



State of California
Office of the Attorney General

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ATTORNEY GENERAL

April 15, 2020

Via Electronic Correspondence

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

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

RE: Proposed Ethos Capital Takeover of .ORG Registry Agreement

Dear Messrs. Botterman and Marby:

I urge ICANN to reject the transfer of control over the .ORG registry to Ethos Capital. The proposed transfer raises serious concerns that cannot be overlooked.

My office has “responsibility for supervising charitable trusts in California, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations...” (Gov. Code, § 12598.) My office is tasked with the authority to “investigate transactions and relationships of corporations and trustees...for the purpose of ascertaining whether or not the purposes of the corporation or trust are being carried out in accordance with the terms and provisions of the articles of incorporation or other instrument.” (Gov. Code, § 12588). To that end, my office conducted an investigation of ICANN and its role in approving the transfer of the .ORG Registry Agreement from the Public Interest Registry (“PIR”) (the supporting organization to the Internet Society (“ISOC”)) to Ethos Capital. A key component of our review begins with ICANN’s articles of incorporation which states as follows:

[ICANN] is not organized for the private gain of any person...
recogni[zing] the fact that the Internet is an international network
of networks, owned by no single nation, individual or
organization” and as such, ICANN will “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.

[ICANN] shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole.

ICANN followed the principles set out in its articles of incorporation and bylaws when it embarked on its search for a new .ORG registry operator in 2002. At that time, ICANN recognized that the .ORG domain required unique protections. For example, it noted that “in view of the noncommercial character of many present and future .org registrants, affordability is important. A significant consideration will be the price at which the proposal commits to provide initial and renewal registrations and other registry services.”¹

Nearly two decades later, ICANN reaffirmed its view of the unique nature of the .ORG registry:

When [ISOC] applied for and was awarded the right to manage .ORG in 2002, ISOC made commitments to the Internet community on how it would differentiate and uphold the unique purpose of the .ORG [top level domain]. ICANN awarded the management of the .ORG registry with the belief that ISOC was uniquely positioned to live up to these commitments for the long run. These commitments have been maintained since that 2002 award.²

ICANN selected PIR as the registry operator for the .ORG top level domain because of PIR’s commitment to “institute mechanisms for promoting the registry’s operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community.”³ If, as proposed, Ethos Capital is permitted to purchase PIR, it 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. In effect, what is at stake is the transfer of the world’s second largest registry to a for-profit private equity firm that, by design, exists to profit from millions of nonprofit and non-commercial organizations.

Since news broke of the proposed sale of PIR and transfer of the .ORG registry agreement to a private equity firm, numerous concerns have been raised from all corners of

¹ Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, 20 May 2002, *see* <https://archive.icann.org/en/tlds/org/criteria.htm>.

² Correspondence from Maarten Botterman, Chair, ICANN Board of Directors to Gonzalo Camarillo, Chair, ISOC Board of Trustees, at p. 2, February 13, 2020, *see* <https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf>.

³ Correspondence from Jeffery LeVee of Jones Day, Counsel for ICANN to Lauren Boglivi of Proskauer Rose, PIR’s counsel, at p. 2-3, February 13, 2020, *see* <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.

society, including ICANN's own At-Large Advisory Committee.⁴ Soon thereafter, ICANN appropriately raised crucial questions seeking clarity on a range of issues, including information about the entities and individuals involved in the proposed sale. As discussed below, while PIR and Ethos Capital have responded to some of ICANN's inquiries and provided some of the information sought by ICANN, numerous issues remain unresolved. Further, Ethos Capital, ISOC, and PIR have refused to produce responses to many critical questions posted by the public and Internet community. In light of these questions and the objectives stated in ICANN's articles of incorporation and bylaws, as well as its longstanding commitment to and appreciation of the unique role of the .ORG registry, ICANN must exercise its authority to withhold approval.

Little is known about Ethos Capital and its multiple proposed subsidiaries, including PIR LLC, which will be converted from a nonprofit corporation into a for-profit corporation. Even less is known about how these for-profit corporate entities and private investors will operate their businesses. Without such information, it remains unclear how the .ORG registry and community will be impacted. The affected community includes some 1,200 registrars, millions of registrants, and hundreds of millions of persons who rely on and engage with the .ORG domain across the globe every day. Given the lack of transparency regarding Ethos' future plans, approval of the transfer may place at risk the operational stability of the .ORG registry.

PIR and Ethos have failed to respond to ICANN's questions regarding PIR's financial picture after the sale. PIR maintains that its anticipated income will be sufficient to service the \$300 million loan necessary to complete this purchase and maintain its level of operation. Additionally, as a for-profit entity, PIR will now incur tax liabilities, and its loan will be due in five years. It is therefore disturbing that Ethos has failed to identify the new services it contends will generate the necessary revenue to cover those expenses. While PIR currently has sufficient income for its operations, as a nonprofit it pays no taxes and is not saddled with a \$300 million

⁴ See e.g., ICANN's At-Large Advisory Committee, <https://community.icann.org/display/alacpolicydev/At-Large+Workspace%3A+ISOC+Sells+PIR?preview=/120821713/126423106/ALAC%20Advice%20to%20the%20ICANN%20Board%20on%20the%20ISOC%3APIR%20Issue%20-%20FINAL%20310120.pdf>; ISOC Advisory Board's Advice Statement "2020.02.13-01", https://savedotorg.org/wp-content/uploads/2020/02/Advice-2020.02.13-01-_-PIR-Sales-to-Ethos-Capital.pdf; Members of the United States Congress, <https://www.warren.senate.gov/imo/media/doc/2020.01.16%20Letter%20to%20ICANN%20about%20sale%20of%20.ORG%20registry.pdf>; Letter Signed by 824 nonprofits including National Council of Nonprofits, Girl Scouts of America, and American Bible Society, <https://www.eff.org/document/coalition-letter-sale-public-interest-registry>; National Association of State Charities Officials, <https://www.nasconet.org/wp-content/uploads/2020/01/NASCO-ltr-011720.pdf>; United Nations Human Rights Council, Office of the High Commissioner, <https://www.icann.org/en/system/files/correspondence/kaye-voule-to-marby-20dec19-en.pdf>; and Association for Progressive Communications, <https://www.apc.org/en/pubs/apc-statement-proposed-sale-public-interest-registryorg-domain>.

loan and investors who expect a rate of return. The unstable economic climate makes predictions of future revenue even more speculative. If the sale goes through and PIR's business model fails to meet expectations, it may have to make significant cuts in operations. Such cuts would undoubtedly affect the stability of the .ORG registry.

The absence of critical information is troubling given the unique nature of the .ORG community. In the event Ethos Capital—a new company without any track record that appears to have been formed for the purpose of taking control of the .ORG registry—makes any mistake, it will be at the expense of the .ORG community and will impact the broader Internet community. The cost will be felt downstream, affecting registrars, registrants, and the many individual users who make up the global Internet community. ICANN's analysis of the need for the stability of the .ORG registry must take into consideration that some of the .ORG registrants are critical organizations dedicated to assist in times of crisis. The list of such organizations is long, including the World Health Organization, the World Bank, the Red Cross, Doctors Without Borders, and the United Nations. PIR (the nonprofit entity) has dutifully managed the .ORG registry to the benefit of these entities for more than 16 years. Permitting Ethos Capital or any other business to take control of the registry, without clarity about the potential changes, poses meaningful concerns to the nonprofit community.

ISOC purports to support the Internet, yet its actions, from the secretive nature of the transaction, to actively seeking to transfer the .ORG registry to an unknown entity, are contrary to its mission and potentially disruptive to the same system it claims to champion and support. Assuming, *arguendo*, that Ethos Capital possesses ideas to improve PIR's financial health, it is unclear what prevents PIR and ISOC from engaging in improvements now. No response has yet been provided supporting the proposition that as nonprofit corporations, PIR is currently restricted from engaging in new practices that would both improve their financial health while furthering their charitable mission.

There has been too little information provided about the sale process by which the proposed transfer sale was agreed to by ISOC. If ISOC was concerned about diversifying its revenue streams, what did ISOC do, if anything, before deciding to sell the .ORG registry agreement? Why did ISOC not conduct a competitive bid process for a new registry operator if it wanted a change in the registry operator? Did ISOC explore options other than a sale to a private equity firm, given that its nonprofit status was key to PIR becoming the .ORG registrar? What consultation, if any, did ISOC conduct with its stakeholders prior to proceeding with the proposed sale?

With ICANN's unique role in coordinating and managing Internet infrastructure, its global reach cannot be overstated. In furtherance of its mission, ICANN must consider the impact of its decision within the current global context. Just last year, ICANN and PIR renewed the .ORG registry agreement. The new registry agreement removed price caps on .ORG domain names, despite receiving over 3,000 comments in opposition, with only six individuals in

support.⁵ There is mounting concern that ICANN is no longer responsive to the needs of its stakeholders. ICANN has an obligation to weigh the impact of approving the proposed transfer of the .ORG registry, in light of the lack of information, compared to information ICANN possessed and the criteria it used when it first awarded ISOC/PIR the privilege to operate the .ORG registry in 2002.

My office is also concerned that the .ORG registry agreement with ICANN contains a presumption in favor of renewing the agreement following its expiration. This automatic renewal provision leaves the nonprofit community that uses the .ORG registry with no protection. While the automatic renewal provision made some sense when the .ORG registry was operated by PIR and ISOC that had solid track records, it makes no sense to extend this provision to operators that have no experience operating a Registry.

My office is committed to protecting California's and the public's interest in a properly functioning and accessible .ORG domain system. ICANN has long recognized the unique nature of the .ORG registry as the Internet's home for noncommercial entities and interests. ISOC and PIR are charitable organizations that are accountable to their community stakeholders and to the public at large. In contrast, a private equity firm is accountable only to its investors. Given the concerns stated above, and based on the information provided, 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.

This office will continue to evaluate this matter, and will take whatever action necessary to protect Californians and the nonprofit community.

Sincerely,



Attorney General

cc: Jeffrey Levee (jlevee@jonesday.com)
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⁵ See e.g., <https://reviewsignal.com/blog/2019/06/24/the-case-for-regulatory-capture-at-icann/>.