. Rule 10 provides in relevant part as follows:

“10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief.^[87] Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

⁸⁴ The standard for interim relief provided in Rule 10 of the Interim Supplementary Procedures is identical to the standard in ICANN’s Bylaws, Art. IV, § 4.3(p), as amended November 28, 2019. This standard was first implemented in ICANN’s Bylaws dated October 1, 2016.

⁸⁵ Claimants’ IM Request, p. 4 (as stated in their IM Request, “Claimants respectfully seek Interim Measures of Protection pursuant to Section 10 [Rule 10] of the Interim Rules [Interim Supplementary Procedures]”); ICANN’s Opposition, ¶ 18.

⁸⁶ Interim Supplementary Procedures, Rule 2 (“These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.”)

⁸⁷ “Emergency Panelist” is defined in Rule 1 of the Interim Supplementary Procedures as follows:

“EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).”

- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.”

68. Rule 5 of the Interim Supplementary Procedures provides that “[i]n the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief..., the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.”

69. Rule 11 of the Interim Supplementary Procedures⁸⁸ provides further general guidance on the standards to be applied, stating in relevant part:

“11. Standard of Review

Each IRP PANEL shall conduct an objective, *de novo* examination of the DISPUTE⁸⁹].

- a. With respect to COVERED ACTIONS⁹⁰], the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN’S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN’s Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. . . . ”

⁸⁸ Rule 11 of the Interim Supplementary Procedures matches the language in ICANN’s Bylaws, Art. IV, § 4.3(i).

⁸⁹ "Disputes" are defined to including the following relevant circumstances:

“(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

- (1) exceeded the scope of the Mission;
 - (2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
 - (3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
 - (4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- ”

Bylaws, Art. IV, § 4.3(b)(iii).

⁹⁰ "Covered Actions" are defined as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.” Bylaws, Art. IV, § 4.3(b)(ii).

70. Finally, the ICDR Rules, Article 6 (Emergency Measures of Protection), section (5) provides in relevant part that

“The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.”

71. In view of Article 6(5), it is clear that this Decision of the Emergency Panelist concerning interim relief can be reconsidered, modified or vacated by the IRP Panel, and does not resolve the merits to be fully addressed by the Panel. For any request for interim relief that is denied by the Emergency Panelist, Claimants may renew their request and present their full case on the merits to the IRP Panel.

VI. DISCUSSION AND ANALYSIS

72. This Part addresses first whether the ICDR should be ordered to recuse itself in this case due to an alleged conflict of interest (Section A). After addressing that preliminary issue, the Emergency Panelist turns to assess whether Claimants have satisfied the second element in the standard for interim measures under Rule 10 of the Interim Supplementary Procedures (Section B). The section then addresses the parties’ submissions on each of the issues for which Claimants request interim measures of protection, with the Emergency Panelist’s analysis under the first and third elements of Rule 10 and a decision on each issue (Section C).

A. Request for ICDR’s Recusal Due to Alleged Conflict of Interest

73. Claimants object to the ICDR’s role in this IRP, alleging a conflict of interest and requesting that the “ICDR must therefore recuse itself, and the parties must agree upon another forum for adjudication of this request.”⁹¹ At minimum, Claimants request that the ICDR and ICANN must “fully disclose the terms of their financial relationship”⁹² so that the issue can be properly considered and resolved.

⁹¹ Claimants’ IM Request, p. 4; Claimants’ Brief, p.7.

⁹² Claimants’ Brief, p.5.

74. Claimants contend that ICDR has a financial conflict of interest as to this request for interim measures, or, at minimum, there is an *apparent* conflict because ICDR is the sole provider of IRP services to ICANN.⁹³ Claimants maintain that if an IRP Standing Panel is created, the ICDR could lose cases and fees that it otherwise would maintain. Claimants allege that ICDR will face competition for its role as facilitator of the new Standing Panel.⁹⁴ That conflict must be subject to proper disclosure.⁹⁵
75. Claimants further contend that each case generates initial filing fees for the ICDR, and the New gTLD Program is expected to expand in coming years, with a proportionate share of additional disputes reasonably expected to arise. Claimants argue that this should be enough of a “significant financial interest,” under the IBA Guidelines (see below), to raise justifiable doubts as to the ICDR’s impartiality and independence as to Claimants’ demand for the immediate imposition of the Standing Panel. Claimants also state that ICANN’s Bylaws regarding Conflicts of Interest, Article IV, § 4.3(q)(ii), require: “(ii) The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.”⁹⁶ Moreover, Claimants contend that the ICDR has demonstrated bias in favor of ICANN specifically with respect to Claimants’ request for interim measures in this case and presumably in other cases. Claimants explain that typically in IRP proceedings, the ICDR requires the parties make equal monetary deposits to secure the IRP panelists’ time. However, with respect to requests for interim measures, ICDR requires that claimants pay 100% of the deposit and ICANN to pay nothing.
76. Claimants, in emails to the ICDR case administrator in this IRP (dated March 24, 2020 and March 31, 2020), challenged the ICDR on this approach and asked for clarification of what “ICDR procedure” requires that the filing party must submit the full initial deposit for an Emergency Panelist.⁹⁷ The ICDR replied by email dated April 1, 2020 as follows:

“The procedure to bill the entire deposit for emergency arbitrator compensation to the party filing an emergent relief application is an internal, universal policy of the ICDR. It was developed after many years of processing emergency applications in an effort to

⁹³ Claimants’ IM Request, p. 2.

⁹⁴ Claimants Brief, p. 3.

⁹⁵ Claimants’ IM Request, p. 2.

⁹⁶ Claimants’ Brief, pp. 5-6.

⁹⁷ Ex. E.

insure payment of the emergency arbitrator. As this policy was implemented post-2014 it is not currently outlined in the rules but it will be addressed in our next revision. It is not specific in any way to IRP cases but applies to all commercial disputes involving an emergency application that the ICDR manages under its rules.

ICANN was not involved in any way with our discussions and decisions surrounding the implementation of this policy.”⁹⁸

77. Claimants cite to the IBA Guidelines on Conflicts of Interest in International Arbitration.⁹⁹ Claimants contend the Guidelines are applicable to this situation, and should be deemed authoritative. General Standard 2(a) provides: “An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.” General Standard 2(c) provides an objective “reasonable person” test to analyze such conflicts. General Standard 2(d) further provides: “Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence in any of the situations described in the Non-Waivable Red List.” That list includes in paragraph 1.3: “The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.”¹⁰⁰ General Standard 3(a) provides: “If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties,... prior to accepting his or her appointment.” Further, General Standard 3(d) provides: “Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.” Finally, Claimants contend that General Standard 5(b) provides that ICDR as administrator is bound by the same rules as set forth above, and “it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected.” Claimants thus request that ICDR and ICANN disclose the terms of their financial relationship, particularly as it relates to ICANN activities to create the IRP Standing Panel that has been required by ICANN’s Bylaws.¹⁰¹ At the June 3rd hearing, Claimants stated that the

⁹⁸ Id.

⁹⁹ IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by IBA Council in 2014 (“IBA Guidelines”), at file:///C:/Users/cgibson/AppData/Local/Temp/IBAGuidelinesonConflictOfInterest2014.pdf.

¹⁰⁰ IBA Guidelines, Non-Waivable Red List, ¶1.3.

¹⁰¹ Claimants claims they are entitled to see all contracts between ICANN and ICDR, as well as a summary of payments made by ICANN to ICDR each year since inception of the relationship. In addition, Claimants claims they are entitled to see all correspondence between ICANN and ICDR relating to the Standing Panel.

analysis of conflict of interest for an administrator such as the ICDR is the same as that for an arbitrator.¹⁰²

78. ICANN, on the other hand, contends that nothing in the ICDR's actions as the IRP Provider in this proceeding demonstrates a violation of ICANN's Bylaws or a conflict of interest. According to ICANN, Claimants misunderstand ICDR's role in this proceeding and its relation to the IRP Standing Panel. ICANN claims that (i) the ICDR is not "adjudicating" this request for interim relief; instead, the ICDR has an administrative function; (ii) the fact that a Standing Panel will be established will not automatically revoke the ICDR's position as the IRP Provider; (iii) the ICDR has no financial interest in selecting panelists – it receives no portion of the panelist fees and its only revenue comes from administrative fees, which any other dispute resolution provider would also charge; (iv) the Bylaws direct the IRP Provider to "function independently from ICANN";¹⁰³ (v) Claimants' challenge ignores explicit provisions in the Bylaws directing the administration of the IRP in this manner until the IRP Standing Panel is established;¹⁰⁴ (vi) pursuant to the ICDR's longstanding policy (which applies to all cases administered by the ICDR and not just to IRPs), the ICDR requires the party requesting emergency relief to pay the initial deposit for the emergency arbitrator, and this does not demonstrate any bias toward ICANN; (vii) the ICDR has already disclosed the terms of its financial relationship with ICANN – that is, the only revenues the ICDR receives from IRP proceedings are the standard filing fees for non-monetary claims; and (viii) in light of this last point, Claimants already have the relief they seek (disclosure). ICANN also contends that the IBA Guidelines are not referenced in ICANN's Bylaws, the Interim Supplementary Procedures or the ICDR Rules, and therefore there is no basis to enforce the IBA Guidelines here.¹⁰⁵
79. The Emergency Panelist observes, as an initial matter, that Claimants challenge against the ICDR does not prevent the ICDR from administering this case. Rule 2 of the Interim Supplementary Procedures provides that the "Interim Supplementary Procedures, *in addition to the ICDR RULES*," apply "in all cases submitted to the ICDR in connection with Article 4,

¹⁰² June 3rd Hearing, audio transcript (8:40 – 8:50).

¹⁰³ ICANN Bylaws, Art. 4, § 4.3(m).

¹⁰⁴ *Id.*, Art. 4, § 4.3(k)(ii) (IRP Panel); *id.* § 4.3(p) (Emergency Panelist).

¹⁰⁵ June 3rd Hearing, audio transcript (54:45 – 55:20).

Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect.” The ICDR Rules, in turn, in Article 19.4 provide in relevant part:

“Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator [ICDR] from proceeding with administration and shall be referred to the tribunal for determination once constituted.”

80. The Emergency Panelist finds that the ICDR has not been compromised in its role as administrator of this IRP, even in view of Claimants’ interim relief request that ICANN be ordered to appoint the IRP Standing Panel. As indicated by Article 19.4, the Emergency Panelist, not the ICDR, will rule on issues directed to jurisdiction in this case, including whether the ICDR can administer this IRP. Moreover, the Emergency Panelist, not the ICDR, will determine whether or not to grant Claimants’ interim relief request that ICANN be ordered to appoint the IRP Panel.¹⁰⁶
81. Furthermore, the Emergency Panelist recognizes that the ICDR “has been designated and approved by ICANN’s Board of Directors as the IRP Provider...under Article 4, Section 4.3 of ICANN’s Bylaws.”¹⁰⁷ This designation has not been withdrawn, even while the process is underway for the appointment of members of the IRP Standing Panel. The Emergency Panelist finds that the ICDR meets or exceeds the standard set forth in the current Bylaws that “[a]ll IRP proceedings shall be administered by a well-respected international dispute resolution provider (‘IRP Provider’).”¹⁰⁸ The Bylaws require that the ICDR, as the IRP Provider, “shall function independently from ICANN”¹⁰⁹ Claimants have not provided any evidence that the ICDR has failed to act independently in its administration functions. In addition, ICANN’s Bylaws, in the Conflict of Interest provision for IRPs, Article IV, § 4.3(q)(ii), provide:

¹⁰⁶ The Emergency Panelist also notes that to the extent Claimants’ challenge against the ICDR can be considered an indirect challenge to the jurisdiction of the Emergency Panelist (appointed by the ICDR under the ICDR Rules), the Emergency Panelist refers to the ICDR Rules, Art. 19.1 providing that:

The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s)....”

¹⁰⁷ See Interim Supplementary Procedures, Rule 1 (Definitions): “ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the IRP Provider (IRPP) under Art. 4, Section 4.3 of ICANN’s Bylaws.”

¹⁰⁸ Bylaws, Art. 4, § 4.3(m)(i).

¹⁰⁹ ICANN Bylaws, Art. 4, § 4.3(m).

“The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.”¹¹⁰

82. Here, the ICDR, when requested by Claimants, disclosed the relevant information concerning its relationship with ICANN, the source of any revenue received by the ICDR in connection with IRP cases, and the basis for requesting that Claimants pay the full deposit for the Emergency Panelist’s fees. The ICDR case administrator, in an email dated March 20, 2020 stated:

“In furtherance to our email of February 28, 2020 and pursuant to our fee schedule found here, filing fees are paid by the party that brings a claim before the ICDR. Should a Respondent file a counterclaim, they would be responsible for the appropriate filing fees at the time of filing.

. . . .

The compensation and expenses for the Panelist are disclosed and set at the time of appointment. The ICDR will process invoices upon receipt and disburse payment to the Arbitrator from the deposits made by the parties. The itemized invoices will be available for the parties to view online through AAAWebfile. *The ICDR does not withhold or receive any portion of the compensation paid to the panelists. The ICDR’s only revenue is the amounts described in the above-reference fee schedule or possibly a room rental fee for a hearing conducted in one of our facilities.*

Lastly, in 2006, the ICDR was designated by ICANN as the Independent Review Panel Provider (IRPP) pursuant to their bylaws. *There were no payments made by ICANN to the ICDR in relation to this designation.*”

83. Regarding the approach taken by the ICDR requiring Claimants to pay the full deposit for the fees of the Emergency Panelist – discussed in Part VI, Section (C)(6) below, with ICANN changing its position and now committing to pay such fees – the ICDR case administrator, in an email dated April 1, 2020, stated:

“The procedure to bill the entire deposit for emergency arbitrator compensation to the party filing an emergent relief application is an internal, universal policy of the ICDR. It was developed after many years of processing emergency applications in an effort to insure payment of the emergency arbitrator. As this policy was implemented post-2014 it is not currently not outlined in the rules but it will be addressed it in our next revision. It is not specific in any way to IRP cases but applies to all commercial disputes involving an emergency application that the ICDR manages under its rules.

¹¹⁰ Claimants’ Brief, pp. 5-6.

ICANN was not involved in any way with our discussions and decisions surrounding the implementation of this policy.”¹¹¹

84. The role for the ICDR since its designation by the ICANN Board as the IRP Provider has not changed over the years, even as ICANN’s Bylaws have called for the establishment of an IRP Standing Panel. As ICANN has indicated, the appointment of a Standing Panel does not mean that IRP cases will no longer need to be administered by a dispute resolution provider, or that the ICDR will be replaced.¹¹² Moreover, the Interim Supplementary Procedures envisage circumstances where, if the Standing Panel is not in place *or even if it is in place*, the ICDR will have a role to play. For example, Rule 3 of the Interim Supplementary Procedures provides in relevant part:

“In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist.”

85. Claimants argue that, because their request for interim measures calls for the immediate appointment of the Standing Panel, the ICDR faces a conflict of interest and cannot administer this case. The Emergency Panelist disagrees. Here, the Emergency Panelist determines that Claimants have not demonstrated a conflict of interest or any bias on the part of the ICDR, and the ICDR has already provided Claimants disclosure of “any material relationship with ICANN” under Article IV, § 4.3(q)(ii). It appears from the evidence before the Emergency Panelist that – even if a Standing Panel is constituted in the near future – this will not alter the ICDR’s status as the IRP Provider. Any decision to consider whether to replace the ICDR would be the subject of a separate ICANN initiative, one that ICANN has not called for and that currently does not exist.

¹¹¹ Ex. E.

¹¹² ICANN cites to the transcript of a meeting of the IRP Implementation Oversight Team (“IRP-IOT”), a committee constituted to oversee the IRP. The Chair of the IRP-IOT explains that as to the IRP Provider and the Standing Panel, “the two are separate,” and even as a Standing Panel is appointed, “ICDR will stand and continue their administrative work throughout.” Ex. RE-9, pp. 13-14. Moreover, another committee member stated that after the 2016 Bylaw revisions, “there has not been a switch from the ICDR as the administrator.” Moreover, “[t]he existence of the [S]tanding [P]anel will not change the fact that all of the parties to an arbitration need an administrative force behind it.” *Id.*, p. 14. ICANN thus reports that the IRP-IOT discussed this issue with ICANN after the Board approved the October 2016 Bylaws revisions, but decided it was not necessary at that time “to change service providers.” ICANN’s Opposition, ¶ 65 (citing Ex. RE-9).

86. Finally, to the extent the IBA Rules might apply,¹¹³ the Emergency Panelist disagrees with Claimants contention that the analysis of conflict of interest for an administrator such as the ICDR is the same as that for an arbitrator. The provisions of the IBA rules cited by Claimants, with the exception of General Standard 5(b), refer to arbitrators, not to a dispute resolution administrative provider such the ICDR. In particular, General Standard 5 (Scope) confirms that “[t]hese Guidelines apply equally to tribunal chairs, sole arbitrator and co-arbitrators, howsoever appointed.” Further, General Standard 5(b), cited by Claimants, provides that

“Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.”

87. General Standard 5(b) does not apply to the ICDR in its role as the administrator of IRP cases, because the ICDR does not act as an “arbitral or administrative secretary” or “assistant” to IRP Panelists or to the Emergency Panelist.

88. All of this is not to say that there could never be circumstances indicating bias or conflict of interest on the part of an institution such as ICDR. However, in this case, the record establishes that the ICDR, in requesting from Claimants the payment of the full deposit for the Emergency Panelist fees, was following its standard practices for all commercial arbitration cases involving requests for interim relief – this is not evidence of bias. Further, as noted above, there is no indication that the ICDR will be removed from its role as the IRP Provider, even if a Standing Panel is ordered to be appointed. Finally, it is not for the ICDR to determine whether ICANN has violated its Bylaws by declining to pay the deposit for fees of the Emergency Panelist (although as discussed in Part VI, Section C(6) below, ICANN has changed its position on this issue).¹¹⁴

89. For all of the above reasons, the Emergency Panelist denies Claimants’ request that the ICDR be ordered to recuse itself from this IRP. As with the entirety of this Decision, this finding

¹¹³ The Emergency Panelist need not decide in this case whether the IBA Guidelines apply, and recognizes that neither the Bylaws, Interim Supplementary Procedures, nor ICDR Rules incorporate the IBA Guidelines. The Emergency Panelist does observe that ICANN’s Bylaws, Art. 4, § 4.3(n)(ii), indicate that the “Rules of Procedure shall be informed by international arbitration norms.”

¹¹⁴ See ICANN’s Bylaws, Art. 4, § 4.3(r) (“ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members.”).

does not bind the IRP Panel. The Emergency Panelist leaves Claimants to reassert this request in the main IRP proceedings, should Claimants wish to do so.

B. Sufficiently Serious Questions Related to the Merits

90. Rule 10 of the Interim Supplementary Procedures requires that “[i]nterim relief may *only* be provided if the EMERGENCY PANELIST determines that the Claimant has established *all* of the [three] factors” listed in Rule 10.¹¹⁵ As emphasized by ICANN at the June 3rd Hearing, the burden under this rule is on Claimant to satisfy these three factors. However, the second factor (ii) is expressed in the disjunctive: “(A) likelihood of success on the merits; *or* (B) sufficiently serious questions related to the merits.”¹¹⁶
91. Claimants at the June 3rd Hearing contended that the focus, at this point, should be on the standard set out in (B), “sufficiently serious questions related to the merits.”¹¹⁷ Claimants argue that a “detailed analysis of the merits is inappropriate at this stage of the proceeding” and “[s]ubstantive issues are for the full panel, not this Emergency Panel.”¹¹⁸ ICANN contends, on the other hand, that “an analysis of the merits is not just appropriate but essential.”¹¹⁹ The Emergency Panelist agrees with ICANN on this point. The Emergency Panelist must review the merits of the underlying IRP, at least to the extent necessary to determine whether Claimant has established that there are “sufficiently serious questions related to the merits.”
92. The Emergency Panelist will address the “sufficiently serious questions” issue first to determine if that standard is met; if it is not met, there is no need to evaluate each of Claimants’ individual requests for interim relief under factors (i) (“A harm for which there will be no adequate remedy in the absence of such relief”) and (iii) (“A balance of hardships tipping decidedly toward the party seeking relief”).

1) ICANN Alleges Time-Bar Against Some of Claimants’ IRP Claims

¹¹⁵ Interim Supplementary Procedures, Rule 10 (italics added).

¹¹⁶ *Id.* (italics added).

¹¹⁷ Claimants’ Slide Deck, slide 5 (“Claimants have raised ‘sufficient questions’”); June 3rd Hearing, audio transcript (2:13:45 – 2:13:60).

¹¹⁸ See Claimants’ Slide Deck, slides 3 & 5.

¹¹⁹ June 3rd Hearing, audio transcript (1:01:25 – 1:02:30).

93. ICANN contends that a number of Claimants’ IRP claims are time-barred and stressed at the June 3rd Hearing that this was an important point.¹²⁰ In doing so, ICANN has characterized and classified Claimants’ IRP claims, as listed in the chart in paragraph 94 below.¹²¹ Claimants during the June 3^d Hearing objected to ICANN’s classification of its IRP claims, arguing that Claimants’ “arguments are as stated in our Complaint.”¹²² Indeed, the Emergency Panelist has summarized Claimants’ claims in Part III, Section B(1) above. The Emergency Panel decides, however, that it is useful, before further review of the IRP merits, to consider whether one or more of Claimants’ IRP claims is time-barred. If a claim is time-barred, that finding would defeat the possibility that the particular claim raises “sufficiently serious questions related to the merits.” The Emergency Panelist reiterates, however, that the preliminary assessment made here, regarding issues of any time-barred claims, does not finally resolve the merits of these issues, which are to be fully addressed by the IRP Panel.
94. As noted in paragraph 24 above, ICANN submitted a letter on June 16, 2020 responding to a question from the Emergency Panelist requesting that ICANN clarify which of Claimants’ claims ICANN contends are time barred.¹²³ In its letter, ICANN provided the following chart setting forth Claimants’ claims (as framed by ICANN); ICANN’s position on the timeliness of each claim; the date of any allegedly relevant ICANN Board action; and the alleged deadline that would have applied for filing an IRP claim¹²⁴:

Claim	ICANN’s Position on Timeliness	Date of ICANN Action (if any)	Deadline for Filing IRP (Governing Rule)
[1] ICANN should have re-evaluated the HTLD CPE Result	Untimely (and meritless)	22 Aug. 2014	20 Sept. 2014 (30 July 2014 Bylaws)
[2] The Board should not have accepted the <i>Despegar</i> IRP Final Declaration	Untimely (and meritless)	10 Mar. 2016	8 Apr. 2016 (11 Feb. 2016 Bylaws)

¹²⁰ ICANN’s Opposition, ¶ 23 (“Claimants barely *reference* the Board’s actions (on Requests 16-11 and 18-6 in their IRP Request, instead attempting to re-litigate the underlying claims, which are long since time-barred.”); June 3rd Hearing, audio transcript (54:00 – 54:15).

¹²¹ See also ICANN’s Slide Deck, slides 12-14, ICANN’s Opposition ¶¶ 23-24, and ICANN’s IRP Response, ¶¶ 43-44, 51, 58, 64, 75-76, and 80-82.

¹²² June 3rd Hearing, audio transcript (2:12:00 – 2:12:40).

¹²³ ICANN Counsel’s Letter dated June 16, 2020.

¹²⁴ ID. ICANN’s chart was provided with a number of footnotes providing references and further explanation. Those footnotes have been omitted in this copy of the chart. The Emergency Panelist also added numbering in square brackets “[]” to each of the claims listed in the chart.

[3] ICANN should not have allowed Afilias to acquire HTLD	Untimely (and meritless)	None, but information public since at least 23 March 2016	N/A or 21 Apr. 2016 (11 Feb. 2016 Bylaws)
[4] ICANN should have taken some (unspecified) action concerning the Despegar IRP in light of the Dot Registry IRP Declaration	Untimely (and meritless)	9 Aug. 2016	7 Sept. 2016 (11 Feb. 2016 Bylaws)
[5] The Ombudsman should have reviewed Request 16-11	No such requirement and/or Untimely	N/A and/or 15 Feb. 2018	N/A (11 Feb. 2016 Bylaws) and/or 15 June 2018 (Interim Procedures)
[6] The Ombudsman should have evaluated Request 18-6	Untimely (and meritless)	N/A or 23 May 2018	N/A or 20 Sept. 2018 (Interim Procedures)
[7] The Board should not have denied Request 18-6	Timely (but meritless)	18 July 2018	N/A (IRP timely filed)
[8] The Board should not have denied Request 16-11	Timely (but meritless)	27 Jan. 2019	N/A (IRP timely filed)
[9] ICANN should produce FTI's and the CPE Provider's Documents	Premature request	None	N/A (request premature)

95. ICANN indicated in its chart that different versions of the Bylaws (with different deadlines for filing IRP claims) apply to Claimants' claims made in this IRP. ICANN also stated that

“Even if all of the ICANN actions identified in this chart are evaluated under the time for filing set forth in Rule 4 of the Interim Supplementary Procedures, which became effective 25 October 2018..., those claims would still be untimely. Under the Interim Procedures, Claimants had 120 days (instead of 30) to initiate a CEP or IRP, and they did not do so. Nor did they file this IRP within the 12-month outside limit for filing IRP claims set forth in Rule 4 of the Interim Procedures.”¹²⁵

96. The Interim Supplementary Procedures, Rule 4 (Time for Filing) provides in relevant that:

“A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.”

97. Referring to ICANN's list of claims above, the Emergency Panelist notes that ICANN has acknowledged Claimants' claims in this IRP related to the Board's denial of Request 18-6 [7]

¹²⁵ ICANN acknowledges that when Claimants initiated CEP on October 2, 2018, it tolled the statute of limitation on potential claims. ICANN Counsel's Letter dated June 16, 2020, p. 3, n. 10 and n. 12.

and Request 16-11 [8] were filed in a timely fashion. To the extent Claimants' IRP claims are based on the Board's decisions (and BAMC's recommendations) to deny Claimants' Request 18-6 and Request 16-11, such claims are timely. Further, ICANN has not challenged the timeliness of Claimants' current request that ICANN should be required to produce FTI's and the CPE Provider's (EIU) documents [9], but instead contends that the request is premature.

98. The Emergency Panel has reviewed claims [1] through [6], as classified and listed by ICANN, in view of both the Bylaws in effect at the relevant time and the deadlines in Rule 4 of the Interim Supplementary Procedures. Items [1], [2], [3] and [4] can be addressed first, followed by items [5] and [6], which are addressed together to consider both timeliness and the merits in relation to appointment of an Ombudsman:
99. [1] ICANN should have re-evaluated the HTLD CPE Result: The Emergency Panelist observes that this claim, as stated by ICANN, is similar to a claim that was considered by the *Despegar* IRP panel: "The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered."¹²⁶ As discussed in relation to item [2] and [4] below, to the extent Claimants seek to bring a "[d]irect challenge to the HTLD CPE result"¹²⁷ outside of the matters covered by Request 16-11 (and the subsequent BAMC recommendation and Board decision to deny Request 16-11), that claim would be untimely under both the July 30, 2014 version of the Bylaws¹²⁸ and Rule 4 of the Interim Supplementary Procedures.¹²⁹
100. [2] The Board should not have accepted the *Despegar* IRP Final Declaration: Claimants did not directly challenge the Board's acceptance of the *Despegar* IRP Declaration – the Board accepted that Final Declaration on March 10, 2016. As discussed in paragraph 43 above, ICANN's Board in its January 2019 Resolution found that claims with respect to the *Despegar*

¹²⁶ *Despegar* IRP Declaration, ¶ 55(i).

¹²⁷ ICANN's Slide Deck, slide 12.

¹²⁸ Under ICANN's Bylaws, as amended July 30, 2014, Art. IV, § 3(3), "[a] request for independent review must be filed *within thirty days* of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation" (italics added).

¹²⁹ Under Rule 4 of the Interim Supplementary Procedures, a challenge would have to be brought "no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction."

IRP Declaration were time-barred. If Claimants are attempting to bring an outright challenge to the Board's acceptance of the *Despegar* IRP Declaration now, the challenge would be untimely under both the February 11, 2016 Bylaws¹³⁰ in effect at the relevant time, and under Rule 4 of the Interim Supplementary Procedures.¹³¹

101. However, when the Board accepted the *Despegar* IRP Declaration, it directed that ICANN:

(i) “ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations” and

(ii) “complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation.”

102. As to the first of these issues, the *Despegar* IRP panel noted that while many general complaints were made by the Claimants as to the CPE process, “the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.”¹³² As to the second of these directives, the *Despegar* IRP panel declined to make a finding on the Portal Configuration issue, indicating “that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.”¹³³

103. It appears that Claimants, instead of directly challenging the Board's acceptance of the *Despegar* IRP Declaration, waited (i) to submit Request 16-11, after ICANN had completed an investigation of the Portal Configuration issues, and the Board had acted upon the findings of that investigation by passing its two August 2016 Resolutions (on August 9, 2016), concluding, among other things, that the cancellation of HTLD's .HOTEL application was not warranted, and directing ICANN to move forward with processing HTLD's application;¹³⁴ and (ii) to submit Request 18-6 after the completion of the CPE Process Review and the Board's acceptance of the results in its March 2018 Resolutions, where the Board concluded that no

¹³⁰ In terms identical to the July 2014 Bylaws, ICANN's Bylaws as amended February 11, 2016, provide in Art. IV, § 3(3) that an IRP must be filed within 30 days of the posting of the minutes of the relevant Board meeting.

¹³¹ Under Rule 4 of the Interim Supplementary Procedures, if they apply, a challenge against the *Despegar* IRP Declaration would have to be brought “no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.”

¹³² *Despegar* IRP Declaration, ¶ 143.

¹³³ *Id.*, ¶ 138.

¹³⁴ August 2016 Resolutions.

overhaul or change to the CPE process for the current round of the New gTLD Program is necessary. As noted above, the IRP claims regarding Request 16-11 and Request 18-6 were timely submitted; however, to the extent Claimants' IRP claims directly challenge the Board's acceptance of the *Despegar* IRP Declaration, they are untimely and therefore do not raise "sufficiently serious questions related to the merits."

104. [3] ICANN should not have allowed Afilias to acquire HTLD: ICANN contends Claimants' claim – that ICANN should *not* have allowed Afilias to acquire HTLD – is untimely. The Emergency Panelist observes that Claimants in their IRP Request challenged "ICANN allowing a domain registry conglomerate [Afilias] to takeover the 'community-based' applicant HTLD" and that "HTLD is no longer the same company that applied for the .HOTEL TLD."¹³⁵

105. ICANN in its June 16, 2020 letter to the Emergency Panelist contends that

"There was no Board action or inaction in conjunction with this matter, and thus under the Bylaws in effect at that time, Claimants could not have filed an IRP. Even if there was a viable argument regarding Board action or inaction (which there is not), information regarding Afilias' acquisition of HTLD was publicly available as of 23 March 2016, which would have resulted in an IRP filing deadline of 21 April 2016."¹³⁶

106. ICANN refers to a letter dated March 23, 2016¹³⁷, which was available on ICANN's website in its correspondence files, in which Philipp Grabensee, Managing Director of HTLD, informed ICANN that, among other things "Afilias will in the near future be the sole shareholder of Applicant." Further on the issue of timeliness, ICANN in its IRP Response stated that

"These claims accrued no later than 25 August 2016, when Claimants acknowledged in Request 16-11 (but did not challenge) that Afilias was acquiring all shares of HTLD. Claimants did not assert that the Board should have taken any action as a result of Afilias' acquisition of the remaining shares of HTLD until submitting their IRP Request in December 2019, more than three years later."¹³⁸

107. The Emergency Panelist observes that the Board's August 2016 Resolutions (dated August 9, 2016), which were the basis for Claimants' Request 16-11, stated in relevant part:

¹³⁵ IRP Request, p. 4.

¹³⁶ ICANN Counsel's Letter dated June 16, 2020, p. 2, n. 5.

¹³⁷ Claimants' Ex. ZZ (23 March 2016 Letter), p. 2.

¹³⁸ ICANN's IRP Response, ¶ 80.

“Lastly, Mr. Grabensee noted the following recent changes to HTLD's relationship with Mr. Krischenowski: (i) the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015; (ii) Mr. Krischenowski stepped down as a managing director of GmbH Berlin effective 18 March 2016; (iii) Mr. Krischenowski's wholly-owned company transferred its 50% shares in GmbH Berlin to Ms. Ohlmer (via her wholly-owned company); (iv) *GmbH Berlin will transfer its shares in HTLD to Afiliac plc*; and (v) Mr. Grabensee is now the sole Managing Director of HTLD.”¹³⁹

108. The Emergency Panelist further observes that Claimants in Request 16-11 did not directly challenge the sale of HTLD to Afiliac. However, Request 16-11 contains the following passages relevant to the issue of whether Claimants were aware of the sale of HTLD shares to Afiliac:

“HTLD and some of its shareholders acted in a way that was untrustworthy and in violation of the application's terms and conditions. *It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest holder in the same application, Afiliac.*

After Mr. Krischenowski's illegal actions had been challenged and ICANN had informed HTLD that it was taking the situation seriously, Mr. Krischenowski's wholly-owned company transferred its interests in HTLD's application to the wholly-owned company of HTLD's CEO at the time. ICANN has now revealed that illegal access to trade secrets of competitors was also made through HTLD's CEO's email account.

One interest-holder cannot disclaim responsibility for another interest-holder's actions by buying him out. Those with an interest in an application must rise and fall together; one ought not to benefit from the other's misdeeds. The point is all the stronger where the misdeeds are carried out by the applicant's acting CEO and consultant(s).

The (belated) replacement of the CEO and consultant(s)/associates and a change in the shareholder structure do not excuse nor annihilate illegal activities, committed by previous management and staff. *The sale to Afiliac of shares (or Afiliac's promise to acquire shares) held by fraudulent interest-holders and the management reshuffle, are fruitless attempts to cover up the applicant's misdeeds.* The ICANN Board cannot turn a blind eye to HTLD's illegal actions, simply because the shareholder and management structure recently changed.¹⁴⁰

¹³⁹ August 2016 Resolutions (italics added).

¹⁴⁰ Request 16-11, pp. 18-19 (italics added). Further, Claimants in Ex. Z have submitted a copy of an article dated May 12, 2016, publicly available, stating that “Afiliac will become the sole shareholder of HTLD.” Claimants’ Ex. Z.

109. At the June 3rd Hearing, Claimants argued there is insufficient evidence to determine when Claimants learned “about ICANN’s inaction as to the Afilias transaction,” and that further briefing is needed on this issue.¹⁴¹ ICANN, on the other hand, stated at the hearing that the sale of HTLD to Afilias “was public,” that “ICANN posts these things on its website,” and that ICANN permits these transfers to occur, usually through a “staff action” without Board involvement.¹⁴²
110. In view of all of the above evidence, the Emergency Panel determines that an attempt by Claimants to bring an outright challenge to an action or failure to act by the ICANN Board concerning the transfer of ownership interests from HTLD to Afilias is time-barred. The evidence indicates that, at least as of August 25, 2016 when Claimants submitted Request 16-11, Claimants were aware of relevant facts concerning this transfer. Even if no Board action was involved (as alleged by ICANN), and therefore there were no “minutes of the relevant Board meeting” from which the 30-day limitation of the February 2016 Bylaws could be tallied, nonetheless, Rule 4 of the Interim Supplementary Procedures provides that a claim should be asserted, at the latest, no “more than twelve (12) months from the date of such action or inaction.” Here, it appears that Claimants claim challenging the transfer of ownership interest from HTLD to Afilias was first asserted, at the earliest, on October 2, 2018 when Claimants initiated the CEP with ICANN, and more than two years after Request 16-11 was submitted.
111. In determining that this claim is untimely, the Emergency Panelist concludes that it does not raise “sufficiently serious questions related to the merits.” However, this decision on untimeliness concerning a claim directly challenging the transfer of ownership interest from HTLD to Afilias does not prevent Claimants from raising the factual circumstances of that transfer – as Claimants referenced in Request 16-11 – in support of their contentions concerning the Portal Configuration issue (discussed below).
112. Moreover, the Emergency Panelist recognizes that Claimants claim directly challenging the transfer of ownership interest from HTLD to Afilias is one of Claimants’ principal claims in this IRP. The Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

¹⁴¹ June 3rd Hearing, audio transcript (2:12:15 – 2:13:15).

¹⁴² June 3rd Hearing, audio transcript (1:35:32 – 1:38:47).

113. [4] ICANN should have taken some (unspecified) action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration: ICANN contends that Claimants’ IRP claim is untimely to the extent it challenges that ICANN should have taken some action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration. The Emergency Panelist disagrees. ICANN in its June 16, 2020 letter indicates that the Board action (accepting the *Dot Registry* IRP Declaration) was taken on August 9, 2016,¹⁴³ and that under the February 2016 Bylaws the deadline for making a challenge would have been September 7, 2016. Further, at the June 3rd Hearing, ICANN’s counsel explained that there is a “new IRP decision [*Dot Registry* IRP] and Board action on that decision, and if there was an argument to make, the time to make that argument was after the *Dot Registry* IRP and the Board action on the *Dot Registry* IRP, and Claimants did not make that here.”¹⁴⁴

114. The *Dot Registry* IRP Declaration was issued on July 29, 2016 and the Board accepted that declaration on August 9, 2016. Claimants filed Request 16-11 on August 25, 2016, 16 days after the Board’s August 2016 resolution accepting the *Dot Registry* IRP. Request 16-11 asserts claims that (i) “[t]he ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the *Dot Registry* case”¹⁴⁵ and (ii) the Board’s acceptance of the *Dot Registry* IRP Declaration is incompatible with the Board’s acceptance of the *Despegar* IRP Declaration.¹⁴⁶ In particular, Request 16-11 sets out:

“The reason why the *Dot Registry* IRP Panel came to the opposite conclusion to the *Despegar et al.* IRP Panel, is because – as revealed in the *Dot Registry* IRP Declaration – the *Despegar et al.* IRP Panel relied on false and inaccurate material information. When the ICANN Board accepted the *Despegar et al.* IRP Declaration, it relied on the same false and inaccurate material information.”¹⁴⁷

115. Request 16-11 asserted that ICANN breached its transparency obligations based on information that only became clear after the *Dot Registry* Final Declaration was issued:

“The *Despegar et al.* Panel’s reliance on false information that the EIU served as an independent panel (i.e., without intimate involvement of ICANN staff) was material

¹⁴³ See ICANN August 2016 Resolutions 2016.08.09.11-2016.08.09.13, at <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

¹⁴⁴ June 3rd Hearing, audio transcript 1:22:30 – 1:24:03.

¹⁴⁵ Request 16-11, p. 8.

¹⁴⁶ Id. (“The ICANN Board’s acceptance of the *Dot Registry* IRP Declaration is incompatible with the ICANN Board’s acceptance of the IRP Declaration regarding the .hotel gTLD (the ‘*Despegar et al.* IRP Declaration’)”).

¹⁴⁷ Id., p. 9

to the IRP Declaration. It is now established that the ICANN staff was intimately involved. The finding that such intimate involvement of the ICANN staff existed was material to the outcome in the *Dot Registry* case. The Requesters and the *Despegar et al.* Panel were given incomplete and misleading information on the ICANN staff involvement in the CPE and that fact is the only reason for a divergent outcome between both IRP Declarations.

Moreover, the fact that material information was hidden from Requesters and the *Despegar et al.* Panel is a clear transparency violation. Requesters specifically asked for all communications, agreements between ICANN and the CPE Panel. Requesters and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was inexistent and/or could not be disclosed. However, the *Dot Registry* IRP Declaration reveals that ICANN did possess information, which it had first once more pretended to be inexistent, and that it afterwards disclosed to Dot Registry, while it failed to disclose similar information to Requesters, although Requesters had explicitly asked for this information and the *Despegar et al.* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Requesters and the Panel at that time that it had disclosed the information to Dot Registry. ICANN should have informed Requesters and the Panel spontaneously about the existence and the content of this material information.”¹⁴⁸

116. Request 16-11 also alleges that the “ICANN Board discriminated against Requesters by accepting *Dot Registry* IRP Determination and refusing to reconsider its position on the CPE determination re .hotel.”¹⁴⁹ In view of these arguments made in reference to the Board’s decision to accept the *Dot Registry* IRP, as well as other claims asserted, Claimants in Request 16-11 sought several measures of relief, including “[t]he ICANN Board is requested to declare that HTLD’s application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary.”

117. The Emergency Panelist determines that, to the extent Claimants in this IRP raise a claim in Request 16-11 based on the Board’s decision to accept the *Dot Registry* IRP Declaration on August 9, 2016 (at which time Claimants would have been put on notice of the impact of any action or failure to action by the Board giving rise to alleged harm to Claimants), that claim is timely under the February 2016 Bylaws and Rule 4 of the Interim Supplementary Procedures.¹⁵⁰

¹⁴⁸ Id., pp. 13-14.

¹⁴⁹ Id., p. 18.

¹⁵⁰ Under Rule 4, the claim is brought “no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE.”

118. [5] and [6] The Ombudsman should have reviewed Request 16-11 and Request 18-6: The Emergency Panelist reviews Claimants’ Ombudsman claims both as to timeliness and the merits.
119. Claimants’ IRP Request seeks that the IRP Panel “immediately appoint an ombudsman to review the BAMC’s decisions in RFRs 16-11 and 18-6, as required by the Bylaws,”¹⁵¹ and Claimants’ IM Request correspondingly seeks the same relief by way of interim measures.¹⁵² ICANN contends that to the extent Claimants assert IRP claims that Request 16-11 and Request 18-6 should have been reviewed by the Ombudsman, these claim are untimely and without merit.
120. Ombudsman for Request 16-11: ICANN claims that “the Ombudsman had no role in Reconsideration Requests when Request 16-11 was submitted.”¹⁵³ In its June 16, 2020 letter, ICANN explains that at the time when Request 16-11 was submitted, the “operative Bylaws (11 Feb. 2016 Bylaws) did not provide for Ombudsman review of Reconsideration Requests.”¹⁵⁴ ICANN also contends that even if there was a viable argument regarding Ombudsman review, Claimants were on notice that no such review was part of the process for Request 16-11 as of February 15, 2018, when the Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process That Were Placed On Hold Pending Completion Of The CPE Process Review (“Roadmap”) was publicly posted.¹⁵⁵
121. Claimants contend, on the other hand, that “as to RFR-16-11, even though the BAMC decided to consider that RFR in 2018, it failed to refer it to the Ombudsman as required by the Bylaws *then in effect*.”¹⁵⁶ Claimants essentially argue that Request 16-11 – at least with respect to the

¹⁵¹ IRP Request, p. 12.

¹⁵² Claimants’ IM Request, p. 4.

¹⁵³ ICANN’s IRP Response, pp. 11-12; ICANN’s Opposition, p. 10, n. 42.

¹⁵⁴ ICANN Counsel’s Letter dated June 16, 2020, p.2 n. 7 (citing BAMC Recommendation on Request 16-11, p 18, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf>; and Board Resolution 2019.01.27.23, at <https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f>).

¹⁵⁵ *Id.* The Roadmap specifically states that “Each of the foregoing requests [including Request 16-11] was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time that the requests were filed.” The Roadmap provides detail on the steps to be taken for each of the Reconsideration Requests; those steps do not include reference to the Ombudsman.

¹⁵⁶ IM Request, p.7; Claimants’ Brief, p. 14 (*italics added*).

question of whether Claimants' request was entitled to Ombudsman review – should have been considered under Bylaws in effect at the time when ICANN lifted the “hold” that had been placed on Request 16-11 (and several other Reconsideration Requests), rather than under the February 2016 Bylaws in effect when Request 16-11 was filed. As noted above, the hold had been ordered by the BGC until the CPE Process Review was completed.

122. The Emergency Panelist disagrees with Claimants' view. Request 16-11 was filed on August 25, 2016, alleging that certain action or inaction by ICANN violated its Articles, Bylaws or other policies and commitments in effect at that time. When Request 16-11 was filed, there was no procedure in place for the Ombudsman to review Reconsideration Requests.¹⁵⁷ Further, a claim to request Ombudsman review is untimely in view of the Roadmap published by ICANN on February 15, 2018. Under the February 2016 Bylaws, although they did not provide for Ombudsman review, if there had been such a procedure, an IRP claim would have been required to be made within 30 days of the publication of the Roadmap. Further, under Rule 4 of the current Interim Supplementary Procedures governing this IRP, Claimants would have 120 days from the date Claimants became aware of publication of the Roadmap (“aware of the material effect of the action or inaction giving rise to the DISPUTE”) to bring their IRP claim (or engage in the CEP). Claimants, in response to ICANN's contentions, have not alleged that they were unaware of the publication of the Roadmap, with its specific steps for moving forward on the several Reconsideration Requests that had been placed on hold, including Request 16-11. As noted above, Claimants did not initiate the CEP until October 2, 2018. The Emergency Panelist finds that Claimants IRP claim that Request 16-11 should have been reviewed by the Ombudsman is without merit because there was no such requirement in the February 2016 Bylaws and is also untimely; it therefore fails to raise “sufficiently serious questions related to the merits.”

123. Ombudsman for Request 18-6: With respect to Request 18-6, Claimants contend that they are entitled to what the Bylaws allegedly require – an independent Ombudsman review of Reconsideration Requests, prior to any decision by the BAMC.¹⁵⁸ Claimants state that the Board has never once rejected a BAMC (or BGC) recommendation on any Reconsideration

¹⁵⁷ The Ombudsman's role was incorporated into the version of the Bylaws in effect as of October 1, 2016.

¹⁵⁸ Claimants' Reply, p. 12.

Request. The independent Ombudsman is supposed to provide a check on that, but has inexplicably recused himself from every single relevant case. Claimants argue ICANN has no excuse for this, and offers no explanation as to why a substitute Ombudsman could not have been appointed. Claimants assert that ICANN could hire a substitute now, and Claimants could have that independent check in this case. Claimants argue they have been irreparably harmed because they have been denied that independent check, required by the Bylaws.¹⁵⁹

124. ICANN contends that conduct by the Ombudsman is not subject to challenge in a Reconsideration Request or an IRP, which is why ICANN put “N/A” in the chart included in its letter of June 16, 2020 (see paragraph 94 above).¹⁶⁰ ICANN further states that the Ombudsman made the decision to recuse himself on May 23, 2018.¹⁶¹ The Ombudsman’s recusal letter is posted on ICANN’s website, along with all of the other relevant submissions and links to ICANN’s BAMC recommendation and Board decision in connection with Request 18-6.¹⁶² Given the May 2018 date, ICANN contends that September 20, 2018 would have been the applicable deadline (under the Interim Supplementary Procedures, Rule 4) for the filing of an IRP, if Ombudsman action could be the subject to an IRP.¹⁶³

125. The Emergency Panelist agrees with ICANN and determines that Claimants’ IRP claim is untimely regarding the appointment of an Ombudsman for Request 18-6. By comparison, as noted above, the claims in this IRP with respect to Request 16-11 and Request 18-6 *are* timely. However, neither Request 18-6 nor Request 16-11 included any claim as to the appointment of an Ombudsmen. The earliest date from which to assess timeliness of Claimants’ Ombudsman claim is October 2, 2018, when Claimants initiated the CEP. Under the Interim Supplementary Procedures, Rule 4, Claimants would have had 120 days to bring an IRP claim (or engage in the CEP) from May 23, 2018, the date when the Ombudsman recused himself.¹⁶⁴ Claimants have not contended that they were unaware of the Ombudsman’s recusal in May 2018. For this

¹⁵⁹ Id., pp. 12-13.

¹⁶⁰ ICANN Counsel’s Letter dated June 16, 2020, p.2 n. 8.

¹⁶¹ See Ex. R-37 (email chain of ICANN’s request to ICANN’s Ombudsman Herb Waye and Mr. Waye’s response dated May 23, 2018 regarding Request 18-6), at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

¹⁶² See ICANN’s Request 18-6 webpage, with links to documents, resources and ICANN decisions, at <https://www.icann.org/resources/pages/reconsideration-18-6-trs-et-al-request-2018-04-17-en>.

¹⁶³ ICANN Counsel’s Letter dated June 16, 2020, p.2 n. 8.

¹⁶⁴ See R-33 (The provisions for extending the time to file an IRP while Claimants participated in the CEP); Ex. R-34 (Claimants did not enter CEP until October 2, 2016, more than 120 days after the Ombudsman recused himself).

reason of untimeliness, Claimants have failed to raise “sufficiently serious questions related to the merits.”

126. Moreover, the Emergency Panelist determines that, regarding the merits of Claimants’ claim that an Ombudsmen should have been appointed for Request 18-6, Claimants have also failed to raise “sufficiently serious questions related to the merits.”

127. Claimants have contended that

“ICANN has subverted this check on its decisions by failing to provide a non-conflicted Ombudsman, not just in this case but in every single case concerning the new gTLD program at least since 2017. Indeed, it appears the Ombudsman has recused itself in 15 out of 18 cases, including 14 of 14 cases involving New gTLD applicants.”¹⁶⁵

128. Further, Claimants argue that “[i]t clearly violates ICANN’s Bylaws to systematically refuse to provide this important, purportedly neutral and independent check prior to consideration and adoption by the BAMC or Board.”¹⁶⁶ Without this mechanism, Claimants allege that the accountability process involving Reconsideration Requests is a sham.

129. ICANN has explained that the “Ombudsman provides to the BAMC an evaluation of the Reconsideration Request before the BAMC makes a recommendation to the Board.” The Ombudsmen is supposed to serve as “an objective advocate for fairness and ”to provide an “independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”¹⁶⁷

¹⁶⁵ Claimants’ IM Request, p. 9.

¹⁶⁶ *Id.*

¹⁶⁷ Art. 5, § 5.2 provides:

“The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2, the Ombudsman shall serve the function expressly provided for in Section 4.2.”

130. Claimants’ concerns, if correct, serve to reveal a deficiency in the current approach for ICANN’s Ombudsmen system: due to the Ombudsmen’s informal role under the Bylaws, Article 5, that same Ombudsmen is frequently required to exercise recusal in relation to duties for Reconsideration Requests, as set forth in the Bylaws, Article 4, Section 4.2(l). The Emergency Panelist recommends that ICANN should, as Claimants propose, consider engaging more than one Ombudsmen to avoid recurrent recusals.

131. Even so, the Ombudsman correctly recused himself under the Bylaws in effect for Request 18-6, and the Emergency Panelist determines that there has been no violation by the Ombudsman or by the Board of ICANN’s Articles, Bylaws or other policies, that would give rise to “sufficiently serious questions related to the merits.” The Ombudsman letter of recusal stated: “*Pursuant to Article 4, Section 4.2(l)(iii)*, I am recusing myself from consideration of Request 18-6.”¹⁶⁸ Article 4, Section 4.2(l)(iii) of the July 22, 2017 Bylaws, in effect when Request 18-6 was submitted, which are identical to ICANN’s current Bylaws on this point, provides:

“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.”

132. ICANN asserts in relation to Article 4, Section 4.2(l)(iii) that:

“it is entirely proper – indeed, required – for the Ombudsman to recuse himself in any Reconsideration Request involving matters for which the Ombudsman took a position before the Reconsideration Request was filed. Moreover, this provision provides the ‘specific reasons’ Claimants seek as to the Ombudsman’s recusal from Request 18-6: he recused himself ‘[p]ursuant to Article 4, Section 4.2(l)(iii)’ of the Bylaws, meaning the ICANN Ombudsman took a position concerning the subject of Request 18-6, before Request 18-6 was filed.”¹⁶⁹

133. The Emergency Panelist also observes that under the July 2017 Bylaws (and the current Bylaws), Article 5, Section 5.3(a), the Ombudsman only investigates complaints “which have not otherwise become the subject of either a Reconsideration Request or Independent Review

¹⁶⁸ Ex. R-37 (italics added).

¹⁶⁹ ICANN’s Opposition, ¶ 25.

Process.”¹⁷⁰ ICANN has argued that the lack of Ombudsman review does not create “any possibility of irreparable harm to Claimants.”¹⁷¹ Given that Claimants have initiated this IRP and will receive a fair decision on their claims from the independent IRP Panel, the Emergency Panelist finds that under Rule 10 of the Interim Supplementary Procedures, Claimants have not established “harm for which there will be no adequate remedy in the absence of such relief.”

134. Claimants’ request for interim measures of protection that an Ombudsman be appointed with respect to Request 16-11 and Request 18-6 is denied. However, as previously noted, in determining that interim relief is not appropriate at this time with respect to the appointment of the Ombudsman, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

2) Sufficiently Serious Questions Related to the Merits of Claimants’ Claims (that are not Time-Barred)

135. From the analysis above, it remains to be determined whether Claimants have, pursuant to Rule 10 of the Interim Supplementary Procedures, established “sufficiently serious questions related to the merits” as to any of Claimants’ claims that are not time-barred. The Emergency Panelist considers Requests 16-11 and Request 18-6, which ICANN has acknowledged are not time-barred, as well as relief requested in relation to the ICANN Board’s decision to accept the *Dot Registry* IRP Declaration, insofar as that relief is requested in Request 16-11. As discussed above, the Emergency Panelist as determined that Claimants claim regarding the sale of HTLD to Afilias is untimely.

136. (a) Request 16-11: Request 16-11 alleged, among other things, that the Board (i) failed to take into account the impact of the *Dot Registry* IRP Declaration,¹⁷² a case that had been decided in July 2016 (after the *Despegar* IRP Declaration issued in February 2016), and that the Board’s acceptance of the *Dot Registry* IRP Declaration on August 9, 2016 is incompatible with the

¹⁷⁰ Bylaws, Art. 5, § 5.3(a); see ICANN’s IRP Response, ¶ 40; ICANN’s Opposition, ¶ 9. See also Ex. E (email dated March 16, 2020 from the Ombudsman to Claimants’ counsel, in response to Claimants’ request for assistance “in all of these ways, with respect to ICANN’s apparently willful failure to implement basic procedural rights required by Bylaws since 2013.” The Ombudsman, noting that an IRP had already been filed and citing the Bylaws, Art. 5, § 5.3, stated: “Note that my powers end where IRPs begin.”).

¹⁷¹ ICANN’s Opposition, ¶ 39.

¹⁷² *Dot Registry LLC v. ICANN*, Declaration of the Independent Review Panel, ICDR Case No. 01-14-0001-5004, dated July 29, 2016 (“*Dot Registry*” IRP Declaration”), at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

Board's acceptance of the *Despegar* IRP Declaration; (ii) failed to consider the unfair competitive advantage HTLD obtained by accessing trade secrets of competing prospective registry operators; (iii) relied on false and inaccurate material information regarding the EIU's CPE results; (iv) failed to take material action to investigate and address allegedly illegal actions attributable to HTLD (including allegations that one of the individuals who had accessed the data, Ms. Ohlmer, was "the CEO of HTLD at the time she obtained unauthorized access to other applicants' confidential information");¹⁷³ (v) failed to remedy violations of ICANN's Articles and Bylaws while doing so for other for other applicants; (vi) unjustifiably refused to cancel HTLD's application in violation of ICANN's core obligations; and (vii) discriminated against the .HOTEL gTLD applicants by accepting the *Dot Registry* IRP Declaration while refusing to reconsider the Board's position on the CPE determination for .HOTEL. Request 16-11 requested that the Board cancel HTLD's .HOTEL application and take other necessary steps, and if the application is not canceled, refrain from executing the registry agreement with HTLD and provide full transparency about communications between ICANN, ICANN's Board, HTLD, EIU and third parties (including individuals supporting HTLD's application), and in any event, (viii) asked the Board to conduct a meaningful review of the .HOTEL CPE to ensure consistency of approach with its handling of the *Dot Registry* IRP case and the CPE results there.¹⁷⁴

137. On January 27, 2019, the Board accepted the BAMC's recommendation to deny Request 16-11 in its January 2019 Resolution.¹⁷⁵ While Claimants in Request 16-11 had requested reconsideration of the Board's August 2016 Resolutions concerning the Portal Configuration issues because ICANN had allegedly failed to properly investigate those issues, the January 2019 Resolution found that the Board had adopted August 2016 Resolutions after considering all material information and without reliance on false or inaccurate material information.¹⁷⁶

¹⁷³ Request 16-11, pp. 15-16. According to Request 16-11, Ms. Ohlmer "was listed as CEO in HTLD's application until 17 June 2016, and she also acquired shares from Mr. Krischenowski in a HTLD affiliated company after Mr. Krischenowski's actions were subject to serious challenge. Nevertheless, the Board's decision is based on Mr. Krischenowski's actions and affiliation to HTLD only." *Id.*

¹⁷⁴ Request 16-11.

¹⁷⁵ Ex. R-29.

¹⁷⁶ *Id.*

138. On one of the issues, the BAMC recommendation focused primarily on one of the three individuals who accessed the data, Mr. Krischenowski, who had “acted as a consultant for HTLD’s Application at the time it was submitted in 2012,”¹⁷⁷ stating that

“Mr. Krischenowski claimed that he did not realize the portal issue was a malfunction, and that he used the search tool in good faith. Mr. Krischenowski and his associates also certified to ICANN that they would delete or destroy all information obtained, and affirmed that they had not used and would not use the information obtained, or convey it to any third party.”

and

“Mr. Krischenowski was not directly linked to HTLD’s Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD.”¹⁷⁸

139. The BAMC recommendation further states that

“In its investigation, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD’s Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski’s first instance of unauthorized access to confidential information did not occur until early March 2014; and his searches relating to the .HOTEL applicants did not occur until 27 March, 29 March and 11 April 2014.”¹⁷⁹

140. Further, the BAMC recommendation states:

“Specifically, whether HTLD’s Application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013 – all of which occurred before Mr. Krischenowski or his associates accessed any confidential information, which occurred from March 2014 through October 2014.”¹⁸⁰

141. In a footnote, the BAMC addressed the allegation concerning access to the data by Ms. Ohlmer, who was alleged by Claimants in Request 16-11 to be the CEO of HTLD:

¹⁷⁷ See Recommendation of BAMC on Request for Reconsideration 16-11, dated November 16, 2018, p. 10, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf>.

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ Id., pp. 11-12.

“The BAMC concludes that Ms. Ohlmer’s prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 §8, at Pg. 15) does not support reconsideration *because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD’s Application in CPE.*”¹⁸¹

142. The January 2019 Resolution concluded, in particular, that there was no evidence that the Board did not consider the alleged “unfair advantage” HTLD obtained as a result of the Portal Configuration issues, and that there was no evidence the Board discriminated against Claimants. The January 2019 Resolution agreed with the BAMC that Krischenowski’s unauthorized access did not affect HTLD’s application, including the CPE result.¹⁸² As to allegation concerning Ms. Ohlmer, the Board considered and addressed a rebuttal submission that had been made by Claimants. In the rebuttal submission, Claimants alleged that they were “given no access to essential documents kept by ICANN and are therefore not given a fair opportunity to contest all arguments and evidence adduced by the BAMC” on these issues.¹⁸³ Further, as to Ms. Ohlmer, one of the individuals alleged to have had access to the private data, the rebuttal states:

“The BAMC ignores that this material information was not considered by the ICANN Board and should, along with the other facts in this matter, have led to the disqualification of HTLD as an applicant. The Recommendation mentions Ms. Ohlmer’s unauthorized involvement in a footnote, (i) alleging that Requesters acknowledge that Ms. Ohlmer’s prior association with HTLD had ended no later than 17 June 2016, and (ii) concluding that her prior association with HTLD *does not support reconsideration ‘because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD’s Application in CPE.’*”

Both the BAMC’s allegation and its conclusion are incorrect. First, Requesters’ statement that Ms. Ohlmer was listed as CEO in HTLD’s application until 17 June 2016 is not an acknowledgment that Ms. Ohlmer’s prior association with HTLD had ended by then. Second, *Ms. Ohlmer illegally accessed confidential information at a time when she was CEO of HTLD. Through her access of this confidential information as CEO, the information was automatically provided to HTLD. Indeed, the individual who manages (or managed) HTLD was informed of competitors’ trade secrets as from the moment Ms. Ohlmer accessed the confidential information. HTLD acknowledged that she was (i) principally responsible for representing HTLD, (ii) highly involved in the process of*

¹⁸¹ Id., p. 10, n. 44 (italics added).

¹⁸² January 2019 Resolution, § 3(D)(3).

¹⁸³ Rebuttal to the BAMC Recommendation in Reconsideration Request 16-11, dated November 30, 2018, p. 1, at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-requestor-rebuttal-bamc-recommendation-30nov18-en.pdf>.

organizing and garnering support for the .hotel application, and (iii) responsible for the day-to-day business operations of HTLD. The fact that unauthorized access occurred on more than one occasion by different individuals associated to HTLD and that information contained in the applications of direct competitors was targeted, shows that the unauthorized access by HTLD's executives was made willfully and with intent.

. . . .

In any event, given Ms. Ohlmer's position with HTLD at the time of illegal access, it is impossible for her to make an affirmative statement that she did not and would not share the confidential information with HTLD. As a result, it is also impossible for HTLD to confirm that it did not access the confidential information.”¹⁸⁴

143. In response to this rebuttal allegation concerning Ms. Ohlmer, the ICANN Board in its January 2019 Resolution acknowledged that “The Requestors claim that Ms. Ohlmer was CEO of HTLD when she accessed the confidential information of other applicants, and that she had been CEO from the time HTLD submitted HTLD's Application until 23 March 2016.” The Board however concludes:

“The Board finds that this argument does not support reconsideration as the Board did consider Ms. Ohlmer's affiliation with HTLD when it adopted the 2016 Resolutions. Indeed, the Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 notes that: (1) Ms. Ohlmer was an associate of Mr. Krischenowski; (2) Ms. Ohlmer's wholly-owned company acquired the shares that Mr. Krischenowski's wholly-owned company had held in GmbH Berlin (itself a 48.8% minority shareholder of HTLD); and (3) Ms. Ohlmer (like Mr. Krischenowski) "certified to ICANN [org] that [she] would delete or destroy all information obtained, and affirmed that [she] had not used and would not use the information obtained, or convey it to any third party." As the BAMC noted in its Recommendation, Mr. Grabensee affirmed that GmbH Berlin would transfer its ownership interest in HTLD to another company, Afilias plc. Once this transfer occurred, Ms. Ohlmer's company would not have held an ownership interest in HTLD.”¹⁸⁵

144. The Emergency Panelist determines that Claimants have raised “sufficiently serious questions related to the merits” in in relation to the Board’s denial of Request 16-11, with respect to the allegations concerning the Portal Configuration issues in Request 16-11. This conclusion is made on the basis of all of the above information, and in view of Claimants’ IRP Request claim that ICANN subverted the investigation into HTLD’s alleged theft of trade secrets.¹⁸⁶ In particular, Claimants claim that ICANN refused to produce key information underlying its reported conclusions in the investigation; that it violated the duty of transparency by

¹⁸⁴ Id., pp. 3-4 (italics added).

¹⁸⁵ January 2019 Resolution, § 3(D)(3).

¹⁸⁶ Claimants IRP Request, p. 4.

withholding that information; that the Board's action to ignore relevant facts and law was a violation of Bylaws; and further, to extent the BAMC and/or Board failed to have such information before deciding to disregard HTLD's alleged breach, that violated their duty of due diligence upon reasonable investigation, and duty of independent judgment.¹⁸⁷

145. The Emergency Panelist echoes concerns that were raised initially by the *Despegar* IRP Panel regarding the Portal Configuration issues, where that Panel found that "serious allegations" had been made¹⁸⁸ and referenced Article III(1) of ICANN's Bylaws in effect at that time,¹⁸⁹ but declined to make a finding on those issues, indicating "that it should remain open to be considered at a future IRP should one be commenced in respect of this issue."¹⁹⁰ Since that time, ICANN conducted an internal investigation of the Portal Configuration issues, as noted above; however, the alleged lack of disclosure, as well as certain inconsistencies in the decisions of the BAMC and the Board regarding the persons to whom the confidential information was disclosed and their relationship to, or position with HTLD, as well as ICANN's decision to ultimately rely on a "no harm no foul" rationale when deciding to permit the HTLD application to proceed, all raise sufficiently serious questions related to the merits of whether the Board breached ICANN's Article, Bylaws or other policies and commitments.
146. Further, Claimants have raised sufficiently serious questions in their IRP Request whether ICANN materially misled Claimants and the *Despegar* IRP Panel, which allegedly relied on false and inaccurate material information, as subsequently revealed by the IRP Panel's findings in (and the Board's acceptance of) the *Dot Registry* IRP Declaration.¹⁹¹ Claimants allege that "the fact that material information was hidden from Claimants and the *Despegar* Panel is a violation of ICANN's obligations to conduct its operations in a transparent [manner]."¹⁹² Claimants consequently seek review whether they were discriminated against in violation of Bylaws, as Claimants allege that the Board addressed alleged violations of its Bylaws in the CPE for *Dot Registry*, but not for Claimants.¹⁹³ If (as Claimants allege) ICANN materially

¹⁸⁷ *Id.*, pp. 24-26.

¹⁸⁸ *Despegar* IRP Declaration, ¶ 131.

¹⁸⁹ Article III(1) of ICANN's Bylaws provided that "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."

¹⁹⁰ *Despegar* IRP Declaration, ¶ 138.

¹⁹¹ Claimants IRP Request, pp. 18-21.

¹⁹² *Id.*, p. 20.

¹⁹³ *Id.*, pp. 21-24.

misled Claimants and the *Despegar* IRP Panel, as later revealed by the *Dot Registry* IRP Declaration, then it is not a sufficient justification, as asserted by ICANN, that the key difference in relation to the disputed disclosure issues in the *Dot Registry* IRP and *Despegar* IRP cases, respectively, is that the IRP Panel in the *Dot Registry* case ordered ICANN to produce the requested documents, while the IRP Panel in the *Despegar* case did not.¹⁹⁴

147. (b) Request 18-6: Request 18-6 claimed that ICANN’s March 2018 Resolutions are contrary to ICANN commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner. In addition, Request 18-6 claims that the Board failed to offer a meaningful review of Claimants’ complaints regarding HTLD’s application for .HOTEL. Request 18-6 requests that, unless ICANN cancels HTLD’s .HOTEL application, the Board should reverse its decisions in which it (i) accepted the findings in the CPE Process Review Reports; (ii) concluded that no overhaul or change to the CPE process for the current round of the New gTLD Program is necessary; and (iii) declared that the CPE Process Review has been completed. In the event that ICANN does not reverse its decisions, Request 18-6 asks that ICANN organize a hearing on these issues and that, prior to the hearing, ICANN provide full transparency regarding all communications between ICANN, the Board and ICANN’s counsel, on the one hand, and the CPE Process Reviewer (FTI), on the other hand, and provide transparency on its consideration of the CPE Process and the CPE Process Review and give access to all material the BAMC and Board considered during its meetings on the CPE Process and the CPE Process Review.

148. On July 18, 2018, the Board denied Request 18-6 in its July 2018 Resolution, concluding that the Board considered all material information and that the Board’s March 2018 Resolutions concerning the CPE Process Reviews are consistent with ICANN’s mission, commitments, core values, and policies.¹⁹⁵ The Board found that Claimants provided no evidence

¹⁹⁴ ICANN’s IRP Response, ¶¶ 42-49. Claimants in their IRP Request claim that “Claimants had explicitly asked for and been denied this information, and the *Despegar* Panel had expressly questioned ICANN about this information at the IRP hearing. Claimants’ IRP Request, p. 20. Claimants allege that “the unanimous *Dot Registry* panel required ICANN to turn over all relevant internal correspondence and correspondence with the EIU, which ICANN had denied to the *Despegar* panel had even existed. Id., p. 9. Claimants allege that “[i]t is inexcusable that ICANN did not inform Claimants and the Panel at that time – or since – that it had disclosed such material information to *Dot Registry* and to that IRP Panel. Claimants IRP Request, p. 20.

¹⁹⁵ ICANN Board Resolution 2018.07.18.09, at <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g> (“July 2018 Resolution”).

demonstrating how the March 2018 Resolutions concerning the CPE Process Review violated ICANN's commitment to fairness, or that the Board's actions were inconsistent with ICANN's commitments to transparency, multi-stakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.¹⁹⁶ In particular, the Board's July 2018 Resolution found that the CPE Process Review satisfied applicable transparency obligations, and that challenges to FTI's methodology and to the scope of the CPE Process Review did not warrant reconsideration.

149. Claimants in their IRP Request claim that (i) ICANN subverted FTI's CPE Process Review¹⁹⁷ and exercised undue influence over both EIU (with respect to EIU's CPE decisions) and FTI (with respect to the CPE Process Review); (ii) ICANN's, EIU's and FTI's communications are critical to this inquiry, but have been kept secret; and (iii) the FTI's report reveals a lack of independence of the EIU, and relevant documents have not been disclosed.¹⁹⁸ Claimants claim the BAMC conducted no independent investigation of its own despite the mandate of the *Dot Registry* decision and the noted failure by FTI to obtain critical evidence from the EIU and ICANN staff.
150. ICANN, on the other hand, responds that the Board's action on Request 18-6 complied with ICANN's Articles, Bylaws and established policies and procedures. ICANN states that while Claimants argue ICANN should have reconsidered Board resolutions concerning the CPE Review because FTI was unable to review the EIU's internal correspondence, Claimants do not challenge any of the Board's (or BAMC's) conclusions in response to Request 18-6. Further, the Board was entitled to accept FTI's conclusion that it had sufficient information for its review.¹⁹⁹
151. The Emergency Panelist finds, as to Request 18-6, that Claimants have failed to raise "sufficiently serious questions related to the merits." There is insufficient evidence in the record, despite Claimants' assertion that FTI was ICANN's "hand-picked a consulting firm,"

¹⁹⁶ Id.

¹⁹⁷ IRP Request, p. 4.

¹⁹⁸ IRP Request, pp. 12-21.

¹⁹⁹ ICANN's IRP Response, ¶¶ 62-78.

to impugn the independence and integrity of FTI and its methodology and the scope of work in relation to the CPE Review Process. As ICANN's Board indicated in its July 2018 Resolution, "[t]he Board selected FTI because it has 'the requisite skills and expertise to undertake' the CPE Process Review, and relied on FTI to develop an appropriate methodology."²⁰⁰ Moreover, although EIU refused FTI's request to produce certain categories of documents, the Board found there is no policy or procedure that would require ICANN to reject FTI's CPE Process Review Reports because the EIU did not produce certain internal emails.²⁰¹

152. Rule 11 of the Interim Supplementary Procedures provides in relevant part that "the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment." In view of the evidence submitted in relation to Request 18-6, the Emergency Panelist determines that the Board's decision to accept FTI's CPE Process Review Reports was within the realm of reasonable business judgment.

C. Harm for Which There will be No Adequate Remedy in the Absence of Relief and Balance of Hardships Tipping Decidedly Toward Party Seeking Relief

153. In light of the Emergency Panelist's decision that Claimants have raised sufficiently serious questions related to the merits with respect to the BAMC's recommendation for, and Board's acceptance of, Request 16-11, the Emergency Panelist will assess Claimants requests for interim relief under the remaining two factors of Rule 10 of the Interim Supplementary Procedures. As discussed above, Rule 10 requires that Claimants must establish – in addition to (A) likelihood of success on the merits or (B) sufficiently serious questions related to the merits – each of the following two factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

154. The Emergency Panelist will now address each of the Claimants' requests for interim measures while applying these two standards.

²⁰⁰ July 2018 Resolution, Analysis and Rationale, Section 3.A.2.

²⁰¹ Id.

1) Claimants' request that ICANN be required to not change the status quo as to the .HOTEL Contention Set during the pendency of this IRP

155. Claimants allege that ICANN proposes to award the .HOTEL gTLD registry agreement to HTLD, thereby eliminating Claimants' applications from contention for award of that contract. Claimants claim that ICANN's threatened action would make this IRP meaningless, and a complete waste of time and money, because Claimants would have no recourse even if they prevail. ICANN will have already awarded the contract, and the .HOTEL gTLD could be operational by HTLD before this IRP concludes. That would leave Claimants with no possible redress.²⁰²
156. Claimants contend that ICANN shows no respect for unanimous IRP precedent prohibiting ICANN from changing the *status quo* as to any gTLD Contention Set during the pendency of an IRP that could materially affect that Contention Set. ICANN takes this position despite its own Bylaws, which state that prior IRP decisions must be respected by ICANN as binding precedent.²⁰³
157. Claimants further contend that in all prior and relevant cases, IRP Emergency Panels have held that ICANN could not change the *status quo* as to a Contention Set under such circumstances.²⁰⁴ In particular, Claimants cite to the interim decisions by emergency panelists in the *Dot Registry, LLC v. ICANN* and *DCA Trust v. ICANN* cases, alleging both involved the

²⁰² Claimants IM Request, p. 5.

²⁰³ Claimants' Brief, p. 8.

²⁰⁴ *Id.*; see Ex. RELA-5: *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Emergency Independent Review Panelist's Order on Request for Emergency Measures for Protection (Dec. 23, 2014) ("*Dot Registry* Interim Decision") (ordering ICANN to refrain from proceeding with Contention Set resolution, stating that "... the need for interim measures is urgent to prevent the imminent dissipation of substantial rights."; also stating that if ICANN was allowed to proceed with the auction, Dot Registry would potentially suffer an "irrevocable loss" that "would not be compensable by monetary damages."); Ex. RELA-4: *DCA Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (May 7, 2014) ("*DCA* Interim Decision") (ordering "ICANN [to] immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same."; "In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review."); Ex. RELA-6: *GCC v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (Feb. 12, 2015) ("*GCC* Interim Decision") (ordering ICANN to "refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted"); see also, *Donuts v. ICANN*, ICDR Case No. 01-14-0000-1579, Resolution of Request for Emergency Relief (Nov. 21, 2014) (after forcing Claimant to file a Request for Emergency Relief, ICANN voluntarily agreed to a stay as to three new gTLD applications, in exchange for Claimant withdrawing that Request).

identical situation where ICANN threatened to delegate a TLD, which was subject to a competing applicant's IRP. In both decisions, the panelists required ICANN to maintain the contention set and not delegate the disputed TLD until the IRP was resolved. Claimants argue that here is no reason for any different result in this case, and that any different result would violate ICANN's Bylaws, Article 2, §2.3,²⁰⁵ which requires equal treatment of similarly situated parties.²⁰⁶

158. In the *Dot Registry* IRP, the Emergency Panelist stated in relevant part:

“While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012. ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.”²⁰⁷

159. Claimants allege that ICANN's Bylaws provide that prior IRP decisions must be respected by ICANN as binding precedent. Article 4, §4.3(a)(vi), provides that one of the “Purposes of the IRP” is to

“Reduce Disputes *by creating precedent* to guide and inform the Board, Officers[], Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.”

160. In addition, Article 4, §4.3(i)(ii) provides that: “All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law *and prior relevant IRP decisions.*” And furthermore, Article 4, §4.3(v) states (emphasis added):

“[A]ll IRP decisions ... shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue*, and norms of applicable law.”

²⁰⁵ Art. 2, § 2.3(Non-Discriminatory Treatment): “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”

²⁰⁶ Claimants' Brief, p. 3.

²⁰⁷ *Dot Registry* Interim Decision, ¶ 54.

161. Claimants contend that ICANN has no justification for ignoring the prior, binding precedents. The Bylaws do not materially differ from those in the prior cases. The facts and Bylaws as to the *Dot Registry* case, in particular, are relevantly virtually identical. Therefore, Claimants state that the Emergency Panelist must order ICANN to stay all action as to the .Hotel Contention Set, until such time as the IRP is resolved.²⁰⁸
162. ICANN, on the other hand, claims that Claimants will not suffer irreparable harm if .HOTEL is delegated.²⁰⁹ ICANN contends that Claimants' argument incorrectly assumes that once a gTLD is contracted for and delegated, the registry agreement (and operation of the gTLD) can never be assigned to another registry operator. However, ICANN states there is no technological, legal, or other barrier preventing the transfer of a registry agreement from one registry operator to another after a registry agreement is in place or even after a gTLD has been delegated. Rather, ICANN's registry agreements specifically contemplate transition of control of gTLDs, and ICANN has a process for transitioning to a prospective successor.²¹⁰ ICANN states it will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP.²¹¹ Even if the IRP Panel determines that ICANN violated its Articles or Bylaws, and the ICANN Board then determines (based upon the Board's review of the IRP Panel's conclusions and recommendations) that .HOTEL should be subject to auction that results in another applicant being awarded the right to operate .HOTEL, ICANN states it would have the right to enter into a registry agreement with a new prevailing party. Emergency relief is unnecessary because any harm to Claimants can be adequately remedied.²¹²
163. ICANN contends that Claimants do not submit actual evidence supporting their claim that they will suffer irreparable harm if .HOTEL proceeds to contracting and delegation. Instead, Claimants rely on decisions on requests for interim relief in other IRP proceedings. In addition to those other proceedings being distinguishable, ICANN states the California Superior Court has found that any harm caused by delegation of a gTLD is not irreparable and therefore cannot support a request for interim relief. In 2017, in *DotConnectAfrica Trust v. ICANN*, an applicant

²⁰⁸ Claimants' Brief, p. 10.

²⁰⁹ ICANN's Opposition, ¶ 29.

²¹⁰ ICANN's Opposition, ¶ 29.

²¹¹ *Id.*, ¶ 30.

²¹² *Id.*

for .AFRICA (“DCA”) moved for a preliminary injunction to prevent ICANN from entering into a registry agreement for .AFRICA with a competing applicant.²¹³ The California Superior Court denied the motion, finding “no potential for irreparable harm” to DCA.²¹⁴ The court explained that the “gTLD can be re-[assigned] to DCA in the event DCA prevails.”²¹⁵ The court further noted that re-assigning gTLDs “is not uncommon and has occurred numerous times,” acknowledging ICANN’s established procedure for assigning registry agreements.²¹⁶

164. ICANN claims that the same is true here. ICANN states that it will contractually preserve the option of effecting an assignment of .HOTEL to another registry operator pending the outcome of this IRP. Then, if the IRP Panel agrees with Claimants, and the ICANN Board determines (based on its review of the IRP Panel’s declaration) that HTLD should not operate .HOTEL, ICANN can effect an assignment of .HOTEL to another registry operator.²¹⁷

165. ICANN claims that neither the *Dot Registry* Interim Decision nor the *DCA* Interim Decision considered the fact that the registry agreements for the gTLDs at issue could be assigned to another registry operator.²¹⁸ In addition, the *GCC* Interim Decision, cited by Claimants, is different in a critical respect from the dispute here: in that case, the claimants opposed the existence of the .PERSIANGULF gTLD because “the GCC and its members are extremely sensitive to use of the term ‘Persian Gulf’ in virtually any context, including its use as a top level domain.”²¹⁹ Thus, ICANN states the delegation (and “operation” by any entity) of .PERSIANGULF was the harm – not the operation of the gTLD by one applicant rather than another. Here, the delegation of .HOTEL in itself is not the harm; Claimants allege harm related to the identity of the registry operator, but this harm can be adequately remedied through the registry transfer process.

²¹³ Ex. RELA-2: Order Denying Plaintiff’s Motion for Preliminary Injunction, *DotConnectAfrica Trust v. ICANN*, Case No. BC607494 (Super. Ct. Cal. 3 Feb. 2017) (“*DCA Trust* Superior Court Decision”).

²¹⁴ *Id.*, p. 4.

²¹⁵ *Id.*

²¹⁶ *Id.* Similarly, ICANN claims that in 2016, the District Court for the Central District of California denied an application to prevent the .WEB contention set from proceeding to “auction [to] award the rights to operate the registry to the winning bidder.” Order Denying Plaintiff’s Ex Parte Application for Temporary Restraining Order, at Pg. 1, *Ruby Glen, LLC v. ICANN*, Case No. CV 16-5505 PA (C.D. Cal. 26 July 2016), Ex. RELA-3. “[B]ecause the results of the auction could be unwound, Plaintiff ha[d] not met its burden to establish that it will suffer irreparable harm” if the auction proceeded. *Id.* at p. 4.

²¹⁷ ICANN’s Opposition, ¶ 33.

²¹⁸ See *DCA* Interim Decision, ¶¶ 39-50; *Dot Registry* Interim Decision, ¶¶ 50-52.

²¹⁹ *GCC* Interim Decision, ¶ 10.

166. ICANN concludes that while the older IRP interim decisions did not consider whether the harm identified here can be remedied by transferring the registry agreement after delegation, the more recent California Superior Court decision addressed exactly this issue and concluded that there was no irreparable harm under the circumstances. ICANN urges that the Emergency Panelist should do the same here because the same remedy will be available when this IRP concludes: ICANN would be able to terminate the registry agreement with HTLD and enter into a registry agreement with another party, if required by the circumstances.²²⁰
167. Claimants, in their Reply Brief, emphasize that ICANN’s Bylaws require it to respect the prior IRP interim decisions as binding precedent, a key point that ICANN does not address. Claimants have cited the *Dot Registry* Interim Decision and the *DCA* Interim Decision – both involved the identical situation where ICANN threatened to delegate a TLD that was subject to a competing applicant’s IRP. In both decisions, the emergency panelist required ICANN to maintain the contention set and not delegate the disputed TLD until the IRP was resolved.²²¹
168. Claimants state that the California Superior Court decision denying the preliminary injunction did not consider prior IRP precedents and ICANN’s Bylaws in its analysis.²²² In addition, Claimants here, unlike in that case, do not seek damages and seek only injunctive relief. Further, there is no intervener in this case that would suffer any damage. Also, the California court found a public interest in launching the .AFRICA gTLD; such an interest that does not exist as to .HOTEL, as both the .HOTELES and .HOTELSs gTLDs have been delegated for SEVERAL years with zero registrations to-date.²²³ Therefore, the California Superior Court preliminary decision cannot override unanimous IRP precedent that binds ICANN and this panel.²²⁴
169. Claimants allege that reliance on ICANN’s Transition Policy is an extremely uncertain and inadequate remedy. Claimants state that while ICANN presents that TLD registry transition is a simple process and that gTLDs are fungible assets (like second-level domain names, e.g., “example.com”), ICANN’s argument is fanciful, as clearly evidenced by the complex

²²⁰ ICANN’s Opposition, ¶ 36.

²²¹ Claimants’ Reply, pp. 3-4.

²²² *Id.*, p. 4.

²²³ Ex. K.

²²⁴ Claimants’ Reply, p. 4.

Transition Policy itself, especially with respect to Community TLDs.²²⁵ Claimants contend they would be irreparably harmed if ICANN proceeded to delegate the .HOTEL gTLD to Claimants' competitor, HTLD, particularly as a "community" TLD. HTLD would be permitted to launch .HOTEL and could ruin the market before it can be assigned to another applicant. Claimants argue this is far less speculative than the notion that HTLD would simply assign over the gTLD if Claimants prevail in this IRP. While ICANN states that it "will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP," it has provided no sworn statement to that effect. Moreover, a statement to "preserve the option" is not a promise that ICANN would exercise such option. Claimants state that ICANN cites no precedent for such a clause in any registry agreement, as there is none. ICANN cannot confirm that HTLD would accept such a clause, and cannot confirm that HTLD would abide by such a clause, even if HTLD did accept it.²²⁶ Moreover, Claimants allege there are other technical and business concerns addressed in the Transition Policy, which have no certainty as to outcome. The ICANN Board would need to approve the assignment, which would have to be proposed by HTLD – and neither of those actions can be guaranteed by ICANN. Future registry transition is inherently uncertain, and cannot cure the irreparable harm that is demonstrably likely to result from delegation during pendency of this IRP.²²⁷

170. Claimants argue that ICANN does not address what would happen to all of the "hotel community" members who have purchased .HOTEL domains by the time of any proposed assignment and put them to use (e.g., for websites, email). The Transition Policy would require the successor registry operator to accept those legacy registrations. That would constitute certain, irreparable harm to the successor, who might have sold any or all of those registrations to different parties, for higher prices and/or longer registration terms, and without restrictions as to use. Claimants allege the successor would be forced to accept the legacy customers and

²²⁵ Id., p. 5; Ex. RE-5 (Registry Transition Processes).

²²⁶ Id., p. 6.

²²⁷ Id., p. pp. 7-8. Claimants claim ICANN has recently been involved in an analogous dispute over the proposed assignment of the .ORG gTLD, operated on behalf of the non-profit organizational community. The non-profit operator sought to assign the gTLD to a private equity firm run by domain industry veterans (including a former ICANN CEO). Many in the non-profit community objected to the sale, and found support from the California Attorney General. That pressure caused ICANN to recently reject the assignment. Ex. I (ICANN's Board Resolution on the matter, including analysis of the factors considered in registry transition proposal). Claimants contend this is real evidence that ICANN cannot guarantee a smooth registry transition in this matter.

policies of HTLD.²²⁸ Moreover, a community gTLD must operate with defined “community restrictions” intended to limit usage to the community.²²⁹ If the disputed .HOTEL gTLD launches with restrictions, that is likely to create market stigma, poisoning the gTLD.²³⁰ This is allegedly what has happened with several restricted gTLDs to-date, as their registry operators realized they needed to open their restricted registries to survive.²³¹

171. Claimants allege, as to balance of hardships, that neither ICANN nor any third party has shown any harm from maintaining the *status quo*. ICANN refers to the so-called “hotel community” purportedly represented by HTLD and the alleged harm to HTLD and that community.²³² However, Claimants claim that ICANN provides no evidence as to any urgency or other potential hardship in this matter, which ICANN itself unilaterally delayed for years while it internally reviewed and reported on the CPE. This matter has been active since 2012 when Claimants filed their applications and each paid US\$ 185,000 to ICANN to process those applications. Claimants are far more prejudiced than anyone else, as their respective investments (including consultants’ fees, executive time and other resources) remain idle while this matter continues.²³³ Claimants also allege that ICANN delegated the .HOTELES (Spanish/plural) gTLD in 2015, and it has not even launched yet. Similarly, ICANN delegated the .HOTELS (plural) gTLD in 2017, and it has also not launched.²³⁴ Claimants contend these facts prove there are two available, nearly identical gTLDs already delegated by ICANN, with market demand apparently so weak that they have not been launched for any use at all.²³⁵ Claimants also assert that HTLD has had an opportunity to attempt to intervene in this matter to aver that its rights might be prejudiced, but has done nothing. At best, ICANN is speculating without any evidence, and contrary to evidence presented by Claimants.

²²⁸ Id., p. 7.

²²⁹ According to Claimants, this is one of the elements of the CPE that is at the core of this IRP case. Claimants argue that there is no legitimate hotel community, and instead .HOTEL domains should be made available to anyone without restriction – just like hundreds of other top-level domains including .HOTELES, .TRAVEL, .VOYAGE, .VIAJES, .VACATIONS, .TOURS, .HOLIDAY, .THEATER and .THEATRE.

²³⁰ Claimants’ Reply Brief, p. 7.

²³¹ Ex. J (2018 industry press article regarding .TRAVEL gTLD).

²³² Claimants’ Reply Brief, p. 8 (citing ICANN’s Opposition at ¶¶ 3, 5).

²³³ Claimants’ Reply Brief, pp. 8-9.

²³⁴ Ex. K.

²³⁵ Claimants’ Reply Brief, p. 9.

172. In sum, Claimants contend that the balance of hardships weighs against ICANN, as Claimants would suffer demonstrable and irreparable market harm, as per the evidence Claimants have presented. Registry transition would be an uncertain and insufficient remedy, which ICANN has not guaranteed and cannot promise. Neither ICANN nor any other party has shown any evidence of potential harm from the *status quo*. Therefore, Claimants request that the Emergency Panelist must follow unanimous, binding IRP precedents and order ICANN to preserve that *status quo* until this IRP case is resolved.
173. At the June 3rd Hearing, Claimants added as to the issue of “harm,” that if ICANN delegated .HOTEL to Claimants’ competitor, “that harm is obvious.” Claimants additionally referred to ICANN’s Transition Policy, alleging it is complicated and that many factors go into the transition analysis; the ICANN Board resolution with respect to the potential transaction of .ORG from one registry operator to another, reflecting the complexity and uncertainty involved;²³⁶ and concerns that there is no declaration from ICANN or Afilias as to any language that might be included in a registry contract if delegation occurred; and no declaration from Afilias alleging any harm.
174. Decision: The Emergency Panelist finds that this issue presents a close call. Claimants have cited to prior IRP precedents granting interim relief to maintain the *status quo* and involving similar facts and related concerns (i.e., ICANN moving to delegate a gTLD that was subject to a competing applicant’s IRP). Claimants argue that these prior IRP cases must be respected as binding precedent. ICANN has attempted to distinguish those IRP cases and cited to a California Superior Court case denying a request for injunctive relief to enjoin ICANN from delegating the rights to the .AFRICA gTLD, in another case involving a competing applicant.
175. The Emergency Panelist observes that each of these prior decisions was decided under standards that differ from the express standard now codified in Rule 10 of the Interim Preliminary Procedures, discussed above. The prior IRP cases, although raising similar concerns to those now faced by Claimants and providing “persuasive precedent” in terms of their analysis of certain policies, interests and issues, relied on prior versions of the ICANN Bylaws, before the standard set forth in Rule 10 of the Supplementary Procedures was in effect.

²³⁶ Ex. I (ICANN’s Board Resolution on the matter, including analysis of the factors considered in registry transition proposal).

They also relied on the ICDR Rules, Article 6 (Emergency Measures of Protection) and general arbitration practice to identify standards for granting interim relief. While the ICDR Rules remain in effect, the Interim Supplementary Procedures provide, in Rule 2, that “[i]n the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern.”

176. The California Superior Court did not reference ICANN’s Bylaws and relied on standards drawn from California court precedent for the issuance of preliminary injunctions. One prong of that analysis was “likelihood of success on the merits”; however, the court did not include or consider the alternative standard of Rule 10, “sufficiently serious questions related to the merits,” on which Claimants rely in this IRP. Moreover, the court found the plaintiff was unlikely to prevail on the merits in that case because, in accordance with the terms of its gTLD application – which included a covenant barring all court-based lawsuits against ICANN arising from ICANN’s evaluation of new gTLD applications – the plaintiff was not supposed to be before the court in the first place.²³⁷ This merits-based analysis by the court had nothing to do with any underlying claims by the plaintiff about whether or not the action or failure to act by ICANN Board might be in breach of ICANN’s Article, Bylaws or other policies and commitments.

177. The Supplementary Procedures, Rule 10, which applies to Claimants’ request for interim measures in this case, has articulated specific standards that supersede criteria considered by the panelists and the judge in those prior cases. Rule 10 requires that Claimants must establish *all* of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

178. The Emergency Panelist has already addressed factor (ii) above (“finding there were sufficiently serious questions related to the merits), leaving factors (i) and (iii) to be considered here. In view of all of the submissions, evidence, and arguments made in this case, and in view

²³⁷ *DCA Trust* Superior Court Decision, p. 6.

of the finding above that there are sufficiently serious questions related to the merits, the Emergency Panelist determines that Claimants have established “[a] harm for which there will be no adequate remedy in the absence of such relief” and that the “balance of hardships tip[] decidedly toward [Claimants] seeking relief.”

179. Addressing the third (iii) factor first, given the long delays in this case that have already occurred (some due to processes convened by ICANN, which ICANN has acknowledged) and ICANN’s further acknowledgement that the only harm to ICANN is “to not be able to continue its processes,”²³⁸ the Emergency Panelist finds the balance of hardships tip decidedly toward Claimants. There is no evidence before the Emergency Panelist of harm to a “hotel community” caused by the additional delay in delegating .HOTEL until this IRP is decided. In addition, the non-party, HTLD (now Afiliias), has not sought to intervene in this case (or submit a declaration) to assert that any of its rights might be prejudiced. Further, there is no evidence of a public interest in favor of delegation, as was found by the California Superior Court in the case involving the delegation of the .AFRICA gTLD. As stated well by the Emergency Panelist in the *Dot Registry* IRP:

“While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012. ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.”²³⁹

180. The closer question relates to factor (i), “[a] harm for which there will be no adequate remedy in the absence of such relief.” ICANN has alleged that there is no technological, legal, or other barrier preventing the transfer of a registry agreement from one registry operator to another after a gTLD has been delegated; that it can contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome this IRP; and that Claimants have not submitted sufficient evidence supporting their claim that they face the requisite harm if .HOTEL proceeds to contracting and delegation.

²³⁸ June 3rd Hearing, audio transcript (1:01:45 – 1:02:20).

²³⁹ *Dot Registry* Interim Decision, ¶ 54.

181. The Emergency Panelist determines that Claimants have provided sufficient evidence, in part in view of the prior IRP interim decisions decided on similar issues, that the harm Claimants faces is one for which there will be no adequate remedy in the absence of such relief. Claimants have raised concerns as to the impact on the market for .HOTEL domain names if it is initially delegated as a “community” gTLD; the legacy concerns associated with domain name registrations subject to use restrictions intended to limit use to a community and potential conflicts with domain names registered by a new operator; and transition concerns involving uncertainty and the complexity of attempting to effectuate the transition from one registry operator to another, particularly if the incumbent registry operator is being forced to involuntarily relinquish its operation of the .HOTEL gTLD to a competitor. Although the Emergency Panelist does not question ICANN’s undertaking that it would seek to include a new contract clause in its registry agreement with Afilias requiring transfer in the specific situation where a decision in this IRP is issued in favor of Claimants, there is no specific language as to the scope of this clause in evidence and there are uncertainties associated with Afilias willingness (or unwillingness) to agree to such a restriction. Concerns between potential registry operators as competitors accentuate all of these points.
182. For all of the above reasons, and in view of all of the matters considered in this Decision, the Emergency Panelist decides to grant Claimants’ request that ICANN be required to maintain the *status quo* as to the .HOTEL Contention Set (i.e., do not enter into a registry contract with Afilias and do not enter into the delegation phase for .HOTEL) during the pendency of this IRP.²⁴⁰
183. In determining that interim relief is appropriate at this time with respect to maintaining the *status quo* as to the .HOTEL Contention Set, the Emergency Panelist makes clear that this decision does not finally resolve this issue. As discussed in paragraph 78 above, the decision of the Emergency Panelist concerning interim relief on this point can be reconsidered, modified or vacated by the IRP Panel, and does not resolve the merits to be fully addressed by the Panel.

²⁴⁰ The Emergency Panelist notes that, to the extent it is relevant to distinguish between prohibitory and mandatory injunctions and the corresponding degree of scrutiny for each, this order to maintain the *status quo* is prohibitory. Cf. Ex. RELA-1: Emergency Panelist’s Decision on Claimant’s Request for Interim Measures of Protection, *Namecheap, Inc. v. ICANN*, ICDR Case No. 01-20-0000-6787 (Mar. 20, 2020), ¶ 97.

2) Claimants' request that ICANN be required to preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP

184. Claimants request an order requiring ICANN to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP. Although Claimants indicated that they would “shortly will make a detailed request to ICANN pursuant to its so-called Document Disclosure Policy (“DIDP”), and incorporate[] that DIDP request by reference herein,” no such DIDP request was submitted to the Emergency Panelist.²⁴¹
185. Claimants have provided in their IM Request some detailed information about the documents sought and indicate that many of those categories of documents were required to be disclosed by ICANN to the *Dot Registry* IRP panel, even after ICANN’s alleged repeated denial as to the existence of some of them.²⁴² Claimants contend they are entitled to a preservation order so that the IRP Panel in this case will have the same documents available to it from ICANN, the EIU and FTI, as the IRP panel forced ICANN to disclose in the *Dot Registry* IRP case involving nearly identical facts, parties and documents. Claimants also seek additional documents from HTLD and Afilias in this matter, that were not relevant in the *Dot Registry* IRP case, and thus seek a preservation order as to those parties as well.²⁴³
186. Claimants contend that such an order is needed; otherwise, there would be no way for Claimants to have necessary documents that could be destroyed before this matter proceeds to discovery and adjudication. Claimants assert that ICANN offers no reasoning against imposition of such an order, but instead claims that it might be ineffective for various reasons. To the extent ICANN claims such documents are not relevant, Claimants vigorously dispute this claim and again refer to the *Dot Registry* IRP case, where such documents were allegedly hidden by ICANN, but the IRP panel forced their disclosure and found them to be relevant. Claimants and IRP panel in this case must have available all of the pertinent documents already produced in that highly analogous case involving many of the very same core issues.²⁴⁴

²⁴¹ Claimants’ IM Request, pp. 12-13.

²⁴² Claimants’ Brief, p. 11.

²⁴³ *Id.*, p. 12.

²⁴⁴ Claimants’ Reply, pp. 16-17.

187. ICANN states that it will comply with its obligations to preserve documents in its possession, custody, or control.²⁴⁵ ICANN contends, however, that Claimants' requests are more properly raised as discovery requests during the course of the main IRP proceedings, not as a request for interim relief. The Interim Supplementary Procedures provide for certain types of document discovery, and ICANN states that Claimants will have a full opportunity to request documents during the course of the IRP; they do not need interim relief for this purpose.²⁴⁶
188. During the hearing on June 3rd, counsel for ICANN, as noted above, provided an undertaking that he had already sent letters to the EIU and FTI requesting that they preserve relevant documents related to this IRP. The Emergency Panelist requested that ICANN supply copies of these letters, and on June 4, 2020, ICANN submitted copies of the letters, each dated May 22, 2020. In the letter to EIU, ICANN asked EIU "to retain any notes, drafts, and other work product in its possession, custody, or control relating to the Community Priority Evaluation ("CPE") of HTLD's .HOTEL application (and relating to any gTLD applications for .HOTEL." In the letter to FTI, ICANN "instruct[ed] FTI to retain any notes, drafts, and other work product in its possession, custody, or control relating to the Community Priority Evaluation ("CPE") of HTLD's .HOTEL application, the CPE Process Review conducted by FTI, and any gTLD applications for .HOTEL.
189. ICANN also indicated, however, that its contractual relationship with the EIU does not give ICANN control over documents in the EIU's possession, and the EIU was only required to retain documents for five years. The EIU completed the HTLD CPE Evaluation more than five years before Claimants initiated this IRP.²⁴⁷ Further, ICANN states that Afiliias and HTLD are third parties with no duty to ICANN to preserve or provide documents. ICANN lacks the "right, authority, or practical ability to obtain...documents" from them or force them to preserve material.²⁴⁸ ICANN notes that Claimants offered to "propose a list of specific categories of documents" that they would like preserved, but (despite having raised this issue in the IRP Request more than five months ago) have not identified those categories.²⁴⁹

²⁴⁵ ICANN's Opposition, ¶ 47.

²⁴⁶ Id.

²⁴⁷ Id., ¶¶ 47-48.

²⁴⁸ Id., ¶ 61.

²⁴⁹ Id., ¶ 46.

190. Although Claimants cite procedural orders from prior IRPs in support of this request for emergency measures, ICANN claims those orders concerned ICANN's production of documents – they were not preservation orders, did not grant interim relief, and did not extend to third parties. Finally, ICANN contends that Claimants do not even attempt to argue that the balance of hardships tips decidedly in their favor. Claimants must establish this element to obtain interim relief, and they have not even tried to do so.²⁵⁰
191. In view of all of the above circumstances, including (i) ICANN's undertaking that it will comply with its obligations to preserve documents in its possession, custody, or control; (ii) ICANN's letters to the EIU and FTI, (iii) that Afilias and HTLD are non-parties to this IRP, and (iv) that Claimants did not provide a copy of any DIDP request, the Emergency Panelist determines that Claimants have failed to establish “[a] harm for which there will be no adequate remedy in the absence of such relief” and that the “balance of hardships” tip decidedly toward Claimants.
192. In determining that interim relief is not appropriate at this time with respect to the requested interim order to preserve documents, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.
193. For all of these reasons, Claimants' request for interim relief that ICANN be required to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IR, is hereby denied.

3) Claimants' request that ICANN be required to appoint an Ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6

194. This request was addressed above in Part VI, Sections B(1)[5] and [6].

4) Claimants' request that ICANN be required to appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Supplementary Procedures, from which an IRP Panel shall be selected and to which Claimants might appeal, *en banc*, any IRP Panel decision per Rule 14 of the Interim Supplementary Procedures

²⁵⁰ Id., ¶¶ 49-51.

195. Claimants contend that ICANN has continued to violate its Bylaws by failing to make any real progress to adopt an IRP Standing Panel of specially trained panelists, chosen with broad community input – for some eight years – and through several iterations of ICANN Bylaws and a prior IRP declaration requiring them to do so.²⁵¹

196. Claimants state that ICANN’s Bylaws expressly have required the creation of a Standing Panel since 2013,²⁵² as follows:

“There shall be an omnibus standing panel of at least seven members (the ‘Standing Panel’) each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training....”²⁵³

197. Claimants assert that ICANN’s own Interim Supplementary Procedures, Rule 3 (since 2016) begins “[t]he IRP Panel will comprise three panelists selected from the Standing Panel.” Moreover, Rule 10 provides that the Emergency Panel shall be selected from the Standing Panel, and Rule 14 provides for the right of appeal of IRP panel decisions to the Standing Panel, *en banc*.

198. Claimants contend that they are deprived of these important procedural rights because of ICANN’s willful inaction, refusing to create a Standing Panel for some eight years now, and refusing to make much progress towards even beginning to establish one.²⁵⁴ Claimants argue this is particularly outrageous because ICANN was admonished by a previous IRP Panel for exactly this same reason, more than five years ago, in the *DCA Trust v. ICANN*²⁵⁵ case:

“29. First, the Panel is of the view that this IRP could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel [with] “knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected.”

²⁵¹ Claimants IM Request, p. 10.

²⁵² *Id.*

²⁵³ ICANN Bylaws dated April 11, 2013, Art. IV, § 3.6.

²⁵⁴ *Id.*, p. 11.

²⁵⁵ Decision on Interim Measures of Protection, *DCA Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13, dated May 12, 2014.

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an IRP as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.”

199. Claimants contend ICANN has “thumbed its nose” at the *DCA Trust* IRP decision for five years, despite the purposes of the IRP to provide binding decisions and guide ICANN actions to remedy Bylaws violations.²⁵⁶ Claimants request that ICANN be deemed to have violated its Bylaws by failing to implement the Standing Panel despite a long passage of time; indeed, by failing to make any substantial progress over that time. Claimants further request that such a Standing Panel be implemented to adjudicate this case, and to provide Claimants their critical right to appeal – per the Bylaws – that they otherwise will be deprived of for so long as ICANN refuses to implement the Standing Panel.²⁵⁷

200. Claimants contend it has also directly benefited ICANN’s finances, saving perhaps more than US\$ 1 million per year on fees paid by IRP claimants, which ICANN should be paying to maintain a Standing Panel, as clearly required by its Bylaws since 2013.²⁵⁸ Claimants contend that it harms them to not have the benefit of appointments from a Standing Panel with the specialized training, resultant expertise, and community backing that the Bylaws required ICANN to provide to all IRP claimants, more than six years ago. And Claimants will be denied the basic *en banc* appeal mechanism provided by ICANN’s Interim Supplementary Rules, which ICANN purportedly implemented more than three years ago. Claimants allege that ICANN has violated its Bylaws by taking so long to implement the Standing Panel, causing direct harm to Claimants and to all parties who would seek independent review of ICANN conduct.²⁵⁹ At the June 3rd Hearing, Claimants indicated that they are being denied a trained panel selected by community, denied an option to have a mediator from the IRP Standing Panel, and denied rights of an *en banc* appeal, probably most important right; and that Claimants are forced to pay fees up front, whereas the Bylaws require that IRP Panel should be in place and paid by ICANN.

²⁵⁶ Id.

²⁵⁷ Claimants’ Brief, p. 3.

²⁵⁸ Claimants’ IM Request, p. 12.

²⁵⁹ Claimants’ IM Request, p. 12.

201. ICANN contends that the establishment of the Standing Panel is a process that is driven, in the first instance, by ICANN’s “community,” and ICANN does not control their progress.²⁶⁰ ICANN contends that Claimants argument of harm is speculative and premature: the panelists for this IRP have not been selected; and pursuant to the Bylaws, Claimants may nominate one of the panelists, and that panelist will be involved in selecting (along with the panelist that ICANN chooses) the chair.²⁶¹ Claimants may select a panelist with as much specialized experience and expertise as they wish, and this process is set forth in the Bylaws, which were subject to public comment.²⁶²
202. ICANN contends that as to Claimants’ purported right to an appeal mechanism, the concern is premature and not appropriate for emergency relief.²⁶³ ICANN states that Claimants can only possibly be harmed if this IRP concludes; if the IRP Panel (which has not yet been selected) makes a final determination against Claimants; Claimants decide to appeal the decision; and, at that point, the Standing Panel has not been established. Until then, there is no risk of harm – much less irreparable harm – associated with this argument.²⁶⁴
203. ICANN states that even if it were appropriate to order ICANN to implement the Standing Panel, ICANN cannot “snap its proverbial fingers and do this.”²⁶⁵ The establishment of the Standing Panel depends on contributions and work from across ICANN’s community, including the IRP Implementation Oversight Team (“IRP-IOT”), representatives of ICANN’s Supporting Organizations (“SOs”) and Advisory Committees (“ACs”), and others. ICANN cannot unilaterally complete these processes. An order that ICANN do so before this IRP may proceed could halt the IRP for six months or more, while the community, ICANN, and the Board work to complete the processes.²⁶⁶ The process for establishing a Standing Panel is set forth in the Bylaws. The Bylaws require ICANN to work with SOs, ACs, and the Board to identify, solicit, and vet applications for Standing Panel membership. This process has begun: on March 31, 2020, ICANN opened a call for expressions of interest for panelists to serve on the Standing

²⁶⁰ ICANN’s Opposition, ¶ 42.

²⁶¹ Id., ¶ 43.

²⁶² Id.

²⁶³ Id., ¶ 44.

²⁶⁴ Id., ¶ 44.

²⁶⁵ ICANN’s Opposition, ¶ 54.

²⁶⁶ Id.

Panel and published a “Summary of Comments Received from Supporting Organizations and Advisory Committees on qualifications for Standing Panelists, and Next Steps.”²⁶⁷ Once they are received, SOs and ACs – not ICANN’s Staff or Board – are responsible for nominating a slate of Standing Panel members, which the ICANN Board will then consider. ICANN cannot mandate the speed at which the community process will occur.²⁶⁸ If the Board has questions on that proposal, it will need time to seek clarification. The selected Standing Panel members will also need training.²⁶⁹

204. ICANN argues that with respect to Claimants reference to the 2014 *DCA Trust* IRP – which stated that “[h]ad ICANN timely constituted the standing panel, the panel could have addressed DCA Trust’s request for an IRP as soon as it was filed in January 2014” – this was not a determination that ICANN violated its Articles, Bylaws, policies or procedures, and it does not apply to the current circumstances because the process for selecting a Standing Panel changed when ICANN enacted its new Bylaws in October 2016. Under the current Bylaws,²⁷⁰ ICANN does not have the power to complete the Standing Panel process on its own because of the roles of the SOs and ACs. Since the Bylaws were amended to provide for a process for establishing the Standing Panel, ICANN (with the SOs and ACs) has worked toward establishing a Standing Panel, including most recently by opening a call for expressions of interest for Standing Panel membership. Accordingly, the *DCA Trust* decision should not provide guidance, and is not binding precedent here.²⁷¹

205. Claimant in their Reply Brief claim that ICANN admits that implementation of the Standing Panel will take no more than six to twelve months longer than if it does not implement the Standing Panel. Claimants aver that this is a minimal, additional wait period given there is no evidence of ongoing harm to anyone from the delay in processing the .HOTEL applications submitted in 2012. Moreover, Claimants argue that ICANN offers no excuse for its willful failure to implement the Standing Panel, which it required itself to implement – at behest of its

²⁶⁷ Expressions of Interest were due in July 2020, but the deadline has been extended to the end of August 2020.

²⁶⁸ *Id.*, ¶ 55.

²⁶⁹ *Id.*, ¶ 56.

²⁷⁰ Bylaws, Art. 4, § 4.3(j).

²⁷¹ *Id.*, ¶¶ 57-58.

broader Community – more than six years ago. ICANN offers no evidence of any effort to implement its Bylaws in that respect prior to March 31, 2020.²⁷²

206. Claimants contend that ICANN falsely claims the implementation of the Standing Panel is beyond its control. Claimants state ICANN controls the work of its constituent bodies, and has control over those bodies' staff support and budgets, and regularly imposes timelines on work.²⁷³ There is no reason why ICANN could not prioritize the IRP-IOT work with more staffing and a Board-requested timeline. Claimants argue that it is not important to ICANN, especially since ICANN benefits from bottom line benefits from the *status quo* – claimants paying hundreds of thousands of dollars in fees that ICANN has promised in its Bylaws to pay, for more than six years. Claimants argue that neither Claimants nor the Emergency Panelist, nor the broader ICANN Community, can have confidence that ICANN will fulfill its Bylaws obligations with any diligence, unless ordered to do so.²⁷⁴ ICANN says that the process for selecting the Standing Panel changed in 2016; however, that does not excuse their inaction up to that date, or since. Claimants allege ICANN has provided no evidence of any real effort to appoint a Standing Panel, under any process, until just two months ago. Claimants request that ICANN needs a clear order to implement the safeguards guaranteed by Bylaws to these Claimants and to the entire ICANN community. Only then can this dispute be resolved fairly, in accord with ICANN's 2013 Bylaws. Only then will Claimants have their ICANN-given right to a specially trained Standing Panel, including Claimants' right to *en banc* appeal of any decision of the panel.

207. The Emergency Panelist finds that Claimants have raised serious concerns about the delays associated with implementation of the Standing Panel, first recognized by the Emergency Panelist in the *DCA Trust v. ICANN* case. ICANN's Bylaws from 2013, as noted above, provide that “[t]here shall be an omnibus standing panel of at least seven members (the ‘Standing Panel’) each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration.” Although this Bylaw is expressed in the future tense (“*there shall be*”), more than seven years have passed since enactment of that Bylaw.

²⁷² Claimants' Reply Brief, p. 13.

²⁷³ *Id.*, pp. 13-14.

²⁷⁴ *Id.*

Moreover, ICANN's October 2016 Bylaws, referenced by ICANN above, provide identical language in Article 4, § 4.3(j)(i), and more than three years have passed since the enactment of the 2016 Bylaws. These delays raise the prospect that ICANN, by not moving forward for such a long period, has risked breaching the commitment that it made through its Bylaws on this point, starting with the 2013 Bylaws.

208. Claimants have also pointed to important procedural rights, including in particular the right to an appeal before an *en banc* panel comprised of members of the Standing Panel, as set forth in the Interim Supplementary Procedures, Rule 14, and the Bylaws, Article 4, §4.3(x)(i).²⁷⁵ Moreover, Claimants have pointed to the costs imposed on Claimants and on other claimants, given ICANN's position that it does not pay for IRP panelist fees and the ICDR's fees when the Standing Panel has not yet been established. As to this last point, the Emergency Panelist has addressed separately Claimants' request that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists in Section VI.C(6) below, noting that ICANN has now changed its position and has committed to pay IRP panelist and emergency panelist fees, in accordance with the Bylaws, Article 4, § 4.3(r).²⁷⁶
209. Even in view of the legitimate concerns raised above, the Emergency Panelist nonetheless finds that Claimants' interim relief request – that ICANN be required to appoint immediately the Standing Panel – is premature. As noted by ICANN, Claimants, through the appointment process for the IRP panel in this case, have the opportunity to nominate a panelist with the relevant expertise, and ICANN can do the same. Accordingly, on the present record, Claimants have limited, if any, immediate risk of harm during the course of this IRP.
210. Moreover, the formal process for appointing the IRP Standing Panel is now underway with the solicitation of expressions of interest for panel members. Thus, the risk of harm to Claimants (“for which there will be no adequate remedy in the absence of such relief”) – which is *not* zero – is dependent upon not only (i) the assumption that ICANN's will not continue with the new-

²⁷⁵ Rule 14 of the Interim Supplementary Procedures provides in relevant part: “An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting *en banc* within 60 days of the issuance of such decision. The *en banc* STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard....”

²⁷⁶ Art. 4, § 4.3(r) provides that: “ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members”.

found momentum to get the Standing Panel constituted, but also on (ii) the possibility that the IRP Panel in this case makes a final determination *against* Claimants, that Claimants decide to appeal the decision; and that, at that point, the Standing Panel has not yet been established. Given the process involved in constituting the Standing Panel, including involvement of committees and the ICANN community, as described by ICANN above, the balance of hardships, on the whole and as of the time of this Decision, do not tip decidedly toward Claimants on this request.

211. In determining that interim relief is not appropriate at this time with respect to the appointment of the Standing Panel, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel. The Emergency Panelist leaves Claimants to reassert this relief in the main IRP proceedings, in order to preserve rights under the Bylaws to an appeal to the Standing Panel, sitting *en banc*, should Claimants need (and wish) to do so.

212. For all of these reasons, Claimants request for interim relief that ICANN be ordered to immediately appoint the IRP Standing Panel is denied.

5) Claimants request that ICANN be required to adopt final Rules of Procedure

213. Claimants contend that ICANN has failed to adopt final IRP rules of procedure – for some six years – despite the Bylaws that have clearly required ICANN to do so; instead, Claimants argue that “we have incomplete, improper ‘Interim’ rules in place for more than three years now, with no apparent timeline or plan to complete the actual Rules.”²⁷⁷ Claimants state that ICANN has failed to come close to finalizing the Interim Supplementary Rules imposed more than three years ago, promised by the Bylaws six years ago. That failure in adopting final rules, which should have been a priority for ICANN, likely will cause much to be argued by the parties and decided by the Panel – which should have been the focus of ICANN-driven community consensus, and set in the rules by now.²⁷⁸

214. ICANN contends that just as in the case of the Standing Panel, the development of updated procedural rules is a process that is driven by ICANN’s community and ICANN does not

²⁷⁷ Claimants’ IM Request, p. 10.

²⁷⁸ *Id.*, pp. 11-12.

control the progress.²⁷⁹ Further, the Bylaws specifically contemplate that, while these community driven processes move forward, there are operative rules that will govern this IRP proceeding – the ICDR’s International Arbitration Rules (which will continue to control once updated procedures are implemented), the Interim Supplementary Procedures, which apply in this case and about which the Claimants make no complaints, and the Bylaws provisions for selecting panelists in the absence of a Standing Panel. Claimants have not even argued that they will suffer irreparable harm if the Interim Supplementary Procedures are used, just as they are being used in other IRPs currently pending.²⁸⁰

215. ICANN argues that Claimants’ request that the IRP be delayed until ICANN has finalized the procedures rules is unreasonable. ICANN has already adopted interim procedures – the Interim Supplementary Procedures – that govern this proceeding, and Claimants have used those procedures, as have claimants in two other IRPs that are currently proceeding. The Bylaws delegate responsibility for developing updated procedures to the IRP-IOT “comprised of members of the global Internet community.”²⁸¹ As Claimants know (because Claimants’ counsel is on the IRP-IOT), the IRP-IOT is actively working to finalize updated procedures, but was stalled because the membership was unable to commit the necessary time. The ICANN Board, when it was clear that the IRP-IOT was stalled, coordinated with the ICANN community and re-comprised the IRP-IOT so that updated procedures can be finalized. The re-comprised IRP-IOT is meeting regularly. Additionally, consistent with the Bylaws’ commitment to seeking broad, informed participation from the public, the IRP-IOT has invited multiple rounds of public comment in the course of developing updated procedures, and further public comment will be needed prior to Board consideration of a finalized set of procedures.²⁸² Ordering ICANN to complete these processes before the IRP proceeds will pause the IRP for an extended time.

216. The Emergency Panelist, having reviewed the arguments present by the parties, finds that Claimants have failed to establish “[a] harm for which there will be no adequate remedy in the absence of such relief” and the a “balance of hardships tipping decidedly toward [Claimants] seeking relief.” Claimants have provided no evidence, nor argument, to suggest that they are

²⁷⁹ ICANN’s Opposition, ¶ 42.

²⁸⁰ *Id.*, ¶ 42.

²⁸¹ ICANN Opposition, ¶ 59.

²⁸² *Id.*

harmful by having to proceed in this case under the Interim Supplementary Procedures. For all of these reasons, Claimants' request for interim relief that ICANN be ordered to adopt final rules of procedure is denied.

6) Claimants request that ICANN be required to pay all costs of the Emergency Panelist and IRP Panelists

217. Claimants IM Request includes a demand that ICANN be required to pay all of the costs of the Emergency Panelist in this IRP, and the costs of the other IRP panelists to be appointed in this matter, because this approach is required by ICANN's Bylaws. In particular, the Bylaws, Article 4, § 4.3(r), provide that "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members."
218. Claimants allege that "ICANN has intentionally refused to implement the Standing Panel, as it then would be required to pay millions of dollars in fees annually to the Standing Panel members, much of which is paid by Claimants to the ICDR now – and for the past six-plus years since the Standing Panel was to be implemented."²⁸³ Claimants argue ICANN cannot be allowed to ignore its Bylaws and concomitant financial obligations for so long and at such great cost to the broader community and to Claimants.²⁸⁴ In particular, Claimants contend there is no basis for ICDR to require Claimants to pay 100% of the Emergency Panel fees, rather than an equal split of Emergency Panel fees, as is the case for the other IRP panelist fees. Claimants state the Emergency Panelist has the ability to apportion all fees to-date to ICANN, which is in accord with the Bylaws, so that costs are placed where ICANN's Bylaws require them to be placed – with ICANN.²⁸⁵
219. ICANN in its Opposition Brief initially contended that Claimants' request – that ICANN be required to pay Claimants' portion of IRP and panelist fees now, rather than allow the IRP Panel to apportion fees at the conclusion of the IRP – is by definition not irreparable harm. ICANN states Claimants' demand will be redressed by the IRP Panel in conjunction with its final award, where the Panel may allocate fees based on the outcome of the IRP.²⁸⁶

²⁸³ Claimants' Brief, p. 20.

²⁸⁴ Id.

²⁸⁵ Claimants' Reply, p. 16.

²⁸⁶ ICANN's Opposition, ¶ 45.

220. ICANN in its letter of June 11, 2020 to the Emergency Panelist subsequently amended its position on these issues. In its letter, ICANN stated as follows:

“In light of your question during the hearing, ICANN has further analyzed Article 4, Section 4.3(r), taking into consideration the spirit of the Bylaws as a whole since they were significantly revised in 2016. As a result, ICANN has decided to revise its response to your question as follows: ICANN will pay 100% of IRP panelists’ deposits upon appointment. This applies to Emergency Panelists and to the members of the full IRP Panel. Although ICANN maintains that this issue is not properly raised in a request for interim relief (because there is an adequate remedy for any harm through the IRP Panel’s re-apportionment of costs at the conclusion of the proceeding (see Bylaws Art. 4, § 4.3(p)(i))), ICANN has decided to reimburse Claimants ... for the Emergency Panelist’s initial deposit. Additionally, ICANN will bear 100% of the full Panel’s fees, when the Panel is selected. We note, however, that apportionment of these fees may be adjusted by the IRP Panel pursuant to Section 4.3(r), which provides: “the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.”

We understand that the only other costs that Claimants have paid to date is the filing fee charged by the ICDR to commence an IRP. ICANN does not interpret Bylaws Section 4.3(r) to require ICANN to pay the ICDR’s filing fees. As I noted during the hearing, the IRP Provider will continue to play a critical role in the IRP process even after the Standing Panel is established. (Bylaws Art. 4, § 4.3(i).) Thus, ICANN does not anticipate that the IRP Provider filing fees will be eliminated with the establishment of the Standing Panel.”

221. On June 16, 2020, Claimants submitted an email in which they responded to ICANN’s June 11th letter and stated their position on the issue of the IRP administrative costs. Claimants indicated they appreciated ICANN’s revised position to pay 100% of IRP panelists deposits upon appointment, including those of the Emergency Panelist and members of the full IRP Panel. However, Claimants also state in relevant part that:

“ICANN must also pay the ICDR filing fees. The Bylaws require ICANN to pay all administrative costs of the IRP. So there is no justification for forcing claimants to pay a ... filing fee for ICDR administrative costs. We ask that ICANN reconsider and explain why it feels justified in forcing claimants to make that payment, else also reimburse Claimants in this case their ICDR filing fee....

Also, what is ICANN's position as to past ICDR fees paid by claimants since enactment of the Bylaws re the Standing Panel, including some of these Claimants? By ICANN's own reasoning (at last, and at least), all of those fees also should be reimbursed by ICANN, including [amount omitted] to the claimants in the previous .Hotel IRP (*Despegar*, including these Claimants).”

222. On June 18, 2020, ICANN sent a letter to Claimant, while copying the Emergency Panelist, in which ICANN responded to the questions in Claimant’s email of June 16th concerning the IRP administrative costs. ICANN’s June 18th letter states in relevant part that:

“Second, you ask ICANN to “explain” why ICANN does not interpret Bylaws Article 4, Section 4.3(r) to require ICANN to pay the ICDR’s filing fees. I provided that explanation in my 11 June 2020 letter to Mr. Gibson: “As I noted during the hearing, the IRP Provider will continue to play a critical role in the IRP process even after the Standing Panel is established. (Bylaws Art. 4, § 4.3(i).) Thus, ICANN does not anticipate that the IRP Provider filing fees will be eliminated with the establishment of the Standing Panel.” Furthermore, the ICDR filing fees are for the initiation of an IRP (not its administration) and do not fall within the definition of Section 4.3(r).

Third, you ask about “ICANN’s position as to past ICDR fees paid by claimants” in prior IRPs, and specifically about the *Despegar et al. v. ICANN* IRP claimants. You, of course, are well aware that the Bylaws were amended substantially in October 2016, and Section 4.3(r) was added at that time. As a result, ICANN has now agreed that it will reimburse/pay the administrative fees, including panelist fees, for IRPs adjudicated under the Bylaws in effect on 1 October 2016 or later. As you also know, there are currently only three such IRPs.

The Despegar claimants plainly have no basis to even suggest they meet these requirements because *Despegar et al. v. ICANN* was filed and decided well before the 1 October 2016 Bylaws took effect. Neither the Bylaws in effect when the Despegar IRP Request was filed, nor the Bylaws that were in effect when the Despegar Final Declaration was issued, directed ICANN to bear the administrative costs of the IRP under any circumstances. Instead, those Bylaws provided that:

‘The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances.’

The Despegar claimants were the “part[ies] not prevailing” in that IRP, and the Panel ordered them to bear 50% of the IRP panelists’ fees, consistent with the relevant Bylaws.”

223. The Emergency Panelist refers to ICANN’s statement in its June 11th letter that it has “further analyzed Article 4, Section 4.3(r), taking into consideration the spirit of the Bylaws as a whole since they were significantly revised in 2016.” Further, the Emergency Panelist acknowledges ICANN’s undertaking, stated in its letter, that

“ICANN will pay 100% of IRP panelists’ deposits upon appointment. This applies to Emergency Panelists and to the members of the full IRP Panel.”

224. In view of these undertakings, the Emergency Panelist determines that there is no longer a concern that Claimants, in connection with the administrative costs for this IRP case and in the

absence of interim relief, face a “harm for which there will be no adequate remedy in the absence of such relief.” Claimants, by virtue of ICANN’s undertakings, will received most of the relief demanded in their IM Request on this point. As to the additional question, raised by Claimants in their June 16th letter, concerning whether ICANN should reimburse them for their payment of the ICDR initial filing fee,²⁸⁷ Claimants have not shown that they will incur harm or decided hardship as to the requirement to pay this fee.

225. Claimants’ request for interim measures of protection that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists is largely moot in view of ICANN’s amended position on these issues. As to Claimants request that ICANN should be required to reimburse Claimants for the ICDR initial filing fee, Claimants’ request for interim relief is denied, but this issue can be fully addressed by the IRP Panel in the main IRP proceedings. As stated previously, in determining that interim relief is not appropriate at this time, the Emergency Panelist makes clear that this decision does not finally resolve this issue (or the other issues decided), which can be fully addressed by the IRP Panel.

VII. DECISION

226. For the reasons stated above, the Emergency Panelist decides as follows:

- A. Claimants’ request that the ICDR be ordered to recuse itself from this IRP is denied.
- B. Claimants have raised sufficiently serious questions related to the merits in relation to the Board’s decision to deny Request 16-11.
- C. Claimants have failed to raise sufficiently serious questions related to the merits in relation to the Board’s decision to deny Request 18-6.
- D. Claimants’ request for interim measures that ICANN be required to maintain the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP is granted.

²⁸⁷ The Emergency Panelist understands that the ICDR’s Initial Filing Fee, under the ICDR’s standard International Arbitration Fee Schedule, is set at US\$ 3750.00 for cases like this IRP involving Non-Monetary claims. The ICDR administrator for this case referenced the ICDR’s fee schedule in his email to the parties dated March 20, 2020. See Ex. E. Claimants refer to this amount in their IM Request, p. 7.

- E. Claimants' request for interim measures that ICANN be required to preserve, and to direct HTLD, EIU, FTI and Afiliias to preserve, all potentially relevant information for review in this IRP is denied.
- F. Claimants' request for interim measures that an Ombudsman be appointed with respect to Request 16-11 and Request 18-6 is denied.
- G. Claimants request for interim measures that ICANN be ordered to immediately appoint the IRP Standing Panel is denied.
- H. Claimants' request for interim measures that ICANN be ordered to adopt final rules of procedure is denied.
- I. Claimants' request for interim measures that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists is largely moot in view of ICANN's amended position on these issues (discussed above). As to Claimants request that ICANN should be required to reimburse Claimants for the ICDR initial filing fee, that request is denied.

227. In accordance with Rule 15 (Costs) of the Interim Supplementary Procedures, each party shall bear its own legal expenses. The Emergency Panelist makes no order to award any administrative costs and fees at this time, leaving that question to be decided by the IRP Panel.

This Decision is an Interim Order and does not constitute an IRP Final Declaration or settlement of the claim submitted in this IRP. In accordance with the ICDR Arbitration Rules, this Decision may be accepted, rejected or revised by the duly appointed IRP Panel.



Christopher S. Gibson
Emergency Panelist

August 7, 2020

Date

Exhibit 9

RESPONDENT'S EXHIBIT



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BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

As amended 2 June 2022

[ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES](#)

[ARTICLE 2 POWERS](#)

[ARTICLE 3 TRANSPARENCY](#)

[ARTICLE 4 ACCOUNTABILITY AND REVIEW](#)

[ARTICLE 5 OMBUDSMAN](#)

[ARTICLE 6 EMPOWERED COMMUNITY](#)

[ARTICLE 7 BOARD OF DIRECTORS](#)

[ARTICLE 8 NOMINATING COMMITTEE](#)

[ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION](#)

[ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION](#)

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[ARTICLE 12 ADVISORY COMMITTEES](#)

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[ARTICLE 17 CUSTOMER STANDING COMMITTEE](#)

[ARTICLE 18 IANA NAMING FUNCTION REVIEWS](#)

[ARTICLE 19 IANA NAMING FUNCTION SEPARATION PROCESS](#)

[ARTICLE 20 INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND](#)

Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;

(iii) an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and

(iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

(i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.

(ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(b) The scope of the IRP is defined with reference to the following terms:

(i) A "**Claimant**" is any legal or natural person, group, or entity including, but not limited to the EC, a Supporting Organization, or an Advisory Committee that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

(A)The EC is deemed to be materially affected by all Covered Actions. ICANN shall not assert any defenses of standing or capacity against the EC in any forum.

(B)ICANN shall not object to the standing of the EC, a Supporting Organization, or an Advisory Committee to participate in an IRP, to compel an IRP, or to enforce an IRP decision on the basis that it is not a legal person with capacity to sue. No special pleading of a Claimant's capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings. No Claimant shall be allowed to proceed if the IRP Panel (as defined in Section 4.3(g)) concludes based on evidence submitted to it that the Claimant does not fairly or adequately represent the interests of those on whose behalf the Claimant purports to act.

(ii) "**Covered Actions**" are defined as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.

(iii) "**Disputes**" are defined as:

(A)Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

(2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or

(5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws.

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract, and

(C) Claims regarding PTI service complaints by direct customers of the IANA naming functions that are not resolved through mediation.

(c) Notwithstanding any other provision in this Section 4.3, the IRP's scope shall exclude all of the following:

- (i) EC challenges to the result(s) of a PDP, unless the Supporting Organization(s) that approved the PDP supports the EC bringing such a challenge;
- (ii) Claims relating to ccTLD delegations and re-delegations;
- (iii) Claims relating to Internet numbering resources, and
- (iv) Claims relating to protocol parameters.

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP ("**Community IRP**"), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

(e) Cooperative Engagement Process

- (i) Except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process ("**CEP**") for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time.
- (ii) The CEP is voluntary. However, except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.
- (iii) Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator ("**IRP Mediator**") after at least one CEP meeting.
- (iv) Unless all parties agree on the selection of a particular IRP Mediator, any

IRP Mediator appointed shall be selected from the members of the Standing Panel (described in [Section 4.3\(j\)](#) below) by its Chair, but such IRP Mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter.

(f) [ICANN](#) hereby waives any defenses that may be afforded under Section 5141 of the California Corporations Code ("**CCC**") against any Claimant, and shall not object to the standing of any such Claimant to participate in or to compel an IRP, or to enforce an IRP decision on the basis that such Claimant may not otherwise be able to assert that a Covered Action is ultra vires.

(g) Upon the filing of a Claim, an Independent Review Process Panel ("**IRP Panel**", described in [Section 4.3\(k\)](#) below) shall be selected in accordance with the Rules of Procedure (as defined in [Section 4.3\(n\)\(i\)](#)). Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and [ICANN](#)'s written response ("**Response**") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. If no Response is timely filed by [ICANN](#), the IRP Panel may accept the Claim as unopposed and proceed to evaluate and decide the Claim pursuant to the procedures set forth in these Bylaws.

(h) After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that are to be addressed by the IRP Panel.

(i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

(iv) With respect to claims that [ICANN](#) has not enforced its contractual rights with respect to the [IANA](#) Naming Function Contract, the standard of review shall be whether there was a material breach of [ICANN](#)'s obligations under the [IANA](#) Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

(v) For avoidance of doubt, IRPs initiated through the mechanism contemplated at [Section 4.3\(a\)\(iv\)](#) above, shall be subject to a separate standard of review as

defined in the IANA Naming Function Contract.

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the "**Standing Panel**") each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

(ii) ICANN shall, in consultation with the Supporting Organizations and Advisory Committees, initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A) ICANN, in consultation with the Supporting Organizations and Advisory Committees, shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)), beginning by consulting the "**IRP Implementation Oversight Team**" (described in Section 4.3(n)(i)) on a draft tender document.

(B) ICANN shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations and Advisory Committees and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C) The Supporting Organizations and Advisory Committees shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D) Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.

(iii) Appointments to the Standing Panel shall be made for a fixed term of five years with no removal except for specified cause in the nature of corruption, misuse of position, fraud or criminal activity. The recall process shall be developed by the IRP Implementation Oversight Team.

(iv) Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region (as defined in Section 7.5).

(k) IRP Panel

(i) A three-member IRP Panel shall be selected from the Standing Panel to hear

a specific Dispute.

(ii) The Claimant and ICANN shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.

(iii) Assignment from the Standing Panel to IRP Panels shall take into consideration the Standing Panel members' individual experience and expertise in issues related to highly technical, civil society, business, diplomatic, and regulatory skills as needed by each specific proceeding, and such requests from the parties for any particular expertise.

(iv) Upon request of an IRP Panel, the IRP Panel shall have access to independent skilled technical experts at the expense of ICANN, although all substantive interactions between the IRP Panel and such experts shall be conducted on the record, except when public disclosure could materially and unduly harm participants, such as by exposing trade secrets or violating rights of personal privacy.

(v) IRP Panel decisions shall be made by a simple majority of the IRP Panel.

(l) All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.

(m) IRP Provider

(i) All IRP proceedings shall be administered by a well-respected international dispute resolution provider ("**IRP Provider**"). The IRP Provider shall receive and distribute IRP Claims, Responses, and all other submissions arising from an IRP at the direction of the IRP Panel, and shall function independently from ICANN.

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("**Rules of Procedure**") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN.

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

(B) Issues relating to joinder, intervention, and consolidation of Claims;

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN's Response;

(D) Availability and limitations on discovery methods;

(E) Whether hearings shall be permitted, and if so what form and structure such hearings would take;

(F) Procedures if ICANN elects not to respond to an IRP; and

(G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed.

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that

violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;

(iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

(p) A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered as described in Section 4.3(o)(iv), in order to maintain the *status quo*. A single member of the Standing Panel ("**Emergency Panelist**") shall be selected to adjudicate requests for interim relief. In the event that no Standing Panel is in place when an Emergency Panelist must be selected, the IRP Provider's rules shall apply to the selection of the Emergency Panelist. Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

(q) Conflicts of Interest

(i) Standing Panel members must be independent of ICANN and its Supporting Organizations and Advisory Committees, and so must adhere to the following criteria:

(A) Upon consideration for the Standing Panel and on an ongoing basis, Panelists shall have an affirmative obligation to disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding.

(B) Additional independence requirements to be developed by the IRP Implementation Oversight Team, including term limits and restrictions on post-term appointment to other ICANN positions.

Exhibit 10

RESPONDENT'S EXHIBIT

GET
STARTEDNEWS
AND
MEDIA

POLICY

PUBLIC
COMMENT

RESOURCES

COMMUNITY

QUICKLINKS

Resources

 [About ICANN](#) [Board](#) [Accountability](#) [Governance](#) [Groups](#)[Business](#)[Civil Society](#) [Complaints Office](#)[Domain Name
System Abuse](#) [Contractual
Compliance](#) [Registrars](#) [Registry Operators](#) [Domain Name
Registrants](#)[GDS Metrics](#) [Identifier Systems
Security, Stability
and Resiliency
\(OCTO IS-SSR\)](#) [ccTLDs](#) [Internationalized
Domain Names](#) [Universal
Acceptance
Initiative](#) [Policy](#)

BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

Note: this page is an archive of an old version of the bylaws. The current [ICANN bylaws](#) are always available at:

<https://www.icann.org/resources/pages/governance/bylaws-en>

As amended 11 February 2016

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ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

Operational Design Phase (ODP)	<p>The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:</p> <ol style="list-style-type: none"> 1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are <ol style="list-style-type: none"> a. Domain names (forming a system referred to as "DNS"); b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and c. Protocol port and parameter numbers. 2. Coordinates the operation and evolution of the DNS root name server system. 3. Coordinates policy development reasonably and appropriately related to these technical functions.
Implementation	
<input type="checkbox"/> Public Comment	
Root Zone KSK Rollover	
<input type="checkbox"/> Technical Functions	
<input type="checkbox"/> ICANN Locations	
<input type="checkbox"/> Help	

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities

most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board. With respect to any matters that would fall within the provisions of [Article III, Section 6](#), the Board may act only by a majority vote of all members of the Board. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of those present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those members present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "all of the members of the Board."

Section 2. RESTRICTIONS

ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

Section 3. NON-DISCRIMINATORY TREATMENT

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

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.

Section 2. WEBSITE

ICANN shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations, and Advisory Committees; (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN's budget, annual audit, financial contributors and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN activities of interest to significant segments of the ICANN community; (vii) comments received from the community on policies being developed and other matters; (viii) information about ICANN's physical meetings and public forums; and (ix) other information of interest to the ICANN community.

Section 3. MANAGER OF PUBLIC PARTICIPATION

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN, including the Website and various other means of communicating with and receiving input from the general community of Internet users.

Section 4. MEETING NOTICES AND AGENDAS

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

Section 5. MINUTES AND PRELIMINARY REPORTS

1. All minutes of meetings of the Board and Supporting Organizations (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary for posting on the Website.
2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any resolutions passed by the Board of Directors at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4)

vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (as set forth in Articles VIII - X of these Bylaws) and Advisory Committees (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted.

3. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 5.2 above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.
4. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN's principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 6. NOTICE AND COMMENT ON POLICY ACTIONS

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:
 - a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
 - b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
 - c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.
2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in [Section 6\(1\)\(b\) of this Article](#), prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN budget, ICANN shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in [Article I of these Bylaws](#). The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of [Article III](#) and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
 - a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
 - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
 - c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
 - a. evaluate requests for review or reconsideration;
 - b. summarily dismiss insufficient requests;
 - c. evaluate requests for urgent consideration;

- d. conduct whatever factual investigation is deemed appropriate;
 - e. request additional written submissions from the affected party, or from other parties;
 - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
 - g. make a recommendation to the Board of Directors on the merits of the request, as necessary.
4. ICANN shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.
5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within fifteen days after:
- a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 15 days from the initial posting of the rationale; or
 - b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
 - c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.
6. To properly initiate a Reconsideration process, all requestors must review and follow the Reconsideration Request form posted on the ICANN website. at <http://www.icann.org/en/groups/board/governance/reconsideration>. Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.
7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests 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 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.

9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.
10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.
11. The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.
12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.
13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.
14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.
15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.
16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a

final recommendation and its best estimate of the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN's website.

17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. The Board's decision on the recommendation is final.
18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN's headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.
19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.
20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
 - a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;
 - b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;
 - c. an explanation of any other mechanisms available to ensure that ICANN is accountable to persons materially affected by its decisions; and
 - d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or

another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in [Section 2 of this Article](#), ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.
2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?;
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.
6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for

terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN.
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this [Section 3](#).
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.
10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
 - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
 - b. request additional written submissions from the party seeking review, the Board, the [Supporting Organizations](#), or from other parties;
 - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
 - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
 - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
 - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in

advance.

13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.
15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.
17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.
19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ICANN's website when they become available.
20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.
21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.

Section 4. PERIODIC REVIEW OF ICANN STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee shall provide its own review mechanisms.

ARTICLE V: OMBUDSMAN

Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.
2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.
3. The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.
4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN budget recommended by the ICANN President to the Board. Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in [Section 2 of Article IV](#) or the Independent Review Policy set forth in [Section 3 of Article IV](#) have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the [ICANN](#) community who believe that the [ICANN](#) staff, Board or an [ICANN](#) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by [ICANN](#) staff, the Board, or [ICANN](#) constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

Section 3. OPERATIONS

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the [ICANN](#) community (excluding employees and vendors/suppliers of [ICANN](#)) may have with specific actions or failures to act by the Board or [ICANN](#) staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;
2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to [ICANN](#)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;
3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from [ICANN](#) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by [ICANN](#));
4. heighten awareness of the Ombudsman program and functions through routine interaction with the [ICANN](#) community and online availability;
5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and
6. comply with all [ICANN](#) conflicts-of-interest and confidentiality policies.

Section 4. INTERACTION WITH [ICANN](#) AND OUTSIDE ENTITIES

1. No [ICANN](#) employee, Board member, or other participant in [Supporting Organizations](#) or [Advisory Committees](#) shall prevent or impede the Ombudsman's contact with the [ICANN](#) community (including employees of [ICANN](#)). [ICANN](#) employees and Board members shall direct members of the

ICANN community who voice problems, concerns, or complaints about ICANN to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

2. ICANN staff and other ICANN participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.
3. Contact with the Ombudsman shall not constitute notice to ICANN of any particular action or cause of action.
4. The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.
5. The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies.

Section 5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE VI: BOARD OF DIRECTORS

Section 1. COMPOSITION OF THE BOARD

The ICANN Board of Directors ("Board") shall consist of sixteen voting members ("Directors"). In addition, four non-voting liaisons ("Liaisons") shall be designated for the purposes set forth in [Section 9 of this Article](#). Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the ICANN Board.

Section 2. DIRECTORS AND THEIR SELECTION; ELECTION OF CHAIRMAN AND VICE-CHAIRMAN

1. The Directors shall consist of:
 - a. Eight voting members selected by the Nominating Committee established by [Article VII of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seats 1 through 8.
 - b. Two voting members selected by the Address Supporting Organization according to the provisions of [Article VIII of these Bylaws](#). These seats on the Board of Directors are referred to in these Bylaws as Seat 9 and

Exhibit 11

RESPONDENT'S EXHIBIT

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)¹

Adopted 25 October 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016²; (2) to the extent public comments received in response to the USP reflected clear movement away from either the current Supplementary Procedures or the

¹ CONTEXTUAL NOTE: These Interim Supplementary Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² See <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

1. Definitions

In these Interim Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN's Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN's Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant's filing of a written statement of a DISPUTE with the ICDR.

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws.

ICDR RULES refers to the ICDR's International Arbitration rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8)

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.

2. Scope

The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is Independent and Impartial pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Interim Supplementary Procedures.

4. Time for Filing³

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

5A. Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies). The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an “in-person hearing” refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

³ The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

5B. Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed." Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT's certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT's proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative's proficiency

in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT's proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN's language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

6. Written Statements

A CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the CLAIMANT'S claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating as an amicus upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages, double-spaced and in 12-point font.

For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN's Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall reasonably receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall undertake reasonable efforts to provide notice by electronic message within two business days (calculated at ICANN's principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.⁴ The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

⁴ During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

8. Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law (including, without limitation, disclosures to competitors of the disclosing person, group or entity, of any competition-sensitive information of any kind). Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.

- b. All DISPUTES shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN's obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article 4, Section 4.3(a)(iv) of ICANN's Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

12. IRP PANEL Decisions

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties. IRP PANEL DECISIONS shall be issued in English, and the English version will be authoritative over any translations.
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.
- c. Subject to Article 4, Section 4.3 of ICANN's Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under

the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

Exhibit 12

RESPONDENT'S EXHIBIT

BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

Note: this page is an archive of an old version of the bylaws. The current ICANN (Internet Corporation for Assigned Names and Numbers) bylaws are always available at:

<https://www.icann.org/resources/pages/governance/bylaws-en>
([/resources/pages/governance/bylaws-en](https://www.icann.org/resources/pages/governance/bylaws-en)).

As amended 1 October 2016

ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES

ARTICLE 2 POWERS

ARTICLE 3 TRANSPARENCY

ARTICLE 4 ACCOUNTABILITY AND REVIEW

ARTICLE 5 OMBUDSMAN

ARTICLE 6 EMPOWERED COMMUNITY

ARTICLE 7 BOARD OF DIRECTORS

ARTICLE 8 NOMINATING COMMITTEE

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

ARTICLE 12 ADVISORY COMMITTEES

ARTICLE 13 OTHER ADVISORY MECHANISMS

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

Section 4.2. RECONSIDERATION

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors directly.

(b) The EC (Empowered Community) may file a Reconsideration Request (as defined in Section 4.2(c)) if approved pursuant to Section 4.3 of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the EC (Empowered Community) of these Bylaws. The EC (Empowered Community) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the EC (Empowered Community) for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) 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 (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) 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.

(d) Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:

- (i) Disputes relating to country code top-level domain ("ccTLD (Country Code Top Level Domain)") delegations and re-delegations;
- (ii) Disputes relating to Internet numbering resources; and
- (iii) Disputes relating to protocol parameters.

(e) The Board has designated the Board Governance Committee to review and consider Reconsideration Requests. The Board Governance Committee shall have the authority to:

- (i) Evaluate Reconsideration Requests;
- (ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;
- (iii) Evaluate Reconsideration Requests for urgent consideration;
- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties; and
- (vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the Reconsideration Request process. Except with respect to a Community Reconsideration Request, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be

communicated to the Requestor, who shall then have the option of withdrawing the request or agreeing to bear such costs.

(g) All Reconsideration Requests must be submitted by the Requestor to an email address designated by the Board Governance Committee:

(i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:

(A)for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

(B)for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or

(C)for requests challenging either Board or Staff inaction, within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at

<https://www.icann.org/resources/pages/accountability/reconsideration-en>.

Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

(i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits. Requestors may submit all documentary evidence necessary to

demonstrate why the action or inaction should be reconsidered, without limitation.

(j) 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.

(k) The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee 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 Board Governance Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

(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 Governance Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Governance 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 Governance Committee shall review the Reconsideration Request without involvement by the Ombudsman.

(m) The Board Governance Committee may ask ICANN (Internet Corporation for Assigned Names and Numbers) Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(n) The Board Governance Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an opportunity to be heard. The Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

(o) The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected by ICANN (Internet Corporation for Assigned Names and Numbers) from third parties shall be provided to the Requestor.

(p) The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party.

(q) The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days 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), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Governance Committee shall endeavor to produce its final recommendation to the Board within 90 days of

receipt of the Reconsideration Request. The final recommendation of the Board Governance Committee shall be documented and promptly (i.e., as soon as practicable) posted on the Website 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 Board Governance Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the 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 Board Governance Committee'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.

(r) The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 45 days of receipt of the Board Governance Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Governance Committee. The Board's decision on the recommendation shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Governance Committee's recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN (Internet Corporation for Assigned Names and Numbers) maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Requestor a

written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

(t) The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the Requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Reconsideration Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the matter with urgency, the Requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

(u) The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

(i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;

(ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the

reasons for any Reconsideration Request pending for more than ninety (90) days;

(iii) an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and

(iv) whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN (Internet Corporation for Assigned Names and Numbers) shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

(i) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.

(ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to the global Internet community and Claimants.

(iv) Address claims that ICANN (Internet Corporation for Assigned Names and Numbers) has failed to enforce its rights under the IANA

(Internet Assigned Numbers Authority) Naming Function Contract (as defined in Section 16.3(a)).

(v) Provide a mechanism by which direct customers of the IANA (Internet Assigned Numbers Authority) naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(b) The scope of the IRP is defined with reference to the following terms:

(i) A "**Claimant**" is any legal or natural person, group, or entity including, but not limited to the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

(A)The EC (Empowered Community) is deemed to be materially affected by all Covered Actions. ICANN (Internet Corporation for

efforts are completed) and the EC (Empowered Community) Administration shall promptly notify the Decisional Participants of the Mediation Resolution.

(j) The EC (Empowered Community) shall be deemed to have accepted the Mediation Resolution if it has not delivered an EC (Empowered Community) Community IRP Initiation Notice (as defined in Section 4.2(e) of Annex D) pursuant to and in compliance with Section 4.2 of Annex D within eighty (80) days following the Mediation Resolution Date.

ARTICLE 5 OMBUDSMAN

Section 5.1. OFFICE OF OMBUDSMAN

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain an Office of Ombudsman ("**Office of Ombudsman**"), to be managed by an ombudsman ("**Ombudsman**") and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

(b) The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

(c) The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

(d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) Budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Section 5.1 shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 5.2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent

Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2, the Ombudsman shall serve the function expressly provided for in Section 4.2.

Section 5.3. OPERATIONS

The Office of Ombudsman shall:

- (a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;
- (b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;
- (c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel

matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

(d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

(e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

(f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and

(g) comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies.

Section 5.4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

(a) No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

(c) Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

(d) The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5.5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE 6 EMPOWERED COMMUNITY

Section 6.1. COMPOSITION AND ORGANIZATION OF THE EMPOWERED COMMUNITY

(a) The Empowered Community ("**EC (Empowered Community)**") shall be a nonprofit association formed under the laws of the State of California

consisting of the ASO (Address Supporting Organization), the ccNSO (Country Code Names Supporting Organization) (as defined in Section 10.1), the GNSO (Generic Names Supporting Organization) (as defined in Section 11.1), the ALAC (At-Large Advisory Committee) (as defined in Section 12.2(d)) (i) and the GAC (Governmental Advisory Committee) (each a "**Decisional Participant**" or "associate," and collectively, the "**Decisional Participants**").

(b) This Article 6 shall constitute the articles of association of the EC (Empowered Community) and shall be considered the formational "governing document" (as defined in Section 18008 of the CCC) of the EC (Empowered Community), and the terms contained herein and in these Bylaws relating to the EC (Empowered Community) shall be the EC (Empowered Community)'s "governing principles" (as defined in Section 18010 of the CCC), which may only be amended as set forth in Section 25.2. Where necessary for purposes of interpretation of these Bylaws, an "associate" shall be deemed to be a "member" of the EC (Empowered Community) as defined in Section 18015 of the CCC. Any change in the number and/or identity of Decisional Participants for any reason (including the resignation of any Decisional Participant or the addition of new Decisional Participants as a result of the creation of additional Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees)), and any corresponding changes in the voting thresholds for exercise of the EC (Empowered Community)'s rights described in Annex D of these Bylaws, will only be effective following the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D. The EC (Empowered Community) may not be dissolved except upon the completion of the process for amending Fundamental Bylaws described in Section 25.2 and Annex D.

(c) The sole purpose of the EC (Empowered Community) is to exercise its rights and perform its obligations under ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and these Bylaws, and the EC (Empowered Community) shall have no other powers or rights except as expressly provided therein. The EC (Empowered Community) may only act as provided in these Bylaws. Any act of the EC (Empowered Community) that is not in accordance with these Bylaws shall not be effective.

(d) The EC (Empowered Community) shall not acquire, hold, manage, encumber or transfer any interest in real or personal property, nor have any directors, officers or employees. The EC (Empowered Community) shall not merge with or into another entity nor shall it dissolve, except with the approval

Exhibit 13

RESPONDENT'S EXHIBIT

BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS | A California Nonprofit Public-Benefit Corporation

Note: this page is an archive of an old version of the bylaws. The current ICANN (Internet Corporation for Assigned Names and Numbers) bylaws are always available at:

<https://www.icann.org/resources/pages/governance/bylaws-en>
([/resources/pages/governance/bylaws-en](https://www.icann.org/resources/pages/governance/bylaws-en)).

As amended 22 July 2017

ARTICLE 1 MISSION, COMMITMENTS AND CORE VALUES

ARTICLE 2 POWERS

ARTICLE 3 TRANSPARENCY

ARTICLE 4 ACCOUNTABILITY AND REVIEW

ARTICLE 5 OMBUDSMAN

ARTICLE 6 EMPOWERED COMMUNITY

ARTICLE 7 BOARD OF DIRECTORS

ARTICLE 8 NOMINATING COMMITTEE

ARTICLE 9 ADDRESS SUPPORTING ORGANIZATION

ARTICLE 10 COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

ARTICLE 11 GENERIC NAMES SUPPORTING ORGANIZATION

ARTICLE 12 ADVISORY COMMITTEES

ARTICLE 13 OTHER ADVISORY MECHANISMS

ARTICLE 14 BOARD AND TEMPORARY COMMITTEES

Resolution ("**GAC (Governmental Advisory Committee) Consensus (Consensus) Statement**"), (B) the Governmental Advisory Committee (Advisory Committee) shall not be eligible to support or object to any petition pursuant to Annex D or Approval Action (as defined in Section 1.1 of Annex D), and (C) any EC (Empowered Community) Decision (as defined in Section 4.1(a) of Annex D) that requires the support of four or more Decisional Participants (as defined in Section 6.1(a)) pursuant to Annex D shall instead require the support of three or more Decisional Participants with no more than one Decisional Participant objecting.

(iii) For the avoidance of doubt, the GAC (Governmental Advisory Committee) Carve-out shall not apply to the exercise of the EC (Empowered Community)'s rights where a material factor in the Board's decision was advice of the Governmental Advisory Committee (Advisory Committee) that was not GAC (Governmental Advisory Committee) Consensus (Consensus) Advice.

Section 3.7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) Budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE 4 ACCOUNTABILITY AND REVIEW

Section 4.1. PURPOSE

In carrying out its Mission, ICANN (Internet Corporation for Assigned Names and Numbers) shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws. This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and operations, which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.2. RECONSIDERATION

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board or Staff may request ("**Requestor**") the review or reconsideration of that action or inaction by the Board. For purposes of these Bylaws, "**Staff**" includes employees and individual long-term paid contractors serving in locations where ICANN (Internet Corporation for Assigned Names and Numbers) does not have the mechanisms to employ such contractors directly.

(b) The EC (Empowered Community) may file a Reconsideration Request (as defined in Section 4.2(c)) if approved pursuant to Section 4.3 of Annex D ("**Community Reconsideration Request**") and if the matter relates to the exercise of the powers and rights of the EC (Empowered Community) of these Bylaws. The EC (Empowered Community) Administration shall act as the Requestor for such a Community Reconsideration Request and shall act on behalf of the EC (Empowered Community) for such Community Reconsideration Request as directed by the Decisional Participants, as further described in Section 4.3 of Annex D.

(c) A Requestor may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) 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 (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and/or established ICANN (Internet Corporation for Assigned Names and Numbers) 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.

(d) Notwithstanding any other provision in this Section 4.2, the scope of reconsideration shall exclude the following:

- (i) Disputes relating to country code top-level domain ("ccTLD (Country Code Top Level Domain)") delegations and re-delegations;
- (ii) Disputes relating to Internet numbering resources; and
- (iii) Disputes relating to protocol parameters.

(e) The Board has designated the Board Accountability Mechanisms Committee to review and consider Reconsideration Requests. The Board Accountability Mechanisms Committee shall have the authority to:

- (i) Evaluate Reconsideration Requests;
- (ii) Summarily dismiss insufficient or frivolous Reconsideration Requests;
- (iii) Evaluate Reconsideration Requests for urgent consideration;
- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties; and
- (vi) Make a recommendation to the Board on the merits of the Reconsideration Request, if it has not been summarily dismissed.

(f) ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the Reconsideration Request process. Except with respect to a Community Reconsideration Request, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to recover from a party requesting review or reconsideration any costs that are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be

communicated to the Requestor, who shall then have the option of withdrawing the request or agreeing to bear such costs.

(g) All Reconsideration Requests must be submitted by the Requestor to an email address designated by the Board Accountability Mechanisms Committee:

(i) For Reconsideration Requests that are not Community Reconsideration Requests, such Reconsideration Requests must be submitted:

(A) for requests challenging Board actions, within 30 days after the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale;

(B) for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action; or

(C) for requests challenging either Board or Staff inaction, within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

(ii) For Community Reconsideration Requests, such Community Reconsideration Requests must be submitted in accordance with the timeframe set forth in Section 4.3 of Annex D.

(h) To properly initiate a Reconsideration Request, all Requestors must review, complete and follow the Reconsideration Request form posted on the Website at

<https://www.icann.org/resources/pages/accountability/reconsideration-en>.

Requestors must also acknowledge and agree to the terms and conditions set forth in the form when filing.

(i) Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request, not including exhibits. Requestors may submit all documentary evidence necessary to

demonstrate why the action or inaction should be reconsidered, without limitation.

(j) 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.

(k) The Board Accountability Mechanisms Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Accountability Mechanisms Committee 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 Board Accountability Mechanisms Committee's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Website.

(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.

(m) The Board Accountability Mechanisms Committee may ask ICANN (Internet Corporation for Assigned Names and Numbers) Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(n) The Board Accountability Mechanisms Committee may request additional information or clarifications from the Requestor, and may elect to conduct a meeting with the Requestor by telephone, email or, if acceptable to the Requestor, in person. A Requestor may also ask for an opportunity to be heard. The Board Accountability Mechanisms Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation.

(o) The Board Accountability Mechanisms Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation. Any information collected by ICANN (Internet Corporation for Assigned Names and Numbers) from third parties shall be provided to the Requestor.

(p) The Board Accountability Mechanisms Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the Requestor, by the ICANN (Internet Corporation for Assigned Names and Numbers) Staff, and by any third party.

(q) The Board Accountability Mechanisms Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days 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), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Accountability Mechanisms Committee shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request. The final recommendation of the Board Accountability Mechanisms Committee shall be documented and promptly (i.e., as soon as practicable) posted on the Website 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 Board Accountability Mechanisms Committee's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the 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 Board Accountability Mechanisms Committee'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.

(r) The Board shall not be bound to follow the recommendations of the Board Accountability Mechanisms Committee. The final decision of the Board and its rationale shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Accountability Mechanisms Committee within 45 days of receipt of the Board Accountability Mechanisms Committee's recommendation or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on the Website. In any event, the Board's final decision shall be made within 135 days of initial receipt of the Reconsideration Request by the Board Accountability Mechanisms Committee. The Board's decision on the recommendation shall be posted on the Website in accordance with the Board's posting obligations as set forth in Article 3 of these Bylaws. If the Requestor so requests, the Board shall post both a recording and a transcript of the substantive Board discussion from the meeting at which the Board considered the Board Accountability Mechanisms Committee's recommendation. All briefing materials supplied to the Board shall be provided to the Requestor. The Board may redact such briefing

materials and the recording and transcript on the basis that such information (i) relates to confidential personnel matters, (ii) is covered by attorney-client privilege, work product doctrine or other recognized legal privilege, (iii) is subject to a legal obligation that ICANN (Internet Corporation for Assigned Names and Numbers) maintain its confidentiality, (iv) would disclose trade secrets, or (v) would present a material risk of negative impact to the security, stability or resiliency of the Internet. In the case of any redaction, ICANN (Internet Corporation for Assigned Names and Numbers) will provide the Requestor a written rationale for such redaction. If a Requestor believes that a redaction was improper, the Requestor may use an appropriate accountability mechanism to challenge the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s redaction.

(s) If the Requestor believes that the Board action or inaction for which a Reconsideration Request is submitted is so urgent that the timing requirements of the process set forth in this Section 4.2 are too long, the Requestor may apply to the Board Accountability Mechanisms Committee for urgent consideration. Any request for urgent consideration must be made within two business days (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.

(t) The Board Accountability Mechanisms Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Accountability Mechanisms Committee agrees to consider the matter with urgency, it will cause notice to be provided to the Requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Accountability Mechanisms Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Reconsideration Request, or as soon thereafter as feasible. If the Board Accountability Mechanisms Committee does not agree to consider the matter with urgency, the Requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

(u) The Board Accountability Mechanisms Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

- (i) the number and general nature of Reconsideration Requests received, including an identification if the Reconsideration Requests were acted upon, summarily dismissed, or remain pending;
- (ii) for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any Reconsideration Request pending for more than ninety (90) days;
- (iii) an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
- (iv) whether or not, in the Board Accountability Mechanisms Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN (Internet Corporation for Assigned Names and Numbers) shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("**IRP**"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

- (i) Ensure that ICANN (Internet Corporation for Assigned Names and Numbers) does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through

(i) If a resolution to the dispute is reached by the Mediation Administration and the Board Mediation Representatives, the Mediation Administration and the Board Mediation Representatives shall document such resolution including recommendations ("**Mediation Resolution**" and the date of such resolution, the "**Mediation Resolution Date**"). ICANN (Internet Corporation for Assigned Names and Numbers) shall promptly post the Mediation Resolution on the Website (in no event later than 14 days after mediation efforts are completed) and the EC (Empowered Community) Administration shall promptly notify the Decisional Participants of the Mediation Resolution.

(j) The EC (Empowered Community) shall be deemed to have accepted the Mediation Resolution if it has not delivered an EC (Empowered Community) Community IRP Initiation Notice (as defined in Section 4.2(e) of Annex D) pursuant to and in compliance with Section 4.2 of Annex D within eighty (80) days following the Mediation Resolution Date.

ARTICLE 5 OMBUDSMAN

Section 5.1. OFFICE OF OMBUDSMAN

(a) ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain an Office of Ombudsman ("**Office of Ombudsman**"), to be managed by an ombudsman ("**Ombudsman**") and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

(b) The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

(c) The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

(d) The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) Budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) Budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to

the Board. Nothing in this Section 5.1 shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 5.2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2 , the Ombudsman shall serve the function expressly provided for in Section 4.2 .

Section 5.3. OPERATIONS

The Office of Ombudsman shall:

- (a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process;
- (b) perform the functions set forth in Section 4.2 relating to review and consideration of Reconsideration Requests;

(c) exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;

(d) have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));

(e) heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;

(f) maintain neutrality and independence, and have no bias or personal stake in an outcome; and

(g) comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts of interest and confidentiality policies.

Section 5.4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

(a) No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers)

employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

(b) ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

(c) Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

(d) The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

(e) The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5.5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

Exhibit 14

RESPONDENT'S EXHIBIT

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

This page is available in:

English | العربية (<https://www.icann.org/resources/board-material/resolutions-2019-01-27-ar>) |
Español (<https://www.icann.org/resources/board-material/resolutions-2019-01-27-es>) |
Français (<https://www.icann.org/resources/board-material/resolutions-2019-01-27-fr>) |
Русский (<https://www.icann.org/resources/board-material/resolutions-2019-01-27-ru>) |
中文 (<https://www.icann.org/resources/board-material/resolutions-2019-01-27-zh>).

27 Jan 2019

1. **Consent Agenda:**

- a. **Approval of Minutes**
- b. **Acceptance of GNSO2 Review Working Group's Implementation Final Report**
Rationale for Resolutions 2019.01.27.02 – 2019.01.27.03
- c. **Consideration of the At-Large Advisory Committee (Advisory Committee) Detailed Implementation Plan**
Rationale for Resolutions 2019.01.27.04 – 2019.01.27.07
- d. **FY20 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget**
Rationale for Resolution 2019.01.27.08
- e. **October 2021 ICANN (Internet Corporation for Assigned Names and Numbers) Meeting Venue Contracting**
Rationale for Resolutions 2019.01.27.09 – 2019.01.27.11
- f. **Contract Renewal and Disbursement for ERP Initiative (Oracle Cloud)**
Rationale for Resolutions 2019.01.27.12 – 2019.01.27.13
- g. **Reaffirming the Temporary Specification for gTLD (generic Top Level Domain) Registration Data**
Rationale for Resolutions 2019.01.27.14 – 2019.01.27.15

2. **Main Agenda:**

- a. **Delegation of the موريتانيا, country-code top-level domain representing Mauritania in Arabic Script to Université de Nouakchott Al Aasriya**
Rationale for Resolution 2019.01.27.16
- b. **Delegation of the .SS (South Sudan) country-code top-level domain to the National Communication Authority (NCA)**
Rationale for Resolution 2019.01.27.17
- c. **GAC (Governmental Advisory Committee) Advice: Barcelona Communiqué (October 2018)**
Rationale for Resolution 2019.01.27.18

- d. **Adoption of GNSO (Generic Names Supporting Organization) Consensus (Consensus) Policy relating to Certain Red Cross & Red Crescent Names at the Second Level of the Domain Name (Domain Name) System**
Rationale for Resolutions 2019.01.27.19 – 2019.01.27.20
- e. **Board Committee Membership and Leadership Changes**
Rationale for Resolutions 2019.01.27.21 – 2019.01.27.22
- f. **Consideration of Reconsideration Request 16-11: Travel Reservations SRL, Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Registry LLC, Minds + Machines Group Limited, Spring McCook, LLC, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) (.HOTEL)**
Rationale for Resolution 2019.01.27.23
- g. **Consideration of Reconsideration Request 18-9: DotKids Foundation (.KIDS)**
Rationale for Resolution 2019.01.27.24
- h. **Consideration of Reconsideration Request 16-12: Merck KGaA (.MERCK)**
Rationale for Resolution 2019.01.27.25
- i. **AOB**

1. Consent Agenda:

a. Approval of Minutes

Resolved (2019.01.27.01), the Board approves the minutes of the 25 October Regular and Organizational Meetings of the ICANN (Internet Corporation for Assigned Names and Numbers) Board and the 6 November Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. Acceptance of GNSO2 Review Working Group's Implementation Final Report

Whereas, as part of the second review of the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)), on 3 February 2017 the Board accepted the GNSO (Generic Names Supporting Organization) Review Implementation Plan and directed the GNSO (Generic Names Supporting Organization) Council to provide the Board with regular reporting on the implementation efforts.

Whereas, the GNSO (Generic Names Supporting Organization) Review Working Group, with GNSO (Generic Names Supporting Organization) Council approval and oversight, provided the Board via the Organizational Effectiveness Committee (OEC) with semi-annual updates on the progress of implementation efforts until such time that the implementation efforts concluded.

Whereas, the OEC monitored the progress of implementation efforts via the semi-annual implementation reports and recommends that the Board accept the Implementation Final Report of the second GNSO (Generic Names Supporting

Organization) Review issued by the GNSO (Generic Names Supporting Organization) Review Working Group and approved by the GNSO (Generic Names Supporting Organization) Council on 16 August 2018
(<https://community.icann.org/display/gnsocouncilmeetings/Motions+16+August+2018>).

Resolved (2019.01.27.02), the Board acknowledges the GNSO (Generic Names Supporting Organization) Review Working Group's hard work and thanks them for producing the report of implementation of recommendations to improve the GNSO (Generic Names Supporting Organization)'s effectiveness, transparency, and accountability, in line with the proposed timeline as set out in the adopted GNSO (Generic Names Supporting Organization) Review Implementation Plan.

Resolved (2019.01.27.03), the Board accepts the GNSO2 Review Implementation Final Report of the second GNSO (Generic Names Supporting Organization) Review issued by the GNSO (Generic Names Supporting Organization) Review Working Group, which marks the completion of this important review. The Board encourages the GNSO (Generic Names Supporting Organization) to continue monitoring the impact of the implementation of the recommendations from the second Review of the GNSO (Generic Names Supporting Organization) as part of its continuous improvement process.

Rationale for Resolutions 2019.01.27.02 – 2019.01.27.03

Why is the Board addressing the issue?

ICANN (Internet Corporation for Assigned Names and Numbers) organizes independent reviews of its supporting organizations and advisory committees as prescribed in Article 4 Section 4.4 (/resources/pages/governance/bylaws-en#IV-4) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, to ensure ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder model remains transparent and accountable, and to improve its performance.

This action completes the second review of the GNSO (Generic Names Supporting Organization) and is based on the Implementation Final Report as adopted by the GNSO (Generic Names Supporting Organization) Council, the final report of the independent examiner, Westlake Governance, as well as the GNSO (Generic Names Supporting Organization) Review Working Group's (WG (Working Group)) assessment of the recommendations as adopted by the GNSO (Generic Names Supporting Organization) Council. Following the assessment of all pertinent documents and community feedback by the OEC, the Board is now in a position to consider and accept the Implementation Final Report.

The Board, with recommendation from the Organizational Effectiveness Committee of the Board (OEC), considered all relevant documents, including the final report, the GNSO (Generic Names Supporting Organization) Review Working Party Feasibility Assessment and Prioritization of Recommendations by Independent Examiner (https://gnso.icann.org/sites/default/files/filefield_49053/review-feasibility-prioritization-25feb16-en.pdf) ("Feasibility Assessment"), and accepted the final report issued by the independent examiner on 25 June 2016. The Board adopted the Feasibility Assessment, except recommendations 23 and 32. Additionally, the Board directed the GNSO (Generic Names Supporting Organization) Council to: draft an implementation

plan for the adopted recommendations with a realistic timeline that took into account the continuously high community workload and consideration of the prioritization proposed by the WG (Working Group); publish the plan no later than six (6) months after the Board's adoption of the Feasibility Assessment; ensure that the implementation plan includes definitions of desired outcomes and a way to measure current state as well as progress toward the desired outcome; and report back regularly to the Board on its implementation progress.

On 3 February 2017, the Board accepted the Implementation Plan provided by the WG (Working Group) and approved by the GNSO (Generic Names Supporting Organization) Council on 15 December 2016, and directed the WG (Working Group) to provide semi-annual updates to the OEC until such time that the implementation efforts have concluded.

What is the proposal being considered?

The proposal being considered is that the Board accepts the WG (Working Group)'s Implementation Final Report, adopted by the GNSO (Generic Names Supporting Organization) Council, and considered by the OEC.

Which stakeholders or others were consulted?

The Board, through the OEC, consulted with the GNSO (Generic Names Supporting Organization) Review Working Group, who was responsible for the implementation, and recommended good practices for conducting effective reviews on a timely basis and monitored the progress of the review as well as the progress of the implementation of review recommendations.

What concerns, or issues were raised by the community?

The implementation work conducted by the GNSO (Generic Names Supporting Organization) followed its standard practices to promote transparency and accountability. No concerns were voiced by the community.

What significant materials did the Board review?

The Board reviewed relevant Bylaws sections (</resources/pages/governance/bylaws-en/#article4>), Organizational Review Process documentation (</en/system/files/files/org-reviews-process-flowchart-31aug17-en.pdf>), GNSO (Generic Names Supporting Organization) Review Recommendations Implementation Plan (</en/system/files/correspondence/gnso-review-implementation-plan-to-icann-board-21nov16-en.pdf>), and the GNSO (Generic Names Supporting Organization) Review Working Group's Implementation Final Report (<https://gnso.icann.org/sites/default/files/file/field-file-attach/gnso2-review-implementation-30jul18-en.pdf>).

What factors did the Board find to be significant?

The Board found several factors to be significant, contributing to the effective completion of the implementation work:

- Convening a dedicated group that oversees the implementation of Board-accepted recommendations
- An implementation plan containing a realistic timeline for the implementation, definition of desired outcomes and a way to measure current state as well as progress toward the desired outcome
- Timely and detailed reporting on the progress of implementation

Are there positive or negative community impacts?

This Board action is expected to have a positive impact on the community by acknowledging and highlighting an effective completion of implementation of GNSO (Generic Names Supporting Organization) Review Recommendations.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

This Board action is anticipated to have no fiscal impact as the implementation efforts have successfully concluded. The ramifications on the ICANN (Internet Corporation for Assigned Names and Numbers) organization, the community and the public are anticipated to be positive, as this Board action signifies an important milestone for organizational reviews and self-governance of ICANN (Internet Corporation for Assigned Names and Numbers).

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

This Board action is not expected to have a direct effect on security, stability or resiliency issues relating to the DNS (Domain Name System).

How is this action within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and what is the public interest served in this action?

The Board's action is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment pursuant to section 4.1 of the Bylaws to continue reviewing that entities within ICANN (Internet Corporation for Assigned Names and Numbers) have an ongoing purpose, and to improve the performance of its supporting organizations and advisory committees. This action will serve the public interest by fulfilling ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to continuous review of its components to confirm that where people engage with the ICANN (Internet Corporation for Assigned Names and Numbers) community support the purposes and expectations of that engagement.

Is public comment required prior to Board action?

No public comment is required.

c. Consideration of the At-Large Advisory Committee (Advisory Committee) Detailed Implementation Plan

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws Article 4, Section 4.4 ([/resources/pages/governance/bylaws-en#IV-4](#)) calls on the ICANN (Internet Corporation for Assigned Names and Numbers) Board to "cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness."

Whereas, the independent examiner of the At-Large Review produced a Final Report (<https://community.icann.org/display/ALRW/Final+Report%3A+Review+of+the+At-Large+Community>), in February 2017. That report was received by the Board in June 2018, and at the same time the Board accepted the At-Large Review Recommendations Feasibility Assessment & Implementation Plan and the At-Large Review Implementation Overview Proposal as approved by the ALAC (At-Large Advisory Committee).

Whereas, in response to that June 2018 resolution, the At-Large Review Implementation Working Group was created. That Working Group developed and approved the At-Large Review Implementation Plan (https://docs.google.com/document/d/12fQ1jKp88g3sQHZv_SzIMGqEXssL8DtzTkr-Cv8LpTE/edit?pli=1) (the "Implementation Plan") on 19 November 2018, which was endorsed by the ALAC (At-Large Advisory Committee) endorsement on 27 November 2018.

Resolved (2019.01.27.04), the Board acknowledges the At-Large Review Implementation Working Group's work and thanks the members of that Working Group for their efforts.

Resolved (2019.01.27.05), the Board accepts the At-Large Review Implementation Plan, including the phased approach contained within. The Board acknowledges that more details with regard to implementation details may be required for implementation of Priorities 2 and 3 activities.

Resolved (2019.01.27.06), the Board directs the At-Large Review Implementation Working Group to provide updates to the OEC every six months. Those bi-annual updates shall identify achievements as measured against the existing implementation plan, as well as details on future implementation plans. It is during these updates that the At-Large Review Implementation Working Group shall provide more details on implementation progress, and measurability. The OEC may request interim briefings if deemed necessary.

Resolved (2019.01.27.07), that any budgetary implications of the At-Large Review implementation shall be considered as part of the applicable annual budgeting processes.

Rationale for Resolutions 2019.01.27.04 – 2019.01.27.07

To ensure ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder model remains transparent and accountable, and to improve its performance, ICANN (Internet Corporation for Assigned Names and Numbers) organizes independent reviews of its supporting organizations and advisory committees as prescribed in [Article 4 Section 4.4 \(/resources/pages/governance/bylaws-en#IV-4\)](#) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. The second At-Large started in 2016 and the independent examiner presented its Final Report in May 2017.

The At-Large Review Implementation recommendations as noted in the At-Large Review Implementation Overview Proposal have the potential to advance ICANN (Internet Corporation for Assigned Names and Numbers)'s transparency and accountability objectives and have been considered carefully by the Board's Organizational Effectiveness Committee as well as by the full Board.

The Board resolution will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) and especially the ALAC (At-Large Advisory Committee) and At-Large community as it reinforces ICANN (Internet Corporation for Assigned Names and Numbers)'s and the ALAC (At-Large Advisory Committee) and At-Large community's commitment to maintaining and improving its accountability, transparency and organizational effectiveness throughout the implementation process.

Due to the number of recommendations that need to be implemented, the Board supports the approach by priorities as laid out in the Implementation Plan (Exhibit A). This will allow the community time to refine details as the implementation process proceeds— especially during Priority 2 and 3 activities set out in that Implementation Plan.

Some recommendations – especially those foreseen to be implemented under Priority 2 and 3 activities – may benefit from additional details regarding their exact implementation. Due to the difficulty to predict these issues months in advance, the Board supports the idea that the At-Large Review Implementation Working Group provides updates bi-annually to the OEC. It is during these updates that the ALAC (At-Large Advisory Committee) can provide greater implementation details with regard to those recommendations that are going to be scheduled for the forthcoming six-month period following the respective OEC update. At that time, the ALAC (At-Large Advisory Committee) would be in a better position to flag any significant variations from the original implementation plan and timing. The At-Large Review Implementation Plan sets out the prioritization, expected resource allocation in terms of staff time, web and wiki resources, expected budgetary implications such as additional staff resources, and the steps to implementation. While the majority of implementation activities will use existing At-Large resources, any additional fiscal implications are noted below. The ALAC (At-Large Advisory Committee) will utilize the normal annual budgetary comment process to request the required resources. If such resources are not provided, the likely result would be a significant slow down in the speed of the Review Implementation.

Why is the Board addressing the issue?

This resolution moves the second review of the At-Large community into the implementation phase. Following the assessment of the Implementation Plan and the feedback from the Board's Organizational Effectiveness Committee, the Board is now in a position to consider the Plan and instruct the ALAC (At-Large Advisory Committee) to continue the implementation process as set out in the Plan. This step is an important part of the Organizational Review process of checks and balances, to ensure that the spirit of Board-approved recommendations will be addressed through the implementation plans, while being mindful of budgetary and timing constraints.

What is the proposal being considered?

The proposal the Board is considering is the Organizational Effectiveness Committee's recommendation of the adoption of the At-Large Review Implementation Plan, drafted and adopted by the At-Large Review Implementation Working Group, endorsed by the ALAC (At-Large Advisory Committee).

Which stakeholders or others were consulted?

Immediately after the Board passed the Resolution on the At-Large Review, the leadership of the At-Large Review Working Group provided updates on the Review and next steps on each of the five RALO monthly teleconferences. The creation of the At-Large Review Implementation Working Group involved careful consideration of members to ensure geographical balance and diversity within each RALO, including among the 232 At-Large Structures and over 100 individual members. During the development of the At-Large Review Implementation Plan, the At-Large Review Implementation WG (Working Group) members updated the ALAC (At-Large Advisory Committee) as well as each RALO on a regular basis with the progress that was being made. There were also several discussions on the At-Large Review Implementation during ICANN63 face-to-face sessions. At each step, feedback was discussed by the At-Large Review Implementation WG (Working Group) and incorporated into the final Plan.

What concerns, or issues were raised by the community?

During the development of the At-Large Review Implementation Plan, the At-Large community raised the concern over whether the third At-Large Summit (ATLAS III) would take place as tentatively scheduled during ICANN66 in Montreal in October 2019 and identified as a Priority 1 activity and requiring budgetary consideration in advance of the broader organizational budget cycle. In September 2018 the Board confirmed that the ICANN (Internet Corporation for Assigned Names and Numbers) organization still had authority to proceed with the planning and contracting.

What significant materials did the Board review?

The Board reviewed the At-Large Review Implementation Plan as adopted by the At-Large Review Implementation Working Group and endorsed by the ALAC (At-Large Advisory Committee).

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers), the Community, and/or the Public (strategic plan, operating plan, or budget)?

The work to improve the effectiveness of the At-Large organization – by implementing the issues resulting from the Review and the At-Large Review Implementation Overview Proposal, may require additional financial resources that are subject to ICANN (Internet Corporation for Assigned Names and Numbers)'s normal budgetary processes. This resolution does not authorize any specific funding for those implementation efforts. The Board understands that some of the Priority 1 work, such as skills development and communication efforts, will require FY20 Additional Budget Requests. The Board also understands that the ongoing and Priority 2 activities are estimated to require the addition of one Full Time Employee equivalent, and there are other anticipated resource needs for items such as communications and data collection.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

This action is not expected to have a direct impact on the security, stability or resiliency of the DNS (Domain Name System). Still, once the improvements are implemented, future activities of the ALAC (At-Large Advisory Committee) and At-Large community, including advice or inputs into the policy development processes, will become more transparent and accountable, which in turn might indirectly contribute to the security, stability or resiliency of the DNS (Domain Name System).

Is public comment required prior to Board action?

The Draft Report of the independent examiner was posted for public comment. There is no public comment required prior to this Board action. The voice of the ALAC (At-Large Advisory Committee) has been reflected throughout the review process – via the At-Large Review Working Party that produced the ALAC (At-Large Advisory Committee) Implementation Overview Proposal; the At-Large Review Implementation Working Group that developed the implementation plan; and the ALAC (At-Large Advisory Committee) that endorsed the implementation plan.

How is this action within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and what is the public interest served in this action?

Given that At-Large represents the best interests of individual Internet end users within ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder governance approach, the approval of the At-Large Review Implementation Plan, which will lead to a strengthened At-Large community, will have a direct positive impact to ICANN (Internet Corporation for Assigned Names and Numbers)'s mission in its bottom-up policy development process. The public interest is also served through this action which furthers the continued development and support of a diverse and informed multistakeholder community.

d. FY20 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget

Whereas, the draft FY20 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget (OP&B) was posted for public comment in accordance with the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws on 28 September 2018.

Whereas, comments received through the public comment process were reviewed and responded to and provided to the BFC members for review and comment.

Whereas, all public comments have been taken into consideration, and where appropriate and feasible, have been incorporated into a final FY20 IANA (Internet Assigned Numbers Authority) OP&B.

Whereas, the Public Technical Identifier's Board adopted a Final FY20 PTI OP&B on 20 December 2018, which is a required input for the ICANN (Internet Corporation for Assigned Names and Numbers) Board's consideration of the broader IANA (Internet Assigned Numbers Authority) OP&B. Per the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, once the IANA (Internet Assigned Numbers Authority) OP&B is adopted by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, it is then posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website and the Empowered Community has an opportunity to consider the IANA (Internet Assigned Numbers Authority) OP&B for rejection.

Whereas, the public comments received, as well as other solicited community feedback were taken into account to determine required revisions to the draft IANA (Internet Assigned Numbers Authority) FY20 Operating Plan and Budget.

Resolved (2019.01.27.08), the Board adopts the FY20 IANA (Internet Assigned Numbers Authority) Operating Plan and Budget, including the FY20 IANA (Internet Assigned Numbers Authority) Caretaker Budget.

Rationale for Resolution 2019.01.27.08

In accordance with Section 22.4 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board is to adopt an annual budget for the operation of the IANA (Internet Assigned Numbers Authority) functions and publish that budget on the ICANN (Internet Corporation for Assigned Names and Numbers) website. On 28 September 2018 drafts of the FY20 PTI O&B and the FY20 IANA (Internet Assigned Numbers Authority) OP&B were posted for public comment. The PTI Board approved the PTI Budget on 20 December 2018, and the PTI Budget was received as input into the FY20 IANA (Internet Assigned Numbers Authority) Budget.

The published draft FY20 PTI OP&B and the draft FY20 IANA (Internet Assigned Numbers Authority) OP&B were based on numerous discussions with members of ICANN (Internet Corporation for Assigned Names and Numbers) org and the ICANN (Internet Corporation for Assigned Names and Numbers) Community, including extensive consultations with ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and other stakeholder groups throughout the prior several months.

All comments received in all manners were considered in developing the FY20 IANA (Internet Assigned Numbers Authority) OP&B. Where feasible and appropriate these inputs have been incorporated into the final FY20 IANA (Internet Assigned Numbers Authority) OP&B proposed for adoption.

The FY20 IANA (Internet Assigned Numbers Authority) OP&B will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers) in that it

provides a proper framework by which the IANA (Internet Assigned Numbers Authority) services will be performed, which also provides the basis for the organization to be held accountable in a transparent manner.

This decision is in the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, as it is fully consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic and operational plans, and the results of which in fact allow ICANN (Internet Corporation for Assigned Names and Numbers) to satisfy its mission.

This decision will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) with respect to any funding that is dedicated to those aspects of the DNS (Domain Name System).

This is an Organizational Administrative Function that has already been subject to public comment as noted above. ICANN (Internet Corporation for Assigned Names and Numbers)'s Empowered Community now has an opportunity to consider if it will exercise its rejection power over this OB&P.

e. **October 2021 ICANN (Internet Corporation for Assigned Names and Numbers) Meeting Venue Contracting**

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) intends to hold its last Public Meeting of 2021 in the North America region.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) organization has completed a thorough review of the available venues in the North America region and finds the one in Seattle, Washington to be the most suitable.

Resolved (2019.01.27.09), the Board authorizes the President and CEO, or his designee(s), to engage in and facilitate all necessary contracting and disbursements for the host venue for the October 2021 ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting in Seattle, Washington, in an amount not to exceed *[REDACTED-FOR NEGOTIATION PURPOSES]*.

Resolved (2019.01.27.10), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article III, section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Resolved (2019.01.27.11), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2019.01.27.09 – 2019.01.27.11

As part of ICANN (Internet Corporation for Assigned Names and Numbers)'s Public Meeting strategy, ICANN (Internet Corporation for Assigned Names and Numbers) seeks to host a meeting in a different geographic region (as defined in the ICANN

(Internet Corporation for Assigned Names and Numbers) Bylaws) three times a year. ICANN72 is scheduled for 23-28 October 2021. Following a search and evaluation of available venues, the organization identified Seattle, Washington as a suitable location for the ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting.

The organization performed a thorough analysis of the available locations and prepared a paper to identify those that met the Meeting Location Selection Criteria (see <http://meetings.icann.org/location-selection-criteria> (<https://meetings.icann.org/location-selection-criteria>)). Based on the proposals and analysis, ICANN (Internet Corporation for Assigned Names and Numbers) has identified Seattle, Washington as the location for ICANN72. Selection of this North America location adheres to the geographic rotation guidelines established by the Meeting Strategy Working Group.

The Board reviewed the organization's briefing for hosting the meeting in Seattle, Washington and the determination that the proposal met the significant factors of the Meeting Location Selection Criteria, as well as the related costs for the facilities selected, for the October 2021 ICANN (Internet Corporation for Assigned Names and Numbers) Public Meeting. ICANN (Internet Corporation for Assigned Names and Numbers) conducts Public Meetings in support of its mission to ensure the stable and secure operation of the Internet's unique identifier systems, and acts in the public interest by providing free and open access to anyone wishing to participate, either in person or remotely, in open, transparent and bottom-up, multistakeholder policy development processes.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in hosting the meeting and providing travel support as necessary, as well as on the community in incurring costs to travel to the meeting. But such impact would be faced regardless of the location and venue of the meeting. This action will have no impact on the security or the stability of the DNS (Domain Name System).

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

f. Contract Renewal and Disbursement for ERP Initiative (Oracle Cloud)

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has an established a need to renew contracts for ERP solution, Oracle Cloud.

Whereas, the Board Finance Committee has reviewed the financial implications of contract renewal with Oracle Cloud for ICANN (Internet Corporation for Assigned Names and Numbers)'s ERP solution and has considered alternatives.

Whereas, both the organization and the Board Finance Committee have recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the contracts with Oracle Cloud for ICANN (Internet Corporation for Assigned Names and Numbers)'s ERP solution and make all necessary disbursements pursuant to those contracts.

Resolved (2019.01.27.12), the Board authorizes the President and CEO, or his designee(s), to take all necessary actions to renew the contracts with Oracle Cloud for ICANN (Internet Corporation for Assigned Names and Numbers)'s ERP solution and make all necessary disbursements pursuant to those contracts.

Resolved (2019.01.27.13), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2019.01.27.12 – 2019.01.27.13

ICANN (Internet Corporation for Assigned Names and Numbers) has successfully utilized Oracle Cloud ERP since implementation Go Live in December 2016. Over the past years, ICANN (Internet Corporation for Assigned Names and Numbers) organization has gradually increased the ERP systems and transactional processing knowledge and is in a position to make incremental efficiency improvements to maximize original investment. The Oracle Cloud ERP replaced a then aging Finance, Human Resources and Procurement legacy systems. This solution provided ICANN (Internet Corporation for Assigned Names and Numbers) org with an integrated ERP solution under a single system of record improving systems capacity, global reporting and analysis capability, leading to improved productivity and cross-functional efficiencies, and enhance internal controls.

Current Contract

ICANN (Internet Corporation for Assigned Names and Numbers)'s current contract with Oracle Cloud ERP was for a three-year period. This contract expired in December 2018. Oracle Cloud has provided ICANN (Internet Corporation for Assigned Names and Numbers) with a one-month contract extension. Annual cost is *[REDACTED – FOR NEGOTIATION PURPOSES]*.

New Contract

After thorough analysis, negotiations, and an adjustment to the number of licenses with the supplier, the organization has two options available: (i) three-year contract at *[REDACTED – FOR NEGOTIATION PURPOSES]* annually with three-year total cost of *[REDACTED – FOR NEGOTIATION PURPOSES]*, (ii) five-year contract at *[REDACTED – FOR NEGOTIATION PURPOSES]* annually with five-year total cost of *[REDACTED – FOR NEGOTIATION PURPOSES]*.

After careful analysis of options submitted by the organization, the five-year contract option is considered a viable, cost-effective solution. This solution has lower total cost, lock-in pricing for protection against increases for five years, and flexibility for the organization to perform another overall ERP systems analysis in three years (2021-2022) to determine if the solution set is best for ICANN (Internet Corporation for Assigned Names and Numbers).

The Board reviewed the organization's and the Board Finance Committee's recommendations for contracting and disbursement authority for Oracle Cloud ERP contract renewal.

Taking this Board action fits squarely within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the public interest in that it ensures that payments of large amounts for one invoice to one entity are reviewed and evaluated by the Board if they exceed a certain amount of delegated authority through ICANN (Internet Corporation for Assigned Names and Numbers)'s Contracting and Disbursement Policy. This ensures that the Board is overseeing large disbursements and acting as proper stewards of the funding ICANN (Internet Corporation for Assigned Names and Numbers) receives from the public.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) to renew Oracle Cloud ERP contract. This impact is currently included in the FY20 Operating Plan and Budget that is pending Board approval. This action will not have a direct impact on the security, stability and resiliency of the domain name system.

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

g. Reaffirming the Temporary Specification for gTLD (generic Top Level Domain) Registration Data

Whereas, on 17 May 2018, the Board adopted the Temporary Specification for gTLD (generic Top Level Domain) Registration Data (the "Temporary Specification") to be effective 25 May 2018 for a 90-day period. The Temporary Specification establishes temporary requirements to allow ICANN (Internet Corporation for Assigned Names and Numbers) and gTLD (generic Top Level Domain) registry operators and registrars to continue to comply with existing ICANN (Internet Corporation for Assigned Names and Numbers) contractual requirements and community-developed policies concerning gTLD (generic Top Level Domain) registration data (including WHOIS (WHOIS (pronounced "who is"; not an acronym))) in light of the European Union's General Data Protection Regulation (GDPR).

Whereas, on 21 August 2018, the Board reaffirmed the adoption of the Temporary Specification to be effective for an additional 90-day period beginning on 23 August 2018.

Whereas, on 6 November 2018, the Board reaffirmed the adoption of the Temporary Specification to be effective for an additional 90-day period beginning on 21 November 2018.

Whereas, the Board adopted the Temporary Specification pursuant to the procedures in the Registry Agreement and Registrar Accreditation Agreement for adopting temporary policies. This procedure requires that "[i]f the period of time for which the Temporary Policy is adopted exceeds ninety (90) calendar days, the Board shall reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus (Consensus) Policy".

Resolved (2019.01.27.14), the Board reaffirms the Temporary Specification for gTLD (generic Top Level Domain) Registration Data (/resources/pages/gtld-registration-data-specs-2018-05-17-en#temp-spec) pursuant to the procedures in the Registry Agreement and Registrar Accreditation Agreement concerning the establishment of

temporary policies. In reaffirming this Temporary Specification, the Board has determined that:

1. The modifications in the Temporary Specification to existing requirements concerning the processing of personal data in registration data continue to be justified and immediate temporary establishment of the Temporary Specification continues to be necessary to maintain the stability or security of Registrar Services, Registry Services or the DNS (Domain Name System) or the Internet.
2. The Temporary Specification is as narrowly tailored as feasible to achieve the objective to maintain the stability or security of Registrar Services, Registry Services or the DNS (Domain Name System) or the Internet.
3. The Temporary Specification will be effective for an additional 90-day period beginning 19 February 2019.

Resolved (2019.01.27.14), the Board reaffirms the Advisory Statement Concerning Adoption of the Temporary Specification for gTLD (generic Top Level Domain) Registration Data (/en/system/files/files/advisory-statement-gtld-registration-data-specs-17may18-en.pdf), which sets forth its detailed explanation of its reasons for adopting the Temporary Specification and why the Board believes such Temporary Specification should receive the consensus support of Internet stakeholders.

Rationale for Resolutions 2019.01.27.14 – 2019.01.27.15

The European Union's General Data Protection Regulation (GDPR) went into effect on 25 May 2018. The GDPR is a set of rules adopted by the European Parliament, the European Council and the European Commission that impose new obligations on all companies and organizations that collect and maintain any "personal data" of residents of the European Union, as defined under EU data protection law. The GDPR impacts how personal data is collected, displayed and processed among participants in the gTLD (generic Top Level Domain) domain name ecosystem (including registries and registrars) pursuant to ICANN (Internet Corporation for Assigned Names and Numbers) contracts and policies.

On 17 May 2018, the Board adopted the Temporary Specification for gTLD (generic Top Level Domain) Registration Data ("Temporary Specification") to establish temporary requirements to allow ICANN (Internet Corporation for Assigned Names and Numbers) and gTLD (generic Top Level Domain) registry operators and registrars to continue to comply with existing ICANN (Internet Corporation for Assigned Names and Numbers) contractual requirements and community-developed policies concerning gTLD (generic Top Level Domain) registration data (including WHOIS (WHOIS (pronounced "who is"; not an acronym))) in relation to the GDPR. The Temporary Specification, which became effective on 25 May 2018, was adopted utilizing the procedure for temporary policies established in the Registry Agreement and the Registrar Accreditation Agreement.

On 21 August 2018, the Board reaffirmed the Temporary Specification for an additional 90-day period beginning 23 August 2018. On 6 November 2018, the Board again reaffirmed the adoption of the Temporary Specification to be effective for a subsequent 90-day period beginning on 21 November 2018.

As required by the procedure in the Registrar Accreditation Agreement and Registry Agreements for adopting a temporary policy or specification, "[i]f the period of time for which the Temporary Policy is adopted exceeds ninety (90) calendar days, the Board shall reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus (Consensus) Policy."

Today, the Board is taking action to reconfirm the Temporary Specification for an additional 90 days as the temporary requirements continue to be justified in order to maintain the stability or security of registry services, registrar services or the DNS (Domain Name System). When adopting the Temporary Specification, the Board provided an Advisory Statement (/en/system/files/files/advisory-statement-gtld-registration-data-specs-17may18-en.pdf) to provide a detailed explanation of its reasons for adopting the Temporary Specification and why the Board believes such Temporary Specification should receive the consensus support of Internet stakeholders. The Board reaffirms the Advisory Statement, which is incorporated by reference into the rationale to the Board's resolutions.

As required when a temporary policy or specification is adopted, the Board took action to implement the consensus policy development process and consulted with the GNSO (Generic Names Supporting Organization) Council on potential paths forward for considering the development of a consensus policy on the issues within the Temporary Specification. The consensus policy development process must be concluded in a one-year time period. The Board takes note that the GNSO (Generic Names Supporting Organization) Council launched (/news/blog/gnsocouncil-launches-edpd-on-the-temporary-specification-for-gtld-registration-data) an Expedited Policy Development Process on the Temporary Specification, and the Working Group is continuing with its deliberations to develop proposed policy recommendations. On 21 November 2018 the Working Group published for public comment the Initial Report of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD (generic Top Level Domain) Registration Data (<https://gnsocouncil.org/en/issues/epdp-gtld-registration-data-specs-initial-21nov18-en.pdf>). The Working Group defined a schedule to produce a final report in February 2019 and for the report to be provided to the Board for consideration prior to the expiration of the 1-year period provided for the Temporary Specification. The Board will continue to engage with the GNSO (Generic Names Supporting Organization) Council on this matter and reconfirms its commitment to provide the necessary support to the work of the Expedited Policy Development Process to meet the deadline (see 7 August 2018 letter from Cherine Chalaby to GNSO (Generic Names Supporting Organization) Council Chair: <https://www.icann.org/en/system/files/correspondence/chalaby-to-forrest-et-al-07aug18-en.pdf> (</en/system/files/correspondence/chalaby-to-forrest-et-al-07aug18-en.pdf>)).

The Board's action to reaffirm the Temporary Specification is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission "[...] to ensure the stable and secure operation of the Internet's unique identifier systems [...]". As one of ICANN (Internet Corporation for Assigned Names and Numbers)'s primary roles is to be responsible for the administration of the topmost levels of the Internet's identifiers, facilitating the ability to identify the holders of those identifiers is a core function of ICANN (Internet Corporation for Assigned Names and Numbers). The Board's action

today will help serve the public interest and further the requirement in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws to "assess the effectiveness of the then current gTLD (generic Top Level Domain) registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data." [Bylaws Sec. 4.6(e)(ii)]

Also, this action is expected to have an immediate impact on the continued security, stability or resiliency of the DNS (Domain Name System), as it will assist in continuing to maintain WHOIS (WHOIS (pronounced "who is"; not an acronym)) to the greatest extent possible while the community works to develop a consensus policy. Reaffirming the Temporary Specification is not expected to have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) organization beyond what was previously identified in the Board's [rationale for resolutions 2018.05.17.01 – 2018.05.17.09 \(/resources/board-material/resolutions-2018-05-17-en#1.a.rationale\)](#). If the resource needs are greater than the amounts currently budgeted to perform work on WHOIS (WHOIS (pronounced "who is"; not an acronym))- and GDPR-related issues, the President and CEO will bring any additional resource needs to the Board Finance Committee for consideration, in line with existing fund request practices.

This is an Organizational Administrative Function of the Board for which public comment is not required, however ICANN (Internet Corporation for Assigned Names and Numbers)'s approach to addressing compliance with ICANN (Internet Corporation for Assigned Names and Numbers) policies and agreements concerning gTLD (generic Top Level Domain) registration data in relation to the GDPR has been the subject of comments from the community over the past year ([https://www.icann.org/dataprotectionprivacy_\(dataprotectionprivacy\)](https://www.icann.org/dataprotectionprivacy_(dataprotectionprivacy))).

2. Main Agenda:

a. Delegation of the موريتانيا. country-code top-level domain representing Mauritania in Arabic Script to Université de Nouakchott Al Aasriya

Resolved (2019.01.27.16), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Naming Function Contract with ICANN (Internet Corporation for Assigned Names and Numbers), PTI has reviewed and evaluated the request to delegate the موريتانيا. country-code top-level domain to Université de Nouakchott Al Aasriya. The documentation demonstrates that the proper procedures were followed in evaluating the request.

Rationale for Resolution 2019.01.27.16

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Naming Function Contract, PTI has evaluated a request for ccTLD (Country Code Top Level Domain) delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

What is the proposal being considered?

The proposal is to approve a request to create the موريتانيا. country-code top-level domain in Arabic script and assign the role of manager to Université de Nouakchott Al Aasriya.

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, PTI consulted with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

[REDACTED-SENSITIVE DELEGATION INFORMATION]

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country-code top-level domains are designated to serve, and responsive to obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency. This is an organizational administrative function not requiring public comment.

b. Delegation of the .SS (South Sudan) country-code top-level domain to the National Communication Authority (NCA)

Resolved (2019.01.27.17), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Naming Function Contract with ICANN (Internet Corporation for Assigned Names and Numbers), PTI has reviewed and evaluated the request to delegate the .SS (South Sudan) country-code top-level domain to National Communication Authority (NCA). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Rationale for Resolution 2019.01.27.17

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Naming Function Contract, PTI has evaluated a request for ccTLD (Country Code Top Level Domain) delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

What is the proposal being considered?

The proposal is to approve a request to create the .SS country-code top-level domain and assign the role of manager to National Communication Authority (NCA).

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, PTI consulted with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their significantly interested parties.

What concerns or issues were raised by the community?

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

[REDACTED-SENSITIVE DELEGATION INFORMATION]

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country-code top-level domains are designated to serve, and responsive to obligations under the IANA (Internet Assigned Numbers Authority) Naming Function Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency. This is an Organizational Administrative Function not requiring public comment.

c. GAC (Governmental Advisory Committee) Advice: Barcelona Communiqué (October 2018)

Whereas, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) met during the ICANN63 meeting in Barcelona, Spain and issued advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board in a [communiqué \(/en/system/files/correspondence/gac-to-icann-25oct18-en.pdf\)](#) on 25 October 2018 ("Barcelona Communiqué").

Whereas, the Barcelona Communiqué was the subject of an [exchange \(https://gac.icann.org/sessions/gac-and-icann-board-conference-call-regarding-icann62-communication\)](#) between the Board and the GAC (Governmental Advisory Committee) on 28 November 2018.

Whereas, in a 20 December 2018 [letter \(/en/system/files/correspondence/ismail-to-chalaby-botterman-20dec18-en.pdf\)](#), the GAC (Governmental Advisory Committee) provided additional clarification of language contained in the Barcelona Communiqué Annex titled Follow-up to Original Joint Statement by ALAC (At-Large Advisory Committee) and GAC (Governmental Advisory Committee) (Abu Dhabi, 2 November 2017).

Whereas, in a 21 December 2018 [letter \(/en/system/files/correspondence/drazek-et-al-to-icann-board-21dec18-en.pdf\)](#), the GNSO (Generic Names Supporting Organization) Council provided its feedback to the Board concerning advice in the Barcelona Communiqué relevant to generic top-level domains to inform the Board and the community of gTLD (generic Top Level Domain) policy activities that may relate to advice provided by the GAC (Governmental Advisory Committee).

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) organization published a [memorandum \(/en/system/files/files/implementation-memo-two-character-ascii-labels-22jan19-en.pdf\)](#) and [historical briefing paper \(/en/system/files/files/historical-overview-two-character-ascii-labels-22jan19-en.pdf\)](#) providing clarification regarding the development and evolution of ICANN (Internet Corporation for Assigned Names and Numbers) organization's procedure for the

release of two-character labels at the second level and the standard framework of measures for avoiding confusion with corresponding country codes.

Whereas, the Board developed a scorecard to respond to the GAC (Governmental Advisory Committee)'s advice in the Barcelona Communiqué, taking into account the dialogue between the Board and the GAC (Governmental Advisory Committee), the clarification letter provided by the GAC (Governmental Advisory Committee) Chair, the information provided by the GNSO (Generic Names Supporting Organization) Council, and the memorandum and briefing paper released by the ICANN (Internet Corporation for Assigned Names and Numbers) org.

Whereas, the Board has considered the previously deferred GAC (Governmental Advisory Committee) advice (/en/system/files/files/resolutions-panamacity62-gac-advice-scorecard-16sep18-en.pdf) regarding two-character country codes at the second level from the Panama Communiqué, and has included a response in the current scorecard "GAC (Governmental Advisory Committee) Advice – Barcelona Communiqué: Actions and Updates (25 January 2019)".

Resolved (2019.01.27.18), the Board adopts the scorecard titled "GAC (Governmental Advisory Committee) Advice – Barcelona Communiqué: Actions and Updates (25 January 2019) (/en/system/files/files/resolutions-barcelona63-gac-advice-scorecard-27jan19-en.pdf)" in response to items of GAC (Governmental Advisory Committee) advice in the Barcelona Communiqué and the Panama Communiqué.

Rationale for Resolution 2019.01.27.18

Article 12, Section 12.2(a)(ix) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws permits the GAC (Governmental Advisory Committee) to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." In its Barcelona Communiqué (25 October 2018), the GAC (Governmental Advisory Committee) issued advice to the Board on: two-character country codes at the second level and protection of names and acronyms of Intergovernmental Organizations (IGOs) in gTLDs. The GAC (Governmental Advisory Committee) also provided a follow-up to previous advice GDPR and WHOIS (WHOIS (pronounced "who is"; not an acronym)), the Dot Amazon applications, protection of the Red Cross and Red Crescent designations and identifiers, and a follow-up to the joint statement by ALAC (At-Large Advisory Committee) and GAC (Governmental Advisory Committee) (Abu Dhabi, 2 November 2017). The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. Any GAC (Governmental Advisory Committee) advice approved by a full consensus of the GAC (Governmental Advisory Committee) (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the GAC (Governmental Advisory Committee) and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

The Board is taking action today on all items in the Barcelona Communiqué, including the items related to two-character country codes at the second level as well as protections of IGOs. The Board is also taking action on the items regarding two-character country codes at the second level from the Panama Communiqué, consideration of which had been previously deferred.

The Board will continue to defer consideration of five items from the San Juan Communiqué, including: four advice items related to GDPR and WHOIS (WHOIS (pronounced "who is"; not an acronym)) and one advice item related to IGO (Intergovernmental Organization) reserved acronyms, pending further discussion with the GAC (Governmental Advisory Committee). The Board will consider if further action is needed following these discussions.

The Board's actions are described in the [scorecard dated 25 January 2019](https://www.icann.org/en/system/files/files/resolutions-barcelona63-gac-advice-scorecard-27jan19-en.pdf) ([/en/system/files/files/resolutions-barcelona63-gac-advice-scorecard-27jan19-en.pdf](https://www.icann.org/en/system/files/files/resolutions-barcelona63-gac-advice-scorecard-27jan19-en.pdf)).

In adopting its response to the GAC (Governmental Advisory Committee) advice in the Barcelona Communiqué, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Panama Communiqué (28 June 2018):
<https://www.icann.org/en/system/files/correspondence/gac-to-icann-28jun18-en.pdf> ([/en/system/files/correspondence/gac-to-icann-28jun18-en.pdf](https://www.icann.org/en/system/files/correspondence/gac-to-icann-28jun18-en.pdf)) [PDF, 576 KB]
- Barcelona Communiqué (25 October 2018):
<https://www.icann.org/en/system/files/correspondence/gac-to-icann-25oct18-en.pdf> ([/en/system/files/correspondence/gac-to-icann-25oct18-en.pdf](https://www.icann.org/en/system/files/correspondence/gac-to-icann-25oct18-en.pdf))
- The GNSO (Generic Names Supporting Organization) Council's review of the advice in the Barcelona Communiqué as presented in the 21 December 2018 letter to the Board:
<https://www.icann.org/en/system/files/correspondence/drazek-et-al-to-icann-board-21dec18-en.pdf> ([/en/system/files/correspondence/drazek-et-al-to-icann-board-21dec18-en.pdf](https://www.icann.org/en/system/files/correspondence/drazek-et-al-to-icann-board-21dec18-en.pdf))
- The GAC (Governmental Advisory Committee)'s clarification of Barcelona Communiqué Attach Language – Follow-up to Original Joint Statement by ALAC (At-Large Advisory Committee) and GAC (Governmental Advisory Committee) (Abu Dhabi, 2 November 2017):
<https://www.icann.org/en/system/files/correspondence/ismail-to-chalaby-botterman-20dec18-en.pdf> ([/en/system/files/correspondence/ismail-to-chalaby-botterman-20dec18-en.pdf](https://www.icann.org/en/system/files/correspondence/ismail-to-chalaby-botterman-20dec18-en.pdf))
- The ICANN (Internet Corporation for Assigned Names and Numbers) Organization's memorandum providing clarification regarding the development and evolution of ICANN (Internet Corporation for Assigned Names and Numbers) organization's procedure for the release of two-character labels at the second level and the standard framework of measures for avoiding confusion with corresponding country codes:
<https://www.icann.org/en/system/files/files/implementation-memo-two-character-ascii-labels-22jan19-en.pdf> ([/en/system/files/files/implementation-memo-two-character-ascii-labels-22jan19-en.pdf](https://www.icann.org/en/system/files/files/implementation-memo-two-character-ascii-labels-22jan19-en.pdf))

- The ICANN (Internet Corporation for Assigned Names and Numbers) Organization's Historical Overview of Events Regarding Two-Character Labels at the Second Level in the New gTLD (generic Top Level Domain) Namespace: <https://www.icann.org/en/system/files/files/historical-overview-two-character-ascii-labels-22jan19-en.pdf> (</en/system/files/files/historical-overview-two-character-ascii-labels-22jan19-en.pdf>)

The adoption of the GAC (Governmental Advisory Committee) advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the GAC (Governmental Advisory Committee) concerning gTLDs and other matters. There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System). This is an Organizational Administrative function that does not require public comment.

d. Adoption of GNSO (Generic Names Supporting Organization) Consensus (Consensus) Policy relating to Certain Red Cross & Red Crescent Names at the Second Level of the Domain Name (Domain Name) System

Whereas, in March 2017 the Generic Names Supporting Organization (Supporting Organization) ("GNSO (Generic Names Supporting Organization)) and the Governmental Advisory Committee (Advisory Committee) ("GAC (Governmental Advisory Committee)) engaged in a good faith, facilitated dialogue in an attempt to resolve outstanding differences between the GNSO (Generic Names Supporting Organization)'s original Policy Development Process ("PDP (Policy Development Process)) consensus recommendations and the GAC (Governmental Advisory Committee)'s advice concerning certain Red Cross and Red Crescent names.

Whereas, in the course of that facilitated dialogue the GAC (Governmental Advisory Committee) and the GNSO (Generic Names Supporting Organization) noted certain specific matters, namely:

1. The public policy considerations associated with protecting identifiers associated with the international Red Cross movement ("Movement") in the domain name system;
2. The GAC (Governmental Advisory Committee)'s rationale for seeking permanent protection for the terms most closely associated with the Movement and its respective components is grounded in the protections of the designations "Red Cross", "Red Crescent", "Red Lion and Sun", and "Red Crystal" under international treaty law and under multiple national laws;
3. The list of names of the Red Cross and Red Crescent National Societies is a finite, limited list of specific names of the National Societies recognized within the Movement (http://www.ifrc.org/Docs/ExcelExport/NS_Directory.pdf (http://www.ifrc.org/Docs/ExcelExport/NS_Directory.pdf));
4. There are no other legitimate uses for these terms; and
5. The GAC (Governmental Advisory Committee) had provided clarification following the completion of the GNSO (Generic Names Supporting Organization) PDP (Policy Development Process), via its March 2014

Singapore Communiqué, on the finite scope of the specific list of Movement names for which permanent protections were being requested

(<https://gacweb.icann.org/download/attachments/28278854/Final%20Communique%20%20Singapore%202014.pdf?version=1&modificationDate=1397225538000&api=v2>

(<https://gacweb.icann.org/download/attachments/28278854/Final%20Communique%20%20Singapore%202014.pdf?version=1&modificationDate=1397225538000&api=v2>)).

Whereas, following the GAC (Governmental Advisory Committee)-GNSO (Generic Names Supporting Organization) discussion, the ICANN (Internet Corporation for Assigned Names and Numbers) Board had requested that the GNSO (Generic Names Supporting Organization) Council consider initiating the GNSO (Generic Names Supporting Organization)'s process for amending previous GNSO (Generic Names Supporting Organization) policy recommendations concerning the full names of the Red Cross National Societies and the International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, and a defined, limited set of variations of these names, in the six official languages of the United Nations (<https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.e.i>) ([/resources/board-material/resolutions-2017-03-16-en#2.e.i](https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.e.i))).

Whereas, in May 2017 the GNSO (Generic Names Supporting Organization) Council resolved to reconvene the original PDP (Policy Development Process) Working Group to consider the Board's request

(<https://gnso.icann.org/en/council/resolutions#20170503-071>

(<https://gnso.icann.org/en/council/resolutions#20170503-071>)).

Whereas, in August 2018 the reconvened PDP (Policy Development Process) Working Group submitted six recommendations that received the Full Consensus (Consensus) of the Working Group to the GNSO (Generic Names Supporting Organization) Council (<https://gnso.icann.org/en/issues/igo-ingo/red-cross-protection-policy-amend-process-final-06aug18-en.pdf>) (<https://gnso.icann.org/en/issues/igo-ingo/red-cross-protection-policy-amend-process-final-06aug18-en.pdf>)), including a defined, limited set of variations of the Red Cross and Red Crescent names to be reserved under the proposed Consensus (Consensus) Policy (<https://gnso.icann.org/en/issues/igo-ingo/red-cross-identifiers-proposed-reservation-06aug18-en.pdf>) (<https://gnso.icann.org/en/issues/igo-ingo/red-cross-identifiers-proposed-reservation-06aug18-en.pdf>)).

Whereas, in September 2018 the GNSO (Generic Names Supporting Organization) Council voted unanimously to approve all the PDP (Policy Development Process) consensus recommendations

(<https://gnso.icann.org/en/council/resolutions#20180927-3>

(<https://gnso.icann.org/en/council/resolutions#20180927-3>)) and in October 2018

further approved the submission of a Recommendations Report to the ICANN

(Internet Corporation for Assigned Names and Numbers) Board

(<https://gnso.icann.org/en/council/resolutions#20181024-1>

(<https://gnso.icann.org/en/council/resolutions#20181024-1>)).

Whereas, as required by the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, a public comment period was opened in November 2018 to allow the public a reasonable opportunity to provide input on the proposed Consensus

(Consensus) Policy prior to Board action as well as for the GAC (Governmental Advisory Committee) to provide timely advice on any public policy concerns.

Whereas, the Board has considered the GNSO (Generic Names Supporting Organization)'s recommendations and all other relevant materials relating to this matter.

Resolved (2019.01.27.19), the Board hereby adopts the final recommendations of the reconvened International Governmental Organizations (IGO (Intergovernmental Organization)) & International Non-Governmental Organizations (INGO) PDP (Policy Development Process) Working Group, as passed by a unanimous vote of the GNSO (Generic Names Supporting Organization) Council on 27 September 2018.

Resolved (2019.01.27.20), the Board directs the President and CEO, or his authorized designee, to develop and execute an implementation plan, including costs and timelines, for the adopted recommendations consistent with ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws Annex A and the Implementation Review Team Guidelines & Principles endorsed by the Board on 28 September 2015 (see <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en-2.f> (/resources/board-material/resolutions-2015-09-28-en#2.f)), and to continue communication with the community on such work.

Rationale for Resolutions 2019.01.27.19 – 2019.01.27.20

Why is the Board addressing the issue?

The GNSO (Generic Names Supporting Organization) conducted a PDP (Policy Development Process), concluding in November 2013, that considered and developed certain policy recommendations for protecting certain identifiers associated with the Red Cross and Red Crescent movement. Those of the GNSO (Generic Names Supporting Organization)'s recommendations that were consistent with GAC (Governmental Advisory Committee) advice on the subject; namely, relating to the specific terms "Red Cross", "Red Crescent", "Red Crystal" and "Red Lion & Sun" were adopted by the Board in April 2014

(<http://www.icann.org/en/groups/board/documents/resolutions-30apr14-en.htm#2.a> (/en/groups/board/documents/resolutions-30apr14-en.htm#2.a)). Following implementation work by ICANN (Internet Corporation for Assigned Names and Numbers) Organization and community volunteers, these four specific terms are now withheld from delegation at the top and second levels of the DNS (Domain Name System), in the six official languages of the United Nations, under a Consensus (Consensus) Policy that went into force in January 2018.

The Board did not approve the remaining GNSO (Generic Names Supporting Organization) policy recommendations from 2013 that concerned other Red Cross and Red Crescent identifiers, e.g. the full names of all the National Societies of the Red Cross movement and those of the International Red Cross and Red Crescent Movement, the International Committee of the Red Cross, and the International Federation of Red Cross and Red Crescent Societies. The Board did not approve these policy recommendations at that time to allow for further discussions between the Board, GNSO (Generic Names Supporting Organization), GAC (Governmental Advisory Committee) and community about the inconsistencies between the GNSO (Generic Names Supporting Organization) policy recommendations and the GAC

(Governmental Advisory Committee)'s advice. Over the next several months, the Board facilitated dialogue among the groups about a possible path forward. Following the conclusion of a facilitated dialogue between the GAC (Governmental Advisory Committee) and the GNSO (Generic Names Supporting Organization) in March 2017, the GNSO (Generic Names Supporting Organization) Council reconvened the original PDP (Policy Development Process) Working Group to consider possible modifications of its previous recommendations concerning these specific identifiers.

In September 2018, the GNSO (Generic Names Supporting Organization) Council unanimously approved the modified policy recommendations presented in the final report of the PDP (Policy Development Process) Working Group. With the GNSO (Generic Names Supporting Organization) Council's unanimous approval of the modified policy recommendations, the Board is now taking action to adopt the revised consensus policy recommendations in accordance with the process documented under the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

What is the proposal being addressed?

The PDP (Policy Development Process) recommendations are that certain specific Red Cross and Red Crescent names as well as a list of agreed, permitted variants of those names be withheld from delegation at the second level of the DNS (Domain Name System), in all six official languages of the United Nations. The PDP (Policy Development Process) recommendations include a specific, documented process and criteria for correcting errors found on the list of agreed names and variants, as well as for adding or removing entries from the list. The adopted policy will supplement the existing Consensus (Consensus) Policy on protection at the top and second levels of the terms "Red Cross", "Red Crescent", "Red Crystal" and "Red Lion & Sun" in all six official languages of the United Nations.

For clarity, the PDP (Policy Development Process) recommendations do not include proposals for protection of the specific acronyms associated with the international Red Cross movement, which remains an issue outstanding from the original 2013 GNSO (Generic Names Supporting Organization) PDP (Policy Development Process) that resulted in recommendations that are inconsistent with GAC (Governmental Advisory Committee) advice regarding these acronyms.

Which stakeholders or others were consulted?

The reconvened PDP (Policy Development Process) Working Group performed its work in accordance with the GNSO (Generic Names Supporting Organization)'s PDP (Policy Development Process) Manual and Working Group Guidelines, which include provisions pertaining to broad community representation. Members of the Working Group comprised representatives from various parts of the GNSO (Generic Names Supporting Organization) and ICANN (Internet Corporation for Assigned Names and Numbers) community, including representatives of the Red Cross. The Working Group's Initial Report was published for public comment in June 2018, following which the group considered all input received in developing its final recommendations, all of which received the Full Consensus (Consensus) of the Working Group. Prior to the GNSO (Generic Names Supporting Organization) Council's vote on the Final Report, the Working Group chair conducted a meeting with community members who had expressed some concerns about the proposed recommendations. The GNSO

(Generic Names Supporting Organization) Council voted unanimously to approve all the recommendations in September 2018.

The policy recommendations as approved by the GNSO (Generic Names Supporting Organization) Council were published for public comment in November 2018 and the GAC (Governmental Advisory Committee) notified of the Council's action.

What concerns or issues were raised by the community?

Possible concerns about freedom of expression were raised concerning reservation of the Red Cross and Red names at the second level of the DNS (Domain Name System), as well as the Working Group's development of criteria and a process for adding new names and variants to the list instead of recommending a fixed list. The community also sought clarity about the mechanism for implementing the proposed policy (i.e. whether ICANN (Internet Corporation for Assigned Names and Numbers) Org's contracts with its contracted parties will need to be amended). The Board understands that the Working Group believes it addressed these concerns in developing its final Consensus (Consensus) Policy recommendations.

Other community comments supported the proposed policy, citing the public policy need to provide adequate protections for the Red Cross against abuse of its names and recognized variants, as well as the fact that the recommended protections are grounded in international humanitarian law and multiple national laws.

What significant materials did the Board review?

The Board reviewed the Working Group's Final Report and the recommended protected list of Red Cross names (<https://gnso.icann.org/sites/default/files/file/field-file-attach/red-cross-protection-policy-amend-process-final-06aug18-en.pdf> (<https://gnso.icann.org/sites/default/files/file/field-file-attach/red-cross-protection-policy-amend-process-final-06aug18-en.pdf>), and <https://gnso.icann.org/sites/default/files/file/field-file-attach/red-cross-identifiers-proposed-reservation-06aug18-en.pdf> (<https://gnso.icann.org/sites/default/files/file/field-file-attach/red-cross-identifiers-proposed-reservation-06aug18-en.pdf>)), the GNSO (Generic Names Supporting Organization) Council's Recommendations Report (<https://gnso.icann.org/en/drafts/reconvened-red-cross-recommendations-14oct18-en.pdf> (<https://gnso.icann.org/en/drafts/reconvened-red-cross-recommendations-14oct18-en.pdf>)), a summary of the public comments received (<https://www.icann.org/en/system/files/files/report-comments-red-cross-names-consensus-policy-04jan19-en.pdf> ([/en/system/files/files/report-comments-red-cross-names-consensus-policy-04jan19-en.pdf](https://www.icann.org/en/system/files/files/report-comments-red-cross-names-consensus-policy-04jan19-en.pdf))) and the relevant GAC (Governmental Advisory Committee) advice on this subject (<https://gac.icann.org/> (<https://gac.icann.org/>)).

What factors did the Board find to be significant?

The recommendations were developed following the GNSO (Generic Names Supporting Organization) Policy Development Process as set out in Annex A of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws and have received the full consensus of the Working Group as well as the unanimous support of the GNSO (Generic Names Supporting Organization) Council. As stated in the ICANN

(Internet Corporation for Assigned Names and Numbers) Bylaws ([Annex A, Sec. 9.a. \(/resources/pages/governance/bylaws-en/#annexA\)](#)), "Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers)."

The Bylaws also allow for input from the GAC (Governmental Advisory Committee) in relation to public policy concerns that might be raised if a proposed policy is adopted by the Board. In this context, the GAC (Governmental Advisory Committee)'s October 2018 [Barcelona Communiqué \(https://gac.icann.org/contentMigrated/icann63-barcelona-communication\)](#) expressed the hope that the Board will adopt the GNSO (Generic Names Supporting Organization)'s recommendations.

Are there positive or negative community impacts?

The Board's adoption of these recommendations will resolve the issue, outstanding since 2013, of inconsistencies between the GAC (Governmental Advisory Committee)'s advice and the GNSO (Generic Names Supporting Organization)'s previous policy on these specific Red Cross and Red Crescent names. This means that the interim protections previously put into place by the Board concerning these names will be replaced by the Consensus (Consensus) Policy when it goes into effect, leading to greater clarity as to the scope of protections for these names for ICANN (Internet Corporation for Assigned Names and Numbers)'s Contracted Parties and the community at large.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

Aside from any financial or other resource costs that may arise during work on implementation of the adopted policy, no fiscal or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers), the community or the public are envisaged.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

There are no security, stability or resiliency issues relating to the DNS (Domain Name System) that can be directly attributable to the implementation of the PDP (Policy Development Process) recommendations.

Is this either a defined policy process within ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations) or ICANN (Internet Corporation for Assigned Names and Numbers)'s Organizational Administrative Function decision requiring public comment or not requiring public comment?

This matter concerns the GNSO (Generic Names Supporting Organization)'s policy process, as defined and described by the ICANN (Internet Corporation for Assigned

Names and Numbers) Bylaws and the GNSO (Generic Names Supporting Organization)'s operating procedures. All requirements for public comments as part of these processes have been met.

e. Board Committee Membership and Leadership Changes

Whereas, Chris Disspain is a member of the Board and the current Chair of the Board Accountability Mechanisms Committee (BAMC).

Whereas, León Sanchez is a current member of the Board and member of the BAMC.

Whereas, to facilitate the smooth transition of leadership of the BAMC, the Board Governance Committee (BGC) recommended that the Board immediately appoint León Sanchez as the Chair of the BAMC and retain Mr. Disspain as a member of the BAMC.

Whereas, Matthew Shears has expressed interest in becoming a member of the Organizational Effectiveness Committee (OEC) and the BGC recommended that the Board immediately appoint Mr. Shears as a member of the OEC.

Resolved (2019.01.27.21), the Board appoints León Sanchez as the Chair of the BAMC and retains Chris Disspain as a member of the BAMC, effectively immediately.

Resolved (2019.01.27.22), the Board appoints Matthew Shears as a member of the OEC, effective immediately.

Rationale for Resolutions 2019.01.27.21 – 2019.01.27.22

The Board is committed to facilitating a smooth transition in the leadership of its Board Committees as part of the Board's ongoing discussions regarding succession planning. To that end, the Board Accountability Mechanisms Committee (BAMC) has suggested that its current Chair, Chris Disspain, step down as Chair (but remain as a member) and that the Board appoint León Sanchez as Chair of the BAMC. As a member of the BAMC, Mr. Disspain will work with Mr. Sanchez during a transition period.

As the Board Governance Committee (BGC) is tasked with recommending committee assignments, the BGC has discussed the BAMC's proposal and has recommended that the Board appoint León Sanchez as the new BAMC Chair and retain Mr. Disspain as a member of the BAMC, effectively immediately. The Board agrees with the BGC's recommendation.

The Board is also committed to facilitating the composition of Board Committees in accordance with the Board Committee and Leadership Selection Procedures (</en/system/files/files/bgc-leadership-selection-procedures-02nov17-en.pdf>). The BGC has considered the interest expressed by Matthew Shears in joining the Organizational Effectiveness Committee and has recommended that the Board approve this appointment. The Board agrees with the BGC's recommendation.

The action is in the public interest and in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it is important that Board Committees, in performing the duties as assigned by the Board in compliance with

ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws and the Committees' charters, have the appropriate succession plans in place to ensure leadership continuity within the Committees. Moreover, it is equally important that the composition of Board Committees is established pursuant to the [Board Committee and Leadership Selection Procedures \(/en/system/files/files/bgc-leadership-selection-procedures-02nov17-en.pdf\)](#). This action will have no financial impact on the organization 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.

f. Consideration of Reconsideration Request 16-11: Travel Reservations SRL, Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds + Machines Group Limited, Spring McCook, LLC, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) (.HOTEL)

Whereas, Travel Reservations SRL, Fegistry LLC, Minds + Machines Group Limited, and Radix FZC (and its subsidiary applicant dotHotel Inc.) (collectively, the Requestors) submitted standard applications for .HOTEL, which was placed in a contention set with other .HOTEL applications. Another applicant, HOTEL Top-Level-Domain S.a.r.l. (HTLD), submitted a community-based application for .HOTEL.

Whereas, HTLD participated in Community Priority Evaluation (CPE) and prevailed.

Whereas, on 9 August 2016, the Board adopted Resolutions 2016.08.09.14 and 2016.08.09.15 (the 2016 Resolutions), which directed ICANN (Internet Corporation for Assigned Names and Numbers) organization to move forward with the processing of the prevailing community application for the .HOTEL gTLD (generic Top Level Domain) (HTLD's Application) submitted by HTLD.

Whereas, Requestors submitted Reconsideration Request 16-11 seeking reconsideration of the 2016 Resolutions.

Whereas, while Request 16-11 was pending, the Board directed ICANN (Internet Corporation for Assigned Names and Numbers) organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee (BGC) determined that the pending Reconsideration Requests relating to CPEs, including Request 16-11, would be placed on hold until the CPE Process Review was completed.¹

Whereas, on 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) org published three reports on the CPE Process Review (CPE Process Review Reports).

Whereas, on 15 March 2018, the Board passed the [Resolutions 2018.03.15.08 through 2018.03.15.11 \(/resources/board-material/resolutions-2018-03-15-en#2.a\)](#), which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD (generic Top

Level Domain) Program, and directed the Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, in accordance with [Resolutions 2018.03.15.08 through 2018.03.15.11 \(/resources/board-material/resolutions-2018-03-15-en#2.a\)](#), the BAMC invited the Requestors to make a telephonic presentation to the BAMC in support of Request 16-11, which the Requestors did on 19 July 2018. The BAMC also invited the Requestors to submit additional written materials in response to the CPE Process Review Reports.

Whereas, the BAMC has carefully considered the merits of Request 16-11 and all relevant materials and has recommended that Request 16-11 be denied because the Board adopted the 2016 Resolutions based on accurate and complete information. The BAMC also recommended the Board deny Request 16-11 because there is no evidence supporting the Requestors' claim that the Board failed to consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration, nor is there evidence that the Board discriminated against the Requestors.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 16-11 and all relevant materials related to Request 16-11, including the Requestors' rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2019.01.27.23), the Board adopts the [BAMC Recommendation on Request 16-11 \(/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf\)](#).

Rationale for Resolution 2019.01.27.23

1. Brief Summary and Recommendation

The full factual background is set forth in the [BAMC Recommendation on Request 16-11 \(/en/system/files/files/reconsideration-18-10-acto-bamc-recommendation-21dec18-en.pdf\)](#) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 16 November 2018, the BAMC evaluated Request 16-11 and all relevant materials and recommended that the Board deny Request 16-11 because the Board adopted the 2016 Resolutions based on accurate and complete information. The BAMC also recommended the Board deny Request 16-11 because there is no evidence supporting the Requestors' claim that the Board failed to consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration, nor is there evidence that the Board discriminated against the Requestors.

On 30 November 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal). The Board notes that the Rebuttal is not called for under the Bylaws applicable to Request 16-11, which are set forth in the 2016 Bylaws that were in effect Request 16-11 was filed.² Nonetheless, the

Board has considered the arguments in the Requestors' rebuttal and finds that they do not support reconsideration for the reasons set forth below.

2. Issue

The issues are whether the Board's adoption of the 2016 Resolutions occurred: (i) without consideration of material information; or (ii) were taken as a result of its reliance on false or inaccurate material information.

These issues are considered under the relevant standards for reconsideration requests in effect at the time that Request 16-12 was submitted. These standards are discussed in detail in the [BAMC Recommendation \(/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf\)](#).

3. Analysis and Rationale

A. The Board Adopted The 2016 Resolutions After Considering All Material Information And Without Reliance On False Or Inaccurate Material Information.

The Requestors suggest that reconsideration of the 2016 Resolutions is warranted because [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) failed to properly investigate the Portal Configuration and failed to address the alleged actions relating to the Portal Configuration. Specifically, the Requestors assert that [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) did not verify the affirmation by Dirk Kirschenowski, the individual whose credentials were used to access confidential information of other authorized users of the New gTLD (generic Top Level Domain) portal, that he did not and would not provide the information he accessed to HTLD or its personnel. The BAMC concluded, and the Board agrees, that this argument does not support reconsideration because Requestors did not identify any false or misleading information that the Board relied upon, or material information that the Board failed to consider relating to the Portal Configuration in adopting the 2016 Resolutions.

First, the BAMC determined, and the Board agrees, that [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) undertook a careful and thorough analysis of the Portal Configuration and the issues raised by the Requestors regarding the Portal Configuration. The results of the investigation were shared with the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#), and were carefully considered by the Board in its adoption of the 2016 Resolutions. The BAMC noted that, in its investigation, [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's Application to prevail in CPE. Moreover, [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s](#) investigation revealed that at the time that Mr. Krischenowski accessed confidential information, he was

not directly linked to HTLD's Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD. Mr. Philipp Grabensee, the sole Managing Director of HTLD, informed ICANN (Internet Corporation for Assigned Names and Numbers) org that Mr. Krischenowski was "not an employee" of HTLD, but that Mr. Krischenowski acted as a consultant for HTLD's Application at the time it was submitted in 2012. Mr. Grabensee further verified that HTLD "only learned about [Mr. Krischenowski's access to the data] on 30 April 2015 in the context of ICANN (Internet Corporation for Assigned Names and Numbers)'s investigation." Mr. Grabensee stated that the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015.³

Second, contrary to the Requestors' assertions, the BAMC determined that ICANN (Internet Corporation for Assigned Names and Numbers) org did verify the affirmation from Mr. Krischenowski that he and his associates did not and would not share the confidential information that they accessed as a result of the Portal Configuration with HTLD. ICANN (Internet Corporation for Assigned Names and Numbers) org also confirmed with HTLD that it did not receive any confidential information from Mr. Krischenowski or his associates obtained from the Portal Configuration. As discussed in the Rationale of the 2016 Resolutions, this information was considered by the Board in adopting the Resolutions.⁴ As the Board noted Rationale of the 2016 Resolutions, even if Mr. Krischenowski (or his associates) had obtained sensitive business documents belonging to the Requestors, it would not have had any impact on the CPE process for HTLD's Application. The Requestors have not explained how confidential documents belonging to the other applicants for .HOTEL could impact the CPE criteria, which do not consider other entities' confidential information. While Mr. Krischenowski's access occurred prior to the issuance of the CPE Report in June 2014, HTLD did not seek to amend its application during CPE, nor did it submit any documentation that could have been considered by the CPE panel.⁵ There is no evidence that the CPE Panel had any interaction at all with Mr. Krischenowski during the CPE process, and therefore there is no reason to believe that the CPE Panel ever received the confidential information that Mr. Krischenowski obtained.⁶

For these reasons, which are discussed in further detail in the BAMC Recommendation and incorporated herein by reference, the BAMC determined, and the Board agrees, the Requestors did not identify any false or misleading information that the Board relied upon, or material information that the Board failed to consider relating to the Portal Configuration in adopting the 2016 Resolutions. The Board's decision to allow HTLD's Application to proceed was made following a comprehensive investigation, and was well reasoned and consistent with ICANN (Internet Corporation for Assigned Names and Numbers) org's Articles and Bylaws. In particular, in reaching its decision that

HTLD's Application should not be excluded, the Board carefully considered the results of ICANN (Internet Corporation for Assigned Names and Numbers) org's forensic review and investigation of the Portal Configuration and the Requestors' claims relating the alleged impact of Portal Configuration on the CPE of HTLD's Application.

B. The Board Did Not Rely Upon False Or Misleading Information In Accepting The Despegar IRP Panel's Declaration.

Although Request 16-11 challenges the Board's conduct as it relates to the 2016 Resolutions, the Requestors also appear to challenge the Board's acceptance of the Despegar IRP Panel's Declaration. In particular, the Requestors assert that "the Despegar et al. IRP Panel relied on false and inaccurate material information," such that "[w]hen the ICANN (Internet Corporation for Assigned Names and Numbers) Board accepted the Despegar et al. IRP Declaration, it relied on the same false and inaccurate material information."⁷

As an initial matter, the Board agrees with the BAMC's conclusion that the Requestors' claim is time-barred. The Board's resolution regarding the Despegar IRP Panel's Declaration was published on 10 March 2016.⁸ Request 16-11 was submitted on 25 August 2016, over five months after the Board's acceptance of the Despegar IRP Panel's Declaration, and well past the then 15-day time limit to seek reconsideration of a Board action.⁹

1. The Requestors' Claims Regarding the Dot Registry and Corn Lake IRP Panel Declarations Do Not Support their Claims of Discrimination.

Even had the Requestors timely challenged the Board's resolution regarding the Despegar IRP Panel's Declaration, the Board agrees with the BAMC that the Requestors' claims do not support reconsideration. The Requestors cite to the IRP Panel Declaration issued in *Dot Registry, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) (Dot Registry IRP Panel Declaration)* to support their claim that the Despegar IRP Panel Declaration was based "upon the false premise that the [CPE Provider's] determinations are presumptively final and are made independently by the [CPE Provider], without ICANN (Internet Corporation for Assigned Names and Numbers)'s active involvement."¹⁰ In particular, the Requestors claim that the Dot Registry IRP Panel Declaration demonstrates that "ICANN (Internet Corporation for Assigned Names and Numbers) did have communications with the evaluators that identify the scoring of individual CPEs,"¹¹ such that the Despegar IRP Panel relied upon false information (namely ICANN (Internet Corporation for Assigned Names and Numbers) org's representation in its Response to the 2014 DIDP Request that ICANN (Internet Corporation for Assigned Names and Numbers) org does not engage in communications with individual evaluators who are involved in the scoring of CPEs, which was

the subject of Request 14-39), when it found ICANN (Internet Corporation for Assigned Names and Numbers) org to be the prevailing party. As a result, the Requestors suggest that the ICANN (Internet Corporation for Assigned Names and Numbers) Board also relied upon false information when it accepted the Despegar IRP Panel Declaration. The Requestors also argue that they are "situated similarly" to the Dot Registry claimants, and therefore if the Board refuses to grant the Requestors relief when the Board granted the Dot Registry claimants relief, then the Board is discriminating against the Requestors in contradiction to ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and Bylaws. The BAMC concluded, and the Board agrees, that the Dot Registry IRP Declaration and the Board's response to it, however, do not support the Requestors' request for reconsideration for the following reasons.

First, contrary to the Requestors' assertion, the Dot Registry IRP Panel did not find that ICANN (Internet Corporation for Assigned Names and Numbers) org engaged in communications with CPE evaluators who were involved in the scoring of CPEs. Second, the statements made by one IRP Panel cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP. The Dot Registry IRP concerned .LLC, .INC, and .LLP while the Despegar IRP concerned .HOTEL. Different issues were considered in each IRP, based on different arguments presented by different parties concerning different applications and unrelated factual situations. As such, there is no support for the Requestors' attempt to apply the findings of the Dot Registry IRP Declaration to the Despegar IRP.

Similarly, the BAMC concluded, and the Board agrees, that the Requestors' citation to the Board's acceptance of the final declaration in *Corn Lake, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers)*, (Corn Lake IRP Declaration) and decision "to extend its final review procedure to include review of Corn Lake's charity expert determination"¹² does not support reconsideration. As was the case with the Dot Registry IRP, the circumstances in the Corn Lake IRP and the Board's subsequent decision concerning .CHARITY involved different facts and distinct considerations specific to the circumstances in Corn Lake's application. As such, the Board's action there does not amount to inconsistent or discriminatory treatment; it is instead an example of the way that the Board must "draw nuanced distinctions between different [gTLD (generic Top Level Domain)] applications,"¹³ and is consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and Bylaws.

2. The CPE Process Review Confirms that ICANN (Internet Corporation for Assigned Names and Numbers) Org did not

have any Undue Influence on the CPE Provider with respect to the CPEs Conducted.

The BAMC concluded, and the Board agrees, that the Requestors' suggestion that ICANN (Internet Corporation for Assigned Names and Numbers) org exerted undue influence over the CPE Provider's execution of CPE does not warrant reconsideration.¹⁴ Indeed, as the BAMC correctly pointed out, this argument has already been addressed by the Board in the 2018 Resolutions.¹⁵

In short, the CPE Process Review's Scope 1 Report confirms that "there is no evidence that ICANN (Internet Corporation for Assigned Names and Numbers) org had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process," including with respect to HTLD's Application.¹⁶ The Requestors believe that the Scope 1 Report demonstrates that "the CPE Provider was not independent from ICANN (Internet Corporation for Assigned Names and Numbers). Any influence by ICANN (Internet Corporation for Assigned Names and Numbers) in the CPE was contrary to the policy, and therefore undue."¹⁷ The Requestors do not identify what "policy" they are referring to, but regardless, their disagreement with the conclusions of the Scope 1 Report do not support reconsideration. This is because the Requestors do not dispute that, when ICANN (Internet Corporation for Assigned Names and Numbers) org provided input to the CPE Provider, that input did *not* involve challenging the CPE Provider's conclusions, but rather was to ensure that the CPE Reports were clear and "that the *CPE Provider's* conclusions"—not ICANN (Internet Corporation for Assigned Names and Numbers) org's conclusions—were "supported by sufficient reasoning."¹⁸ The Requestors also cite "phone calls between ICANN (Internet Corporation for Assigned Names and Numbers) and the CPE Provider to discuss 'various issues,'" claiming that those calls "demonstrate that the CPE Provider was not free from external influence from ICANN (Internet Corporation for Assigned Names and Numbers)" org and was therefore not independent.¹⁹ Neither of these facts demonstrates that the CPE Provider was "not independent" or that ICANN (Internet Corporation for Assigned Names and Numbers) org exerted undue influence over the CPE Provider. These types of communications instead demonstrate that ICANN (Internet Corporation for Assigned Names and Numbers) org protected the CPE Provider's independence by focusing on ensuring that the CPE Provider's conclusions were clear and well-supported, rather than directing the CPE Provider to reach a particular conclusion. This argument therefore does not support reconsideration. Accordingly, the BAMC concluded, and the Board agrees, that because the Scope 1 Report demonstrates that ICANN (Internet Corporation for Assigned

Names and Numbers) org did not exert undue influence on the CPE Provider and CPE process, it disproves the Requestors' claim that "the *Despegar et al.* IRP Panel was given incomplete and misleading information" which is based solely on the premise of ICANN (Internet Corporation for Assigned Names and Numbers) org's undue influence in the CPE process.²⁰

3. The Requestors Have Not Demonstrated that ICANN (Internet Corporation for Assigned Names and Numbers) Org was Obligated to Produce Communications Between ICANN (Internet Corporation for Assigned Names and Numbers) Org and the CPE Panel.

The Board agrees with the BAMC's conclusion that reconsideration is not warranted because, as the Requestors claim, the Despegar IRP Panel did not order ICANN (Internet Corporation for Assigned Names and Numbers) org to produce documents between ICANN (Internet Corporation for Assigned Names and Numbers) org and the CPE Provider. The BAMC noted that that ICANN (Internet Corporation for Assigned Names and Numbers) org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN (Internet Corporation for Assigned Names and Numbers) org and the CPE panel. And no policy or procedure required ICANN (Internet Corporation for Assigned Names and Numbers) org to voluntarily produce documents during the Despegar IRP or thereafter.²¹ In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN (Internet Corporation for Assigned Names and Numbers) org to produce all documents reflecting "[c]onsideration by ICANN (Internet Corporation for Assigned Names and Numbers) of the work performed by the [CPE Provider] in connection with Dot Registry's application" and "[a]cts done and decisions taken by ICANN (Internet Corporation for Assigned Names and Numbers) with respect to the work performed by the [CPE Provider] in connection with Dot Registry's applications."²² ICANN (Internet Corporation for Assigned Names and Numbers) org's communications with the CPE panels for .INC, .LLC, and .LLP fell within the scope of such requests, and thus were produced. Ultimately, ICANN (Internet Corporation for Assigned Names and Numbers) org acted in accordance with applicable policies and procedures, including ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, in both instances.²³

4. The Requestors Have Not Demonstrated that a New CPE of HTLD's Application is Appropriate.

Without identifying particular CPE criteria, the Requestors ask the Board to "ensure meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the

Dot Registry [IRP Panel Declaration]."²⁴ The BAMC determined, and the Board agrees, that to the extent the Requestors are asserting that the outcome of the CPE analysis of HTLD's Application is inconsistent with other CPE applications, this argument was addressed in Scope 2 of the CPE Process Review. There, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."²⁵ Additionally, for the reasons discussed in above and in detail in the BAMC Recommendation, the Board finds that neither the .HOTEL CPE nor the 2016 Resolutions evidence inconsistent or discriminatory treatment toward the Requestors. For these reasons, this argument does not support reconsideration.

C. The 2018 Resolutions Are Consistent With ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission, Commitments, Core Values and Established ICANN (Internet Corporation for Assigned Names and Numbers) Policy(ies).

The Requestors' criticisms of the 2018 Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. None support reconsideration. The BAMC found, and the Board agrees, that the BAMC and the Board addressed the Requestors' concerns regarding the 2018 Resolutions in its Recommendation on Request 18-6,²⁶ which the Board adopted on 18 July 2018.²⁷ The rationales set forth by the BAMC, and the Board in its determination of Request 18-6, are incorporated herein by reference.

D. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.

As an initial matter, Request 16-11 was submitted pursuant to the 11 February 2016 Bylaws, see Discussion *supra*, which do not call for a rebuttal to the BAMC's recommendation.²⁸ Nonetheless, the Board has considered the Requestors' Rebuttal and finds that the Requestors have not provided any additional arguments or facts supporting reconsideration.

1. The 11 February 2016 Bylaws Govern Request 16-11.

The Requestors assert that the Board should consider Request 16-11 under the standards for reconsideration set forth in ICANN (Internet Corporation for Assigned Names and Numbers) org's 18 June 2018 Bylaws, i.e., the version of the Bylaws in effect at the time of the BAMC's recommendation, rather than the 11 February 2016 version which was in effect when Request 16-11 was submitted on 25 August 2016. However, the 18 June 2018 Bylaws did not exist when the Requestors submitted Request 16-11, and the Board did not provide for retroactive treatment when it approved the 18 June 2018 version of the Bylaws;

accordingly, the 18 June 2018 Bylaws have no retroactive effect. Indeed, the Reconsideration Request form that the Requestors submitted references the standard for reconsideration under the 11 February 2016 Bylaws, instructing requestors that, for challenges to Board action, "[t]here has to be identification of material information that was in existence [at] the time of the decision and that was not considered by the Board in order to state a reconsideration request." (See Request 16-11, § 8, at Pg. 7.) Therefore, the BAMC correctly considered Request 16-11 under the 11 February 2016 Bylaws, which were in effect when the Requestors submitted Request 16-11.

2. The Requestors' Challenges to the Bylaws are Untimely.

The Requestors assert that "the formal requirements of Article 4(2)(q) [of the 18 June 2018 Bylaws] and the circumstances of this case create an unjustified imbalance that prevents Requestors from participating in the reconsideration proceedings in a meaningful way" because the BAMC issued a 33-page recommendation "almost four months" after the Requestors' telephonic presentation concerning Request 16-11, when (under the current Bylaws) rebuttals must be filed within 15 days after the BAMC publishes its recommendations and may not exceed 10 pages. (Rebuttal, at Pg. 1.) As noted above, the operative version of the Bylaws do not provide the Requestors with a right to submit a rebuttal, so reconsideration is not warranted on account of the Requestors' apparent disagreement with the deadlines governing rebuttals under the current (inapplicable) version of the Bylaws.²⁹ Moreover, the Requestors *have* meaningfully participated in the reconsideration process: the Requestors made a presentation at a telephonic hearing concerning Request 16-11 (Rebuttal, at Pg. 1); and, as noted in the BAMC's Recommendation, the Requestors submitted—and the BAMC considered—seven letters in support of Request 16-11.³⁰ The Requestors have now also submitted a rebuttal in support of Request 16-11, which the Board has considered. Accordingly, the Requestors have not shown that they have been prevented from "meaningful" participation in the reconsideration request process.

3. The Board Considered Ms. Ohlmer's Actions When it Adopted the 2016 Resolutions.

The Requestors assert that the "Board ignored the role of [Katrin] Ohlmer" (Rebuttal, at Pg. 3) in the Portal Configuration issue. The Requestors claim that Ms. Ohlmer was CEO of HTLD when she accessed the confidential information of other applicants, and that she had been CEO from the time HTLD submitted HTLD's Application until 23 March 2016. (Request 16-11, § 8, at Pg. 19; see also Rebuttal, at Pg. 3.) The Requestors claim that, because of her role at HTLD, information Ms. Ohlmer

accessed "was automatically provided to HTLD." (Rebuttal, at Pg. 4.) The Requestors also assert that "HTLD acknowledged that [Ms. Ohlmer] was (i) principally responsible for representing HTLD, (ii) highly involved in the process of organizing and garnering support for [HTLD's Application], and (iii) responsible for the day-to-day business operations of HTLD."³¹

The Board finds that this argument does not support reconsideration as the Board did consider Ms. Ohlmer's affiliation with HTLD when it adopted the 2016 Resolutions. Indeed, the Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 notes that: (1) Ms. Ohlmer was an associate of Mr. Krischenowski; (2) Ms. Ohlmer's wholly-owned company acquired the shares that Mr. Krischenowski's wholly-owned company had held in GmbH Berlin (itself a 48.8% minority shareholder of HTLD); and (3) Ms. Ohlmer (like Mr. Krischenowski) "certified to ICANN (Internet Corporation for Assigned Names and Numbers) [org] that [she] would delete or destroy all information obtained, and affirmed that [she] had not used and would not use the information obtained, or convey it to any third party."³² As the BAMC noted in its Recommendation, Mr. Grabensee affirmed that GmbH Berlin would transfer its ownership interest in HTLD to another company, Afiliac plc. Once this transfer occurred, Ms. Ohlmer's company would not have held an ownership interest in HTLD.³³

4. The Requestors' Arguments Concerning HTLD's and Mr. Krischenowski's Assurances and HTLD's Relationship with Mr. Krischenowski Do Not Support Reconsideration.

The Board finds that the Requestors' arguments that the Board should not have accepted the statements from Messrs. Grabensee or Krischenowski that HTLD did not receive the confidential information from the Portal Configuration does not warrant reconsideration because the Requestors have not provided any arguments or facts that have not already been addressed by the BAMC in its Recommendation.

Similarly, the Board concludes that the Requestors' arguments that the Board failed to consider timing of HTLD's separation from Mr. Krischenowski in adopting the 2016 Resolutions does not warrant reconsideration. Contrary to the Requestors' argument, it is clear that the Board considered the timing of HTLD's separation from Mr. Krischenowski when it adopted the Resolutions. In the Rationale for the 2016 Resolutions, the Board referenced the same timing in the Rationale for the Resolutions, noting that "the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015" and "Mr. Krischenowski stepped down as a managing director of GmbH Berlin effective 18 March 2016."³⁴ The Requestors disagree with the Board's conclusion that the

timing did not support cancelling HTLD's Application, but this disagreement, without more, is not grounds for reconsideration.

5. The Requestors Do Not Challenge the Application of Specific CPE Criteria to HTLD's Application

The Requestors claim that the BAMC incorrectly concluded that the Requestors "do not challenge the application of the CPE criteria to HTLD's application or a particular finding by the CPE Provider on any of the CPE criteria." (Rebuttal, at Pg. 9, citing Recommendation, at Pg. 1). However, neither Request 16-11 nor the Rebuttal identifies any of the CPE criteria nor discusses the application of specific CPE criteria to HTLD's Application. (See Request 16-11; Rebuttal.) The Requestors simply reiterate their arguments that the CPE Provider applied (unspecified) CPE criteria "inconsistent[ly] and erroneous[ly]," and that the BAMC should not have considered the CPE Process Review Reports when it made its Recommendation. (Rebuttal, at Pgs. 9-10.) The BAMC addressed these arguments in its Recommendation, and the Board adopts the BAMC's reasoning as if fully set forth herein.

For these reasons, the Board concludes that reconsideration is not warranted.

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

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

g. Consideration of Reconsideration Request 18-9: DotKids Foundation (.KIDS)

Whereas, in Resolution 2010.03.12.47 (/resources/board-material/resolutions-2010-03-12-en#20), as part of the New gTLD (generic Top Level Domain) Program, the ICANN (Internet Corporation for Assigned Names and Numbers) Board "request[ed] stakeholders to work through their [Supporting Organizations (Supporting Organizations)] SOs and [Advisory Committees (Advisory Committees)] ACs, and

form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs."

Whereas, in response to [Resolution 2010.03.12.47 \(/resources/board-material/resolutions-2010-03-12-en#20\)](#), the Joint SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) New gTLD (generic Top Level Domain) Applicant Support Working Group (JAS WG (Working Group)) was formed.

Whereas, on 13 September 2011, the JAS WG (Working Group) issued its Final Report, setting forth various recommendations regarding financial and non-financial support to be offered to "Support-Approved Candidates" in conjunction with the New gTLD (generic Top Level Domain) Program.

Whereas, in [Resolution 2011.10.28.21 \(/resources/board-material/resolutions-2011-10-28-en#2\)](#), the Board committed to taking the JAS Final Report seriously, and convened a working group of Board members "to oversee the scoping and implementation of recommendations out of [the JAS Final] Report, as feasible."

Whereas, in [Resolutions 2011.12.08.01 – 2011.12.08.03 \(/resources/board-material/resolutions-2011-12-08-en#1.1\)](#), the Board approved the implementation plan of the JAS Final Report developed by the Board working group, directed ICANN (Internet Corporation for Assigned Names and Numbers) organization to finalize the implementation plan in accordance with the proposed criteria and process for the launch of the Applicant Support Program (ASP) in January 2012, and approved a fee reduction to US\$47,000 Applicant Support candidates that qualify for the established criteria.

Whereas, the Requestor DotKids Foundation submitted a community-based application for .KIDS, which was placed in a contention set with one other .KIDS application and an application for .KID.

Whereas, the Requestor applied for, and was awarded, financial assistance in the form of a reduced application fee pursuant to the ASP.

Whereas, the Requestor participated in Community Priority Evaluation and did not prevail, and an ICANN (Internet Corporation for Assigned Names and Numbers) Auction was scheduled for 10 October 2018.

Whereas, in August 2018, the Requestor contacted ICANN (Internet Corporation for Assigned Names and Numbers) org to request financial support for engaging in the string contention resolution process, which ICANN (Internet Corporation for Assigned Names and Numbers) org denied as being out of scope for the ASP.

Whereas, on 21 September 2018, the Requestor submitted Reconsideration Request 18-9, seeking reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) org's response to its request for financial assistance to participate in the string contention resolution process.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 18-9 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j)

and (k) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(I)(iii) of the Bylaws.

Whereas, the BAMC has carefully considered the merits of Request 18-9 and all relevant materials and has recommended that Request 18-9 be denied because ICANN (Internet Corporation for Assigned Names and Numbers) org adhered to established policies and procedures in responding to the Requestor's request for financial assistance for engaging in the string contention resolution process; and ICANN (Internet Corporation for Assigned Names and Numbers) org did not violate its core values established in the Bylaws concerning the global public interest.

Whereas, on 3 December 2018, the Requestor submitted a rebuttal (/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf) to the BAMC Recommendation on Request 18-9 (/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf).

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-9 (/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf) and all relevant materials related to Request 18-9, including the Requestors' rebuttal (/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf), and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2019.01.27.24), the Board adopts the BAMC Recommendation on Request 18-9 (/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf).

Rationale for Resolution 2019.01.27.24

1. Brief Summary and Recommendation

The full factual background is set forth in the BAMC Recommendation on Request 18-9 (/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated by reference here.

On 16 November 2018, the BAMC evaluated Request 18-9 and all relevant materials and recommended that the Board deny Request 18-9 because ICANN (Internet Corporation for Assigned Names and Numbers) org adhered to established policies and procedures in responding to the Requestor's request for financial assistance for engaging in the string contention resolution process; and ICANN (Internet Corporation for Assigned Names and Numbers) org did not violate its core values established in the Bylaws concerning the global public interest.

On 3 December 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal). The Board notes that the Rebuttal was submitted after the time period allotted under [Article 4, Section 4.2\(g\) of the ICANN \(Internet Corporation for Assigned Names and Numbers\) Bylaws \(/resources/pages/governance/bylaws-en/#article4\)](#). Nonetheless, the Board has considered the arguments in the Requestor's rebuttal and finds that they do not support reconsideration for the reasons set forth below.

2. Issue

The issues are as follows:

- Whether [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) complied with established policies when responding to the Requestor's request for financial support for engaging in the string contention resolution process for the .KID/.KIDS contention set under the ASP; and
- Whether [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) complied with its Core Values established in the Bylaws concerning [ICANN \(Internet Corporation for Assigned Names and Numbers\) org's](#) commitment concerning the global public interest.³⁵

These issues are considered under the relevant standards for reconsideration requests, which are set forth in the [BAMC Recommendation \(/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf\)](#).

3. Analysis and Rationale

A. **[ICANN \(Internet Corporation for Assigned Names and Numbers\) Org Adhered to Established Policies and Procedures in Responding to the Requestor's Request for Financial Assistance.](#)**

The Requestors suggest that reconsideration is warranted because [ICANN \(Internet Corporation for Assigned Names and Numbers\) org's](#) denial of its request for financial assistance to participate in contention resolution contradicts the JAS Final Report. Specifically, the Requestor claims that [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) was under "time pressure" when it considered the JAS Final Report, which caused the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) to only approve the JAS WG (Working Group)'s recommendation for a reduction in the application fee for qualified applicants and, correspondingly, the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) did "not consider[]" other parts of the recommendations at that time.³⁶ The BAMC determined, and the Board agrees, that the Requestor has not provided any evidence to support its claim that the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) did not consider the entire JAS Final Report in 2011. As discussed in detail in BAMC Recommendation and incorporated herein by reference, the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) *did*

thoughtfully and fully consider all of the recommendations set forth in the JAS Final Report. On 28 October 2011, the ICANN (Internet Corporation for Assigned Names and Numbers) Board resolved to "seriously" consider the Final Report and convened a working group of Board members "to oversee the scoping and implementation of the recommendations arising out of [the JAS Final Report], as feasible."³⁷ The Board working group thereafter worked with a subgroup of community members appointed by the JAS WG (Working Group) to develop the *Process* and *Criteria* documents that set forth the scope and requirements of the ASP, which the Board then approved in December 2011.³⁸

The fact that the ICANN (Internet Corporation for Assigned Names and Numbers) Board did not adopt all of the JAS Final Report's recommendations when it approved the implementation plan in accordance with the *Process* and *Criteria* documents does not support the Requestor's view that ICANN (Internet Corporation for Assigned Names and Numbers) org did not consider (and reject) the recommendations which were not implemented. As an initial matter, no policy or procedure required ICANN (Internet Corporation for Assigned Names and Numbers) to adopt the recommendations set forth in the JAS Final Report in full. To the contrary, as noted in the JAS Final Report, the recommendations were only "submitted *for consideration* to the GNSO (Generic Names Supporting Organization), ALAC (At-Large Advisory Committee), ICANN (Internet Corporation for Assigned Names and Numbers) Board and ICANN (Internet Corporation for Assigned Names and Numbers) community."³⁹ It remained within the ICANN (Internet Corporation for Assigned Names and Numbers) Board's discretion to determine which recommendations to implement, if any, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board resolved to do so only "as feasible."⁴⁰

The Requestor's position also is contradicted by the plain language of the Rationale for Resolutions 2011.12.08.01 – 2011.12.08.03 (/resources/board-material/resolutions-2011-12-08-en#1.1), which specified that that Board had considered and determined *not* to adopt all of the recommendations set forth in the JAS Final Report: "Note: This process does not follow all JAS recommendations."⁴¹ Instead, the Board, in its discretion, found it feasible and resolved to approve financial assistance in the form of a "fee reduction to \$47,000" for qualifying Applicant Support candidates.⁴²

As the BAMC noted, the only JAS recommendations approved by the Board are those set forth in the *Process* and *Criteria* documents, which in turn defined the scope and requirements of the ASP. All other JAS WG (Working Group) recommendations were considered and not adopted. Because the ASP, as implemented, does not provide for financial assistance for the contention resolution process, the Board agrees with the BAMC's conclusion that ICANN (Internet Corporation for Assigned Names and Numbers) org did not contravene any

established policy or procedure when it denied the Requestor's request for such support.

Nor does the Requestor identify any policy or procedure (because there is none) obligating ICANN (Internet Corporation for Assigned Names and Numbers) to go back and reconsider, as part of the current New gTLD (generic Top Level Domain) Program round, the JAS WG (Working Group)'s recommendations that were previously not adopted. To the contrary, the requirements of the ASP as set forth in the *Process* and *Criteria* documents were intended to be "very clear requirements that are the *final requirements* of the program for applicant support."⁴³

The Board further agrees with the BAMC's conclusion that even if the Board were to "address the remainder of the JAS Final Report," as the Requestor asks,⁴⁴ reconsideration still would be not warranted. The BAMC has reviewed the JAS Final Report and associated relevant materials, including comments made in response to the Request for Public Comment, and has confirmed that financial assistance in the form requested by the Requestor was never recommended by the JAS WG (Working Group) or otherwise. Thus, even if ICANN (Internet Corporation for Assigned Names and Numbers) org were to "address the remainder of the JAS Final Report," as the Requestor asks,⁴⁵ ICANN (Internet Corporation for Assigned Names and Numbers) org would not find any recommendation in the JAS Final Report that financial support be made available for engaging in the contention resolution process.

B. ICANN (Internet Corporation for Assigned Names and Numbers) Org Adhered to Its Core Values in Responding to the Requestor's Request for Financial Assistance.

The Board agrees with the BAMC's finding that ICANN (Internet Corporation for Assigned Names and Numbers) org has not violated its core value to act in the global public interest by denying the Requestor's financial assistance request. The Core Value cited by the Requestor provides:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.⁴⁶

ICANN (Internet Corporation for Assigned Names and Numbers) org's implementation of the ASP is the embodiment of this Core Value, not, as the Requestor claims, a contravention of it. The Core Value to "seek[] and support broad, informed participation" via the multistakeholder model is illustrated in the ICANN (Internet Corporation for Assigned Names and Numbers) Board's request, in March 2010, that stakeholders "work through their [Supporting Organizations (Supporting

Organizations]] SOs and [Advisory Committees (Advisory Committees)] ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs."⁴⁷ The JAS Final Report, which the ICANN (Internet Corporation for Assigned Names and Numbers) Board fully considered, was developed in response to ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to the multistakeholder model, and exemplifies ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to "ascertain the global public interest" as it concerns the New gTLD (generic Top Level Domain) Program. In resolving to consider the JAS Final Report, the Board noted that it "takes seriously the assertions of the ICANN (Internet Corporation for Assigned Names and Numbers) community that applicant support will encourage diverse participation in the New gTLD (generic Top Level Domain) Program and promote ICANN (Internet Corporation for Assigned Names and Numbers)'s goal of broadening the scope of the multi-stakeholder model."⁴⁸

The BAMC determined, and the Board agrees, that the Requestor appears to urge ICANN (Internet Corporation for Assigned Names and Numbers) org to circumvent the established policy set forth in the requirements governing the ASP in a manner favorable to the Requestor, which undermines, rather than bolsters, the global public interest. ICANN (Internet Corporation for Assigned Names and Numbers) org is committed to diversity, operational stability, and non-discrimination, but it is not responsible for guaranteeing a gTLD (generic Top Level Domain) for any specific applicant. The Requestor has failed to demonstrate any violation of ICANN (Internet Corporation for Assigned Names and Numbers)'s core values.

C. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.

As an initial matter, the Board notes that the Rebuttal is untimely. The Requestor received the Recommendation on 17 November 2018.⁴⁹ The Rebuttal was due 15 days later, on 2 December 2018.⁵⁰ The Requestor submitted the Rebuttal on 3 December 2018, one day after the deadline.⁵¹ Nonetheless, the Board has considered the arguments in the Requestor's rebuttal and finds that they do not support reconsideration for the following reasons.

1. Request 18-9 Seeks Reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) Org's Denial of the Requestor's Request for Financial Support.

The Requestor argues in the Rebuttal that is not "directly" seeking "funding support." (Rebuttal at Pg. 1. *See also id.* at Pg. 3 (Request 18-9 "did not request any particular form of financial assistance.")) However, as the BAMC noted in the Recommendation, on 27 August 2018, the Requestor sent an email to ICANN (Internet Corporation for Assigned Names and Numbers) org stating that it was "looking to request financial

support for engaging in the string contention resolution process." ([BAMC Recommendation \(/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf\)](/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf)) at Pg. 9, citing Exhibit A to Recommendation.) The Requestor identified ICANN (Internet Corporation for Assigned Names and Numbers) org's response to this email "reject[ing] the request" as the action it seeks to have reconsidered.⁵² Accordingly, the BAMC reasonably understood Request 18-9 to seek reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) org's denial of the Requestor's request for financial support.

The Requestor now asserts that Request 18-9 "simply" asks "the ICANN (Internet Corporation for Assigned Names and Numbers) Board to initiate the process to consider the remaining parts of the JAS Final Report." ([Rebuttal \(/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf\)](/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf)) at Pg. 1.) However, the BAMC already considered this claim. The BAMC concluded that "ICANN (Internet Corporation for Assigned Names and Numbers) org *did* thoughtfully and fully consider all of the recommendations set forth in the JAS Final Report." ([BAMC Recommendation \(/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf\)](/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf)), at Pg. 13.) The Board agrees, and adopts the reasoning set forth in the BAMC Recommendation.

The Board finds that the Requestor's Rebuttal has not provided any new arguments, or identified any policy or procedure (because there is none) obligating ICANN (Internet Corporation for Assigned Names and Numbers) to reconsider the JAS WG (Working Group)'s recommendations that it previously did not adopt.

The Board notes that the Rebuttal expresses disagreement with the BAMC's conclusion that the Board made it clear that it had determined not to adopt all of the recommendations set forth in the JAS Final Report. The Requestor claims that this "at best leaves the question open" as to whether the Board would give further consideration to the recommendations that it did not follow. ([Rebuttal \(/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf\)](/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf)), at Pg. 2) However, nothing in the materials cited the Requestor supports the Requestor's assertion that the Board intended to "leave[] . . . open" the possibility of further consideration of the JAS recommendations that it did not adopt in 2011. ([Rebuttal \(/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf\)](/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf)), at Pg. 2.) As the BAMC explained, [Resolutions 2011.12.08.01 – 2011.12.08.03 \(/resources/board-material/resolutions-2011-12-08-en#1.1\)](/resources/board-material/resolutions-2011-12-08-en#1.1) and supporting

materials make clear that the Board considered and decided not to adopt any JAS WG (Working Group) recommendations except those set forth in the *Process* and *Criteria* documents. Specifically, [Resolution 2011.12.08.01 \(/resources/board-material/resolutions-2011-12-08-en#1.1\)](#) directed ICANN (Internet Corporation for Assigned Names and Numbers) org to "finalize the implementation plan *in accordance with the proposed criteria and process* for the launch of the Applicant Support Program."⁵³ The *Process* and *Criteria* documents neither provide for the additional funding the Requestor seeks nor provide for potential reevaluation of the JAS recommendations that the Board did not adopt in 2011.⁵⁴ The Board is not persuaded by the Requestor's arguments to the contrary, which are based on opinion. The Requestor has not provided any new facts or evidence to demonstrate that reconsideration is warranted.

2. The JAS WG (Working Group) Never Recommended Financial Support in the Form Sought by the Requestor.

For the first time in the Rebuttal, the Requestor argues that, without "some further support (e.g., in terms of fee reduction, adjustment, staggering or otherwise), the Applicant Support program simply does not make sense." ([Rebuttal \(/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf\)](#), at Pg. 1.) As a preliminary matter, the Bylaws state that Rebuttals "shall . . . be limited to rebutting or contradicting the issues raised in the" Recommendation, and shall "not offer new evidence" if the Requestor "could have provided" that evidence when it originally submitted the Request.⁵⁵ As such, this argument does not rebut a specific issue raised in the Recommendation; it should have been raised in the Request, and is therefore not properly raised in the Rebuttal. Moreover, any challenge to the Board [Resolutions 2011.12.08.01 – 2011.12.08.03](#) or the ASP is long since time barred ([/resources/board-material/resolutions-2011-12-08-en#1.1](#)). Nevertheless, the Board has considered the argument and concludes that it does not support reconsideration for the following reasons.

The Requestor argues that the BAMC incorrectly concluded that none of the JAS WG (Working Group)'s recommendations that the Requestor relied on in Request 18-9 "suggest a specific intent to make financial support available to assist in the contention resolution process." ([Rebuttal \(/en/system/files/files/reconsideration-18-9-dotkids-requestor-rebuttal-bamc-recommendation-03dec18-en.pdf\)](#), at Pg. 3.) The Requestor asserts that "[e]ven if direct support for the contention resolution process is not available, the adjustment of other fees could have significant impact on" Support-Approved Candidates, and that the BAMC should not have concluded that "just

because direct contribution might not be included[,] . . . other fee adjustments" might have been contemplated. (*Id.*) The BAMC's conclusion was not as limited as the Requestor suggests; the BAMC concluded that the JAS Final Report did not support financial support of any type for any portion of the contention resolution process. ([BAMC Recommendation \(/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf\)](#), at Pgs. 15-16.) Additionally, as the BAMC noted, the JAS Final Report specifically stated that, in the case of string contention, the Applicant would have to "fund[] this additional step" of the process. ([BAMC Recommendation \(/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf\)](#), at Pg. 16, quoting JAS Final Report at 28.) The Requestor does not identify any policy or procedure (nor is there one) requiring [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) to modify or add on to the [JAS WG \(Working Group\)](#)'s recommendations to provide additional support to the Requestor or similarly situated applicants when the Board has not made such provisions and the report to the Board did not even recommend such support.

The Board also finds that the Requestor's assertion that the BAMC concluded that "any other further financial support will not help" is inaccurate. (Rebuttal, at Pg. 3.) The BAMC concluded that [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](#) adhered to established policies and procedures when it concluded that additional financial assistance for the Requestor was not available under the ASP. ([BAMC Recommendation \(/en/system/files/files/reconsideration-18-9-dotkids-bamc-recommendation-request-16nov18-en.pdf\)](#), at Pgs. 12-16.)

For the above reasons, none of the Requestor's Rebuttal arguments support reconsideration.

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

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

h. Consideration of Reconsideration Request 16-12: Merck KGaA (.MERCK)

Whereas, Merck KGaA (Requestor) submitted a community-based application for .MERCK (the Application), which was placed in a contention set with other .MERCK applications.

Whereas, the Requestor participated in Community Priority Evaluation (CPE) and but did not prevail.

Whereas, the Requestor submitted Reconsideration Request 16-12, seeking reconsideration of the CPE report of its Application, and ICANN (Internet Corporation for Assigned Names and Numbers) organization's acceptance of that CPE report.

Whereas, while Request 16-12 was pending, the Board directed ICANN (Internet Corporation for Assigned Names and Numbers) organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-12, would be placed on hold until the CPE Process Review was completed.⁵⁶

Whereas, on 13 December 2017, ICANN (Internet Corporation for Assigned Names and Numbers) org published three reports on the CPE Process Review (CPE Process Review Reports).

Whereas, on 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11 (/resources/board-material/resolutions-2018-03-15-en#2.a), which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD (generic Top Level Domain) Program, and directed the Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, in accordance with Resolutions 2018.03.15.08 through 2018.03.15.11 (/resources/board-material/resolutions-2018-03-15-en#2.a), the BAMC invited the Requestor to submit additional materials and to make a presentation to the BAMC in support of Request 16-12.

Whereas, the Requestor submitted additional materials in support and made a telephonic presentation to the BAMC in support of Request 16-12; the Requestor also submitted a written summary of its telephonic presentation to the BAMC.

Whereas, the BAMC has carefully considered the merits of Request 16-12 and all relevant materials and has recommended that Request 16-12 be denied because the CPE Provider did not violate any established policies or procedure in its evaluation of

Criterion 2 and ICANN (Internet Corporation for Assigned Names and Numbers) org's acceptance of the CPE Provider's Report complied with established policies.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 16-12 and all relevant materials related to Request 16-12 and the Board agrees with the BAMC's Recommendation.

Resolved (2019.01.27.25), the Board adopts the BAMC Recommendation on Request 16-12 (/en/system/files/files/reconsideration-16-12-merck-kгаа-bamc-recommendation-14dec18-en.pdf).

Rationale for Resolution 2019.01.27.25

1. Brief Summary and Recommendation

The full factual background is set forth in the BAMC Recommendation on Request 16-12 (/en/system/files/files/reconsideration-16-12-merck-kгаа-bamc-recommendation-14dec18-en.pdf) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 14 December 2018, the BAMC evaluated Request 16-12 and all relevant materials and recommended that the Board deny Request 16-12 because the CPE Provider did not violate any established policies or procedure in its evaluation of Criterion 2 and that ICANN (Internet Corporation for Assigned Names and Numbers) organization's acceptance of the CPE Provider's Report complied with established policies.

The Board has carefully considered the BAMC's Recommendation (/en/system/files/files/reconsideration-16-12-merck-kгаа-bamc-recommendation-14dec18-en.pdf) and all relevant materials related to Request 16-12, and the Board agrees with the BAMC's Recommendation (/en/system/files/files/reconsideration-16-12-merck-kгаа-bamc-recommendation-14dec18-en.pdf).

2. Issue

The issues are as follows:

- Whether the CPE Provider adhered to the Guidebook in its application of Criterion 2, Nexus between Proposed String and Community, in the CPE Report;
- Whether ICANN (Internet Corporation for Assigned Names and Numbers) org complied with applicable policies and procedures when it accepted the CPE Report;
- Whether ICANN (Internet Corporation for Assigned Names and Numbers) org must disclose documentary information and communications between ICANN (Internet Corporation for Assigned Names and Numbers) org and the CPE Provider relating to the Application; and

- Whether the Board complied with applicable Commitments, Core Values, and policies when it acknowledged and accepted the findings set forth in the CPE Process Review Reports.

These issues are considered under the relevant standards for reconsideration requests in effect at the time that Request 16-12 was submitted. These standards are discussed in detail in the [BAMC Recommendation \(/en/system/files/files/reconsideration-16-12-merck-kгаа-bamc-recommendation-14dec18-en.pdf\)](/en/system/files/files/reconsideration-16-12-merck-kгаа-bamc-recommendation-14dec18-en.pdf).

3. Analysis and Rationale

A. The CPE Criteria and Procedures

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.⁵⁷ The CPE standards and CPE process are defined in Module 4, Section 4.2 of the Applicant Guidebook (Guidebook). Community-based applications that undergo CPE are evaluated by the following criteria: Criterion 1: Community Establishment; Criterion 2: Nexus Between the Proposed String and Community; Criterion 3: Registration Policies; and Criterion 3: Community Endorsement.⁵⁸ Pursuant to the Guidebook, the sequence of the criteria reflects the order in which those criteria will be assessed by the CPE Provider. To prevail in CPE, an application must receive at least 14 out of 16 points on the scoring of the four criteria, each of which is worth a maximum of four points. An application that prevails in CPE "eliminates all directly contending standard applications, regardless of how well qualified the latter may be."⁵⁹ CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.⁶⁰ A CPE Provider's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4.2.3 of the Guidebook.⁶¹

B. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Criterion 2.

The Requestor claims that the CPE Provider erred in awarding the Requestor's Application zero out of four points for Criterion 2. Criterion 2 evaluates "the relevance of the string to the specific community that it claims to represent."⁶² It is measured by two sub-criterion: sub-criterion 2-A-Nexus (worth a maximum of three points); and sub-criterion 2-B-Uniqueness (worth a maximum of one point).⁶³

1. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-A-Nexus.

The Requestor's Application received zero points for sub-criterion 2-A. To obtain three points for sub-criterion 2-A, the applied-for string must "match the name of the community or be a well-known short-form or abbreviation of the community."⁶⁴ The CPE Provider determined that the Requestor's Application did not satisfy the three point test because the applied-for string

does not "match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community."⁶⁵

For a score of two, the applied-for string should "closely describe the community or the community members, without over-reaching substantially beyond the community."⁶⁶ It is not possible to obtain a score of one for this sub-criterion. The CPE Provider also found that the Requestor's Application did not satisfy the two-point test because the applied-for string does not "identify...the community as defined in the application."⁶⁷

The CPE Provider found that

although the string "Merck" matches the name of the community defined in the Application, it also matches the name of another corporate entity known as "Merck" within the US and Canada. This US-based company, Merck & Co., Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US\$39.5 billion in 2015. It is therefore a substantial entity also known by the name "Merck".⁶⁸

The CPE Provider therefore determined that the string is "'over-reaching substantially beyond the community'...it defines because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant."⁶⁹

The BAMC found that, although the Requestor disagrees with the CPE Provider's conclusion, the Requestor has not identified any policy or procedure that the CPE Provider violated in its determination.⁷⁰ Nor has the Requestor provided any evidence that the CPE Provider violated any established policy or procedure. The BAMC noted that the Requestor does not deny that the U.S.-based entity is connected to the Requestor's community as defined in the Application; to the contrary, the majority of Request 16-12 is devoted to summarizing the decades-old, contentious legal dispute between the Requestor and the U.S.-based Merck & Co., Inc. (a former subsidiary of the Requestor) over which company may use the name "MERCK" outside the United States.⁷¹ As such, the BAMC concluded, and the Board agrees, that the Requestor's substantive disagreement with the CPE Provider's conclusion is not grounds for reconsideration.

Additionally, as reported in the CPE Process Review Scope 2 Report, the CPE Provider acted consistent with the Guidebook in its analysis under sub-criterion 2-A for all the CPEs that were conducted.⁷²

Consideration of the CPE Provider's treatment of the Merck & Co. Application confirms the consistency of the CPE Provider's analysis of sub-criteria 2-A across the board for all CPEs. In the CPE Report on the community-based application filed by Merck & Co., Inc. for the .MERCK gTLD (generic Top Level Domain) (Merck & Co. CPE Report), the CPE Provider applied the same reasoning to the Merck & Co. Application as the reasoning included in the Requestor's CPE Report: it found that the Merck & Co., Inc.'s applied-for string (.MERCK) substantially over-reaches beyond the community because the Requestor here is "a substantial entity also known by the name 'Merck'" and is not included in the Merck & Co. Application's community definition in its application for .MERCK.⁷³ There, the CPE Provider considered whether the existence of the Requestor should prevent the Merck & Co. Application from receiving any points on the nexus element.⁷⁴ For that reason, the CPE Provider awarded the Merck & Co. Application zero points on sub-criterion 2-A, just as the CPE Provider did with respect to the Requestor's Application.⁷⁵

With respect to the Requestor's claim that the size of its community is larger than the community associated with Merck & Co., Inc. and therefore "the string clearly identifies the Requestor"⁷⁶, the BAMC concluded, and the Board agrees, that this assertion does not show that the CPE Provider failed to adhere to any established policy or procedure in concluding that the string .MERCK over-reaches substantially beyond the community definition in the Requestor's Application. Nor has the Requestor shown that the CPE Provider failed to adhere to any policy or procedure in awarding zero points on the nexus element. Rather, as the BAMC noted, the Guidebook specifically instructs that zero points must be awarded if the string substantially over-reaches beyond the community in the application.

The BAMC determined, and the Board agrees, that the Requestor's suggestion that it should have been awarded more points for sub-criterion 2-A because it "will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights" does not warrant reconsideration because the Requestor does not point to any policy or procedure indicating that the CPE Provider must (or even should) take geo-targeting considerations into consideration when scoring sub-criterion 2-A. The BAMC notes that no such policy exists under the Guidebook.

With respect to the Requestor's suggestion that the CPE Provider failed to consider evidence of "unlawful intrusion" into its territories and its "illegal use" of the word Merck by Merck & Co., Inc.,⁷⁷ the BAMC concluded, and the Board agrees, that the CPE Provider was not required to evaluate the decades-long

trademark dispute between the Requestor and Merck & Co., Inc.^{78,79} Accordingly, the CPE Provider did not violate any established policy or procedure in not taking the ongoing legal disputes into consideration, and this argument does not warrant reconsideration. For the same reason, the Board also agrees with the BAMC's conclusion that ICANN (Internet Corporation for Assigned Names and Numbers) org was not required to provide the CPE Provider with information relating to the legal disputes between the Requestor and Merck & Co., Inc. The Requestor does not and cannot identify any policy or procedure obligating ICANN (Internet Corporation for Assigned Names and Numbers) to provide such information to the CPE Provider.

2. The Application of Sub-Criterion 2-A is Consistent with Other CPE Reports.

The Requestor asserts that the CPE Provider's analysis of sub-criterion 2-A in the CPE Report is inconsistent with its analysis of the same sub-criterion for the applications for .ECO, .RADIO, .SPA, and .ART, claiming that in each of those cases, the "applicant was awarded three points under the nexus requirement although there were other entities using the same name."⁸⁰ The BAMC concluded, and the Board agrees, that the Requestor provides no support or additional argument concerning this assertion, and further, the argument is misplaced. As discussed in detail in the BAMC Recommendation and incorporated herein by reference, in each of these cases, the CPE Provider determined that the applied-for string did *not* match the name of the community, but it identified the community without over-reaching substantially beyond the community.⁸¹ By contrast, the CPE Provider concluded that .MERCK *did* match the name of the community, but it *also* matched the name of another community, that of US-based Merck & Co., Inc.⁸² Accordingly, the Board agrees with the BAMC's conclusion that reconsideration is not warranted on this basis because the Requestor has not provided any evidence that the CPE Provider contradicted any established policy or procedure.

3. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-B-Uniqueness.

The BAMC determined, and the Board agrees, that the Requestor has not demonstrated that the CPE Provider violated any policy or procedure in awarding the Requestor's Application zero points for sub-criterion 2-B-Uniqueness. To obtain one point for sub-criterion 2-B, the applied-for string must have no other significant meaning beyond identifying the community described in the application.⁸³ An application that does not qualify for two or three points for sub-criterion 2-A will not qualify for a score of one for sub-criterion 2-B.⁸⁴ Here, the CPE Provider awarded

zero points under sub-criterion 2-B because the applied-for string did not receive a score of two or three on sub-criterion 2-A for the reasons discussed above.⁸⁵

The Requestor suggests that the CPE Provider should have awarded the Application one point on the uniqueness element because of the Requestor's longstanding and sole use of its community name MERCK.⁸⁶ Similar to its arguments in sub-criterion 2-A, the Board agrees with BAMC that Requestor's challenge of the CPE Provider's scoring on sub-criterion is based solely on a substantive disagreement with the CPE Provider's conclusions, which is not grounds for reconsideration. The Requestor has failed to show any policy or procedure violation in connection with the CPE Provider's finding that the Application should receive a score of zero points for sub-criterion 2-B.

C. The CPE Report did not Implicate Due Process Rights.

The Requestor argues that the CPE Provider "failed to take reasonable care" in drafting the CPE Report, "and misapplied standards and policies developed by ICANN (Internet Corporation for Assigned Names and Numbers) in the [Guidebook], resulting in a denial of due process to the Request[or]."⁸⁷ The Board agrees with the BAMC that this argument does not warrant reconsideration. For the reasons discussed above and in further detail in the BAMC Recommendation, the Requestor has not demonstrated any failure by the CPE Provider to follow the established policy and procedures for CPE as set forth in the Guidebook. Rather, the Requestor suggests that there should have been a formal appeal process for decisions by ICANN (Internet Corporation for Assigned Names and Numbers) org's third-party service providers, including the CPE Provider, Legal Rights Objection Panels, and String Confusion Panels. The methods for challenging determinations in the course of the gTLD (generic Top Level Domain) contention resolution process are set forth in the Guidebook, which was developed after extensive community consultation, and adopted by the Board in June 2011.⁸⁸ The time for challenging the Guidebook has long passed.⁸⁹

As the BAMC noted, the Guidebook provides a path for challenging the results of the CPE process through ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms.⁹⁰ Indeed, the Requestor has exercised this right by invoking the Reconsideration process with Request 16-12.⁹¹ Accordingly, the Board finds that because the CPE Provider's application of Criterion 2 to the Application was consistent with the Guidebook, ICANN (Internet Corporation for Assigned Names and Numbers) org's acceptance of the CPE Report was also consistent with applicable policies and procedures, and did not implicate any "due process" violation. The Board further finds that the absence of an appeal mechanism under the Guidebook for the substance of evaluation results does not constitute a due process violation.

D. The CPE Process Review Supports the Results of the Merck KGaA Application.

The CPE Process Review Scope 2 Report shows that CPE Provider applied the CPE criteria consistently across all CPEs and that there is no evidence that CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines.⁹² For this additional reason, the BAMC found, and the Board agrees, that the Requestor's argument that the CPE Provider incorrectly applied Criterion 2 does not support reconsideration.

The Requestor argues that the CPE Process Review Scope 2 and 3 Reports are excessively narrow and did not reevaluate the CPE Provider's application of the Nexus criteria or assess the propriety or reasonableness of the research undertaken by the CPE Provider.⁹³ For the reasons set forth in the BAMC Recommendation and incorporated herein by reference, the BAMC concluded, and the Board agrees, that the Requestor's claims do not support reconsideration because the Requestor did not demonstrate that any violation of process or procedure has been violated. (BAMC Recommendation, Pgs. 25-28.)

E. The Requestor's Request for the Disclosure of Documentary Information is Not Grounds for Reconsideration.

The BAMC determined, and the Board agrees, that the Requestor's request for the disclosure of documentary information between the ICANN (Internet Corporation for Assigned Names and Numbers) org and the CPE provider relating to the Application and CPE Report is not properly made in the context of a reconsideration request, as the Requestor is not asking ICANN (Internet Corporation for Assigned Names and Numbers) org to reconsider Board or staff action or inaction.⁹⁴ As such, the Board agrees with the BAMC that this is not grounds for reconsideration. To the extent the Requestor wishes to make a request under ICANN (Internet Corporation for Assigned Names and Numbers)'s Documentary Information Disclosure Policy (DIDP), the Requestor may do so separately, consistent with the DIDP.⁹⁵ However, it should be noted that the documentary information that the Requestor seeks was the subject of multiple DIDP Requests and subsequent Requests for Reconsideration, which the Requestor may consider consulting before submitting an additional substantially identical request.⁹⁶

For the foregoing reasons, the Board concludes that reconsideration is not warranted.

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

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

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

i. AOB

Published on 29 January 2019

¹ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> ([/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf](https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf)).

² See ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 11 February 2016, Art. 4, § 2 (<https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV>) ([/resources/pages/bylaws-2016-02-16-en#IV](https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV))).

³ Letter from Mr. Philipp Grabensee to ICANN (Internet Corporation for Assigned Names and Numbers) (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>) ([/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf](https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf)). The Requestors assert that Ms. Ohlmer has also been associated with HTLD. See Request 16-11 § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. See Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>) ([/resources/board-material/resolutions-2016-08-09-en#2.h](https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h)). The BAMC concluded that Ms. Ohlmer's prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 § 8, at Pg. 15) does not support reconsideration because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE. The Board agrees.

⁴ <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h> ([/resources/board-material/resolutions-2016-08-09-en#2.h](https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h)).

⁵ Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>) ([/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf](https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf))).

⁶ *Id.* at Pg. 95-96.

⁷ *Id.*, § 8, Pg. 9.

⁸ 2016 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>) ([/resources/board-material/resolutions-2016-03-10-en#2.a](https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a))).

⁹ ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 11 February 2016, Art. IV, § 2.5.

¹⁰ Request 16-11, § 8, Pg. 12.

¹¹ *Id.* (emphasis in original).

¹² Letter from Crowell and Moring to ICANN (Internet Corporation for Assigned Names and Numbers) Board, dated 28 December 2016, at Pg. 4-5 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf> ([/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf))).

¹³ *Id.*

¹⁴ Request 16-11, § 8, at Pg. 12-13.

¹⁵ 2018 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a> ([/resources/board-material/resolutions-2018-03-15-en#2.a](https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a))).

¹⁶ FTI Scope 1 Report at Pg. 3 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf> ([/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf](https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf))).

¹⁷ 1 February 2018 letter from Petillion to BAMC, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf> ([/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf))).

¹⁸ 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing FTI Scope 1 Report, at Pg. 12 (emphasis added).

¹⁹ *Id.*

²⁰ *Id.*, at Pg. 3.

²¹ Nothing in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the DIDP, or other policy or procedure requires ICANN (Internet Corporation for Assigned Names and Numbers) to voluntarily produce in the course of an IRP documents that were properly withheld in response to a DIDP request.

²² Procedural Order No. 3, *Dot Registry LLC v. ICANN (Internet Corporation for Assigned Names and Numbers)*, ICDR Case No. 01-14-0001-5004 (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en> ([/resources/pages/dot-registry-v-icann-2014-09-25-en](https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en))).

²³ The Requestors were fully aware that communications occurred between ICANN (Internet Corporation for Assigned Names and Numbers) org and the CPE panel, since such communications are expressly contemplated in the CPE Panel Process Document and ICANN (Internet Corporation for Assigned Names and Numbers) disclosed the existence of these communications in the 2014 DIDP Response. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe> (<https://newgtlds.icann.org/en/applicants/cpe>)) ("The Economist Intelligence Unit works with ICANN (Internet Corporation for Assigned Names and Numbers) when questions arise or when additional process information may be required to evaluate an application.").

²⁴ Request 16-11, § 9, Pg. 20.

²⁵ Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> (/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf)).

²⁶ BAMC Recommendation on Request 18-6 (<https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf> (/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf)).

²⁷ Resolution 2918.07.18.09 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g> (/resources/board-material/resolutions-2018-07-18-en#2.g)).

²⁸ See ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 11 February 2016, Art. 4, § 2 (<https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV> (/resources/pages/bylaws-2016-02-16-en#IV)).

²⁹ See ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 11 February 2016, Art. 4, § 2 (<https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV> (/resources/pages/bylaws-2016-02-16-en#IV)).

³⁰ See <https://www.icann.org/resources/pages/reconsideration-16-11-trs-et-al-request-2016-08-25-en> (/resources/pages/reconsideration-16-11-trs-et-al-request-2016-08-25-en) (providing links to letters).

³¹ *Id.*, citing Letter from Grabensee to ICANN (Internet Corporation for Assigned Names and Numbers) org, 18 May 2016, (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-18may16-en.pdf> (/en/system/files/correspondence/grabensee-to-willett-18may16-en.pdf)).

³² See Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h> (/resources/board-material/resolutions-2016-08-09-en#2.h).

³³ *Id.*

³⁴ Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h> (/resources/board-material/resolutions-2016-08-09-en#2.h).

³⁵ See *generally*, Reconsideration Request 18-9.

³⁶ Reconsideration Request 18-9, § 7 at Pg. 4.

³⁷ 28 October 2011 Board Resolution (<https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2> (/resources/board-material/resolutions-2011-10-28-en#2)).

³⁸ 8 December 2011 Board Resolution (<https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1> (/resources/board-material/resolutions-2011-12-08-en#1)).

³⁹ JAS Final Report at I (emphasis added) (<http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf> (<https://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>)).

- ⁴⁰ 28 October 2011 Board Resolution (<https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2> (</resources/board-material/resolutions-2011-10-28-en#2>)).
- ⁴¹ 8 December 2011 Board Resolution (<https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1> (</resources/board-material/resolutions-2011-12-08-en#1>)).
- ⁴² 8 December 2011 Board Resolution (<https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1> (</resources/board-material/resolutions-2011-12-08-en#1>)).
- ⁴³ 28 October 2011 Board Minutes (emphasis added) (<https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2> (</resources/board-material/minutes-2011-10-28-en#2>)).
- ⁴⁴ Reconsideration Request 18-9, § 7 at Pg. 4.
- ⁴⁵ Reconsideration Request 18-9, § 7 at Pg. 4.
- ⁴⁶ ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 18 June 2018, Art. 1, § 1.2(b)(ii).
- ⁴⁷ 12 March 2010 Board Resolution (<https://www.icann.org/resources/board-material/resolutions-2010-03-12-en> (</resources/board-material/resolutions-2010-03-12-en>)).
- ⁴⁸ <https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2> (</resources/board-material/minutes-2011-10-28-en#2>).
- ⁴⁹ Email from Requestor to ICANN (Internet Corporation for Assigned Names and Numbers), dated 3 December 2018, attached as Attachment ___ to the Reference Materials.
- ⁵⁰ See ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 18 June 2018, Art. 4, § 4.2(q) (setting out deadline for submitting rebuttals).
- ⁵¹ See <https://www.icann.org/resources/pages/reconsideration-18-9-dotkids-request-2018-09-21-en> (</resources/pages/reconsideration-18-9-dotkids-request-2018-09-21-en>).
- ⁵² Request 18-9, § 2, at Pg. 1.
- ⁵³ Resolution 2018.12.08.01 (<https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1> (</resources/board-material/resolutions-2011-12-08-en#1>)) (emphasis added).
- ⁵⁴ See *Process* and *Criteria* documents, included in Board Briefing Materials for 8 December 2011 Board Meeting, at pages 81 and 87 of 164 (<https://www.icann.org/en/system/files/bm/briefing-materials-3-08dec11-en.pdf> (</en/system/files/bm/briefing-materials-3-08dec11-en.pdf>)).
- ⁵⁵ ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 18 June 2018, Art. 4, § 4.2(q).
- ⁵⁶ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (</en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>).
- ⁵⁷ See Guidebook, Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf> ([<https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f>](https://newgtlds.icann.org/en/applicants/agb/string-</p></div><div data-bbox=)

[contention-procedures-04jun12-en.pdf](#)). See also <https://newgtlds.icann.org/en/applicants/cpe> (<https://newgtlds.icann.org/en/applicants/cpe>).

⁵⁸ *Id.* at Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf> (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>)).

⁵⁹ *Id.* at Module 4, § 4.2.3, Pg. 4-9.

⁶⁰ *Id.* Module 4, § 4.2.2.

⁶¹ *Id.* at Module 4, §§ 4.2.2 and 4.2.3. at Pgs. 4-8 and 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf> (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>)).

⁶² See Guidebook, Module 4, § 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf> (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>)).

⁶³ *Id.* at Pgs. 4-12-4-13.

⁶⁴ *Id.*

⁶⁵ CPE Report, at Pg. 3.

⁶⁶ *Id.* at Pg. 4-12.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ The Requestor asserts that the BAMC should re-evaluate the Application in the course of making a recommendation on Request 16-12. See Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf> ([/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf))). The applicable version of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws direct the BAMC to consider only whether the challenged action violates established ICANN (Internet Corporation for Assigned Names and Numbers) policies or procedures and do not authorize the BAMC to perform a *de novo* review of the Application. See ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

⁷¹ See Request 16-12, § 8, Pgs. 7-10.

⁷² CPE Process Review Scope 2 Report, at pgs. 36-37 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> ([/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf](https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf))).

⁷³ *Id.*

⁷⁴ Merck & Co., Inc. CPE Report, Pg. 4.

⁷⁵ *Id.*

⁷⁶ Request, § 8, Pg. 9.

⁷⁷ *Id.*

⁷⁸ See Request 16-12, § 8, at Pg. 7-10.

⁷⁹ See, Guidebook, Module 4, § 4.2.3.

⁸⁰ 2017 Presentation Summary at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-summary-bgc-presentation-31mar17-en.pdf> ([/en/system/files/files/reconsideration-16-12-merck-kгаа-summary-bgc-presentation-31mar17-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-summary-bgc-presentation-31mar17-en.pdf))).

⁸¹ .ART CPE Report at Pg. 5 (<https://newgtlds.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf> (<https://newgtlds.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>)); .SPA CPE Report at Pg. 4 (<https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf> (<https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>)); .ECO CPE Report at Pg. 5-6 (<https://newgtlds.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf> (<https://newgtlds.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>)); .RADIO CPE Report at Pg. 4-5 (<https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf> (<https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>)).

⁸² CPE Report at Pg. 3-4.

⁸³ *Id.* at Pg. 4-13.

⁸⁴ *Id.* at Pg. 4-14.

⁸⁵ CPE Report at Pg. 5; see also Guidebook, Module 4, § 4.2.3, Pg. 4-14 ("The phrasing ' . . . beyond identifying the community' in the score of 1 for 'uniqueness' implies a requirement that the string does identify the community, i.e. scores 2 or 3 for 'Nexus,' in order to be eligible for a score of 1 for 'Uniqueness.'").

⁸⁶ Request, § 8, Pg. 11.

⁸⁷ Request 16-12, § 8, Pg. 6.

⁸⁸ *Id.*

⁸⁹ See <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en#1> ([/resources/board-material/resolutions-2011-06-20-en#1](https://www.icann.org/resources/board-material/resolutions-2011-06-20-en#1)). Under the Bylaws in effect in June 2012, Reconsideration Requests were due no later than thirty days after information regarding the challenged Board action is published or within thirty days after a Requestor became aware of or should reasonably have become aware of challenged Staff action. ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, 16 March 2012, Art. IV, § 2.5 (<https://www.icann.org/resources/pages/bylaws-2012-12-21-en#IV> ([/resources/pages/bylaws-2012-12-21-en#IV](https://www.icann.org/resources/pages/bylaws-2012-12-21-en#IV))).

⁹⁰ Guidebook, Module 6, § 6, at Pg. 6-4.

⁹¹ The Requestor also exercised this right when it filed an IRP proceeding concerning objections that the Requestor and Merck & Co., Inc. filed against each other in the course of their competing applications for the .MERCCK gTLD (generic Top Level Domain). See <https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf> (</en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf>).

⁹² Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> (</en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>)). The Requestor believes that the Scope 2 Report "has no significance with respect to Merck KGaA's Request for Reconsideration." (12 April 2018 Letter from Bettinger to ICANN (Internet Corporation for Assigned Names and Numbers), at Pg. 8.) However, the Scope 2 Report's findings are directly relevant to the Requestor's claim that the CPE Provider's determination concerning sub-criterion 2-A-Nexus, was inconsistent with the CPE Provider's determinations under the same sub-criterion for .SPA, .RADIO, .ART, and .ECO.

⁹³ 12 April 2018 Letter from Bettinger to ICANN (Internet Corporation for Assigned Names and Numbers), at Pg. 6 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-supp-submission-12apr18-en.pdf> (</en/system/files/files/reconsideration-16-12-merck-kgaa-supp-submission-12apr18-en.pdf>)). See also Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 7 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf> (</en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf>)).

⁹⁴ 12 April 2018 Letter from Bettinger to ICANN (Internet Corporation for Assigned Names and Numbers), at Pg. 10.

⁹⁵ See <https://www.icann.org/resources/pages/didp-2012-02-25-en> (</resources/pages/didp-2012-02-25-en>).

⁹⁶ See, e.g., DIDP Request 20180115-1 and response thereto (<https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en> (</resources/pages/didp-20180115-1-ali-request-2018-02-15-en>)) (Request for Reconsideration Denied on 18 July 2018 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.c>) (</resources/board-material/resolutions-2018-07-18-en#2.c>)); DIDP Request 20180110-1 and response thereto (<https://www.icann.org/resources/pages/didp-20180110-1-ali-request-2018-02-12-en> (</resources/pages/didp-20180110-1-ali-request-2018-02-12-en>)) (Request for Reconsideration Denied on 18 July 2018 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.b>) (</resources/board-material/resolutions-2018-07-18-en#2.b>)).