



Via Email:
reconsideration@icann.org

November 19, 2019

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

RE: Your Proposed Determination of Reconsideration Request 19-3

Dear ICANN Board:

We are writing to you in your role as the stewards and guardians of the Multistakeholder Model. You devote yourselves to ICANN's Mission of coordinating the allocation and assignment of names in the DNS through policies "*developed through a bottom-up consensus-based multistakeholder process* and designed to ensure the stable and secure operation of the Internet's unique names systems."¹ We respectfully submit that ICANN org's decisions in negotiating and executing the .ORG registry contract will cause serious harm to the nonprofit and noncommercial community of .ORG registrants and to the Multistakeholder Model. We ask for your oversight and intervention.

As you know, EFF submitted Reconsideration Request 19-3 on 21 September 2019. On November 3rd, as the Montreal meeting was starting, the Board shared its Proposed Determination of EFF's Request.

We respectfully ask the Board to a) meet with EFF and b) rescind and revise the Proposed Determination of Reconsideration Request 19-3 with respect to the Uniform Rapid Suspension Policy (URS) and the provision for unilateral creation of new rights protection mechanisms (RPMs) by the Public Interest Registry (PIR).

We do so for four reasons:

1. The GNSO did not extend the URS to legacy gTLDs, including .ORG, for good reasons, which ICANN org has not carefully considered;
2. Intruding on a policy determination currently pending in the GNSO's multistakeholder policy development process does not show respect for our

¹ Bylaws for ICANN, 18 June 2018, Section 1.1 Mission (emphasis added).

- Multistakeholder Model or for the work of dozens of volunteers over thousands of hours of analysis, debates, and decision-making;
3. While contracting authority has been delegated to ICANN org, it is you, the Board, who retains the power to decide whether efficiency of harmonized contracts outweighs the Multistakeholder Model (another ICANN Core Value and indeed a central plank of ICANN's Mission); and
 4. The proposed sale of PIR to a private equity firm removes the trusted Internet Society from its oversight position and heightens the need for you to spend more time and discussion on the .ORG contract renewal challenges.

In light of the difficult and timely questions before you, we renew EFF's request of 15 November 2019 for a meeting of the Board and an extension of our time to respond more formally to your Proposed Determination of Reconsideration Request 19-3.

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I. The GNSO Did Not Extend the URS to Legacy gTLDs, Including .ORG, for Good Reasons, Which ICANN Org Has Not Carefully Considered.

In preparation for the roll-out of new gTLDs in the late 2000s, the GNSO dedicated itself to drafting rules for the New gTLD Applicant Guidebook, including new rules that would address concerns about trademark protections arising from the introduction of many new gTLDs at the same time. To this end, the Implementation Review Team and later the Special Trademarks Initiative (STI) Working Team (created by a special resolution of the GNSO Council with a balanced set of stakeholder volunteers) met to negotiate the trademark protection rules for new gTLDs.

When the STI team finished its work, its outcome included the URS, an ultra-fast, ultra-cheap suspension proceeding. The URS was proposed to the GNSO Council *expressly for new gTLDs* and adopted by the GNSO Council for that purpose:

Whereas, on 11 December 2009, the STI Review Team delivered its Report to the GNSO Council describing an alternative proposal **to address trademark concerns in the New gTLD Program that was supported by a consensus of its members;**

RESOLVED, that the GNSO appreciates the hard work and tremendous effort shown by each member of the STI review team in developing the STI alternative proposal on an expedited basis;

RESOLVED FURTHER, that the GNSO Council directs Staff to forward the recommendations to the Board in response to its 12 October 2009 letter ...to allow the ICANN community to comment on the STI recommendations prior to finalization of the model to be included in the Draft Applicant Guidebook.²

Overall, the URS was intended for ultra-fast, ultra-cheap, “slam-dunk” cases that could be dealt with quickly and easily—the types of cases that were expected to multiply with the introduction of new gTLDs. The URS was developed in response to a very specific situation and was not intended for more complicated cases, such as those involving noncommercial uses or fair use defenses.

Simply put, **the URS was not intended for .ORG registrants.**

*What cost-benefit analysis was made of the dangers to .ORG registrants from being thrown into URS proceedings, or the likelihood that a system ill-equipped for these cases would make erroneous decisions, increasing the risk of unjustified suspensions of .ORG registrations?*³

According to the Proposed Determination, ICANN staff had no obligation to demonstrate that it had considered this whatsoever⁴—which is exactly why the Multistakeholder Model is so important here. At no time has ICANN org shown any knowledge of the dangers of applying the URS to millions of legacy, noncommercial registrants. At no time has ICANN org refuted EFF’s concerns for itself and other .ORG registrants.

II. Intruding on a Policy Determination Currently Pending in the GNSO’s Multistakeholder Process Shows a Lack of Respect for the GNSO, its Working Groups, and the Volunteer Time Dedicated to Analyzing Complex Policy Issues.

By proposing and then executing a contract making the URS *mandatory* for all .ORG domains, ICANN org asserted its judgment that the URS *should* apply to .ORG. But

² <https://gnso.icann.org/en/council/resolutions> [emphasis added]

³ See Request 19-3, at p. 6.

⁴ Proposed Determination, at p. 17. The Proposed Determination also suggests that applying the URS to .ORG domains is reasonable based solely on the facts that (a) “ICANN community’s Implementation Recommendation Team has recommended making URS a mandatory RPM *for new gTLDs*” and (b) “the GNSO has concluded that the URS was not inconsistent with any of its *existing* policy recommendations.” *Id.* (first emphasis added). But the appropriateness of URS for new gTLDs does not establish its appropriateness for .ORG, nor does the fact that the GNSO has not yet definitively come out against it.

pending before the GNSO’s Rights Protections Mechanisms Policy Development Process Working Group *right now* is the question of whether we—the GNSO and ICANN—should extend the URS from new gTLDs to legacy gTLDs. As EFF wrote in its Reconsideration Request, this question has been directed by the GNSO Council to the *currently in-progress* RPM PDP Working Group as a charter question for that group.⁵

Further, *this very policy question is currently being discussed and debated by the RPM PDP Working Group. It was raised by the Working Group at ICANN66 in Montreal, and it will be discussed over the next few weeks as the Working Group considers URS-related proposals submitted by Working Group members.*⁶

What issue could be more squarely before the RPM WG and the GNSO Community as part of the Multistakeholder Model than whether the URS should be extended to the largest legacy gTLDs? By making its own judgment call without regard for the Working Group’s or the GNSO’s ultimate determinations, ICANN org signaled a disregard for those groups and their efforts.

III. ICANN Org Did Not Respect the Multistakeholder Model in Negotiating and Executing Parts of the Renewed .ORG Registry Agreement.

We respectfully submit that the efficiency of a common set of registry contracts does not outweigh the Multistakeholder Model and indeed the very mission ICANN of developing policy on an individualized basis through our “bottom-up consensus-based multistakeholder process.”

The Proposed Determination suggests that when the Board delegated its contract authority to ICANN org, ICANN org’s ability to negotiate any terms by bilateral negotiation was made sacred. But on the ark of efficiency, ICANN Org has sacrificed the Multistakeholder Model.

The Proposed Determination suggests that the Core Value of “efficiency” requires ICANN to prioritize harmonization among Registry Agreements over every concern EFF voiced about the RA and every other ICANN Core Value.⁷ It characterizes the goal of moving all registries to “the base registry agreement” created for new gTLDs as the driving force behind ICANN org’s decision. The Proposed Determination even asserts

⁵ See https://gns0.icann.org/sites/default/files/filefield_48755/rpm-charter-15mar16-en.pdf.

⁶ See Proposal #31 on “the issue of whether the URS should become an ICANN Consensus Policy.” <https://community.icann.org/display/RARPMRIAGPWG/2019-11-03+ICANN66+Montreal+-+Review+of+all+Rights+Protection+Mechanisms+%28RPMs%29+in+all+gTLDs+PDP+WG>

⁷ Proposed Determination, at p. 20.

that the new .ORG contract “reflect[s] the Staff’s continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA.”⁸

We are dumbfounded by the characterization of ICANN org’s disregard of the Multistakeholder Model as operating in the “global public interest.” “Efficiency” alone cannot outweigh the Core Value of “open, transparent and bottom-up, multistakeholder policy development processes.” ICANN’s Mission of coordinating the allocation and assignment of names in the DNS through the policies “developed through a bottom-up consensus-based multistakeholder process” must supersede the slight convenience of harmonization among RAs.

We respectfully submit that it falls within the Board’s authority and responsibility to oversee ICANN org, particularly as to matters that involve:

- interacting with the ICANN community to ensure that ICANN is serving the global public interest within ICANN’s mission;
- considering policy recommendations arising out of Supporting Organizations, including participating in consultation processes if necessary; or
- exercising strategic oversight, including oversight of the development of the strategic plan.⁹

All of these areas are identified as “key roles” of the ICANN Board.¹⁰ Likewise, ICANN’s Delegation of Authority Guidelines note that while the ICANN CEO “oversees day-to-day operations,” the Board “exercises oversight over the CEO, and is responsible for the identification of the strategic direction that the operations will serve.”¹¹

In other words, the Board’s delegation of contracting authority is not an abdication of the Board’s role in the contracting process. **As members of the Board, you remain responsible for oversight of ICANN org’s exercise of its delegated authority, especially where issues arise that implicate the public interest and policy development processes.**

Critically, the Board’s oversight role in the case at hand includes ensuring that ICANN org neither intentionally nor inadvertently jettisons the Multistakeholder Model. We ask the Board to look closely at the issues we raise about the .ORG contract renewal—and remove the URS and “additional protections” provisions from the .ORG contract.

⁸ *Id.* at p. 24.

⁹ ICANN’s Delegation of Authority Guidelines, adopted 8 November 2016, at p. 1, <https://www.icann.org/en/system/files/files/delegation-of-authority-guidelines-08nov16-en.pdf>.

¹⁰ *Id.*

¹¹ *Id.* at p. 4.

IV. The Recent News that Internet Society Intends to Sell the Public Interest Registry to a Private Equity Firm Magnifies Concerns About the Agreement's Impact on .ORG Registrants.

During the .ORG RA renewal process, it was not public information that the Internet Society would soon announce a sale of PIR to private equity firm Ethos Capital. The proposed sale invites additional scrutiny to ensure appropriate stewardship and oversight of the .ORG TLD.

In the comments on the Registry Agreement that EFF and the Domain Name Rights Coalition filed in April 2019, we noted the text gives PIR a great deal of leeway in implementing new rights protection mechanisms without the input of the ICANN community:

Experience in the new gTLDs has shown this to be a dangerous proposition. So-called rights protection mechanisms are, at best, compromises between trademark holders' interest in enforcement and the broader public's right to register and use domain names as a vital avenue of free expression. **As such, they implicate public and private rights that may not line up with a single registry operator's priorities.**¹²

That risk of misalignment between a registry's interests and those of the public is particularly pronounced given the .ORG TLD's important place in the nonprofit sector. As we explained in our comments, trademark disputes must be treated differently for organizations that rely on legal protections for noncommercial use:

Because the .org TLD is used primarily by nonprofit organizations engaged in a variety of charitable, educational, religious, scientific, and public interest activities, their uses of a domain name are far more likely to be noncommercial, and thus outside any exclusive right of a trademark holder. Warning noncommercial users to avoid registering a domain name because of the possibility of trademark infringement is similar to warning residents of tropical climates to wear heavy coats because of the possibility of snowstorms. Both warnings, applied in the wrong context, would cause more harm than they prevent.¹³

ICANN should not give a registry wide berth to make decisions that might chill noncommercial speech without ensuring that the registry represents the voice and interests of the nonprofit sector. Indeed, when the Internet Society made its proposal to the ICANN board in 2002 to transfer management of .ORG to PIR, ISOC's then-president and CEO Lynn St. Amour particularly stressed ISOC's position of trust in the sector as well as its positioning to provide oversight to PIR:

¹² <https://mm.icann.org/pipermail/comments-org-renewal-18mar19/2019q2/003200.html>.

¹³ *Id.*

We're proposing [to] set up a separate non-profit company called Public Interest Registry that will draw upon the resources of ISOC's extended global network to drive policy and management. [...]

We're the foremost noncommercial organization focused on the Internet. We have a strong tradition and long tradition of working in the public interest [...]

We have over 10,000 individual members [...] [and] over 137 organizational members, many noncommercial are included amongst them, spanning most of the noncommercial base.

PIR policies will be derived from ISOC principles [...]

We propose that the Public Interest Registry will be able to avail itself of the resources of the Internet Society, which provides an existing and globally extensive network of contacts with noncommercial Internet users. [...]

We actually believe that we can provide [support for the .ORG community] through ISOC's stable, responsible stewardship.¹⁴

In the days since the sale was announced, nonprofit leaders have begun to express their concerns about the sale. Electronic Privacy Information Center president and former PIR board chair Marc Rotenberg told a reporter he was "very disappointed" and reiterated that .ORG was built to serve the interests of nonprofit and noncommercial users.¹⁵

ICANN must carefully reexamine the .ORG Registry Agreement in light of this news. Without the oversight and participation of the nonprofit community, measures that give the registry authority to institute new RPMs or make other major policy changes invite management decisions that conflict with the needs of the .ORG community.

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In light of the difficult and timely questions before you, we renew EFF's request for a meeting with the Board and an extension of our time to respond more formally to your Proposed Determination of Reconsideration Request 19-3 within two weeks thereafter.

¹⁴ <https://archive.icann.org/en/meetings/bucharest/captioning-evening-26jun02.htm#TheInternetSociety>.

¹⁵ <https://gizmodo.com/private-equity-ghouls-buy-non-profit-that-handles-org-1839860118>.

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