

ICANN BOARD PAPER NO. [To be assigned by the Secretary]

**TITLE:** PIR Change of Control

**PROPOSED ACTION:** For Board Consideration

**EXECUTIVE SUMMARY:**

On [14 November 2019](#), Public Interest Registry (PIR) formally notified ICANN of a “Notice of Indirect Change of Control and Entity Conversion” (Change of Control Request) in advance of closing the proposed transaction referenced in the notice. The proposed transaction would result in PIR converting from a Pennsylvania non-profit corporation to a for-profit Pennsylvania limited liability company and Ethos Capital, LLC or its affiliated entities (Ethos Capital) acquiring 100% ownership of PIR from the Internet Society (ISOC). PIR operates the .ORG generic Top-Level Domain (gTLD) and six other new gTLDs. Created in 1985, .ORG is one of the original TLDs in the Domain Name System (DNS), and contains nearly 10.5 million registered domain names, making it the third largest gTLD by volume.

In accordance with [Section 7.5 of the applicable gTLD registry agreements](#), ICANN must either approve or withhold consent of the proposed change of control within a specified time frame. Since 14 November 2019, the ICANN org and Board have worked together to thoughtfully and thoroughly evaluate the proposed acquisition to ensure that the .ORG registry remains secure, reliable, and stable and determine whether the proposed transaction is in the public interest. While conducting its due diligence, ICANN org requested additional information from PIR, ISOC, and Ethos Capital on multiple occasions, and ICANN and PIR have agreed to several extensions to enable ICANN the time necessary to evaluate their responses, as well as to permit PIR, ISOC and Ethos Capital additional time to address certain issues raised by various parties concerning the transaction. In response to community concerns, PIR has proposed several commitments related to its plans for operating .ORG to be added to the .ORG registry agreement in the form of Public Interest Commitments (PICs).

In January 2020, as a result of the proposed transaction, the Office of the California State Attorney General (CA-AGO) initiated an investigation of ICANN and how the transaction would impact nonprofits, among other matters and concerns. On 15 April 2020, ICANN received a letter from the CA-AGO urging ICANN to withhold consent for the proposed change of control request, and providing the CA-AGO’s detailed reasoning for its conclusion. The deadline for ICANN to either approve or withhold consent on the proposed change of control of PIR is 4 May 2020.

**PROPOSED RESOLUTION:**

Whereas, Public Interest Registry (PIR) is currently a non-profit organization incorporated in the State of Pennsylvania, and serves as the registry operator for seven top-level domains: .ORG, [.ONG](#), [.NGO](#); [.xn--c1avg](#) (Cyrillic script); [.xn--i1b6bla6a2e](#) (Devanagari script); [.xn--nqv7f](#) (Chinese 2-character script); and [.xn--nqv7fs00ema](#) (Chinese 4-character script). PIR has a registry agreement with ICANN for each of these seven TLDs (PIR's Registry Agreements).

Whereas, on 13 November 2019, [PIR announced](#) that the Internet Society (ISOC), PIR's parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital or its affiliated entities (collectively, Ethos Capital) will ultimately acquire PIR and all of its assets from ISOC. On [14 November 2019](#), PIR formally notified ICANN of a change of control in advance of closing the proposed transaction.

Whereas, Section 7.5 of PIR's Registry Agreements with ICANN require that PIR seek ICANN's written approval for the change of control, and that ICANN must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN the right to request additional information from PIR regarding the proposed transaction.

Whereas, ICANN and PIR have mutually agreed to five extensions of time within which ICANN must respond to the PIR change of control notification. ICANN is obligated to provide PIR a response by 4 May 2020.

Whereas, following ICANN's receipt of formal notice of PIR's change of control request, at the direction of the ICANN Board, ICANN org has conducted extensive due diligence on the proposed transaction in order to understand whether it would be reasonable under PIR's Registry Agreements for ICANN to either approve or withhold consent to the proposed change of control. ICANN org has on three occasions requested additional information from PIR (on 9 December 2019, 19 February 2020, and 3 April 2020) and in each instance PIR provided written responses to ICANN org. Each of ICANN org's requests is publicly available. PIR's responses have also been made publicly available to the extent that PIR has consented to such public disclosure. The ICANN Board has access to all non-public information provided by PIR to ICANN org.

Whereas, in response to ICANN org's final set of questions, PIR provided ICANN with an updated draft of proposed Public Interest Commitments (PICs) for the .ORG Registry to try to address some of the key commitments being made to the .ORG community and other interested parties. This updated draft PIC was made available on [icann.org](#) for public consideration. After consideration of additional input on the PICs, PIR identified that it would be willing to make further modifications in order to support ICANN's enforcement powers and clarify the role of the proposed "Stewardship Council".

Whereas, in January 2020, the Office of the Attorney General of the State of California (CA-AGO) requested information from ICANN regarding the proposed transfer of PIR from ISOC to Ethos Capital in order to "analyze the impact to the nonprofit community including

ICANN.” ICANN is a California not-for-profit public benefit corporation, and the CA-AGO is responsible for supervising not-for-profit organizations in California.

Whereas, on 15 April 2020, ICANN received a letter from the CA-AGO “urg[ing] ICANN to reject the transfer of control over the .ORG Registry” and advising ICANN that “ICANN must exercise its authority to withhold approval.” The CA-AGO cited numerous factors, including the size of the .ORG registry, the unique nature of the .ORG registry, the CA-AGO’s conclusion that many questions remain unanswered by PIR, and the unknown nature of Ethos Capital, its range of proposed subsidiaries and its investors, a lack of transparency regarding Ethos Capital’s future plans and the financial impact of a \$360 million loan necessary to complete the transaction. The CA-AGO also questioned the financial viability and potential for failure of the .ORG registry in the future. The CA-AGO provided its reasoning for how these factors supported its assessment and how the CA-AGO considered this in light of its understanding of ICANN’s Articles of Incorporation and Bylaws. The CA-AGO declared California’s public interest in the .ORG registry running as a home for noncommercial entities, and that this public interest would be better served by withholding approval of the change of control. The CA-AGO declared that it would take “whatever action necessary to protect . . . the nonprofit community.”

Whereas, the ICANN Board has been active in its oversight of ICANN org’s evaluation of PIR’s change of control request. The Board has: received regular updates on ICANN org’s review of the request as well as the status of the CA-AGO’s investigation of ICANN; overseen ICANN org in its continued engagement with PIR to obtain additional information; had all of PIR’s responses (non-public and public) made available for review; received a petition from protesters outside of ICANN’s Los Angeles offices during the Board’s January 2020 Board workshop; engaged with the ISOC Board of Directors for information from ISOC’s perspective; convened a public forum in March 2020 during ICANN67 to hear the ICANN community’s concerns; and considered the PICs that PIR proposes for inclusion in the .ORG Registry Agreement and requested ICANN org to make a public notice over the same. The Board has received 30 briefings from ICANN org on this issue, representing at least 50 hours of scheduled meetings. Each Board member also devoted substantial time to prepare for these briefings. The collective Board hours devoted in preparation for this decision count in the thousands.

Resolved (2020.04.xx.xx), the ICANN Board directs ICANN’s President and CEO to withhold ICANN’s consent to PIR’s Change of Control Request pursuant to Section 7.5 of PIR’s Registry Agreements, thereby rejecting PIR’s request. The Board finds the withholding of consent is reasonable in light of the balancing of all of the circumstances addressed or discussed by the Board.

Resolved (2020.04.xx.xx), the above decision is without prejudice to PIR to submit a new notice of indirect change of control and entity conversion for consideration if PIR successfully achieves an entity conversion approval in Pennsylvania through the Pennsylvania Court, which the ICANN Board and org will consider when evaluating any new notice.

**PROPOSED RATIONALE:**

The Board's action in withholding consent for the change of control of Public Interest Registry (PIR) pursuant to the terms of PIR's Registry Agreements is both reasonable and in the public interest. The Board was presented with a unique and complex situation – a request to approve a fundamental change of control over one of the longest-standing and largest registries, that also includes a change in corporate form from a viable not-for-profit entity to a for-profit entity with a US\$360 million debt obligation, and with new and untested community engagement mechanisms relying largely upon ICANN contractual compliance enforcement to hold the new entity accountable to the .ORG community. ICANN is being asked to agree to contract with a wholly different form of entity; instead of contracting with the mission-based not-for-profit that has responsibly operated the .ORG registry for nearly 20 years, with the protections for its own community embedded in its mission and status as a not-for-profit entity. If ICANN were to consent, ICANN would have to trust that the new proposed for-profit entity that no longer has the embedded protections that come from not-for-profit status, which has fiduciary obligations to its new investors and is obligated to service and repay US\$360 million in debt, would serve the same benefits to the .ORG community.

While PIR's current parent entity, the Internet Society (ISOC), would obtain a US\$1 billion endowment to secure its future through the proposed transaction, that is not within the scope of ICANN's consideration. The valuation of PIR is notable; in 2002, ISOC was awarded the ability to operate the .ORG registry through a purpose-built non-profit developed to support the unique nature of the .ORG community. PIR's responsible operation of the .ORG registry since that time created this US\$1 billion value, value that ISOC is looking to realize through engaging in a transaction that will result in the conversion of PIR into a profit-making entity. The ICANN Board has considered the reasonableness of consent to the change of control as it relates to the new form of entity ICANN is asked to contract with for the registry agreements themselves, including in light of ICANN's mission to support and enhance the security, stability and resiliency of the Internet's unique identifiers. The ICANN Board understands that while technically ICANN will still hold a contract with PIR, the changes in the form of that entity are of meaningful significance to the Board's consideration of the Change of Control Request. On the whole, the ICANN Board determines that the public interest is better served in withholding consent as a result of various factors that create unacceptable uncertainty over the future of the third largest gTLD registry.

The ICANN Board's action should not be read to provide any commentary on the propriety of for-profit entities operating gTLD registries, nor as any prohibition or judgment on the role of private equity firms controlling registry operators. The considerations in front of the Board here are specific to this transaction, particularly in light of the long-standing history of the .ORG registry.

## **Background**

Created in 1985, .ORG is one of the original TLDs in the Domain Name System (DNS). In 2002, through a [competitive bidding process conducted by ICANN](#), ICANN selected a proposal submitted by ISOC to establish a wholly owned subsidiary, PIR, to serve as the .ORG registry operator, which PIR has been since 2003. ISOC is the sole member of PIR. Prior to 2003, .ORG was operated by VeriSign, Inc (previously Network Solutions, Inc.), the registry operator of the .COM and .NET gTLDs. PIR is the registry operator for seven gTLDs in total. In addition to .ORG, it operates [.ONG](#), [.NGO](#), [.xn--c1avg](#) (Cyrillic script), [.xn--j1b6bla6a2e](#) (Devanagari script), [.xn--nqv7f](#) (Chinese 2-character script), and [.xn--nqv7fs00ema](#) (Chinese 4-character script). Since its establishment, PIR has operated as a non-profit organization, incorporated in the State of Pennsylvania.

In winning the bid to operate .ORG, ISOC purpose-built the not-for-profit entity, PIR, to serve the needs of the .ORG registry and the noncommercial community. PIR represents its mission as “for the benefit of [its] end user consumers and the Internet as a whole”. Under U.S. tax regulations, PIR was established as a “Supporting Organization” to ISOC, which has obligated PIR to act in support of ISOC as well as ISOC’s mission. PIR contributes a portion of its revenue every year to ISOC; for 2018, the most recent year reported, PIR provided over US\$48 million to ISOC while also serving PIR’s mission through “improv[ing] the stability and security of the .ORG registry and deliver[ing] a robust Education and Outreach program that enlightens non-profits and NGOs”. PIR holds itself out as “entrusted by millions to operate in the public interest” and “refus[ing] to compromise [its] ethical standards for the sake of expediency, popularity or profitability.” This is the entity that has responsibly served as the registry operator and steward for the .ORG (and other) registries since 2002. PIR’s Registry Agreements are between ICANN and PIR. PIR’s most recent U.S. tax filing for 2018 report nearly US\$95 million in revenue, with nearly US\$50 million of that revenue distributed as grants in service of PIR’s mission.

#### **Timeline of events**

On 13 November 2019, [PIR announced](#) that ISOC, its parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital will acquire PIR and all of its assets from ISOC. The proposed transaction would result in PIR converting from a Pennsylvania non-profit corporation to a for-profit Pennsylvania limited liability company and Ethos Capital acquiring 100% ownership of PIR from the Internet Society (ISOC). Ethos Capital envisions a “new” PIR, which would convert from its historical not-for-profit status to a for-profit entity controlled by a private capital firm. Through the proposed transaction, ISOC – with which ICANN does not have a contract for any of the registries that PIR operates – would receive U.S.\$1 billion as an endowment for its future. Upon completion of the transaction, PIR would no longer have the obligation to provide support to ISOC or serve any other charitable purpose, but instead would be subject to a US\$360 million debt obligation to service in support of the Ethos/PIR transaction. PIR would convert into a new for-profit entity (if authorized by the relevant regulatory authorities) that would be responsible for contracting with ICANN for the operation of the PIR registries. The current iteration of the not-for-profit PIR would no longer exist.

On [14 November 2019](#), PIR formally submitted to ICANN a “Notice of Indirect Change of Control and Entity Conversion” (Change of Control Request) in advance of closing the proposed transaction between Ethos Capital and ISOC. After review of the information provided by PIR in the 14 November submission, ICANN requested additional information from PIR on 9 December 2019. Additionally, on [9 December 2019](#), John Jeffrey, ICANN org’s General Counsel and Secretary, sent a letter to the CEO’s of both PIR and ISOC, requesting both organizations to commit to completing the process in an open and transparent manner, including the agreeing to the publication of questions from ICANN org and the responses from PIR. PIR responded to ICANN org’s request for additional information on 20 December 2019, and later agreed to [publication of PIR’s responsive materials, documents](#) subject to limited redaction by PIR.

As the initial deadline for ICANN org to respond to PIR by either providing or withholding consent to the proposed change of control was 19 January 2020, ICANN and PIR agreed on [17 January 2020](#) to extend the deadline by 30 days to 17 February 2020. On [14 February 2020](#), the deadline was extended again by mutual agreement to 29 February 2020. On [19 February 2020](#), ICANN org requested additional information from PIR as part of its diligence process, and on [21 February 2020](#) agreed with PIR to an extension to 20 March 2020. PIR responded to ICANN’s information request on [4 March 2020](#). On [17 March 2020](#), the two organizations agreed to an extension to 20 April 2020, and on 16 April 2020, a final extension was agreed upon, giving ICANN until 4 May 2020 to respond to PIR’s request. On 3 April 2020, ICANN provided PIR with two sets of questions for additional information. One set of questions are in follow-up to previous ICANN inquiries designed to further understand the proposed transaction and its potential effect on PIR and the .ORG top-level domain (TLD). The second set of questions relate specifically to the PICs proposed by PIR to be included in the .ORG registry agreement. Following receipt of the questions, [PIR submitted an updated proposal for its PICs on 7 April 2020](#). On [8 April 2020](#), ICANN posted a public notice that PIR’s provided an updated proposal. On 12 April 2020, PIR submitted to ICANN responses to the other questions posed on 3 April 2020. While PIR identified many portions of those responses as confidential, and therefore ICANN org could not post those portions on its website, the ICANN Board was provided with access to all materials submitted by PIR.

#### **ICANN’s Evaluation Process**

Due to the circumstances of the proposed PIR change of control, including its planned conversion to a for-profit entity, ICANN org requested extensive additional information from PIR, including regarding details of the transaction structure, financing and other funding sources, the parties involved, the role of the Pennsylvania authorities, information related to financial resources and operational and technical capability, how the “new” PIR would be responsive to the needs of the non-commercial community, what input the .ORG community had provided to PIR on the proposed transaction and how that community input would be reflected in the operations of the “new” PIR. This evaluation of the proposed transaction, which includes the diligence imposed by the ICANN-adopted specification or policy on registry operator criteria in effect, incorporated review of financial resources, operational and technical capabilities, the

transaction structure, background screening and other components. This diligence process is part of ICANN org's responsibility in evaluating this proposed Change of Control Request, and the Board has remained apprised of ICANN org's review throughout the process.

ICANN org's evaluation of PIR's Change of Control Request was more comprehensive than the evaluation that ICANN org has conducted over other change of control requests. This was necessary under the circumstances and due to the extremely unique nature of the proposed change. This Change of Control Request for PIR's Registry Agreements includes the largest registry to date to be subject to the change of control process, and we understand the proposed transaction is the most complex that has been submitted for review. Hundreds of pages of supporting documentation have been produced by PIR in multiple responses, detailing multiple levels of new entities intended for creation to support the future PIR LLC in operating under PIR's Registry Agreements. Section 7.5 of PIR's Registry Agreements with ICANN require that PIR seek ICANN's written approval for the change of control, and that ICANN must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN the right to request additional information from PIR regarding the proposed transaction. PIR's Registry Agreements also permit ICANN to evaluate the proposed change of control transaction under the totality of the circumstances, including the public interest and the interests of the .ORG community

The Board has deliberated and discussed this issue with ICANN org 30 separate occasions, receiving current updates and providing ICANN org with direction concerning next steps. ICANN org has devoted countless hours in consideration of all aspects of PIR's request, and the collective hours from Board members devoted to consideration of this issue total in the thousands. This intensive review is required under the circumstances, as ICANN is bound to, and it is in the public interest for ICANN to uphold, the principles that ICANN's multistakeholder community agreed to include within ICANN's contracts. ICANN is responsible for conducting a thorough review and evaluation to ensure that a change of control review is more than just an exercise of checking boxes. The ICANN Board and org, in the extensive evaluation of the proposed transaction, returned multiple times to PIR for more information, as well as to ISOC, to understand the impact of the proposed transaction

In reviewing the financial stability of PIR following the consummation of the proposed transaction, the ICANN Board noted that, following the transaction, PIR would have a significant amount of debt, and be obligated to service and ultimately repay a loan in the amount of \$360 million. The Board noted that the incurrence of this debt was not for the benefit of PIR or the .ORG community, but for the financial interests of ISOC, Ethos Capital and the other investors in the transaction. While PIR has provided financial projections to ICANN org that show the capacity of PIR to generate sufficient cash flow to service the loan and repay the debt at maturity, financial projections are by their nature speculative and generally unreliable, and do not account for unforeseen circumstances. As such, if PIR's

financial projections are materially inaccurate, PIR could potentially fail to generate the cash flow needed to repay the debt at maturity, and there can be no certainty that PIR or Ethos Capital will be able to refinance the debt at maturity if necessary. Accordingly, the ICANN Board believes that burdening PIR with significant debt obligations could create uncertainty as to the long-term financial stability of PIR, particularly in light of the current and likely ongoing economic uncertainty.

Much of the public discourse around the proposed transaction also focused on the question of how the .ORG registrants would be protected and served. Both the ICANN and the PIR/.ORG communities have been very vocal about the proposed transaction. Almost immediately after the transaction was announced by ISOC/PIR/Ethos Capital, the ICANN org and Board started receiving correspondence related to the matter, with the first letter of concern coming from the Internet Commerce Association on 15 November 2019, just two days after the announcement. In total, ICANN has received over ## letters regarding this proposed transaction. A full inventory of the correspondence with relevant links to those publicly available on [ICANN's correspondence page](#), is available in [Appendix A to this Rationale](#). At ICANN67, the ICANN Board dedicated an entire live streamed public forum to hear from the ICANN community about the proposed PIR transaction, and published both a [transcript of the event](#), and [answers](#) to questions that were not addressed in real time during the forum. Many of these communications focus specifically on the fact that, since 2002, PIR has been responsible for operating .ORG in a manner that serves the needs of the .ORG community, and that the information the public could access regarding the impact of the proposed transaction did not support the .ORG community in the same way. Many commenters discussed their concerns with the conversion of PIR to a for-profit entity, as for-profit entities held by private venture firms are understood to have a profit motive. In addition, commenters discussed their concerns with the removal of the protections embedded into PIR's not-for-profit mission of responsiveness to and engagement with its community, and discussed how that could impact the very policies able to be instituted at the registry level. The Board understands these concerns; the .ORG community has relied on PIR's commitments for nearly 20 years, and the proposed transaction fundamentally changes the PIR/.ORG community relationship. The Board must take that history into account, as well as the lack of meaningful engagement with that community in the design of the proposed transaction, as part of the reasonableness of withholding consent to PIR's request.

Part of how ICANN tried to address these community – and ICANN's – concerns was by continuously urging PIR, ISOC, and Ethos Capital to provide full transparency regarding the proposed transaction. Similarly, ICANN has attempted to provide the maximum amount of transparency possible throughout this process. This has included publishing the requests for information and the answers (subject to requested redaction by PIR for confidentiality reasons) to ICANN org's questions. Additionally, ICANN org has published several blogs and announcements from ICANN to the ICANN community designed to provide updates on the process.

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Beginning in December 2019, PIR, ISOC and Ethos Capital began engaging with the .ORG community. They utilized webinars, blog posts, and press releases among other things in an attempt to listen and assuage concerns from their community related to this proposed transaction. According to PIR and Ethos Capital, “we consistently heard three primary concerns expressed for the transaction: (1) pricing; (2) commitment to free expression; and (3) use of registrant and user data.” On 21 February 2020, PIR and Ethos Capital proposed to the .ORG community to voluntarily adopt a legally binding amendment to the .ORG registry agreement in the form of a [Public Interest Commitment \(“PIC”\)](#) following the closing of the proposed sale of PIR to address concerns voiced by some in the .ORG Community. From 3 March through 13 March 2020, PIR conducted what it called a “Public Engagement Period” where PIR and Ethos Capital collected written feedback about their proposed PIC, and addressed the feedback in a summary on their [website](#) dedicated to the proposed transaction. PIR submitted a proposed PIC to ICANN for consideration on 16 March 2020. On 7 April 2020, PIR submitted an [updated PIC](#) to ICANN for consideration, with [changes addressing certain of the questions ICANN posed](#) regarding the 16 March proposal.

The 7 April version of the PIC outlines five primary commitments for PIR:

- 1) A commitment to restrict price increases based on a specified formula until June 2027 (2 years prior to the end of the term of the current Registry Agreement). This includes a table clearly listing the maximum allowable wholesale price of a .org domain name for each of the 8 years.
- 2) The creation of a Stewardship Council to provide independent advice to the registry operator regarding modifications proposed by PIR to certain registry policies regarding:(x) censorship and freedom of expression; and (y) use of .ORG registrant and user data (the “Designated Policies”). The Stewardship Council would have the binding right to veto any modification to the Designated Policies.
- 3) To establish a “Community Enablement Fund” (without a specific fund amount) to provide support for initiatives benefiting .ORG registrants.
- 4) To produce and publish an Annual Report that self-assesses compliance with the PIC. The Annual Report will also include a transparency report disclosing the number of .ORG domain name registrations that were suspended or terminated by Registry Operator during the preceding year under Registry Operator’s Anti-Abuse Policy or pursuant to court order.
- 5) A commitment to allow any subsequent revisions to the PIC to undergo ICANN’s public comment process as part of ICANN’s consideration of such proposed revisions.

Following ICANN org and Board’s review of the proposed PIC, ICANN shared feedback with PIR regarding the commitment related to the Stewardship Council and its role. PIR noted its intention to revise the PIC in line with the concerns identified by ICANN, and PIR committed that its PIC could be updated to support the Stewardship Council having powers related to enforcement as well as development of relevant policies, and in a way to make ICANN org’s enforcement powers capable of objective application. The Board

notes that a majority of the comments received during the public notice period continue to raise concerns and questions about the future commitments for how PIR will continue to serve the .ORG community, as well as about the process within ICANN to reach a decision on PIR's request.

Other than the pricing issues, the items addressed in the proposed PIC are similar to those that are currently embedded within PIR's structure. Whereas PIR today has an [Advisory Council](#) embedded into its structure to serve as an intermediary between end users and PIR, and remaining accountable to that group is within PIR and ISOC's control, the "new" PIR would look to ICANN to enforce that community relationship through an untested "Stewardship Council" through the PICs governing PIR's relationship with that Stewardship Council, including on matters of PIR's internal policies. Although the PICs address some of the accountability concerns, the ICANN Board is not satisfied that ICANN org should be the new backstop for holding PIR accountable to its community as contemplated under the PICs. PIR has operated for nearly 20 years with internal mechanisms to support and protect its community. PIR and Ethos clearly recognize that responsiveness to the .ORG community is an important element for the success of this proposed transaction; it is unreasonable to now expect ICANN to accept that burden of enforcement in order to allow PIR and Ethos' preferred corporate structure to move forward. In addition, while intended to include members who are independent of PIR and Ethos Capital, the membership of the Stewardship Council is subject to the approval of PIR's board of directors and, as a result, could become captured by or beholden to the for-profit interests of PIR's owners and therefore are unlikely to be truly independent of Ethos Capital or PIR's board. The Board's concerns here have also been raised by many people or entities who shared their thoughts with ICANN after public notice was provided on the 7 April 2020 revision to PIR's revised PIC.

The ICANN Board also remains concerned with the lack of transparency concerning Ethos Capital's exit strategy for the PIR investment or its plans relating to capital disbursements from PIR's operations to Ethos Capital and the other investors. Ethos Capital has maintained that its investment horizon is 10 years and that it has no current plans to distribute excess PIR capital to investors. ICANN cannot be assured that Ethos Capital's investment horizon will not change (as there is no enforceable commitment in this respect) or the minority investors in the transaction will not pressure Ethos Capital to pursue an exit from PIR prior to 10 years. In addition, while PIR has advised ICANN that there will be certain limitations on PIR's ability to distribute capital to its investors (such as covenants in credits agreements relating to the \$360 million of debt incurred to help finance the transaction), the Board cannot be assured that such distributions will not be made, which could cause PIR to be drained of its financial resources.

In addition, ICANN considered the fact that Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator. While it is anticipated that PIR's existing management team will continue post-closing, there is no guarantee that such management will in fact remain at PIR post-closing for an extended period of time. In addition, the fact that

Ethos Capital's founder was a managing partner that led his prior private equity firm's acquisition of Donuts only demonstrates a track record of acquisition and does not demonstrate an ability or track record of successfully operating a registry operator, particularly one of the size of .ORG. Thus, Ethos Capital's lack of experience and success in operating a registry operator is concerning for a registry with over 10.5 million domain name registrations.

The ICANN Board also considered the information provided by PIR concerning the investors involved in the transaction, and noted that PIR declined to provide the specific ownership interests of the investors in the transaction (it only provided general categories of ownership levels). In addition, ICANN has not been provided detailed information concerning various minority investors (many of whom are entities, likely with additional investors), including vehicles through which significant minority investors (the apparent second largest investor to Ethos Capital) will make its investment.

The ICANN Board also considered the ability of PIR to engage in the business operations and practices that Ethos Capital and PIR argue will benefit the .ORG community solely as a result of the transaction. No evidence has been provided to ICANN that demonstrates that PIR (as a non-profit entity) is not currently able to pursue these valuable business initiatives, which could benefit the .ORG community, without the risks associated with the consummation of the transaction.

Since the time that ISOC, PIR and Ethos Capital announced the proposed transaction, there has been misunderstanding of ICANN's role. Many have been looking to ICANN to answer questions that are better posed to ISOC or to Ethos Capital. Many appear to be looking to ICANN to cure an apparent lack of engagement by ISOC with ISOC's community through engagement with ICANN and the ICANN community, even though many of the decisions made by ISOC in solicitation and acceptance of Ethos Capital's proposal are outside of the type of decisions that are able to be changed through ICANN. However, the ICANN Board has endeavored to, and encouraged and directed ICANN org to, allow for engagement opportunities, such as the public forum highlighted above. The Board is aware of and has considered each of the letters sent to it, and has followed this issue very closely.

#### **Reviews by the California and Pennsylvania Authorities of the Proposed Transaction**

##### *California Attorney General*

On 23 January 2020, ICANN received a subpoena from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC to Ethos Capital. The CA-AGO, which by statute supervises the operations of all not-for-profit entities in California, including ICANN, states that it is "analyz[ing] the impact to the nonprofit community, including to ICANN." Subsequent to ICANN's receipt of this letter, the CA-AGO requested more time to complete his review. The letter served as one factor in ICANN org requesting more time from PIR to complete the review of the transaction, as the ICANN Board and org had

already identified that ICANN needed additional information for its due diligence, and additional time was needed for ICANN's review.

On 15 April 2020, ICANN received another letter from the CA-AGO regarding PIR's change of control request. In this letter, the CA-AGO "urge[d] ICANN to reject the [proposed] transfer of control" based on a determination that it "raises serious concerns." Citing ICANN's commitment to pursue the public interest as expressed in its Articles of Incorporation, the CA-AGO opined that, if permitted to purchase PIR, "Ethos Capital . . . will no longer have the unique characteristics that ICANN valued at the time that it selected PIR as the nonprofit to be responsible for the .ORG registry."

Commented [3]: link to 15 April letter. See <https://www.icann.org/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf>

The CA-AGO cited concerns such as the uncertainty about Ethos Capital as a brand-new entity, the private investors involved in financing the transaction, and the future operation of the .ORG registry, including the adequacy of PIR's future revenues and a lack of transparency regarding Ethos Capital's future plans. Based on the foregoing, the CA-AGO deemed these risks particularly serious in light of "the unique nature of the .ORG community" and concluded that approval of the transaction "may place at risk the operational stability of the .ORG registry." The CA-AGO also highlighted its concerns with how PIR's need to service debt obligations could impact the continued viability of the .ORG registry. In light of these and other concerns, the CA-AGO concluded that "the .ORG registry and the global Internet community – of which innumerable Californians are a part – are better served if ICANN withholds approval of the proposed sale and transfer of PIR and the .ORG registry to the private equity firm Ethos Capital." The CA-AGO stated that "[i]n light of . . . the objectives stated in ICANN's articles of incorporation and bylaws . . . ICANN must exercise its authority to withhold approval."

ICANN is a non-profit public benefit corporation organized under the laws of the state of California. As such, the CA-AGO asserts authority over ICANN in several relevant respects. Because ICANN is registered as a charitable nonprofit corporation, the CA-AGO asserts regulatory power over ICANN pursuant to the California Supervision of Trustees and Fundraisers for Charitable Purposes Act. *See, e.g.*, Cal. Gov. Code section 12596 (authorizing Attorney General to maintain action "to enforce a charitable trust" with respect to covered charitable entities); section 12598(a) (authorizing Attorney General to maintain action "for ensuring compliance with trusts" as to such entities; authorizing Attorney General action "for ensuring compliance with . . . articles of incorporation", and authorizing Attorney General to "protect[] assets held by charitable trusts and public benefits corporations"). The CA-AGO also asserts more general corporate regulatory authority over ICANN pursuant to its powers under the California Corporate Code. *See, e.g.*, Cal. Corp. Code section 5250 (authorizing the CA-AGO to address a "fail[ure] to comply with trusts which [a corporation] has assumed" and authorizing the Attorney General to redress a "depart[ure] from the purposes for which [a corporation] is formed").

The CA-AGO explained its understanding of what ICANN's Articles of Incorporation and Bylaws, and the mission defined therein, compel ICANN to do when considering PIR's request. In its authority to speak for the public interest for California, the CA-AGO determined that California's public interest in the .ORG registry running as a home for noncommercial entities, and that the public interest would be better served by ICANN withholding approval of the change of control. As the CA-AGO's letter observes, its determination is buoyed by the significant opposition received from other organizations and politicians, with virtually no counterbalancing support except from the parties involved in the transaction and their advisors.

The Board recognizes that the CA-AGO's 15 April 2020 letter might not reflect all recent information submitted by PIR to ICANN or directly to the CA-AGO in connection with the PIR's request. That, combined with the CA-AGO's closing note that it continues its investigation and will take "whatever action necessary to protect . . . the nonprofit community" support ICANN in its determination that it is reasonable to withhold consent at this time. The ICANN Board's action is also reasonable in light of its consideration of the role of the CA-AGO in overseeing whether ICANN is acting in compliance with its Articles of Incorporation. The Board takes the CA-AGO's inputs seriously both in the substance and in impact. . Further, in considering the CA-AGO's letter as part of its overall evaluation process, the Board also considered the statement by the CA-AGO that approval of PIR's change of control request would be in contravention of the CA-AGO's declared public interest, and considered that statement in line with all of the other circumstances of the transaction as available to the Board, and concurs in some of the factors that contribute to the CA-AGO's urged outcome.

The ICANN Board considers the CA-AGO's letter as one aspect of support for the reasonableness of withholding consent from the requested change of control, but the letter does not alone determine or require this outcome. The Board considers all of the aspects of the proposed transaction and the information available to the Board.

#### *Pennsylvania Attorney General*

The Pennsylvania Attorney General also has a role in oversight of PIR, and in reviewing the proposed conversion of PIR from a not-for-profit to a for-profit entity. The ICANN Board understands that the Pennsylvania process will not be completed prior to 4 May, and therefore ICANN does not know at this time either the PA Attorney general's view on the proposed conversion of PIR to for-profit status, or whether the relevant court in Pennsylvania will authorize the conversion. The Board notes that the lack of approval from the Pennsylvania authorities has remained an area of concern for the Board, and weighs towards the reasonableness of the Board's withholding consent at this time. The Board notes that understanding how the Pennsylvania authorities evaluate Pennsylvania's public interest in considering the proposed conversion is a relevant and missing piece of information today.

#### **Conclusion**

The Board's action is in line with ICANN's mission because ICANN has performed significant due diligence to comply with its contractual obligation to consider PIR's request, and to meet the responsibility of coordinating the unique identifiers in a responsible manner. ICANN's actions are thereby in accordance with ICANN's Articles of Incorporation and Bylaws' public interest mandates, and are also aligned with how the CA-AGO explained his views of the public interest. Taking this action supports ICANN's ability to continue performing all aspects of ICANN's mission. Specifically, as it relates to the operation of the impacted registries, the ICANN Board has no indication that the security and stability of those registries is at risk, or to the unique identifier system, if ICANN does not consent. The public interest is also served on balance through this action, in supporting the multistakeholder model and the contractual principles entrusted to ICANN, and in taking the necessary steps to maintain the stability and viability of ICANN as an entity. The ICANN Board must take into account all circumstances here. The not-for-profit PIR entity has enjoyed a close and responsible relationship with its community for nearly 20 years. Now that PIR has been a successful entity, growing to US\$1 billion in valuation, ICANN is asked to allow PIR to be sold to an untested private equity firm, removing the protections of the not-for-profit status and burdening the entity with US\$360 million in debt in the midst of current and likely ongoing economic uncertainty. Along with that, when pressed for information on how the sale will continue to serve and bring value to the .ORG community, the solution is for ICANN to take on enforcement responsibility for the PIR/community relationship and for reliance on an untested Stewardship Council model and other PICs. ICANN entrusted to PIR the responsibility to serve the public interest in its operation of the .ORG registry, and now ICANN is being asked to transfer that trust to a new entity without a public interest mandate. This proposed transaction has posed difficult questions to the ICANN Board and the community, and the totality of the circumstances supports a denial in this instance. If PIR is able to provide additional information that resolves the concerns raised by the Board, PIR remains able to re-submit or initiate a new request for change of control of its Registry Agreements.

**Signature Block:**

Submitted by: Russ Weinstein

Position: Sr. Director, gTLD Accounts & Services, Global Domains Division

Date Noted:

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