

Board Reference Materials - 9 August 2016 Special Board Meeting

The originally published version of this document contained information that was withheld from publication in accordance with the [ICANN Publication Practices](#). The updated information can be found in the document at pages 172 - 174. To view a redacted or previously withheld version, please see <https://www.icann.org/en/board-activities-and-meetings/board-materials-redaction-archive-register>

Annex A

Input Tracking – GNSO PDP Recommendations on Privacy & Proxy Services Accreditation Issues

The purpose of this checklist is to assist the Board in assuring that all parties with an interest have had an opportunity to participate and weigh in on the recommendations arising out of the GNSO PDP, and to provide a summary of how those inputs were considered. This checklist should be included with the Board paper transmitting the policy recommendations to the Board for decision.

ISSUE: Privacy & Proxy Services Accreditation Issues Policy Development Process

DATE OF COUNCIL APPROVAL: 21 January 2016

Public Comment¹

Identify all documents submitted for public comment as part of the consideration of this issue and the dates of the public comment forums. Also identify the total number of commenters. Also note any open mic/forum sessions on the topic. Include link to the summary and analysis of public comments.² In the “outreach efforts” column, please identify the actions taken to publicize the comment period or meeting to encourage participation.

Comment Period Dates or Meeting Date	Dates opened / closed or Meeting Date	Number of commenters	Outreach Efforts
Publication of Preliminary Issue Report for public comments	12 December 2011	10	Broadly circulated, including announcement on ICANN website: https://www.icann.org/news/announcement-2011-12-12-

¹ This checklist is not intended as a replacement for full public comment summaries. Rather, this checklist is a supplement to the comment summarization work, to identify in a quick manner that key inputs were received and taken into consideration prior to the issue reaching the Board.

² Required public comment sessions upon presentation of the GNSO Recommendations to the Board will be tracked separately.

			en
Public session at ICANN48	21 November 2013		Recording and transcripts of community discussion: http://archive.icann.org/meetings/buenosaires2013/en/schedule/thu-ppsai.html
Public session at ICANN49	27 March 2014		Recording and transcripts of community discussion: https://singapore49.icann.org/en/schedule/thu-ppsai
Public session at ICANN50	25 June 2014		Recording and transcripts of community discussion: https://london50.icann.org/en/schedule/wed-ppsai
Public session at ICANN51	15 October 2014		Recording and transcripts of community discussion: https://la51.icann.org/en/schedule/wed-ppsai
Public session at ICANN52	11 February 2015		Recording and transcripts of community discussion: https://singapore52.icann.org/en/schedule/wed-ppsai
Public session at ICANN53	24 June 2015		Recording and transcripts of community discussion: https://buenosaires53.icann.org/en/schedule/wed-ppsai
Publication of Initial Report for public comments	5 May – 21 July 2015	Over 11,000 individual submissions (many of which were based on an online template), an online	Broadly circulated, including announcement on ICANN website: https://www.icann.org/public-

		petition signed by over 10,000 persons (many of whom also submitted additional comments) and over 150 specific responses to an online survey	comments/ppesai-initial-2015-05-05-en
Public session at ICANN54	21 October 2015		Recording and transcripts of community discussion: https://meetings.icann.org/en/dublin54/schedule/wed-ppesai
Publication of Final Recommendations subject to Board consideration	5 February – 16 March 2016	5	Broadly circulated, including announcement on ICANN website: https://www.icann.org/public-comments/ppesai-recommendations-2016-02-05-en
GAC session at ICANN56	28 June 2016		Recording and transcript of session: https://icann562016.sched.org/event/7FEY?iframe=no

Tracking of GNSO or Stakeholder Inputs

For each GNSO Stakeholder Group, Constituency or Advisory Committee identified below, identify if any input was received, and provide a brief summary of how those inputs were considered. The brief summary should include whether the stakeholder group at issue voiced any opposition to the items under consideration and whether any changes were recommended to the recommendations. Note: In some cases, certain Stakeholder Groups may make comments through component constituencies instead of through a collective statement of the Stakeholder Group. Only comments that are provided on behalf of one of the identified SGs or Constituencies should be recorded in this section.

Group	Requested	Received	Summary of Action on Input
GNSO Council	Yes	Yes	Final recommendations approved on 21 January 2016: http://gns0.icann.org/en/council/resolutions#201601
Registrar Stakeholder Group	Yes	No (individual members commented)	
Registry Stakeholder Group	Yes	No (individual members commented)	
Commercial Stakeholder Group	Yes	No (individual Constituencies commented)	
Business Constituency	Yes	Yes, in response to initial WG outreach, Initial Report and Final Report	WG reviewed and addressed relevant input received from this group
IPC Constituency	Yes	Yes, in response to initial WG outreach, Initial Report and Final Report	WG reviewed and addressed relevant input received from this group
ISP Constituency	Yes	Yes, in response to initial WG outreach and Initial Report	WG reviewed and addressed relevant input received from this group
Non-Commercial Stakeholder Group	Yes	Yes, in response to initial WG outreach and Initial Report	WG reviewed and addressed relevant input received from this group
Non-Commercial Users Constituency	Yes	No (individual members commented)	
Not for Profit Operational Concerns Constituency	Yes	No	

ccNSO	Yes	No	
ASO	Yes	No	
At-Large	Yes	Yes, in	WG reviewed and addressed relevant

Advisory Committee		response to initial outreach and Initial Report	input received from this group
Governmental Advisory Committee ³	Yes	Yes, in response to the Initial Report via the Public Safety Working Group	WG reviewed and addressed relevant input received from this group; a further community discussion was held at ICANN56 to discuss ways to effectively address GAC concerns during implementation
RSSAC	Yes	No	
SSAC	Yes	No	

Specific Outreach and Emerging Interests

If the working group or the GNSO Council performed any specific outreach to groups not identified above for advice or assistance on the issues under discussion, please identify the groups/entities consulted, the inputs received and how they were considered. In addition, if a definable group of collective interests emerge during a PDP and is not listed above, those collective inputs should be identified below. In the “outreach efforts” column, please identify the actions taken to identify key interested parties to encourage their participation. Also note if there are any groups identified as key that did not respond to outreach efforts.

Entity/Group	Outreach efforts	How inputs were considered
n/a	n/a	n/a

³ Formal GAC advice to the Board will be tracked through the GAC Register of Advice.

Annex B - GNSO Council Recommendations Report to the Board regarding Adoption of the Final Recommendations from the Policy Development Process Working Group on Privacy and Proxy Services Accreditation Issues

1. Executive Summary

On 21 January 2016 the GNSO Council [voted](#) unanimously to approve all the recommendations contained in the [Final Report](#) from the GNSO Working Group that had been chartered to conduct a Policy Development Process (PDP) on privacy and proxy services accreditation issues. This Recommendations Report is being sent to the Board for its review of the PDP recommendations, which the GNSO Council recommends be adopted by the Board. All the final PDP recommendations received Full Consensus support from all the members of the Working Group (please see Annex A for a summary of all the approved recommendations).

The Privacy and Proxy Services Accreditation issues (PPSAI) PDP Working Group had been [chartered](#) to “provide the GNSO Council with policy recommendations regarding the issues identified during the 2013 RAA negotiations, including recommendations made by law enforcement and GNSO working groups, that were not addressed during the 2013 RAA negotiations and otherwise suited for a PDP; specifically, issues relating to the accreditation of Privacy & Proxy Services.” As part of its deliberations on this issue, the Working Group was tasked to consider, at a minimum, the issues outlined in the [Staff Briefing Paper](#) that had been published in September 2013 on the topic. These issues covered various aspects of a possible accreditation program for privacy and proxy services, including the relay and reveal of requests for customer contact information, requirements for the contactability and responsiveness of service providers to complaints of abuse, and the rights and responsibilities of privacy and proxy service customers.

The PDP Working Group published an [Initial Report](#) for public comment in May 2015. Following an extensive review of all the public comments received, the Working Group finalized its recommendations and completed its [Final Report](#), which was submitted to the GNSO Council on 7 December 2015.

The policy recommendations, if approved by the Board, will impose obligations on contracted parties. The GNSO Council's unanimous vote in favor of these items exceeds the voting threshold required by Article X, Section 3.9.f of the ICANN Bylaws regarding the formation of consensus policies. Under the ICANN Bylaws, the Council's supermajority support for the PDP recommendations obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN.

2. If a successful GNSO Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the Constituency(ies) or Stakeholder Group(s) that held that position.

N/A

3. An analysis of how the issue(s) would affect each Constituency or Stakeholder Group, including any financial impact on the Constituency or Stakeholder Group.

Any policy recommendation regarding the accreditation of privacy and proxy service providers will affect a number of Constituencies and Stakeholder Groups, in particular, those that offer and those that are customers of privacy or proxy services. The Working Group included members from all the GNSO's Stakeholder Groups and Constituencies as well as the At Large Advisory Committee and several individuals. The GNSO's Constituencies and Stakeholder Groups were therefore adequately represented during the Working Group phase of the PDP.

4. An analysis of the period of time that would likely be necessary to implement the policy.

The creation of an accreditation program for privacy and proxy service providers and the implementation of all the recommendations from the PDP will take a substantial

period of time due to the scale of the project and the fact that this will be the first time ICANN has implemented such a program for this industry sector. While the Registrar Accreditation Agreement (RAA) may serve as a reference point for the program, the PDP Working Group's Final Report acknowledged that this may not be the most appropriate model for a number of reasons.

The 2013 RAA contains an interim specification relating to the offering of privacy and proxy services by ICANN-accredited registrars and their affiliates. This specification is due to expire either on 1 January 2017 or upon the launch of an accreditation program, whichever first occurs. ICANN staff believes that it will be necessary to extend the duration of the interim specification by at least 12-18 months to allow for a fully considered implementation of the PDP recommendations. This is due to the complexity of the recommendations and in light of ICANN's typical practice of providing contracted parties at least six months' notice to come into compliance with new policy requirements after policies are fully implemented. In accordance with the terms of the 2013 RAA, this extension of the duration of the interim Specification on Privacy and Proxy Registrations will have to be agreed upon by ICANN and the Registrar Stakeholder Group.

5. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest.

No outside advisor provided input to the Working Group.

6. The Final Report submitted to the GNSO Council

The Final Report of the Privacy and Proxy Services Accreditation Issues PDP Working Group was submitted to the GNSO Council on 8 December 2015 and can be found here in full: [Final Report](#).

Translations of the Final Report have been requested in all the other official languages of the United Nations as well as in Portuguese.

7. A copy of the minutes of the Council deliberation on the policy issue, including all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

Please refer to the GNSO Council's resolution adopting the final recommendations from the PDP Working Group at <http://gns0.icann.org/en/council/resolutions#201601> as well as the transcript and minutes from that Council meeting, at <http://gns0.icann.org/en/meetings/transcript-council-21jan16-en.pdf> and <http://gns0.icann.org/en/meetings/minutes-council-21jan16-en.htm> respectively.

8. Consultations undertaken

External

As mandated by the GNSO's PDP Manual, the Working Group reached out shortly after its initiation to ICANN's Supporting Organizations and Advisory Committees as well as the GNSO's Stakeholder Groups and Constituencies to seek their input on the Charter questions. See <https://community.icann.org/x/SRzRAg> for all the responses received (these were from the Business Constituency, the Intellectual Property Constituency, the Internet Service Providers & Connectivity Providers Constituency, the Non-Commercial Stakeholder Group and the At Large Advisory Committee).

Also in line with the PDP Manual, the Working Group's Initial Report was published for public comment following its release on 5 May 2015 (see: <https://www.icann.org/public-comments/ppsai-initial-2015-05-05-en>). All the public comments received were compiled into a uniform Public Comment Review Tool and reviewed by the Working Group (see <https://community.icann.org/x/KIFCAw>). Due to the unusually large volume of comments received (including over 11,000 public comments and almost 150 survey responses), the Working Group created four Sub Teams to review the comments, and extended its timeline to ensure that it could carefully and thoroughly consider all the input received.

In addition, the Working Group held two face-to-face meetings immediately prior to the ICANN meetings in Los Angeles (on 10 October 2014) and Dublin (on 16 October 2015). It also conducted open community sessions during all ICANN

meetings held between the launch of the Working Group and the completion of its Final Report. Transcripts, documents and recordings from the two Working Group face-to-face meetings can be found here: <https://community.icann.org/x/AiHxAg> (Los Angeles) and <https://community.icann.org/x/uaxYAw> (Dublin). Transcripts and recordings of all Working Group meetings can be found on the Working Group wiki space at: <https://community.icann.org/x/9iCfAg>.

Internal

Regular updates were provided to the PDP Working Group by ICANN's Contractual Compliance and Registrar Services teams. Some of these team members attended Working Group calls on a regular basis and joined the Group for their two face-to-face meetings. The implementation advice and overall feedback provided by these staff members was very helpful in facilitating consensus formation among the Working Group, especially in relation to questions regarding the workings of the registrar accreditation process, ICANN's practice in handling complaints from registrants, and possible implementation considerations.

9. Summary and analysis of Public Comment Forum to provide input on the Privacy and Proxy Services Accreditation Issues PDP Recommendations, as adopted by the GNSO Council prior to ICANN Board consideration.

A public comment forum was opened on 5 February 2016 to solicit feedback on the recommendations prior to ICANN Board consideration:

<https://www.icann.org/public-comments/ppsai-recommendations-2016-02-05-en>.

Following the close of the public comment period on 16 March 2016, a Report of Public Comments will be prepared and published.

10. Impact/implementation considerations from ICANN staff

Implementation of the final recommendations from the PPSAI PDP Working Group will require significant ICANN staff resources. Implementation of this accreditation program will likely include, at a minimum, the development of privacy/proxy accreditation application, screening, data escrow, contracting, and Contractual Compliance procedures and requirements. Implementation will also require resolution

of complicated practical issues related to Working Group recommendations surrounding Whois disclosure; the transfer of privacy/proxy-registered domains between accredited privacy/proxy services and ICANN-accredited registrars; and de-accreditation of privacy and/or proxy services.

The interim RAA Specification on Privacy and Proxy Registrations, which will expire when this accreditation program goes into effect (provided the Specification is extended as noted in Section 4, above) links all of its requirements to registrar contractual obligations. Though some policy requirements to such obligations will be added during this implementation, Staff expects that most privacy and proxy services will continue to be affiliated with ICANN-accredited registrars (meaning, they share common ownership and management) following the implementation of this accreditation program. As a result, Staff expects that these relationships could continue much as they do today after the new accreditation program is implemented, albeit with new policy requirements.

However, the WG directed that access to privacy/proxy accreditation should not be limited to entities that are affiliated with ICANN-accredited registrars. As a result, implementation may require the creation of a beginning-to-end accreditation program for entities who do not currently have either a direct or indirect relationship with ICANN. This element of the accreditation program will be more complicated to implement and operate.

Annex A: Final Recommendations from the Privacy and Proxy Services Accreditation Issues PDP WG (extracted from the Executive Summary of the Final Report)

The WG has reached **FULL CONSENSUS** on all the following recommendations:

I. DEFINITIONS:

1. The WG recommends the adoption of the following definitions, to avoid ambiguities surrounding the common use of certain words in the WHOIS context. The WG recommends that these recommendations be used uniformly by ICANN, including generally in relation to WHOIS beyond privacy and proxy service issues:
 - **"Privacy Service"** means a service by which a Registered Name is registered to its beneficial user as the Registered Name Holder, but for which alternative, reliable contact information is provided by the privacy or proxy service provider for display of the Registered Name Holder's contact information in the Registration Data Service (WHOIS) or equivalent services¹.
 - **"Proxy Service"** is a service through which a Registered Name Holder licenses use of a Registered Name to the privacy or proxy customer in order to provide the privacy or proxy customer use of the domain name, and the Registered Name Holder's contact information is displayed in the Registration Data Service (WHOIS) or equivalent services rather than the customer's contact information.

¹ The definitions of Privacy Service and Proxy Service reflect those in the 2013 RAA. In this context, the 2013 RAA also defines "Registered Name" as a domain name within the domain of a gTLD, about which a gTLD Registry Operator (or an Affiliate or subcontractor thereof engaged in providing Registry Services) maintains data in a Registry Database, arranges for such maintenance, or derives revenue from such maintenance, and "Registered Name Holder" is defined as the holder of a Registered Name.

NOTE: In relation to the definitions of a Privacy Service and a Proxy Service, the WG makes the following additional recommendation:

- Registrars are not to knowingly² accept registrations from privacy or proxy service providers who are not accredited through the process developed by ICANN. For non-accredited entities registering names on behalf of third parties, the WG notes that the obligations for Registered Name Holders as outlined in section 3.7.7 of the 2013 RAA would apply³.
- **“Affiliate”**, when used in this Final Report in the context of the relationship between a privacy or proxy service provider and an ICANN-accredited registrar, means a privacy or proxy service provider that is Affiliated with such a registrar, in the sense that word is used in the [2013 RAA](#). Section 1.3 of the 2013 RAA defines an “Affiliate” as a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified.
- **“Publication”** means the reveal⁴ of a person’s (i.e. the licensee or beneficial owner of a registered domain name) identity/contact details in the WHOIS system.
- **“Disclosure”** means the reveal of a person’s (i.e. the licensee or beneficial owner of a registered domain name) identity/contact details to a third party Requester without Publication in the WHOIS system.

² In this context, “knowingly” refers to actual knowledge at the time that the registration is submitted to the registrar. As implementation guidance, this knowledge would normally be obtained through a report to the registrar from ICANN or a third party.

³ Section 3.7.7.3 of the 2013 RAA reads as follows: “Any Registered Name Holder that intends to license use of a domain name to a third party is nonetheless the Registered Name Holder of record and is responsible for providing its own full contact information and for providing and updating accurate technical and administrative contact information adequate to facilitate timely resolution of any problems that arise in connection with the Registered Name.”

⁴ As the single word “reveal” has been used in the WHOIS context to describe the two distinct actions that the WG has defined as “Disclosure” and “Publication”, the WG is using “reveal” within its definitions as part of a more exact description, to clarify which of the two meanings would apply in any specific instance. The rest of this Initial Report generally uses the terms “Disclosure” and “Publication” to refer to the relevant specific aspect of a “reveal”.

- The term “*person*” as used in these definitions is understood to include natural and legal persons, as well as organizations and entities.
- “*Law enforcement authority*” means law enforcement, consumer protection, quasi-governmental or other similar authorities designated from time to time by the national or territorial government of the jurisdiction in which the privacy or proxy service provider is established or maintains a physical office. This definition is based on Section 3.18.2 of the 2013 Registrar Accreditation Agreement, which provision spells out a registrar’s obligation to maintain a point of contact for, and to review reports received from, law enforcement authorities⁵; as such, the WG notes that its recommendation for a definition of “law enforcement authority” in the context of privacy and proxy service accreditation should also be updated to the extent that, and if and when, the corresponding definition in the RAA is modified.
- “*Relay*”, when used in the context of a request to a privacy or proxy service provider from a Requester, means to forward the request to, or otherwise notify, the privacy or proxy service customer that a Requester is attempting to contact the customer.
- “*Requester*”, when used in the context of Relay, Disclosure or Publication, including in the Illustrative Disclosure Framework described in Annex B, means an individual, organization or entity (or its authorized representatives) that requests from a privacy or proxy service provider either a Relay, or Disclosure or Publication of the identity or contact details of a customer, as the case may be.

II. NO DISTINCTION IN TREATMENT; WHOIS LABELING REQUIREMENTS; VALIDATION & VERIFICATION OF CUSTOMER DATA:

2. Privacy and proxy services (“P/P services”) are to be treated the same way for the purpose of the accreditation process.

⁵ See <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

3. The status of a registrant as a commercial organization, non-commercial organization, or individual should not be the driving factor in whether P/P services are available to the registrant. Fundamentally, P/P services should remain available to registrants irrespective of their status as commercial or non-commercial organizations or as individuals. Further, P/P registrations should not be limited to private individuals who use their domains for non-commercial purposes.
4. To the extent that this is feasible, domain name registrations involving P/P service providers should be clearly labelled as such in WHOIS⁶.
5. P/P customer data is to be validated and verified in a manner consistent with the requirements outlined in the [WHOIS Accuracy Program Specification](#) of the 2013 RAA (as may be updated from time to time). In the cases where a P/P service provider is Affiliated with a registrar and that Affiliated registrar has carried out validation and verification of the P/P customer data, re-verification by the P/P service provider of the same, identical, information should not be required.

MANDATORY PROVISIONS TO BE INCLUDED IN PROVIDER TERMS OF SERVICE & MINIMUM REQUIREMENTS TO BE COMMUNICATED TO CUSTOMERS:

6. All rights, responsibilities and obligations of registrants and P/P service customers as well as those of accredited P/P service providers need to be clearly communicated in the P/P service registration agreement, including a provider's obligations in managing those rights and responsibilities and any specific requirements applying to transfers and renewals of a domain name. In particular, all accredited P/P service providers must disclose to their customers

⁶ While this may be possible with existing fields, the WG has also explored the idea that the label might also be implemented by adding another field to WHOIS, and is aware that this may raise certain questions that should be appropriately considered as part of implementation. For clarity, references to "WHOIS" in this Final Report are to the current globally accessible gTLD Registration Directory Service as well as any successors or replacements thereto.

the conditions under which the service may be terminated in the event of a transfer of the domain name, and how requests for transfers of a domain name are handled.

7. All accredited P/P service providers must include on their websites, and in all Publication and Disclosure-related policies and documents, a link to either a request form containing a set of specific, minimum, mandatory criteria, or an equivalent list of such criteria, that the provider requires in order to determine whether or not to comply with third party requests, such as for the Disclosure or Publication of customer identity or contact details.
8. All accredited P/P service providers must publish their terms of service, including pricing (e.g. on their websites). In addition to other mandatory provisions recommended by the WG, the terms should at a minimum include the following elements in relation to Disclosure and Publication:
 - Clarification of when those terms refer to Publication requests (and their consequences) and when they refer to Disclosure requests (and their consequences). The WG further recommends that accredited providers expressly include a provision in their terms of service explaining the meaning and consequences of Publication.
 - The specific grounds upon which a customer's details may be Disclosed or Published or service suspended or terminated, including Publication in the event of a customer's initiation of a transfer of the underlying domain name⁷. In making this recommendation, the WG noted the changes to be introduced to the [Inter Registrar Transfer Policy \("IRTP"\)](#) in 2016, where following a Change of Registrant⁸ a registrar is required to impose a 60-day inter-registrar transfer lock.

⁷ The WG believes there should be no mandatory restriction on providers being able to terminate service to a customer on grounds stated in the terms of service, subject to any other specific limitation that may be recommended in this report by the WG. The WG notes that it is probably not possible to create a general policy that would in all cases prevent Publication via termination of service where the customer is ultimately shown to have been innocent (i.e. not in breach).

⁸ This is defined as a material, i.e. non-typographical, change to either the registrant name, organization or email address (or in the absence of an email contact, the administrative contact listed for the registrant).

- Clarification as to whether or not a customer: (1) will be notified when a provider receives a Publication or Disclosure request from a third party; and (2) may opt to cancel its domain registration prior to and in lieu of Publication or Disclosure. However, accredited P/P service providers that offer this option should nevertheless expressly prohibit cancellation of a domain name that is the subject of a UDRP proceeding.
 - Clarification that a Requester will be notified in a timely manner of the provider's decision: (1) to notify its customer of the request; and (2) whether or not the provider agrees to comply with the request to Disclose or Publish. This should also be clearly indicated in all Disclosure or Publication related materials.
9. In addition, the WG recommends the following as best practices for accredited P/P service providers⁹:
- P/P service providers should facilitate and not obstruct the transfer¹⁰, renewal or restoration of a domain name by their customers, including without limitation a renewal during a Redemption Grace Period under the [Expired Registration Recovery Policy](#) and transfers to another registrar.
 - P/P service providers should use commercially reasonable efforts to avoid the need to disclose underlying customer data in the process of renewing, transferring or restoring a domain name.
 - P/P service providers should include in their terms of service a link or other direction to the ICANN website (or other ICANN-approved online location such as the provider's own website) where a person may look up the authoritative definitions and meanings of specific terms such as Disclosure or Publication.

⁹ The WG recognizes that implementation of these recommendations may involve the development of new procedures.

¹⁰ See also the WG's observations below under Recommendation #21 regarding the additional risks and challenges that may arise when the P/P service provider is independent of (i.e. not Affiliated with) an ICANN-accredited registrar, and which may be of particular concern in relation to transfers and de-accreditation issues.

CONTACTABILITY & RESPONSIVENESS OF PRIVACY & PROXY SERVICE PROVIDERS:

10. ICANN should publish and maintain a publicly accessible list of all accredited P/P service providers, with all appropriate contact information. Registrars should be advised to provide a web link to P/P services run by them or their Affiliates as a best practice. P/P service providers should declare their Affiliation with a registrar (if any) as a requirement of the accreditation program¹¹.
11. P/P service providers must maintain a point of contact for abuse reporting purposes. In this regard, a “designated” rather than a “dedicated” point of contact will be sufficient, since the primary concern is to have one contact point that third parties can go to and expect a response from. For clarification, the WG notes that as long as the requirement for a single point of contact can be fulfilled operationally, it is not mandating that a provider designate a specific individual to handle such reports.
12. P/P service providers should be fully contactable, through the publication of contact details on their websites in a manner modelled after Section 2.3 of the 2013 RAA [Specification on Privacy and Proxy Registrations](#), as may be updated from time to time.
13. Requirements relating to the forms of alleged malicious conduct to be covered by the designated published point of contact at an ICANN-accredited P/P service provider should include a list of the forms of malicious conduct to be covered. These requirements should allow for enough flexibility to accommodate new types of malicious conduct. By way of example, Section 3 of the Public Interest Commitments (PIC) Specification¹² in the New gTLD

¹¹ The WG discussed, but did not reach consensus on, the possibility of requiring a registrar to also declare its Affiliation (if any) with a P/P service provider.

¹² See <http://newgtlds.icann.org/en/applicants/agb/agreement-approved-20nov13-en.pdf>; Section 3 provides that “Registry Operator will include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or

Registry Agreement or Safeguard 2, Annex 1 of the GAC's Beijing Communiqué¹³ could serve as starting points for developing such a list.

14. The designated point of contact for a P/P service provider should be capable and authorized to investigate and handle abuse reports and information requests received.

STANDARD FORM & REQUIREMENTS FOR ABUSE REPORTING & INFORMATION REQUESTS:

15. A uniform set of minimum mandatory criteria that must be followed for the purpose of reporting abuse and submitting requests (including requests for the Disclosure of customer information) should be developed. Forms that may be required by individual P/P service providers for this purpose should also include space for free form text¹⁴. P/P service providers should also have the ability to “categorize” reports received, in order to facilitate responsiveness. P/P service providers must also state the applicable jurisdiction in which disputes (including any arising under the Illustrative Disclosure Framework in Annex B) should be resolved on any forms used for reporting and requesting purposes.

RELAYING (FORWARDING) OF THIRD PARTY REQUESTS:

copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.”

¹³ See <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>. Safeguard 2, Annex 1 provides that “Registry operators will ensure that terms of use for registrants include prohibitions against the distribution of malware, operation of botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law.”

¹⁴ With the specific exception of Disclosure requests from intellectual property rights holders (see Recommendation #19 below), the WG discussed but did not finalize the minimum elements that should be included in such a form in relation to other requests and reports. The WG notes that this recommendation is not intended to prescribe the method by which a provider should make this form available (e.g. through a web-based form) as providers should have the ability to determine the most appropriate method for doing so.

16. Regarding Relaying of Electronic Communications¹⁵:

- All communications required by the RAA and ICANN Consensus Policies must be Relayed.
- For all other electronic communications, P/P service providers may elect one of the following two options:
 - i. Option #1: Relay all electronic requests received (including those received via emails and via web forms), but the provider may implement commercially reasonable safeguards (including CAPTCHA) to filter out spam and other forms of abusive communications, or
 - ii. Option #2: Relay all electronic requests received (including those received via emails and web forms) from law enforcement authorities and third parties containing allegations of domain name abuse (i.e. illegal activity)
- In all cases, P/P service providers must publish and maintain a mechanism (e.g. designated email point of contact) for Requesters to contact to follow up on or escalate their original requests.

17. Regarding Further Provider Actions When There Is A Persistent Delivery Failure of Electronic Communications:

- All third party electronic requests alleging abuse by a P/P service customer will be promptly Relayed to the customer. A Requester will be promptly notified of a persistent failure of delivery¹⁶ that a P/P service provider becomes aware of.
- The WG considers that a “persistent delivery failure” will have occurred when an electronic communications system abandons or otherwise stops attempting to deliver an electronic communication to a customer after a

¹⁵ The WG agrees that emails and web forms would be considered “electronic communications” whereas human-operated faxes would not. The WG recommends that implementation of the concept of “electronic communications” be sufficiently flexible to accommodate future technological developments.

¹⁶ The WG notes that failure of “delivery” of a communication is not to be equated with the failure of a customer to “respond” to a request, notification or other type of communication.

certain number of repeated or duplicate delivery attempts within a reasonable period of time. The WG emphasizes that such persistent delivery failure, in and of itself, is not sufficient to trigger further provider obligation or action in relation to a relay request unless the provider also becomes aware of the persistent delivery failure.

- As part of an escalation process, and when the above-mentioned requirements concerning a persistent delivery failure of an electronic communication have been met, the provider should upon request Relay a further form of notice to its customer. A provider should have the discretion to select the most appropriate means of Relaying such a request. A provider shall have the right to impose reasonable limits on the number of such requests made by the same Requester for the same domain name.
- When a service provider becomes aware of a persistent delivery failure to a customer as described herein, that will trigger the P/P service provider's obligation to perform a verification/re-verification (as applicable) of the customer's email address(es), in accordance with the WG's recommendation that customer data be validated and verified in a manner consistent with the WHOIS Accuracy Specification of the 2013 RAA (see the WG's Recommendation #5, above, and the background discussion under Category B, Question 2 in Section 7, below).
- However, these recommendations shall not preclude a P/P service provider from taking any additional action in the event of a persistent delivery failure of electronic communications to a customer, in accordance with its published terms of service.

DISCLOSURE OR PUBLICATION OF A CUSTOMER'S IDENTITY OR CONTACT DETAILS:

18. Regarding Disclosure and Publication, the WG agreed that none of its recommendations should be read as being intended to alter (or mandate the alteration of) the prevailing practice among P/P service providers to review requests manually or to facilitate direct resolution of an issue between a Requester and a P/P service customer. It also notes that disclosure of at least

some contact details of the customer may in some cases be required in order to facilitate such direct resolution. In relation to Publication that is subsequently discovered to be unwarranted, the WG believes that contractual agreements between providers and their customers and relevant applicable laws will govern, and are likely to provide sufficient remedies in such instances.

19. The WG has developed an illustrative Disclosure Framework to apply to Disclosure requests made to P/P service providers by intellectual property (i.e. trademark and copyright) owners. The proposal includes requirements concerning the nature and type of information to be provided by a Requester, non-exhaustive grounds for refusal of a request, and the possibility of neutral dispute resolution/appeal in the event of a dispute. The WG recommends that a review of this Disclosure Framework be conducted at an appropriate time after the launch of the program and periodically thereafter, to determine if the implemented recommendations meet the policy objectives for which they were developed. Such a review might be based on the non-exhaustive list of guiding principles developed by the GNSO's Data and Metrics for Policy Making (DMPM) WG, as adopted by the GNSO Council and ICANN Board. As noted by the DMPM WG, relevant metrics could include industry sources, community input via public comment or surveys or studies. In terms of surveys (whether of providers, customers or requesters), data should be anonymized and aggregated. Please refer to Annex B for the full Disclosure Framework.

20. Although the WG has reached consensus on an illustrative Disclosure Framework for handling requests from intellectual property (i.e. trademark and copyright) rights-holders, it has not developed a similar framework or template that would apply to other Requesters, such as LEA or anti-abuse and consumer protection groups. The WG is aware that certain concerns, such as the need for confidentiality in relation to an on-going LEA investigation, may mean that different considerations would apply to any minimum requirements that might be developed for such a framework. In this regard, in its Initial Report the WG had sought community feedback on specific concerns relating to the handling of LEA requests, such as whether or not providers should be

mandated to comply with them. Based on input received, the WG recommends that accredited P/P service providers should comply with express requests from LEA not to notify a customer where this is required by applicable law. However, this recommendation is not intended to prevent providers from either voluntarily adopting more stringent standards or from cooperating with LEA. In the event that a Disclosure Framework is eventually developed for LEA requests, the WG recommends that the Framework expressly include requirements under which at a minimum: (a) the Requester agrees to comply with all applicable data protection laws and to use any information disclosed to it solely for the purpose to determine whether further action on the issue is warranted, to contact the customer, or in a legal proceeding concerning the issue for which the request was made; and (b) exempts Disclosure where the customer has provided, or the P/P service provider has found, specific information, facts, and/or circumstances showing that Disclosure will endanger the safety of the customer.

DEACCREDITATION & ITS CONSEQUENCES:

21. Regarding de-accreditation of a P/P service provider:

The WG reiterates its previous observation that increased risks to a customer's privacy may be involved when a customer is dealing with a P/P service provider who, even if accredited by ICANN, is not Affiliated with an ICANN-accredited registrar. De-accreditation was noted as one topic where additional problems may arise. The WG therefore recommends that the following general principles be adopted and followed when a more detailed P/P service de-accreditation process is developed during implementation. As with transfers of domain names that occur other than as a result of de-accreditation of a P/P service provider, these principles are based on the WG's belief that customer privacy should be a paramount concern. As such, reasonable safeguards to ensure that a customer's privacy is adequately protected in the course of de-accreditation of a customer's P/P service provider – including when transfer of a customer's domain name or names is involved – should be integral to the rules governing the de-accreditation process.

Principle 1: A P/P service customer should be notified in advance of de-accreditation of a P/P service provider. The WG notes that the current practice for registrar de-accreditation involves the sending of several breach notices by ICANN Compliance prior to the final step of terminating a registrar's accreditation. While P/P service provider de-accreditation may not work identically to that for registrars, the WG recommends that ICANN explore practicable ways in which customers may be notified during the breach notice process (or its equivalent) once ICANN issues a termination of accreditation notice but before the de-accreditation becomes effective. The WG recommends that de-accreditation become effective for existing customers 30 days after notice of termination. The WG notes that, in view of the legitimate need to protect many customers' privacy, the mere publication of a breach notice on the ICANN website (as is now done for registrar de-accreditation) may not be sufficient to constitute notice.

Principle 2: Each step in the de-accreditation process should be designed so as to minimize the risk that a customer's personally identifiable information is made public.

Principle 3: The WG notes that the risk of inadvertent publication of a customer's details in the course of de-accreditation may be higher when the provider in question is not Affiliated with an ICANN-accredited registrar. As such, implementation design of the de-accreditation process should take into account the different scenarios that can arise when the provider being de-accredited is, or is not, Affiliated with an ICANN-accredited registrar.

In addition to the three principles outlined above, the WG recommends specifically that, where a Change of Registrant (as defined under the IRTP) takes place during the process of de-accreditation of a proxy service provider, a registrar should lift the mandatory 60-day lock at the express request of the beneficial user, provided the registrar has also been notified of the de-accreditation of the proxy service provider¹⁷.

¹⁷ The WG notes that the new changes to the IRTP give a registrar the discretion to lift the lock at the beneficial user's request, and that no specific exceptions were created at the time the policy was reviewed.

ADDITIONAL GENERAL RECOMMENDATIONS

In addition to the recommendations it developed for each of its Charter questions, the WG also recommends that the following general principles be adopted as part of the P/P service provider accreditation program.

First, the next review of the IRTP should include an analysis of the impact on P/P service customers, to ensure that adequate safeguards are in place as regards P/P service protection when domain names are transferred pursuant to an IRTP process. Where a P/P service customer initiates a transfer of a domain name, the WG recognizes that a registrar should have the same flexibility that it has currently to reject incoming transfers from any individual or entity, including those initiated by accredited P/P services. Nevertheless, the WG recommends that, in implementing those elements of the P/P service accreditation program that pertain to or that affect domain name transfers and in addition to its specific recommendations contained in this Final Report, ICANN should perform a general “compatibility check” of each proposed implementation mechanism with the then-current IRTP.

Secondly, the WG recommends that ICANN develop a public outreach and educational program for registrars, P/P service providers and customers (including potential customers) to inform them of the existence, launch and features of the P/P service accreditation program.

Thirdly, the WG recommends that providers should be required to maintain statistics on the number of Publication and Disclosure requests received and the number honored, and provide these statistics in aggregate form to ICANN for periodic publication. The data should be aggregated so as not to create a market where nefarious users of the domain name system are able to use the information to find the P/P service that is least likely to make Disclosures.

Finally, the WG has concluded that the registrar accreditation model with its multiple steps, governed by the RAA, may not be entirely appropriate for P/P services; however, it is a useful starting point from which relevant portions may be adapted to apply to P/P service providers. The implications of adopting a particular accreditation

model will need to be worked out as part of the implementation of its policy recommendations, if adopted.

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben – Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

On February 1st, 2016, ICANN published the Determination of the Board Governance Committee (BGC) in relation to Requester's Reconsideration Request 15-21 (hereinafter: the "Second BGC Determination").

On the basis of the arguments set out in the Second BGC Determination, *"the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21."*

4. Date of action/inaction:

February 1st, 2016.

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

February 2nd, 2016.

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

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see

<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the “Application”).

Requester has elected to participate in the Community Priority Evaluation (“CPE”) in accordance with the provisions set out in the Applicant Guidebook.

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester’s application for the .GAY gTLD “*did not prevail in Community Priority Evaluation*”.

Despite having invoked ICANN’s Accountability Mechanisms on various occasions, “*the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21.*”

Therefore, the Requester is now facing contention resolution with three other applicants for the same string “*through the other methods as described in Module 4 of the Applicant Guidebook*”, requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in a “last resort” auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the EIU Determinations had been developed in accordance with ICANN’s standards, in particular those set out in the Applicant Guidebook.

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

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and does not necessarily have the public interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group in many countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the safety and security of this community and its members.

The fact that not only Requester but the gay community in its entirety is affected by the CPE Report and the Determinations is substantiated by the various letters of support for the Reconsideration Requests that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce. Requester also refers in this respect to the numerous letters of support received when developing its Application for the .GAY gTLD.

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.

In the First Determination, the BGC specified that *“new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel’s Report.”*

Now, the evidence provided by Requester shows that the EIU has appointed at least one evaluator who developed the First EIU Determination in order to develop the Second EIU Determination, which is contrary to the instructions by the BGC.

8.2. The Second BGC Determination

Section C of the Second BGC Determination reads as follows:

“The Requester contends that reconsideration is warranted because “it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,” in contravention of the BGC’s Determination on Request 14-44. However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU. Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE.” (emphasis added)

8.3. The “CPE Panel Process Document”

On August 6, 2014, ICANN published the Economist Intelligence Unit’s Process documentation for Community Priority Evaluation in view of providing

“transparency of the panel’s evaluation process”.^{1 2}

According to this CPE Panel Process Document:

*“The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”*³ (emphasis added)

The CPE Panel Process Document describes the CPE Evaluation Process as follows:

“The EIU evaluates applications for gTLDs once they become eligible for review under CPE. The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:

[...]

*As part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see “Verification of letter(s) of support and opposition” section for further details.)”*⁴ (emphasis added)

Furthermore, on page 5 of the CPE Panel Process Document, the EIU has described the process for “Verification of letter(s) of support and opposition”, which reads as follows:

“As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:”

[...]

“For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter

¹ See <https://newgtlds.icann.org/en/applicants/cpe>, § CPE Resources.

² See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf> for the actual CPE Panel Process Document.

³ CPE Panel Process Document, Page 2.

⁴ CPE Panel Process Document, Page 2, §CPE Evaluation Process, third bullet.

verification process.”

And:

“To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month.”

8.4. The EIU made a process error in allowing a third person, not even a core team member, and certainly not an “independent evaluator” to perform the verification of the letters of support and opposition

Bearing in mind the confirmation by the BGC that the “*CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements*”, and that “*the CPE Materials are entirely consistent with the Guidebook*”, the BGC confirmed – apparently on the basis of information ICANN does not want to see independently verified – that:

“The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”

Now, considering the fact that the CPE Process Document – which is considered by the BGC to be “*consistent with*” and “*strictly adheres to the Guidebook’s criteria and requirements*”, it is clear that the verification of the letters should have been performed by an independent evaluator (as emphasized in §8.2 above), and not by someone “*responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”.

It is therefore clear that, according to the CPE Panel Process Document, the point of contact for organizations had to be an evaluator. Also, the verification of the letters had to be performed by an evaluator.

Based on the statement contained in the last BGC Determination, it is clear that the BGC confirmed that the contact person for organizations was not an evaluator, and the letters of have not been verified by an evaluator.

In any case, it is obvious that – when reviewing the Second BGC Determination in light of the Applicant Guidebook and the CPE Panel Process Document –

previously defined processes and policies have not been followed, regardless of whether one sees the Applicant Guidebook and the CPE Panel Process Document as defining the same process, or that the one complements the other.

8.5. The BGC rejected Requester’s arguments that the CPE Materials imposed additional requirements than the ones contained in the New gTLD Applicant Guidebook

In the context of its First and Second Reconsideration Requests, Requester claimed that the EIU was not entitled to develop the CPE Materials in so far and to the extent they imposed more stringent requirements than the ones set forth by the Applicant Guidebook. Furthermore, Requester contended that the EIU’s use of these CPE Materials violated the policy recommendations, principles and guidelines issued by the GNSO relating to the introduction of new gTLDs.⁵

Nonetheless, the BGC confirmed in the Second BGC Determination that:

- *“none of the CPE Materials comprise an addition or change to the terms of the Guidebook;”^{6 7}*
- *“The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements”;*⁸
- *“the CPE Materials are entirely consistent with the Guidebook”.*⁹

One of the key arguments put forward by the BGC was that Requester should have challenged the development and implementation of the CPE Materials earlier, in particular *“within 15 days of the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action”.*

The BGC concluded that:

- *“[...] nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested.”;* and
- *“no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit.”¹⁰*

Requester notes that the Applicant Guidebook does not include the concept of a

⁵ Second BGC Determination, page 11.

⁶ The Second BGC Determination defines the term “CPE Materials” as “(1) the EIU’s CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN’s CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline).

⁷ Second BGC Determination, page 12.

⁸ *Ibid.*

⁹ Second BGC Determination, footnote 34.

¹⁰ Second BGC Determination, page 14.

“core team” that is appointed in the context of CPE. In fact, the Applicant Guidebook only refers to a “Community Priority Panel” that is appointed by ICANN in order to perform CPE.¹¹

Therefore, the CPE Panel Process Document introduces a concept that has not been included in the Applicant Guidebook, which only refers to “evaluators”.

Indeed, according to the CPE Panel Process Document, each application is evaluated by seven individuals, being two independent evaluators and five core team members.

The fact that the BGC confirmed that, in addition to the seven individuals, an eight person has contributed to developing the CPE Determinations, being a “*person [...] responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”, can only lead to the following conclusions:

- the CPE Panel Process Document provides for a process and composition of a team that is different from what the Applicant Guidebook states (being only a “Community Priority Panel” that performs CPE);

OR

- the team that has been composed by the EIU in order to perform CPE for Requester’s Application does not have the composition that has been defined in the Applicant Guidebook nor in the CPE Panel Process Document.

8.6. Conclusion

For the reasons set out above, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies:

- contained in the Applicant Guidebook;
- contained in the CPE Materials;
- relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester’s Application in a discriminatory manner.

Indeed, when developing the Second BGC Determination, the BGC should, on the basis of the arguments and facts set out above, have confirmed:

- that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator, as

¹¹ See Applicant Guidebook, 4-8.

prescribed by this CPE Panel Process Document, but by someone else (a “core team member” or someone “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU”; or

- that the CPE Panel Process Document *does* define and describe a process that is more stringent than the one set out in the Applicant Guidebook, which does not require the independent evaluator perform such verification of letters of support and objection.

In the first case, the process followed by the EIU would be in direct contradiction with the processes it has designed itself and, moreover, would be contrary to the First BGC Determination, which required the EIU to appoint a new evaluation panel for performing CPE.

In the second case, the BGC has erred in confirming that “*none of the CPE Materials comprise an addition or change to the terms of the Guidebook*”.

Setting aside any possible arguments regarding possibly unfounded time-barred allegations, it is obvious that the outcome of a process is often, if not always, determined by the fact whether the correct process has been followed. In any event, the above facts clearly show that the EIU and – by extension ICANN – have not.

8.7. Request for a Hearing

Bearing in mind the elements set out above, Requester respectfully submits the request to organize a hearing with the BGC in order to further explain its arguments and exchange additional information in this respect.

8.8. Reservation of Rights

Notwithstanding the fact that Requester only relates to the fact that the EIU and ICANN have not followed due process in developing the Second CPE Determination, Requester is submitting this Reconsideration Request with full reserve of its rights, claims and defenses in this matter, whether or not stated herein.

9. What are you asking ICANN to do now?

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

- (i) acknowledge receipt of this Reconsideration Request;

- (ii) determine that the Second BGC Determination is to be set aside;
- (iii) invite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;
- (iv) determine that, given the circumstances, any and all of its requests set out in §9 of Requester's Second Reconsideration Request be awarded, which are incorporated herein by reference.

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

Requester has standing in accordance with:

- (1) ICANN's By-Laws, considering the fact that Requester has been adversely affected by the Second BGC Determination; and
- (2) ICANN's Top-Level Domain Application Terms and Conditions.

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

- Yes
- No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

N/A

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

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

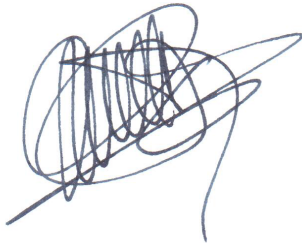
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be "Bart Lieben", with a large, sweeping flourish extending to the right.

February 17, 2016

Bart Lieben

Date

Attorney-at-Law

**RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-3
26 JUNE 2016**

The Requester, Dotgay LLC, seeks reconsideration of the Board Governance Committee's (BGC's) denial of the Requester's previous reconsideration request, Request 15-21.

I. Brief Summary.

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community-based, the Requester was invited to and did participate in CPE in October 2014 (First CPE). The Requester's Application did not prevail in the First CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that the Requester had not prevailed in the First CPE (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE (Second CPE Report). As a result, the Application remains in contention with the other applications for .GAY. Just like all other contention sets, the .GAY contention set can be resolved by ICANN's last resort auction or by some other arrangement amongst the involved applicants.

The Requester sought reconsideration of the Second CPE Report and ICANN's acceptance of it (Request 15-21). After reviewing all of the relevant material, the BGC denied Request 15-21 (Determination on Request 15-21). The Requester has now submitted Reconsideration Request 16-3 (Request 16-3), challenging the Determination on Request 15-21

contending that the BGC erroneously determined that the EIU had adhered to all applicable policies and procedures in conducting the Second CPE. Request 16-3 is premised upon one, and only one, basis: the Requester argues that the EIU improperly permitted someone other than one of the “evaluators” to send verification emails to the authors of letters of support and opposition to the Application, which the Requester contends contravenes applicable policies and procedures.

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3. In response, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support. The Presentation, however, did not relate to the sole issue raised in Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application. Rather, the Presentation focused on the merits of the Second CPE Report, which is neither the subject of Request 16-3 nor a proper basis for reconsideration.

The Requester’s claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the EIU that materially or adversely affected the Requester, and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information. Instead, the Requester relies on a purely administrative step of the verification process that the EIU took in the course of administering the Second CPE. More specifically, the EIU delegated

the physical sending of verification emails for letters of support/opposition to a member of the EIU's core team to serve as a Verification Coordinator rather than one of the evaluators due to the large number of letters of support/opposition. That protocol did not affect the Requester, materially or adversely, as is required to support reconsideration. To the contrary, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation consistent with the Applicant Guidebook (Guidebook). Additionally, the substantive evaluation of the letters was performed by the evaluators in accordance with Module 4.2.3 of the Guidebook. As such, the BGC recommends that Request 16-3 be denied.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.¹

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.² Those applications were placed into a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in Module 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.³

¹ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

² See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

³ See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).⁴ The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in the First CPE.⁵

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.⁶

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.⁷ On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).⁸

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of it, and of the First DIDP Response.⁹

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.¹⁰ The BGC directed that "the CPE Panel's Report shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE

⁴ *Id.*

⁵ See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁶ <https://www.icann.org/resources/pages/14-44-2014-10-22-en>.

⁷ <https://www.icann.org/resources/pages/20141022-02-2014-10-31-en>.

⁸ See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

⁹ See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁰ Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf> at Pg. 31.

for the Application.”¹¹ In addition to directing that new evaluators conduct the second CPE of the Application, the BGC also recommended that the EIU consider including new members of the core team to assess the evaluation results.¹²

In furtherance of the BGC’s Determination on Request 14-44, the EIU administered the Second CPE, appointing two new evaluators as directed by the BGC, and one new core team member as the BGC suggested.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.¹³

On 22 October 2015, the Requester submitted Reconsideration Request 15-21, seeking reconsideration of the Second CPE Report and ICANN’s acceptance of it.¹⁴

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN’s DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.¹⁵ On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).¹⁶

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Request 15-21), which sought reconsideration of the Second CPE Report and ICANN’s acceptance of it, and of the Second DIDP Response.¹⁷

On 1 February 2016, the BGC issued the Determination on Request 15-21, finding that Request 15-21 should be denied.¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

¹⁴ <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁵ See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁶ See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁷ See generally <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

The Requester submitted Request 16-3 on 17 February 2016.¹⁹ Request 16-3 challenges the Determination on Request 15-21 on the sole basis that the person at the EIU who sent verification emails to the authors of letters of support and opposition to the Application was not a CPE “evaluator.”²⁰

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3.²¹ In response, Pursuant to Article IV, Section 2.12 of ICANN’s Bylaws, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support.²² The Requester, however, did not address the sole issue that is the basis for Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application.²³ Instead, the

(continued...)

¹⁸ Determination on Request 15-21, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

¹⁹ *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>. ICANN has also reviewed and considered several letters sent in support of Request 16-3, including one from Transgender Equality Uganda and one from Trans-Fuzja. (*See* <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.) In addition, ICANN also reviewed and considered two letters from CenterLink that the Requester submitted along with its Presentation materials, indicating CenterLink’s support of the Requester’s Application. (*See id.*)

²⁰ *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²¹ Request, § 8.7, Pg. 8.

²² *See* <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

²³ *See* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

Presentation addressed the merits of the Second CPE Report, which is not the subject of Request 16-3 and is not a proper basis for reconsideration.²⁴ ²⁵

B. Relief Requested.

The Requester asks that ICANN:

1. “[A]cknowledge receipt of this Reconsideration Request;”
2. “[D]etermine that the [Determination on Request 15-21] is to be set aside;”
3. “[I]nvite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;”
and
4. “[D]etermine that, given the circumstances, any and all of its requests set out in § 9 of Requester’s Second Reconsideration Request be awarded, which are incorporated herein by reference.”²⁶

III. The Relevant Standards For Reconsideration Requests And CPE.

A. Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a staff or Board action or inaction in accordance with specified criteria, which include a requirement that the requester has been “materially [and] adversely affected” by the challenged action or inaction.²⁷ The Requester here

²⁴ *Id.*

²⁵ The BGC also notes that it received and considered the 24 June 2016 letter from dotgay LLC, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dotgay-to-icann-bgc-24jun16-en.pdf>.

²⁶ Request, § 9, Pgs. 8-9.

²⁷ Bylaws, Art. IV, § 2. Article IV, §§ 2.1-2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been materially and 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

challenges both staff and Board action.²⁸

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.²⁹ In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the EIU violated any established policy or procedure.

A Board action may be subject to reconsideration where it was undertaken “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, where it was “taken as a result of the Board’s reliance on false or inaccurate material information.”³⁰ Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

B. Community Priority Evaluation.

(continued...)

(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.

²⁸ While the Requester indicated that it challenged staff action (see Request, § 2, Pg. 1), the crux of Reconsideration Request 16-3 is a challenge to the BGC’s Determination on Request 15-21, and as such, challenges both Board and staff action.

²⁹ See BGC Recommendation on Reconsideration Request 13-5, *available at*

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc>.

³⁰ Bylaws, Art. IV, § 2.

The standards governing CPE are set forth in Module 4.2 of the Guidebook. The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's CPE provisions³¹ and summarizing those provisions.³² In addition, the EIU has published supplementary guidelines (CPE Guidelines) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.³³

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.³⁴ CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.³⁵ A CPE panel's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

IV. Analysis And Rationale.

The Requester seeks reconsideration of the Determination on Request 15-21, arguing that the BGC should have "confirm[ed]" that the EIU did not follow applicable policies and

³¹ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

³² CPE Panel Process Document, available at <https://newgtlds.icann.org/en/applicants/cpe>.

³³ CPE Guidelines, available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

³⁴ Guidebook, § 4.2.

³⁵ *Id.* at § 4.2.2.

procedures in conducting the Second CPE.³⁶ Specifically, the Requester claims that the EIU violated the CPE Panel Process Document because the person who sent verification emails to the authors of letters of support and opposition to the Application was a member of the core team (serving as a Verification Coordinator) and was not one of the two “evaluators” assigned to conduct the CPE.³⁷ However, the Requester fails to identify any conduct by the EIU that contradicts an established policy or procedure in a manner that materially and adversely affected the Requester.³⁸ The process of verifying letters is an administrative task.³⁹ Regardless of which person physically sent the verification emails, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation in accordance with Module 4.2.3 of the Guidebook, which included an evaluator’s substantive evaluation of the letters in compliance with the CPE Panel Process Document.

Moreover, the Requester does not identify any material information the BGC did not consider in reaching the Determination on Request 15-21, or any reliance upon false or inaccurate information.⁴⁰ The act of sending a verification email is not material, so long as the evaluators performed their task of evaluating the letters of support and opposition. There is no claim that the evaluators did not conduct the actual evaluation. As such, the Determination on Request 15-21 properly confirmed that reconsideration was not warranted based on the EIU’s decision to delegate the sending of verification emails to a Verification Coordinator, and thus the Determination on Request 15-21 does not itself warrant reconsideration.⁴¹

³⁶ Request, § 8.6, Pg. 7.

³⁷ *Id.*, § 8.4, Pgs. 5-6.

³⁸ See Bylaws, Art. IV, §§ 2.1-2.

³⁹ See <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 2.

⁴⁰ See Bylaws, Art. IV, § 2.

⁴¹ While Request 16-3 generally is styled as a request for the BGC to reconsider the Determination on Request 15-21, the Requester also argues that the “EIU ha[s] not respected the policies and processes” governing CPE. Request, § 8.6, Pg. 7.

A. The EIU’s Letter Verification Process Did Not Violate Applicable Policies And Procedures In A Manner That Materially Or Adversely Affected The Requester.

The Requester’s claims arise entirely out the CPE Panel Process Document’s provisions that an “evaluator” verifies letters of support and opposition to an application undergoing CPE, which the Requester claims did not occur here.⁴² In other words, the Requester argues that reconsideration is warranted because the EIU did not adhere to the CPE Panel Process Document insofar as the person who physically sent the emails verifying the letters of support and opposition was not an “evaluator” but, instead, was another EIU employee.⁴³ However, the EIU’s decision to delegate this administrative task to an employee cannot support reconsideration, because it did not affect the substance of the Second CPE in any fashion and did not change the fact that the evaluators conducted the actual evaluation of the letters.

To start, the Determination on Request 15-21 already addressed this argument.⁴⁴ The Determination on Request 15-21 acknowledged that the verification emails were sent by a person “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”⁴⁵ The Determination on Request 15-21 also explained that the CPE Panel Process Document mandates that one of the two evaluators

⁴² CPE Panel Process Document at Pg. 5; Request, § 8.4, Pg. 5-6. Request 16-3 also contains a sentence arguing that the EIU appointed one of the same evaluators to conduct the Second CPE as performed the First CPE. Request, § 8.1, Pg. 3. The powerpoint to which the Requester referred during its Presentation also fleetingly touched upon this issue. (See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>, at Pg. 13.) However, other than in passing reference, Request 16-3 does not argue that reconsideration is warranted because the same evaluator conducted the Second CPE. Instead, that argument appears to be a vestige from the Requester’s Request 15-21, which raised that argument. (See Request 15-21, § 8.2, Pg. 5, available at <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.) As explained in the Determination on Request 15-21, that argument fails to support reconsideration because it is factually inaccurate; ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and added a new core team member for the administration of the Second CPE. (Determination on Request 15-21 at Pgs. 28-29.)

⁴³ See Request, § 8.1, Pg. 3.

⁴⁴ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁵ *Id.*, Pgs. 28-29.

be “responsible for the letter verification process.”⁴⁶ Here, the CPE Panel members delegated the physical sending of the verification emails to a Verification Coordinator.⁴⁷ This procedure is in accord with the CPE Panel Process Document’s provision that a letter is verified when its author “send[s] an email *to the EIU* acknowledging that the letter is authentic.”⁴⁸ While the CPE Panel Process Document indicates that an “evaluator” will contact letter authors,⁴⁹ there is no policy or procedure that forbids the EIU from delegating the administrative task of sending the verification email to someone other than the actual “evaluator,” as the Determination on Request 15-21 correctly noted.

Moreover, the Requester has not demonstrated how it was materially or adversely affected by the EIU’s decision to delegate this administrative function to an administrative employee. On that ground alone, no reconsideration is warranted.⁵⁰ The identity of the person physically sending the verification emails did not have any impact upon the results of the verification or the results of the Second CPE as a whole; the verification results were communicated to both of the evaluators and the entire core team to permit a full and complete evaluation in accordance with the Guidebook, which included an evaluator’s substantive evaluation of the verified letters in compliance with the CPE Panel Process Document.⁵¹ Nor is there anything inherently nefarious to the EIU’s decision in this regard; much as a company executive might delegate to her assistant the physical sending of emails sent on her behalf, the EIU evaluators assign the Verification Coordinator the task of physically sending the verification emails. In short, the Requester has not indicated how it was affected by the decision to delegate

⁴⁶ See CPE Panel Process Document at Pg. 5; Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁷ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁸ CPE Panel Process Document at Pg. 5 (emphasis added).

⁴⁹ *Id.*

⁵⁰ Bylaws, Art. IV, §§ 2.1-2

⁵¹ Guidebook § 4.2.3; CPE Panel Process Document at Pg. 5.

the sending of the verification emails to a Verification Coordinator, much less how it was materially or adversely affected, as is required to support a reconsideration request.⁵²

Nonetheless, “[i]n an effort to provide greater transparency on an administrative aspect of the Community Priority Evaluation (CPE) process,” the EIU has provided “additional information regarding verification of letters of support and opposition” (EIU Correspondence).⁵³ The EIU Correspondence confirms that “the two evaluators assigned to assess a specific application review the letter(s) of support and opposition. For every letter of support/opposition received, both of the evaluators assess the letter(s) as described in the Guidebook, section 4.2.3 Criterion 4: Community Endorsement.”⁵⁴ As such, the EIU Correspondence confirms that the EIU complied with the CPE Panel Process Document’s instruction that an evaluator “assesses both the relevance of the organization and the validity of the documentation.”⁵⁵ The EIU Correspondence further explains that:

[t]he process of verification of letter(s) is an administrative task. . . . [F]or evaluations involving large numbers of letters of support or opposition, the EIU assigned its Project Coordinator, a senior member of the core team, to serve as Verification Coordinator and to take the purely administrative step of ensuring that the large volume of verification emails, as well as follow-up emails and phone calls, were managed efficiently.⁵⁶

The need for a Verification Coordinator arose when an “administrative issue[] related to the verification of letters of support” occurred, namely certain entities submitted letters of support or opposition to multiple applications.⁵⁷ Because different evaluators were assigned to conduct CPE with respect to the various applications, those entities began to receive verification

⁵² See Bylaws, Art. IV, §§ 2.1-2.

⁵³ EIU Correspondence, *available at* <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 1.

⁵⁴ *Id.*

⁵⁵ CPE Panel Process Document at Pg. 5.

⁵⁶ EIU Correspondence at Pg. 2.

⁵⁷ *Id.*

emails from different people within the EIU.⁵⁸ The EIU “received complaints from the authors of the letters, who requested that they be contacted by a single individual,” thus the EIU assigned the Verification Coordinator the administrative task of sending all verification emails.⁵⁹ As the EIU Correspondence emphasizes, “the results of the verification [a]re communicated to both of the evaluators” and it is the evaluators who score the applications.⁶⁰

In sum, the EIU Correspondence confirms that the Verification Coordinator sends the verification emails purely for administrative ease, and that the Requester was not affected (let alone materially or adversely) by the delegation of this administrative task from the evaluator to the Verification Coordinator. As such, the Requester has not identified any conduct on the part of the EIU that warrants reconsideration.

B. The Requester Has Not Shown That The Determination on Request 15-21 Was The Result Of The BGC Failing To Consider Material Information, Or Considering False Or Inaccurate Information.

The Requester argues that reconsideration of the Determination on Request 15-21 is warranted because *either*: (1) “the BGC should . . . have confirmed[] that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator”; *or* (2) the CPE Panel Process Document sets forth “a process that is more stringent than the one set forth in the Applicant Guidebook, which does not require the independent evaluator [to] perform such verification of support and objection.”⁶¹ Reconsideration is not warranted on either ground, because the Requester has not shown that the BGC failed to consider material information or

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at Pg. 1.

⁶¹ Request, § 8.6, Pg. 8.

relied on false or inaccurate information with respect to either issue. The Requester has not shown that either basis for reconsideration it poses actually took place.

First, as explained *supra*, the EIU substantively adhered to the CPE Panel Process Document and the Guidebook in administering the Second CPE, including with respect to the letter verification process. The Requester has not identified any material information the BGC failed to consider, or any false or inaccurate information it relied upon in reaching the Determination on Request 15-21 that no reconsideration was warranted with respect to the fact that an EIU administrative employee sent the verification emails during the Second CPE. As such, no reconsideration of the Determination on Request 15-21 is warranted.⁶²

Second, the Requester argues that the BGC “erred in confirming that ‘none of the CPE Materials comprise an addition or change to the terms of the Guidebook.’”⁶³ As an initial matter, as the Determination on Request 15-21 explained, any challenge to the CPE materials (including the CPE Panel Process Document) is time-barred.⁶⁴ The Requester argues that through its reconsideration requests and the Determination on Request 15-21, it has discovered that the CPE Panel Process Document “introduces a concept that has not been included in the . . . Guidebook, which only refers to ‘evaluators’.”⁶⁵ However, the CPE Panel Process Document does not in fact comprise an addition or change to the terms of the Guidebook. The Guidebook provides that “[c]ommunity priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications.”⁶⁶ The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to

⁶² See Bylaws, Art. IV, § 2.

⁶³ Request, § 8.6, Pg. 8 (quoting Determination on Request 15-21 at Pg. 12).

⁶⁴ Determination on Request 15-21 at Pgs. 11-12.

⁶⁵ Request, § 8.5, Pg. 7.

⁶⁶ Guidebook § 4.2.2.

implement the Guidebook's CPE provisions⁶⁷ and summarizing those provisions.⁶⁸ The fact that someone other than an evaluator physically sends verification emails to authors of letters of support or opposition does not mean anyone other than a "community priority panel" has "review[ed]" the Application, as the Guidebook instructs.⁶⁹

In sum, the Requester has not demonstrated that the Determination on Request 15-21 reflects a failure on the part of the BGC to consider material information, or that the BGC considered false or inaccurate information, in concluding either that the EIU substantively complied with the CPE Panel Process Document, or that the CPE Panel Process Document adheres to the Guidebook. Therefore, the BGC thinks that no reconsideration of the Determination on Request 15-21 is warranted.

V. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration. The BGC therefore recommends that Request 16-3 be denied. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 March 2016. However, the Requester sought, was

⁶⁷ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

⁶⁸ CPE Panel Process Document.

⁶⁹ Guidebook, § 4.2.2.

invited to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.⁷⁰

The timing of the Presentation delayed the BGC's consideration of Request 16-3. The first practical opportunity to address Request 16-3 after receiving the Presentation was 26 June 2016.

⁷⁰ See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

REFERENCE MATERIALS – BOARD SUBMISSION 2016.08.09.2c

Title: Reconsideration Request 16-3

Item Removed From Agenda

Item Removed From Agenda

**ARTICLES OF INCORPORATION
[POST-TRANSITION IANA]**

1. The name of this corporation is [Post-Transition IANA] (the “**Corporation**”).
2. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for public and charitable purposes. Such purposes shall be within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “**Code**”) or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code.
3. The specific purpose of the Corporation is to operate exclusively to carry out the purposes of the Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation (“**ICANN**”), by performing the IANA functions on behalf of ICANN.
4. The name of the Corporation's initial agent for service of process in the State of California, United States of America is [Corporation Trust Company].
5. The initial street and mailing address of the Corporation is 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536.
6. The Corporation shall have only one member (as defined in Section 5056 of the California Corporations Code), which shall be ICANN.
7. No substantial part of the activities of the Corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate or intervene in any political campaign (including the publishing or distribution of statements) on behalf of or in opposition to any candidate for public office.
8. The property of the Corporation is irrevocably dedicated to public and charitable purposes and no part of the net income or assets of this Corporation shall ever inure to the benefit of any director, trustee, member or officer of the Corporation, or to any private person, except that the Corporation is authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3.
9. Upon the dissolution or winding up of the Corporation, any assets remaining after payment, or provision for payment, of all debts and liabilities of the Corporation shall be distributed to ICANN, unless ICANN no longer qualifies as a tax-exempt organization under Section 501(c)(3) of the Code in which case such assets shall be distributed for charitable or educational purposes within the meaning of Section 501(c)(3) of the Code to one or more other organizations that lessen the burdens of government and promote the global public interest in the operational stability of the Internet and that are exempt from tax under Section 501(c)(3) of the Code.

10. In no event shall the Corporation be controlled directly or indirectly by one or more “disqualified persons” (as defined in Section 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of Section 509 (a) of the Code.
11. The Corporation may engage in any activities that are reasonably related to or in furtherance of its stated purposes, or in any other charitable activities, provided that the Corporation will not carry on any activities not permitted to be carried on (i) by a corporation exempt from federal income tax under Section 501(c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Code. The Corporation shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.
12. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation or its members for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 12 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.
13. These Articles may only be adopted, amended, or repealed in whole or in part with the approval of (a) at least four of the five directors of the Corporation, and (b) ICANN.

DATE: _____

Incorporator

ARTICLES OF INCORPORATION
[POST-TRANSITION IANA]

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DATE: _____

Incorporator

Staff Report of Public Comment Proceeding Template (v4.0)

Overview:

*This template is being provided to assist staff in the preparation of a report that summarizes and, where appropriate, analyzes public comments. Please save the document in either *.doc/*.docx and submit to: public-comment@icann.org.*

Instructions:

- **Title:** Please enter the exact title that was used in the original Announcement.
- **Comment Period:** Enter the original Open, Close, and Staff Report Due Dates. (*Format: Day Month Year, e.g., 15 June 2016*). Please note if any extensions were approved.
- **Prepared By:** This field will accommodate a situation where an individual or group other than the principal staff contact, e.g., a Working Group, develops a report.
- **Important Information Links:** Do not enter any information in this section; the Public Comment Team will provide the appropriate links.
- **Section I: General Overview and Next Steps:** Please use this area to provide any general summary or highlights of the comments and indicate the next steps following publication of the report.
- **Section II: Contributors:** Please use the tables provided to identify those organizations/groups and individuals who provided comments. It is not necessary to identify “spammers” or other commenters who posted off-topic or irrelevant submissions. In addition, if there is a large number of submissions, it is acceptable to characterize the respondent communities rather than attempt to list them individually in tables.
- **Section III: Summary of Comments:** This section should provide an accurate, representative, and thorough review of the comments provided. As the disclaimer explains, this is a summary only of those contributions that the author determines to be appropriate to the topic’s purpose. Authors are cautioned to be conscious of bias and avoid characterizing or assessing the submitted public comments. If an analysis of the comments is intended, please use Section IV below.
- **Section IV: Analysis of Comments:** Please use this section for any assessments, evaluations, and judgments of the comments submitted and provide sufficient rationale for any positions that are advocated. If an analysis will not be undertaken or, if one will be published subsequently, please add a note to that effect in this section.

Note: You may also utilize, for this section, the Public Comment Issue Tracking Checklist template, which is available at: <https://community.icann.org/x/d67hAg>.

Staff Report of Public Comment Proceeding

Draft PTI Articles of Incorporation			
Publication Date:	05 August 2016		
Prepared By:	ICANN Staff		
Public Comment Proceeding		Important Information Links	
Open Date:	01 July 2016		
Close Date:	31 July 2016		
Staff Report Due Date:	05 August 2016		
Staff Contact:		Email:	samantha.eisner@icann.org
Section I: General Overview and Next Steps			
<p>Now that the IANA Stewardship Transition Coordination Group (ICG) and Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) proposals have been transmitted to the National Telecommunications and Information Agency (NTIA), one of the key implementation planning items is to incorporate an affiliate, referred to as PTI, for the performance of the naming-related IANA functions. ICANN also intends to subcontract the performance of the numbering- and protocol parameter-related IANA functions to PTI.</p> <p>In order to incorporate an affiliate, which is a necessary step in ICANN's planning efforts for the implementation of the ICG Proposal, a first step is to file articles of incorporation. There are legal requirements for the content of articles of incorporation.</p> <p>The proposed draft of the PTI Articles of Incorporation was developed collaboratively by the ICANN legal team and the independent counsel hired to advise the IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship).</p> <p>These proposed draft Articles were out for a 30-day public comment from 01 July – 31 July to allow any interested party to review and provide feedback. This timeline allows for comments to be analyzed and incorporated in time for an adoption of the PTI Articles by the ICANN Board and filing for the incorporation of PTI by mid-August.</p> <p>Next Steps:</p> <p>The PTI Articles have been updated to reflect changes to address comments. The updated document is provided along with this Summary. ICANN will be presenting this document to the ICANN Board to authorize the formation of PTI.</p>			
Section II: Contributors			

At the time this report was prepared, a total of **three (3)** community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
Non Commercial Stakeholder Group	Matthew Shears	NCSG
Cross Community Working Group on IANA Stewardship Transition	Jonathan Robinson	CWG-Stewardship
Registry Stakeholder Group	Stephane Van Gelder	RySG

Individuals:

Name	Affiliation (if provided)	Initials

Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

The RySG comments noted its view that the “sole and the most important purpose of [PTI] is to carry out the IANA functions” and suggested a modification of Article 3 (Purpose) to remove the language “for the benefit of” and replace it with “perform the IANA functions”. The RySG also noted its concern with the language on amendment of the Articles (Article 13), and suggested some revision.

The CWG-Stewardship submitted comments as well as a proposed draft modification to the PTI Bylaws. The CWG-Stewardship provided specific suggestions of edits to refine the purpose of PTI as set forth at Article 3 of the Bylaws, that both reflect the tax concerns that need to be included in the document and that more appropriately tailor the document to reflect the role of the PTI. On Article 13 (amendments), the CWG-Stewardship proposed a modification to the language to better reflect the state of discussions within the CWG-Stewardship and align with the PTI Bylaws as contemplated for adoption.

The NCSG provided comments on four Articles:

Article 3 (Purpose) – The NCSG questioned whether language should be added to the purpose to allow for a change in membership to PTI or a change in contracting with ICANN for the performance of the IANA functions. The NCSG recommended modifying the reference to ICANN in the purpose section to a reference to “its members.”

Article 9 (Distribution of Assets) – The NCSG suggests that there should be a specification in this section that the IANA Functions are not assets for the purposes of this provision, and inserting language on the limitation of the distribution of the naming functions based on the processes for separation included in the CWG-Stewardship proposal.

Article 10 (Disqualified Purposes) – The NCSG requested information on why Section 4946 of the U.S. IRS code should be relied upon, as opposed to Section 4958. The NCSG also requested information

on how this would need to be modified in the event PTI separates from ICANN. Finally, the NCSG requested a clarification on whether the code reference is required by law.

Article 11 (Limitation to Exempt Purposes) – The NCSG questioned whether the scope of the language in this provision had the effect of allowing activities beyond the narrow purpose and mission of PTI. The NCSG was specifically concerned with the wording “reasonably related to or in furtherance of its stated purpose.”

The NCSG also raised a general question of the power of the PTI Board to ignore the findings of one of the reviews called for within the ICANN Bylaws of the PTI Operations, such as the IANA Functions Reviews or a Separation Cross Community Working Group. Finally, the NCSG asked whether the Articles could be used to prevent a separation.

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

Based on the comments received, some edits are being made to the PTI Articles of Incorporation.

Article 3 – Purpose

Understanding the concerns raised by the RySG, CWG-Stewardship and the NCSG, the purpose section has been re-worded to the language included within the CWG-Stewardship’s submission. This wording limits PTI’s purpose to the performance of the IANA Functions, while also addressing legal concerns that the wording needs to be appropriate to form PTI as a specific “supporting organization” of ICANN (using a U.S. Tax Code meaning of “supporting organization”) for tax exemption purposes. As a result, the language of concern to the RySG has been removed.

On the NCSG’s further concerns about the possibility of additional members in the future, and the removal of the reference to ICANN, neither of those comments can be taken on. The CWG-Stewardship proposal did not call for PTI to be developed as an entity that could take on more members; it specified PTI as having a sole member. As a result, the wording at Article 3 (as well as Article 6, specifying ICANN as the sole member) are appropriate for consistency with the Proposal. Additionally, the reference to ICANN within Article 3 is not based on ICANN’s role as the sole member of PTI, but rather based on the fact that PTI will be a “supporting organization” to ICANN by performing the IANA functions. Therefore, the specific reference to ICANN is appropriate in this instance.

Article 9 – Distribution of Assets

As the IANA functions are services, and not assets, the NCSG’s request for specification that the services are not assets for the purposes of the Articles would likely cause confusion as opposed to adding clarity to this section. Because this section is about distribution of assets – and not about identification of a new provider for the IANA naming functions – the concerns raised by the NCSG to specify that the naming functions cannot be distributed outside of the processes specified in the CWG-Stewardship Proposal do not appear to require a change.

Article 10 – Disqualified Persons

In response to the NCSG's query, the reference to Section 4946 is appropriate in this section because PTI will be a "supporting organization" of ICANN (using a U.S. Tax Code meaning of "supporting organization"). The tax code setting out supporting organization requirements, Section 509(a)(3)(C), states that such an organization must not be "controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations described in paragraph (1) or (2)." Given this explicit reference in the tax code, it is important to have Article 10 reflected within the PTI Articles.

To the NCSG's question of what would happen if PTI separates from ICANN, the impact of such a separation on PTI's governing documents would have to be evaluated at that time, and taking into consideration the specific circumstances of the separation.

Article 11 – Limitation to Exempt Purposes

The NCSG raised a valuable concern of upholding PTI's limited, narrow purpose. The primary purpose of this Article is to require PTI to act only in furtherance of charitable purposes, and not engage in impermissible activities that 501(c)(3) organizations may not engage in. This language does not authorize PTI to act outside of the purpose as stated at Article 3.

Article 13 – Amendment

Since the time that the Articles were posted for comment, there has been substantial conversation within the CWG-Stewardship on areas where the PTI Board would need to apply a higher threshold to its decisions, including on Amendments to the PTI Articles. The language presented by the CWG-Stewardship in its comments, which presents a straightforward 4/5 majority approval, has been adopted. This is also aligned with the RySG's comment.

RESPONSE TO GENERAL QUESTIONS

In developing the PTI Articles, the focus was on delivering Articles that are consistent with the CWG-Stewardship Proposal. Implicitly, that includes making sure that there is nothing in the Articles that would allow for the PTI Board to ignore or act contrary to the accepted IFR recommendations (or recommendations from other reviews), or to stand in the way of separation. ICANN has already made commitments on how it will consider the outcomes of these reviews, and there is nothing in the PTI Articles that would impair those requirements. ICANN, as the sole member of PTI, also has incentive to make sure that PTI is acting in alignment with the recommendations. We thank the NCSG for raising these concerns.

AMENDED AND RESTATED ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

1. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the “**Corporation**”).
2. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “**Code**”), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 4 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by carrying out the mission set forth in the bylaws of the Corporation (“**Bylaws**”). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.
3. 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.
4. Notwithstanding any other provision of these Articles:
 - a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501(c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170(c)(2) of the Code.

- b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.
 - c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.
 - d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 2 hereof.
5. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 5 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.
6. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 2 hereof and, if possible, to a § 501(c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.
7. Any amendment to these Articles shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community, a California nonprofit association established by the

Bylaws (the “**Empowered Community**”), following procedures set forth in Article 25.2 of the Bylaws.

8. Any transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN’s assets shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community prior to the consummation of the transaction, following procedures set forth in Article 26 of the Bylaws.

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3. 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.
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5. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 5 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.
6. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 2 hereof and, if possible, to a § 501(c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.
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AMENDED AND RESTATED

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6. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 2 hereof and, if possible, to a § 501(c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.
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Staff Report of Public Comment Proceeding Template (v4.0)

Overview:

*This template is being provided to assist staff in the preparation of a report that summarizes and, where appropriate, analyzes public comments. Please save the document in either *.doc/*.docx and submit to: public-comment@icann.org.*

Instructions:

- **Title:** Please enter the exact title that was used in the original Announcement.
- **Comment Period:** Enter the original Open, Close, and Staff Report Due Dates. (*Format: Day Month Year, e.g., 15 June 2016*). Please note if any extensions were approved.
- **Prepared By:** This field will accommodate a situation where an individual or group other than the principal staff contact, e.g., a Working Group, develops a report.
- **Important Information Links:** Do not enter any information in this section; the Public Comment Team will provide the appropriate links.
- **Section I: General Overview and Next Steps:** Please use this area to provide any general summary or highlights of the comments and indicate the next steps following publication of the report.
- **Section II: Contributors:** Please use the tables provided to identify those organizations/groups and individuals who provided comments. It is not necessary to identify “spammers” or other commenters who posted off-topic or irrelevant submissions. In addition, if there is a large number of submissions, it is acceptable to characterize the respondent communities rather than attempt to list them individually in tables.
- **Section III: Summary of Comments:** This section should provide an accurate, representative, and thorough review of the comments provided. As the disclaimer explains, this is a summary only of those contributions that the author determines to be appropriate to the topic’s purpose. Authors are cautioned to be conscious of bias and avoid characterizing or assessing the submitted public comments. If an analysis of the comments is intended, please use Section IV below.
- **Section IV: Analysis of Comments:** Please use this section for any assessments, evaluations, and judgments of the comments submitted and provide sufficient rationale for any positions that are advocated. If an analysis will not be undertaken or, if one will be published subsequently, please add a note to that effect in this section.

Note: You may also utilize, for this section, the Public Comment Issue Tracking Checklist template, which is available at: <https://community.icann.org/x/d67hAg>.

Staff Report of Public Comment Proceeding

TITLE: Reinstated ICANN Articles of Incorporation			
Publication Date:	29 July 2016		
Prepared By:	ICANN Staff		
Public Comment Proceeding		Important Information Links	
Open Date:	27 May 2016		
Close Date:	13 July 2016		
Staff Report Due Date:	29 July 2016		
Staff Contact:		Email:	Samantha.eisner@icann.org
Section I: General Overview and Next Steps			
<p>Now that the IANA Stewardship Transition Coordination Group (ICG) and Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) proposals have been transmitted to the National Telecommunications and Information Agency (NTIA), one of the key implementation planning items is to amend the ICANN Articles of Incorporation to reflect the recommendations in those Proposals.</p> <p>The proposed draft of the Restated Articles of Incorporation was developed collaboratively by the ICANN legal team and the independent counsel hired to advise the CCWG-Accountability and the Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions (CWG-Stewardship). Both the independent counsel to the community groups and ICANN's General Counsel agree that the draft Restated Articles are consistent with the community proposals relating to the IANA Stewardship Transition.</p> <p>These proposed draft Restated Articles were out for a 30-day public comment from 27 May – 13 July to allow any interested party to review and provide feedback. This timeline allows for comments to be analyzed and incorporated in time for an adoption of the Restated Articles by the ICANN Board.</p> <p>Next Steps</p> <p>In response to the comments received, there have been slight modifications to the Restated Articles which are posted with this Report. The ICANN Board will be requested to approve the Restated Articles and direct the filing of these Restated Articles if and when the NTIA's IANA Functions Contract with ICANN expires.</p>			
Section II: Contributors			

At the time this report was prepared, a total of six (6) community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
The Internet Service and Connectivity Providers Constituency	Olivier Muron	ISPCP
Business Constituency	Steve DelBianco	BC
Cross Community Working Group on Enhancing ICANN Accountability	Leon Sanchez, Thomas Rickert & Mathieu Weill	CCWG-Accountability
The Intellectual Property Constituency	Gregory S. Shatan	IPC

Individuals:

Name	Affiliation (if provided)	Initials
Brian Carpenter		
Brett Schaefer & Paul Rosenzweig	The Heritage Foundation	

Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

Brian Carpenter objected to the deletion of historical text that described ICANN's mission, and questioned reflecting the mission through a reference to the ICANN Bylaws. He requested that ICANN's mission be reflected in the Articles as a protection against mission creep, and suggested it was more appropriate for the mission to be in the Articles.

The Heritage Foundation provided proposed text to include the concept of "incorporation" into the Articles, as opposed to "organized", as well as specifying ICANN's principal office, so as to confirm the status of California law within the design of ICANN and the recent accountability enhancements. The Heritage Foundation also requested a modification to the text regarding the definition of the global public interest, replacing a "may" with a "shall". The Heritage Foundation also questioned the deletion of historic text regarding "disqualified persons" and requested the Board to provide an explanation for the deletion of the text, including specific analysis.

The ISPCP commented that the draft is consistent and reflects the consensus outcomes of the work in the Stewardship Transition Process.

The BC commented that the Restated Articles reflect changes required to implement the CCWG-Accountability and CWG proposals. While relying on legal statements that there is no difference between "incorporation" or "organized", the BC requests that the original text of "organized under" remain, but with a footnote explaining that they are equivalent words.

The CCWG-Accountability provided proposed language to address the "may" versus "shall" issue in relation to the definition of global public interest. The CCWG-Accountability referred to its proposal in the development of language. Finally, the CCWG-Accountability identified a typo that the counsel

confirmed.

The IPC provided some further analysis of issues raised by other commenters. On Brian Carpenter's concern, the IPC noted that the community would benefit from further explanation for the basis of the modification of the mission statement language in the Articles, and confirmation that this change would not expand the basis of ICANN's activities. On the removal of the "disqualified persons" language, the IPC requested further explanation to support this removal. On the definition of the global public interest, the IPC supported the clarifications provided by the CCWG-Accountability in its comments.

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

The comments require few changes to the made from the version of the Restated Articles posted for comment.

Mission

Because of the significant amount of work the community devoted to restating ICANN's mission statement within the ICANN Bylaws, and the fact that the mission statement part of the "fundamental" Bylaws that requires community approval to modify, the concerns raised by Brian Carpenter do not require modifications to the text. The risk of mission creep would not be reduced through the inclusion of the requested text in the Restated Articles. As the IPC noted, the reason for the removal of the text in the Restated Articles and reference to the Bylaws was to create an explicit incorporation of the carefully crafted mission statement into the Articles and reduce any possibility for there to be conflicting statements of ICANN's mission between the two documents. The removal of the specific mission statement language from the ICANN Bylaws does not provide any authorization for ICANN to act outside of that mission.

Incorporated versus Organized Under

On the "incorporation" issue, both ICANN and the external counsel to the CCWG-Accountability confirmed that the appropriate language for use in California Articles of Incorporation is "organized under". Because of the legal nature of this document, the "organized under" language is appropriate in the document. As a result, the suggested language presented by the Heritage Foundation is not the wording that is accepted as standard in this legal document and cannot be taken on. Similarly, the use of explanatory footnotes in Articles of Incorporation, which must be accepted by and filed with the California Secretary of State, is not a usual practice and could risk the document being rejected for filing. As a result, ICANN is not able to take on the BC's suggestion.

Principal Place of Business

Regarding the Heritage Foundation's request to insert into the Articles of Incorporation that ICANN's Principal Place of Business is California is not able to be taken on. As the external counsel to the CCWG-Accountability confirmed, including this in the Articles would not be consistent with the CCWG-Accountability's proposal. In the development of the proposal, the CCWG-Accountability elected to keep ICANN's headquarters as a matter for the standard Bylaws, and to not make that item a "fundamental" Bylaw that would require a higher threshold for amendment. Bringing in the principal place of business into the Articles would override that decision of the CCWG-Accountability.

Disqualified Persons

Both the Heritage Foundation and the IPC requested information on the removal of the disqualified persons language that was previously included in the Articles. Some of the language that is within ICANN Articles is included or necessary as a result of ICANN's tax-exempt status. The specific language about disqualified persons was likely included to address a specific tax-related situation that may have been contemplated when ICANN was formed in 1998. However, based upon the nearly 20 years of time that has elapsed, there is no tax-based reason to keep the language in the Articles today. The language describes a requirement that a 501(c)(3) organization must meet in order to be a "supporting organization" (a U.S. tax code term) of another 501(c)(3) public charity. ICANN, however, has already achieved public charity status since the time the initial Articles were adopted. Because ICANN now has a long track record of qualifying as a public charity on its own, it should not need to qualify as a supporting organization of any other entity in order to maintain that public charity status. Further, the Articles (original or Restated) do not name one or more other 501(c)(3) public charities that ICANN supports, which would be necessary for supporting organization status. On the whole, this supports the removal of the language, which if retained would be superfluous.

Definition of Global Public Interest

The Heritage Foundation, CCWG-Accountability and IPC each commented on this item. The draft Restated Articles will be modified to incorporate the language provided by the CCWG-Accountability. This language separates out the expectation that the definition of global public interest will arise from a multistakeholder process from the statement that the definition may change from time to time, which was the source of misunderstanding in the CCWG-Accountability conversations on this term. This modified language appears to be the more appropriate clarification than that provided by the Heritage Foundation.

Clarifications to Address Typographic Errors

The typographic error identified by the CCWG-Accountability was already fixed in the version posted for public comment. No further edits are necessary.

High-Level Summary of Root Zone Maintainer Agreement

Issue	Current State of Terms
Condition Precedent	<ul style="list-style-type: none"> The effectiveness of the Agreement is conditioned on ICANN accepting responsibility for coordination of root management from US Department of Commerce (DOC) and the DOC discharging Verisign from its obligations under the cooperative agreement related to the root zone management system.
ICANN Responsibilities	<ul style="list-style-type: none"> Authenticate and verify change requests and submit such requests to Verisign. Serve as the root key signing key operator. Submit the Root Zone changes to Verisign. Notify Verisign via email of Emergency Root Zone File Regenerations or Emergency Root Zone Change Submissions within two hours of receipt of a request from a TLD or registry operator. Request an Emergency Root Zone File Regeneration or submit an Emergency Root Zone Change Submission. Inform the TLD registry operator or Root Server Operator of the completion of the requested change upon notification by Verisign Issue an emergency key roll-over in accordance with a to be agreed upon plan if any key signing key component is lost or confirmed by the Parties to be compromised and re-sign all of the ZSKs. Use commercially reasonable efforts to solely use the Interface for all Root Zone Change Submissions (other than Emergency Root Zone File Regenerations) within 12 months from the effective date of the Agreement. Use commercially reasonable efforts to perform the activities set forth in the transition plans.
Verisign Services	<ul style="list-style-type: none"> Authorized to perform a technical validation of service data and notify ICANN of any discrepancy. If ICANN determines that a change should proceed, Verisign must process the change. ICANN may publish the results of Verisign’s technical validation checks. In the case of a failed technical validation, Verisign must notify ICANN of the reasons for the failure and ICANN may report the results to the applicable TLD registry operator or Root Server Operator. ICANN may publicly publish the list of technical validations performed by Verisign. Edit, generate and sign the Root Zone File. Publish the Root Zone File, root-servers.net zone file and Root Hints File. Notify the root server operators of the availability of the Root Zone File and root-servers.net zone file. Promptly respond to requests from root server operators to transfer the Root Zone File and root-servers.net zone file. Serve as the zone signing key operator and Issue an emergency key roll-over in accordance with a to be agreed upon plan if any zone signing key component is lost or confirmed by the Parties to be compromised. Use commercially reasonable efforts to participate in key management ceremonies. Maintain transition plans (that must be mutually acceptable to the Parties) for transitioning the services to a successor or ICANN as Caretaker RZM. Use commercially reasonable efforts to provide the transition services. Develop and maintain a business continuity plan and implement the plan in the event of a force majeure event. Appoint a representative to the Root Zone Evolution Review Committee.

Issue	Current State of Terms
Suspension of Services	<ul style="list-style-type: none"> • Verisign may suspend providing the Services and Additional Services (in whole or part) to comply with applicable law. The parties will meet promptly to address the issue and modify the Services and Additional Services to comply with applicable law. • Verisign is not liable for Service and Additional Service failures associated with “force majeure” events (such as earthquakes, floods, armed conflicts, labor strikes, etc).
Fees	<ul style="list-style-type: none"> • ICANN will pay Verisign \$25,000 per month for the Services. • ICANN will also pay Verisign fees for any Additional Services to be determined with the development of such Additional Services. • ICANN reimburses Verisign for all fees charged by a Government Authority to Verisign as a result of the Services. • ICANN reimburses Verisign for all sales, use and value-added tax and similar Taxes related to ICANN’s consumption of Services and Additional Services charged by a Governmental Authority to Verisign as a result of the Services.
Term	8 years with automatic renewal, unless earlier terminated pursuant to a transition process.
Initiation of Transition Process	<ul style="list-style-type: none"> • Parties can elect to initiate a process to transition to a successor provider as follows: <ul style="list-style-type: none"> ○ By either party, at any time following the fifth anniversary of the effective date of the Agreement ○ Following a merger, acquisition, consolidation, and/or other transfer of all or substantially all the assets and/or business of Verisign to a third party, (i) by ICANN or (ii) following the second anniversary of the effective date of the Agreement, by Verisign. ○ By ICANN, if Verisign materially breaches its obligations (other than an SLA) under the Agreement and does not cure within 30 days. ○ By ICANN, if Verisign fails to meet a Service Level Requirement for the same Service Level three times in three consecutive months. ○ By ICANN, if Verisign suspends its performance of the Services which materially impacts the Services for more than 7 days. ○ By ICANN, if Verisign is unable to perform due to a force majeure event for 7 days. ○ By Verisign, if ICANN materially breaches the license or confidentiality provisions and does not cure within 30 days. ○ By ICANN, if the community requests that ICANN initiate an RFP process, at any time following the third anniversary of the effective date of the Agreement. ○ By ICANN, if Verisign fails to participate in three consecutive scheduled key management ceremonies for the signing of the ZSK with a KSK. • ICANN must initiate the transition process within 120 days of the event giving rise to the transition right. Verisign may initiate the transition process at any time following the event giving rise to the transition right. • Termination is not effective until either (a) a successor RZM (following an RFP) is chosen and ready to transition or (b) ICANN steps in as a “Caretaker RZM” if there is no suitable available candidate.
Emergency Transition Process	<ul style="list-style-type: none"> • If ICANN is seeking an emergency transition due to suspension, force majeure or failure to participate in a key signing, ICANN may, through an emergency transition process, serve as the Caretaker RZM; provided that ICANN will not terminate the Agreement if Verisign resumes performing the Services prior to the successful completion of the requirements of the emergency transition plan.

Issue	Current State of Terms
	<ul style="list-style-type: none"> ICANN may publish the full Emergency ICANN Transition Plan upon either Party's initiation of the transition process.
Transition Process	<ul style="list-style-type: none"> The Agreement specifies procedures and steps to be followed in connection with the transition process. ICANN may publish a high-level version of the Community Transition Plan at any time and the full Community Transition Plan upon either Party's initiation of the transition process. The transition process is to be concluded within one year. Verisign is not required to provide any Services or Additional Services beyond the one-year transition period. If no suitable candidate agrees to the role, ICANN can serve as the Caretaker RZM, and will initiate a new RFP to identify a suitable candidate.
Indemnification	<p>Verisign indemnifies ICANN for third party claims arising from:</p> <ol style="list-style-type: none"> Verisign's gross negligence or willful misconduct Any conduct of Verisign (other than acts taken to perform the Services) that directly and proximately causes ICANN to violate any Law Verisign's breach of a warranty <p>But no obligation to indemnify if the claim arose as result of:</p> <ol style="list-style-type: none"> ICANN's breach ICANN's gross negligence or willful misconduct <hr/> <p>ICANN indemnifies Verisign for third party claims arising from:</p> <ol style="list-style-type: none"> ICANN's gross negligence or willful misconduct Verisign's violation of law directly and proximately caused by performance of the Services and/or Additional Services, entry into the Agreement or any acts by ICANN that causes Verisign to violate any Law ICANN's breach of a warranty Verisign's processing of an ICANN confirmed submission (i.e. submissions that ICANN requests proceed after being tagged by Verisign following its checks) <p>But no obligation to indemnify if the claim arose as result of:</p> <ol style="list-style-type: none"> Verisign's breach Verisign's gross negligence or willful misconduct
Limitation on Liability	<ul style="list-style-type: none"> Generally, \$2,500,000 cap per claim or series of related claims \$9,000,000 cap for the first violation of law claim and \$6,000,000 cap for subsequent violation of law claims \$10,000,000 cap generally and \$26,000,000 cap for violation of laws claims Can seek recovery for loss profits, punitive damages, etc. arising from the agreement, subject to the cap amounts. The foregoing liability limitations are renewed and apply to each 8 year term.
Sole remedy	<p>If the Agreement provides an express remedy (i.e., ICANN's only remedy for Verisign's breach of an SLA is a service credit and termination), then that is the sole remedy for such a breach.</p>
Location	<ul style="list-style-type: none"> Verisign must obtain ICANN's written approval (not to be unreasonably withheld, delayed or conditioned) prior to re-locating the Verisign RZMS to a country other than the country where it is currently located.

Issue	Current State of Terms
Assignment	<ul style="list-style-type: none"> • Neither Party can assign the Agreement without the other’s consent, which cannot be unreasonably withheld. • Verisign may assign the Agreement without ICANN’s consent in connection with a change of control of Verisign, but must provide 30 days notice prior to the consummation of the change of control. • Either Party can assign the Agreement to an Affiliate without needing consent or providing notice to the other Party. • Either Party can subcontract the Agreement upon prior notice to the other Party. • Party is required to provide other party information in connection with assignment and subcontracting arrangements.
Dispute Resolution	<ul style="list-style-type: none"> • Escalation process of consultation, mediation and arbitration. • Governing law is California.
Service Levels	<ul style="list-style-type: none"> • 99.4% monthly availability of Verisign RZMS. • With respect to Standard Root Zone Change Submissions, Verisign must publish a root zone file within 72 hours after its receipt for at least 99% of such submissions. • With respect to Emergency Root Zone File Regeneration or Emergency Root Zone Change Submissions, Verisign must publish a root zone file within 6 hours for 100% of such submissions. • With respect to Scheduled Root Zone Change Submissions, Verisign must use commercially reasonable efforts to publish a root zone file based upon such submission on the date specified by ICANN. • Verisign must publish the root zone file within 24 hours from the previous publication. • If Verisign fails to meet a service level, it will provide ICANN with a remediation plan. • ICANN will receive services credits for service level violations. • Verisign can only count up to four hours per week and eight hours per month of service maintenance against compliance with the service levels.
Intellectual property	<ul style="list-style-type: none"> • Each party disclaims any ownership rights in the Root Zone File and Service Data. • ICANN grants Verisign, to the extent applicable, a non-exclusive license to use the Service Data solely in connection with the provision of Services. • Verisign grants ICANN a non-exclusive license to access the Verisign RZMS to transmit Service Data and authorize Root Zone Change Submissions. • Verisign grants ICANN and successor root zone management providers with a license to use Verisign’s interface. • Each Party retains exclusive right to its respective intellectual property and any intellectual property it owned prior to the Agreement. • Verisign retains all rights in and to the Verisign’s intellectual property used, created, developed, modified or practiced in the performance of the Services as well as the Verisign System and ICANN retains all rights in and to the ICANN RZMS. • Intellectual property for Additional Services to be handled on case-by-case basis in the applicable Statements of Work.
Continuity	<ul style="list-style-type: none"> • Verisign will maintain a business continuity plan and implement such plan in the event of a force majeure. Verisign will periodically test this plan and will provide ICANN with a copy. • This plan will ensure that (a) the Verisign System receives the same product support level as the .com shared registration system and (b) the integrity of Service Data in the Root Zone

Issue	Current State of Terms
	File will receive the same product support level as the .com DNS resolution service.

Privileged and Confidential

ATTACHMENT A:

Privileged and Confidential

Our ref fpe/mne/
Your ref

Flip Petillion
Advocaat
Confidential - Contact
Information

June 5, 2015

By Email

ICANN
To the attention of:

Members of the ICANN Board
and

Mr Akram Atallah,
President, Global Domains Division

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Dear Members of the ICANN Board of Directors and Mr Atallah,

Re: Recent Data Exposure Issues in the New gTLD Applicant and GDD portals

I am writing to you on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds+Machines Group Limited (formerly, Top Level Domain Holdings Limited), and Radix FZC (and its subsidiary applicant DotHotel Inc.).

My clients are all applicants for the .HOTEL gTLD and express their deep concern about a recent data exposure issue that occurred in the New gTLD Applicant and GDD portals. Specifically, the user credentials of one person (D. Krischenowski) were used to conduct over 60 searches that resulted in over 200 unauthorized access incidents across an unknown number of TLDs. In this way, sensitive and confidential business information concerning several of the .HOTEL applicants was obtained. This matter is of direct concern to my clients; the situation is all the more worrying as D. Krischenowski, the holder of the user credentials, is associated with competing TLD applicants, including a competing applicant for .HOTEL, HOTEL Top-Level-Domain s.a.r.l. ('HOTEL sarl'), to which priority status has been granted and which forms the subject of discussion in a pending Independent Review Process.

The limited information that has so far become available shows that the user was deliberately looking for sensitive and confidential business information concerning competing applicants.

Allocating a critical Internet resource to an applicant associated with fraudulent action is a serious risk to the public interest that requires appropriate action by ICANN.

My clients request full information concerning this data exposure issue and the actions that have been taken by ICANN to limit damages for the affected parties. In particular, I would ask you to provide me with the following information:

- What was the precise nature of the security issue?
- When did the security issue occur?
- How could the security issue occur?
- How could the security issue have been avoided?
- How was the security issue discovered?
- Who raised the security issue?
- How did the security issue come to ICANN's attention?
- What actions did ICANN take after being informed of the security issue?
- How does ICANN enforce the portal's terms and conditions in case of obvious breach?
- What are the concrete actions that ICANN undertook vis-à-vis D. Krischenowski?

Please also send me a copy of the terms and conditions to which D. Krischenowski agreed and of the correspondence with D. Krischenowski and his legal counsel. Needless to say that a mere statement by a legal counsel denying improper or unlawful action is an insufficient ground for ICANN to refrain from taking further action.

My clients ask for full transparency and appropriate measures by ICANN.

We appreciate your attention to and consideration of this matter.

Sincerely yours,



Flip Petillion

Response to Documentary Information Disclosure Policy Request

To: Flip Petillion

Date: 5 July 2015

Re: Request No. 20150605-1

Thank you for your request dated 5 June 2015 (the “Request”), which was submitted pursuant to the Internet Corporation for Assigned Names and Numbers’ (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts, Inc. (and its subsidiary applicant Spring McCook, LLC), Minds + Machines Group Limited (formerly, Top Level Domain Holdings Limited) and Radix FZC (and its subsidiary applicant DotHotel Inc.). For reference, a copy of your Request is attached to the email forwarding this Response.

Items Requested

Your Request seeks the disclosure of the following information regarding the data exposure issue in the New gTLD Applicant and GDD (Global Domains Division) portals first reported on 1 March 2015:

1. What was the precise nature of the security issue?
2. When did the security issue occur?
3. How could the security issue occur?
4. How could the security issue have been avoided?
5. How was the security issue discovered?
6. Who raised the security issue?
7. How did the security issue come to ICANN’s attention?
8. What actions did ICANN take after being informed of the security issue?
9. How does ICANN enforce the portal’s terms and conditions in case of obvious breach?
10. What are the concrete actions that ICANN took vis-à-vis D. Krischenowski?

You also requested a copy of the terms and conditions to which D. Krischenowski agreed and the correspondence with D. Krischenowski and his legal counsel.

Response

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Simple requests for non-documentary information are not appropriate DIDP requests. Nevertheless, the majority of your questions (Items 1, 2, 3, 5, 6, 7, and 8) have been addressed by the public announcements and Q&A published on the New gTLD microsite and have been readdressed below. (See <http://newgtlds.icann.org/en/announcements-and-media/announcement-01mar15-en>, <http://newgtlds.icann.org/en/announcements-and-media/announcement-02mar15-en>, <http://newgtlds.icann.org/en/announcements-and-media/announcement-2-02mar15-en>, <http://newgtlds.icann.org/en/announcements-and-media/announcement-30apr15-en>, and <http://newgtlds.icann.org/en/announcements-and-media/announcement-27may15-en>.)

On 27 February 2015, ICANN received notice of a potential security issue affecting the New gTLD Applicant and GDD (Global Domains Division) portals. Upon notification, ICANN confirmed the reported issue and immediately took the portals offline to address the issue. (See <https://www.icann.org/news/announcement-2015-03-01-en>.) Under certain circumstances, an authenticated portal user could potentially view data of, or related to, other users. Access to, and data in, these portals is limited to New gTLD Program applicants and New gTLD registry operators. These portals contain information from applicants to ICANN's New gTLD Program and new gTLD registry operators. No other systems were affected. The portals' configuration was updated to address the issue and the portals were restored on 2 March 2015. (See <https://www.icann.org/news/announcement-3-2015-03-02-en>.)

ICANN conducted an in depth forensic investigation into whether any data was exposed to an unauthorized user. Two consulting firms reviewed and analyzed all log data going back to the activation of the New gTLD Applicant portal on 17 April 2013 and the activation of the GDD portal on 17 March 2014. The results of the investigation indicate that the portal users were able to view data that was not their own. Based on the investigation to date, the unauthorized access resulted from advanced searches conducted using the login credentials of 17 users, which exposed 330 advanced search result records, pertaining to 96 applicants and 21 registry operators. These records may have included attachment(s). These advanced searches occurred during 36 user sessions out of a total of nearly 595,000 user sessions since April 2013. Based on the information that ICANN has collected to date, our investigation leads us to believe that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted using a limited set of user credentials. The remaining user credentials, representing the majority of users who viewed data, were either used to:

- Access information pertaining to another user through mere inadvertence and the users do not appear to have acted intentionally to obtain such information. These users have all confirmed that they either did not use or were not aware of having access to the information. Also, they have all confirmed that they will not use any such information for any purpose or convey it to any third party; or

- Access information of an organization with which they were affiliated. At the time of the access, they may not have been designated by that organization as an authorized user to access the information.

(See <https://www.icann.org/news/announcement-2015-05-27-en>.)

Following the conclusion of the first phase of its forensics investigation, ICANN contacted the users who appear to have viewed information that was not their own and required that they provide an explanation of their activity. ICANN also asked them to certify that they will delete or destroy all information obtained and to certify that they have not and will not use the data or convey it to any third party. (See <https://www.icann.org/news/announcement-2015-04-30-en>.) ICANN also informed the parties whose data was viewed and provided them with information regarding the date(s) and time(s) of access and what portion(s) of their data was seen. (See *id.*)

On 27 May 2015, ICANN additionally provided the affected parties with the name(s) of the user(s) whose credentials were used to view their information without their authorization or by individuals that were not officially designated by their organization to access certain data and any explanation(s) and/or certification(s) that the user(s) provided to ICANN regarding the unauthorized access. (See <https://www.icann.org/news/announcement-2015-05-27-en>.)

With respect to Items 4, 9 and 10, these questions seek information that are not only beyond the scope of DIDP requests as noted above, but are also subject to the following DIDP Defined Conditions of Nondisclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Confidential business information and/or internal policies and procedures.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

With respect to your requests for the terms and conditions to which D. Krischenowski agreed, all New gTLD Applicant portal users are subject to the TLD Application System Terms of Use, available at <http://newgtlds.icann.org/en/applicants/tas/terms>, and the TLD Terms and Conditions, available at <http://newgtlds.icann.org/en/applicants/agb/terms>. All GDD portal users are subject to the attached Authorized User Terms and Conditions that appear when the user logs in to the portal for the first time.

With respect to your request for correspondence with D. Krischenowski and his legal counsel, this request calls for documents that are subject to the following DIDP Defined Conditions of Nondisclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, which is contained within the ICANN Accountability & Transparency: Framework and Principles please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at MyICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest because as we continue to enhance our reporting mechanisms, reports will be posted for public access.

We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

ICANN GDD Portal

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Authorized Users may post, upload and/or otherwise provide information, data or content (“User Content”) through the Portal. You are solely responsible for any User Content you provide and for any consequences thereof. You represent that you have the right to post any User Content which you post to the Portal, and that such User Content, or its use by us as contemplated, does not violate these terms and conditions, applicable law, or the intellectual property, publicity or privacy rights of others and is provided only with express written consent from any individual or entity of which the information relates. Except to the extent ICANN may review User Content for thoroughness and/or completeness, ICANN does not otherwise monitor, review, or edit User Content except to the extent expressly requested by you. ICANN reserves the right to remove or disable access to any User Content for any or no reason, including, but not limited to, User Content that, in ICANN’s sole discretion, violates these terms and conditions. ICANN may take these actions without prior notification to you. Removal or disabling of access to User Content shall be at our sole discretion, and we do not promise to remove or disable access to any specific User Content.

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Governing Law

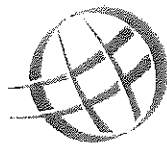
The laws of the State of California will govern these terms and conditions and your use of the Portal, without giving effect to any principles of conflicts of laws. You agree that any action arising out of these terms and conditions or your use of the Portal shall be brought in state or federal court in Los Angeles, California, and you consent to the jurisdiction of such courts.

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If any portion of these terms and conditions is deemed unlawful, void or unenforceable, that portion will be deemed severable and will not affect the validity or enforceability of the remaining provisions. These terms and conditions set forth the entire understanding between you and ICANN with respect to the subject matter hereof and supersede any prior or contemporaneous communications, representations, or agreements, whether oral or written, between you and ICANN with respect to such subject matter.

I have read this Agreement and agree to the terms and conditions.

Cancel



The Internet Corporation for Assigned Names and Numbers

ICANN

Confidential

VIA E-MAIL (GPERRONE@DESPEGAR.COM)

23 February 2016

Guillermo Luis Perrone
General Counsel
Decolar.com, Inc.

Re: New gTLD Applicant Portal

I am responding to your letter to me of 29 July 2015. As an initial matter, I apologize for the delayed response. As you know, ICANN responded to the 5 June 2015 Documentary Information Disclosure Policy Request submitted by Travel Reservations (formerly, Despegar Online SRL), Donuts, Inc., Famous Four Media Limited, Fegistry LLC, Minds+Machines Group Limited, and Fadix FZC (collectively the Requesters) which raised similar concerns that you raised in your 29 July 2015 letter; the Requesters did not seek reconsideration of that response. ICANN completed its investigation of the portal configuration issue on 19 November 2015, and is still considering the issues raised in your letter. In order for ICANN to do so, it would be helpful to have some further information from your client regarding the issues raised in your letter:

First, you state in your letter that Mr. Krischenowski has “readily apparent ties” to HOTEL Top-Level-Domain s.a.r.l. (“Hotel TLD”), a competing applicant for .HOTEL. This statement is significant to the ultimate question of how to proceed, yet Mr. Krischenowski is not one of the listed contacts in Hotel TLD’s application for .HOTEL (“Application”). You provide no evidence that Mr. Krischenowski is affiliated with Hotel TLD’s Application, other than noting that Mr. Krischenowski and the listed contacts in Hotel TLD’s Application collaborated together with respect to other new gTLD applications. It would be helpful if you could forward whatever evidence you have demonstrating the connection between Mr. Krischenowski and Hotel TLD.

Second, please forward any information demonstrating that your client has been competitively disadvantaged by the accessing of its confidential information. It does not appear that access to your client’s information could have had any effect on the Community Priority Evaluation (“CPE”) panel’s determination that Hotel TLD’s Application met the requirements for community priority. The CPE for Hotel TLD’s Application began on 19 February 2014 and was completed on 12 June 2014. ICANN’s

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Cairo Brussels Silicon Valley Washington

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ICANN

investigation indicates that your client's application was accessed on 27 March 2014, after the CPE had already commenced. Hotel TLD did not submit a change request during CPE, nor did it submit any documentation that could have been considered by the CPE panel.

I thank you for your assistance and apologize again for our delayed response.

Regards,

A handwritten signature in cursive script, appearing to read 'Akram Atallah'. The signature is written in dark ink and is positioned above the printed name.

Akram Atallah
President, Global Domains Division

Flip Petillion
fpetillion@crowell.com
Personal Contact Information
Redacted

1 March 2016

Mr Akram Atallah,
President, Global Domains Division
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

UNITED STATES OF AMERICA

Cc: Members of the ICANN Board

By e-mail to Akram.Attalah@icann.org

Dear Mr. Atallah,

Re: Data exposure issue

I am writing to you on behalf of Travel Reservations SRL ("TRS", formerly Despegar Online SRL) in response to your letter of 23 February 2016 in which you request evidence that Mr. Dirk Krischenowski is affiliated with HOTEL Top-Level-Domain sàrl ("HTLD") and information demonstrating that TRS was disadvantaged by the accessing of its confidential information.

My client appreciates that you are now addressing the issue.

The answer to your first question, the evidence of affiliation between Mr. Dirk Krischenowski and HTLD, can be found in three string confusion objections initiated by HTLD against applications by Despegar Online SRL and Booking.com. In these cases, HTLD was represented by Mr. Dirk Krischenowski of HTLD (Annexes 1 to 3). The evidence shows that Mr. Dirk Krischenowski is part of HTLD and has authority to represent HTLD.

To answer your second question, TRS has been severely impacted by the unauthorized access of its confidential information, regardless of the CPE result. The unauthorized access of this information is a clear illegal appropriation of trade secrets. These trade secrets contain sensitive business information that is now held by HTLD. As you know, TRS applied for several hotel-related TLDs, including .hotel and .hoteles. HTLD is a competing applicant for .hotel. The fact that this competing applicant's representative repeatedly accessed confidential information on business plans, contingency planning, the estimated scale of the registry's technical operation, the technical infrastructure, etc. indicates that HTLD sought to obtain an unfair competitive advantage. If the .hotel TLD is delegated to HTLD, then TRS and HTLD would be competing in the same market of hotel-related TLDs. However, HTLD would have an unfair competitive

advantage because of its access to trade secrets it maliciously obtained. The damage resulting from such unfair competitive advantage can only be undone if HTLD is precluded from operating hotel-related TLDs.

*

I am confident that the above answers your questions and allows ICANN to take the only action that is appropriate given the circumstances, which is to cancel HTLD's application for .hotel.

Indeed, allowing for HTLD's application to proceed would go against everything that ICANN stands for. It would be the acquiescence in criminal acts that were committed with the obvious intent to obtain an unfair advantage over direct competitors. Such acquiescence would be contrary to ICANN's obligations under its Articles of Incorporation and Bylaws and to ICANN's mandate to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and through open and transparent processes that enable competition and open entry in Internet-related markets. When the background screening criteria for new gTLD applicants were introduced, ICANN affirmed the right to deny an otherwise qualified application, recognizing ICANN's duty "to protect the public interest in the allocation of critical Internet resources" (gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24). In this respect, ICANN made clear that "applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or the Internet to facilitate the commission of crimes" were going to be "automatically disqualified from the program" (gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22).

In the case at hand, ICANN caught a representative of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. The situation is even more critical as the crime was committed with the obvious intent of obtaining sensitive business information of a competing applicant. It is clearly not in the public interest, and the public interest will not be protected, if critical Internet resources are allocated to HTLD. Allocating the .hotel TLD to HTLD is not in accord with any of the core values that should guide the decisions and actions of ICANN. It would go against ICANN's mandate to act in conformity with, inter alia, open and transparent processes that enable competition and open entry in Internet-related markets.

In this respect, I must admit that your letter has come somewhat as a surprise. There should be no need for applicants to remind ICANN about its core obligations.

My initial request – on behalf of several applicants concerned – for the ICANN Board to take appropriate action on HTLD's application dates back to 5 June 2015. TRS substantiated the request further on 29 July 2015. Now, seven months later, you write that you finally are considering the issue. I understand from your letter, and from the assurance that was given by counsel to ICANN at the hearing of 9 December 2015 in the IRP on the CPEs regarding .hotel and .eco, that ICANN has abandoned the position that the ICANN Board has no duty to act on the issue. At said hearing counsel to ICANN confirmed that the matter was under consideration by the Board. However, although you were contacted on 5 June 2015, there are no indications that the Board gave consideration to the matter, either before or after said hearing. Our request was never put on the agenda of the Board, although there have been numerous Board meetings since. The questions you now raise in your letter of 23 February 2016 further show that ICANN has done nothing to consider the issue.

As a matter of fact, your request for evidence that Mr. Dirk Krischenowski is affiliated with HTLD shows that ICANN has not done a proper investigation into the matter. Annexes 1 to 3, which show this affiliation, are part of ICANN's own file on HTLD. The fact that you ask TRS to provide ICANN with this information shows that ICANN has not done any investigation and that you are not in a position to publish any investigation results.

In addition, it is unclear how your request for information that TRS was disadvantaged by the fraudulent actions of Dirk Krischenowski has any bearing on the matter, and the reference you make to the CPE is somewhat disturbing. The fact that HTLD may not have used the sensitive and confidential business plans and information it had stolen with respect to the CPE is irrelevant. As explained above, the result of the CPE has no bearing on the fact that it is inappropriate to allocate a critical Internet resource to a party that has been cheating.

Moreover, the outcome of the CPE on HTLD's application has been severely criticized. In its IRP Declaration of 11 February 2016, the IRP Panel recognized that SRL's criticism on the inconsistent outcomes of the CPE had merit, and decided "*there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.*" The CPE result on HTLD's application was inconsistent, and marks were allocated in an inconsistent and unpredictable fashion. Given the serious concerns expressed by the IRP Panel, the inconsistent and erroneous CPE result on HTLD's application should not be upheld. A recent intervention of the ICANN Board (Annex 4) shows that ICANN can take all steps necessary to address inconsistent and/or unreasonable results of a process that apparently was subject to due process. I fail to see why ICANN is not taking similar steps in a CPE that was void of due process and consistency.

In view of the above, I reiterate the request that ICANN and its Board cancel the application of HTLD for .hotel at its meeting of 10 March 2016, failure of which I have the instruction to bring this matter to the attention of an IRP panel, in which case this correspondence will be made public without further notice.

This letter is not intended to be a complete statement of the elements of facts or law relevant to this matter and is sent without prejudice and reserving all rights.

Yours sincerely,



Flip Petillion

Annexes:

Annex 1: SCO Expert Determination in ICDR Case No. 50-504-T-00237-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1016-75482-en.pdf>

Annex 2: SCO Expert Determination in ICDR Case No. 50-504-T-000211-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1249-1940-en.pdf>

Annex 3: SCO Expert Determination in ICDR Case No. 50-504-T-000212-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1249-87712-en.pdf>

Annex 4: ICANN Board Resolutions 2016.02.03.12 – 2016.02.03.13

<https://www.icann.org/resources/board-material/resolutions-2016-02-03-en>

Annex 1.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

New gTLD String Confusion Panel

Re: 50 504 T 00237 13

HOTEL TOP-LEVEL-DOMAIN
S.a.r.l, Objector

and

BOOKING.COM B.V., Applicant

String: <HOTELS>

EXPERT DETERMINATION

The Parties

The Objector is HOTEL Top-Level-Domain S.a.r.l (“Objector”) and is represented by Dirk Krischenowski of Objector.

The Applicant is Booking.com B.V. (“Applicant”) and is represented by Flip Petillion of Crowell & Moring.

The New gTLD String Objected To

The new gTLD applied for and objected to is: <HOTELS.>

Prevailing Party

The Applicant has prevailed, and the Objection is dismissed.

The New gTLD String Confusion Process

Module 3 of the ICANN Applicant Guidebook (“AGB”) contains Objection Procedures and the new gTLD Dispute Resolution Procedures (“the Procedure”).

Article 1(b) of the Procedure states that “The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person and entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this new gTLD Dispute Resolution Procedure.”

As expressed in the AGB and the Procedure, there are four (4) grounds to object to the registration of new gTLDs. One of these grounds expressed String Confusion, as described in DRP Article 2(e)(i): **“(i) ‘String Confusion Objection’ refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.”**

Article 3(a) states that “String Confusion Objections shall be determined by the International Centre for Dispute Resolution.”

Procedural History of this Case

Applicant filed its Application for the string .HOTELS. Objector timely filed and served its String Confusion Objection dated March 13, 2013 with attachments Annex A1 through A5 (“Objection”). The Applicant timely filed and served its gTLD Response to String Confusion Objection dated May 16, 2013 with attachments 1 – 63 (“Response”). The International Centre for Dispute Resolution appointed the undersigned as expert (ICDR letter to parties, June 14, 2013).

Basis for Objector’s Standing to Object based on String Confusion

Objector is an applicant for gTLD string .HOTEL. The applications by Applicant (for .HOTELS) and Objector (for .HOTEL) are not in the same contention set.

Parties’ Contentions

The Objector (HOTEL Top-Level-Domain S.a.r.l) contends that registration of the applied-for string .HOTELS and its co-existence with .HOTEL would be confusing on multiple bases and would cause detriment and disruption. (Objection, Pars. 2b1-8, 3, 3a-b and e) It contends that the meaning of “hotel” and “hotels” is and is perceived as essentially identical notwithstanding that “hotels” is plural. It also contends that there is minimal acoustic difference between the words and that if registration were approved there would be potential for deceit and cybersquatting. Objector also states, in support of its objection on string confusion grounds, that others have filed community objections. Objector summarizes that co-existence of the two strings would likely deceive or cause confusion, that confusion would arise in the mind of the average reasonable internet user and consumer and that substantial detriment would arise therefrom. (Id., Par. 5)

The Applicant (Booking.com B.V.) contends that the Objection fails to meet the stringent burden to prove string confusion and asserts grounds beyond those subject to review by a string confusion panel, and that there is no likelihood of confusion between the strings. It contends that the strings are not confusingly similar, citing multiple comparisons including those using the String Similarity Assessment Tool. It also contends that the average internet user is used to small differences between TLDs, and that the strings are visually and aurally different and have different meanings. Applicant also contends that the claim of potential “detriment” as asserted by Objector is irrelevant to whether the strings are confusingly similar to each other. It concludes that “there is no risk of confusion in the mind of the average, reasonable Internet user, nor is such risk probable” and requests that the Objection be declared Unsuccessful.

Discussion and Findings

The parties agree that the standard or relevant criterion for a string objection panel, in ruling on a string objection, is set forth in Section 3.5.1 of the AGB:

“A DRSP panel hearing a string confusion objection will consider whether the applied-for TLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion.. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.”

(Objection, Sec. 2a Standards; Response, Sec. VI A. Relevant Criterion)

The AGB and Procedure provide that in a string confusion objection proceeding the Objector bears the burden of proof. (AGB, Sec. 3.5: “The Objector bears the burden of proof in each case.” Procedure, Article 20(c): “The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.”)

Upon my review and consideration of the Objection, Response and attachments to each, the Objector has not sustained its burden of proof. I find insufficient factual and/or evidentiary, and no expert opinion, support for the Objection required to sustain Objector’s burden of proof.

While it undisputed that the words “hotel” and “hotels” are similar, with only the addition of an “s” differentiating them visually, and one string may bring the other to mind, such “[m]ere association . . . is insufficient to find a likelihood of confusion.” (AGB, Sec. 3.5.1) For a likelihood of confusion to exist, it must be *probable*, not merely possible that confusion will arise in the mind of the average, reasonable Internet user.” (Id., italics added) Objector has not sustained its burden of proof in

establishing the characteristics of the average, reasonable Internet user, nor that it is probable that such user is likely to be misled or confused.

I find persuasive the degrees of similarity or dissimilarity between the strings by use of the String Similarity Assessment Tool (Response, pp. 5-7), that ICANN did not put the applications for .HOTEL and .HOTELS in the same contention set (Id., p. 7), and the analysis and conclusions of the independent expert retained by Applicant. (Id., pp. 9-10). I find the strings, of course while similar as noted above, to be sufficiently visually and aurally different for string confusion purposes.

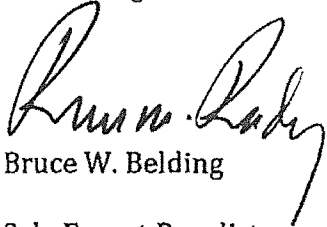
The parties' arguments and contentions regarding alleged business motives and/or attempts to limit competition, alleged detriments that could arise if .HOTELS is approved, and the existence of community objections by others are not addressed herein as they are deemed irrelevant to the task of the expert panel.

Based on the evidence and the parties' submissions, I find no likelihood of string confusion as defined in the AGB and do not find that that it would be probable that confusion would arise in the mind of the average, reasonable Internet user if the applied-for gTLD string is approved.

Determination

The Applicant has prevailed, and the Objection is dismissed.

Dated: August 8, 2013



Bruce W. Belding

Sole Expert Panelist

Annex 2.

**International Centre for Dispute Resolution
New gTLD String Confusion Panel**

Re: 50-504-T-000211-13

Hotel Top-Level-Domain S.a.r.l, OBJECTOR

And

Despegar Online SRL, APPLICANT

String: <**HOTELES**>

EXPERT DETERMINATION

The parties

The Objector is **Hotel Top-Level-Domain S.a.r.l**, 23, Boulevard Charles Marx, Luxembourg 2130, represented by Dirk Krischenowski.

The Applicant is **Despegar Online SRL**, Ruta 8 Kilometre 17,500, Synergia Building, Office 101, Zonameric, Montevideo 1600, Uruguay, represented by Joshua Bourne and Andres Patetta.

The New gTLD String Objected To

The new gTLD string applied for and objected to is: <**HOTELES**>

Prevailing Party

The Applicant has prevailed and the Objection is dismissed.

The New gTLD String Confusion Process

Module 3 of the ICANN gTLD Applicant Guidebook contains Objection Procedures and the New gTLD Dispute Resolution Procedure (“the Procedure”).

Article 1(b) of the Procedure states that “The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure.”

As expressed in the Guidebook, and the Procedure, there are four (4) grounds to object to the registration of new gTLD strings. One of these grounds expressed String Confusion, as described in DRP Article 2(e)(i): “(i) ‘**String Confusion Objection**’ refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.”

Article 3(a) states that “String Confusion Objections shall be administered by the International Centre for Dispute Resolution.”

Procedural History of this Case

The Objection, dated March 13, 2013, was filed with the International Center for Dispute Resolution (the “ICDR”) pursuant to the Procedure. The ICDR acknowledged receipt of the Objection by a letter dated March 18, 2013.

In accordance with Article 9 of the Procedure, on April 4, 2013, the ICDR notified the Objector that it had completed the review of the Objection and determined that the Objection was deficient, in that the Objector failed to furnish proof of service on Applicant. On April 11, 2013, following receipt of additional information from the Objector, the ICDR determined that the Objection now complied with the requirements of the Procedure and with requirements of the ICDR Supplementary Procedures for String Confusion Objections (Rules) (the “ICDR rules”).

In accordance with Article 11(a) of the Procedure and Article 2, 3 of the ICDR rules, on April 17 2013, the ICDR formally notified the Applicant of the Objection. In accordance with Article 11(b) and relevant communications provisions of the Procedure, the Response, dated May 16, 2013, was timely filed with the ICDR. On May 22, 2013, the ICDR notified the parties that the Response complied with the requirements of the Procedure and the ICDR Rules and that it would proceed with the appointment of the expert panel.

The ICDR appointed Peter R. Day as the Panel in this matter on June 14, 2013, and the Panel was informed by an e-mail dated July 5, 2013, that the 45-day time limit for the Panel’s Determination began to run on that date.

The Panel finds that it was properly constituted and is in compliance with the Procedure and the ICDR Rules.

Basis for Objector’s Standing to Object based on String Confusion

Both the Objector and the Applicant have provided copies of the applications for their respective gTLD strings currently pending in the same application round and therefore the Objector has standing to pursue this objection under Section 3.2.2.1, Module 3 of the gTLD Guidebook.

Factual Background

a. Underlying Facts

The Objector is an applicant for the <.hotel> string.

As referred to in the Objection and the Response, in the current round there are a number of applications involving the word “hotel” and various plural forms of that word. The applications for the strings <.hotels> and <.hoteis> represent one of only two non-exact match contention sets created by the ICANN String Similarity Panel during the current round. <.Hotel> and <.hotels> have not been placed in a contention set by the String Similarity Panel.

b. Facts related to the Objector

The objector is seeking to use the <.hotel> string “to serve the global Hotel Community” and proposes to limit registrants to 1) Hotels, 2) Hotel chains, and 3) Hotel associations. Use of the <.hotel> string in this fashion has the goal of increasing the ability of the registrants to compete with third-party booking portals and increased direct bookings.

The objector also envisions better mobile device access, directory services, *etc.*, to enhance the ability of consumers to do direct booking. While the registry plans some restrictions of the use of the <.hotel> string, the overall goal is to provide increased competition and flexibility within the “Hotel community.”

c. Facts related to the Applicant

According to the Response, the applicant is a branch of the largest online travel agency in Latin America. It is applying for five gTLD strings: <.Vuelos> and <.Hoteles> which target the Spanish-speaking market, <.Passagens> and <.Hoteis> which target the Portuguese speaking market, and <.Hotel> for the English-, Spanish- and Portuguese-speaking markets. The applicant has a four-stage plan for use of the <.Hoteles> gTLD string, beginning with a limited use for itself, its subsidiaries and affiliates. Further expansion will be based on testing and experience to determine to what extent use will expand to “travel companies, hotels, airlines, and other tourism organizations.”

A major goal of the Applicant is to provide the Spanish-speaking community “a targeted namespace devoid of piracy, cybersquatting and other malicious activities.”

Parties’ Contentions

a. Objector

The fact that the Applicant has applied for the strings <.hotel>, <.hoteis> and <.hoteles> shows its belief that they are confusing. Further evidence of the likelihood of confusion is the possibility that Applicant could use the <.hoteles> string to redirect to existing <.com> domains.

Especially in the case of a word commonly used internationally such as “hotel,” the plural of the word alone will raise confusion with the singular. The fact that the Applicant has sought registration of <.hotel> itself and multiple plurals suggests recognition by the Applicant of potential confusion.

There is an elaborate discussion of how the distinction between the singular and plural may be blurred depending on the usage and how this may lead to confusion between singular and plural as a TLD string, as well as the concept of invariance as opposed to similarity.

The Objector points out that English is a lingua franca on the Internet, which increases the likelihood for confusion with other plural forms, especially when non-native English speakers are using English on the Internet.

The Objector alleges that the acoustical similarity between “hotel” and “hoteles” could lead to confusion.

The Objector asserts that having seen a TLD string containing the word “hotel” it would be more difficult for an Internet user to memorize related plurals.

The Objector shows that in Google searches based on the Spanish language in Spain and Latin America “HOTEL” is by far the most retrieved term, followed by the plural ‘HOTELES’ and/or ‘HOTELS.’” (The Portuguese plural, “HOTEIS,” appears in much smaller numbers.)

The Objector alleges that the public would suffer a material detriment since the Applicant might use proxy services and offers a number of letters submitted by international hotel organizations supporting the objection.

The Objector alleges that because of the similarities, people might “unwittingly” register domain names under the wrong TLD string, and the similar TLD strings would facilitate deceitful registrations.

The Objector also alleges that the degree of “confusability” would create new squatting opportunities.

The Objector further argues that the similar TLD strings would create a compulsion for multiple defensive registrations with the other TLD string.

The Objector also alleges that while it will offer the <.hotel> TLD string in the interest of the global hotel community, registrations by the Applicant would be more restrictive and lack “hotel community accountability.”

The Objector argues that the <.hotel>/<.hoteles> case is not comparable to the <.eu>/<.eus>, <.com>/<.co>, or <.it>/<.it> cases but rather is like the <hotel.com>/<hotels.com>/<hoteis.com> and <hotel.ce>/<hotels.de> cases in that “leading companies involved in hotel bookings” felt the need to register the singular and plural of “hotel” with the <.com> TLD. The Objector cites several WIPO cases to support this argument.

The Objector suggests that the very limited number of String Similarity Panel contention set decisions is understandable since there is no procedure through which a finding of the panel can be revised. Thus, in this case “the absence of a [String Similarity] Panel finding does not imply that the Panel deemed the risk of confusion to be smaller.”

Finally, the Objector alleges that the competing registrations would “destroy rather than enhance competition and choice.”

b. Applicant

The Applicant argues that the two gTLD strings in this case do not satisfy the narrow standard of paragraph 3.5.1 of the Guidebook defining string confusion.

The Applicant asserts that the Latin American Spanish-speaking market deserves its own TLD string and that users in that market deserve TLD strings in their own language. The Applicant cites from its application that “The intended future mission and purposed of .HOTELES is to serve as a trusted, hierarchical, and intuitive namespace ... for a **Spanish-speaking audience.**”

The Applicant presents the results of a Google searches using the Argentinian and Paraguayan search engines for the word “hoteles” showing the vast majority of the results displaying the Spanish term “hoteles” with far fewer “hotel” results. The Applicant also cites authority that confusion between two terms is less likely “when a term is encountered in an environment associated with the relevant culture of the particular language.”

The Applicant argues that if the roles were reversed (*i.e.*, <.hoteles> were asserted against <.hotel>) the objection would clearly not be granted.

The Applicant also provides case citations supporting the proposition that “generic TLD strings are less important to Internet users than second-level domain strings.” The Applicant argues that most Internet users are sophisticated enough to know the difference between words in different languages and provides examples of <.com> registrations of generic second-level domain names and the equivalent English plural.

The Applicant argues that trademark law, applied in several of the case citations provided by the Objector, does not apply in this case, which involves generic words.

The Applicant argues that detriment to an Objector or other parties is not a criterion to be considered in this case. It rejects the assertions of the hotel associations supporting the Objector and denies that registration of both TLD strings would foster excessive defensive registrations or deceit. The Applicant further argues that its administration of this TLD will be targeted to specific markets and will limit “piracy, cybersquatting, and other malicious activities.”

Discussion and Findings

a. Burden of Proof

The Objector bears the burden of proof in each case, pursuant to Section 3.5, Module 3, gTLD Applicant Guidebook, Procedures, Section 20 (c).

b. Test for String Confusion Objection

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion. [Module 3, New gTLD Applicant Guidebook]

2.2.1.1.3 Outcomes of the String Similarity Review

An application that passes the String Similarity review is still subject to objection by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a string confusion objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather,

confusion based on any type of similarity (including visual, aural, or similarity of meaning) may be claimed by an objector. [Module 2, New gTLD Applicant Guidebook]

c. Findings

As referred to in the Objection and the Response, in the current round there are a number of applications involving the word “hotel” and various plural forms of that word. The applications for the strings <.hotels> and <.hoteis> represent one of only two non-exact match contention sets created by the ICANN String Similarity Panel during the current round. <.Hotel> and <.hotels> have not been placed in a contention set by the Panel, nor have the gTLD strings at issue in this case.

For the String Similarity Panel, the standard of review is almost identical to that for a DRSP panel, except for the addition of the word “visual.” (“String confusion exists where a string so nearly resembles another **visually** that it is likely to deceive or cause confusion.” Emphasis added.) The placing of the strings <.hotels> and <.hoteis> in a contention set by the ICANN String Similarity Panel seems to reflect this approach since the two words are the same length, and the letters “l” and “i” are sufficiently similar to cause confusion, especially when displayed on a computer or mobile device screen.

While both the Objector’s and the Applicant’s written pleadings articulately discuss a number of factors surrounding the assignment of gTLD strings, it is the Panel’s opinion that the key elements in this determination are (1) resemblance, (2) probable confusion, and (3) a likelihood of confusion beyond that caused by mere association. And while the limitation to “visual” confusion is removed in the DRSP appeal process, nevertheless, unlike an objection based on legal rights, the Panel is of the opinion that the primary area for likely string confusion for a gTLD string is visual confusion.

It should be noted that there is nothing in the record to suggest that any trademark is involved in this case. Thus, since the WIPO cases cited by the Objector all involved well-established trademarks and the <.com> top-level domain name, they are of little relevance in this case.

Both parties have addressed the likelihood of misuse, possible effects on competition and possible increased need for defensive registrations. Again, under the gTLD Applicant Guidebook and the rules regarding disputes concerning string confusion, the Panel finds that these considerations are not directly germane to the determination required here.

While both parties have submitted computer search results with their pleadings, it is common knowledge that the “average, responsible Internet user” uses search engines for the purpose of finding products, services or reference information and the links thereto, and has the opportunity to refine, broaden or narrow the search parameters. Thus, it seems unlikely that somewhat similar but still distinct top-level domain names by themselves will affect Internet use, including searches, to the extent of causing user confusion.

Having reviewed the arguments by both parties, the Panel concludes that the Objector has not established the likelihood of probable confusion. The words “hotel” and “hoteles” are sufficiently different, both in length and visual appearance, that it cannot be considered as probable that an “average, responsible Internet user” would not recognize that they are different terms.

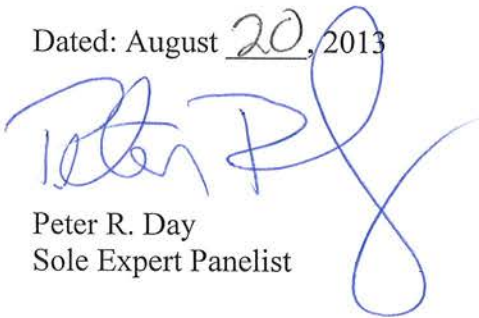
In addition, the fact that “hoteles” should be recognized by Spanish-speaking users (or users having a familiarity with Spanish) as a common Spanish word constitutes sufficient independent status as to render confusion even less likely, notwithstanding some association between the two words. Likewise, assuming the Objector’s contention that English is a lingua franca on the internet, “hoteles” is not an English word and is unlikely to be considered as such.

Similarly, while there may be some aural similarity and similarity of meaning in a general sense with the words “hotel” and “hoteles,” neither seems likely to be the basis for confusion for an “average, responsible Internet user.”

d. Determination

Therefore the Applicant has prevailed and the Objection is dismissed.

Dated: August 20, 2013

A handwritten signature in blue ink, appearing to read "Peter R. Day", with a large, stylized flourish extending from the end of the signature.

Peter R. Day
Sole Expert Panelist

Annex 3.

**International Centre for Dispute Resolution
New gTLD String Confusion Panel**

Re: 50-504-T-000212-13

Hotel Top-Level-Domain S.a.r.l, OBJECTOR

And

Despegar Online SRL, APPLICANT

String: <**HOTEIS**>

EXPERT DETERMINATION

The parties

The Objector is **Hotel Top-Level-Domain S.a.r.l**, 23, Boulevard Charles Marx, Luxembourg 2130, represented by Dirk Krischenowski.

The Applicant is **Despegar Online SRL**, Ruta 8 Kilometre 17,500, Synergia Building, Office 101, Zonameric, Montevideo 1600, Uruguay, represented by Joshua Bourne, Steven M. Levy and Andres Patetta.

The New gTLD String Objected To

The new gTLD string applied for and objected to is: <**HOTEIS**>

Prevailing Party

The Applicant has prevailed and the Objection is dismissed.

The New gTLD String Confusion Process

Module 3 of the ICANN gTLD Applicant Guidebook contains Objection Procedures and the New gTLD Dispute Resolution Procedure (“the Procedure”).

Article 1(b) of the Procedure states that “The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure.”

As expressed in the Guidebook, and the Procedure, there are four (4) grounds to object to the registration of new gTLD strings. One of these grounds expressed String Confusion, as described in DRP Article 2(e)(i): “(i) ‘**String Confusion Objection**’ refers to the objection that the string

comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.”

Article 3(a) states that “String Confusion Objections shall be administered by the International Centre for Dispute Resolution.”

Procedural History of this Case

The Objection, dated March 13, 2013, was filed with the International Center for Dispute Resolution (the “ICDR”) pursuant to the Procedure. The ICDR acknowledged receipt of the Objection by a letter dated March 18, 2013.

In accordance with Article 9 of the Procedure, on April 4, 2013, the ICDR notified the Objector that it had completed the review of the Objection and determined that the Objection was deficient, in that the Objector failed to furnish proof of service on Applicant. On April 11, 2013, following receipt of additional information from the Objector, the ICDR determined that the Objection now complied with the requirements of the Procedure and with requirements of the ICDR Supplementary Procedures for String Confusion Objections (Rules) (the “ICDR rules”).

In accordance with Article 11(a) of the Procedure and Article 2, 3 of the ICDR rules, on April 17 2013, the ICDR formally notified the Applicant of the Objection. In accordance with Article 11(b) and relevant communications provisions of the Procedure, the Response, dated May 16, 2013, was timely filed with the ICDR. On May 22, 2013, the ICDR notified the parties that the Response complied with the requirements of the Procedure and the ICDR Rules and that it would proceed with the appointment of the expert panel.

The ICDR appointed Peter R. Day as the Panel in this matter on June 14, 2013, and the Panel was informed by an e-mail dated July 5, 2013, that the 45-day time limit for the Panel’s Determination began to run on that date.

The Panel finds that it was properly constituted and is in compliance with the Procedure and the ICDR Rules.

Basis for Objector’s Standing to Object based on String Confusion

Both the Objector and the Applicant have provided copies of the applications for their respective gTLD strings currently pending in the same application round and therefore the Objector has standing to pursue this objection under Section 3.2.2.1, Module 3 of the gTLD Guidebook.

Factual Background

a. Underlying Facts

The Objector is an applicant for the <.hotel> string.

As referred to in the Objection and the Response, in the current round there are a number of applications involving the word “hotel” and various plural forms of that word. The applications for the strings <.hotels> and <.hoteis> represent one of only two non-exact match contention sets created by

the ICANN String Similarity Panel during the current round. <Hotel> and <hotels> have not been placed in a contention set by the String Similarity Panel.

b. Facts related to the Objector

The objector is seeking to use the <.hotel> string “to serve the global Hotel Community” and proposes to limit registrants to 1) Hotels, 2) Hotel chains, and 3) Hotel associations. Use of the <.hotel> string in this fashion has the goal of increasing the ability of the registrants to compete with third-party booking portals and increased direct bookings.

The objector also envisions better mobile device access, directory services, *etc.*, to enhance the ability of consumers to do direct booking. While the registry plans some restrictions of the use of the <.hotel> string, the overall goal is to provide increased competition and flexibility within the “Hotel community.”

c. Facts related to the Applicant

According to the Response, the applicant is a branch of the largest online travel agency in Latin America. It is applying for five gTLD strings: <.Vuelos> and <.Hoteles> which target the Spanish-speaking market, <.Passagens> and <.Hoteis> which target the Portuguese speaking market, and <.Hotel> for the English-, Spanish- and Portuguese-speaking markets. The applicant has a four-stage plan for use of the <.Hoteis> gTLD string, beginning with a limited use for itself, its subsidiaries and affiliates. Further expansion will be based on testing and experience to determine to what extent use will expand to “travel companies, hotels, airlines, and other tourism organizations.”

A major goal of the Applicant is to provide the Portuguese-speaking community “a domain name safe from piracy, cybersquatting and other malicious activities.”

Parties’ Contentions

a. Objector

The fact that the Applicant has applied for the strings <.hotel>, <.hoteis> and <.hoteles> shows its belief that they are confusing. Further evidence of the likelihood of confusion is the possibility that Applicant could use the <.hoteis> string to redirect to existing <.com> domains.

Especially in the case of a word commonly used internationally such as “hotel,” the plural of the word alone will raise confusion with the singular. The fact that the Applicant has sought registration of <.hotel> itself and multiple plurals suggests recognition by the Applicant of potential confusion.

There is an elaborate discussion of how the distinction between the singular and plural may be blurred depending on the usage and how this may lead to confusion between singular and plural as a TLD string, as well as the concept of invariance as opposed to similarity.

The Objector points out that English is a lingua franca on the Internet, which increases the likelihood for confusion with other plural forms, especially when non-native English speakers are using English on the Internet.

The Objector alleges that the acoustical similarity between “hotel” and “hoteis” could lead to confusion.

The Objector asserts that having seen a TLD string containing the word “hotel” it would be more difficult for an Internet user to memorize related plurals.

The Objector points out that Google searches for the word “hotel” or its plurals in several languages will yield large numbers of “hits” of multiple versions of the word. (Although the terms “hotel” and “hotels” yield the largest number of results, the results for the Spanish and Portuguese plurals are still relatively large numbers.)

The Objector alleges that the public would suffer a material detriment since the Applicant might use proxy services and offers a number of letters submitted by international hotel organizations supporting the objection.

The Objector alleges that because of the similarities, people might “unwittingly” register domain names under the wrong TLD string, and the similar TLD strings would facilitate deceitful registrations.

The Objector also alleges that the degree of “confusability” would create new squatting opportunities.

The Objector further argues that the similar TLD strings would create a compulsion for multiple defensive registrations with the other TLD string.

The Objector also alleges that while it will offer the <hotel> TLD string in the interest of the global hotel community, registration by the Applicant would be more restrictive and lack “hotel community accountability.”

The Objector argues that the <hotel>/<hoteis> case is not comparable to the <.eu>/<.eus>, <.com>/<.co>, or <.It>/<.it> cases but rather is like the <hotel.com>/<hoteis.com> and <hotel.ce>/<hotels.de> cases in that “leading companies involved in hotel bookings” felt the need to register the singular and plural of “hotel” with the <.com> TLD. The Objector further cites several WIPO cases to support this argument.

The Objector suggests that the very limited number of String Similarity Panel contention set decisions is understandable since there is no procedure through which a finding of the panel can be revised. Thus, in this case “the absence of a [String Similarity] Panel finding does not imply that the Panel deemed the risk of confusion to be smaller.”

Finally, the Objector alleges that the competing registrations would “destroy rather than enhance competition and choice.”

b. Applicant

The Applicant argues that the two gTLD strings in this case do not satisfy the narrow standard of paragraph 3.5.1 of the Guidebook defining string confusion.

The Applicant asserts that the Latin American Portuguese-speaking market deserves its own TLD string and that users in those markets deserve TLD strings in their own language. The Applicant

asserts that its use of the <.hoteis> string will be aimed at that market only and presents the results of a Google search in Brazil for the word “hoteis” showing the vast majority of the results display the Portuguese word “hoteis.” The Applicant also cites authority that confusion between two terms is less likely “when a term is encountered in an environment associated with the relevant culture of the particular language.”

The Applicant argues that if the roles were reversed (*i.e.*, <.hoteis> were asserted against <.hotel>) the objection would clearly not be granted.

The Applicant also provides case citations supporting the proposition that “generic TLD strings are less important to Internet users than second-level domain strings.” The Applicant argues that most Internet users are sophisticated enough to know the difference between words in different languages and provides examples of <.com> registrations of generic second-level domain names and the equivalent English plural.

The Applicant argues that trademark law, applied in several of the case citations provided by the Objector, does not apply in this case, which involves generic words.

The Applicant argues that detriment to an Objector or other parties is not a criterion to be considered in this case. It rejects the assertions of the hotel associations supporting the Objector and denies that registration of both TLD strings would foster excessive defensive registrations or deceit. The Applicant further argues that its administration of this TDL will be targeted to specific markets and will limit “piracy, cybersquatting, and other malicious activities.”

Discussion and Findings

a. Burden of Proof

The Objector bears the burden of proof in each case, pursuant to Section 3.5, Module 3, gTLD Applicant Guidebook, Procedures, Section 20 (c).

b. Test for String Confusion Objection

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion. [Module 3, New gTLD Applicant Guidebook]

2.2.1.1.3 Outcomes of the String Similarity Review

An application that passes the String Similarity review is still subject to objection by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a string confusion objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather,

confusion based on any type of similarity (including visual, aural, or similarity of meaning) may be claimed by an objector. [Module 2, New gTLD Applicant Guidebook]

c. Findings

As referred to in the Objection and the Response, in the current round there are a number of applications involving the word “hotel” and various plural forms of that word. The applications for the strings <.hotels> and <.hoteis> represent one of only two non-exact match contention sets created by the ICANN String Similarity Panel during the current round. <.Hotel> and <.hotels> have not been placed in a contention set by the Panel, nor have the gTLD strings at issue in this case.

For the String Similarity Panel, the standard of review is almost identical to that for a DRSP panel, except for the addition of the word “visual.” (“String confusion exists where a string so nearly resembles another **visually** that it is likely to deceive or cause confusion.” Emphasis added.) The placing of the strings <.hotels> and <.hoteis> in a contention set by the ICANN String Similarity Panel seems to reflect this approach since the two words are the same length, and the letters “l” and “i” are sufficiently similar to cause confusion, especially when displayed on a computer or mobile device screen.

While both the Objector’s and the Applicant’s written pleadings articulately discuss a number of factors surrounding the assignment of gTLD strings, it is the Panel’s opinion that the key elements in this determination are (1) resemblance, (2) probable confusion, and (3) a likelihood of confusion beyond that caused by mere association. And while the limitation to “visual” confusion is removed in the DRSP appeal process, nevertheless, unlike an objection based on legal rights, the Panel is of the opinion that the primary area for likely string confusion for a gTLD string is visual confusion.

It should be noted that there is nothing in the record to suggest that any trademark is involved in this case. Thus, since the WIPO cases cited by the Objector all involved well-established trademarks and the <.com> top-level domain name, they are of little relevance in this case.

Both parties have addressed the likelihood of misuse, possible effects on competition and possible increased need for defensive registrations. Again, under the gTLD Applicant Guidebook and the rules regarding disputes concerning string confusion, the Panel finds that these considerations are not directly germane to the determination required here.

While both parties have submitted computer search results with their pleadings, it is common knowledge that the “average, responsible Internet user” uses search engines for the purpose of finding products, services or reference information and the links thereto, and has the opportunity to refine, broaden or narrow the search parameters. Thus, it seems unlikely that somewhat similar but still distinct top-level domain names by themselves will affect Internet use, including searches, to the extent of causing user confusion.

Having reviewed the arguments by both parties, the Panel concludes that the Objector has not established the likelihood of probable confusion. The words “hotel” and “hoteis” are sufficiently different, both in length and visual appearance, that it cannot be considered as probable that an “average, responsible Internet user” would not recognize that they are different terms.

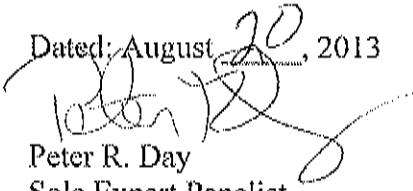
In addition, the fact that “hoteis” should be recognized by Portuguese-speaking users (or users having a familiarity with Portuguese) as a common Portuguese word constitutes sufficient independent status as to render confusion even less likely, notwithstanding some association between the two words. Likewise, assuming the Objector’s contention that English is a lingua franca on the internet, “hoteis” is not an English word and is unlikely to be considered at such.

Similarly, while there may be some aural similarity and similarity of meaning in a general sense with the words “hotel” and “hotcis,” neither seems likely to be the basis for confusion for an “average, responsible Internet user.”

d. Determination

Therefore, the Applicant has prevailed and the Objection is dismissed.

Dated: August 20, 2013



Peter R. Day
Sole Expert Panelist

Annex 4.

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#) [Français \(/fr\)](#)

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& ACCOUNTAB TY \(/ST WARDSH ACCOUNTAB TY\)](#)

Resources

▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](#)

▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)

▶ [Accountability \(/resources/accountability\)](#)

▶ [Governance \(/resources/pages/governance-2012-02-25-en\)](#)

▶ [Groups \(/resources/pages/groups-2012-02-06-en\)](#)

[Business \(/resources/pages/business\)](#)

▶ [Contractual Compliance \(/resources/pages/compliance-2012-02-25-en\)](#)

▶ [Registrars \(/resources/pages/registrars-0d-2012-02-25-en\)](#)

▶ [Registries \(/resources/pages/registries-46-2012-02-25-en\)](#)

[Operational Metrics \(/resources/pages/metrics-gdd-2015-01-30-en\)](#)

▶ [Identifier Systems Security, Stability \(Security, Stability and Resiliency\) and Resiliency \(IS-SSR\) \(/resources/pages/is-ssr-2014-11-24-en\)](#)

▶ [ccTLDs \(/resources/pages/cctlds-21-2012-02-25-en\)](#)

▶ [Internationalized Domain Names \(/resources/pages/idn-2012-02-25-en\)](#)

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

03 Feb 2016

1. Consent Agenda:

a. [Approval of Board Meeting Minutes](#)

b. [RSSAC \(Root Server System Advisory Committee\) Co-Chair Appointments](#)
Rationale for Resolution 2016.02.03.03

c. [Redelegation of the .TG domain representing Togo to the Autorite de Reglementation des Secteurs de Postes et de Telecommunications \(ART&P\)](#)
Rationale for Resolutions 2016.02.03.04 – 2016.02.03.05

d. [Delegation of the .ю \("eu"\) domain representing the European Union in Cyrillic script to EURid vzw/asbl](#)
Rationale for Resolutions 2016.02.03.06 – 2016.02.03.07

e. [Delegation of the .澳門 \("Macao"\) domain representing Macao in Traditional Chinese script to the Bureau of Telecommunications Regulation \(DSRT\)](#)
Rationale for Resolutions 2016.02.03.08 – 2016.02.03.09

2. Main Agenda:

a. [Consideration of Independent Review Process Panel's Final Declaration in Merck KGaA v. ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)
Rationale for Resolution 2016.02.03.10

b. [Reconsideration Requests 15-19 \(the ICANN \(Internet Corporation for Assigned Names and Numbers\) Business Constituency & the ICANN \(Internet Corporation for Assigned Names and Numbers\) Noncommercial Stakeholder Group \(NCSG \(Non-Commercial Stakeholders Group\)\)\) and 15-20 \(The Internet Commerce Association\)](#)
Rationale for Resolution 2016.02.03.11

c. [Consideration of Expert Determination Re: Objection to Application for .HOSPITAL](#)
Rationale for Resolutions 2016.02.03.12 – 2016.02.03.13

d. [Ombudsman Report Regarding Complaint by Hu Yi Global Information Resources \(applicant for .招聘 \("recruitment" in Chinese\)\)](#)
Rationale for Resolution 2016.02.03.14

e. [GAC \(Governmental Advisory Committee\) Advice: Dublin Communiqué \(October 2015\)](#)
Rationale for Resolution 2016.02.03.15

f. [Board Governance Committee Recommendation Regarding Implementation of Public Interest Commitments for .DOCTOR Registry Agreement](#)
Rationale for Resolution 2016.02.03.16

g. [Establishing a Set of KPIs for Board Performance and Improvement Efforts \(ATRT2 Rec. 1, 2 & 3\)](#)
Rationale for Resolutions 2016.02.03.17 – 2016.02.03.18

- ▶ Universal Acceptance Initiative
(/resources/pages/universal-acceptance-2012-02-25-en)
- ▶ Policy
(/resources/pages/policy-01-2012-02-25-en)
- ▶ Public Comment (/public-comments)
- ▶ Technical Functions
(/resources/pages/technical-functions-2015-10-15-en)
- ▶ Contact
(/resources/pages/contact-2012-02-06-en)
- ▶ Help
(/resources/pages/help-2012-02-03-en)

h. **USG IANA (Internet Assigned Numbers Authority) Stewardship Transition – Additional FY16 Expenses and Funding**

Rationale for Resolution 2016.02.03.19

3. **Executive Session – CONFIDENTIAL**

a. **President and CEO FY16 SR1 At-Risk Compensation**

Rationale for Resolution 2016.02.03.20

[Published on 5 February 2016]

b. **Election of Göran Marby as ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO (Published on 11 February 2016)**

1. Consent Agenda:

a. **Approval of Board Meeting Minutes**

Resolved (2016.02.03.01), the Board approves the minutes of the 21 October, 22 October and 2 December 2015 Meetings of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Resolved (2016.02.03.02), the Board approves the minutes of the 18 October New gTLD (generic Top Level Domain) Program Committee (NGPC) Meeting.

b. **RSSAC (Root Server System Advisory Committee) Co-Chair Appointments**

Whereas, Article XI, Section 2 of the Bylaws governs the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)).

Whereas, Article XI, Section 2, Subsection 3B of the Bylaws states that the Board of Directors shall appoint the co-chairs and the members of the RSSAC (Root Server System Advisory Committee).

Whereas, on 3 December 2015, the RSSAC (Root Server System Advisory Committee) conducted an election for one co-chair position and elected Brad Verd (Verisign, A/J-Root Server Operator) to a two-year term as co-chair.

Whereas, Tripti Sinha (University of Maryland, D-Root Server Operator) will continue to serve as co-chair for the second year of a two-year term.

Resolved (2016.02.03.03), the Board of Directors accepts the recommendation of the RSSAC (Root Server System Advisory Committee) and appoints Tripti Sinha and Brad Verd as co-chairs of RSSAC (Root Server System Advisory Committee) and extends its best wishes to Tripti and Brad in their important new roles.

Rationale for Resolution 2016.02.03.03

The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the Board to appoint the RSSAC (Root Server System Advisory Committee) co-chairs as selected by the membership. The appointment of RSSAC (Root Server System Advisory Committee) co-chairs will allow the RSSAC (Root Server System Advisory Committee) to be properly composed to serve its function within ICANN (Internet Corporation for Assigned Names and Numbers)'s policy development work as an advisory committee.

The appointment of co-chairs is not anticipated to have any fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This is an Organizational Administrative Function for which no public comment is required.

c. **Redelegation of the .TG domain representing Togo to the Autorité de Régulation des Secteurs de Postes et de Télécommunications (ART&P)**

Resolved (2016.02.03.04), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Functions Contract, ICANN (Internet Corporation for

Assigned Names and Numbers) has reviewed and evaluated the request to redelegate the .TG country-code top-level domain to Autorite de Reglementation des Secteurs de Postes et de Telecommunications (ART&P). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2016.02.03.05), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2016.02.03.04 – 2016.02.03.05

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Functions Contract, the ICANN (Internet Corporation for Assigned Names and Numbers) staff has evaluated a request for ccTLD (Country Code Top Level Domain) redelegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) staff has followed the proper procedures.

What is the proposal being considered?

The proposal is to approve a request to IANA (Internet Assigned Numbers Authority) to change the sponsoring organization (also known as the manager or trustee) of the .TG country-code top-level domain to Autorite de Reglementation des Secteurs de Postes et de Telecommunications (ART&P).

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, ICANN (Internet Corporation for Assigned Names and Numbers) staff consults 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?

Staff are 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 ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions 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.

d. Delegation of the .eu ("eu") domain representing the European Union to Cyrillic script to EURid vzw/asbl

Resolved (2016.02.03.06), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Functions Contract, ICANN (Internet Corporation for Assigned Names and Numbers) has reviewed and evaluated the request to delegate the eu country-code top-level domain to EURid vzw/asbl. The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2016.02.03.07), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2016.02.03.06 - 2016.02.03.07**Why the Board is addressing the issue now?**

In accordance with the IANA (Internet Assigned Numbers Authority) Functions Contract, the ICANN (Internet Corporation for Assigned Names and Numbers) staff 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 ICANN (Internet Corporation for Assigned Names and Numbers) staff has followed the proper procedures.

What is the proposal being considered?

The proposal is to approve a request to IANA (Internet Assigned Numbers Authority) to create the country-code top-level domain and assign the role of sponsoring organization (also known as the manager or trustee) to EURid vzw/asbl.

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, ICANN (Internet Corporation for Assigned Names and Numbers) staff consults 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?

Staff are 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 ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions 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.

e. Delegation of the .澳門 ("Macao") domain representing Macao in Traditional Chinese script to the Bureau of Telecommunications Regulation (DSRT)

Resolved (2016.02.03.08), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Functions Contract, ICANN (Internet Corporation for Assigned Names and Numbers) has reviewed and evaluated the request to delegate the .澳門 country-code top-level domain to the Bureau of Telecommunications Regulation (DSRT). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2016.02.03.09), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2016.02.03.08 – 2016.02.03.09

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Functions Contract, the ICANN (Internet Corporation for Assigned Names and Numbers) staff 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 ICANN (Internet Corporation for Assigned Names and Numbers) staff has followed the proper procedures.

What is the proposal being considered?

The proposal is to approve a request to IANA (Internet Assigned Numbers Authority) to create the country-code top-level domain and assign the role of sponsoring organization (also known as the manager or trustee) to the Bureau of Telecommunications Regulation (DSRT).

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, ICANN (Internet Corporation for Assigned Names and Numbers) staff consults 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?

Staff are 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 ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions 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.

2. Main Agenda:

a. Consideration of Independent Review Process Panel's Final Declaration on *Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers)*

Whereas, on 11 December 2015, an Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Merck KGaA (Merck) against ICANN (Internet Corporation for Assigned Names and Numbers) (Final Declaration).

Whereas, in its IRP, Merck challenged the Board Governance Committee's (BGC) denial of Reconsideration Request 14-9, which in turn challenged the expert determinations overruling Merck's legal rights objections (LROs) to new gTLD (generic Top Level Domain) applications submitted by its former affiliate, U.S.-based Merck Sharp & Dohme Corporation, for strings incorporating the "Merck" mark (Expert Determinations).

Whereas, the Panel denied Merck's IRP Request and, among other things, declared that the Board's actions did not in any way violate ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation (Articles), Bylaws, or the Applicant Guidebook (Guidebook). (See Final Declaration, ¶¶ 41-68, <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) [PDF, 1.47 MB].)

Whereas, in accordance with Article IV, section 3.21 of ICANN's Bylaws, the Board has considered the Panel's Final Declaration.

Resolved (2016.02.03.10), the Board accepts the findings of the Panel's Final Declaration: (1) ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the *Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers)* IRP; (2) the Board acted without conflict of interest in taking its decision; (3) the Board exercised due diligence and care in having a reasonable amount of facts in front of them; (4) the Board exercised independent judgment in taking the decision, believed to be in the best interests of the company; (5) the Board (including the Board Governance Committee) did not violate the Articles, Bylaws, or Guidebook; and (6) Merck shall reimburse ICANN (Internet Corporation for Assigned Names and Numbers) costs in the amount of US\$48,588.54.

Rationale for Resolution 2016.02.03.10

Merck KGaA (Merck) filed a request for an Independent Review Process (IRP), which arose out of its legal rights objections (LROs) to new gTLD (generic Top Level Domain) applications

submitted by its former affiliate, U.S.-based Merck Sharp & Dohme Corporation, for strings incorporating the "Merck" mark. Merck's LROs were overruled (Expert Determinations). Merck filed Reconsideration Request 14-9 challenging the Expert Determinations. The Board Governance Committee (BGC) denied Reconsideration Request 14-9, finding that Merck had not stated proper grounds for reconsideration and that the Request failed to demonstrate that the expert panel had acted in contravention of established policy or procedure. Merck's IRP Request challenged the denial of Reconsideration Request 14-9 and, among other things, also argued that the Board should have taken further action with respect to the Expert Determinations.

On 11 December 2015, the three-member IRP Panel (Panel) issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board adopts the findings of the Panel, which are summarized below, and can be found in full at <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](https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf)) [PDF, 1.47 MB].

Using the applicable standard of review, the Panel found that: (1) ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the *Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP*; (2) the Board acted without conflict of interest in taking its decision; (3) the Board exercised due diligence and care in having a reasonable amount of facts in front of them; (4) the Board exercised independent judgment in taking the decision, believed to be in the best interests of the company; and (5) the Board's actions or inactions did not, in any way, violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook). (See Final Declaration, ¶¶ 41-68.)

More specifically, as the Panel found, the standard of review for an IRP is specifically prescribed in Article IV, Section 3.4 of the Bylaws, and "the Panel may not substitute its own view of the merits of the underlying dispute." (*Id.* at ¶¶ 21-22.) The Panel further found that the reconsideration process is "of limited scope" as set forth in Article IV, Section 2.2 of the Bylaws, and "[n]one of th[e] three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits." (*Id.* at ¶ 47.) The Panel also found that: "this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess [the BGC's determination] that the Sole Panel Expert [in the legal rights objection proceedings] did not apply the wrong standards." (*Id.* at ¶ 49.) The Panel was also clear that "a referral or appeal process for LRO decisions...was not included in the [Guidebook] and it is not open to this Panel to create it." (*Id.* at ¶ 60.) In summary, the Panel explained that "Merck's complaints are, in short, not focused on the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert [, which] is not a basis for action by this Panel..." (*Id.* at ¶ 50.)

Merck also claimed that ICANN (Internet Corporation for Assigned Names and Numbers) discriminated against Merck through the Board's (and the BGC's) acceptance of the Expert Determinations because the "Board has provided the possibility for third-party review of some *prima facie* erroneous expert determinations while denying the same to other, similarly situated parties, including the Claimant." (*Id.* at ¶ 53(emphasis in original).) In response to this claim, the Panel found that:

As to the claim of discrimination, this Panel finds that it was within the discretion of the BGC and Board...to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it. [¶] In conclusion, Merck was not discriminated against.

(*Id.* at ¶ 61.)

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN (Internet Corporation for Assigned Names and Numbers)'s long-standing accountability mechanisms. Accordingly, and for the reasons set forth in this Resolution and Rationale, the Board has accepted the Panel's Final Declaration as indicated above. Adopting the Panel's Final Declaration will have no direct financial impact on the organization and no 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.

- b. Reconsideration Requests 15-19 (the ICANN (Internet Corporation for Assigned Names and Numbers) Business Constituency & the ICANN (Internet Corporation for Assigned Names and Numbers) Noncommercial Stakeholders (Stakeholders) Group) and 15-20 (The Internet Commerce Association)

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Business Constituency and the ICANN (Internet Corporation for Assigned Names and Numbers) Noncommercial Stakeholders (Stakeholders) Group filed Reconsideration Request 15-19, and the Internet Commerce Association filed Reconsideration Request 15-20 (collectively, "Requesters"), both of which seek reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) Board Resolutions 2015.09.28.04 (renewal of .CAT registry agreement), 2015.09.28.05 (renewal of .TRAVEL registry agreement), and 2015.09.28.06 (renewal of .PRO registry agreement).

Whereas, the Board Governance Committee ("BGC") thoroughly considered the issues raised in Reconsideration Requests 15-19 and 15-20 and all related materials.

Whereas, the BGC recommended that Reconsideration Requests 15-19 and 15-20 be denied because the Requesters have not stated proper grounds for reconsideration, and the Board agrees.

Resolved (2016.02.03.11), the Board adopts the BGC's Recommendation on Reconsideration Requests 15-19 and 15-20, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> (/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf) [PDF, 146 KB].

Rationale for Resolution 2016.02.03.11

I. Brief Summary

In passing Board Resolutions 2015.09.28.04, 2015.09.28.05, and 2015.09.28.06 (collectively, the "Resolutions"), the ICANN (Internet Corporation for Assigned Names and Numbers) Board approved the renewal of registry agreements for three legacy TLDs— .CAT, .TRAVEL, and .PRO, respectively. The three renewed registry agreements ("Renewed Registry Agreements") are the result of bilateral negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) staff and the respective registry operators. The Renewed Registry Agreements are based on the form of the registry agreement for new gTLDs ("New gTLD (generic Top Level Domain) Registry Agreement") and include new gTLD (generic Top Level Domain) rights protection mechanisms ("RPMs") such as the Trademark Post-Delegation Dispute Resolution Procedure ("Trademark PDDRP") and the Uniform Rapid Suspension system ("URS"), which did not exist under the legacy registry agreements.

In seeking reconsideration of the Resolutions, the Requesters note that the Generic Names Supporting Organization (Supporting Organization) ("GNSO (Generic Names Supporting Organization)") has not yet issued a consensus policy regarding the application of new gTLD (generic Top Level Domain) RPMs to legacy TLDs and suggest that the Renewed Registry Agreements represent an attempt by ICANN (Internet Corporation for Assigned Names and Numbers) staff to preempt that policy development process. The Requesters further assert that, in passing the Resolutions, the Board failed to consider: (1) the details of the relevant contract negotiations, specifically email communications and other documents reflecting communications between ICANN (Internet Corporation for Assigned Names and Numbers) staff and the relevant registry operators; and (2) a later-published preliminary issue report by ICANN (Internet Corporation for Assigned Names and Numbers) staff regarding gTLD (generic Top Level Domain) RPMs ("Preliminary Issue Report"), which recommends, among other things, that a GNSO (Generic Names Supporting Organization) policy development process be undertaken to address the application of RPMs to legacy TLDs generally.

The Requesters' claims do not support reconsideration. The inclusion of the new gTLD (generic Top Level Domain) RPMs in the Renewed Registry Agreements is part of the package of agreed-upon terms resulting from the bilateral negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and each registry operator, and not, as Requesters claim, a "unilateral decision by ICANN (Internet Corporation for Assigned Names and Numbers) contractual staff." The Requesters present no evidence to the contrary – i.e., that applying the new gTLD (generic Top Level Domain) RPMs to

the Renewed Registry Agreements was based on a unilateral decision by ICANN (Internet Corporation for Assigned Names and Numbers) staff. The Requesters suggest that the Board should have reviewed all of ICANN (Internet Corporation for Assigned Names and Numbers) staff's communications with the .CAT, .TRAVEL, and .PRO registry operators in order to confirm that the negotiations were in fact bilateral. Such contention, however, does not support reconsideration. Staff provided the Board with all material information, including the comments from the public comment forum, for consideration. In approving the Resolutions, the Board considered all material information provided by staff. No policy or procedure requires the Board to review each and every email or other written exchange between ICANN (Internet Corporation for Assigned Names and Numbers) staff and registry operators during the course of the negotiations and the Requesters do not identify any particular piece of material information that the Board failed to consider. Moreover, as is publicly posted in the respective public comment reports as well as in the Board's rationales for each of the Resolutions, the registry operators specifically "expressed their interest to renew their registry agreement based on the New gTLD (generic Top Level Domain) Registry Agreement." Indeed, not one of these registry operators has indicated that their renewal negotiations were anything but bilateral or sought reconsideration of either staff or Board action as it relates to the Renewed Registry Agreements. Further, the registry agreements each called for presumptive renewal of the agreements at their expiration so long as certain requirements were met – meaning that, if the parties took no action, the registry agreements would have renewed automatically under the same terms as the original registry agreements so as long as the registry operators were in good standing at the time of renewal as provided in the registry agreements.¹ At the time of renewal, these registry operators were in good standing and were therefore subject to the terms of the presumptive renewal. The registry operators, however, elected to enter into negotiations with ICANN (Internet Corporation for Assigned Names and Numbers) based on the existing New gTLD (generic Top Level Domain) Registry Agreement terms.

As the Requesters have not demonstrated that the Board failed to consider any material information in passing the Resolutions, they have not stated a basis for reconsideration of the Resolutions.

II. **Facts**

The BGC Recommendation on Reconsideration Requests 15-19 and 15-20, which sets forth in detail the facts relevant to this matter, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Requests 15-19 and 15-20 is available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> ([/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf)) [PDF, 146 KB], and is attached as Exhibit C to the Reference Materials.

III. **Issues**

In view of the claims set forth in Requests 15-19 and 15-20, the issues for reconsideration are whether ICANN (Internet Corporation for Assigned Names and Numbers)'s Board failed to consider material information in passing the Resolutions approving the renewal of the registry agreements for .CAT, .TRAVEL, and .PRO.

IV. **The Relevant Standards for Evaluating Reconsideration Requests**

The BGC Recommendation on Reconsideration Requests 15-19 and 15-20, which sets forth the relevant standards for evaluating reconsideration requests, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Requests 15-19 and 15-20 is available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> ([/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsq-request-15-20-ica-bgc-recommendation-13jan16-en.pdf)) [PDF, 146 KB], and is attached as Exhibit C to the Reference Materials.

V. **Analysis and Rationale**

The Requesters claim, without support, that ICANN (Internet Corporation for Assigned Names and Numbers) staff unilaterally imposed the New gTLD (generic Top Level

Domain) Registry Agreement as a starting point for the Renewed Registry Agreements and, therefore, "transform[ed] the PDDRP and URS into de facto Consensus (Consensus) Policies without following the procedures laid out in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws for their creation." Contrary to what the Requesters claim, while the registry operators had a presumptive right of renewal under the terms of their existing legacy registry agreement, they chose to re-negotiate and renew their agreements based upon the New gTLD (generic Top Level Domain) Registry Agreement terms.

The Board's Rationales for the Resolutions as well as the public comment reports make clear that the Renewed Registry Agreements were "based on the bilateral negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and the [respective] Registry Operator[s], where [the] Registry Operator[s] expressed their interest to renew their registry agreement based on the New gTLD (generic Top Level Domain) Registry Agreements." The Board further stated in the Rationales for the Resolutions that the "inclusion of the URS was developed as part of the proposal in bilateral negotiations," and confirmed that the URS "has not been adopted as a consensus policy and ICANN (Internet Corporation for Assigned Names and Numbers) has no ability to make it mandatory for any TLDs other than new gTLD (generic Top Level Domain) applicants who applied during the first round," and that "the Board's approval of the Renewal Registry Agreements[s] for .CAT, .PRO, and .TRAVEL] is not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so." In short, the Requesters' claim that the provisions of the New gTLD (generic Top Level Domain) Registry Agreement were in some way imposed on the registry operators is unsupported.

Reconsideration of a Board action, the process that Requesters have invoked here, is warranted only where the Board took action without consideration of material information or with reliance upon false or inaccurate information. Here, the Requesters do not identify any material information that the Board purportedly failed to consider in passing the Resolutions. More specifically, the Requesters provide no support for their argument that the Board failed to consider "the actual record of exchanges—emails and other correspondence, as well as notes and minutes of meeting and discussions—between [ICANN (Internet Corporation for Assigned Names and Numbers)] staff and officers and the personnel of these three registries that would support the conclusion that [the parties engaged in] bilateral negotiations..." The Requesters also present no support for their claim that the Board failed to consider the Preliminary Issue Report (because it "did not exist at the time of the Board's decision"). As a result, the BGC concluded and the Board agrees that reconsideration is not appropriate.

First, the Requesters do not identify any material information that the Board purportedly failed to consider. That is, the Requesters do not identify any evidence that the negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and the registry operators were not bilateral in nature because no such evidence exists. As there is no policy or procedure that requires the Board to review each and every email or other written exchange between ICANN (Internet Corporation for Assigned Names and Numbers) staff and registry operators during the course of the contract negotiations, the Requesters do not and cannot identify such a policy or procedure. The Requesters' substantive disagreement with the Board's actions does not mean that the Board's actions were taken without consideration of all relevant material information.

Second, the Requesters claim that the Board failed to consider the Preliminary Issue Report, which invited community feedback regarding the inclusion of several topics in a GNSO (Generic Names Supporting Organization) policy development process charter, including "whether any of the new [RPMs] (such as the URS) should, like the UDRP (Uniform Domain-Name Dispute Resolution Policy), be Consensus (Consensus) Policies applicable to all gTLDs." The Requesters claim that, in light of the Preliminary Issue Report, the Renewed Registry Agreements will "interfer[e] with the standard policy development process." However, as the Requesters acknowledge, the Preliminary Issue Report did not exist at the time the Resolutions were approved, and thus could not constitute "material information" the Board failed to consider in approving the Resolutions. As such, no reconsideration is warranted on this basis.

In addition, the Board does not find, as the Requesters suggest, that the Renewed Registry Agreements will "interfere[e] with the standard policy development process." As discussed above, the Board explicitly acknowledged, in the Rationales for the Resolutions, that the URS has not been adopted as consensus policy and that ICANN (Internet Corporation for Assigned Names and Numbers) therefore has no ability to

impose the URS (or other new RPMs applicable to new gTLDs) on legacy TLDs. The existence of certain RPMs in the Renewed Registry Agreements, therefore, has no bearing on the GNSO (Generic Names Supporting Organization) policy development process to determine whether (or not) any of the new RPMs should be consensus policies applicable to all gTLDs. Accordingly, reconsideration is not appropriate.

The full BGC Recommendation on Reconsideration Requests 15-19 and 15-20, which sets forth the analysis and rationale in detail and with which the Board agrees, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Requests 15-19 and 15-20 is available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> ([/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf)) [PDF, 146 KB], and is attached as Exhibit C to the Reference Materials.

VI. Decision

The Board had the opportunity to consider all of the materials submitted by or on behalf of the Requesters or that otherwise relate to Reconsideration Requests 15-19 and 15-20. Following consideration of all relevant information provided, the Board reviewed and has adopted the BGC's Recommendation on Reconsideration Requests 15-19 and 15-20 (<https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> ([/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf)) [PDF, 146 KB]), which shall be incorporated by reference here and deemed a part of this Rationale and is attached as Exhibit C to the Reference Materials to the Board Paper on this matter.

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

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

c. Consideration of Expert Determination Re: Objection to Application for .HOSPITAL

Whereas, on 16 December 2013, an Expert Panel upheld the Independent Objector's (IO) Limited Public Interest (LPI) objection to Ruby Pike, LLC's (Ruby Pike) application for .HOSPITAL (.HOSPITAL Expert Determination).

Whereas, Ruby Pike contends that the .HOSPITAL Expert Determination deviates from the expert determinations for all other health-related LPI objections and that the outlying result is, at a minimum, as inconsistent and unreasonable as the string confusion objection determinations for which ICANN (Internet Corporation for Assigned Names and Numbers) has directed re-evaluation.

Whereas, Ruby Pike initiated a Cooperative Engagement Process (CEP) regarding the .HOSPITAL Expert Determination upholding the IO's LPI objection to Ruby Pike's application for .HOSPITAL.

Whereas, as part of the CEP, the Board has been asked to evaluate this matter and to take action to deal with what Ruby Pike believes to be the inconsistent and unreasonable .HOSPITAL Expert Determination.

Whereas, the Board Governance Committee (BGC): (i) has carefully considered the .HOSPITAL Expert Determination and Ruby Pike's arguments about it; (ii) agrees with Ruby Pike that the Objection proceedings leading to the .HOSPITAL Expert Determination should be re-evaluated, particularly in comparison to the other eight health-related LPI expert determinations; and (iii) recommends that the Board send the .HOSPITAL Objection back for re-evaluation by a new three-party expert panel.

Whereas, the Board has carefully considered the BGC's recommendation and the information and arguments Ruby Pike has presented, as well as the .HOSPITAL Expert Determination in comparison to the other eight health-related LPI expert determinations.

Whereas, after consideration, the Board finds that the .HOSPITAL Expert Determination is seemingly inconsistent with the Expert Determinations resulting from all other health related LPI objections.

Whereas, as set out in the Applicant Guidebook, ICANN (Internet Corporation for Assigned Names and Numbers) has reserved the right to individually consider any application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community.

Resolved (2016.02.03.12), the Board has identified the .HOSPITAL Expert Determination as not being in the best interest of the New gTLD (generic Top Level Domain) Program and the Internet community.

Resolved (2016.02.03.13), the Board directs the President and CEO, or his designee(s), to take all steps necessary to address the perceived inconsistency and unreasonableness of the .HOSPITAL Expert Determination by sending all of the materials for the relevant objection proceeding back to the International Centre of Expertise of the International Chamber of Commerce (ICC (International Chamber of Commerce)), which should in turn establish a new three-member expert panel to re-evaluate those materials in accordance with the criteria for LPI objections as set forth in the Applicant Guidebook. In doing so, the new three-member expert panel should also review as background the "Related LPI Expert Determinations" referenced in the following chart.

Related LPI Expert Determinations	String
Independent Objector v. DotHealth, LLC (http://newgtlds.icann.org/sites/default/files/drsp/23dec13/determination-2-1-1684-6394-en.pdf) [PDF, 154 KB]	.HEALTH
Independent Objector v. Goose Fest, LLC (http://newgtlds.icann.org/sites/default/files/drsp/23dec13/determination-2-1-1489-82287-en.pdf) [PDF, 153 KB]	.HEALTH
Independent Objector v. Afiliis Limited (http://newgtlds.icann.org/sites/default/files/drsp/15nov13/determination-1-1-868-3442-en.pdf) [PDF, 406 KB]	.HEALTH
Independent Objector v. Silver Glen, LLC (http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589-en.pdf) [PDF, 437 KB]	.HEALTHCARE
Independent Objector v. HEXAP SAS (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-1192-28569-en.pdf) [PDF, 474 KB]	.MED
Independent Objector v. Medistry LLC (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-2-1-907-38758-en.pdf) [PDF, 396 KB]	.MED
Independent Objector v. Charleston Road Registry Inc. (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-2-1-1139-2965-en.pdf) [PDF, 427 KB]	.MED
Independent Objector v. Steel Hill, LLC (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-2-1-1561-23663-en.pdf) [PDF, 536 KB]	.MEDICAL

Rationale for Resolutions 2016.02.03.12 – 2016.02.03.13

The Board's action today, addressing how to deal with inconsistent and/or unreasonable Expert Determinations from the New gTLD (generic Top Level Domain) Program LPI process, is part of the Board's role to provide general oversight of the New gTLD (generic Top Level Domain) Program. The action being approved today is to direct re-evaluation of the .HOSPITAL LPI objection proceeding which resulted in the .HOSPITAL Expert Determination. Pursuant to the Applicant Guidebook (Guidebook), the Board has the discretion to individually consider an application for a new gTLD (generic Top Level Domain). (Guidebook Module 6.3,

<http://newgtlds.icann.org/en/applicants/agb/terms-04jun12-en.pdf> (<http://newgtlds.icann.org/en/applicants/agb/terms-04jun12-en.pdf>) [PDF, 130 KB.] The Board's action arises from Ruby Pike's arguments that the .HOSPITAL Expert Determination deviates from all other health-related LPI expert determinations and that the result is inconsistent and unreasonable such that it warrants further action. (See Letter from J. Genga to A. Stathos, dated 15 April 2015, at 8, attached as Attachment A to the Reference Materials.) As set forth in further detail in the Reference Materials, which are incorporated herein by reference, Ruby Pike, an affiliate of Donuts, Inc., argues that the Board (via the New gTLD (generic Top Level Domain) Program Committee (NGPC)) has previously taken steps to address other inconsistent and unreasonable results by initiating a re-evaluation of a certain string confusion objection (SCO) expert determinations (SCO Final Review Mechanism) and should do so here as well. (*See id*)

The Board notes that when it provided for a limited SCO Final Review Mechanism for just a very few expert determinations from string confusion objection proceedings, the NGPC specifically considered, but excluded its application to other forms of objections.

The NGPC considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections, as well as other String Confusion Objection Expert Determinations, and possibly singular and plural versions of the same string. The NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD (generic Top Level Domain) Program. Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

(See <https://www.icann.org/resources/board-material/resolutions-new-gld-2014-10-12-en#2.2> ([/resources/board-material/resolutions-new-gld-2014-10-12-en#2.2](https://www.icann.org/resources/board-material/resolutions-new-gld-2014-10-12-en#2.2).)

Here, although not directly on point, the Board is uniquely swayed, as was the BGC, by Ruby Pike's assertions that the .HOSPITAL Expert Determination is inconsistent with the other eight health-related LPI Expert Determinations, thereby rendering it potentially unreasonable, and thereby warranting re-evaluation. As part of its deliberations, the Board took into consideration the following factors, which the BGC had previously evaluated in making its recommendation:

- The .HOSPITAL Expert Determination is inconsistent with the results of the eight other health related LPI objections that resulted in expert determinations, all of which were filed by the IO. The materials submitted by the IO and the Applicant to the Expert Panels in each instance were very similar and, in some instances, nearly identical (i.e., .HOSPITAL, .MEDICAL, and .HEALTHCARE).
- The .HOSPITAL Expert Determination is the only LPI objection, out of the total of ten LPI objections that resulted in expert determinations, where the expert determination was in favor of the objector rather than the applicant.
- The .HOSPITAL Determination is the only LPI expert determination with a split panel decision.
- The .HOSPITAL Determination is the only LPI expert determination where a dissenting opinion was issued.
- Four of the nine health related LPI objections filed by the IO were against applications by subsidiaries of Donuts, Inc. (Steel Hill, LLC (.MEDICAL); Goose Fest, LLC (.HEALTH); Silver Glen, LLC (.HEALTHCARE); and Ruby Pike, LLC (.HOSPITAL). The objections filed by the IO in all four objections are virtually identical. The .HOSPITAL Determination is the only determination in favor of the objector.
- The .HOSPITAL Expert Panel is the only health related LPI expert panel that evaluated the sufficiency of certain protections and safeguards as part of its determination while other expert panels deferred to ICANN (Internet Corporation for Assigned Names and Numbers) to implement and enforce such safeguards as necessary. (See <http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589->

[en.pdf \(http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589-en.pdf\)](http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589-en.pdf) [PDF, 437 KB].

- Because there are no other competing applications of the [.HOSPITAL TLD \(Top Level Domain\)](#), this action would not impact other [.HOSPITAL](#) applications and therefore would not contradict the NGPC's concern that expanding that re-review would delay consideration of competing applications. (See <https://www.icann.org/resources/board-material/resolutions-new-qtld-2014-10-12-en#2.b> ([/resources/board-material/resolutions-new-qtld-2014-10-12-en#2.b](#))).

Given these circumstances, the Board is persuaded, as was the BGC, that, consistent with the manner in which the Board had addressed previous inconsistent or unreasonable expert determinations, a re-evaluation of the objection proceedings against Ruby Pike's application for [.HOSPITAL](#) is warranted at this time. The re-evaluation proceeding will be administered in accordance with the [ICC \(International Chamber of Commerce\) Expert Rules for Administration of Expert Proceedings](#), which include the following:

- The review panel will consist of three members appointed by the [ICC \(International Chamber of Commerce\)](#) (the "Review Panel").
- The only issue subject to review shall be the [.HOSPITAL](#) objection proceedings and the resulting Expert Determination.
- The record on review shall be limited to the documentary evidence admitted into evidence during the original proceeding. No additional documents, briefs or other evidence may be submitted for consideration, except that the Review Panel shall also consider the identified "Related LPI Expert Determinations" in the above chart as part of its review of the [.HOSPITAL](#) objection proceeding and resulting Expert Determination.
- The standard of review to be applied by the Review Panel is: whether the original Expert Panel could have reasonably come to the decision reached in the underlying [.HOSPITAL](#) LPI objection proceeding through an appropriate application of the standard of review as set forth in the Guidebook.
- [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) will pay the applicable fees of the Review Panel.
- The possible outcomes of the review are: (1) the original [.HOSPITAL](#) Expert Determination is supported by the standard of review and reference to the identified Related LPI Expert Determinations, and will stand as is; or (2) the original [.HOSPITAL](#) Expert Determination reasonably cannot be supported based on the standard of review and reference to the identified Related LPI Expert Determinations, and will be reversed. The Review Panel will submit a written determination including an explanation and rationale for its determination.

There will be a fiscal impact associated with the adoption of this resolution, but nothing that will not or cannot be covered by the existing [New gTLD \(generic Top Level Domain\) Program](#) budget. Approval of the resolution will not impact security, stability or resiliency issues relating to the [DNS \(Domain Name System\)](#).

This is an Organizational Administrative Action not requiring public comment.

d. **Ombudsman Report Regarding Complaint by Hu Yi Global Information Resources (applicant for [.招聘 \("recruitment" in Chinese\)](#))**

Whereas, a String Confusion Objection was filed against Hu Yi Global Information Resources Company's (Hu Yi's) application for the new [gTLD \(generic Top Level Domain\)](#) [.招聘](#) (meaning "recruitment" in Chinese) (Application) by [Employ Media LLC](#).

Whereas, the International Centre for Dispute Resolution (ICDR) sustained the objection because the ICDR "determined that the Applicant is deemed to be in default as it has failed to file a timely Response to the Objection."

Whereas, Hu Yi filed a complaint with the Ombudsman on 9 June 2015 explaining that [Employ Media LLC](#) no longer objected to its Application for [.招聘](#).

Whereas, the Ombudsman issued a report to the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#) regarding Hu Yi's complaint, and set out facts based on his investigation and made specific recommendations in his report.

Whereas, the Board reviewed the Ombudsman Report and thoroughly considered his recommendations.

Resolved (2016.02.03.14), the Board directs the President, Global Domains Division, or his designee(s), to change the status of the Application from "Will Not Proceed" to "Evaluation Complete," and to permit Hu Yi's Application for 招聘 to proceed through the remainder of the new gTLD (generic Top Level Domain) application process.

Rationale for Resolution 2016.02.03.14

The ICANN (Internet Corporation for Assigned Names and Numbers) Ombudsman reports directly to the ICANN (Internet Corporation for Assigned Names and Numbers) Board. The Ombudsman is an important Accountability Mechanism found in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. The purpose of the Ombudsman is to help evaluate whether members of the ICANN (Internet Corporation for Assigned Names and Numbers) community have been treated fairly. The Ombudsman acts as a neutral in attempting to resolve complaints using alternative dispute resolution (ADR (Alternative Dispute Resolution)) techniques. Where, in the course of an investigation of a complaint, the Ombudsman forms an opinion that there has been an issue of administrative fairness, the Ombudsman may notify the Board of the circumstances.

The Ombudsman has issued a report to the Board regarding the closing out of Hu Yi Global Information Resources Company's (Hu Yi's) application for the new gTLD (generic Top Level Domain) 招聘 (meaning "recruitment" in Chinese) (Application) as a result of the default determination issued on the String Confusion Objection. The Ombudsman has recommended that the Board "revive" (or cause to be revived) the Application and permit it to proceed through the remainder of the new gTLD (generic Top Level Domain) application process. Hu Yi is the only applicant for the new gTLD (generic Top Level Domain) 招聘 ("recruitment" in Chinese); and Employ Media LLC is the only entity that filed an objection to the Application. Since its initial filing of the objection, Employ Media has explicitly indicated to ICANN (Internet Corporation for Assigned Names and Numbers) and to the Ombudsman that it no longer objects to the Application. Thus, the Ombudsman determined that permitting the Application to proceed would have no impact on any other applicant and would have no impact on any objector (because there is none). In addition, the Board understands that there are no further evaluation or objection proceedings to which the Application would need to be subjected. The next step in the application process is the contracting phase.

In light of the unique set of circumstances presented here (namely, the fact that the objection was sustained only on procedural grounds, and that the objector later explicitly rescinded the objection and in fact supported the Application), and after a review of the Ombudsman Report, the Board has determined to follow the Ombudsman's recommendation, and direct the President, Global Domains Division or his designee(s) to proceed with processing Hu Yi's Application for the gTLD (generic Top Level Domain) 招聘 through the remainder of the new gTLD (generic Top Level Domain) application process. Taking this action will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability to the community, as it is appropriate to review all applicable circumstances and recommendations resulting from one of ICANN (Internet Corporation for Assigned Names and Numbers)'s long-standing Accountability Mechanisms when taking decisions that have significant impact on applicants.

This decision has no direct financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not impact the security, stability and resiliency of the domain name system.

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

e. GAC (Governmental Advisory Committee) Advice: Dublin Communiqué (October 2015)

Whereas, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) met during the ICANN (Internet Corporation for Assigned Names and Numbers) 55 meeting in Dublin, Ireland and issued a [Communiqué \(/en/system/files/correspondence/gac-to-board-21oct15-en.pdf\)](#) [PDF, 165 KB] on 21 October 2015 ("Dublin Communiqué").

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee, which was decommissioned in October

2015, previously adopted a series of scorecards to respond to certain items of the [GAC \(Governmental Advisory Committee\)](#)'s advice concerning the New gTLD (generic Top Level Domain) Program. The Board has developed another iteration of the scorecard to respond to the advice in the Dublin Communiqué.

Resolved (2016.02.03.15), the Board adopts the scorecard titled "[GAC \(Governmental Advisory Committee\) Advice – Dublin Communiqué 21 October 2015: Actions and Updates \(3 February 2016\)](#)" ([/en/system/files/files/resolutions-annex-1-03feb16-en.pdf](#)) [PDF 136 KB] in response to items of [GAC \(Governmental Advisory Committee\)](#) advice in the Dublin Communiqué.

Rationale for Resolution 2016.02.03.15

[Article XI, Section 2.1](#) ([/en/about/governance/bylaws#XI](#)) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws permit 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." The [GAC \(Governmental Advisory Committee\)](#) issued advice to the Board on various matters, including the New gTLD (generic Top Level Domain) Program, in its Dublin Communiqué (21 October 2015). 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. The Board and the [GAC \(Governmental Advisory Committee\)](#) will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the [GAC \(Governmental Advisory Committee\)](#) advice was not followed.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) previously addressed items of the [GAC \(Governmental Advisory Committee\)](#)'s advice concerning new gTLDs issued in Communiqués from Beijing (April 2013), Durban (July 2013), Buenos Aires (November 2013), Singapore (March 2014), London (June 2014), Los Angeles (October 2014), Singapore (February 2015), and Buenos Aires (June 2015). The NGPC was decommissioned in October 2015, and the Board continues to maintain general oversight and governance over the New gTLD (generic Top Level Domain) Program and provide strategic and substantive guidance on New gTLD (generic Top Level Domain)-related topics as the current round of the Program comes to a conclusion. The Board is taking action to address the new advice from the [GAC \(Governmental Advisory Committee\)](#) in the Dublin Communiqué related to the New gTLD (generic Top Level Domain) Program, as well as other advice. The Board's actions are described in [scorecard dated 3 February 2016](#) ([/en/system/files/files/resolutions-annex-1-03feb16-en.pdf](#)) [PDF, 136 KB].

In adopting its response to the [GAC \(Governmental Advisory Committee\)](#) advice in the Dublin Communiqué, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- [GAC \(Governmental Advisory Committee\) Beijing Communiqué](#) (https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB] (April 2013); [GAC \(Governmental Advisory Committee\) Durban Communiqué](#) (https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_version=1&modificationDate=1374215119858&api=v2) [PDF, 103 KB] (July 2013); [GAC \(Governmental Advisory Committee\) Buenos Aires Communiqué](#) (https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique%20London%20final.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB] (November 2013); [GAC \(Governmental Advisory Committee\) Singapore Communiqué](#) (https://gacweb.icann.org/download/attachments/27132037/GAC_Amended_Communique_Sing5B1%5D.pdf?version=1&modificationDate=1397656205000&api=v2) [PDF, 147 KB] (as amended) (March 2014); [GAC \(Governmental Advisory Committee\) London Communiqué](#) (<https://gacweb.icann.org/download/attachments/27132037/Communique%20London%20final.pdf?version=1&modificationDate=1406852169128&api=v2>) [PDF, 138 KB] (June 2014); [GAC \(Governmental Advisory Committee\) Los Angeles Communiqué](#) ([/en/system/files/correspondence/gac-to-board-15oct14-en.pdf](#)) [PDF, 127 KB] (October 2014); [GAC \(Governmental Advisory Committee\) Singapore Communiqué](#) ([/en/system/files/correspondence/gac-to-board-11feb15-en.pdf](#)) [PDF, 113 KB] (February 2015); [GAC \(Governmental Advisory Committee\) Buenos Aires Communiqué](#) (<https://gacweb.icann.org/download/attachments/27132037/GAC%20Buenos%20Aires%20>

[2053%20Communique.pdf?version=1&modificationDate=1435188375963&api=v2](#)) [PDF, 106 KB] (June 2015); GAC (Governmental Advisory Committee) Dublin Communiqué ([/en/system/files/correspondence/gac-to-board-21oct15-en.pdf](#)) [PDF, 165 KB] (October 2015)

- Applicant responses to GAC (Governmental Advisory Committee) advice: <http://newgtlds.icann.org/en/applicants/gac-advice/> (<http://newgtlds.icann.org/en/applicants/gac-advice/>)
- Applicant Guidebook, Module 3: <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) [PDF, 260 KB]
- 9 November 2015 [letter \(/en/system/files/correspondence/diaz-to-crocker-09nov15-en.pdf\)](#) [PDF, 294 KB] from the Registry Stakeholder Group to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding the GAC (Governmental Advisory Committee)'s advice in the Dublin Communiqué regarding the use of two-character country codes.

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) on the New gTLD (generic Top Level Domain) Program 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.

f. Board Governance Committee Recommendation Regarding Implementation of Public Interest Commitments for .DOCTOR Registry Agreement

Whereas, at its 6 May 2015 meeting, the Board Governance Committee (BGC) recommended that "the NGPC again review the proposed implementation of a public interest commitment for the .DOCTOR TLD (Top Level Domain), and to re-evaluate the NGPC's 12 February 2015 determination."

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) was decommissioned on 22 October 2015 and the Board continues to maintain general oversight and governance over the New gTLD (generic Top Level Domain) Program and provide strategic and substantive guidance on New gTLD (generic Top Level Domain)-related topics as the current round of the Program comes to a conclusion.

Resolved (2016.02.03.16), the Board reaffirms the NGPC's acceptance of the Governmental Advisory Committee (Advisory Committee)'s (GAC (Governmental Advisory Committee)) [advice \(https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_version=1&modificationDate=1390438464000&api=v2\)](https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_version=1&modificationDate=1390438464000&api=v2) [PDF, 97 KB] issued in the Buenos Aires Communiqué (20 November 2013) regarding .DOCTOR, and clarifies that the President and CEO, or his designee(s), is directed to implement the GAC (Governmental Advisory Committee)'s advice by including in the .DOCTOR Registry Agreement the eight additional Public Interest Commitments associated with highly-regulated TLDs.

Rationale for Resolution 2016.02.03.16

In response to a recommendation from the Board Governance Committee (BGC), the Board is taking action at this time to clarify the proposed implementation of public interest commitments for the .DOCTOR TLD (Top Level Domain). The .DOCTOR TLD (Top Level Domain) was included as one of the [Category 1 strings \(https://gacweb.icann.org/display/GACADV/2013-04-11-Safeguards-Categories-1\)](https://gacweb.icann.org/display/GACADV/2013-04-11-Safeguards-Categories-1) requiring additional safeguards in the Governmental Advisory Committee (Advisory Committee)'s (GAC (Governmental Advisory Committee)) [Beijing Communiqué \(https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20April2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2\)](https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20April2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2) [PDF, 156 KB] (11 April 2013). ICANN (Internet Corporation for Assigned Names and Numbers) initiated a public comment period (23 April 2013) to solicit input on how the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) should address the GAC (Governmental Advisory Committee)'s safeguard advice in the Beijing Communiqué.

On 29 October 2013, the NGPC sent a [letter \(/en/system/files/correspondence/crocker-to-dryden-3-29oct13-en.pdf\)](/en/system/files/correspondence/crocker-to-dryden-3-29oct13-en.pdf) [PDF, 664 KB] to the GAC (Governmental Advisory Committee) about its proposed implementation of the Category 1 Safeguard advice in the Beijing Communiqué. The NGPC proposed to modify the text of the Category 1 Safeguards as appropriate to meet the spirit and intent of the advice in a manner that allowed the requirements to be implemented as Public Interest Commitments (PICs) in Specification 11 of the New gTLD (generic Top Level Domain) Registry Agreement. The NGPC also proposed to distinguish the list of strings between those that the NGPC considered to be associated with market sectors or industries that have highly-regulated entry requirements in multiple jurisdictions, and those that do not. The Category 1 Safeguards in the PIC would apply to the TLDs based on how the TLD (Top Level Domain) string was categorized (i.e. the highly-regulated TLDs would have eight additional PICs, and the others would have three additional PICs). In the NGPC's October 2013 proposal, .DOCTOR was not proposed to be classified as "highly-regulated".

In the GAC (Governmental Advisory Committee)'s [Buenos Aires Communiqué \(https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_version=1&modificationDate=1390438464000&api=v2\)](https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_version=1&modificationDate=1390438464000&api=v2) [PDF, 97 KB] (20 November 2013), the GAC (Governmental Advisory Committee) [advised \(https://gacweb.icann.org/display/GACADV/2013-11-20-Cat1-Cat2\)](https://gacweb.icann.org/display/GACADV/2013-11-20-Cat1-Cat2) the Board "to re-categorize the string .doctor as falling within Category 1 safeguard advice addressing highly regulated sectors, therefore ascribing these domains exclusively to legitimate medical practitioners. The GAC (Governmental Advisory Committee) notes the strong implications for consumer protection and consumer trust, and the need for proper medical ethical standards, demanded by the medical field online to be fully respected." The NGPC considered the GAC (Governmental Advisory Committee)'s Buenos Aires advice, and in the iteration of the [Scorecard from 5 February 2014 \(https://gacweb.icann.org/download/attachments/33849634/resolutions-new-gtld-annex-1-05feb14-en.pdf?version=1&modificationDate=1392335353000&api=v2\)](https://gacweb.icann.org/download/attachments/33849634/resolutions-new-gtld-annex-1-05feb14-en.pdf?version=1&modificationDate=1392335353000&api=v2) [PDF, 371 KB], the NGPC (1) adopted the proposed [implementation \(/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf\)](/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf) [PDF, 61 KB] of Category 1 Safeguards that was sent to the GAC (Governmental Advisory Committee) in October 2013; and (2) accepted the GAC (Governmental Advisory Committee)'s Buenos Aires advice to "re-categorize the string .doctor as falling within Category 1 safeguard advice addressing highly regulated sectors and ensure that the domains in the .doctor TLD (Top Level Domain) are ascribed exclusively to legitimate medical practitioners."

One of the contending applicants for the .DOCTOR TLD (Top Level Domain) raised some concerns in [Reconsideration Request 15-3 \(/resources/pages/reconsideration-15-3-brice-trail-llc-2015-03-12-en\)](/resources/pages/reconsideration-15-3-brice-trail-llc-2015-03-12-en) about the proposed implementation of the GAC (Governmental Advisory Committee)'s advice and with respect to what Public Interest Commitments will be required in the .DOCTOR Registry Agreement. At its 6 May 2015 meeting, the Board Governance Committee began discussions about Reconsideration Request 15-3, and postponed making a final determination on the Reconsideration Request. The BGC recommended that "the NGPC again review the proposed implementation of a public interest commitment for the .DOCTOR TLD (Top Level Domain), and to re-evaluate the NGPC's 12 February 2015 determination." The NGPC has since been decommissioned and the Board continues to maintain general oversight and governance over the New gTLD (generic Top Level Domain) Program and provide strategic and substantive guidance on New gTLD (generic Top Level Domain)-related topics as the current round of the Program comes to a conclusion.

With this action, the Board clarifies that to implement the GAC (Governmental Advisory Committee) advice that the NGPC accepted in February 2014, the following eight Category 1 Safeguards should be included in the .DOCTOR Registry Agreement:

1. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring registrants to comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.
2. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars at the time of registration to notify registrants of the requirement to comply with all applicable laws.
3. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring that registrants who collect and maintain sensitive health and financial data implement

reasonable and appropriate security measures commensurate with the offering of those services, as defined by applicable law.

4. Registry Operators will proactively create a clear pathway for the creation of a working relationship with the relevant regulatory or industry self-regulatory bodies by publicizing a point of contact and inviting such bodies to establish a channel of communication, including for the purpose of facilitating the development of a strategy to mitigate the risks of fraudulent and other illegal activities.
5. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring registrants to provide administrative contact information, which must be kept up-to-date, for the notification of complaints or reports of registration abuse, as well as the contact details of the relevant regulatory, or industry self-regulatory, bodies in their main place of business.
6. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring a representation that the registrant possesses any necessary authorizations, charters, licenses and/or other related credentials for participation in the sector associated with the TLD (Top Level Domain).
7. If a Registry Operator receives a complaint expressing doubt with regard to the authenticity of licenses or credentials, Registry Operators should consult with relevant national supervisory authorities, or their equivalents regarding the authenticity.
8. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring registrants to report any material changes to the validity of the registrants' authorizations, charters, licenses and/or other related credentials for participation in the sector associated with the TLD (Top Level Domain) in order to ensure they continue to conform to appropriate regulations and licensing requirements and generally conduct their activities in the interests of the consumers they serve.

By clarifying the implementation details of the NGPC's 5 February 2014 action, the Board notes that other potential registrants of .DOCTOR domains – such as professors, doctors of law and those who perform repairs or have "doctor" in their business name (e.g., "Shoe Doctor," "Computer Doctor") would not be limited by the PICs from being able to register names in the TLDs. Additionally, directories, review sites, commentators and services that provide information about medical and other types of doctors could be permitted. In clarifying the implementation details of the NGPC's 5 February 2014 action, the Board notes that it considered a review of a sample of regulatory schemes in multiple jurisdictions to determine whether the term "doctor" is associated with market sectors that have clear and/or regulated entry requirements in multiple jurisdictions, or is strongly associated with a highly-regulated industry in multiple jurisdictions. The review indicates that the term "doctor" is associated with medical practitioners in many countries, and in this context, has highly-regulated entry requirements (e.g. Kenya Medical Practitioners and Dentists Act, the German Approbationsordnung für Ärzte (Regulation of the Licensing of Doctors), and the Medical Board of Australia). The term "doctor" in various jurisdictions around the world also applies to persons who have earned doctoral degrees. In this context, the term "doctor" is also associated with clear and/or regulated entry requirements in multiple jurisdictions for obtaining such degrees (e.g. Doctor of Philosophy (PhD), Doctor of Education (EdD) and Doctor of Psychology (PsyD)). The review also shows that the term "doctor" is used in a general sense to refer to a person having expertise in a particular field without reference to formalized licensing requirements as noted above by the examples "Shoe Doctor," "Computer Doctor".

It should be noted, however, that a registry operator may impose additional registration restrictions that may otherwise limit eligible registrants in the TLD (Top Level Domain). For example, the registry operator may impose registration restrictions that require potential registrants to validate their credentials as licensed medical practitioners in order to register a name in the TLD (Top Level Domain). Imposing such a restriction would be at the discretion of the registry operator.

In adopting its response to the BGC recommendation, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- [GAC \(Governmental Advisory Committee\) Beijing Communiqué](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_version=1&modificationDate=1375787122000&api=v2) (https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB] (April 2013); [GAC](#)

(Governmental Advisory Committee) Durban Communiqué (https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_version=1&modificationDate=1374215119858&api=v2) [PDF, 103 KB] (July 2013); GAC (Governmental Advisory Committee) Buenos Aires Communiqué (https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB] (November 2013); GAC (Governmental Advisory Committee) Singapore Communiqué (https://gacweb.icann.org/download/attachments/27132037/GAC_Amended_Communique_Singapore_5B1%5D.pdf?version=1&modificationDate=1397656205000&api=v2) [PDF, 147 KB] (as amended) (March 2014); GAC (Governmental Advisory Committee) London Communiqué (<https://gacweb.icann.org/download/attachments/27132037/Communique%20London%20final.pdf?version=1&modificationDate=1406852169128&api=v2>) [PDF, 138 KB] (June 2014); GAC (Governmental Advisory Committee) Los Angeles Communiqué ([/en/system/files/correspondence/gac-to-board-15oct14-en.pdf](https://www.icann.org/en/system/files/correspondence/gac-to-board-15oct14-en.pdf)) [PDF, 127 KB] (October 2014); GAC (Governmental Advisory Committee) Singapore Communiqué ([/en/system/files/correspondence/gac-to-board-11feb15-en.pdf](https://www.icann.org/en/system/files/correspondence/gac-to-board-11feb15-en.pdf)) [PDF, 113 KB] (February 2015); GAC (Governmental Advisory Committee) Buenos Aires Communiqué (<https://gacweb.icann.org/download/attachments/27132037/GAC%20Buenos%20Aires%202053%20Communique.pdf?version=1&modificationDate=1435188375963&api=v2>) [PDF, 106 KB] (June 2015)

- Applicant responses to GAC (Governmental Advisory Committee) advice: <http://newgtlds.icann.org/en/applicants/gac-advice/> (<http://newgtlds.icann.org/en/applicants/gac-advice/>)
- Applicant Guidebook, Module 3: <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) [PDF, 260 KB]
- [Reconsideration Request 15-3 \(/resources/pages/reconsideration-15-3-brice-trail-llc-2015-03-12-en\)](https://www.icann.org/resources/pages/reconsideration-15-3-brice-trail-llc-2015-03-12-en)
- Other correspondence related to implementation of the Category 1 Safeguard Advice from the GAC (Governmental Advisory Committee)

The adoption of the Board's resolution will have a positive impact on the community because it will provide greater clarity to the GAC (Governmental Advisory Committee), the applicants and the community about the implementation of the Public Interest Commitments applicable to the .DOCTOR TLD (Top Level Domain). This clarification will also allow the contending applicants for the .DOCTOR TLD (Top Level Domain) to move forward with resolving the contention set.

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.

g. Establishing a Set of KPIs for Board Performance and Improvement Efforts (ATRT2 Rec. 1, 2 & 3)

Whereas, on 26 June 2014, the ICANN (Internet Corporation for Assigned Names and Numbers) Board accepted the recommendations of the Final Report of the Second Accountability and Transparency Review Team (ATRT2) published on 31 December 2013.

Whereas, ATRT2 Recommendation 1 stated "The Board should develop objective measures for determining the quality of ICANN (Internet Corporation for Assigned Names and Numbers) Board members and the success of Board improvement efforts, and analyze those findings over time."

Whereas, ATRT2 Recommendation 2 stated "The Board should develop metrics to measure the effectiveness of the Board's functioning and improvement efforts, and publish the materials used for training to gauge levels of improvement."

Whereas, ATRT2 Recommendation 3 stated "The Board should conduct qualitative/quantitative studies to determine how the qualifications of Board candidate pools change over time and should regularly assess Directors' compensation levels against prevailing standards."

Whereas, the Board Governance Committee (BGC) considered ATRT2 Recommendations and provided the Board with recommendations on implementation, including among other things the development of Key Performance Indicators (KPIs) to help measure the Board's function and improvement efforts.

Whereas, the Board recognizes the importance of measuring how well the Board functions, including its logistical aspects, and of measuring the Board's improvement efforts.

Whereas, the Board is engaged, through the BGC, in an ongoing process to review the Board's working practices and develop comprehensive and holistic KPIs and other relevant metrics with which the Board can measure its effectiveness and improvement over time.

Whereas, the BGC has recommended that the Board accept a first set of KPIs specifically in response to the ATRT2 recommendations, with the understanding that additional and more comprehensive KPIs will continue being developed and modified over time as part of the BGC and the Board's standard operating procedures and activities.

Resolved (2016.02.03.17), the Board approves the KPIs set forth in Attachment 1 to the Reference Materials, and agrees with the BGC that the Board should continue to develop of more comprehensive, richer set of KPIs and other relevant metrics with which the Board can measure its effectiveness and improvement over time.

Resolved (2016.02.03.18), with respect to the portion of ATRT2 Recommendation 3 recommending that the Board "conduct qualitative/quantitative studies to determine how the qualifications of Board candidate pools change over time", the Board will undertake to commence discussions with the Nominating Committee and electing bodies that are responsible for the selection of Directors and that have access to the qualifications of candidate pools.

Rationale for Resolutions 2016.02.03.17 – 2016.02.03.18

The implementation of [recommendations \(/en/about/aoc-review/atr/final-recommendations-31dec13-en.pdf\)](#) [PDF, 3.46 MB] from the Second Accountability and Transparency Review Team (ATRT2) began in June 2014, shortly after the Board accepted the recommendations. The initial Implementation Plan scheduled the completion of Recommendations 1, 2 and 3 in June 2015, which was later revised to February 2016, to allow Board Governance Committee (BGC) to further discuss the overall process, including the development of Key Performance Indicators (KPIs) to help measure the efforts called for in ATRT2 Recommendations 1, 2 and 3.

The BGC is working with the Board to review comprehensively the Board's performance and improvement efforts and to develop relevant and substantive KPIs to measure both. The first set of KPIs (see Attachment A to the Reference Materials) that the Board has approved today was developed directly in response to the ATRT2 recommendations. However, the Board is dedicated to pursuing the development of even more meaningful KPIs as an ongoing effort to help improve the metrics by which the Board measures its performance overtime. Accordingly, the Board now considers this effort as part of its ongoing activities to help enhance its performance, which the BGC is tasked with in Section I.A of its charter (see <https://www.icann.org/resources/pages/charter-06-2012-02-25-en> (/resources/pages/charter-06-2012-02-25-en)).

With respect to ATRT 2 Recommendation 1, the Board has previously stated that it is difficult to determine the quality of individual Board members as this terminology could be interpreted in many different ways. In accepting this recommendation, the Board agreed to measure its improvement efforts (training programs) over time, which is what the first approved KPIs address.

With respect to ATRT 2 Recommendation 2, which is partly redundant to Recommendation 1, the proposed first KPIs measure the Board's current logistical functioning.

With respect to ATRT 2 Recommendation 3, the Board has previously indicated that it does not have access to the information related to the Board candidate pools, and in particular as it relates to the Nominating Committee candidates, that would allow for assessment or measurement by the Board of Board candidate qualifications. Accordingly, the Board will undertake to commence discussions with the Nominating Committee and the electing bodies that are responsible for the selection of Directors and that have access to the qualifications of candidate pools.

Adopting this initial set of KPIs will have no direct fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) or the community that is not already budgeted, and will not have an impact of the security, stability and resiliency of the domain name system.

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

h. USG IANA (Internet Assigned Numbers Authority) Stewardship Transition – Additional FY16 Expenses and Funding

Whereas, on 25 June 2015, the Board approved the FY16 Operating Plan and Budget, which included an estimated budget envelope of US\$7 million for the USG IANA (Internet Assigned Numbers Authority) Stewardship Transition Project (the Project) to be funded by the Reserve Fund.

Whereas, that budget envelope was fully utilized during the first five months of FY16, including a US\$4 million cost of external legal advice (as referred to at <https://www.icann.org/resources/pages/iana-stewardship-project-costs-2015-10-16-en> ([/resources/pages/iana-stewardship-project-costs-2015-10-16-en](https://www.icann.org/resources/pages/iana-stewardship-project-costs-2015-10-16-en))) during that five-month period.

Whereas, it is projected that the cost to complete the Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability's (CCWG) Work Stream 1 recommendation development work and, to carry out the implementation work (including bylaws drafting) during the remaining seven months of FY16 to be US\$8 to 9 million, including US\$3.5 million for additional external legal advice.

Whereas, the Board Finance Committee (BFC), the co-chairs of the CCWG and the Cross-Community Working Group to Develop an IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal on Naming Related Functions (CWG) met on 28 January 2016 to address this escalating cost issue.

Whereas, the BFC recommended the following three actions: (a) the CFO to work with the CCWG and CWG co-chairs to review and confirm the estimates for the remainder of FY16; (b) ICANN (Internet Corporation for Assigned Names and Numbers) to facilitate a discussion on how to establish proper budgetary estimates and cost control mechanisms for the next phase of Cross Community Work in FY16 (Implementation including Bylaws Drafting), to take place between the CCWG and CWG co-chairs and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Chairs/Chartering Organizations; (c) the ICANN (Internet Corporation for Assigned Names and Numbers) Board should initiate a community discussion on how to replenish the Reserve Fund.

Whereas, the Board Finance Committee met on 2 February 2016 to follow up on the actions agreed during the call on 28 January 2016, and determined as an interim measure to recommend to the Board to approve an expenditure of US\$4.5 million to cover the current estimate of costs of the Project from December 2015 until the end of the ICANN (Internet Corporation for Assigned Names and Numbers) 55 meeting in Marrakech, and that cost would be funded from the Reserve Fund.

Whereas the Board reiterates on its 25 June 2015 statement that the Board is "committed to supporting the community in obtaining the advice it needs in developing recommendations in support of the transition process, and also notes the importance of making sure that the funds entrusted to ICANN (Internet Corporation for Assigned Names and Numbers) by the community are used in responsible and efficient ways. Assuring the continuation of cost-control measures over the future work of the independent counsel is encouraged." (See <https://www.icann.org/resources/board-material/resolutions-2015-06-25-en#2.c> ([/resources/board-material/resolutions-2015-06-25-en#2.c](https://www.icann.org/resources/board-material/resolutions-2015-06-25-en#2.c)).

Resolved (2016.02.03.19), the Board approves a budget envelope of up to US\$4.5 million, as an interim measure, to cover the costs of the Project incurred from December 2015 to the end of the ICANN55 in Marrakech (in addition to the budgeted envelope of US\$7 million included in the already approved FY16 Operating Plan and Budget) to be funded through a fund release from the Reserve Fund.

Rationale for Resolution 2016.02.03.19

The USG IANA (Internet Assigned Numbers Authority) Stewardship Transition is a major initiative to which the ICANN (Internet Corporation for Assigned Names and Numbers) Community as a whole is dedicating a significant amount of time and resources. ICANN (Internet Corporation for Assigned Names and Numbers)'s support for the community's work towards a successful completion of the Project (including both the USG IANA (Internet Assigned Numbers Authority) Stewardship transition proposal development and the CCWG's work) is critical for ICANN (Internet Corporation for Assigned Names and Numbers).

Considering its exceptional nature and the significant amount of costs anticipated to be incurred, the funding of this Project could not be provided through the Operating Fund. Accordingly, when the Board approved the FY15 and FY16 Operating Plans and Budgets, it included the anticipated funding of the transition initiative costs through a corresponding withdrawal from the Reserve Fund.

ICANN (Internet Corporation for Assigned Names and Numbers) is not able to unilaterally decide to fund these expenses through the New gTLD (generic Top Level Domain) auction proceeds, or potential excess from New gTLD (generic Top Level Domain) application fees, as the Board has committed in the past to organize community consultation on the future use of these funds.

The costs on the USG Stewardship Transition Initiative incurred through the first five months of FY16 totaled US\$7 million, an amount equal to the total envelope budgeted for the entire of FY16. Furthermore, the expenses projected for the remaining seven months of FY16 are estimated at US\$8 to US\$9 million, including US\$3.5 million in external legal advice expenses.

Considering the strategic importance for this initiative to be successfully completed, the Board needs to approve additional expense envelopes for FY16 and identify the funding source.

Based on the extracts from Section 4 of the Charters of the CCWG and CWG, the Board acknowledges that the CCWG and CWG, through their co-chairs, are responsible for defining and requesting staff support, meeting support, experts and facilitators. The CCWG and CWG co-chairs are also responsible for defining and requesting additional advisors or experts and, doing so by providing ICANN (Internet Corporation for Assigned Names and Numbers) with rationale and expected costs.

The CCWG Charter states:

The ICANN (Internet Corporation for Assigned Names and Numbers) Staff assigned to the CCWG Accountability will fully support the work of the CCWG Accountability as requested by the co-chairs, including meeting support, document drafting, editing and distribution and other substantive contributions when deemed appropriate by the CCWG-Accountability. ICANN (Internet Corporation for Assigned Names and Numbers) will provide access to relevant experts and professional facilitators as requested by the CCWG Accountability Chairs.

The CWG charter contains the same statement as above.

The CCWG Charter continues

[...] the CCWG-Accountability may also identify additional advisors or experts to contribute to its deliberations [...]. Should additional costs be involved in obtaining input from additional advisors or experts, prior approval must be obtained from ICANN (Internet Corporation for Assigned Names and Numbers). Such a request for approval should at a minimum include the rationale for selecting additional advisors or experts as well as expected costs.

The CWG Charter reads:

The chairs of this charter's drafting team, Jonathan Robinson and Byron Holland, will write to ICANN (Internet Corporation for Assigned Names and Numbers) seeking reasonable travel resources for CWG members to participate in face-to-face CWG meetings, but on the understanding that the CWG will make every effort to hold any face-to-face meetings concurrent, or in conjunction with regularly scheduled ICANN (Internet Corporation for Assigned Names and Numbers) meetings.

As a result, the BFC recommended to the CCWG and CWG co-chairs the following three actions: (a) the CFO to work with the CCWG and CWG co-chairs to review and confirm the estimates for the remainder of FY16; (b) ICANN (Internet Corporation for Assigned Names and Numbers) to facilitate a discussion on how to establish proper budgetary estimates and cost control mechanisms for the next phase of Cross Community Work in FY16 (Implementation including Bylaws drafting), to take place between the CCWG and CWG co-chairs and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Chairs/Chartering Organizations; (c) the ICANN (Internet Corporation for

Assigned Names and Numbers) Board should initiate a community discussion on how to replenish the Reserve Fund.

The above requests are consistent with previous communication issued by ICANN (Internet Corporation for Assigned Names and Numbers)'s CFO:

- to the CCWG co-chairs on 14 October 2015 through a letter on the ICANN (Internet Corporation for Assigned Names and Numbers) website (see <https://community.icann.org/display/acctcrosscomm/Costs+of+independent+legal+advice> (<https://community.icann.org/display/acctcrosscomm/Costs+of+independent+legal+advice>)) requesting the co-chairs to provide estimates for external legal advice.
- to the CWG and CCWG co-chairs, an email dated 30 November 2015, providing actual costs incurred by the four-month period ending 31 October 2015 and requesting to provide the ICANN (Internet Corporation for Assigned Names and Numbers) CFO with cost estimates for the external legal advice expected to be incurred from 31 October 2015 until 30 June 2016.

In addition, as the amount of expenses incurred for this initiative totals an estimated US\$24.7 million for FY15 and FY16, it is expected that the Reserve Fund balance will be approximately reduced to US\$60 million, corresponding to approximately 6 to 7 months of Operating Expenses, well below its current target level of 12 months of Operating Expenses or approximately US\$113 million. As a result, the Board will initiate a process to identify a solution to replenish the Reserve Fund by the estimated amount of US\$24.7 million (or its actual amount once known). The ICANN (Internet Corporation for Assigned Names and Numbers) Board plans to initiate a community discussion on how to replenish the Reserve Fund.

The Board expects that as the community groups continue to incur costs for the initiative, they will perform cost management exercises. Guidelines will be developed on cost management practices.

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.

3. Executive Session – CONFIDENTIAL

a. President and CEO FY16 SR1 At-Risk Compensation

Whereas, each Board member has confirmed that he/she does not have a conflict of interest with respect to establishing the amount of payment for the President and CEO's FY16 SR1 at-risk compensation payment.

Whereas, the Compensation Committee recommended that the Board approve payment to the President and CEO for his FY16 SR1 at-risk compensation.

Resolved (2016.02.03.20), the Board hereby approves a payment to the President and CEO for his FY16 SR1 at-risk compensation component.

Rationale for Resolution 2016.02.03.20

When the President and CEO was hired, he was offered a base salary, plus an at-risk component of his compensation package. This same structure exists today. Consistent with all ICANN (Internet Corporation for Assigned Names and Numbers) staff members, the President and CEO is to be evaluated against specific goals, which the President and CEO has set in coordination with the Compensation Committee.

Following FY16 SR1, which is a scoring period that ran from 16 May 2015 through 15 November 2015, the President and CEO provided to the Compensation Committee his self-assessment of his achievements towards his goals for FY16 SR1 the measurement period. After seeking input from other Board members, the Compensation Committee reviewed with the President and CEO his FY16 SR1 goals and discussed his achievements against those goals. Following that discussion, the Compensation Committee recommended that the Board approve the President and CEO's at-risk compensation for the first scoring period of FY16 and the Board agrees with that recommendation.

While this will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), it is an impact that was contemplated in the FY16 budget. This decision will not have an impact on the security, stability or resiliency of the domain name system.

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

[Published on 5 February 2016]

b. Effect on of Göran Marby as ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO (Published on 11 February 2016)

Whereas, Fadi Chehadé will step down as President and Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) on 15 March 2016.

Whereas, in order to conduct a search for a new President and CEO, the Board established a CEO Search Committee consisting of eight Board members.

Whereas, a description of the position of the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO was posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website at <http://www.icann.org/en/groups/other/ceo-search/en/groups/other/ceo-search>.

Whereas, the CEO Search Committee engaged Odgers Berndtson, an international executive search firm, to identify candidates for the President and CEO position.

Whereas, the executive search firm conducted a detailed, thorough, global and international search for a CEO candidate, and identified numerous candidates for the CEO Search Committee to consider.

Whereas, the CEO Search Committee carefully considered the qualifications of all identified candidates and chose a number to interview at length.

Whereas, approximately 115 candidate resumes were received, 16 candidates were chosen for further evaluation by the CEO Search Committee, eight candidates were interviewed in face-to-face meetings by the CEO Search Committee, and four candidates were interviewed in face-to-face meetings by the full Board.

Whereas, after lengthy interviews and deliberations, the Board identified Göran Marby as the leading candidate for the President and CEO position.

Whereas, the Board finds that Göran Marby possesses the leadership, political, technical and management skills necessary to lead ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO.

Whereas, the CEO Search Committee has recommended that Göran Marby be elected President and CEO and the Compensation Committee has recommended a reasonable compensation package for Göran Marby.

Whereas, Göran Marby will not be able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO for several weeks following Fadi Chehadé's final date of employment.

Whereas, the Board has determined that Akram Atallah should be appointed President and CEO for the time period of 16 March 2016 and until Göran Marby is able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO.

Resolved (2016.02.03.21), beginning on 16 March 2016 and until Göran Marby is able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO, Akram Atallah shall serve as President and CEO at the pleasure of the Board and in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, and shall hold this office until his resignation, removal, or other disqualification from service, or until his successor shall be elected and qualified.

Resolved (2016.02.03.22), beginning on the date that Göran Marby is able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO, and contingent upon the execution of a formal written Agreement based on terms that have been approved by the Board, Göran Marby is elected as President and CEO, to serve at

the pleasure of the Board and in accordance with the ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, and shall hold this office until his resignation, removal, or other disqualification from service, including termination of his Agreement, or until his successor shall be elected and qualified.

Resolved (2016.02.03.23), ICANN (Internet Corporation for Assigned Names and Numbers)'s Board Chair and its General Counsel are authorized to finalize a formal written Agreement with Göran Marby, and ICANN (Internet Corporation for Assigned Names and Numbers)'s Board Chair is authorized to execute that Agreement on behalf of ICANN (Internet Corporation for Assigned Names and Numbers).

Resolved (2016.02.03.24), the Board wishes to thank Odgers Berndtson for its assistance with the CEO search process.

Resolved (2016.02.03.25), this resolution shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article III, section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, pending public announcement of the selection of the new President and CEO.

[Published on 11 February 2016]

¹ Article IV, Section 2 of the .CAT, .TRAVEL, and .PRO registry agreements provide that the agreements shall be renewed upon the expiration of the initial term for successive terms, unless the following has occurred:

- i. an arbitrator or court has determined that Registry has been in fundamental and material breach of Registry's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 despite notice and an opportunity to cure in accordance with Article VI hereof and (ii) following the final decision of such arbitrator or court, Registry has failed to correct the conduct found to constitute such breach....

.CAT Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/cat-agreement-2005-09-23-en> (*/resources/unthemed-pages/cat-agreement-2005-09-23-en*); .TRAVEL Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/travel-agreement-2006-04-12-en> (*/resources/unthemed-pages/travel-agreement-2006-04-12-en*); .PRO Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/pro-agreement-2010-04-22-en> (*/resources/unthemed-pages/pro-agreement-2010-04-22-en*).



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(<https://www.twitter.com/icann>)



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Groups (https://www.icann.org/resources/pages/groups-2012-02-06-en)	PGP Keys (/en/contact/pgp-keys)	Request for Reconsideration (/groups/board/governance/reconsideration)	Annual Report (/about/annual-report)	Registrar Problems (/en/news/announcements/announcement-06mar07-en.htm)
Board (/resources/pages/board-of-directors-2014-03-19-en)	Certificate Authority (/contact/certificate-authority)	Ombudsman (/help/ombudsman)	Financials (/en/about/financials)	WHOIS (http://whois.icann.org/)
President's Corner (/presidents-corner)	Registry Liaison (/resources/pages/contact-f2-2012-02-25-en)		Document Disclosure (/en/about/transparency)	
Staff (/en/about/staff)	AOC Review (http://forms.icann.org/en/about/aoc-review/contact)		Planning (/en/about/planning)	
Careers (https://icann-openhire.silkroad.com/epostings/index.cfm?fuseaction=app.allpositions&organization_id=16025&version=1)	Reviews (http://forms.icann.org/en/groups/reviews/contact)		Dashboard Beta (https://www.icann.org/dashboard)	
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Flip Petillion
fpetillion@crowell.com
Personal Contact Information Redacted

8 March 2016

Members of the ICANN Board, and
Mr Akram Atallah,
President, Global Domains Division

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

UNITED STATES OF AMERICA

By e-mail

Dear Members of the ICANN Board of Directors and Mr. Atallah,

Re: .hotel data exposure issue

I am writing to you on behalf of Travel Reservations SRL ("TRS", formerly Despegar Online SRL), Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds+Machines Group Limited (formerly, Top Level Domain Holdings Limited), Donuts Inc. (and its subsidiary applicants Spring McCook, LLC and Little Birch, LLC), and Radix FZC (and its subsidiary applicant DotHotel Inc.).

My clients are all applicants for the .hotel and/or .eco gTLD and have expressed their concerns about the data exposure issue that occurred in the New gTLD Applicant and GDD portals. My clients expressed their concerns *inter alia* in a letter of 5 June 2015 and within the IRP proceedings in ICDR Case No. 01-15-002-8061 to which ICANN was a party. Unfortunately however, the Board has so far not addressed this issue.

In its Declaration of 11 February 2016, the IRP Panel denied my clients' requests. However, the IRP Panel considered that my clients had raised legitimate concerns that should be tackled by ICANN. With the present letter, I urge you to address my clients' concerns appropriately, with due respect for the Articles of Incorporation and Bylaws.

On 5 June 2015 my clients asked that there be full transparency and that ICANN adopt appropriate measures regarding the data exposure issue. On 11 February 2016 the IRP Panel ruled that “[t]he 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] Bylaw[s].”¹ According to the Panel, it was not clear if ICANN had properly investigated the allegation of association between HOTEL Top-Level-Domain s.a.r.l. (“HTLD”) and Mr. Dirk Krischenowski and, if it had, what conclusions ICANN had reached. The Panel added that ICANN is required to investigate the issue properly and to make public the fact of the investigation and the result thereof. The Panel added that appropriate action should have been taken by the date of the IRP Declaration, the failure of which could well amount to an inexcusable inaction by the Board.

At the hearing of 7 December 2015, counsel to ICANN, in the presence of senior ICANN staff and ICANN’s Deputy General Counsel, assured the panel that the issue was still under consideration by the ICANN Board.² However, although the Board was first contacted about this on 5 June 2015, there are no indications that the Board ever gave consideration to this matter, either before or after the 7 December hearing. My clients’ request was never put on the agenda of the Board, although there have been numerous Board meetings since.

In addition, it is apparent that ICANN has not investigated the issue properly. On 10 November 2015, ICANN asserted that there is no evidence to show that HTLD is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials.³ However, the affiliation between Mr. Dirk Krischenowski and HTLD is apparent from public information that is available on the ICANN website. As a matter of fact Mr. Dirk Krischenowski of HTLD represented HTLD in three string confusion objections against applications by Despegar Online SRL and Booking.com (Annexes 1 to 3). ICANN’s own evidence thus shows that Mr. Dirk Krischenowski is part of HTLD and that he has authority to represent HTLD. To paraphrase the IRP Panel⁴, ICANN’s argument – that the affiliation between Mr. Dirk Krischenowski and HTLD is unsupported – represents, at best, that ICANN’s investigations had not yet revealed this obvious link and, at worst, an attempt to mislead the IRP Panel about the Board’s intent to avoid dealing with what is clearly a serious and sensitive issue that relates to the integrity of the application process for the .hotel gTLD.

The integrity of the application process for the .hotel gTLD is at risk if ICANN allows HTLD’s application to proceed. Allowing HTLD’s application to proceed would go against everything that ICANN stands for. It would amount to an acquiescence in criminal acts that were committed with the obvious intent to obtain an unfair advantage over direct competitors. Such acquiescence would be contrary to ICANN’s obligations under its Articles of Incorporation and Bylaws, and to ICANN’s mandate to operate for the benefit of the Internet community as a whole by carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law, and through open and transparent processes that enable competition and open entry in Internet-related markets. When the background screening criteria for new gTLD applicants were introduced, ICANN affirmed the right to deny an otherwise qualified application, recognizing ICANN’s duty “to protect the public interest in the allocation of critical Internet resources”⁵. In this respect, ICANN made clear that “applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or

¹ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 133-134.

² ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 137.

³ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, ICANN’s Sur-Reply re .hotel of 10 November 2015, para. 25.

⁴ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 127.

⁵ gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24.

the Internet to facilitate the commission of crimes” were going to be “automatically disqualified from the program”⁶.

In the case at hand, ICANN caught a representative of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. The situation is even more critical as the crime was committed with the obvious intent of obtaining sensitive business information concerning a competing applicant. It is clearly not in the public interest, and the public interest will not be adequately protected, if critical Internet resources are allocated to HTLD. Allocating the .hotel TLD to HTLD is not in accordance with any of the core values that should guide the decisions and actions of ICANN. It would go against ICANN's mandate to act in conformity with, *inter alia*, open and transparent processes that enable competition and open entry in Internet-related markets.

As a result, we see no other solution but for ICANN to cancel HTLD's application for .hotel, and to allow the other applications for .hotel to proceed.

*

In view of the above, I reiterate my clients' request that ICANN and its Board cancel the application of HTLD for .hotel at its meeting of 10 March 2016; failing this, I have instructions to bring this matter to the attention of an IRP panel.

This letter is not intended to be a complete statement of the elements of facts or law relevant to this matter and is sent without prejudice and reserving all rights.

Yours sincerely,



Flip Petillion

⁶ gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22.

Annexes:

Annex 1: SCO Expert Determination in ICDR Case No. 50-504-T-00237-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1016-75482-en.pdf>

Annex 2: SCO Expert Determination in ICDR Case No. 50-504-T-000211-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1249-1940-en.pdf>

Annex 3: SCO Expert Determination in ICDR Case No. 50-504-T-000212-13

<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-3-1-1249-87712-en.pdf>



The Internet Corporation for Assigned Names and Numbers

16 March 2016

Mr. Johannes Lenz-Hawliczek
Chief Executive Officer
HOTEL Top-Level-Domain S.a.r.l.
Lockenhuhnweg 9
12355 Berlin
Germany

Re: New gTLD Applicant Portal

Dear Mr. Johannes Lenz-Hawliczek:

In late February 2015, ICANN learned about a misconfiguration issue affecting the New gTLD Applicant and GDD portals that allowed portal users to view confidential business information belonging to other applicants if they conducted a particular type of advanced search. ICANN's investigation uncovered information suggesting that one user in particular, Dirk Krischenowski, accessed and downloaded materials pertaining to a large number of other users as a result of the misconfiguration issue.

After concluding its initial investigation, ICANN notified affected users that its initial investigation indicated their data was viewed by another portal user(s) without authorization. Subsequently, an affected user, Travel Reservations SRL, formerly Despegar Online SRL ("Despegar"), wrote to ICANN to raise concerns regarding Mr. Krischenowski's access to proprietary information that it submitted to ICANN in support of its applications for .HOTEL, .HOTEIS and .HOTELES, and to request that ICANN cancel HOTEL Top-Level-Domain S.a.r.l.'s ("Hotel TLD") application for the .HOTEL gTLD. ICANN has also received a letter from Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC ("Fegistry"), Minds+Machines Group Limited (formerly, Top Level Domain Holdings Limited) ("Minds +Machines"), Donuts Inc. (and its subsidiary applicants Spring McCook, LLC and Little Birch, LLC) ("Donuts"), and Radix FZC (and its subsidiary applicant DotHotel Inc.) requesting that ICANN cancel Hotel TLD's application for .HOTEL. The letters indicate that these other applicants and Despegar are all represented by the same counsel. Accordingly, ICANN has initiated further investigation into the matter. ICANN is taking the concerns raised in these letters very seriously and is investigating the facts and considering how to respond.

ICANN's investigation confirmed that there were at least eight searches from sessions conducted using credentials associated with Mr. Krischenowski that resulted in access to Despegar's information. The compromised information included responses to several application questions for the .HOTEL, .HOTEIS, and .HOTELES strings, which are all applications filed by Despegar or its affiliates. ICANN's investigation also confirmed searches from sessions conducted using Mr. Krischenowski's credentials that resulted in access to information belonging to Minds + Machines, Donuts and Fegistry.

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It appears that Mr. Krischenowski accessed and downloaded, at minimum, the financial projections for Despegar's applications for .HOTEL, .HOTEIS and .HOTELES, and the technical overview for Despegar's applications for .HOTEIS and .HOTEL. Mr. Krischenowski appears to have specifically searched for terms and question types related to financial or technical portions of the application. Mr. Krischenowski responded to ICANN's request for an explanation through legal counsel acknowledging that he accessed other users' materials but denying he acted improperly or unlawfully.

ICANN's investigation has revealed certain business connections between Hotel TLD and Mr. Krischenowski. These connections include, but are not limited to, Mr. Krischenowski's representation of Hotel TLD in three string confusion objections initiated by Hotel TLD against applications by Despegar and Booking.com. Mr. Krischenowski also has various apparent business connections with Hotel TLD's primary contact Johannes Lenz-Hawliczek and its secondary contact Katrin Ohlmer.

Given the aforementioned, ICANN is in the process of making a determination regarding whether Mr. Krischenowski's access of the materials of other applicants was made in support of Hotel TLD's application for the .HOTEL domain and the appropriate response to the requests that ICANN cancel the Hotel TLD application for .HOTEL. Accordingly, ICANN would like to provide Hotel TLD the opportunity to respond. Should Hotel TLD choose to do so, we request a response within the next seven (7) days.

Please note that ICANN's investigation into this matter is ongoing and that ICANN expressly reserves all of its rights with respect to this matter, including but not limited to all remedies that may be available to ICANN relating in any way to this matter and the right to take further action relating to any instances of misuse of the portals.

Sincerely,

A handwritten signature in black ink, appearing to read "Christine A. Willett", written in a cursive style.

Christine A. Willett
Vice President, GDD Operations

Ms. Christine A. Willett
Vice President, GDD Operations
Internet Corporation for Assigned Names and Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Via E-Mail, Fax and Federal Express

23 March 2016

New gTLD Applicant Portal
Your letter dated 16 March 2016

Dear Ms. Willett,

Reference is made to your letter dated 16 March 2016. We thank you for the opportunity to respond.

HOTEL Top-Level-Domain S.à.r.l. ("Applicant") deeply regrets that, further to the GDD portal misconfiguration, Mr. Krischenowski has apparently accessed proprietary information that Applicant's competitors submitted to ICANN in support of their applications for the .HOTEL gTLD. However, the competitors' request that ICANN cancel Applicant's application for .HOTEL for that reason is unfounded. In accessing the proprietary information, Mr. Krischenowski did not act on Applicant's behalf, and he did not act in support of Applicant's application for .HOTEL. In particular, any proprietary information that Mr. Krischenowski could have obtained could not have supported Applicant's application as the application had already been submitted at the time of the incident.

Applicant has itself investigated the incident and has implemented significant changes to the management and ownership of Applicant as outlined in paragraph 5 below.

Based on the information available to date, we would like to inform you as follows:

1. At the time of the incident, Mr. Krischenowski was (through a wholly-owned company) a 50 % shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (the "GmbH"), the minority (48,8%) shareholder of Applicant. He was not an employee of Applicant. To a very limited extent, Mr. Krischenowski also acted as business consultant of Applicant. In these functions, however, he did not have the general power to represent Applicant. (However, in the individual case of the String Confusion Objections, he was authorized by the Applicant to represent the Applicant in this matter. The reason for this individual representation of Applicant was that the string confusion objections were based on IP rights held by the GmbH and Mr. Krischenowski was the managing director of the GmbH at the time.)

In accessing the proprietary information, Mr. Krischenowski did not act on Applicant's behalf, nor did he use Applicant's User Login ID.

2. Mr. Krischenowski did not inform Applicant's personnel of his action and did not provide any of the accessed information to Applicant or its personnel. Applicant's personnel did not have any

knowledge about Mr. Krischenowski's action, and did not consent to it or approve it. They only learned about it on 30 April 2015 in the context of ICANN's investigation.

3. The portal misconfiguration issue occurred between 17 March 2014 and 27 February 2015. As is clear from the chronology of events, any information that Mr. Krischenowski could have obtained during the portal misconfiguration could not have supported Applicant's application for .HOTEL.
 - Applicant's application had already been filed in May 2012.
 - The last documents amending the application were uploaded on 16 August 2013 and 30 August 2013 (change of address and additional endorsements), well before the issue occurred.
 - In the context of ICANN's initial evaluation in 2013, Applicant answered two questions related to technical issues on 11 June 2013.
 - On 30 April 2014, Applicant submitted a clarifying comment regarding the language of the policy description in the public part of its application.
 - On 11 June 2014, Applicant prevailed in Community Priority Evaluation.
 - On 24 December 2014, Applicant informed ICANN of the change of legal form of its shareholder Afilias Ltd. to Afilias plc.

The chronology clearly shows that by 17 March 2014, the start date of the portal misconfiguration issue, Applicant had long since submitted its entire application which formed the basis for the Community Priority Evaluation on 11 June 2014. The clarifying comment of 30 April 2014 regarding the policy description took place after the incident but concerned the public part of Applicant's application. As policy descriptions by all applicants are public from the beginning of the application process and are not proprietary information, the Applicant could not have benefitted from the incident with respect to the submission of this clarifying comment. The change request of 24 December 2014 concerning the shareholder's legal form did not impact the substance of the application. Therefore, due to the chronology of events, it is clear that any information which Mr. Krischenowski may have obtained through the portal misconfiguration could not have influenced the application, and there is no link whatsoever between Mr. Krischenowski accessing such information and the application.

4. To our knowledge, none of the proprietary information Mr. Krischenowski may have obtained through the portal misconfiguration has influenced or supported Applicant's application. Statements to the contrary would be unsubstantiated.
5. Applicant has asked Mr. Krischenowski to step down as a managing director of the GmbH, to which Mr. Krischenowski has agreed with effect as of 18 March 2016. In this function, he has been replaced by Mr. Lenz-Hawliczek and Ms. Ohlmer. Further, as of 18 March 2016, Mr. Krischenowski has caused his wholly-owned company to transfer its 50 % shareholding in the GmbH to Ms. Ohlmer (via her wholly-owned company). Finally, the contract on business consultancy services between Applicant and Mr. Krischenowski was terminated with effect as of 31 December 2015.

In addition to the action taken above, and to reflect our responsibility and commitment to the HOTEL community, we jointly took the following decision:

Afilias plc, the majority shareholder of Applicant, and the GmbH have agreed that the GmbH shall transfer its shares in Applicant to Afilias plc. Subject to notarization and registration, and an agreement between the parties regarding an initial cash payment and deferred purchase price for such interest, Afilias plc will in the near future be the sole shareholder of Applicant, and there will not be any corporate relationship between Applicant and the GmbH. Also we would like to inform you that Mr. Lenz-Hawliczek and Ms. Ohlmer have been replaced as managing directors of Applicant by myself (Philipp Grabensee) as the sole Managing Director. In addition, a Change Request has been submitted on 23 March 2016 to replace the primary and secondary contacts of the .HOTEL application by myself and Mr. John Kane of Afilias plc, respectively.

In light of the facts as set forth in this letter, including the actions taken by the Applicant as set forth herein, we do not believe that Mr. Krischenowski's actions should impact Applicant's eligibility as a TLD applicant/operator per the provisions of the Applicant Guidebook nor disqualify or otherwise affect the legitimacy of the HOTEL community.

We believe that the comprehensive steps outlined above demonstrate the seriousness with which we take ICANN's inquiry into this matter, and we are confident that Applicant remains best suited to operate the .HOTEL TLD on behalf of the global hotel community - an important community that has been enthusiastically preparing for the launch of this important new resource.

In summary, we are of the opinion that a cancellation of Applicant's application for .HOTEL would not be appropriate and would unfairly penalize the global hotel community. We therefore kindly ask you to uphold our application.

Please do let us know if we can assist with the investigation of the facts surrounding this matter or if you have any questions.

Kind regards,



Philipp Grabensee
Sole Managing Director



The Internet Corporation for Assigned Names and Numbers

10 May 2016

Mr. Philipp Grabensee
Managing Director
HOTEL Top-Level-Domain S.a.r.l.
168, Av. de la Liberte
L-1930 Luxembourg
Luxembourg

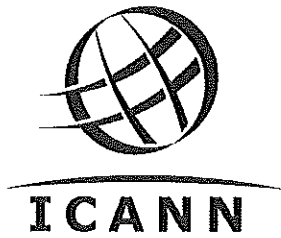
Re: New gTLD Applicant Portal

Dear Mr. Grabensee,

Thank you for your letter of 23 March 2016.

With respect to the information that you provided regarding HOTEL Top-Level-Domain S.a.r.l.'s (HTLD's) affiliation with Dirk Krischenowski, Johannes Lenz-Hawliczek, and Katrin Ohlmer, we would like additional information regarding the nature and status of the affiliation. Specifically:

- (1) What was the nature and extent of the relationship between HTLD and Mr. Krischenowski during each of the following time periods? (2) What was Mr. Krischenowski's role and responsibilities with respect to HTLD during each of the following time periods?
 - (a) when HTLD submitted its New gTLD Program application for the .HOTEL string;
 - (b) when Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014; and
 - (c) the present time period.
- (3) What was the nature and extent of the relationship between HTLD and Mr. Lenz-Hawliczek during each of the following time periods? (4) What was Mr. Lenz-Hawliczek's role and responsibilities with respect to HTLD during each of the following time periods?
 - (a) when HTLD submitted its New gTLD Program application for the .HOTEL string;



(b) when Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014; and

(c) the present time period.

- (5) What was the nature and extent of the relationship between HTLD and Ms. Ohlmer during each of the following time periods? (6) What was Ms. Ohlmer's role and responsibilities with respect to HTLD during each of the following time periods?

(a) when HTLD submitted its New gTLD Program application for the .HOTEL string;

(b) when Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014; and

(c) the present time period.

Additionally, you advised in your letter that "Afilias plc, the majority shareholder of Applicant, and the GmbH have agreed that the GmbH shall transfer its shares in Applicant to Afilias plc. Subject to notarization and registration, and an agreement between the parties regarding an initial cash payment and deferred purchase price for such interest, Afilias plc will in the near future be the sole shareholder of Applicant, and there will not be any corporate relationship between Applicant and the GmbH." Please explain exactly what the corporate relationship is currently between HTLD and any entity in which Mr. Krischenowski has any ownership interest. Please also explain exactly what the corporate relationship will be in the future between HTLD and any entity in which Mr. Krischenowski has any ownership interest, and specify exactly on what date this change in the relationship occurred or will occur.

We would greatly appreciate a response from you within the next seven days.

Sincerely,

Christine A. Willett
Vice President, GDD Operations

Flip Petillion

12 May 2016

Members of the ICANN Board, and
Mr Akram Atallah,
President, Global Domains Division
Ms. Christine Willett
Vice President, GDD Operations

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

UNITED STATES OF AMERICA

By e-mail

Dear Members of the ICANN Board of Directors, Mr. Atallah and Ms. Willett

Re: .hotel data exposure issue

I refer to my letter of 8 March 2015, and I am writing to you on behalf of Travel Reservations SRL ("TRS", formerly Despegar Online SRL), Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds+Machines Group Limited (formerly, Top Level Domain Holdings Limited), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), and Radix FZC (and its subsidiary applicant DotHotel Inc.).

Earlier today, I was informed of recent correspondence between ICANN and HOTEL Top-Level-Domain s.a.r.l. ("HTLD"). I was surprised that I had to find out about this correspondence myself, despite counsel to ICANN had committed to keep me informed of developments. Not having heard back from him, despite repeated requests, I address my request, as expressed in my e-mail of 10 May 2016, directly to you. Please find attached the relevant correspondence.

In any event, I understand from ICANN's letter to HTLD of 16 March 2016 that ICANN:

- (i) is taking my clients' concerns very seriously;
- (ii) acknowledges that Dirk Krischenowski accessed and downloaded confidential information in relation to my clients' applications (including technical and financial information) and that he appears to have specifically searched for such information; and
- (iii) found out that multiple business connections exist between HTLD and Mr. Krischenowski.

From HTLD's response of 23 March 2016, I learn that:

- (i) Mr. Krischenowski was an important shareholder of HTLD;
- (ii) that he was a consultant to HTLD at the time he accessed my clients' proprietary information; and
- (iii) that Mr. Krischenowski continued being a consultant and an important shareholder of HTLD, long after applicants were informed about Mr. Krischenowski illegal appropriation of trade secrets.

HTLD claims that it only learned about Mr. Krischenowski's action on 30 April 2015. However, HTLD kept Mr. Krischenowski as a consultant until 31 December 2015, and Mr. Krischenowski remained the managing director of HTLD's related company, Hotel Top-Level-Domain GmbH, until 18 March 2016. Mr. Krischenowski also remained a major shareholder of HTLD.

As a result, HTLD did not take any action until it was informed that ICANN is taking the issue very seriously.

HTLD's is now claiming that it did not use the information that was misappropriated by Mr. Krischenowski to support its application in the framework of ICANN's evaluation.

However, it is of no relevance whether or not HTLD has used this information in the framework of ICANN's evaluation of .hotel. What matters is that the information was accessed with the obvious intent to obtain an unfair advantage over direct competitors. The future registry operator of the .hotel gTLD will compete with other registry operators. In the unlikely event that HTLD were allowed to operate the .hotel gTLD, HTLD would have an unfair advantage over competing registry operators, because of its access to sensitive business information of my clients. HTLD could use this unfair advantage to adapt its commercial strategy, pricing, technical infrastructure, etc., an advantage HTLD would never have obtained, had it not illegally accessed sensitive business information of its direct competitors.

The fact that HTLD nevertheless submits that the information that was obtained by Mr. Krischenowski could not have supported HTLD's application for .hotel, and that it waited for almost an entire year, and after being summoned by ICANN, to terminate its relationship with Mr. Krischenowski, further demonstrates that allowing HTLD's application to proceed would be a disservice to the Internet community.

*

In view of the above, I reiterate my clients' request that ICANN and its Board cancel the application of HTLD for .hotel.

This letter is not intended to be a complete statement of the elements of facts or law relevant to this matter and is sent without prejudice and reserving all rights.

Yours sincerely,



Flip Petillion

Annexes:

Letter of counsel to ICANN of 16 March 2016

Letter on behalf of my clients of 27 April 2016

Letter on behalf of my clients of 10 May 2016

JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2452
TELEPHONE: +1.213.489.3939 • FACSIMILE: +1.213.243.2539

JP003845/1500880556
172210-665016

March 16, 2016

Mr. Flip Petillion
Crowell & Moring
7, Rue Joseph Stevens
B-1000 Brussels
Belgium

Re: New gTLD Applicant Portal

Dear Mr. Petillion:

We represent ICANN with respect to this matter. We write in response to your letter dated 1 March 2016 sent on behalf of Travel Reservations SRL (formerly Despegar Online SRL) ("Despegar") and your letter dated 8 March 2016 sent on behalf of Despegar and Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds+Machines Group Limited (formerly, Top Level Domain Holdings Limited), Donuts Inc. (and its subsidiary applicants Spring McCook, LLC and Little Birch, LLC), and Radix FZC (and its subsidiary applicant DotHotel Inc.).

We thank you for bringing this matter to ICANN's attention and in particular for providing the information regarding Mr. Krischenowski's apparent representation of Hotel TLD in three string confusion objections in 2013. Please let us know if any of your clients have any further information regarding the connection between Mr. Krischenowski and Hotel TLD.

ICANN takes the portal misconfiguration issue and your clients' concerns very seriously and is thoroughly considering the appropriate response. Prior to making a final determination on your clients' request that ICANN cancel the application of Hotel TLD for the .Hotel gTLD, ICANN would like to provide Hotel TLD an opportunity to respond. To that end, ICANN will send a letter to Hotel TLD informing Hotel TLD of your clients' request that ICANN cancel Hotel TLD's application for the HOTEL gTLD, and asking Hotel TLD to respond within seven (7) days.

We appreciate your continued patience through this process and we will keep you informed of developments.

Very truly yours,



Michael G. Morgan

Flip Petillion

27 April 2016

Michael G. Morgan
Jones Day
555 South Flower Street
Fiftieth Floor
Los Angeles
California 90071.2452

UNITED STATES OF AMERICA

By e-mail: mgmorgan@jonesday.com

Dear Colleague,

Re: .hotel data exposure issue (your reference JP003845/1500880556 172210-66016)

I refer to your letter of 16 March 2016 in which you informed me that ICANN was going to send a letter to Hotel Top-Level-Domain s.a.r.l. ("HTLD"), asking HTLD to respond within seven days.

Could you please inform me of any developments and send me a copy of the communications between ICANN and HTLD? I thank you in advance.

Yours sincerely,



Flip Petillion



Flip Petillion



10 May 2016

Michael G. Morgan
Jones Day
555 South Flower Street
Fiftieth Floor
Los Angeles
California 90071.2452

UNITED STATES OF AMERICA

By e-mail: **mgmorgan@jonesday.com**

Dear Colleague,

Re: **.hotel data exposure issue (your reference JP003845/1500880556 172210-66016)**

I refer to my email of 27 April 2016, in which I requested an update on the developments and a copy of the communications between ICANN and HTLD. Unless mistaken, I did not yet receive a response. May I conclude that HTLD did not react to my clients' request, since you committed to keep me informed of the developments in this matter?

In the meantime, it was brought to my attention that the ICANN Board has scheduled a discussion on a report on .hotel at its meeting of 15 May 2016. The ICANN Board also plans to hold a confidential session at said meeting. I trust that the report on .hotel will be communicated well in advance of the meeting and that the Board's discussion on .hotel will not be part of the confidential session. My clients are of the opinion that they are entitled to full transparency regarding ICANN's consideration of the .hotel extension, and that they ought to be informed of all discussions by ICANN and its Board members regarding .hotel.

Therefore, I am looking forward to receiving i) a copy of all communications between ICANN and HTLD, ii) ICANN's report on .hotel, iii) ICANN's confirmation that .hotel will not be discussed during a confidential session, and iv) information on all other developments and discussions that may have occurred regarding .hotel.

You will appreciate that my clients should be given an opportunity to examine the requested information prior to the Board's meeting. I therefore insist that you send me the requested information by no later than 12 May 2016 at 11am UTC, failing which I will have to address my request directly to the ICANN Board.

p. 1 / 2

I thank you in advance for your immediate attention to this matter and your prompt reply.

Yours sincerely,

Flip Petillion

Flip Petillion

HOTEL Top-Level-Domain S.à.r.l. | 68, Av. de la Liberté | L-1930 Luxembourg | Luxembourg

18 May 2016

Ms. Christine A. Willett
Vice President, GDD Operations
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: HOTEL Top-Level-Domain S.à.r.l.

Dear Ms. Willett:

We are in receipt of your letter dated 10 May 2016. Thank you for providing HOTEL Top-Level-Domain S.à.r.l. ("HTLD") the opportunity to respond to the questions you have raised. Our responses to your queries are as follows:

1. What was the nature and extent of the relationship between HTLD and Mr. Krischenowski during each of the following time periods?

a. When HTLD submitted its New gTLD Program application for the .HOTEL string.

Mr. Krischenowski was CEO and a 50% shareholder of HOTEL Top-Level-Domain GmbH (the "GmbH"), the 48,8% minority shareholder of HTLD. Further, Mr. Krischenowski was a consultant to HTLD pursuant to a consulting agreement between the two parties.

b. When Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014.

Mr. Krischenowski was Managing Director and a 50% owner (indirectly via his wholly-owned company) of the GmbH at this time. He was also a consultant to HTLD.

c. The present time period.

There is no relationship between Mr. Krischenowski and HTLD at the present time.

2. What was Mr. Krischenowski's role and responsibilities with respect to HTLD during each of the following time periods?

a. When HTLD submitted its New gTLD Program application for the .HOTEL string.

Mr. Krischenowski was a consultant to HTLD at this time and assisted in the preparation of the application for the .HOTEL string. Other than such activities as a consultant, he had no role or responsibilities with respect to HTLD.

- b. When Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014.

Mr. Krischenowski was party to a consulting agreement with HTLD at this time, under which he had provided services related to the string confusion objections filed on behalf of HTLD in 2013, but he had no active role or responsibility with respect to HTLD under this consulting agreement or otherwise in March 2014.

- c. The present time period.

Mr. Krischenowski has no role or responsibility with HTLD at the present time.

3. What was the nature and extent of the relationship between HTLD and Mr. Lenz-Hawliczek during each of the following time periods?

- a. When HTLD submitted its New gTLD Program application for the .HOTEL string.

Mr. Lenz-Hawliczek was one of two Managing Directors of HTLD at this time (along with Ms. Ohlmer). He was also a 25% shareholder of the GmbH.

- b. When Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014.

Mr. Lenz-Hawliczek was a Managing Director of HTLD at this time. He was also a 25% shareholder of the GmbH.

- c. The present time period.

Mr. Lenz-Hawliczek was terminated as Managing Director of HTLD effective 23 March 2016. He is CEO and a 25% shareholder in the GmbH.

4. What was Mr. Lenz-Hawliczek's role and responsibilities with respect to HTLD during each of the following time periods?

- a. When HTLD submitted its New gTLD Program application for the .HOTEL string.

Mr. Lenz-Hawliczek was a Managing Director of HTLD at this time and was principally responsible (along with Ms. Ohlmer) for representing HTLD in the process of assisting in the preparation of the application for the .HOTEL string.

Mr. Lenz-Hawliczek was highly involved in the process of organizing and garnering support for the .HOTEL application from the global hotel community. In such role, he attended hotel industry meetings and congresses, gave presentations to community members, and coordinated efforts at ICANN meetings regarding the HTLD application.

Further, Mr. Lenz-Hawliczek was responsible, along with Ms. Ohlmer, for the day-to-day business operations of HTLD.

- b. When Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014.

Mr. Lenz-Hawliczek was a Managing Director of HTLD at this time. As such, he continued to act as a liaison to the global hotel community on behalf of HTLD. He attended industry meetings and drafted updates for distribution to community members regarding HTLD's application for the .HOTEL string.

Further, Mr. Lenz-Hawliczek was responsible, along with Ms. Ohlmer, for the day-to-day business operations of HTLD.

- c. The present time period.

Mr. Lenz-Hawliczek has no current role with HTLD, having been terminated as Managing Director effective 23 March 2016.

5. What was the nature and extent of the relationship between HTLD and Ms. Ohlmer during each of the following time periods?

- a. When HTLD submitted its New gTLD Program application for the .HOTEL string.

Ms. Ohlmer was one of two Managing Directors of HTLD at this time (along with Mr. Lenz-Hawliczek). She was also a 25% shareholder in the GmbH).

- b. When Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014.

Ms. Ohlmer was a Managing Director of HTLD at this time. She was also a 25% shareholder in the GmbH (indirectly, via her wholly-owned company, Korala GmbH).

- c. The present time period.

Ms. Ohlmer was terminated as Managing Director of HTLD effective 23 March 2016. She is a 75% shareholder in the GmbH (indirectly, via her wholly-owned company, Korala GmbH).

6. What was Ms. Ohlmer's role and responsibilities with respect to HTLD during each of the following time periods?

- a. When HTLD submitted its New gTLD Program application for the .HOTEL string.

Ms. Ohlmer was a Managing Director of HTLD at this time and was principally responsible (along with Mr. Lenz-Hawliczek) for representing HTLD in the process of assisting in the preparation of the application for the .HOTEL string.

Ms. Ohlmer was highly involved in the process of organizing and garnering support for the .HOTEL application from the global hotel community. In such role, she attended hotel industry meetings and congresses, gave presentations to community members, and coordinated efforts at ICANN meetings regarding the HTLD application.

Further, Ms. Ohlmer was responsible, along with Mr. Lenz-Hawliczek, for the day-to-day business operations of HTLD.

- b. When Mr. Krischenowski accessed and downloaded confidential data belonging to some of the applicants for the .HOTEL string in March 2014.

Ms. Ohlmer was a Managing Director of HTLD at this time. As such, she continued to act as a liaison to the global hotel community on behalf of HTLD.

Further, Ms. Ohlmer was responsible, along with Mr. Lenz-Hawliczek, for the day-to-day business operations of HTLD.

- c. The present time period.

Ms. Ohlmer has no current role with HTLD, having been terminated as Managing Director effective 23 March 2016.

7. Please explain exactly what the corporate relationship is currently between HTLD and any entity in which Mr. Krischenowski has any ownership interest. Please also explain exactly what the corporate relationship will be in the future between HTLD and any entity in which Mr. Krischenowski has any ownership interest, and specify exactly on what date this change in the relationship occurred or will occur.

There is presently no corporate relationship between HTLD and any entity in which Mr. Krischenowski has any ownership interest.

There will be no such corporate relationship in the future.

Again, thank you for the opportunity to respond. Please feel free to contact me should you have any further questions regarding this matter.

Best regards



Philipp Grabensee
Sole Managing Director

REFERENCE MATERIALS – BOARD SUBMISSION NO. 2016.08.09.2H

TITLE: **Consideration of Request for Cancellation of HOTEL Top-Level Domain S.a.r.l's (HTLD's) Application for .HOTEL**

SUMMARY BACKGROUND

Travel Reservations SRL, formerly Despegar Online SRL (Despegar) has requested that ICANN cancel HOTEL Top-Level Domain S.a.r.l's (HTLD's) application for .HOTEL. The request for cancellation from Despegar and others (collectively, .HOTEL Claimants)¹ is premised on Dirk Krischenowski's apparent business connections to HTLD, coupled with his exploitation of the portal issue that allowed parties to access confidential information of various applicants for new gTLDs, including information of several of the .HOTEL Claimants.

The Board has considered the .HOTEL Claimants' request, ICANN's forensic investigation of the portal issue, HTLD's response to the request, and all relevant information and documents relating to the matter, and concluded that cancellation of HTLD's application for .HOTEL is not warranted.

DOCUMENT/BACKGROUND LINKS:

The following attachments are relevant to the Board's consideration of the .HOTEL Claimants' request for cancellation of HTLD's application for .HOTEL:

- **Attachment A:** Privileged and Confidential
- **Attachment B:** 5 June 2015 letter from Mr. Petillion (counsel for the .HOTEL Claimants) to ICANN, seeking information regarding the portal issue and Mr. Krischenowski's activities (the information request was treated as a DIDP request) , also available at: <https://www.icann.org/en/system/files/files/didp-request-20150605-1-petillion-redacted-05jun15-en.pdf>.
- **Attachment C:** ICANN's 5 July 2015 DIDP Response to Mr. Petillion's request for information, also available at: <https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>.
- **Attachment D:** 29 July 2015 letter from the General Counsel of Despegar to ICANN requesting cancellation of HTLD's application for .HOTEL.

¹ In addition to Despegar, the .HOTEL Claimants include Famous Four Media Limited, Fegistry LLC, Minds + Machines Group Limited, Donuts Inc., and Radix FZC.

- **Attachment E:** 23 February 2016 letter from Akram Atallah to the General Counsel of Despegar responding to 29 July 2015 letter.
- **Attachment F:** 1 March 2016 letter from Mr. Petillion (counsel for the .HOTEL Claimants) to ICANN attaching HTLD's string objections against the .HOTEL Claimants' .HOTEL applications in 2013 wherein Mr. Krischenowski represented HTLD, also available at: <https://www.icann.org/en/system/files/correspondence/petillion-to-atallah-01mar16-en.pdf>.
- **Attachment G:** 8 March 2016 letter from Mr. Petillion (counsel for the .HOTEL Claimants) to ICANN reiterating request to cancel HTLD's application for .HOTEL, also available at: <https://www.icann.org/en/system/files/correspondence/petillion-to-atallah-08mar16-en.pdf>.
- **Attachment H:** 16 March 2016 letter from ICANN to Mr. Johannes Lenz-Hawliczek of HTLD informing HTLD of the .HOTEL Claimants' request that ICANN cancel HTLD's application, providing HTLD with an opportunity to respond, and seeking information from HTLD regarding its association with Mr. Krischenowski, also available at: <https://www.icann.org/en/system/files/correspondence/willett-to-lenz-hawliczek-16mar16-en.pdf>.
- **Attachment I:** 23 March 2016 letter from Mr. Philipp Grabensee (who identified himself as the sole Managing Director of HTLD) to ICANN responding to ICANN's 16 March 2016 letter seeking information, also available at: <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>.
- **Attachment J:** 10 May 2016 letter from ICANN to HTLD seeking further information, also available at: <https://www.icann.org/en/system/files/correspondence/willett-to-grabensee-10may16-en.pdf>.
- **Attachment K:** 12 May 2016 letter from Mr. Petillion (counsel for the .HOTEL Claimants) to ICANN reiterating cancellation request, also available at: <https://www.icann.org/en/system/files/correspondence/petillion-to-icann-board-et-al-12may16-en.pdf>.
- **Attachment L:** 18 May 2016 letter from Mr. Grabensee (Managing Director of HTLD) to ICANN confirming information in his 23 March 2016 letter to ICANN, also available at: <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-18may16->

[en.pdf](#).

OTHER RELEVANT MATERIALS:

CPE Report determining that HTLD's application for .HOTEL prevailed in CPE:

<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

Independent Review Panel's Final Declaration in the .ECO and .HOTEL IRPs:

<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

Board Resolutions 2016.03.10.10-2016.03.10.11, adopting the findings in the IRP Panel's Final Declaration in the .ECO and .HOTEL IRPs, and directing the President and CEO (or his designees) "to 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":

<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

Board Resolution 2016.05.27.08, reconfirming Board resolution on .HOTEL and .ECO IRP

Final Declaration: <https://www.icann.org/resources/board-material/resolutions-2016-05-27-en#1.e>.

Submitted by: Amy A. Stathos, Deputy General Counsel
Date Noted: 18 July 2016
Email: amy.stathos@icann.org