

Maarten Botterman
Board Chair, ICANN

Göran Marby
CEO, ICANN

John Jeffrey
General Counsel, ICANN

April 15, 2020

Dear Maarten, Göran, and John,

We write in response to your blog post of 8 April regarding the proposed change of control of the .ORG registry. ICANN's letter to Public Interest Registry (PIR) of 3 April suggests that ICANN is taking seriously the concerns of the NGO community around the sale of PIR to Ethos Capital. Now, it's time for ICANN to follow words with action. PIR's conduct to date demonstrates that it cannot reliably operate the .ORG registry, and will not operate the registry for the good of noncommercial registrants if the deal is consummated. ICANN should reject the proposed change of control, for all of the following reasons.

Procedural Issues

As a preliminary matter, we have two procedural concerns. First, the current comment period of seven days is not sufficient.¹ ICANN should hold a standard 30-day comment period and solicit the views of the NGO community. As John Jeffrey made clear in his letter of 3 April, PIR and Ethos have not been forthcoming with essential information about the transaction despite multiple requests. This is ample grounds for ICANN to disapprove the change of control in advance of the current 20 April deadline if PIR and Ethos do not consent to a further extension until ICANN's and the public's questions are answered and the public can weigh in on PIR's answers. In particular, ICANN needs to publish PIR's responses to the questions ICANN asked on 3 April, and allow stakeholders to comment on those responses.

Second, it's our understanding that the ICANN Board is reviewing the change of control. We believe ICANN's approval or disapproval of the transaction should be subject to a Board vote. Given the circumstances of this transaction and the unprecedented public outcry, it should be obvious that this transaction is not a run-of-the-mill contractual issue that can be handled by ICANN staff in the ordinary course of business. It is, rather, a fundamental decision about the governance of NGOs' presence on the Internet. Attempting to resolve this issue without a Board vote will be seen by the public as an attempt to avoid accountability, and will do harm to the perception of ICANN's legitimacy—an outcome the undersigned wish to avoid.

¹ The Electronic Frontier Foundation, one of the undersigned, submitted a separate comment regarding the timing of this comment period. See <https://www.icann.org/news/blog/pir-transaction-and-proposed-public-interest-commitments-update>.

The Financial Stability of PIR Is at Risk and Ethos Is Avoiding Accountability

While PIR and Ethos have held several public relations events to showcase their unilateral proposals for a “Stewardship Council” and Public Interest Commitments, they have avoided any dialogue about the financial and operational security of PIR post-transfer, the identities of the investors seeking to control PIR, or how those investors’ interests will align with the rights and needs of NGOs who use .ORG names.

The Electronic Frontier Foundation and Americans for Financial Reform Education Fund wrote to ICANN on 21 February, recommending that ICANN seek additional information about these issues, including how PIR intends to service a proposed \$360 million debt to finance Ethos’s buyout without significantly raising registration fees or degrading service or technical upkeep.² EFF and AFREF also asked whether Ethos intends to extract value from PIR for the benefit of its investors through dividend recapitalizations or preferred vendor agreements with third parties such as Donuts, in a manner that could threaten PIR’s financial stability.

It’s clear from Mr. Jeffrey’s letter of 3 April³ that PIR and Ethos have not even attempted to address these concerns, even in confidential communication with ICANN. As of that date, PIR had not provided the names of the directors and officers who would control PIR, an explanation of how PIR will service the \$360 million debt that Ethos plans to burden it with, nor information on how PIR will distribute capital to Ethos’s investors. This reluctance to provide relevant information should itself justify ICANN’s rejection of the change of control. If PIR and Ethos have resisted giving ICANN a complete picture of their financial and structural plans (even on a confidential basis) during ICANN’s review, how can the NGO community expect that PIR will be candid and transparent in the years to come?

What little information PIR and Ethos have provided gives the NGO community no reassurance. Ethos plans to place PIR within a tangled web of Delaware shell companies: Ethos Purpose GP, Purpose Domains Feeder I, Purpose Domains Direct, and Purpose Domains Holdings, in addition to Ethos Capital itself. This Byzantine structure, along with Ethos’s refusal to disclose the directors, officers, partnership agreements, or the allocation of control, suggests a concerted effort to hide the real parties who will control the .ORG domain post-transaction and insulate them from any real oversight by registrants and the multistakeholder community.⁴

PIR has also disclosed that it intends to funnel some of the proceeds of the transaction to employees and “advisors to the transaction,”⁵ potentially including Ethos co-founder and former ICANN CEO Fadi Chehadé. The public has, to date, nothing more than PIR’s assurances that those payments will be proportional to services rendered, rather than unjustified private enrichment at the expense of registrants.

² <https://www.eff.org/document/eff-afref-letter-icann-about-sale-pir>

³ <https://www.icann.org/en/system/files/correspondence/jeffrey-to-nevett-03apr20-en.pdf>

⁴ Ethos, PIR and ISOC promised ICANN that the PICs would provide “accountability for the governance of PIR” and “assurance to .ORG registrants and users that Ethos will uphold its commitments.” <https://www.icann.org/en/system/files/correspondence/sullivan-et-al-to-marby-et-al-22jan20-en.pdf>

⁵ PIR, “Response to February 19, 2020 Questions” at p. 6, <https://www.icann.org/en/system/files/correspondence/cimboric-to-jeffrey-04mar20-en.pdf>.

Ethos’s “Accountability Initiatives,” Including Public Interest Commitments, Are Hollow

Our concern, expressed in multiple fora since the sale was announced in November, remains the same: Ethos and its anonymous private investors will expect PIR to recoup their \$1,135,000,000 purchase price, plus interest on a \$360,000,000 loan, while achieving a significant rate of return. This will require some combination of raising registration fees, cutting spending on the upkeep and reliability of the registry, or offering services to third parties that leverage their control of the registry. The latter may include a practice of suspending domain names, or refusing to register them, at the request of third parties—censorship for profit. The registry operator Donuts, with which many of the principals of PIR and Ethos have been associated, does just this with its “DPML Plus” and “Trusted Notifier” services. Similar efforts by an Ethos-owned PIR would be disastrous in the .ORG domain, which is home to NGOs who are frequent targets of censorship because of their work holding the powerful to account.

Ethos’s proposals for voluntary Public Interest Commitments and a “Stewardship Council,” while ostensibly addressing these concerns, have fatal flaws. Those proposals, even with the changes that Ethos made on 16 March and 9 April, will not be effective at stopping Ethos from profiting at the expense of NGOs and their right to free expression.

Substantively, the “Stewardship Council” proposed by Ethos will have no real power to address censorship concerns. The only relevant power that Ethos proposes to give the council is a veto over “any proposed change” to “PIR policies proposed by PIR concerning appropriate limitations and safeguards regarding censorship of free expression in the .ORG domain name space.”⁶ This power reaches only future changes to unspecified “policies” established and designated by PIR. The council would be precluded from offering “advice or recommendations regarding day-to-day operational matters.”

The inadequacy of this power is evident: conduct that threatens free expression doesn’t necessarily implicate any existing “PIR policies,” nor require any changes to those policies. PIR has not even stated whether it considers any existing policies, including its Anti-Abuse Policy,⁷ to be “policies . . . concerning appropriate limitations and safeguards regarding censorship of free expression.” The Stewardship Council would have no ability to decide which policies fall within its review. Even if PIR does deem its Anti-Abuse Policy to be within the purview of the council, that policy would permit, for example, the unilateral suspension of domain names used by websites that criticize a business or government, based on PIR’s sole determination that such websites are engaged in “fraudulent actions.” Such censorship can be implemented as “day-to-day operational matters” under PIR’s own interpretations of its existing policies, and thus insulated from the council’s review. The council would not be able to change or add PIR policies to address such practices. The council would not even need to be informed of the existence of such practices, just as PIR’s existing Advisory Council was not informed of the pending sale to Ethos.

Even in the narrow circumstances of an overt change to a specific, existing policy, the proposed Stewardship Council is set up in a way that vetoes will be nearly impossible. PIR’s Board would retain a veto over each and every appointment and re-appointment to the council, which

⁶ .ORG Stewardship Council Charter, <https://www.keypointsabout.org/s/ORG-Stewardship-Council-Charter-3-16-201.pdf>

⁷ PIR Anti-Abuse Policy for .ORG and IDNs, <https://thenew.org/org-people/about-pir/policies/org-idn-policies/anti-abuse-policy-org-idn/>

would ensure that council members will remain aligned with PIR’s owners. And because a veto requires a two-thirds supermajority of the council, any three of the seven members would be able to uphold any decision of PIR’s management (perhaps to avoid the PIR Board vetoing their re-appointment to the council).

The council’s other duties with respect to freedom of expression are merely advisory. Given the extremely narrow powers that PIR has proposed to give the Stewardship Council, and its ability to avoid even that level of oversight through interpretation and secrecy, enshrining the existence of the Stewardship Council in a Public Interest Commitment within the Registry Agreement is a meaningless gesture. In the rare instances where PICs have been subject to interpretation and enforcement, they have been interpreted extremely narrowly. For example, in the PICDRP arbitration involving .FEEDBACK, the panel of arbitrators ruled that PIC enforcement could not be used to prevent outright fraud by a registry operator because *the PIC did not explicitly prohibit the registry operator from engaging in fraud*.⁸ A similarly narrow approach by the PICDRP panel to Ethos’s PIC proposal would permit censorship-for-profit by PIR as long as “a binding right to veto modifications” to “Designated Policies” exists on paper.

Conclusion

Ethos CEO Erik Brooks has stated proudly that his firm is “in the business of taking risks.” But ICANN must not take risks with the essential infrastructure of NGOs’ Internet presence at this critical time. PIR’s unwillingness to disclose information necessary to allow a thorough review of the change of control is sufficient reason for ICANN to disapprove that change of control. And moreover, the information disclosed to date suggest that an Ethos-owned PIR will not be an effective steward of the .ORG domain.

ICANN’s role in the Internet’s domain name system derives not from any governmental authority, but only from Internet users’ confidence that ICANN will foster the effective and equitable operation of the DNS. At a moment when the world’s NGOs are deeply engaged in responding to a global pandemic, the world is watching to see how ICANN will protect NGOs. ICANN has asked the right questions of PIR and Ethos. Now, it’s time for ICANN to follow those words with action. ICANN should reject the proposed change of control and open a public bidding process to select a new .ORG registry operator based on the 2002 criteria—an operator selected not for how much borrowed cash it will tender, but for how well it will stand up for NGOs.

Sincerely,
Mitch Stoltz
Senior Staff Attorney
Electronic Frontier Foundation

Co-Signers:
Domain Name Rights Coalition
NTEN
Access Now

cc: ICANN Board Members

⁸ Standing Panel Evaluation Report for .FEEDBACK (14 March 2017) at p. 10, <https://www.icann.org/en/system/files/files/feedback-picdrp-panel-report-14mar17-en.pdf> (“[T]he Panel finds that Respondent’s Registry Operator Agreement contains no covenant by the Respondent to not engage in fraudulent and deceptive practices.”).