

**ICANN BOARD PAPER NO. 2023.06.11.1a**

**TITLE:** **Approval of the Amended  
Not-for-Profit Organizations Constituency Charter**

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

**EXECUTIVE SUMMARY:**

The ICANN Bylaws (Article 11, Section 11.5.c) state that each Generic Names Supporting Organization (GNSO) Stakeholder Group and its associated Constituencies “shall maintain recognition with the ICANN Board.” The ICANN Board has interpreted this language to require approval of any charter amendments. As a best practice, each GNSO Stakeholder Group and Constituency reviews its charter on a regular basis. In September 2013, the ICANN Board approved a four-phase Process for Amending GNSO Stakeholder Group and Constituency Charters (“Process”). This is a defined Process requiring Public Comment and guides ICANN Board consideration of any charter amendments (see Appendix A).

In May 2022, the then Not-for-Profit Operational Concerns Constituency of the GNSO amended its current charter (see Appendix B) including a name change to the Not-for-Profit Organizations Constituency (NPOC) and notified the ICANN organization of its request for approval by the ICANN Board. Following review of the amended NPOC charter (see Appendix C) by the ICANN organization in mid-2022, the ICANN Board Organizational Effectiveness Committee (OEC) directed a Public Comment proceeding on the amended NPOC charter in late 2022. The ICANN organization developed a summary report of the Public Comment submissions, and the NPOC addressed this feedback in early 2023, revising its operating procedures as appropriate.

Having determined that all necessary steps of the Process to this point have been satisfied (see Appendix B), this paper reflects the recommendation of the OEC that the ICANN Board approve the proposed NPOC charter amendments.

**ORGANIZATIONAL EFFECTIVENESS COMMITTEE RECOMMENDATION (subject to review and discussion by the OEC):**

The OEC, having reviewed all relevant materials, recommends that it is appropriate to move this item for ICANN Board consideration, and that the ICANN Board should consider whether it is prepared to approve the proposed amendments to the NPOC charter in line with the Process for Amending GNSO Stakeholder Group and Constituency Charters adopted by the ICANN Board in 2013.

**BACKGROUND:**

The ICANN Bylaws (Article 11, Section 11.5.c) state that each Generic Names Supporting Organization (GNSO) Stakeholder Group and its associated Constituencies “shall maintain recognition with the ICANN Board.” The ICANN Board has interpreted this language to require approval of any charter amendments. As a best practice, each GNSO Stakeholder Group and Constituency reviews its charter on a regular basis. In September 2013, the ICANN Board approved a four-phase Process for Amending GNSO Stakeholder Group and Constituency Charters (“Process”). This is a defined Process requiring Public Comment and guides ICANN Board consideration of any charter amendments (see Appendix A).

In May 2022, the then Not-for-Profit Operational Concerns Constituency of the GNSO amended its current charter (see Appendix B) including a name change to the Not-for-Profit Organizations Constituency (NPOC) and notified the ICANN organization of its request for approval by the ICANN Board. Following review of the amended charter (see Appendix C) by the ICANN organization in mid-2022, the ICANN Board Organizational Effectiveness Committee (OEC) directed a Public Comment proceeding on the amended charter in late 2022. The ICANN organization developed a summary report of the Public Comment submissions, and the NPOC addressed this feedback in early 2023, revising its operating procedures as appropriate.

**PROPOSED RESOLUTION:**

Whereas, the ICANN Bylaws (Article 11, Section 11.5.c) state that “Each Stakeholder Group identified in Section 11.3(a) and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN Board.”

Whereas, the ICANN Board has established a Process for Amending Generic Name Supporting Organization Stakeholder Group and Constituency Charters to guide its consideration of any charter amendments.

Whereas, the Not-for-Profit Organizations Constituency amended its current charter and notified the ICANN organization of its request for approval by the ICANN Board.

Whereas, the Not-for-Profit Organizations Constituency, the ICANN organization, and the Organizational Effectiveness Committee (OEC) have completed all steps identified in the Process to date, and the OEC has recommended that the ICANN Board approve the proposed changes.

Resolved (2023.06.11.xx), the ICANN Board approves the charter amendments of the Not-for-Profit Organizations Constituency of the Generic Names Supporting Organization as documented in this paper and attachments.

## **PROPOSED RATIONALE:**

### **Why is the ICANN Board addressing the issues now?**

The ICANN Bylaws (Article 11, Section 5.c) state that each GNSO Stakeholder Group and its associated Constituencies “shall maintain recognition with the ICANN Board.” The ICANN Board has interpreted this language to require approval of any charter amendments. As a best practice, each GNSO Stakeholder Group and Constituency reviews its charter on a regular basis. In September 2013, the ICANN Board approved a four-phase Process for Amending GNSO Stakeholder Group and Constituency Charters (“Process”). This is a defined Process requiring Public Comment and guides ICANN Board consideration of any charter amendments (see Appendix C).

### **What are the proposals being considered?**

The NPOC completed Phase 1 of the Process by voting to amend its charter and informing the ICANN organization on 9 May 2022. The NPOC amended its charter to change its name, reflect its current practices, align with its operating procedures, and accommodate its evolving needs. It

also considered best practices in the GNSO Operating Procedures, Work Stream 2 Recommendation 6, and the ICANN Bylaws.

Specific amendments include:

- New organizational structure with sections on mission, governance, engagement and outreach, accountability and transparency, elections, meetings, and amendments.
- Changed its name to the “Not-for-Profit Organizations Constituency” (NPOC).
- Revised its mission statement to reflect a focus on not-for-profit operational concerns related to generic top-level domains.
- Clarified areas of governance, including a definition of membership eligibility and the requirement to join the Noncommercial Stakeholder Group prior to joining NPOC.
- Criteria for appointing organizational or alternate representatives.
- Expanded provisions regarding Executive and Policy Committee roles, responsibilities, and eligibility.
- Provisions for engagement and outreach, which acknowledge the potential for future NPOC representation to other ICANN community groups.
- New section on accountability and transparency, including communications to members.
- Revised section on elections, which outlines principles related to quorum and the removal of officers.
- Revised section on meetings, which includes principles related to notices, observers, and recordkeeping.
- Updated amendment section, accounting for best practices from the GNSO Operating Procedures and Work Stream 2 recommendations.

**Is this action within ICANN’s mission? How does it relate to the global public interest?**

This action is within ICANN’s commitments to make decisions by applying documented policies consistently, neutrally, objectively, and fairly and to remain accountable to the Internet community. These commitments ensure ICANN performs its mission to ensure the stable and secure operation of the Internet’s unique identifier systems, specifically, the coordination of the development and implementation of policies. Moreover, this action upholds ICANN’s core value of 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. This action also supports ICANN's strategic objective to improve the effectiveness of ICANN's multistakeholder model of governance and evolve it to be increasingly effective, transparent, and accountable. The amendments supplied align with ICANN's mission and meet the global public interest by way of updating the fundamental governance document for one of the ICANN Board-recognized GNSO constituencies.

**What stakeholders or others were consulted?**

As part of Phase 3 of the Process, the ICANN Board OEC oversaw a 41-day Public Comment proceeding. The Public Comment proceeding received five submissions from four ICANN community groups and one individual. The ICANN organization developed a Summary Report (see Appendix D) and categorized the submissions into three areas: transparency, membership responsibilities, and leadership responsibilities. The NPOC addressed all relevant Public Comment feedback through revisions to its operating procedures (see Appendix E), which did not require further modifications to the amended NPOC charter.

**What materials did the ICANN Board review? What factors did the ICANN Board find to be significant?**

The ICANN Board reviewed the amended NPOC charter and Summary Report of the Public Comment proceeding. The ICANN Board also reviewed the findings from Phase 2 of the Process in which the ICANN organization reviewed the amended NPOC charter, examining the language, form, and structure of the amended NPOC charter, and assessed any potential issues with the proposed changes.

**What factors did the ICANN Board find to be significant?**

The NPOC, ICANN organization, and the OEC completed all steps identified in the Process and publication of the amendments for ICANN community review and Public Comment. The OEC has recommended to the ICANN Board that the NPOC charter amendments be approved,

**Are there any positive or negative ICANN community impacts?**

No concerns were raised by ICANN community members regarding the provisions outlined in the amended NPOC charter throughout the 41-day Public Comment proceeding.

**Are there fiscal or liability concerns for ICANN (Strategic Plan, Operating Plan, Budget); the ICANN community; and/or the public?**

There are no anticipated fiscal impact/ramifications on ICANN or individual community members within the amendments supplied. The amendments supplied align with ICANN's mission and meet the public interest by way of updating the fundamental governance document for one of the ICANN Board-recognized GNSO constituencies.

**Are there any security, stability or resiliency issues relating to the DNS?**

There is no anticipated impact from this decision on the security, stability and resiliency of the domain name system as a result of this decision.

**Is this either a defined policy process within ICANN's Supporting Organizations or Advisory Committees or is it an ICANN organizational administrative function decision requiring Public Comment or not requiring Public Comment?**

The proposed NPOC charter amendments were subjected to a 41-day Public Comment period (4 October 2022 – 14 November 2022). No additional Public Comment prior to ICANN Board action is required.

Submitted by: Carlos Reyes

Position: Director, Policy and Strategy

Date: 7 June 2023

Email: carlos.reyes@icann.org

## **APPENDIX A**

Process for Amending GNSO Stakeholder Group and Constituency Charters

[https://gns0.icann.org/sites/default/files/filefield\\_41943/charter-amendment-process-28sep13-en.pdf](https://gns0.icann.org/sites/default/files/filefield_41943/charter-amendment-process-28sep13-en.pdf)

## **APPENDIX B**

NPOC Charter, 2011

<https://community.icann.org/download/attachments/244944556/NPOC%20Charter%20v2.0.pdf?version=1&modificationDate=1686409660028&api=v2>

## **APPENDIX C**

NPOC Charter, 2023

<https://community.icann.org/download/attachments/244944556/2023%20NPOC%20Charter.pdf?version=1&modificationDate=1686409711018&api=v2>

## **APPENDIX D**

NPOC Charter Public Comment Summary Report

<https://itp.cdn.icann.org/en/files/generic-names-supporting-organization-council-gnso-council/public-comment-summary-report-not-for-profit-operational-concerns-constituency-charter-amendments-19-12-2022-en.pdf>

## **APPENDIX E**

NPOC Operating Procedures

Privileged and Confidential

## ICANN BOARD PAPER NO. 2023.06.11.1b

**TITLE:** ICANN-Designated Agent for Registrar Data Escrow Services

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

### **EXECUTIVE SUMMARY:**

In 2007, ICANN launched the Registrar Data Escrow (RDE) Program. Most recently codified in data escrow provision of the 2013 Registrar Accreditation Agreement (RAA), all ICANN-accredited registrars must regularly deposit certain registration data with ICANN or its designee. As implemented through the RDE Program, ICANN-accredited registrars may elect to deposit registration data via either an ICANN-designated RDE agent (at no charge to the registrar) or an ICANN-approved RDE agent (at the registrar's expense).

Since initiation of the RDE program, over 99% of registrars have elected to use an ICANN-designated RDE agent. ICANN is currently contracted with two ICANN-designated RDE agents: (i) NCC Group (previously Iron Mountain), based in North America, selected via an RFP in 2007; and (ii) DENIC Services ("DENIC"), based in Europe, selected via an RFP in 2017. NCC Group is currently the RDE agent for a large majority of registrars but DENIC was added as an RDE agent for European registrars to conform with GDPR-related requirements.

In accordance with ICANN org's Procurement best practices, on 20 March 2023, ICANN org [published](#) an open Request for Proposal (RFP) for RDE service providers. ICANN org also [notified](#) all contracted parties of the RFP. The RFP ran for five weeks with multiple bidders submitting responses; three bidders were invited to participate in presentations. After evaluation of all proposals and completion of due diligence, ICANN org is seeking to replace NCC Group and continue on a larger scale with DENIC, which has expanded its technical operations to North America and is well positioned to scale and service ICANN's registrar base globally. A long-term contract period is



recommended to reduce impact to registrars that have to migrate among providers when providers change, as well as to improve negotiated pricing for ICANN org. Because the anticipated contract value is greater than US\$500,000, under ICANN's Contracting and Disbursement Policy, Board approval is required before entering into the contract.

ICANN org is seeking Confidential Negotiation Information with DENIC not to exceed Confidential Negotiation Information which is based on the current number of registrars. Recognizing that the number of registrars may increase over time, this requested Board authorization also includes approval for incremental additions to the registrar base, unless that additional amount over the life of the contract is greater than \$500,000 (or more) than Confidential Negotiation Information, in which case the org will seek additional Board approval at that time.

#### **ICANN ORGANIZATION AND BOARD FINANCE COMMITTEE (BFC) RECOMMENDATION:**

Both ICANN org and the BFC recommend that the Board authorize the Interim President and CEO, or her designee(s), to take all necessary actions to enter into, and make disbursement in furtherance of, a contract beginning on or about Confidential Negotiation Information with DENIC Services GmbH & Co. KG for registrar data escrow services.

#### **PROPOSED RESOLUTION:**

Whereas, ICANN has an ongoing need for an experienced and competent provider of registrar data escrow services to support ICANN's global population of accredited registrars, with a primary focus on the populations from North America and Europe.

Whereas, in accordance with ICANN's Procurement's best practices, it is a requirement to regularly revisit vendor contracts to ensure quality and value of service.

Whereas, ICANN org published a Request For Proposal to identify a qualified ICANN-designated agent for registrar data escrow services.

Whereas, ICANN org has completed the Request For Proposal and determined that DENIC Services GmbH & Co. KG, an ICANN-designated registrar data escrow agent for the last five years, is the preferred provider.

Resolved (2023.06.11.XX), the Board authorizes the Interim President and CEO, or her designee(s), to enter into, and make disbursement in furtherance of, a new DENIC Services GmbH & Co. KG contract for <sup>Confidential Negotiation Information</sup> based on the current number of registrars.

Resolved (2023.06.11.XX), as the number of registrars may increase over time, this Board authorization includes approval for additional amounts if the current number of registrars increases, unless that additional amount over the life of the contract reaches US\$500,000 (or more)<sup>Confidential Negotiation Information</sup>, in which case the org must seek additional Board approval at that time.

Resolved (2023.06.11.XX), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the Interim President and CEO determines that the confidential information may be released.

#### **PROPOSED RATIONALE:**

The Registrar Data Escrow Program is an integral component of ICANN's commitment to ensure the security and stability of the Internet and allows for an increased level of business continuity and protection of registrants.

ICANN org identified DENIC Services GmbH & Co. KG as having a clear understanding of the needs of the registrar community and the capability to perform at the appropriate service levels. Additionally, DENIC Services GmbH & Co. KG has a broad understanding of the current industry and of the ICANN multistakeholder model.

DENIC Services GmbH & Co. KG has expanded its technical operations to North America and is well positioned to scale and service ICANN's registrar base globally.

This decision is in the furtherance of ICANN's mission and the support of public interest to support the security, stability, and resiliency of the domain name system by ensuring registrars deposit their data with an ICANN-designated RDE which is able to provide appropriate service levels.

This decision will have a fiscal impact, but the impact has already been accounted for in the FY24 budget and will be for future budgets as well.

As noted above, this action is intended to have a positive impact on the security, stability and resiliency of the domain name system.

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

Submitted By: Aaron Hickmann: Sr. Director, Operations Service Delivery & Support  
and Theresa Swinehart: SVP, Global Domains and Strategy  
Date Noted: 30 May 2023  
Email: [Aaron.hickmann@icann.org](mailto:Aaron.hickmann@icann.org) and  
[Theresa.swinehart@icann.org](mailto:Theresa.swinehart@icann.org)

## ICANN BOARD PAPER NO. 2023.06.11.1c

**TITLE:** **Outsource Contract Renewal for the Information Transparency Platform**

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

### **EXECUTIVE SUMMARY:**

The Information Transparency Platform (ITP), formerly Information Transparency Initiative (ITI), is one of the largest initiatives the ICANN organization has undertaken. Although viewed as a single project, in actuality, it is both a large technological platform program and an ongoing operational activity with several large projects involving the management of online content.

ICANN has been using outsourced support services involving content management since 2017 and has a continued need for third-party development, quality assurance and content management support to augment ICANN's in-house capacity. In December 2022, as part of a benchmarking exercise to ensure competitive rates and market-based pricing, ICANN org issued a Request for Proposal (RFP) for outsourced Software Engineering Staff Augmentation.

Through the RFP process, ICANN org reviewed several competitive proposals, evaluating and comparing resource skill sets, technical capabilities, pricing, and cost of change. After considering these factors and performing extensive due diligence, ICANN org has tentatively selected the current ITP support services firm, and is conducting further negotiations, with the intent to proceed to contracting.

Based on the remaining ITP program milestones ICANN org has identified the need for a further three-year contract with the ITP support services firm. ICANN org has also considered the number of contracted personnel assigned to the ITP program and determined that the ITP support services firm's total team size can be reduced at the

onset of the new contract in order to manage costs. During the three-year contract, ICANN org plans to further reduce contracted resources, while ramping up internal staff resources, which will reduce ICANN org's reliance and expenditure on the external support services firm.

Because the contract is greater than US\$500,000, under ICANN's Contracting and Disbursement Policy the Board is required to approve entering into and making disbursements in furtherance of the contract. Accordingly, ICANN org is now asking the Board to approve a renewal of the contract with the current ITP support services firm <sup>Confidential Negotiation</sup> with a total cost not to exceed <sup>Confidential Negotiation</sup> Information

## **ICANN ORGANIZATION AND BOARD FINANCE COMMITTEE (BFC)**

### **RECOMMENDATION:**

Both ICANN org and the BFC recommend that the Board authorizes the Interim President and CEO, or her designee(s), to take all necessary actions to enter into, and make disbursement in furtherance of, a contract for the period <sup>Confidential Negotiation Information</sup> with the current third-party ITP support services firm.

### **PROPOSED RESOLUTION:**

Whereas, ICANN organization (org) has a need for continued third-party development, quality assurance and content management support to augment its capacity.

Whereas, the current firm has provided services in software engineering, quality assurance, and content management to the Information Transparency Platform (ITP) project since its inception.

Whereas, ICANN org conducted a full request for proposal (RFP) in late 2022 and 2023 for the continued third-party support services for the ITP project.

Resolved (2023.06.11.XX), the Board authorizes the Interim President and CEO, or her designee(s), to enter into, and make disbursement in furtherance of, a further renewed

contract with Confidential Negotiation Information for a term of 36 months, with a total cost not to exceed Confidential Negotiation Information

Resolved (2023.06.11.XX), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the Interim President and CEO determines that the confidential information may be released.

### **PROPOSED RATIONALE:**

The Information Transparency Platform (ITP), formerly Information Transparency Initiative (ITI), is one of the largest initiatives the ICANN organization has undertaken. Although viewed as a single project, in actuality, it is both a large technological platform program and an ongoing operational activity with several mega projects – the configuration of a Document Management System (DMS) and Content Management System (CMS), the integration of those systems, the implementation of a content delivery network (CDN) for faster content access globally, engineering a publishing pipeline to transport content from a desktop to the applicable website, authoring a multi-language translation service, and a taxonomy service to tag content for easy storage and retrieval.

On 23 September 2017, ITI was approved by the ICANN Board via [Resolution](#). It included several objectives:

- Create an integrated, ongoing, operational process to govern, preserve, organize, and secure ICANN's public content.
- Build a foundation of content governance through consistent multilingual tagging, a functional information architecture, and enforced workflows.
- Implement this governance through a new document management system (DMS), the content foundation for ICANN ecosystem-wide governance.
- Deploy new workflows and processes to ensure consistent, multilingual taxonomy for greater content findability and multifaceted search capabilities.

- Surface the improved multilingual content and search to the community through a new content management system (CMS), which will serve as the backbone for ICANN's external web properties.
- Establish a future-proof and content-agnostic technology landscape.
- Upgrade our technical infrastructure, and thereby serve our global community better through increased findability and accessibility of multilingual content.

Since that time, many significant deliverables have been completed:

- All content on <https://icann.org> (over 89,500 pieces of content) has been audited, classified, and tagged to allow improved search, content governance, and the transformation of unstructured content into structured content.
- A controlled taxonomy has been created that will serve ICANN's entire ecosystem of sites.
- A comprehensive [138-page Web Style Guide](#) outlines the structure and behavior of all pages, components, and features on <https://icann.org>. This allows ICANN org to use a predetermined menu of templates and components to quickly create new pages and sites.
- More than 90 percent of the frontend requirements-gathering documentation, wireframing, and basic implementation is complete.
- For the first time, <https://icann.org> has a true multilingual interface in the six U.N. languages.

ICANN org continues to have a need for a third-party provider to help deliver committed features and functions for ITP as planned. The current firm providing these services has worked with the ICANN org team since the project was initiated and has been critical to the project development and delivery process.

There are several milestones remaining for the ITP program, which ICANN org has estimated to require several more years of work. At a high-level these milestones include, but are not limited to building enhanced features and functions to the following webpages:

- Finance
- Legal
- Global Domains and Strategy
- Contractual Compliance
- Community pages
- Contracted Parties
- News and Media
- Newcomers (Fellowship, NextGen)
- Web Analytics
- SSAC and RSSAC
- All other SO/AC websites

Given the remaining work to deliver these milestones, ICANN org has determined that a Confidential Negotiation Information support services contract is needed. By securing a multi-year contract prices are locked in at a more favorable rate for the duration of the contract, rather than experiencing year-over-year increases.

In late 2022, after contracting with the same support services firm for five years, ICANN org issued a Request For Proposal (RFP) to analyze the market and benchmark third-party service vendor capabilities and rates, to establish competitive pricing for the remaining ITP development work.

The RFP contained a project overview, a pricing workbook, a technical skills summary, and more than 100 qualifying questions. Along with a company and financial health section, the qualifying questions were grouped by selection criteria including technical capabilities, resources, operational excellence, account management experience, performance measurement, support for data privacy and security, and financial value and pricing.



A total of 31 vendors were invited to bid in response to the RFP. At the close of the RFP at the end of January 2023, a total of seven vendors submitted full proposals with a range of contract values. All vendors that submitted a response were invited to participate in a reverse auction to ensure the most competitive pricing was received from each.

Each of the vendors' responses was evaluated individually by ICANN org using a scorecard to rate each of the defined and weighted selection criteria. The final three vendors were selected based on their overall scorecard scores and ranking.

These vendors were invited to present their proposals to ICANN org in a virtual meeting format to better understand each bid and ask any pertinent questions. After these interviews ICANN org created a round two scorecard, which was used to guide the team's final decision.

After extensive due-diligence and discussion, ICANN org wishes to proceed with the current ITP support services firm. This selection was made for several reasons:

1. Subject matter expertise in the requirements outlined in the RFP and intimate knowledge of the ITP program.
2. Although not the lowest bidder among the initial seven respondents, the vendor did have a lower bid price of the final three vendors.
3. During the reverse auction their bid fees reduced by approximately <sup>Confidential Negotiation Information</sup> which translates to approximately <sup>Confidential Negotiation Information</sup> than the initial bid.
4. There are inherent risks and additional costs to the ITP program if ICANN org changes support services vendors.

The benefits of outsourcing this work to the current firm include:

- Team flexibility - as the project matures the team must evolve; the necessary skills sets may change, and specific developments may require more or fewer people

- Available resources - significant number of deliverables committed with limited staff

Currently, the project is largely resourced by the support services firm, along with a small group of supporting staff. It is understood that this is not sustainable over the long term of the program, therefore ICANN org created a three-year strategy to remove the dependency on the support services firm. This will be achieved by decreasing the contracted support services resources as ITP milestones are delivered, and adding a lesser number of ICANN org support staff and lower-cost third-party providers to maintain the services. ICANN org expects to fully transition away from the support services firm by the end of the contract term.

This decision is in the furtherance of ICANN's mission and the support of public interest to support the security, stability, and resiliency of the domain name system by ensuring ICANN can provide a platform and content management system to support the organization, Board, and community.

This decision will have a fiscal impact, but the impact has already been accounted for in the FY24 budget and will be for future budgets as well.

This action is intended to have a positive impact on the security, stability and resiliency of the domain name system.

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

Submitted by:	Sally Newell Cohen, SVP Communications
Date Noted:	30 May 2023
Email:	sally.newellcohen@icann.org

**ICANN BOARD SUBMISSION NO. 2023-06-11-2b**

**TITLE:** **Consideration of Namecheap, Inc. v. ICANN (.BIZ, .INFO, .ORG) Independent Review Process Final Declaration**

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

**EXECUTIVE SUMMARY:**

Namecheap, Inc. (an ICANN accredited registrar) initiated an Independent Review Process (IRP) challenging, among other things, the lack of price control provisions in the 2019 Registry Agreements for .BIZ, .INFO, and .ORG.<sup>1</sup> The Final Declaration was provided to the parties in late December 2022. The Board considered the Final Declaration at its 21 January 2023 meeting and asked the Board Accountability Mechanisms Committee (BAMC) to take the following next steps:

- “[F]urther consideration is needed regarding the IRP Panel’s non-binding recommendations set forth in the Final Declaration.”
- “[R]eview, consider, and evaluate the IRP Panel’s Final Declaration and recommendations, and [] provide the Board with its recommendation(s) regarding next steps for the Board to consider.”

The BAMC has reviewed and considered the IRP Panel’s Final Declaration and recommendations and discussed options regarding proposed next steps at its meetings on 2 March 2023, 20 April 2023, and 2 June 2023. After careful consideration and extensive discussion, the BAMC has made the following recommendation, which the Board is being asked to consider.

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE RECOMMENDATION:**

The BAMC recommends that the Board take the following initial steps relating to the Namecheap IRP Panel’s Final Declaration and recommendations: (a) direct the Interim President and CEO, or her designee(s), to retain an economist to provide input regarding the current domain name system (DNS) marketplace with respect to the market power of .INFO and

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<sup>1</sup> The Panel dismissed Namecheap’s claims regarding ICANN’s consideration of Public Interest Registry’s request for indirect change of control when the Panel granted certain portions of ICANN’s motion to dismiss in February 2021.

.ORG; and (b) ask the BAMC, following its receipt and consideration of the economist's input, to provide the Board with its findings and recommendations as to next steps.

**PROPOSED RESOLUTION:**

Whereas, the Final Declaration in the Namecheap, Inc. v. ICANN Independent Review Process regarding .BIZ, .INFO, and .ORG (Namecheap IRP) was issued on 26 December 2022.

Whereas, on 21 January 2023, the Board considered the Namecheap IRP Final Declaration and, in part, resolved that further consideration is needed regarding the IRP Panel's non-binding recommendations set forth in the Final Declaration.

Whereas, pursuant to the Board's 21 January 2023 resolution, the Board Accountability Mechanisms Committee (BAMC) has reviewed, considered, and evaluated the Namecheap IRP Panel's Final Declaration and recommendations and has recommended that the Board take the following initial next steps: (a) direct the Interim President and CEO, or her designee(s), to retain an economist to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power of .INFO and .ORG; and (b) ask the BAMC, following its receipt and consideration of the economist's input, to provide the Board with its findings and recommendations as to next steps.

Resolved (2023.06.11.XX), the Board hereby: (a) directs the Interim President and CEO, or her designee(s), to retain an economist to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power of .INFO and .ORG; and (b) asks the BAMC, following its receipt and consideration of the economist's input, to provide the Board with its findings and recommendations as to next steps.

**PROPOSED RATIONALE:**

After careful review of the Final Declaration in the Namecheap, Inc. v. ICANN Independent Review Process (Namecheap IRP), the Namecheap IRP Panel's recommendations, and the Board Accountability Mechanisms Committee's (BAMC) recommendations, the Board directs ICANN's Interim President and CEO to retain an economist to provide input regarding the current domain name system (DNS) marketplace as it relates to the market power of .INFO and .ORG and asks the BAMC, following its receipt and consideration of the economist's input, to provide its findings and recommendations as to next steps for the Board's consideration.

## **Background Information**

The 2013 .BIZ, .INFO, and .ORG Registry Agreements (2013 Registry Agreements) were all due to expire in June 2019. In anticipation of the expiration of these agreements, ICANN staff entered into separate negotiations with the respective registry operators to renew the agreements. As with all legacy registry agreements, ICANN's preference was to transition the 2013 Registry Agreements to the "Base Registry Agreement," given its additional protections for registrars and registrants and increased operational efficiencies for ICANN, registry operators, registrars, and registrants. The .BIZ, .INFO, and .ORG registry operators were also interested in moving to and requested to transition to the Base Registry Agreement. The Base Registry Agreement does not contain price control provisions, whereas the 2013 Registry Agreements previously contained provisions that, in part, limited increases in wholesale domain name registration prices to no more than 10% per year.

Prior to transitioning the .BIZ, .INFO and .ORG Registry Agreements to the Base Registry Agreement, ICANN considered numerous relevant factors and posted the proposed registry agreements for public comment. ICANN org then considered and analyzed the public comments received, and published reports that summarized the public comments and explained the reasons why ICANN still considered execution of the 2019 .BIZ, .INFO, and .ORG Registry Agreements to be the best course of action.

After conducting its due diligence and briefing the Board regarding the rationale for transitioning .BIZ, .INFO, and .ORG to the Base Registry Agreement, ICANN org proceeded to renew the Registry Agreements in June 2019 (2019 Registry Agreements) on the Base Registry Agreement as proposed.

Namecheap, Inc. (an ICANN accredited registrar) initiated an IRP in February 2020, challenging the lack of price control provisions in the 2019 Registry Agreements, and ICANN's consideration of Public Interest Registry's (PIR's) request for indirect change of control (Change of Control Request).<sup>2</sup> The final IRP hearing took place from 28 March 2022 to 1 April 2022, and the IRP Panel issued its Final Declaration on 26 December 2022.

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<sup>2</sup> With respect to Namecheap's claims regarding PIR's Change of Control Request, the IRP Panel dismissed those claims when it granted certain portions of ICANN's motion to dismiss in February 2021.

### IRP Panel's Final Declaration:

In terms of requested relief, Namecheap had urged the IRP Panel to reimpose the price controls in the 2019 Registry Agreements for .BIZ, .INFO, and .ORG. The Panel did not grant Namecheap the relief it requested, noting that such an “order” is not within an IRP panel’s remit.

In the Final Declaration, the IRP Panel indicated that Namecheap had “prevailed on some, but not all of its claims.” (Final Decl., ¶ 451.) In particular, the Panel agreed with ICANN that Namecheap failed to prove its claim that the removal of the price controls amounted to discriminatory treatment under the Bylaws just because price controls continue to exist in the Registry Agreements for .COM, .NET, and .NAME. The Panel further agreed with ICANN that several of Namecheap’s claims were untimely, including all claims involving the .BIZ Registry Agreement renewal, the claim that ICANN should not have allowed registries and registrars to vertically integrate, and the claim that ICANN violated a policy from February 2006 relating to the renewal of legacy Registry Agreements.

Namecheap prevailed on its specific claims regarding the lack of price control provisions in the 2019 Registry Agreements for .INFO and .ORG, with the Panel finding three violations of the Articles of Incorporations (Articles) and/or Bylaws. Specifically, the Panel declared the following:

- “ICANN’s approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated [the Articles and Bylaws] because ICANN did not act in an open and transparent manner.” (Final Decl., ¶ 486.)
- “ICANN’s approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated [...] the Bylaws because it involved a policy decision to be made by the ICANN Board, and the ICANN Board did not approve this decision or comply with the procedural requirements for formal Board action.” (Final Decl., ¶ 486.)
- “ICANN’s approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated [the Articles and Bylaws] because ICANN did not comply with the procedural requirements for ensuring that ICANN promotes the global public interest and acts for the benefit of the Internet community as a whole.” (Final Decl., ¶ 486.)

### IRP Panel's Recommendations:

In light of its declarations and its view that the noted violations “are procedural rather than substantive in nature,” “[t]he Panel’s overall recommendation is that the ICANN Board analyze

and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decisionmaking process to ensure that similar violations do not occur in the future.” (Final Decl., ¶ 493.) The Panel also recommended the following (Final Decl., ¶¶ 497-504):

- 1) “[D]ecisions as to how to implement the Panel’s rulings in this IRP should be made by the ICANN Board”;
- 2) “[T]he ICANN Board should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest” that encourages participation of diverse stakeholders and “should be conducted in an open and transparent manner that avoids the violations found by the Panel”;
- 3) “[W]hile the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more extensive than for .INFO” in light of the Panel’s finding “that the evidence that price controls should be retained is much stronger for .ORG than for .INFO”;
- 4) “[T]he Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable” and should explain the reasons for not conducting further expert analysis if that decision is made”;
- 5) “[I]f the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public interest, the Panel recommends that ICANN seek to amend the 2019 Registry Agreements to include appropriate price controls”;
- 6) “[T]he ICANN Board may wish to consider approaching the registry operators for .ORG and .INFO about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above”; and
- 7) The “Board consider revisions to ICANN’s decisionmaking process to reduce the risk of similar procedural violations in the future,” such as “adopt[ing] guidelines for determining what decisions involve policy matters for the Board to decide, or what are the issues on which public comments should be obtained.”

The Panel also stated that: “While providing recommendations is consistent with the purpose of the independent review process, the Panel notes that it has no expertise or experience

regarding the internal operations of ICANN, or with the diverse stakeholders in the global Internet community, aside from information presented in this proceeding. Thus, the Panel's recommendations are directed at identifying issues and measures that ICANN should consider and analyze further, in consultation with the Internet community." (Final Decl., ¶ 492.)

### **Board Resolution and the BAMC's Consideration and Recommendations**

The Board considered the Final Declaration at its 21 January 2023 meeting and adopted the following resolutions:

- "[T]he Board acknowledges that the IRP Panel declared the following: (i) Namecheap prevailed on certain of its claims in the Namecheap, Inc. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Namecheap the sum of US\$58,750."<sup>3</sup>
- "[T]he Board directs the Interim President and CEO, or her designee(s), to take all steps necessary to reimburse Namecheap in the amount of US\$58,750."
- "[F]urther consideration is needed regarding the IRP Panel's non-binding recommendations set forth in the Final Declaration."
- "[T]he Board asks the [BAMC] to review, consider, and evaluate the IRP Panel's Final Declaration and recommendations, and to provide the Board with its recommendation(s) regarding next steps for the Board to consider."

In accordance with the Board's resolution, the BAMC reviewed and considered the IRP Panel's Final Declaration and recommendations and discussed options regarding proposed next steps at its meetings on 2 March 2023, 20 April 2023, and 2 June 2023. The BAMC noted and the Board agrees that it would be prudent, and useful, to take the preliminary step of retaining an economist to study certain issue(s) relating to the DNS marketplace. Retaining an economist to study (and provide a report regarding) the current DNS marketplace as it relates to the market power of .INFO and .ORG would directly address Panel Recommendation No. 4 and would also provide useful information for the BAMC and the Board to consider in determining next steps and in considering any process improvements that ICANN may decide should be implemented.

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<sup>3</sup> ICANN had already agreed, pursuant to the Bylaws, that it would pay for the administrative costs of maintaining an IRP, including panelist fees.



The BAMC also specifically noted, and the Board similarly reiterates here, that ICANN is not a competition or price regulator. The Bylaws are clear. Section 1.1(c) of the Bylaws states that “ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide . . . For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.” Section 1.2(b)(iii) of the Bylaws states that “[w]here feasible and appropriate” ICANN should “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market.” In light of these Bylaws, ICANN has frequently explained that it is not a competition or price regulator for the DNS. Rather, where feasible and appropriate, ICANN relies on market mechanisms and dynamics to allow competition to flourish in the DNS.

### **Board Decision**

The Board agrees with the BAMC’s recommendations and notes that, in light of certain of the Panel’s findings and recommendations, it is an appropriate and prudent first step to retain an economist to provide input regarding the current DNS marketplace as it relates to the market power of .INFO and .ORG. Obtaining this expert input is in keeping with the Board’s commitment to ICANN’s Mission, Commitments and Core Values, and may be useful information for the BAMC and the Board to consider in determining next steps and in considering any future process improvements that ICANN may decide to implement.

The Board further notes that taking the decision to commission such an economic study is limited to the specific circumstances as presented by the Namecheap IRP and is a reflection of the seriousness with which the Board considers ICANN’s Accountability Mechanisms and the non-binding recommendations issued by IRP panels. It does not, however, equate to agreement with all of the Panel’s recommendations nor is it an indication that an economic study should be conducted each time there is a question raised regarding pricing in Registry Agreements.

This action is within ICANN’s Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

While commissioning an expert study will have a fiscal impact on ICANN, it is an impact that ICANN will be able to absorb in the FY24 Budget. This action will not have any direct impact on the security, stability or resiliency of the domain name system.

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

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 2 June 2023  
Email: amy.stathos@icann.org

**REFERENCE MATERIALS – ICANN BOARD SUBMISSION NO. 2023-06-11-2b**

**TITLE:                    Consideration of the Namecheap, Inc. v. ICANN (.BIZ, .INFO, .ORG)  
Independent Review Process Final Declaration**

**RELEVANT MATERIALS:**

The following documents are relevant to the Board’s consideration of the Board Accountability Mechanism Committee’s (BAMC) recommendations in the accompanying Board submission:

- [Final Declaration](#) in the Namecheap IRP – issued on 26 December 2022 (also attached as Attachment A).
- The documents, briefs, background facts, arguments, supporting declarations, and Panel rulings submitted during the course of the Namecheap IRP are available at: <https://www.icann.org/resources/pages/irp-namecheap-v-icann-2020-03-03-en>.

Submitted By:                    Amy A. Stathos, Deputy General Counsel  
Date Noted:                      2 June 2023  
Email:                              amy.stathos@icann.org