

Exhibit 32

DotMusic Limited Reconsideration Request (“RR”)

April 14, 2018

1. Requestor Information

Requestors:

Name: DotMusic Limited

Address: Contact Information Redacted

Email: Constantinos Roussos, Contact Information Redacted

Requestor is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

DotMusic Limited (“Requestor”) seeks reconsideration of the ICANN Board’s four resolutions, which concern the community priority evaluation (“CPE”) process review that was conducted by FTI Consulting, Inc.’s (“FTI”) Global Risk and Investigations Practice and

Technology Practice (the “CPE Review”).¹ The ICANN Board adopted the following resolutions on 15 March 2018:²

Resolved (2018.03.15.08), the Board acknowledges and accepts the findings set forth in the three CPE Process Review Reports.

Resolved (2018.03.15.09), the Board concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary.

Resolved (2018.03.15.10), the Board declares that the CPE Process Review has been completed.

Resolved (2018.03.15.11), the Board directs the Board Accountability Mechanisms Committee [(“BAMC”)] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC [PDF, 42 KB] document.³

4. Date of action/inaction:

ICANN acted on 15 March 2018 by adopting resolutions 2018.03.15.08 through 2018.03.15.11 (the “Resolutions”).

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

Requestor became aware of the action on 15 March 2018, when the ICANN Board adopted the Resolutions.

¹ Exhibit 01, Adopted ICANN Board Resolutions (15 Mar. 2018), 2a, <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

² *Id.*

³ *Id.*

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

Requestor is materially affected by the Resolutions, which accept the findings of the CPE Review, because the BAMC intends to rely on the CPE Review to decide Requestor's Reconsideration Request 16-5 ("Request 16-5"). The BAMC's reliance on the procedurally and substantively deficient CPE Review directly affects Requestor's rights regarding its community priority application for the .MUSIC generic top-level domain ("gTLD"), which is the focus of Request 16-5. The ICANN Board's adoption of the Resolutions will materially affect and harm Requestor, and its Request 16-5, because (1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN's Bylaws.

6.1 The CPE Review is Procedurally and Methodologically Deficient.

The ICANN Board adopted the Resolutions despite the facially deficient methodology underlying the CPE Review. FTI, in performing its independent review of the CPE process, only relied upon documents from ICANN as part of its review, since the CPE Provider refused to produce documents and it did not accept submissions from community priority applicants.⁴ Furthermore, FTI only interviewed individuals associated with ICANN and the CPE Provider and those interviews were equally deficient. For example, even though the CPE Provider produced no documents, FTI interviewed only two of its staff members and none of its independent evaluators, project coordinators, or project directors.⁵ No interviews were requested or conducted of any person at DotMusic or any of its experts who have submitted extensive reports for the BAMC's consideration. Accordingly, the CPE Review is based only on interviews with the two CPE

⁴ Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁵ *Id.* at pp. 8-10, 14-15.

Provider staff members, six ICANN staff members, and documents produced only by ICANN.⁶ A review based on this limited, one-sided, and incomplete universe of documents cannot be considered independent.

The ICANN Board was aware that the CPE Review relies on an incomplete universe of information and documents for its conclusions on 15 March 2018, when it nonetheless accepted the CPE Review. ICANN Board member Avri Doria abstained from voting on the Resolutions specifically because she believed that the CPE Review lacked procedural credibility and did not perform proper due diligence:

I am abstaining from the vote on the acceptance of the report from FTI Consulting due to the fact that while I accept the path forward as defined in the motion, I cannot accept the report itself.

From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. In scope 2, the analysis of the application of criteria, while they described a rigorous methodology, the documentation describes their inability to fully apply that methodology. The report indicates that they were not able to obtain all of the required documentation from the CPE provider necessary for the full application of the process they had defined. Any scientific method, when the method cannot be rigorously applied, the results be viewed as, at best, tentative and should be treated with caution. Though FTI Consulting reports that there is no evidence of differential application of criteria, they cannot claim with certainty that there was no differential application in the absence of full and rigorous application of their chosen methodology.

It also appears in the report that only a portion of the evaluators were interviewed. In fact, the report states that FTI consulting only interviewed two of the evaluators from a larger set of evaluators. This appears to me to be another flaw in the application of their methodology.

Any definitive determination that there was no conclusive differential application of criteria would require a further in-

⁶ See *id.* at pp. 3-7, 13-14.

depth study of all CPE applications and would require not only the missing documentation but also require interviewing all of the evaluators and not just the two remaining employees of the evaluation teams.⁷

ICANN Board Member Avri Doria's concerns regarding the CPE Review were also raised before the ICANN Board prior to 15 March 2018 by several participants in the CPE process, including Requestor.⁸ Members of the .HOTEL contention set, represented by Personal Data Redacted), informed ICANN on 1 February 2018 that it lacked "diligence and care in the CPE process review:"

FTI recognized that it did not benefit from a complete data set, as the CPE Provider refused to give access to its email communication pertaining to the CPE process. No reason is provided as to why the CPE Provider refused access.

Remarkably, it seems that the vast majority of evaluators had left the CPE Provider before FTI started its review of the CPE process. Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process.

FTI's review of the CPE process was thus extremely limited.

Given its limited scope, no value can be attached to FTI's conclusion in the report that it found no evidence of undue influence of the ICANN organization on the CPE provider.⁹

Requestor further informed ICANN on 31 January 2018 that the CPE Review "is unreliable and incomplete because it was based on (1) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption

⁷ Exhibit 03, Avri Doria, ICANN Board Meeting Transcript (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

⁸ See, e.g., Exhibit 04, "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (31 Jan. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>; Exhibit 05, Personal Data Redacted to ICANN BAMC (1 Feb. 2018), [https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-Personal Data Redacted-to-icann-bamc-redacted-01feb18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-<small>Personal Data Redacted</small>-to-icann-bamc-redacted-01feb18-en.pdf); Exhibit 06, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

⁹ Exhibit 05, Personal Data Redacted to ICANN BAMC (1 Feb. 2018), p. 2, [https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-Personal Data Redacted-to-icann-bamc-redacted-01feb18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-<small>Personal Data Redacted</small>-to-icann-bamc-redacted-01feb18-en.pdf)

of a flawed and inappropriate compliance-based investigative process by the FTI.”¹⁰ Despite the clearly articulated and supported concerns regarding the procedural basis for the CPE Review, the ICANN Board insisted on adopting a series of resolutions that will materially affect the outcome of Requestor’s Request 16-5.

6.2 The CPE Review Performed No Substantive Analysis of the CPE Process.

The CPE Review simply rubber-stamped the CPE process without any significant analysis. FTI not only performed no substantive review of the CPE process in order to reach its ultimate conclusions on these two issues but also concluded there are no issues with the CPE despite the significant evidence to the contrary.¹¹ Participants and interested parties in the CPE process have since raised concerns to ICANN about the (1) independence of the CPE Provider and (2) the discriminatory application of the CPE criteria based on their own substantive analyses.

FTI did not address any of the evidence, some of which is contained in the CPE Review, indicating that the CPE Provider lacked independence. The Independent Review Process (“IRP”) Panel in *Dot Registry v. ICANN* determined that “ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports.”¹² The CPE Review contains further evidence that the CPE Provider did not act independently from ICANN:

As a matter of fact, FTI’s report shows a lack of independence of the CPE provider. FTI’s Scope 1 report reveals that abundant phone calls were made between the CPE Provider and ICANN. It also mentions that ICANN advised at times that the CPE Provider’s conclusions were not supported by sufficient reasoning.

¹⁰ Exhibit 04, “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (31 Jan. 2018), p. 50, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>.

¹¹ See Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; see also Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

¹² Exhibit 08, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶ 93, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

ICANN was thus intimately involved in the evaluation process. The CPE Provider was anything but an independent provider. The abundant phone calls between ICANN and the CPE Provider to discuss “various issues” and ICANN’s influence on the CPE Provider’s rationale demonstrate that the CPE Provider was not free from external influence from ICANN. As a result, the CPE Provider was not independent.

FTI’s attempt to minimize ICANN’s influence on the CPE Provider is unconvincing. FTI’s report shows (i) that ICANN made extensive comments on the draft reports prepared by the CPE Provider, (ii) that those drafts were discussed at length between the CPE Provider and ICANN, and (iii) that the working of the CPE Provider and ICANN became intertwined to such extent that it became “difficult to discern which comments were made by ICANN organization versus the CPE Provider”. It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or the CPE Provider.

One can only conclude from these findings that the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue. FTI’s report confirms ICANN’s intimate involvement in the CPE and the fact that the *Despegar et al.* IRP Panel was given incomplete and misleading information.¹³

Therefore, FTI clearly ignored evidence and minimized significant evidence in order to conclude that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring, or conclusions reached by the CPE Provider.”¹⁴

In addition to FTI’s dismissal of all evidence concerning the CPE Provider’s lack of independence from ICANN, FTI also ignored significant evidence that the CPE Provider discriminatorily and inconsistently applied the CPE criteria. Cherine Chalaby, member of the ICANN Board, and Mark Carvell, Vice Chair of ICANN’s Governmental Advisory Committee

¹³ Exhibit 05, *Personal Data Redacted* to ICANN BAMC (1 Feb. 2018), p. 3, [https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-Personal Data Redacted-to-icann-bamc-redacted-01feb18-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-Personal%20Data%20Redacted-to-icann-bamc-redacted-01feb18-en.pdf)

¹⁴ Exhibit 02, FTI Consulting, *Communications Between ICANN Organization and the CPE* (13 Dec. 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

(“GAC”), acknowledged the inconsistencies¹⁵ and unfairness¹⁶ in the CPE process. The community priority applicants, such as Requestor, have also repeatedly explained to ICANN how the CPE process is discriminatory and inconsistent.¹⁷ They are supported by independent legal experts that performed substantive evaluations of the CPE. For example, Requestor submitted to ICANN an expert report by Personal Data Redacted

, who concluded that the EIU improperly applied the CPE criteria to community priority applicants as part of the CPE process.¹⁸ The expert opinion by Professor Personal Data Redacted, further supports Personal Data Redacted conclusions; he found that the CPE Review (1) shows an “incomplete understanding” of the CPE’s criteria,¹⁹ (2) contained “interpretive errors,” and (3) contained “errors of inconsistency and discrimination.”²⁰ These expert opinions were affirmed by the Council of Europe, a leading human rights organization with an observer status within the GAC that issued a report substantively analyzing the CPEs and concluding that the CPE Provider

¹⁵ Exhibit 09, ICANN, Transcript of Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 (“I personally would comment that I have observed inconsistencies applying the (AGB) scoring criteria for (CPE)’s and ... there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases.”).

¹⁶ *Id.* at p. 12 (“The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. That was not happening.”).

¹⁷ See Exhibit 10, Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (15 Dec. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>; see also Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Personal Data Redacted (31 Jan. 2018), pp. 20-24, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

¹⁸ See Exhibit 12, Expert Legal Opinion by Personal Data Redacted (17 June 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinionPersonalDataRedacted-17jun16-en.pdf>.

¹⁹ Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Personal Data Redacted (31 Jan. 2018), p. 74, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

²⁰ *Id.* at pp. 20-21.

inconsistently applied the CPE criteria.²¹ FTI did not address any of the aforementioned evidence in the CPE Review even though they all directly contradict its conclusions on the CPE process.²²

Rather, the CPE Review simply concluded that “the CPE Provider consistently applied the CPE criteria throughout all [CPEs]”²³ without adequately addressing any of the concerns from community priority applicants, legal experts, and ICANN members. Not once in the CPE Review did FTI directly address the concerns, evidence, and conclusions put forth by any of the community priority applicants and the Council of Europe. FTI simply defended the CPE process without performing any substantive analysis. As explained by *Personal Data Redacted*,

The second part of FTI’s report (Scope 2) was supposed to focus on the consistency – or better, lack of consistency – of CPE decisions.

However, FTI’s [*sic*] did not analyse the consistency issues during CPE. The report simply sums up the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria. FTI did not examine the consistency between the reasons invoked by the CPE Provider. It also failed to examine whether the CPE provider was consistent in applying those reasons to the different applications. There is no analysis whatsoever as to the inconsistencies invoked by applicants in RfRs, IRPs or other processes.

Emblematic of the lack of analysis is the fact that FTI did not examine the gTLD applications underlying the CPE report. These gTLD applications are not even mentioned among the materials reviewed by FTI. Without reviewing the underlying applications, it is impossible to assess the consistent application of policies and standards. ...

The fact that those inconsistencies were left unaddressed by FTI is inexcusable. Requesters described the inconsistencies clearly and repeatedly. The *Despegar et al.* IRP Panel considered Requesters’

²¹ Exhibit 13, *Personal Data Redacted*, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 41-57, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

²² *Id.* at p. 3.

²³ Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 57, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

description of those inconsistencies to have merit. The existence of said inconsistencies has never been contested. And FTI's report simply ignores them.²⁴

Clearly, FTI's approach to the CPE Review was to simply describe the CPEs rather than evaluate their substance to determine whether the CPE Provider was actually adhering to the applicable guidelines. And, yet, the ICANN Board accepted FTI's conclusions by adopting the Resolutions and the BAMC will now apply the flawed determinations in the CPE Review to Requestor's Request 16-5—materially affecting the treatment of Requestor's community priority application.

6.3 ICANN Adopted the Resolutions in Violation of Its Bylaws.

In adopting the Resolutions, the ICANN Board violated its own Bylaws. It specifically breached the ICANN Bylaws requiring that the ICANN Board (1) comply with international law and conventions in an open and transparent process; (2) adhere to its Commitments and Core Values; and (3) employ procedures designed to ensure fairness and fact-based development.

First, ICANN has not complied with international law and conventions. ICANN is required to “operate in a manner consistent with [its] 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, through open and transparent processes that enable competition and open entry in Internet-related markets.”²⁵ There is an “an international minimum standard of due process as fairness – based ... on the universal views of all legal systems.”²⁶ This principle is violated “when a decision is based upon evidence

²⁴ Exhibit 05, *Personal Data Redacted* to ICANN BAMC (1 Feb. 2018), p. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-icann-bamc-redacted-01feb18-en.pdf>

²⁵ Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

²⁶ Exhibit 15, *Personal Data Redacted*, “General Principles of Law, International Due Process, and the Modern Role of Private International Law” 23 *Duke J. of Comparative and Int'l L.* 411, 422 (2013).

and argumentation that a party has been unable to address.”²⁷ The BAMC and ICANN Board have both made a decision based on the CPE Review.²⁸ While Requestor has submitted numerous materials regarding the CPE Review to the ICANN Board, such as the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,”²⁹ it has been unable to address the evidence supporting the CPE Review because they have not been made publically available.

In fact, ICANN has prevented any attempts by Requestor, and other interested parties, to obtain and review the underlying substance of the CPE Review. On 10 January 2018, Requestor sought disclosure of documentary information relating to the CPE Review (the “DIDP Request”) pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).³⁰ ICANN refused to disclose any of the requested documents.³¹ ICANN thus prevented Requestor from examining the evidence supporting the CPE Review in order to analyze the review’s results in violation of ICANN’s own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness. It is patently unfair to require a party to address criticisms of its conduct without providing that party with relevant and material information that would allow it to properly address those criticisms. ICANN’s stonewalling effectively puts in Requestor in a position that makes it virtually impossible for it to provide a detailed analysis of

²⁷ Exhibit 16, Personal Data Redacted, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 179 (15 Mar. 2017).

²⁸ Exhibit 17, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (4 Feb. 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. ... While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

²⁹ Exhibit 04, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (2 Feb. 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

³⁰ Exhibit 18, Request No. 20180110-1 (10 Jan. 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>. Requestor submitted 19 requests.

³¹ See Exhibit 19, Response to Request No. 20180110-1 (10 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>. ICANN argued that it appropriately determined that “certain documents are not appropriate for disclosure” pursuant to its Nondisclosure Conditions, and it can therefore deny the document request “without contravening its commitment to transparency.” *Id.* at p. 8. Although ICANN can still disclose documents covered by its Nondisclosure Conditions in the public interest, ICANN did not find that there was sufficient public interest to warrant disclosure.

the CPE Review’s deficiencies. Even so, the deficiencies that have been identified in the absence of the requested information are not only sufficient to justify ICANN’s rejection of the CPE Review, they undeniably support disclosure of the additional information that has been requested.

Second, the ICANN Board did not adhere to its Commitments and Core Values. Pursuant to its Bylaws, the ICANN Board must “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”³² ICANN’s adoption of the Resolutions breached four specific Commitments and Core Values:

1. The ICANN Board violated its Commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act” because it did not act for the public benefit by accepting the conclusions of reports that rubber-stamp an evaluation process for community applicants that legal experts, human rights organizations, and ICANN itself has recognized as problematic.
2. The ICANN Board violated its Commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] promote well-informed decisions based on expert advice.”³³ The ICANN Board is aware of *several* independent experts that concluded the CPE Review was procedurally and substantively deficient, as described in **Sections 6.1 and 6.2** above. Yet, it still supported the conclusions of *one* evaluator that employed a blatantly flawed review methodology and ignored all evidence contrary to its own conclusions.
3. The ICANN Board violated its Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.”³⁴ Any neutral, objective, and fair examination of the CPE Review would

³² Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2, <https://www.icann.org/resources/pages/governance/bylaws-en>.

³³ *Id.* at Article 3, Section, 3.1.

³⁴ *Id.* at Article 1, Section, 1.2(a)(v).

conclude that it is deficient, as explained in Requestor’s past submissions to the ICANN Board.³⁵ The ICANN Board thus made a decision in contravention of the aforementioned principles adopting the CPE Review.

4. The ICANN Board violated its Core Value to “[o]perat[e] with efficiency and excellence.”³⁶ It is evident that the knowing acceptance of a deficient independent evaluation does not constitute operating with any degree of excellence.

And, *third*, the ICANN Board violated the Bylaws requiring that it act “consistent with procedure designed to ensure fairness, including implementing procedures to ... encourage fact-based policy development work”³⁷ The CPE Review is based on an incomplete and unreliable universe of documents biased in favor of ICANN, as explained in **Section 6.1** above. The ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness, part of which requires ICANN to encourage fact-based work. The ICANN Board’s decision to adopt the Resolutions, therefore, violates ICANN’s Bylaws because it knowingly adopted the flawed CPE Review with utter disregard for basic notions of due process and fair play.

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

ICANN’s actions materially affect the global music community that has supported the Requestor’s application. Accepting the flawed and incomplete findings of the CPE Review has negatively impacted the timely, predictable, and fair resolution of the .MUSIC gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without

³⁵ See Exhibit 04, “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (31 Jan. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>;

³⁶ Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2(b)(v), <https://www.icann.org/resources/pages/governance/bylaws-en>.

³⁷ *Id.* at Article 1, Section. 1.2(a)(iv).

an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake because an ICANN that lacks these principles undermines its own due diligence and decision-making process in matters that relate to the global public interest and in its determinations that materially affected parties.

By accepting the findings of the CPE Review as final, ICANN is impeding the efforts of anyone attempting to understand the process FTI used to review the CPE process and compromises ICANN's own due diligence process, especially when taking into consideration the issues relevant to the CPE Provider's improper application of CPE criteria as described in Requestor's submissions.³⁸ This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming IRP and/or legal action to safeguard the interests of the music community members, which have supported Requestor's application for .MUSIC, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

8. Detail of Staff/Board Action/Inaction – Required Information

The Requestor filed a community priority application for the .MUSIC gTLD. However, the CPE Provider recommended that ICANN reject the Requestor's community application.³⁹ Requestor subsequently made various submissions, including independent expert reports supporting its community application, showing that the CPE Provider's decision is fundamentally erroneous.⁴⁰ These submissions explain how the CPE Provider disparately treated Requestor's application by misapplying the CPE criteria, applying the CPE criteria differently than in other

³⁸ Exhibit 20, DotMusic's Presentation to the Board Governance Committee (17 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

³⁹ Exhibit 21, DotMusic Limited CPE Report (10 Feb. 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁴⁰ Exhibit 22, "Request 16-5: DotMusic Limited" ICANN (last visited 13 Apr. 2018), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

gTLD community applications, failing to follow its own guidelines, discriminatorily treating the application, making several factual errors, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria.

ICANN began its own review of the CPE process in late 2016.⁴¹ The ICANN Board “direct[ed] [its] President and CEO, or his designee(s), to undertake an independent review” of the CPE process.⁴² ICANN did not disclose any substantive information about this review to the Requestor or other participants in the CPE process. However, since the review concerns an examination of the CPE process, it was apparent to Requestor early on that the review will directly affect the outcome of Request 16-5. Thus, on 5 May 2017, Requestor filed a DIDP request seeking various categories of documents concerning the Board Governance Committee’s (“BGC”) review of the CPE process (the “First DIDP Request”) in an attempt to learn more about the review.⁴³ ICANN did not disclose the substantive information requested in the First DIDP Request.⁴⁴

After Requestor submitted its First DIDP Request, ICANN finally disclosed additional information regarding the CPE review. On 2 June 2017, ICANN announced that FTI was reviewing the CPE process, and collecting information and materials from ICANN and the CPE Provider regarding the process.⁴⁵ In response, on 25 July 2017, the Requestor jointly filed another DIDP Request with dotgay LLC, another community priority applicant, on 10 June 2017 (the

⁴¹ Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (26 Apr. 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁴² Exhibit 24, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁴³ Exhibit 25, Request 20170505-1 (5 May 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

⁴⁴ Exhibit 26, Response to Request 20170505-1 (4 June 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process (“CEP”) with ICANN.

⁴⁵ Exhibit 27, Community Priority Evaluation Process Review Update (2 Jun. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

“Second DIDP Request”) to learn about FTI and the purview of its review.⁴⁶ This request was also denied in violation of ICANN’s commitment to transparency.⁴⁷

Requestor finally learned substantive information about FTI’s review on 13 December 2017, when ICANN decided to publish the results of FTI’s work.⁴⁸ Upon review of FTI’s three reports, Requestor found that they contained significant problems both in the substance of the reports and the procedures that FTI used to in its review.⁴⁹ For instance, FTI did not re-evaluate the CPE applications, examine the substance of the reference material cited in its own reports, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants. As FTI’s review is intended to “assist in the CPE review,”⁵⁰ Requestor sought to learn about FTI and its flawed reports on the CPE process, which makes several conclusions that may significantly impact Request 16-5.⁵¹ Therefore, Requestor submitted to ICANN the DIDP Request in order to obtain documents regarding the underlying substance of the CPE Review.⁵² ICANN again refused to disclose any of the requested documents.⁵³

Rather than provide Requestor with any substantive information regarding the CPE Review, and therefore permit a substantive analysis of FTI’s conclusions, the ICANN Board

⁴⁶ Exhibit 28, Request 20170610-1 (10 Jun. 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁴⁷ Exhibit 29, Response to Request 2-170610-1 (10 July 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>. Requestor began the reconsideration request process in response to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the CEP with ICANN.

⁴⁸ Exhibit 30, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

⁴⁹ See Exhibit 04, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

⁵⁰ Exhibit 27, Community Priority Evaluation Process Review Update (2 Jun. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁵¹ Exhibit 18, Request No. 20180110-1 (10 Jan. 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁵² *Id.*

⁵³ See Exhibit 19, Response to Request No. 20180110-1 (10 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

instead proceeded to adopt the procedurally and substantively deficient CPE Review—as described in **Section 6** above—on 15 March 2018.

9. What are you asking ICANN to do now?

Requestor asks ICANN to reconsider its 15 March 2018 action and reject both the Resolutions and the findings of the CPE Review. This is based on a plethora of factors, including

- (1) the lack of independence of the CPE Review, e.g. neglecting to interview any affected parties, such as DotMusic;
- (2) the DIDP requests filed by DotMusic and rejected by ICANN that would have enabled ICANN to be transparent and accountable, and make a reasonable, unbiased and compelling decision concerning the CPE Review;
- (3) the weakness of the research undertaken by the CPE Provider throughout the CPE process, e.g. the over-reliance on untrustworthy sources like Wikipedia;
- (4) the findings of the Council of Europe that the CPE process was flawed and inconsistent;
- (5) the findings of numerous experts that concluded that DotMusic was improperly and inconsistently graded in its CPE;
- (6) the findings of experts concerning evaluations of other community applicants that concluded that they were improperly and inconsistently graded in their CPE;
- (7) the findings of the *Dot Registry* IRP, which concluded ICANN staff were intimately involved in the CPE process in violation of its Bylaws;
- (8) the findings of the *Despegar* IRP, which concluded that the claim of inconsistencies between CPEs had some merit;⁵⁴
- (9) the scope of the CPE Review that did not include a substantive review of the CPE process, including looking into the appearance of conflicts of interest;

⁵⁴ Exhibit 31, *Despegar Online SRL et al. v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration (12 Feb. 2016), ¶ 146, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

(10) FTI's admission that it was unable to fully apply their methodology because it was unable to obtain all of the required documentation from the CPE Provider necessary for the full application of the process they had defined;

(11) the lack of claim by FTI that there was no procedural improprieties given the absence of a full and rigorous application of their chosen methodology, especially since only two of the CPE Provider's staff were interviewed.⁵⁵

10. Please state specifically 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.

As stated above, Requestor is a community applicant for the .MUSIC gTLD that participated in the CPE process. Requestor's Request 16-5 contests the results of the CPE for .MUSIC and is currently before the BAMC. However, the CPE Review claims that there are no problems with the CPE process. The ICANN Board has decided to accept the CPE Review through the Resolutions and conclude its investigation of the CPE process despite being aware of the significant procedural and substantive problems with the CPE Review. Its acceptance of the flawed CPE Review will directly affect the BAMC's consideration of Request 16-5 and, therefore, Requestor and the community that Requestor seeks to support through the operation of .MUSIC as a community gTLD—the global music community.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

No, the Reconsideration Request is filed on behalf of DotMusic Limited.

⁵⁵ See Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 9-10, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

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

Not applicable.

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

Yes, these documents are attached as Exhibits.

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.



Arif Hyder Ali

April 14, 2018

Date

Exhibit 33

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-5
14 JUNE 2018**

The Requestor, DotMusic Limited, seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.¹ Specifically, the Requestor claims that, “(1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s Bylaws.”²

I. Brief Summary.

The Requestor submitted a community-based application for the .MUSIC generic top-level domain (gTLD) (Application or DotMusic Application), which was placed in a contention set with other .MUSIC applications. The Requestor participated in CPE, but did not prevail. The Requestor challenged the CPE Provider’s evaluation of its Application in Reconsideration Request 16-5, which is pending.³

While Request 16-5 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.⁴ The Board Governance Committee (BGC) thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) a compilation of the research relied

¹ Request 18-5, § 3, at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

² *Id.*, § 6, at Pg. 3.

³ See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

⁴ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.⁵ The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-5, would be placed on hold until the CPE Process Review was completed.⁶

On 13 December 2017, ICANN organization published three reports on the CPE Process Review (CPE Process Review Reports).⁷

On 15 March 2018, the Board passed the Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.⁸

On 14 April 2018, the Requestor submitted Request 18-5, which challenges the Resolutions.⁹ The Requestor claims that “ (1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s Bylaws.”¹⁰

⁵ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁶ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, *see* <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ *See* <https://www.icann.org/news/announcement-2017-12-13-en>.

⁸ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁹ Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

¹⁰ Request 18-5, § 6, at Pg. 3.

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-5 to the Ombudsman for consideration, and the Ombudsman recused himself.¹¹

The BAMC has considered Request 18-5 and all relevant materials and recommends that the Board deny Request 18-5 because the Board considered all material information when it adopted the Resolutions, which are consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.¹² The CPE Process Review Reports identify the materials considered by FTI.¹³ Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.¹⁴

II. Facts.

A. The CPE Provider's Evaluation of .MUSIC.

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited and the Requestor accepted to participate in CPE.¹⁵

On 10 February 2016, the CPE panel issued a CPE report, concluding that the Application did not prevail in CPE.¹⁶ On 24 February 2016, the Requestor filed Request 16-5,

¹¹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-5, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-ombudsman-action-21may18-en.pdf>.

¹² <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹³ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁴ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁵ CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁶ *Id.*; *see also* CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

seeking reconsideration of the CPE determination and approval of the Requestor's community application.¹⁷

B. The CPE Process Review.

While Request 16-5 was still pending, ICANN's Board, as part of the Board's oversight of the New gTLD Program, directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).¹⁸

Subsequently, the BGC determined that, in addition to Scope 1, the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research existed for evaluations that were the subject of pending reconsideration requests (Scope 3).¹⁹ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-5, would be on hold until the CPE Process Review was completed.²⁰

On 13 December 2017, ICANN org published CPE Process Review Reports issued by FTI.²¹

With respect to Scope 1, FTI concluded:

¹⁷ Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

¹⁸ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

¹⁹ *Id.*

²⁰ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

²¹ See <https://www.icann.org/news/announcement-2017-12-13-en>.

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.²²

For Scope 2, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”²³

For Scope 3, “FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider’s working papers to the extent that such material was not otherwise cited in the final CPE report.”²⁴ FTI observed that all eight of the relevant CPE reports (the reports at issue in the Reconsideration Requests that were placed on hold) referenced research. Two of the eight included citations for each reference to research. Of the remaining six, while the reports themselves did not include citations to each reference to research, in five of the six instances, including in the Requestor’s case, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports.²⁵ Accordingly, FTI determined that it was “reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.”²⁶

On 15 March 2018, as detailed above, the Board adopted the Resolutions.²⁷ The Board

²² Scope 1 Report, at Pg. 2, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

²³ Scope 2 Report, at Pg. 3, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

²⁴ Scope 3 Report, at Pg. 3-4, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

²⁵ *Id.*, at Pg. 4, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

²⁶ *Id.* at Pg. 42-44.

²⁷ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>. One Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions.” San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>. Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting. *Id.*

instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),²⁸ and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).²⁹ The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.³⁰

The Board noted that the requestors with pending reconsideration requests

each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.³¹

C. The Requestor's Response to the CPE Process Review.

On 16 January 2018, the Requestor submitted a letter to the Board, claiming that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.³² In this letter, the Requestor asked the Board to take no action with respect to the conclusions

²⁸ <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

²⁹ Resolutions. *See also* Roadmap, <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

³⁰ Roadmap, at Pg. 2.

³¹ *Id.*

³² 16 January Letter from Ali to ICANN Board, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

reached by FTI until parties had an opportunity to respond to the FTI Report and to be heard as it relates to their pending reconsideration requests.³³

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Requestor to “submit additional information relating to Request 16-5, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the Requestor to “make a telephonic oral presentation to the BAMC in support of” Request 16-5. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-5 and that is not already covered by the written materials.”³⁴

On 23 March 2018 and 5 April 2018, the Requestor “reject[ed] BAMC’s invitation to make a telephonic presentation limited to 30 minutes” and “reject[ed] ICANN’s attempt to impose an artificial two weeks deadline” for supplemental briefing.³⁵

D. Request 18-5.

On 14 April 2018, the Requestor submitted Request 18-5, which challenges the Resolutions.³⁶ The Requestor claims that “(1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s bylaws.”³⁷

E. Relief Requested.

³³ *Id.* at Pg. 5.

³⁴ Attachment 1, 19 March 2018 Email from ICANN to the Requestor.

³⁵ 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5

<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>; Attachment 2, 5 April 2018 Email from the Requestor to ICANN.

³⁶ Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

³⁷ *Id.*, § 6, at Pg. 3.

The Requestor asks the Board to “reconsider its 15 March 2018 action and reject both the Resolutions and the findings of the CPE Review.”³⁸

III. Issue Presented.

The issue is whether the Board’s adoption of the Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).

IV. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide 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 adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.³⁹

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁴⁰ Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.⁴¹ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

³⁸ *Id.*, § 9, at Pg. 17.

³⁹ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

⁴⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

⁴¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁴²

On 19 May 2018, the BAMC determined that Request 18-5 is sufficiently stated and sent Request 18-5 to the Ombudsman for review and consideration.⁴³ The Ombudsman thereafter recused himself from this matter.⁴⁴ Accordingly, the BAMC has reviewed Request 18-5 and issues this Recommendation.

V. Analysis and Rationale.

A. The Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).

The Requestor’s claims focus on the transparency, fairness, efficiency, methodology, and scope of the CPE Process Review. But, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. The Requestor’s Challenges to FTI’s Methodology Do Not Warrant Reconsideration.

The Requestor claims that FTI’s methodology was flawed because: (1) the CPE Provider did not produce documents in the course of the investigation; (2) FTI did not interview any

⁴² ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁴³ Ombudsman Action Regarding Request 18-5, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-ombudsman-action-21may18-en.pdf>.

⁴⁴ *Id.*

former employees of the CPE Provider; and (3) FTI did not interview CPE applicants or accept materials from them in the course of its investigation.⁴⁵

As a preliminary matter, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.⁴⁶ The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and it relied on FTI to develop an appropriate methodology.⁴⁷ The Requestor has identified no policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

Moreover, with respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.⁴⁸ FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the CPE process and evaluations.⁴⁹ Accordingly, it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider.

As noted in the CPE Process Review Reports, FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming

⁴⁵ Request 18-5, § 6, at Pg. 3. *See also, e.g.*, 23 March 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf> (FTI did not interview applicants); 16 January Letter from Ali to ICANN Board, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf> (alleging that FTI “deliberately ignored the information and materials provided by the applicants”).

⁴⁶ *See, e.g.*, Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁴⁷ *See* CPE Process Review Update, 2 June 2017, <https://newgtlds.icann.org/en/applicants/cpe>.

⁴⁸ *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁴⁹ *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and that internal and external emails were not “working papers.”⁵⁰ No policy or procedure exists that would require ICANN org to cancel the entire CPE Process Review because the CPE Provider did not produce its internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process Review.⁵¹ Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.⁵² Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has identified no policy or procedure requiring FTI to do more because none exists. Reconsideration is not warranted on this ground.

With respect to the argument that FTI did not interview CPE applicants or accept materials from the applicants in the course of the review, the Requestor has not identified a policy or procedure requiring FTI to do so. While the Requestor may disagree with FTI’s methodology, such disagreement is not sufficient grounds for reconsideration.

⁵⁰ See Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>. See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services 12 Mar 2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

⁵¹ Scope 2 Report at Pg. 9.

⁵² Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

Indeed, FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the investigation.⁵³ FTI noted that neither the Applicant Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Applicant Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants. Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.⁵⁴ Despite that conclusion, FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.⁵⁵

The comments of one Board member about FTI’s methodology also do not support reconsideration. That Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions,”⁵⁶ does not render the vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting.⁵⁷ Likewise, that the Requestor and other parties disappointed in the outcome of CPE determinations raised similar criticisms of the CPE Review process in no way precludes the ICANN Board from accepting the results of that review.⁵⁸

2. FTI Was Not Required to Agree with Others’ Substantive Conclusions and Did Not Fail to Engage in “Substantive Analysis.”

⁵³ *Id.* at Pg. 8.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

⁵⁷ *Id.*

⁵⁸ *See* Request 18-5, § 6, at Pg. 7-8.

In its second argument, the Requestor contends that reconsideration is warranted because, according to the Requestor, “FTI not only performed no substantive review of the CPE process in order to reach its ultimate conclusions on [Scope 1 and Scope 2] but also concluded there are no issues with the CPE despite the significant evidence to the contrary.”⁵⁹ The Requestor’s suggestion that reconsideration is warranted because FTI’s conclusions differed from other opinions claiming that the CPE process is inconsistent.⁶⁰ The Association of Certified Fraud Examiners (ACFE), the anti-fraud organization that has codified the international investigative methodology that FTI followed, required that FTI form an investigative plan, collect all potentially relevant evidence and information, then analyze the relevant evidence and arrive at their conclusion based on that evidence⁶¹—not based on the opinions or investigations of prior investigators or commentators. Consistent with this methodology, FTI “carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE,” including specifically allegations that “ICANN organization had any undue influence on the CPE provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process”⁶² and that the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”⁶³

Similarly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review. Rather, the review was “intended to have a positive impact on the community” and “provide greater transparency into the CPE evaluation process.”⁶⁴ This decision was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the

⁵⁹ Request 18-5, § 6, at Pg. 6.

⁶⁰ See Request 18-5, § 6, at Pg. 6-10.

⁶¹ See Scope 1 Report at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁶² Scope 1 Report, at Pg. 3.

⁶³ Scope 2 Report, at Pg. 3.

⁶⁴ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

process had flaws or could otherwise be improved. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. The Requestor's arguments do not support reconsideration.

Specifically, the Requestor first notes the observation in the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC (Dot Registry IRP) that "ICANN staff was intimately involved in the [CPE] process" and "supplied continuing and important input on the CPE Reports."⁶⁵ But there are good reasons for FTI to have reached different conclusions than the Dot Registry IRP Panel. That Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be "intimately involved in the [CPE] process." At the same time, the Panel emphasized that the Panel was "not assessing whether ICANN staff or the [CPE Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook]." In response, the Board undertook serious consideration of the Panel's comments concerning how ICANN staff members interacted with the CPE provider and the CPE reports, and directed ICANN organization to undertake the CPE Process Review. Based on the *evidence* in a different record, FTI concluded that there was "no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process."⁶⁶

⁶⁵ Request 18-5, § 6, at Pg. 6 (quoting Exhibit 08, Dot Registry v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶ 93, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>).

⁶⁶ Scope 1 Report, at Pg. 3.

Nor, contrary to Requestor's claims, does the "CPE Review contain[] further evidence that the CPE Provider did not act independently from ICANN."⁶⁷ After reviewing emails between ICANN organization and the CPE Provider, FTI concluded that the "vast majority" were "administrative in nature," and that even those that "discussed the substance of the CPE Process and specific evaluations" centered on attempts to "capture the CPE Provider's reasoning."⁶⁸ In reviewing the emails, "FTI observed no instances where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached."⁶⁹ And its interviews of ICANN org and CPE Provider personnel further confirmed that "ICANN organization never questioned or sought to alter the CPE Provider's conclusions," that the CPE Provider "never changed the scoring or the results based on ICANN organization's comments," and that "ICANN organization did not impact the CPE Provider's scoring decisions."⁷⁰

Similarly, the Requestor's complaints regarding the Scope 2 Report's conclusion that "the CPE Provider consistently applied the CPE criteria" is unfounded.⁷¹ The Requestor claims that statements from certain third parties and the Council of Europe (in its 4 November 2016 Report on "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (CoE Report))⁷² are inconsistent with and not addressed by FTI in the CPE Process Review Reports. But again, the fact that others reached different conclusions than FTI does not invalidate FTI's Reports, nor

⁶⁷ Request 18-5, § 6, at Pg. 6.

⁶⁸ Scope 1 Report, at Pg. 11.

⁶⁹ Scope 1 Report, at Pg. 11-12.

⁷⁰ Scope 1 Report, at Pg. 14-15.

⁷¹ See Scope 2 Report, at Pg. 57.

⁷² Request 18-5, § 6, at Pg. 8.

does it warrant reconsideration of the Board’s action in adopting the Resolutions.⁷³ Contrary to the Requestor’s suggestion, FTI did not fail to address evidence of inconsistency. Rather, it “carefully considered the claims raised in Reconsideration Requests and IRP proceedings related to CPE,” and “specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports.”⁷⁴

Finally, the Requestor alleges that “FTI simply defended the CPE process without performing substantive analysis,”⁷⁵ and it cites a submission by another applicant dissatisfied with the results of the CPE Process that criticizes FTI for not examining the underlying CPE applications.⁷⁶ These complaints provide no basis for reconsideration. To be sure, FTI did not conduct a *de novo* redetermination of the scores awarded to each applicant. That was not within the scope of the CPE Process Review, and it would have been improper for FTI to do so. Instead, FTI “examined all aspects of the CPE Provider’s evaluation process in evaluating whether the CPE Provider consistently applied the CPE criteria throughout each CPE.”⁷⁷ The methodical nine-step process FTI laid out and followed cannot plausibly be described as lacking “substantive analysis.” Accordingly, reconsideration is not warranted.

3. The ICANN Board’s Adoption of the Resolutions Complied with the ICANN Bylaws.

Finally, the Requestor contends that the adoption of the Resolutions violated ICANN organization’s Bylaws in three ways: (1) that the Board’s action violated international law and conventions with which the Bylaws require compliance; (2) that the Board’s action violated the

⁷³ This is equally true of the reports of **Personal Data Redacted** that Requestor cites for their disagreement with the CPE Review’s conclusion. See Request 18-5, § 6, at Pg. 8.

⁷⁴ Scope 2 Report, at Pg. 3.

⁷⁵ Request 18-5, § 6, at Pg. 10.

⁷⁶ Request 18-5, § 6, at Pg. 9-10 (citing Letter from **Personal Data Redacted** to ICANN BMAC (1 Feb. 2018), at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-01feb18-en.pdf>).

⁷⁷ Scope 2 Report, at Pg. 8.

Commitments and Core Values set out in the Bylaws; and (3) that the Board’s action violated the Bylaws’ requirement of fairness. As discussed below, none of these arguments warrant reconsideration.

First, as to the claim that the Board’s action purportedly violated international law and conventions, the Requestor asserts that “[t]here is an ‘international minimum standard of due process as fairness—based . . . on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.’”⁷⁸ The Requestor argues that the CPE Process Review did not provide due process to the Requestor because “it has been unable to address the evidence supporting the CPE Review because they [sic] have not been made publically available.”⁷⁹

The Bylaws provide that ICANN org is committed to “carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.”⁸⁰ The Requestor has not demonstrated how the Board’s action in adopting the Resolutions violates this commitment. Rather, the Requestor is attempting to reassert the claims it presented in Request 18-1, challenging ICANN organization’s response to its 2018 DIDP Request seeking documents related to the CPE Process Review. However, for the reasons set forth in the BAMC’s Recommendation of Request 18-1, which are incorporated herein by reference, ICANN org’s response to the Requestor’s 2018 DIDP request did not violate any relevant international law or convention; while the Requestor has a right to full consideration of

⁷⁸ Request 18-5, § 6, at Pg. 10-11 (quoting *Persona Data Redacted* “General Principles of Law, International Due Process, and the Modern Role of Private International Law,” 23 *Duke J. of Comparative & Int’l L.* 411, 422 (2013) and *Personal Data Redacted* , General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes 179 (Mar. 15, 2017)) (alteration in original).

⁷⁹ *Id.*, § 6, at Pg. 11.

⁸⁰ ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

its position, which the BAMC is committed to giving, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP⁸¹

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its oversight of the New gTLD Program, after considering all the relevant issues.⁸² As noted by the Panel in the *Booking v. ICANN* IRP Final Declaration, “the fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.⁸³ Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone set a particularly wide or narrow scope for it or for the disclosure of supporting materials to the Requestor. The Requestor’s conclusory statement that it has been deprived due process because it did not have access to every document underlying the CPE Process Review Reports⁸⁴ does not support reconsideration.

With respect to the Requestor’s second claim that the Board purportedly violated its Commitments and Core Values set out in the Bylaws, the Requestor bases its claim on its earlier criticisms of the CPE Process Review, which does not warrant reconsideration for many of the reasons outlined above. For example, it alleges that the Core Value of “[o]perating with efficiency and excellence” was breached by the “knowing acceptance of a deficient independent evaluation.”⁸⁵ The BAMC finds no support for the Requestor’s claims that the evaluation was

⁸¹ Recommendation of the BAMC on Request 18-1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

⁸² <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁸³ *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, *available at* <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

⁸⁴ Request 18-5, § 6, p. 11-12.

⁸⁵ Request 18-5, § 6, p. 13; *see* ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(b)(v).

“deficient,” let alone that ICANN org accepted it despite “knowing” it was so, and therefore, these arguments provide no basis for reconsideration.

Third, regarding the Requestor’s claims that the adoption of the Resolutions violated the Bylaws’ requirement that ICANN organization act “consistent with procedure[s] designed to ensure fairness, including implementing procedures to . . . encourage fact-based policy development work,”⁸⁶ because, according to Requestor, “[t]he CPE Review is based on an incomplete and unreliable universe of documents biased in favor of ICANN.”⁸⁷ But as described above, FTI’s choice of investigative methodology provides no reason for reconsideration, and it likewise does not when made again through the lens of this particular Bylaws provision.

4. The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-5.

The Requestor claims that it is “materially affected by the Resolutions, which accept the findings of the CPE Review, because the BAMC intends to rely on the CPE Review to decide Requestor’s Reconsideration Request 16-5.”⁸⁸ When the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.⁸⁹ The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-5 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-5), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-5. The BAMC notes that it provided

⁸⁶ ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

⁸⁷ Request 18-5, § 6, at Pg. 13.

⁸⁸ Request 18-5, § 6, at Pg. 3.

⁸⁹ See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

the Requestor an opportunity to “be heard” and to “respond to the FTI Report,”⁹⁰ but the Requestor declined the opportunity when it was offered to it in March and April 2018.⁹¹

VI. Recommendation.

The BAMC has considered the merits of Request 18-5 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments, and Core Values when it passed the Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-5.

⁹⁰ <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

⁹¹ 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5
<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>, Attachment 2, 5 April 2018 Email from the Requestor to ICANN.

Exhibit 34

**ROADMAP FOR CONSIDERATION OF PENDING RECONSIDERATION REQUESTS
RELATING TO COMMUNITY PRIORITY EVALUATION (CPE) PROCESS THAT
WERE PLACED ON HOLD PENDING COMPLETION OF THE CPE PROCESS
REVIEW**

Pending Reconsideration Requests

The Board Governance Committee (BGC) previously determined that the following Reconsideration Requests relating to the CPE process that were pending at the time the CPE Process Review commenced would be on hold until the CPE Process Review was completed.¹

- Request 14-30: Dot Registry, LLC (.LLC), filed 25 June 2014, withdrawn 7 December 2017;
- Request 14-32: Dot Registry, LLC (.INC), filed 16 June 2016, withdrawn 11 December 2017;
- Request 14-33: Dot Registry, LLC (.LLP), filed on 26 June 2014, withdrawn on 15 February 2018.
- Request 16-3: dotgay LLC (.GAY), filed on 17 February 2016;
- Request 16-5: DotMusic Limited (.MUSIC), filed on 24 February 2016;
- Request 16-8: CPA Australia Limited (.CPA), filed on 15 July 2016;
- Request 16-11: Travel Reservations SRL, Spring McCook, LLC, Minds + Machines Group Limited, Famous Four Media Limited, dot Hotel Limited, Radix FZC, dot Hotel Inc., Fegistry, LLC (.HOTEL), filed on 25 August 2016; and
- Request 16-12: Merck KGaA (.MERCK), filed on 25 August 2016

Each of the foregoing requests was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time that the requests were filed. Under the Bylaws that were in effect prior to October 2016, the Board delegated to the BGC with the authority to make a final determination on requests regarding staff action; Board consideration of the BGC's determination was not required, but optional if the BGC deemed it appropriate for a full Board determination. As noted above, Requests 14-30, 14-32, and 14-33 were withdrawn on 7 December 2017, 11 December 2017, and 15 February 2018, respectively. Of the remaining five pending requests, the following relate to staff action and would not require Board action: 16-5, 16-8, and 16-12. However, given the public nature of the CPE Process Review, the Board Accountability Mechanisms Committee

¹ See Letter from Chris Disspain to All Concerned Parties, 17 April 2017, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

(BAMC) may choose to make recommendations to the Board rather than make Final Determinations.

Roadmap for Consideration of Pending Reconsideration Requests

1. Offer the requestors of the pending Reconsideration Requests the opportunity to submit additional information relating to their requests, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. Allow two weeks for requestors to submit any such supplemental materials.
2. Offer the requestors of the pending Reconsideration Requests the opportunity to make an oral presentation to the BAMC, including the requestors who previously presented to the BGC.
3. Consider the pending requests once the requestors have presented to the BAMC (or provided confirmation that they do not intend to present to the BAMC) and have provided their additional submissions (or provided confirmation that they do not intend to submit additional materials in support of their Requests related to the CPE Process Review Reports). The pending requests should be considered in the order in which the requests were filed, if possible. The following is a proposed schedule:
 - a. Schedule two presentations per BAMC meeting, perhaps by setting a couple of meetings as soon as possible after ICANN61.
 - b. Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions (as outlined in para. 1, above), materials presented in the oral presentations (as outlined in para. 2, above), any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.

Exhibit 35

Subject: Re: [Reconsideration Request] Update on Reconsideration Request 16-5
Date: Thursday, April 5, 2018 at 1:07:05 PM Pacific Daylight Time
From: Wong, Rosey (sent by reconsider <reconsider-bounces@icann.org>)
To: reconsideration@icann.org
CC: Jason Schaeffer, Paul Zamek, ALL DOT Music, Constantine Roussos
Attachments: ATT00001.txt

Dear ICANN:

We write in response to your April 4, 2018 email on behalf of our client, DotMusic Limited ("DotMusic"). The email requests that DotMusic respond to several invitations from the BAMC regarding Reconsideration Request 16-5, specifically whether (1) DotMusic would like to make an additional submission to the BAMC, (2) DotMusic's 2 February 2018 report is its supplemental submission to the BAMC, and (3) DotMusic wants to make a 30 minute telephonic presentation to the BAMC.

We have responded to the BAMC's invitations in our 23 March 2018 letter (<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>[icann.org]).

As we have previously made clear to the BAMC, DotMusic rejects ICANN's attempt to impose artificial constraints on any additional submissions regarding Reconsideration Request 16-5. In order to provide ICANN with further substantive comments on the CPE Process Review, DotMusic must have (1) an opportunity to review the underlying documents, and is willing to enter into a confidentiality agreement to achieve that end; (2) sufficient time (at least 3 months) to review those documents; and (3) a meaningful opportunity to submit additional materials without a 10-page limit. ICANN must bear the necessary costs and expenses for DotMusic to review the documents and prepare additional submissions.

The BAMC must identify its specific concerns regarding Reconsideration Request 16-5 after reviewing DotMusic's additional submission, and provide DotMusic with the opportunity to make an *in-person* presentation that addresses those concerns. Furthermore, the BAMC's review of Reconsideration Request 16-5 must involve a substantive review of the merits of the .MUSIC CPE report, taking into account all of the submitted materials supporting the community priority application.

We would appreciate a response from the BAMC by 12 April 2018.

Sincerely,
Rose Marie Wong

Rose Marie Wong
Associate

Dechert LLP
Contact Information Redacted

From: Reconsideration <Reconsideration@icann.org>
Date: April 4, 2018 at 8:22:24 PM EDT
To: Constantine Roussos Contact Information Redacted
Contact Information Redacted
Cc: Reconsideration <Reconsideration@icann.org>
Subject: Update on Reconsideration Request 16-5

Dear Messrs. Roussos and Ali – The below email was intended to be addressed to you relating to Reconsideration Request 16-5. Our sincere apologies for the typo in the salutation.

Best regards,
ICANN
12015 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Dear Messrs. Baxter and Ali,

We write to follow up on the email below, in which we noted that the BAMC invites you to submit additional information relating to Request 16 5, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is 2 April 2018. To date, we have not received a supplemental submission from you or heard from you otherwise. We note that following the publication of CPE Process Review Reports, 2 February 2018, you submitted a report titled “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports.” (https://www.icann.org/en/system/files/correspondence/roussos_to_marby_02feb18_en.pdf)[icann.org] If you would like us to deem that as DotMusic Limited’s additional submission in response to the CPE Process Review Process pursuant to the BAMC’s invitation, please advise. Or, if you intend to submit an additional submission, please advise.

In the email below, the BAMC also invited you to make a telephonic oral presentation to the BAMC in support of your reconsideration request and to let us know by 23 March if you would like to proceed with a telephonic presentation. We have also not heard from you on this issue.

Please advise by 6 April (1) whether you would like to treat the submission of 2 February 2018 as DotMusic Limited’s supplemental submission or if you intend to submit additional materials in support of Request 16 5 and if so, by when; and (2) whether you would like to proceed with a 30 minute telephonic presentation to the BAMC. Please include your availability for a 30 minute telephonic presentation in April and May with your response.

If we have not heard from you by 6 April 2018, we will presume that you do not intend to submit additional materials in support of Request 16 5 and that you do not wish to proceed with a telephonic presentation to the BAMC.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Dear Messrs. Roussos and Ali,

On 15 March 2018, in [Resolution 2018.03.15.11](#), the ICANN Board “directe[d] the Board Accountability Mechanisms Committee [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the [Community Priority Evaluation] (CPE) Process Review in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC\[icann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[icann.org\]](#) for the review the requests. In accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to submit additional information relating to Request 16 5, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. The deadline to submit such additional submission is two weeks from today, which is 2 April 2018.

Additionally, accordance with the [Roadmap\[icann.org\]](#), the BAMC invites you to make a telephonic oral presentation to the BAMC in support of your reconsideration request. Please note that the BAMC asks that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16 5 and that is not already covered by the written materials. If you would like to proceed with a telephonic presentation to the BAMC, please provide confirmation by 23 March 2018. Please include your availability for a 30 minute telephonic presentation in March and April with your response.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

This e-mail is from Dechert LLP, a law firm, and may contain information that is confidential or privileged. If you are not the intended recipient, do not read, copy or distribute the e-mail or any attachments. Instead, please notify the sender and delete the e-mail and any attachments. Thank you.

Exhibit 36

ARIF HYDER ALI

Contact Information Redacted

23 March 2018

VIA E-MAIL

Cherine Chalaby
Chair, ICANN Board
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Chris Disspain
Chair, Accountability Mechanisms
Committee of the Board
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: ICANN's 19 March 2018 Update on Reconsideration Requests 16-3 and 16-5

Dear Messrs. Chalaby and Disspain:

We write on behalf of our clients, DotMusic Limited ("DotMusic") and dotgay LLC ("dotgay"), in response to ICANN's 19 March 2018 e-mails regarding Reconsideration Requests 16-3 and 16-5.

We note with disappointment that, despite our repeated and well-substantiated objections, the ICANN Board ("Board") has accepted FTI Consulting, Inc.'s ("FTI") purported "independent"¹ findings on the Community Process Evaluation Process Review ("CPE Process Review"). We strenuously object to the Board's decision and reject the Board's self-serving justification that "this action is in the public interest and consistent with ICANN's Mission, Commitments and Core Values." Nothing could be further from the truth.

First, we requested the Board for "an opportunity to provide comments on the FTI Report and to be heard" *before* (not after) the Board accepted FTI's reports.² The Board kept silent for nearly two months since that request and then implicitly rejected our request by

¹ ICANN's 17 September 2016 Board Resolution.

² 15 January 2018 Letter from Arif Ali to ICANN ("we request that the ICANN Board take *no* action with respect to the conclusions reached by FTI, until dotgay, and indeed all concerned parties, have had an opportunity to provide comments on the FTI Report and to be heard").

proceeding to rubber stamp the BAMC's recommendation to accept FTI's findings concerning the CPE Process Review. In so doing, the Board not only denied both dotgay and DotMusic a meaningful opportunity to be heard on the numerous flaws in FTI's reports, it also failed to take in to proper consideration the considerable additional information submitted by DotMusic and dotgay demonstrating the process and substantive errors committed by FTI.

Specifically, it is impossible to accept that the Board did in fact seriously consider: (1) Persona Data Redacted's 65-page expert report setting out FTI's substantive and process errors; or (2) the 66-page submission by DotMusic that did the same. Further, it is also clear that the Board turned a blind eye to: (1) the Council of Europe's Report on "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective;" (2) the First Expert Opinion of Professor Personal Data Redacted; (3) the ICANN Ombudsman Chris LaHatte's Report; (4) the ICC Expert's Determination regarding .LGBT; and (5) the Expert Opinion of Personal Data Redacted

.³ Had the Board actually exercised its independent judgment and reviewed these documents, the Board could not have rubber stamped BAMC's recommendation. By accepting FTI's unreliable and inaccurate findings and ignoring the numerous material flaws in FTI's reports as noted in our various submissions, the Board has failed to ensure that FTI performed an "independent review" of the CPE process.⁴ We question the legitimacy of the CPE Review Process and unequivocally reject the Board's decision that "no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary."

Second, the ICANN Board claims that the BAMC's belated invitation to dotgay and DotMusic to submit additional new arguments and make a telephonic presentation—*after* it has already accepted FTI's findings—is "in the public interest and consistent with ICANN's Mission, Commitments and Core Values as it will provide transparency and accountability regarding the CPE process and the CPE Process Review." ICANN's attempt

³ See 20 January 2018 Letter from Arif Ali to ICANN.

⁴ See *e.g.*, *In re AWTR Liquidation Inc.*, 548 B.R. 300, 314 (Bankr. C.D. Cal. 2016); *Palm Springs Villas II Homeowners Ass'n, Inc. v. Parth*, 248 Cal. App. 4th 268, 280 (2016); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

to manufacture accountability and transparency regarding the CPE Process Review *ex post facto* is – to put it simply and politely – ridiculous, especially when ICANN ensured that the entire CPE Review Process was undertaken in secrecy. For example, while FTI was undertaking its purported “independent review” of the CPE Process, we repeatedly reminded the ICANN Board of its commitments to operate transparently and fairly and requested to speak with FTI concerning the CPE Process.⁵ However, FTI declined to interview dotgay and DotMusic—which we learned about not from ICANN, but during our review of FTI’s reports *after* FTI had already completed its review—in connection with the CPE Process Review.⁶

We have even attempted to obtain documents concerning the CPE Review Process from ICANN by submitting multiple document requests pursuant to ICANN’s Documentary Information Disclosure Policy for materials related to FTI’s review.⁷ ICANN has continuously refused to disclose any documents regarding FTI’s review. Given that ICANN has trampled upon its Mission, Commitments and Core Values and denied dotgay’s and DotMusic’s basic rights during the CPE Review Process, such as non-discrimination, due process and fairness; undertaken the CPE Review Process in secrecy; and the Board has already accepted FTI’s findings, there is little left for the ICANN Board to provide “accountability and transparency concerning the CPE Review Process.” The Board’s actions can only be described as procedural posturing.

Third, we understand that the BAMC has invited dotgay and DotMusic to make “new” arguments and oral presentation limited to: (1) “how the CPE Process Review is relevant to their pending Reconsideration Requests;” and (2) “[a]ny specific claims that [we] might have relating to the FTI Reports with respect to [our] particular applications.” ICANN’s opaque processes for undertaking an “independent review” of the CPE Process,⁸ including

⁵ See *e.g.*, 10 June 2017 Letter from Arif Ali to ICANN, p. 1.

⁶ Page 8, FTI’s Scope 2 Report.

⁷ See *e.g.*, Request No. 20170518-1 (18 May 2017); Request No. 20170610-1 (10 Jun. 2017); Request No. 20180115-1 (18 Jan. 18).

⁸ Letter from A. Ali to ICANN Board (30 Jan. 2017) (“dotgay has not received any communication from ICANN regarding the status of the Independent Review or Request for Information from the CPE Provider.”); Letter from A. Ali to ICANN Board (12 March 2017) (“ICANN’s continued lack

its failure to provide accountability and transparency *during* the CPE Process Review,⁹ and its continuous arbitrary and discriminatory treatment of the various requests by dotgay and DotMusic concerning their respective applications by ICANN, its staff and the EIU, makes it impossible for us to accept BAMC's invitation in its current form.

If transparency and accountability are indeed the Board's objectives, then:

1. ICANN must disclose all of the underlying documents that we have requested concerning the CPE Review Process. A complete list of our document requests is enclosed in our January 2018 DIDP requests.¹⁰
2. ICANN must grant both dotgay and DotMusic sufficient time (at least 3 months following complete disclosure) to review the materials disclosed, taking in to consideration that FTI took nearly a year to review the underlying documents and conduct the CPE Review Process. We reject ICANN's attempt to impose an artificial two weeks deadline on dotgay and DotMusic.
3. ICANN must provide dotgay and DotMusic a meaningful opportunity to submit additional materials in support of their respective applications and their criticisms of FTI's reports, without artificial constraints (e.g., a 10-page limit).

of responsiveness to dotgay's inquiries about the status of its request [is] troubling, particularly in light of ICANN's commitments to transparency."); Email from Jamie Baxter to Steve Crocker (17 April 2017) ("reiterat[ing] our ongoing concerns with the lack of transparency that affected parties are receiving on" the CPE review); Letter from A. Ali to Chris Disspain and Jeffrey A. LeVee (10 June 2017) ("ICANN's CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws."); Letter from A. Ali to ICANN Board (8 Aug. 2017) (highlighting dotgay's "concern with and seek[ing] remedy with respect to the ongoing delays in the Board Governance Committee's CPE investigation").

⁹ For example, disclosure of FTI's investigative plan, terms of engagement, communications regarding the scope of FTI's "independent" review, failure to invite comments from CPE applicants or refusal to produce a *single* document relied upon by FTI.

¹⁰ See Request No. 20180115-1 and Request No. 20180110-1. To the extent that there are any concerns regarding confidentiality, both dotgay and DotMusic are willing to enter into confidential agreements with ICANN.

4. The BAMC must be required to identify specific concerns in writing that it may have regarding the applications subsequent to dotgay's and DotMusic's respective supplemental submissions.
5. The BAMC must be required to give dotgay and DotMusic an opportunity to make their respective oral presentations in person. We reject BAMC's invitation to make a telephonic presentation limited to 30 minutes.
6. ICANN must bear the necessary costs and expenses for dotgay and DotMusic to undertake the review of the documents and prepare additional submissions. It is frankly remarkable that ICANN is using part of the application fees paid by applicants to fund its so-called transparency and accountability processes.
7. The BAMC must agree to undertake a substantive review of the merits of .GAY's and .MUSIC's CPE reports, taking in to account all of the materials that have been and that will be submitted in support of the applications.

Absent the foregoing, the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.

DotMusic and dotgay reserve their respective rights to pursue any and all claims, including based in equity and law, against ICANN in any forum worldwide.

Very truly yours,

/s/

Arif H. Ali

Counsel to DotMusic Limited and dotgay LLC

Exhibit 37

Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-1

Requestor¹ submits this Rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Reconsideration Request 18-1 (the “Recommendation”).² The Recommendation concerns Requestor’s request that ICANN reconsider its refusal to disclose the documents requested in Requestor’s DIDP Request.³ The denied document requests all involve the disclosure of pre-existing documents and, despite the Recommendation’s claims, are not requests “to create or compile summaries of any documented information.”⁴ Specifically, Requestor submitted nineteen requests:

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”

¹ This rebuttal adopts the same exhibits and terms as in Requestor’s Reconsideration Request 18-1. *See* Exhibit 23, DotMusic Reconsideration Request 18-1 (Mar. 10, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

² Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

³ *See* Exhibit 23, DotMusic Reconsideration Request 18-1 (Mar. 10, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

⁴ *See* Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 10, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" Requestor's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and

19. All communications between FTI and the CPE Provider regarding FTI's independent review.⁵

ICANN refused to disclose these documents to Requestor. This DIDP Response is clearly improper because (1) ICANN's assertion that the responsive documents fall under of Nondisclosure Conditions is conclusory and unsupported by any evidence; (2) the public interest outweighs any Nondisclosure Condition; and (3) ICANN's decision violates its Commitments and Core Values. The BAMC's Recommendation now attempts to justify ICANN's decision, which improperly implies that several of ICANN's Commitments and Core Values are not implicated in the DIDP Response, that Requestor made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response.⁶

1. The DIDP Response Must Adhere to ICANN's Commitments and Core Values

ICANN must comply with its Commitments and Core Values, even when issuing the DIDP Response, or ICANN will violate its own Bylaws. ICANN is required to "act in a manner consistent with [its] Bylaws"⁷ and "in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values"⁸ in performing its mission "to ensure the stable and secure operation of the Internet's unique identifier systems."⁹ There is no exception carved out for the DIDP in the Bylaws. Therefore, ICANN must act "in conformity with relevant principles of international law and international conventions and applicable local law" during the DIDP process.¹⁰

⁵ Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), pp. 3-6, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁶ Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 31, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

⁷ Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a).

⁸ *Id.* at Art. 1, §1.2.

⁹ *Id.* at Art. 1, § 1.1(a).

¹⁰ *Id.* at Art. 1, §1.2(a).

The ICANN Bylaws thus require that ICANN comply with principles of international law, which includes due process. The BAMC is attempting to circumvent the Bylaws by arguing in the Recommendation that can ignore international legal principles because (1) ICANN can establish its own accountability mechanisms¹¹ and (2) ICANN’s commitment to transparency outweighs its commitment to principles of international law. However, the ICANN Bylaws require that ICANN “carry[] out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes.”¹² This “puts principles of international law first, before ... local law and ICANN’s Bylaws.”¹³ Resultantly, “any principles enshrined in California law, ICANN’s Articles ... and/or ICANN’s Bylaws will only apply to the extent that they are fully compatible with international law.”¹⁴

Hence, the BAMC’s arguments are untenable based on ICANN’s own Bylaws. While ICANN established its own corporate accountability mechanisms, its Bylaws require that these mechanisms comply with international legal principles. The principles of transparency and accountability thus cannot supersede these international principles pursuant to ICANN’s Bylaws; rather international legal principles “serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted”—including ICANN’s accountability mechanisms.¹⁵ As such, neither of the BAMC’s excuses for ignoring the international principle of due process hold water.

¹¹ The Recommendation refers to due process as a “[c]onstitutional protection” or a “constitutional right.” Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 29, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>. The BAMC may be confusing the *constitutional right* to due process, contained in the United States Constitution and applicable to the American government, with the international *principle* of due process.

¹² Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a).

¹³ Exhibit 29, ^{Personal Data Redacted}, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. 40.

¹⁴ *Id.*

¹⁵ *Id.* at p. 39.

2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness

The DIDP is “[a] principal element of ICANN's approach to transparency and information disclosure.”¹⁶ This principle of transparency “is one of the essential principles in ICANN’s creation documents, and its name reverberated through its Articles and Bylaws.”¹⁷ ICANN’s Articles of Incorporation commit it to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”¹⁸ ICANN’s Bylaws contain the same language¹⁹ and, in addition to dedicating an entire Article on transparency,²⁰ reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be “accountable and transparent.”²¹ The Recommendation even admits that the DIDP complies with the principle of transparency:

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org’s approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN org’s operational activities.²²

ICANN’s refusal to disclose the requested documents is in direct contravention of this stated Commitment to transparency, as well as ICANN’s other Commitments and Core Values.

However, ICANN did not adhere to its Commitment to openness and transparency when it denied Requestor’s requests for further information about the ongoing review of the CPE process.

¹⁶ Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

¹⁷ Exhibit 12, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

¹⁸ Exhibit 25, ICANN Articles of Incorporation, § 2.III.

¹⁹ Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a).

²⁰ *See id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

²¹ *Id.* at Art. 1, § 1.2(b)(ii).

²² Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 9, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

The CPE has affected several gTLD applicants through its inconsistent application of the CPE criteria,²³ drawing criticism from legal experts²⁴ and even the Council of Europe.²⁵ Yet, the actual content and scope of the review has been mired in secrecy. Despite its Commitments to transparency and openness, ICANN still has not disclosed relevant information about the independent review to the community applicants. For instance, Requestor and the other applicants do not know (1) critical information regarding the independent review process that would be available through documents believed to be in ICANN's possession, such as the selection process for the independent evaluator; (2) the terms and scope of FTI's work for ICANN; and (3) the documents relied on by FTI in conducting its independent review. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure

The independent review is significant not only to Requestor but also to other gTLD applicants. Its results may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.²⁶ This evaluation process has clearly disproportionately treated

²³ See Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (listing several community applicants with pending reconsideration requests).

²⁴ See Exhibit 26, Letter from Arif Ali to ICANN CEO Göran Marby and the BGC (Jan. 30, 2017), p. 2, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>.

²⁵ Personal Data Redacted, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

²⁶ See Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (listing several community applicants with pending reconsideration requests).

community gTLD applicants by inconsistently and unfairly applying criteria between applicants. And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process in violation of the principle of transparency.

ICANN's refusal to disclose relevant documents through its DIDP also violates the principle of fairness. ICANN specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).²⁷

It further committed itself to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”²⁸

ICANN's DIDP Response is in clear violation of this Commitment. There is an undeniable problem with the consistency and fairness of the CPE process, evident by ICANN's own investigation of the CPE process and by the CPE Provider's lack of cooperation with the investigation. Clearly, the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.²⁹ This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from

²⁷ Exhibit 4, ICANN Bylaws, Art. 3, § 3.1.

²⁸ *Id.* at Art. 1, § 1.2(a)(v).

²⁹ See Exhibit 28, Minutes of BGC Meeting (Aug. 1, 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en> (“This is in large part because, despite repeated requests from ICANN beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced.”).

certain community gTLDs, such as .MUSIC. Despite the clear public interest in maintaining a fair CPE process, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself.

ICANN's failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. While trying to allay concerns about CPE Review Process and defend its reluctance to disclose documents, ICANN has argued that the requested documents are covered by its Nondisclosure Conditions. However, neither ICANN nor the BAMC provide any analysis on whether each requested document is covered by a Nondisclosure Condition. They only state that they applied the "balancing test,"³⁰ expecting Requestor to simply accept the test's conclusions without question.

Furthermore, the BAMC suggests that rejecting the disclosure of the requested documents does not violate its Commitments. The Recommendation implies that the BAMC can ignore the ICANN Bylaws because (i) "the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues;" (ii) "the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let

³⁰ Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 26, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf> ("[The] "balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.").

alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor;” and (iii) the Board was not required to direct FTI to “attempt[] to gather additional information and alternate explanations from community priority applicants, including Requestor, to ensure that it was conducting a fair and thorough investigation about the CPE Process or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants.”³¹ ICANN thus suggests that Requestor should be satisfied that there was a CPE Process Review and that any requests in relation to it are irrelevant because ICANN was not obliged to conduct a CPE Review Process in the first place. This view ignores the simple fact that, regardless of whether ICANN voluntarily acted, ICANN is obligated to adhere to its Bylaws.

ICANN’s actions are in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. Given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness

ICANN’s refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. ICANN has committed itself to “[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN’s effectiveness.”³² ICANN is also committed to two Core Values: (1) “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up,

³¹ *Id.* at pp. 29-30.

³² Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a)(vi).

multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”³³ and (2) “[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.”³⁴

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. ICANN has kept secret details regarding the review process, prohibiting informed participation in the independent review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In additions to violating its Bylaws, ICANN’s attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

5. Conclusion

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 18-1. The Board should grant Request 18-1 and produce the requested documents regarding the CPE independent review.



Arif Hyder Ali

June 20, 2018

Date

³³ *Id.* at Art. 1, § 1.2(b)(ii).

³⁴ *Id.* at Art. 1, § 1.2(b)(v).

Exhibit 38

DotMusic Limited Reconsideration Request (“RR”)

March 10, 2018

1. Requestor Information

Requestors:

Name: DotMusic Limited

Contact Information Redacted

Address:

Email: Constantinos Roussos Contact Information Redacted

Requestor is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, 1900 K Street, NW Washington, DC 20006-1110

Contact Information Redacted

Email:

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

DotMusic Limited (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180110-1, dated February 10, 2018 (the “DIDP Response”), which denied the disclosure of certain documents requested pursuant to ICANN’s DIDP.

On January 10, 2018, Requestor sought disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”) review of the Community Priority Evaluation (“CPE”) process through an independent review by FTI Consulting, Inc. (“FTI”) (the “DIDP Request”).¹ Specifically, the Requestor submitted nineteen (19) requests:

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey;”

¹ Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the “CPE Provider’s working papers associated with” DotMusic’s CPE;
12. “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”
13. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”
14. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”
15. FTI’s investigative plan used during its independent review;
16. FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”
17. All communications between ICANN and FTI regarding FTI’s independent review;
18. All communications between ICANN and the CPE Provider regarding FTI’s independent review; and
19. All communications between FTI and the CPE Provider regarding FTI’s independent review.²

In its Response, ICANN refused to disclose any of the requested documents.³

ICANN argued that it appropriately determined that “certain documents are not appropriate for disclosure” pursuant to its Nondisclosure Conditions, and it can therefore deny the document

² Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), pp. 3-6, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

³ See Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

request “without contravening its commitment to transparency.”⁴ According to ICANN, a significant number of Nondisclosure Conditions apply to the DIDP Request. For instance, ICANN claimed that, because its outside counsel retained FTI, “FTI’s draft and working materials are protected by the attorney-client privilege under California law.”⁵ ICANN further argued that the requests include confidential information from the CPE Provider that cannot be disclosed because “the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations.”⁶ Under its Nondisclosure Conditions, then, ICANN determined that it was not obligated to disclose documents requested in the DIDP Request.

Under the DIDP, however, ICANN can disclose documents covered by the Nondisclosure Conditions under certain circumstances. If ICANN determines that “the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure,”⁷ then it can publish the documents. ICANN did not make such a determination, instead finding that:

ICANN organization’s internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]⁸

ICANN organization’s communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]⁹

⁴ Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

⁵ *Id.*, p. 11. ICANN also argued that, “even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization’s outside counsel’s direction, and FTI’s draft and working materials, ‘might prejudice an[] internal . . . investigation’—that is, the CPE Process Review.” *Id.*

⁶ *Id.*, p. 9.

⁷ *Id.*, p. 7.

⁸ *Id.*, p. 10.

⁹ *Id.*, p. 11.

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]¹⁰

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]¹¹

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]¹²

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]¹³

ICANN thus refused to disclose most of the requested documents to the Requestor.

In addition, ICANN asserted that it could not disclose Requests No. 10 and 16, FTI's engagement letter with ICANN and FTI's follow-up communications with the CPE Provider, respectively, because they do "not exist."¹⁴

4. Date of action/inaction:

ICANN acted on February 9, 2018 by issuing its Response to the DIDP Request.¹⁵

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

The Requestor became aware of the action on February 9, 2018, when the DIDP Response was received.

¹⁰ *Id.*, p. 13.

¹¹ *Id.*, p. 15.

¹² *Id.*, p. 18.

¹³ *Id.*, p. 19.

¹⁴ *Id.*, p. 16, 19. ICANN explained that "FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist." *Id.*, p. 16.

¹⁵ Requestor received the DIDP Response on February 9, 2018, even though the DIDP Response is dated February 10, 2018. *See* Exhibit 3, Email to A. Ali from ICANN (Feb. 9, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>

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

Requestor is materially affected by ICANN's refusal to disclose certain information concerning FTI's review of the CPE process because ICANN intends to rely on the FTI's three reports (the "FTI Reports") to make a decision on Requestor's Reconsideration Request 16-5 ("Request 16-5"). ICANN's reliance on the procedurally and substantively deficient reports will directly affect Requestor's rights regarding its community application for the .MUSIC gTLD, which is the focus of Request 16-5. However, Requestor cannot fully analyze the FTI Reports because ICANN refuses to disclose their underlying documents. ICANN's decision therefore both prevents Requestor from properly and fairly contesting the results and implications of a facially deficient "independent" review and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

ICANN is required to "operate in a manner consistent with [its] 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, through open and transparent processes that enable competition and open entry in Internet-related markets."¹⁶ It has failed to do so.

ICANN has not complied within international law and conventions in violation of its Bylaws. There is an "an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems."¹⁷ This principle is violated "when a decision is based

¹⁶ Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

¹⁷ Exhibit 5, *Persona Data Redacted* "General Principles of Law, International Due Process, and the Modern Role of Private International Law" 23 *Duke J. of Comparative and Int'l L.* 411, 422 (2013).

upon evidence and argumentation that a party has been unable to address.”¹⁸ The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.¹⁹ While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,”²⁰ it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-5—the FTI Reports.

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.²¹ These standards require that ICANN “employ[] open and transparent policy development mechanisms;”²² “apply[] documented policies neutrally and objectively, with integrity and fairness;”²³ and “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”²⁴ ICANN’s DIDP is especially important to ICANN’s commitment to transparency. As a “principle element of ICANN’s

¹⁸ Exhibit 6, *Persona Data Redacted*, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 179 (Mar. 15, 2017).

¹⁹ Exhibit 7, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. . . . While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

²⁰ Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

²¹ See Exhibit 4, ICANN Bylaws (July 22, 2017), Arts. 1, 3-4, <https://www.icann.org/resources/pages/governance/bylaws-en>.

²² *Id.*, Art. 3, § 3.1.

²³ *Id.*, Art. 1, § 1.2(v).

²⁴ *Id.*, Art. 1, § 1.2(vi).

approach to transparency and information disclosure,”²⁵ the DIDP “is intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”²⁶

ICANN has violated these Bylaws, and the commitments contained therein, by refusing to disclose the requested documents. ICANN’s decision raises questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Reconsideration Request 16-5.²⁷

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising how ICANN maintains that it can instruct FTI to undertake such a review, and accept the conclusions of that review, without disclosing the materials that informed FTI’s findings. If ICANN fails to disclose the requested documents, it will underscore the serious questions that have been raised about the impartiality, independent legitimacy, and credibility of FTI’s investigation, which already have been raised by Requestor.²⁸ Such an action would harm the global public interest, Requestor, and the global music community that has supported Requestor’s Application.

ICANN cannot claim that there is no legitimate public interest in disclosing the requested documents given FTI’s conclusions, which are contrary to the findings of other panels and experts.

²⁵ Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁶ *Id.*

²⁷ See Exhibit 10, Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

²⁸ Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

This is clearly shown through FTI’s conclusion that it found no evidence that ICANN influenced the CPE Provider.²⁹ In clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.³⁰ Without the underlying documents, there is no tenable way to analyze whether ICANN unduly influenced the CPE Provider. The documents are given even greater import because ICANN argued that it did not disclose certain documents because “the CPE Provider has not agreed . . . and has threatened litigation.”³¹ In light of the Dot Registry IRP Declaration, a reasonable person would conclude that the CPE Provider’s litigation threats suggests that there were serious and improper conduct during the CPE. Without the requested documents, however, there is no means to determine whether such conduct occurred.

To make matters worse, ICANN admits that “ICANN organization’s outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI’s draft and working materials are protected by the attorney-client privilege under California law.”³² Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.

Given the above considerations, this is clearly a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested

²⁹ Exhibit 11, FTI, Scope 1 Report (Dec. 13, 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

³⁰ See Exhibit 12, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

³¹ Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 9 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

³² *Id.*, p. 11.

disclosure.”³³ ICANN has not disclosed any “compelling” reason that outweighs the public interest in disclosure. In fact, rejecting full disclosure of the requested items undermines both the integrity and the scope of the FTI investigation that the ICANN Board and the BAMC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

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

ICANN’s actions materially affects the global music community that has supported the Requestor’s application. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN’s identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

An opaque ICANN materially damages its credibility, accountability, and trustworthiness. Moreover, an ICANN that lacks transparency undermines its due diligence and decision-making process in matters that relate to the global public interest and determinations that could materially

³³ Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en> (“Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”).

harm affected parties. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that FTI used to review the CPE process, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.³⁴ This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the music community members, which have supported Requestor's application for .MUSIC, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

8. Detail of Staff/Board Action/Inaction – Required Information

The Requestor filed a community-based Top-Level Domain ("gTLD") application for the ".MUSIC" string. However, the CPE Provider recommended that ICANN reject the Requestor's community application.³⁵ Requestor subsequently made various submissions, including independent expert reports supporting their community application, showing that the CPE Provider's decision is fundamentally erroneous.³⁶ These submissions explain how the CPE Provider disparately treated Requestor's application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community applications, failing to follow its own guidelines, discriminatorily treating the application, making several factual errors, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria.

³⁴ Exhibit 13, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

³⁵ Exhibit 14, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

³⁶ Exhibit 15, "Request 16-5: DotMusic Limited" ICANN (last visited Mar. 8, 2018), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

ICANN began its own review of the CPE process in late 2016, assigning the task to the BGC.³⁷ It did not disclose any substantive information about this review to the Requestor or other participants in the CPE process. However, since the review concerns an examination of the CPE process, it was apparent to the Requestor early on that the review will directly affect the outcome of Request 16-5. Thus, on May 5, 2017, the Requestor filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “First DIDP Request”) in an attempt to learn more about the review.³⁸ In submitting this request, the Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes”³⁹ and disclose the requested documents. ICANN failed to do so when it denied certain requests made in the First DIDP Request on June 4, 2017.⁴⁰

After Requestor submitted its First DIDP Request, ICANN finally disclosed some additional information regarding the CPE review. It announced that FTI was reviewing the CPE process, and collecting information and materials from ICANN and the EIU regarding the process.⁴¹ In response to the information disclosed about FTI, on July 25, 2017, the Requestor jointly filed another DIDP Request on 10 June 2017 (the “Second DIDP Request”) to learn about

³⁷ Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

³⁸ Exhibit 17, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

³⁹ Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁴⁰ Exhibit 18, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

⁴¹ Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

FTI and the purview of its review.⁴² This request was also denied in violation of ICANN's commitment to transparency.⁴³

Requestor finally learned substantive information about FTI's review on December 13, 2017, when ICANN decided to publish the results of FTI's work: the FTI Reports.⁴⁴ Upon review of the FTI Reports, Requestor found that they contained significant problems both in the substance of the reports and the procedures that FTI used to in its review.⁴⁵ For instance, FTI did not re-evaluate the CPE applications, examine the substance of the reference material cited in its own reports, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants. As FTI's review is intended to "assist in the CPE review,"⁴⁶ Requestor sought to learn about FTI and its flawed reports on the CPE process, which makes several conclusions that may significantly impact Request 16-5.⁴⁷ Therefore, Requestor submitted to ICANN the DIDP Request.

ICANN first responded to the DIDP Request on February 9, 2018.⁴⁸ In its Response, ICANN determined that the Nondisclosure Conditions applied to most of the requests and that the public interest did not warrant disclosing the following documents:

⁴² Exhibit 20, DotMusic Limited's Second DIDP Request (Jun. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁴³ Exhibit 21, ICANN's Response to DotMusic Limited's DIDP Request (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

⁴⁴ Exhibit 22, "ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process" ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

⁴⁵ See Exhibit 8, Email from DotMusic to ICANN attaching the "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

⁴⁶ Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁴⁷ Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁴⁸ Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]⁴⁹

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]⁵⁰

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]⁵¹

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]⁵²

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]⁵³

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]⁵⁴

In relation to Item 10, ICANN stated that it cannot share the engagement letter between FTI and ICANN because:

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.⁵⁵

In relation to Item 16, ICANN states that there is no written follow-up communication from the FTI to the CPE Provider and as such, "no such documents exist:"

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.⁵⁶

⁴⁹ *Id.*, p. 10.

⁵⁰ *Id.*, p. 11.

⁵¹ *Id.*, p. 13.

⁵² *Id.*, p. 15.

⁵³ *Id.*, p. 18.

⁵⁴ *Id.*, p. 19.

⁵⁵ *Id.*, p. 16.

⁵⁶ *Id.*, p. 19.

ICANN, in providing such responses to the DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. Requestor thus submits this Reconsideration Request in response. Disclosure of such information to the gTLD applicant is necessary to ensure that FTI's "independent" review remains a fair, transparent, and independent process.

9. What are you asking ICANN to do now?

Requestor asks ICANN to disclose all items and documents requested in the DIDP Request.

10. Please state specifically 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.

As stated above, the Requestor is a community applicant for the .MUSIC string and the organization that submitted the DIDP Request to ICANN. Requestor is thus materially affected by ICANN's decision to deny the DIDP Request. Further, the global music community that is supporting the .MUSIC community application is materially affected by ICANN's failure to disclose the requested documents.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

No. The Reconsideration Request is filed on behalf of DotMusic Limited.

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

Not applicable.

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

Yes, these documents are attached as Exhibits.

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.



Arif Hyder Ali

March 10, 2018

Date

Exhibit 39

DotMusic Limited and dotgay LLC Reconsideration Request (“RR”)

1. Requestor Information

Requestors:

Name: DotMusic Limited (“DotMusic”)

Address: Contact Information Redacted

Email: Constantinos Roussos, Contact Information Redacted

Name: dotgay LLC (“dotgay”)

Address: Contact Information Redacted

Email: Jamie Baxter, Contact Information Redacted

Requestors are represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

DotMusic Limited and dotgay LLC (the “Requestors”) seek reconsideration of ICANN’s response to their joint DIDP Request, which denied the disclosure of certain information requested

pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On June 10, 2017, the Requestors sought disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”) review of the Community Priority Evaluation (“CPE”) process through an independent review process by FTI Consulting, Inc. (“FTI”) (the “DIDP Request”).¹ Specifically, the Requestors submitted four requests as follows:

Request No. 1: “Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;”

Request No. 2: “Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its ‘first track’ review;”

Request No. 3: “Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and”

Request No. 4: “Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.”²

Subsequently, on July 10, 2017, ICANN responded to the DIDP Request by asserting that the “information responsive to Items 1 and 3 were previously provided” to the Requestors, and the information requested in Items 2 and 4 (1) “is not an appropriate DIDP request” because it does not concern documentary information and (2) “is subject to the [] DIDP Conditions of Non-Disclosure.”³

¹ Exhibit 1, Request No. 20170610-1, dotgay LLC and DotMusic Limited DIDP Request (June 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

² Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

³ *Id.*

4. Date of action/inaction:

ICANN acted on July 10, 2017 by issuing its response to the DIDP Request (the “DIDP Response”).

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

The Requestors became aware of the action on July 10, 2017, when they received the DIDP Response.

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

The Requestors are materially affected by ICANN’s refusal to disclose certain information concerning FTI’s independent review of the CPE process, as requested in the DIDP Request.

By way of background, the Requestors filed separate community-based generic Top-Level Domain (“gTLD”) applications: DotMusic applied for the “.MUSIC” string and dotgay applied for the “.GAY” string. However, the Economist Intelligence Unit (the “EIU”) recommended that ICANN reject the Requestors’ community applications.⁴ Since the Requestors received the EIU’s decision, they made various submissions, including independent expert reports in support of their separate community applications,⁵ that show the EIU’s decision is fundamentally erroneous. These submissions explain how the EIU Panel disparately treated DotMusic’s application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community

⁴ Exhibit 3, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>; Exhibit 4, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁵ Request 16-5: DotMusic Limited, <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en> (listing documents submitted in support of DotMusic’s Reconsideration Request 16-5); Request 16-3: dotgay LLC, <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en> (listing documents submitted in support of dotgay’s Reconsideration Request 16-3).

applications, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria. dotgay’s submissions show that the EIU, in evaluating dotgay’s community application, misapplied the CPE criteria, failed to follow its own guidelines, discriminatorily treated the application, and made several factual errors that demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities.

In January 2017, ICANN retained an independent reviewer, FTI, to review the CPE process and “the consistency in which the CPE criteria were applied.” FTI is collecting information and materials from ICANN and the CPE provider as part of its review process and will then submit its findings to ICANN based on this underlying information. FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requestors’ Reconsideration Requests—DotMusic submitted Reconsideration Request 16-5 (“Request 16-5”) and dotgay submitted Reconsideration Request 16-3 (“Request 16-3”). Both reconsideration requests are currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requestors, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.”⁶

Thus, on May 5, 2017, DotMusic filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “DotMusic DIDP Request”).⁷ Subsequently, dotgay filed a DIDP Request also seeking documents concerning the BGC’s review of the CPE process on May 18, 2017 (the “dotgay DIDIP Request”).⁸ In submitting these two

⁶ Exhibit 5, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁷ Exhibit 6, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

⁸ Exhibit 7, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

requests, the Requestors expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes.”⁹ ICANN failed to do so when it denied certain requests made in both DotMusic’s DIDP Request on June 4, 2017 and dotgay’s DIDP Request on June 18, 2017.¹⁰

The Requestors had also filed the DIDP Request in pursuit of supplemental information regarding FTI’s independent review process. Once again, ICANN failed to adhere to its Bylaws by acting “through open and transparent processes” when it issued the DIDP Response on July 10, 2017 and did not produce the requested information.¹¹

Specifically, ICANN must “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets.”¹² According to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”¹³ The Bylaws require that ICANN “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”¹⁴ “employ[] open and transparent policy development mechanisms;”¹⁵ “apply[] documented policies neutrally and objectively, with integrity and

⁹ ICANN Bylaws, Art. 1, § 1.2(a).

¹⁰ Exhibit 8, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>; Exhibit 9, Request No. 20170518-1, ICANN’s Response to dotgay’s DIDP Request (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

¹¹ Exhibit 10, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

¹² Amended and Restated Articles of Incorporation, § 2(III).

¹³ ICANN Bylaws, Art. 4, § 4.2(o).

¹⁴ *Id.*, Art. 1, § 1.2(a).

¹⁵ *Id.*, Art. 3, § 3.1.

fairness;”¹⁶ and “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.”¹⁷

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.¹⁸ ICANN’s failure to provide complete responses to the DIDP Request raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Request 16-5, and the .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.¹⁹

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising that ICANN maintains that it can hire FTI to undertake such a review without providing all the materials that will be used to inform FTI’s findings and conclusions to affected parties and without confirming that FTI would even consider documents submitted by the affected parties.

It is of critical importance that ICANN confirm the scope of the material provided to FTI in the course of its review and the details of the review proves in order to ensure full transparency, openness, and fairness. This includes the names of the ICANN employees, officials, executives, board members, agents, etc. that were interviewed by FTI during its independent review process. By providing this information to applicants, ICANN will prevent serious questions from arising concerning the independence and credibility of FTI’s investigation. For similar reasons of

¹⁶ *Id.*, Art. 1, § 1.2(v).

¹⁷ *Id.*, Art. 1, § 1.2(vi).

¹⁸ *See id.*, Arts. 1, 3-4.

¹⁹ Exhibit 11, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

transparency and independence, ICANN must disclose not only the details of FTI's selection process but also the underlying documents.

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

ICANN's action through the DIDP Response materially affects the two global communities supporting the DotMusic and dotgay applications: the global music community and the global gay community. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC and the .GAY gTLDs, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN's identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed ICANN damages its credibility, accountability, and trustworthiness. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that the EIU followed in evaluating community applications, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.²⁰ This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to

²⁰ See Exhibit 12, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; see also Exhibit 13, dotgay's Presentation to the Board Governance Committee (May 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

safeguard the interests of their separate community members, which have supported DotMusic's .MUSIC application²¹ and dotgay's .GAY application, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in disclosing the identities of individuals interviewed by FTI during its independent review process and in confirming that FTI will disclose its final report to the public is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.²² This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."²³ ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the requested items will undermine both the integrity and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5 and Request 16-3. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

²¹ See Exhibit 14, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf> (identifying co-requestors for reconsideration of DotMusic's CPE Evaluation).

²² See Exhibit 15, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

²³ ICANN's Documentary Information Disclosure Policy (last visited Jun. 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

8. Detail of Staff/Board Action/Inaction – Required Information

8.1 The Community Applications Serving as the Bases for the DIDP Request

The Requestors elected to obtain their respective gTLDs by undergoing the CPE process as community applicants. However, both Requestors discovered that the CPE process, as implemented by the EIU, discriminatorily treated community applicants and are now contesting the EIU's final determinations on their applications.

8.1.1 DotMusic's community application for .MUSIC

The .MUSIC CPE process for DotMusic's application was initiated in mid-2015. Nearly a year later, DotMusic discovered that it did not prevail as a community applicant.²⁴ In response to this denial, DotMusic, supported by multiple community organizations, filed Request 16-5 on Feb. 24, 2016.²⁵ Now, over a year later, and after numerous submissions to ICANN²⁶ and a presentation before the BGC,²⁷ DotMusic still has not received a determination from the BGC regarding Request 16-5.

²⁴ Exhibit 16, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

²⁵ Exhibit 17, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

²⁶ *See, e.g.*, Exhibit 18, Letter from DotMusic Limited to the BGC (Mar. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>; Exhibit 19, Letter from DotMusic Limited to the BGC (Mar. 28, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>; Exhibit 20, Expert Legal Opinion of Personal Data Redacted (Jun. 17, 2016), [https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-Personal Data Redacted-redacted-17jun16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-<small>Personal Data Redacted</small>-redacted-17jun16-en.pdf); Exhibit 21, Expert Ethnomusicologist Opinion by Personal Data Redacted (Sep. 12, 2016), [https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-Personal Data Redacted-redacted-12sep16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-<small>Personal Data Redacted</small>-redacted-12sep16-en.pdf); Exhibit 22, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; Exhibit 23, DotMusic's Additional Responses to a Question by the Board Governance Committee during the 17 September 2016 Presentation (Sep. 19, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf>; Exhibit 24, Supplement to DotMusic's Additional Responses to a Question by the BGX during the 17 Sep. 2016 Presentation (Dec. 6, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic Limited to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

²⁷ *See* Exhibit 26, DotMusic's Presentation to the Board Governance Committee (12 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

8.1.2 dotgay's community application for .GAY

Similar to DotMusic, dotgay's CPE evaluation of the .GAY gTLD was initiated in early 2014. dotgay discovered that it did not prevail as a community applicant later that year.²⁸ In response, dotgay filed a reconsideration request with the BGC, which was granted because the BGC determined that the EIU did not follow procedure during the CPE process. As a result, the BGC sent dotgay's community application to the EIU for re-evaluation. However, the second CPE produced the same results based on the same arguments—the EIU rejected dotgay's application.²⁹

When dotgay submitted another reconsideration request to the BGC in regards to this rejection, though, the BGC excused the discriminatory conduct and the EIU's policy and process violations. It refused to reconsider the CPE a second time. Therefore, dotgay filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC's non-response on many of the issues highlighted in the second reconsideration request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.³⁰ For nearly a year afterwards, despite numerous letters to ICANN,³¹ dotgay had still not received a final determination by the ICANN Board.

²⁸ Exhibit 27, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

²⁹ See Exhibit 28, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

³⁰ See Exhibit 29, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

³¹ See Exhibit 30, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 31, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 32, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 34, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board

8.1.3 The BGC's Decision to Place the Requestors' Reconsideration Requests on Hold

Then, on April 26, 2017, ICANN finally updated both Requestors on the status of Request 16-5 and Request 16-3 through a general update to several gTLD applicants with pending reconsideration requests. The Requestors received a letter from ICANN BGC Chair Chris Disspain indicating that their reconsideration requests were “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).³²

This update on the status of their reconsideration requests failed to provide the Requestors with any significant information on the BGC's review of the CPE process, despite the fact that their requests had been pending for over a year.

8.2 The Requestors' Prior DIDP Requests

As a result of this dearth of information, the Requestors submitted separate DIDP requests to ICANN.³³ ICANN's DIDP “is intended to ensure that information contained in documents

(March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

³² Exhibit 35, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

³³ Exhibit 36, DotMusic Limited's First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”³⁴ It serves as a principle element of ICANN’s approach to transparency and information disclosure.”³⁵ In accordance with this principle and policy, ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.³⁶ While the “DIDP procedures do not require ICANN to create or compile summaries of any documented information[,] . . . as part of its commitment to transparency and accountability, ICANN has undertaken [] effort[s] to do so” in the past.³⁷

8.2.1 DotMusic’s DIDP Request

Acting in accordance with ICANN’s DIDP process, DotMusic submitted the DotMusic DIDP Request on May 5, 2017. DotMusic sought information to further its investigation of the “numerous CPE process violations and the contravention of established procedures,” as described in Request 16-5,³⁸ *and* information regarding the CPE process as it concerned its Request 16-5 because “the BGC Letter does not transparently provide any meaningful information besides that

³⁴ Exhibit 37, ICANN Documentary Information Disclosure Policy (lasted visited Jul. 17, 2017), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³⁵ *Id.*

³⁶ See Exhibit 38, ICANN Response to Request No. 20080924-1 (Oct. 24, 2008), <https://www.icann.org/en/about/transparency/20080924-1/younger-response-24oct08-en.pdf> (providing information to applicant not contained in a specifically-identified document); Exhibit 39, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf> (same); Exhibit 40, ICANN Response to Request No. 20161024-8 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-8-cis-response-23nov16-en.pdf> (same); Exhibit 41, ICANN Response to Request No. 20160211-1 (Mar. 12, 2016), <https://www.icann.org/en/system/files/files/didp-20160211-1-rrsg-response-12mar16-en.pdf> (same).

³⁷ Exhibit 42, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf>. In responding to any request submitted pursuant to the DIDP, ICANN staff first identifies all documents responsive to the DIDP request and then reviews those documents to determine whether they call under any of the DIDP’s Nondisclosure conditions. And, if they do, ICANN staff determined whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure. Exhibit 43, Process for Responding to DIDP Requests (Oct. 29, 2013), <http://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

³⁸ Exhibit 44, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

there is a review underway and that the RR is on hold.”³⁹

DotMusic made ten separate requests to ICANN in the DotMusic DIDP Request. These requests were as follows:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;”
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review.⁴⁰

DotMusic concluded in its request that “[t]here are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence

³⁹ *Id.*

⁴⁰ *Id.*

and credibility of such an independent review.”⁴¹

8.2.2 dotgay’s DIDP Request

dotgay also filed a DIDP request, which is related to the .GAY CPE.⁴² It sought to “ensure that information contained in documents concerning ICANN’s operational activities, with within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”⁴³ Further, like other gTLD applicants, dotgay sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”⁴⁴ because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”⁴⁵

As a result of this dearth of information from ICANN, the Requestor made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”¹⁵ and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

⁴¹ *Id.*

⁴² Exhibit 45, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.⁴⁶

Like DotMusic, dotguy concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”⁴⁷

8.3 ICANN’s Response to the Prior DIDP Requests

⁴⁶ *Id.*

⁴⁷ *Id.*

Prior to responding to the DotMusic DIDP Request and the dotgay DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to both requests.⁴⁸ ICANN explained that:

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.⁴⁹

No other information was provided to the Requestors regarding the CPE review at issue in its Request until ICANN issued its formal responses to their prior DIDP Requests.

8.3.1 ICANN's Response to the DotMusic DIDP Request

⁴⁸ Exhibit 46, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁴⁹ *Id.*

ICANN first responded to the DotMusic DIDP Request on June 4, 2017.⁵⁰ ICANN's response provided the same information that had already been given to DotMusic on June 2, 2017 regarding the ICANN's decision to review the CPE process and to hire FTI to conduct an independent review of the CPE process.⁵¹ ICANN further denied Requests Nos. 1-6, 8 and 10. ICANN's responses to these requests were as follows:

Items 1-4: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDIP previous submitted by DotMusic Limited. . . .

Item 8: . . . This item overlaps with Items 4 and 5. . . .

Item 10: . . . These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure.⁵²

⁵⁰ Exhibit 47, ICANN's Response to DotMusic Limited's First DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

⁵¹ *Id.*

⁵² *Id.*

ICANN, in providing such responses to the DotMusic DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. DotMusic thus submitted Reconsideration Request 17-2 (“Request 17-2”) in response.⁵³

8.3.2 ICANN’s Response to the dotgay DIDP Request

ICANN finally responded to the dotgay DIDP Request on June 18, 2017. It provided the same basic information that had already been given on June 2, 2017 to dotgay, and on June 4, 2017 to DotMusic.⁵⁴ ICANN denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN’s responses to these requests were as follows:

Items 1, 2, 3, 8, and 13 . . .

As stated in ICANN’s Response to DIDP Request 20170505-1 that you submitted on behalf of DotMusic Limited, these documents are not appropriate for disclosure based on the [] applicable DIDP Defined Conditions of Non-Disclosure. . . .

Item 9 . . .

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.⁵⁵

⁵³ Exhibit 48, Reconsideration Request 17-2 (Jun. 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

⁵⁴ Exhibit 49, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

⁵⁵ *Id.*

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy. dotgay thus submitted Reconsideration Request 17-3 (“Request 17-3”) in response.⁵⁶

8.4 The DIDP Request

In response to ICANN’s insufficient documentary disclosures on June 2 and 4, 2017, the Requestors sent ICANN a joint letter on June 10, 2017. The letter stated, *inter alia*, that:

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very

⁵⁶ Exhibit 50, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

limited approach of how staff was involved.”⁵⁷

Furthermore, the Requestors made an additional DIDP Request in the joint letter for additional information. The Requestors asked ICANN to provide the following information:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.⁵⁸

8.5 ICANN’s Response to the DIDP Request

On July 10, 2017, ICANN’s responded to the DIDP Request by denying all four information requests.⁵⁹ According to ICANN, its DIDP is only intended to provide “documentary information already in existence within ICANN that is not publically available.”⁶⁰ And, as such, it refused the four requests for the following reasons:

Items 1 and 3

. . . The information responsive to Items 1 and 3 were previously provided in Response to DIDIP Request 20170505-1 and Response to DIDIP Request 20170518-1.

Items 2 and 4

. . . As noted above, the DIDP is limited to requests for documentary

⁵⁷ Exhibit 51, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

⁵⁸ *Id.*

⁵⁹ Exhibit 52, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁶⁰ *Id.*

information already in existence within ICANN that is not publically available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update. This request for information is not an appropriate DIDIP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure. . . .

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.⁶¹

Regarding ICANN’s denial of Items 1 and 3, this information was not previously provided to Requestors. ICANN has not confirmed “that FTI will review all of the documents submitted by DotMusic . . . in the court of their reconsideration requests.”⁶² The documents referenced in ICANN’s response—ICANN’s prior responses to the DotMusic DIDP Request and the dotgay DIDP Request—simply claim that ICANN provided FTI with materials relevant to the Reconsideration Requests at issue, and does not in any way confirm that FTI will review the documents.⁶³ Further, ICANN clearly did not disclose “the details of FTI’s selection process . . . and the terms under which FTI currently operates for ICANN”⁶⁴ to the Requestors in its prior responses to the Requestors’ information

⁶¹ *Id.*

⁶² *Id.*

⁶³ Exhibit 53, ICANN’s Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

⁶⁴ Exhibit 54, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

requests.⁶⁵ The Requestors and other gTLD applicants have not yet received any details regarding ICANN's contract with FTI, even though the contract itself is a document in ICANN's possession.

Further, regarding ICANN's denial of Items 2 and 4, both items request information that is more than likely contained in ICANN documents and that is in the public's interest to disclose. The Requestors seek simply the identity of individuals interviewed by FTI and not the substance of those interviews and seeks confirmation that FTI's final report will be available to the gTLD applicants. Disclosure of such information to the gTLD applicants is necessary to ensure that the independent review remains a fair, transparent, and independent process, as discussed in **Sections 6 and 7** above.

9. What are you asking ICANN to do now?

The Requestors ask ICANN to disclose the documents requested in the DIDP Request.

10. Please state specifically 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.

As stated above, the Requestors are community applicants for gTLD strings and the organizations that issued the DIDP Request to ICANN. They are materially affected by ICANN's decision to deny the DIDP Request, especially since its gTLD application is at issue in the underlying request. Further, the communities supporting their applications—the music community and the gay community—are materially affected by ICANN's failure to disclose the requested

⁶⁵ See Exhibit 55, ICANN's Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

documents.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

Yes, this Reconsideration Request is being brought on behalf of DotMusic and dotgay.

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

Yes, there is a causal connection between the circumstances and the harm for both DotMusic and dotgay, as explained above in **Sections 6 through 8**.

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

Yes, these documents are attached as Exhibits.

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.

Exhibit 40

DotMusic Reconsideration Request (“RR”)

1. Requester Information

Requester is represented by:

Name: Dechert LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester:

Name: DotMusic Limited (“DotMusic”)

Address: Contact Information Redacted

Email: Constantinos Roussos, Contact Information Redacted

Counsel: Arif Hyder Ali, Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

On September 17, 2016, the ICANN Board passed a Resolution requesting ICANN to conduct “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE

reports issued by the CPE provider.”¹ Further, on October 18, 2016, ICANN’s Board Governance Committee (“BGC”) requested it be provided “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”² In so doing, the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.³

On January 30, 2017, DotMusic requested “an immediate update about the status of: (1) DotMusic’s Reconsideration Request 16-5 and the BGC’s best estimate of the time it requires to make a final recommendation on DotMusic’s Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider.”⁴ DotMusic received no response. On April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that DotMusic had not received any communication from the independent evaluator. ICANN had not provided any details as to how the evaluator was selected, what its remit was, what information had been provided, whether the evaluator will seek to consult with the affected parties, etc.⁵

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN BGC Chair Chris Disspain (“BGC Letter”) indicating that the Reconsideration Request 16-5 was “on hold” and *inter alia* that:

The BGC decided to request from the CPE provider the materials and research

¹ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a> (emphasis supplied).

² Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

³ ICANN Bylaws Art. IV. § 2.13 “The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. ***Any information collected by ICANN from third parties shall be provided to the Requestor.***”

⁴ Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, January 30, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>

⁵ Annex B, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCCK).⁶

On May 5, 2017, Arif Ali, on behalf of DotMusic, submitted a DIDP Request 20170505-1 ("DIDP Request")⁷ requesting, *inter alia*:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the

⁶ See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

⁷ See Annex C, DIDP Request at <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

investigation; and

10. All materials provided to ICANN by the evaluator concerning the Review.

DotMusic concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”

On May 15, 2017, in a letter to DotMusic, Jeffrey LeVee, on behalf of ICANN, reiterated the statements of BGC Chairman Chris Disspain and stated that certain questions concerning the CPE Review “will be addressed as part of ICANN’s response to the DIDP in due course.”⁸

In response, on May 21, 2017, Arif Ali, on behalf of DotMusic, responded that DotMusic does “not consider ICANN’s delays justified” and that “[r]egrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic’s information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic’s right to be heard during the evaluation process and comment on the evaluation results be given full effect.” Further, the letter stated that “[i]t is clear that the delays and secrecy are thus impairing ICANN’s Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic’s CPE evaluation does not merely result in a denial of DotMusic’s right to be heard; it also hampers the efficiency of the investigation, by disabling us from being

⁸ Annex F, <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>

able to identify the flaws in the EIU's results. We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests."⁹

On June 4, 2017, ICANN responded to the DIDP Request,¹⁰ stating that:

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017 (*sic*), FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review... [T]he scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

Moreover, ICANN denied critical items requested. Specifically:

Items 1- 4 ... With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6 Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. ***The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early***

⁹ Annex G, <https://www.icann.org/en/system/files/correspondence/ali-to-Levee-21may17-en.pdf>

¹⁰ Annex D, ICANN DIDP Response, June 4, 2017, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>

March 2017. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

[...]

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previously submitted by DotMusic Limited.

Item 8. Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 10. Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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 exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- 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.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

On June 10, 2017, Arif Ali, on behalf of DotMusic and dotgay, sent a joint letter to ICANN stating, *inter alia*, that:¹¹

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration

¹¹ Annex H, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (10 June 2017).

- requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017, to date.

According to ICANN’s DIDP “*Defined Conditions of Nondisclosure:*”¹²

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a **compelling** reason for confidentiality.

Information...may still be made public if ICANN determines, under the particular circumstances, that the **public interest** in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the **public interest** in disclosing the information.

ICANN’s default policy is to release all information requested unless there is a **compelling** reason not to do so. ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of **public interest** in terms of the DIDP Request.

ICANN signed an engagement letter with FTI to perform an ***independent*** review of the CPE Process based on the acceptance by ICANN’s Board of the systemic breaches of its Bylaws

¹² See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>

in the CPE Process identified by the *Despegar* and *Dot Registry* IRP Declarations.¹³ It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions. These materials critically include the items requested by DotMusic in its DIDP request that was denied by ICANN because ICANN “determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.” To prevent serious questions arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to DotMusic and the public to ensure full transparency, openness and fairness. This includes the items requested by DotMusic that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure and conflict check processes (Item 2), and the existence of the terms of appointment (Item 4) but also the underlying documents that substantiate ICANN’s claims.

ICANN’s assertion with regard to Item 5 that with the “exception of the correspondence between the ICANN organization and the CPE Provider regarding the evaluations, all materials provided to the evaluator are publicly available”¹⁴ is undercut by ICANN’s admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP request.¹⁵

¹³ See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>. See also Despegar Declaration, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

¹⁴ See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.4

¹⁵ See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.3 (“The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017.”).

Further, ICANN’s claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel of the close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.¹⁶

In fact, *this is a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”* In addition, ICANN has not disclosed any “compelling” reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including DotMusic’s Reconsideration Request 16-5. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency and credibility of the FTI investigation.

4. Date of action/inaction:

June 4, 2017

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

June 5, 2017

¹⁶ See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> at paras.93-101.

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

ICANN's actions and inactions materially affect the delineated and organized music community defined in DotMusic's application that is supported by organizations with members representing over 95% of global music consumed (the "Music Community") and DotMusic. Not disclosing these documents has negatively impacted the timely, predictable and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency and fairness of the CPE process. Without an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency and openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

ICANN's action and inaction in denying the DIDP Request do not follow ICANN's Resolutions, its Bylaws or generally how ICANN claims to hold itself to high standards of accountability, transparency and openness. Such action and inaction raise additional questions as to the credibility, reliability and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and CPE process of DotMusic's application for the .MUSIC gTLD (Application ID: 1-1115-14110), which is subject to the CPE Reconsideration Request 16-5 ("CPE RR")¹⁷ and is highly relevant to this Request.

A closed and opaque ICANN damages the credibility, accountability and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating

¹⁷ CPE RR 16-5, <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the DotMusic CPE RR. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the Music Community that has supported the DotMusic community-based application for the .MUSIC string to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

The Reconsideration Request and Independent Review Process accountability mechanisms are the only recourse for applicants (or impacted requesters) in lieu of litigation. As such, ICANN must provide documents and Items in DIDP requests in which there is an appearance of gross negligence, conflicts of interest, multiple violations of established process, or even simply questions from the affected parties as to how a certain process was followed.

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

See Answer to Question 6 above.

8. Detail of Staff/Board Action/Inaction – Required Information

See Answer to Question 6 above.

9. What are you asking ICANN to do now?

The Requester requests ICANN to disclose all the Items requested in the Request based on ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability) to serve the global public interest.

Such disclosure will increase transparency and provide DotMusic and the BGC with additional information to assist in evaluating the CPE Report as well as the EIU's decision-making process in issuing the CPE Report. As outlined in Reconsideration Request 16-5 (and incorporated here by reference), ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to inconsistencies and substantial flaws in its rationale methodology and scoring process.

The Requester requests that the BGC apply the Documentary Information Disclosure Policy to the DIDP Request in the manner it was intended to operate to “*ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.*” The Requester requests the BGC:

1. Review the ICANN Staff decision to withhold all the information requested, to ensure that each and every requested Item, documents and information request was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requester requests that the Items and documents requested are disclosed;
2. To recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to do so and, where such a compelling

reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested; and

3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm. Withholding information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws.

As indicated in the CPE Reconsideration Request 16-5, the promise of independence, nondiscrimination, transparency and accountability has been grossly violated in the .MUSIC CPE as the misguided and improper .MUSIC CPE Report shows. As such, the disclosure of the Items and documents requested will ensure that the BGC can perform due diligence and exercise independent judgement to make a well-informed decision pertaining to this DIDP RR (and subsequently the CPE Reconsideration Request 16-5).

10. Please state specifically 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.

DotMusic is a community applicant for .MUSIC, an application supported by organizations with members representing over 95% of music consumed. The justifications under which the Requester has standing and the right to assert this reconsideration request are:

- i. Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.¹⁸
- ii. Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;
- iii. Conflict of interest issues;
- iv. Failure to consider evidence filed; and
- v. Violation of ICANN Articles of Incorporation/Bylaws:
 - a. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.¹⁹
 - b. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.²⁰
 - c. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.²¹
 - d. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.²²
 - e. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.²³
 - f. Remaining accountable to the Internet community through mechanisms that

¹⁸ Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

¹⁹ ICANN Bylaws, Art. I, § 2.6

²⁰ ICANN Bylaws, Art. I, § 2.1

²¹ ICANN Bylaws, Art. I, § 2.7

²² ICANN Bylaws, Art. I, § 2.8

²³ ICANN Bylaws, Art. I, § 2.9

enhance ICANN's effectiveness.²⁴

- g. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.²⁵
- h. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.²⁶
- i. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.²⁷

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? No

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.

12. Do you have any documents you want to provide to ICANN? Yes. See exhibits in Annexes.

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,

²⁴ ICANN Bylaws, Art. I, § 2.10

²⁵ ICANN Bylaws, Art. I, § 2.11

²⁶ ICANN Bylaws, Art. II, § 3

²⁷ ICANN Bylaws, Art. III, § 1

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.



Arif Hyder Ali

June 18, 2017

Date

Exhibit 41

CFE CODE OF PROFESSIONAL STANDARDS INTERPRETATION AND GUIDANCE

The purpose of this Interpretation and Guidance document (the “Guidance”) is to provide clarification about the CFE Code of Professional Standards (the “Standards”) for Certified Fraud Examiners (“CFEs”). Each section of the Standards has been reprinted below in italics, followed by text which is intended to help explain how the Standard should be interpreted. Readers should be mindful that no explanation can cover every situation or circumstance, and therefore the guidance contained herein is intended to show how the Standards *generally* should be interpreted. Ultimately, it is the CFE’s responsibility to act in accordance with the Standards, taking into account the specific facts and circumstances of his particular case.

The Guidance does not constitute rules of conduct for CFEs, nor is it intended to create obligations or duties for CFEs beyond those contained in the Standards. Failure of a Certified Fraud Examiner to adhere to the interpretive text contained in this document shall not by itself be deemed a violation of the Standards. Rather, the Guidance is meant to help clarify the meaning of the Standards and assist CFEs in resolving questions of how the Standards may be applied to particular situations.

Questions, comments or suggestions about the Standards or this Guidance should be directed to:

The Association of Certified Fraud Examiners
Attn: Professional Standards Committee Liaison
ProfessionalStandards@acfe.com

Section I. Preamble

The Association of Certified Fraud Examiners is an association of professionals committed to performing at the highest level of ethical conduct. Members of the Association pledge themselves to act with integrity and to perform their work in a professional manner.

Members have a professional responsibility to their clients, the public interest and each other, a responsibility that requires subordinating self-interest to the interests of those served.

These Standards express basic principles of ethical behavior to guide members in the fulfilling of their duties and obligations. By following these Standards, all Certified Fraud Examiners shall be expected, and all Associate members shall strive, to demonstrate their commitment to excellence in service and professional conduct.

Guidance

This Preamble introduces the Standards for CFEs and it serves three functions. First, it describes the commitment CFEs make to integrity and professionalism. Second, it describes the ACFE’s view of a CFE’s responsibilities to clients, each other and society. And third, it explains the rationale behind, and the scope of, the Standards.

Section II. Applicability of Code

The CFE Code of Professional Standards shall apply to all certified members of the Association of Certified Fraud Examiners (ACFE). Associate members of the ACFE should strive to adhere to the Standards, but are not bound by them. The use of the terms “Certified Fraud Examiner” and “CFE” in this Code shall refer to certified members. For purposes of these Standards, the term “fraud examination” means an assignment or engagement, a substantial purpose of which involves the prevention, detection, investigation, or resolution of fraud or fraud-related conduct.

Guidance

All CFEs, as a condition of their certifications and membership, are required to adhere to the Standards. Associate members of ACFE are not required to follow the Standards, but they are encouraged to do so, as the Standards represent sound principles of conduct for anti-fraud professionals.

Although CFEs are required to follow the Standards when possible, there might be instances where a CFE encounters a conflict between the Standards and certain laws, regulations or court orders to which he is subject. In the event that such a conflict arises, the provisions of the law, regulation or court order should be followed.

In other cases, a CFE might encounter standards or like requirements that are imposed by other professions, industries or employers, and which cover topics that are also covered by the Standards. For example, a CFE who is also a public accountant will likely have confidentiality obligations arising not only from the Standards, but also from the professional rules for CPAs or Chartered Accountants in his jurisdiction. In this situation, the best practice is generally for the CFE to follow the more stringent of the two requirements.

For purposes of these Standards, the term “fraud examination” is defined to mean any engagement or assignment, a substantial purpose of which involves the prevention, detection, investigation or resolution of fraud or fraud-related conduct. Questions of whether a particular engagement or assignment constitutes a fraud examination will be determined on a case by case basis. Examples of assignments or engagements that would be considered fraud examinations include but are not limited to the following:

- A CFE is hired by a client to investigate allegations of fraud or fraud-related conduct;
- A CFE is engaged by a client to provide professional services. During the engagement, evidence of fraud is detected and the CFE is either directed by the client, required by rule or chooses on his own to follow up on such evidence;
- A CFE is directed by his employer to conduct an internal audit based on allegations of fraud by an employee or vendor;
- A CFE is engaged by a client to conduct a fraud risk assessment or evaluation of anti-fraud controls;
- A CFE is engaged to serve as an expert in a litigation case in which questions of fraud or fraud-related conduct are at issue.

Examples of assignments or engagements that would not be considered fraud examinations include but are not limited to the following:

- A CFE who is a CPA is engaged by a client to conduct a general audit of the company's financial statements, where no allegations of fraud have been made and no evidence of fraud is uncovered;
- A CFE who is an internal auditor is directed by his employer to conduct a routine audit where no allegations of fraud are known to him;
- A CFE is engaged to serve as an expert in a litigation case where no questions of fraud or illegal conduct are at issue.

Section III. Standards of Professional Conduct

A. Integrity and Objectivity

1. *Certified Fraud Examiners shall conduct themselves with integrity, knowing that public trust is founded on integrity. CFEs shall not sacrifice integrity to serve the client, their employer or the public interest.*

Guidance

The concept that CFEs should conduct themselves with *integrity* means that CFEs should behave honestly and straightforwardly toward their clients/employers. They should deal fairly with clients/employers and should not knowingly provide clients/employers with information that is materially false or misleading. CFEs should be mindful that the integrity they exhibit reflects not only on them, but also on the ACFE and the anti-fraud profession in general. If a CFE fails to act with integrity, then public confidence in that CFE and in the ACFE itself might be diminished.

The requirement to act with integrity applies both to the conduct of the fraud examination and to the underlying engagement between the CFE and his client/employer. For instance, a CFE would be found to exhibit a lack of integrity if he delivers a fraud examination report that he knows contains materially false or misleading statements, contains information that was furnished recklessly without regard for its accuracy or omits material information that causes the report to be misleading. Similarly, if a CFE were to knowingly overbill a client or falsify expenses in connection with an assignment, this would also show a lack of integrity.

This Standard does not prohibit CFEs from engaging in generally accepted investigative techniques that might involve untruthfulness directed toward suspects or investigation targets. For instance, CFEs in law enforcement who are on undercover assignments may be required to be untruthful about their conduct, their status as law enforcement officers, etc. Absent exceptional circumstances, this type of conduct would not violate the Standard requiring that CFEs act with integrity.

2. *Prior to accepting the fraud examination, Certified Fraud Examiners shall investigate for actual or potential conflicts of interest. CFEs shall disclose any actual or potential conflicts of interest to potentially affected clients or to their employers.*

Guidance

An actual or potential *conflict of interest* exists when a member's ability to act objectively, or in the best interests of his client/employer, is impaired or is reasonably likely to be impaired by any current, prior, or future relationship with parties relevant to the fraud examination. For example, a conflict of interest might exist if a member is asked to conduct a fraud examination of someone with whom he has strong personal or business ties, such as a relative, a friend, or a business partner.

The wording in the Standards that CFEs “*shall disclose any actual or potential conflicts of interest*” makes it clear that a CFE may not proceed with an engagement before each affected client/employer has been notified of the actual or potential conflict. However, the rule does not necessarily bar CFEs from accepting engagements where an actual or potential conflict of interest exists. Instead, the rule only requires that the actual or potential conflict be disclosed. After disclosure, it is the client/employer's decision as to whether the CFE may continue the engagement.

As a matter of best practice, a CFE should disclose any actual or potential conflict to his client/employer in writing. And if, after disclosure, the client/employer consents to allow the CFE to continue the engagement, the consent should be in writing as well. Thus, a record of both the disclosure and the written consent should be maintained in case the CFE's objectivity is later called into question.

Although the Standard only specifies that CFEs shall investigate for actual or potential conflicts “*prior to accepting the fraud examination...*” CFEs should be mindful of the potential for conflicts throughout the engagement, and if an actual or potential conflict arises in the midst of an examination that was not known at the outset, it is best practice for the CFE to disclose that conflict immediately and suspend work until written consent has been obtained from the client/employer. Otherwise, the CFE's work product might be vulnerable to claims that the CFE lacked objectivity.

3. *Certified Fraud Examiners shall maintain objectivity in discharging their professional responsibilities within the scope of the fraud examination.*

Guidance

Objectivity refers to the ability to conduct fraud examinations without being influenced by one's own personal feelings or the personal feelings and motives of others. An objective CFE provides professional services or recommendations in an impartial manner and is not influenced by bias, prejudice, or other information that cannot be substantiated or that has no foundation. *Bias* refers to partiality that prevents an individual from objectively considering an issue or situation, whereas *prejudice* refers to a preconceived opinion or feeling that prevents objective consideration of an issue or situation.

A CFE would likely be found to have violated this Standard, for example, if he were to determine at the outset of an examination that Suspect A had misappropriated funds, and then proceeded to only gather or seek out evidence showing that Suspect A was responsible for the missing money, while ignoring evidence that tended to show Suspect A was not responsible.

This Standard is closely related to Section III.A.2., which requires CFEs to disclose actual or potential conflicts of interest, but it is broader in some respects. While CFEs are only required to disclose conflicts of interest, which may be waived by the client/employer, there is no waiver option for this Standard. A CFE who fails to maintain objectivity is in violation of the Standards regardless of whether the client/employer consents to the CFE's conduct. Therefore, a CFE should remove himself from an engagement if his objectivity has become so diminished that it could significantly impact the outcome or findings of the examination.

4. *Certified Fraud Examiners shall not commit acts discreditable to the ACFE or its membership, and shall always conduct themselves in the best interests of the reputation of the profession.*

Guidance

CFEs who commit discreditable acts tarnish their reputation, the reputation of the ACFE, and the public perception of the CFE designation. A *discreditable act* is an act that damages a CFE's integrity, trustworthiness, or fitness to practice as an anti-fraud professional. Examples of discreditable acts include, but are not limited to:

- Being convicted of an offense punishable by more than one year in prison (a felony) or a crime of moral turpitude.¹
- Being adjudicated for an offense of dishonesty, fraud or gross negligence in a professional engagement
- Breaching a fiduciary responsibility in a professional engagement
- Failing to comply with a valid court order
- Giving intentional false sworn testimony
- Fabricating evidence or knowingly excluding relevant evidence in a professional engagement
- Making threats of bodily harm in connection with a professional engagement
- Failing to turn over to a client/employer records that were (a) provided by the client/employer; or (b) prepared by the CFE for a client/employer (provided that the preparation of such records is complete and no fees for the engagement are due.)
 - Failure to turn over work papers does not constitute an act discreditable unless the CFE is required by law or regulation to turn over such work papers.

¹ Section 5.07 of the ACFE Bylaws defines a *crime of moral turpitude* as “one that calls into question the integrity and judgment of the offender and includes but is not limited to offenses such as bribery; fraud; corruption; solicitation; embezzlement; theft by a fiduciary or trustee; or theft by trick, deceit or false pretenses.”

- Soliciting or disclosing CFE Exam questions and answers, or performing other acts of fraud or deceit in obtaining a CFE certification
5. *Certified Fraud Examiners shall not knowingly make a false statement when testifying under oath in a court of law or other dispute resolution forum. CFEs shall comply with lawful orders of the courts or other dispute resolution bodies. CFEs shall not commit criminal acts or knowingly induce others to do so.*

Guidance

CFEs commonly provide sworn testimony in courts of law or other dispute resolution forums. When doing so they are prohibited from knowingly making a false statement. The use of false statements by a CFE in such circumstances could cause the innocent to be punished or the guilty to go free, or could result in unjust civil or administrative rulings. In short, a CFE's testimony can hold great weight in a legal proceeding, and this power to influence should not be taken lightly. False statements, if uncovered, only serve to undermine the CFE's credibility with the trier of fact and could subject the CFE to legal liability.

Similarly, CFEs are obligated to comply with lawful orders of the courts. Failure to do so shows a disregard for the authority of the court, could negatively impact the outcome of a case, and might constitute a criminal or civil violation for which the CFE can be held liable.

Additionally, this Standard provides that members should not commit criminal acts or knowingly induce others to do so. Generally speaking, this Standard is meant to apply to offenses punishable by more than one year in prison or crimes of moral turpitude.² However, other crimes might constitute a violation of this Standard depending on their severity and the circumstances of the case. For example, reckless or intentional misconduct that endangers the life or safety of another, even if it is not punishable by more than one year in prison, might constitute a violation. Minor infractions that do not involve any aspect of moral turpitude and have no relevance to the CFE's professional conduct, such as traffic violations, would not ordinarily be deemed violations of this Standard, although members should strive to obey all laws at all times.

All cases involving the application of this Standard are decided by the ACFE Board of Regents at its own discretion on a case-by-case basis.

² Section 5.07 of the ACFE Bylaws defines a *crime of moral turpitude* as "one that calls into question the integrity and judgment of the offender and includes but is not limited to offenses such as bribery; fraud; corruption; solicitation; embezzlement; theft by a fiduciary or trustee; or theft by trick, deceit or false pretenses."

B. Professional Competence

1. *Certified Fraud Examiners shall be competent and shall not accept assignments where competence is lacking. In some circumstances, it may be possible to meet the requirement for professional competence by use of consultation or referral.*

Guidance

Professional competence refers to an individual's knowledge, skills, experience and overall capability to perform the duties of a CFE in a particular engagement. Each CFE is responsible for ensuring that he has the requisite competence to perform the services required of him in an adequate and capable manner. This is a determination that is to be made on a case-by-case basis. If a CFE determines that he cannot reasonably expect to complete the engagement with professional competence, then he should not accept the assignment.

The competence required in any given engagement will depend on a number of factors, including the complexity of the case, the specialized nature of the assignment, the CFE's experience and training in the matter at issue and whether the CFE has the ability to consult with or refer the matter to third parties of established competence.

This Standard specifically provides that CFEs may meet the professional competence requirement by consultation or referral with other professionals who possess knowledge, skills or experience that the CFE might lack. For example, suppose a CFE takes on a fraud examination case, and part of the investigation will require data to be recovered from a suspect's computer hard drive. Suppose further that the CFE has no training or experience in recovering data from a hard drive. This would not preclude the CFE from accepting the engagement, provided that he consults with or retains someone with the requisite skills necessary to recover the data in a professionally competent manner. Conversely, if the CFE determines to extract the data himself without any training or consultation, and without understanding fully how to perform that task, then the CFE would likely be found to lack professional competence to handle the engagement.

Competency is not the same thing as perfection. The fact that a CFE might make errors of judgment in an engagement, or even the fact that a CFE might perform an engagement below the level of the client's expectations, does not necessarily mean that the CFE lacked competence. The question of whether a CFE had adequate professional competence to accept an engagement is one that should be focused on the CFE's good-faith assessment of his knowledge, skills and experience at the time the engagement was accepted, not after it has been completed.

2. *Certified Fraud Examiners shall maintain the minimum program of continuing professional education required by the Association of Certified Fraud Examiners. A commitment to professionalism combining education and experience shall continue throughout the CFE's professional career. CFEs shall continually strive to increase the competence and effectiveness of their professional services.*

Guidance

CFEs shall continually strive to increase the level of competence and effectiveness of their professional services by maintaining appropriate continuing professional education (CPE). CPE requirements are set by the ACFE Board of Regents and are subject to change. These requirements are published by ACFE on its website at ACFE.com/CPE. It is the CFE's responsibility to know what CPE requirements have been established by the Board of Regents. Members must maintain the minimum levels of CPE as dictated by the Board and must certify their compliance with CPE requirements in accordance with the Board's rules.

C. Due Professional Care

1. *Certified Fraud Examiners shall exercise due professional care in the performance of their fraud examination services. Due professional care requires diligence, critical analysis and professional skepticism in discharging professional responsibilities.*

Guidance

The requirement that a CFE exercise *due professional care* means that the CFE should perform his services to the best of his ability with consideration for the best interests of the client/employer. A CFE should be diligent in his work and should exercise critical analysis and professional skepticism of at least the level that a client/employer ought to reasonably expect from a competent professional in the CFE's field.

The fact that a CFE makes errors in an engagement or fails to meet the client/employer's expectations does not necessarily mean that he failed to exercise due professional care. In evaluating whether a CFE has exercised due professional care, two primary questions should be addressed: (1) Did the CFE make a good faith effort to perform services to the best of his ability, with the client/employer's best interests in mind? (2) Did the CFE perform his services and exercise critical analysis and professional skepticism no less diligently than what would be expected of a competent professional in the CFE's field? If the answer to both of those questions is yes, then the CFE has likely exercised due professional care, even if errors were made.

2. *Conclusions shall be supported with evidence that is relevant, reliable and sufficient.*

Guidance

CFEs are permitted to draw reasonable conclusions in fraud examination reports and, of course, when offering expert testimony. In fact, the CFE's specialized knowledge, skills and expertise might make him particularly qualified to assist a layperson — whether it is a client/employer or a jury — in drawing conclusions from the evidence at hand.

CFEs must use relevant, reliable and sufficient evidence to support their findings and conclusions. *Evidence* can be defined as all the information that influences a decision-maker in reaching decisions. *Black's Law Dictionary* defines *evidence* as:

Anything perceivable by the five senses, and any proof such as testimony of witnesses, records, documents, facts, data, or tangible objects legally presented at trial to prove a contention and induce a belief in the minds of a jury.

Relevant evidence is evidence that tends to make some fact at issue more or less likely than it would be without the evidence. Evidence that has no relationship to any of the issues in the case is irrelevant.

Evidence is *reliable* if it comes from a trustworthy or believable source. Evidence is *sufficient* to support a CFE's findings and conclusions where the weight of the evidence is such that a reasonable professional could draw the same or a similar conclusion to that of the member. The fact that two professionals might draw different conclusions based on the same evidence does not necessarily mean that one of the experts has acted on insufficient evidence. For example, at trial it is common for expert witnesses to offer opposing and contradictory conclusions based on the facts at issue. The test of sufficiency is not a test of which expert witness is "right" and which is "wrong." Instead, the question is whether a similarly situated professional *could reasonably* draw the same or a similar conclusion as the witness, given the evidence at hand.

Although CFEs are generally permitted to make conclusions based on appropriate evidence, they should be mindful that Article Five of the ACFE Code of Professional Ethics specifically prohibits CFEs from expressing opinions "regarding the guilt or innocence of any person or party." For guidance on this prohibition, refer to Section V.B.2 of this document.

3. *Fraud examinations shall be adequately planned. Planning controls the performance of a fraud examination from inception through completion and involves developing strategies and objectives for performing the services.*

Guidance

Preparation is a critical step in any fraud examination. Planning for a fraud examination involves understanding the goals of the engagement and developing a strategy for its expected conduct, organization and staffing.

The extent of planning required and the nature of the planning process will vary depending on the type of examination to be conducted. It is the CFE's responsibility to ensure that he has adequately planned for each engagement, taking into account the specifics of the case at hand. Generally, larger, more complex examinations will require more detailed planning than smaller, simpler ones. The CFE's familiarity with the client/employer or the facts and circumstances of the case will also impact the amount of planning that is required.

The following questions might help the CFE understand the key issues to be addressed and develop a plan for performing an examination:

- What is the scope of the fraud examination?

- What is the budget?
- Are there adequate resources to conduct this examination?
- What is the line of authority?
- To whom should information be reported?
- What type of report, written or oral, does the client/employer expect? Will law enforcement assistance be necessary?
- What is the nature of the matter(s) at issue?
- Who are the relevant parties?
- What period is under review?
- What are the deadlines?
- Where are the information, documents and data pertinent to the examination located?
- Have any related fraud examinations ever been conducted at the relevant location?
- What other sites, entities, departments or regions might be involved?
- How long has the issue existed?
- If fraud is suspected, did it occur in an industry or location that has a history or culture of fraud?
- Has the organization been in compliance with reporting and regulatory requirements?
- Does the organization have a fraud policy?

The fact that a fraud examination might deviate in course from the CFE's initial plan does not necessarily indicate that the CFE failed to adequately plan the engagement. Fraud examinations, by their nature, are fluid. As new evidence emerges, the CFE might identify new targets and find it necessary to amend his fraud hypothesis and expand the scope of the engagement. Additionally, as the examination progresses the client/employer might make changes to the goals, resources, budgets or timelines of the examination. All of these factors can impact the planning of the engagement. Where changes occur that materially affect the conduct of the examination, the CFE should review his plan and make adjustments as necessary to account for the new information or new client/employer direction.

4. *Work performed by assistants and other professionals operating under the Certified Fraud Examiner's direction on a fraud examination shall be adequately supervised. The extent of supervision required varies depending on the complexities of the work and the qualifications of the assistants or professionals.*

Guidance

In some circumstances the CFE may use other professionals to assist him in a professional engagement. These might include assistants, other CFEs or anti-fraud professionals or third-party professionals with specialized skills. Regardless of who the CFE retains to assist him, the CFE is still ultimately responsible for providing competent services to the client/employer. Therefore, it is the CFE's responsibility to adequately supervise those who are working under his direction to make sure that competent services

are being delivered with due professional care. This Standard does not require a CFE to supervise individuals who are not working under his direct authority.

D. Understanding with Client or Employer

1. *At the beginning of a fraud examination, Certified Fraud Examiners shall reach an understanding with those retaining them (client or employer) about the scope and limitations of the fraud examination and the responsibilities of all parties involved.*

Guidance

At the outset of a fraud examination, the CFE should communicate with his client/employer to ensure that there is mutual understanding regarding the scope, expectations, subject matter, compensation, deliverables and other key issues concerning the examination. This Standard is designed to help preclude disagreements or confusion as to the nature, or the expected outcome, of an engagement.

Issues to be addressed in reaching an understanding about the scope and limitations of the fraud examination will vary, but might include the following:

- The matter to be investigated
- Timeliness or urgency of the engagement
- Compensation
- Requirements for status updates and ongoing communication
- Guidelines for the final report
- The format for the final report
- Confidentiality requirements
- Expertise or resources (e.g., equipment, software, etc.) required
- Supporting assistance, if any, needed from the client/employer
- Specific responsibilities of the member, client/employer and other parties involved in the engagement
- Scope of documents, witnesses and/or physical areas accessible to the CFE

As a matter of best practice it is suggested that CFEs document the understanding in a formal written contract or a client engagement letter. However, oral agreements are not prohibited by this Standard. Furthermore, it is recognized that in some circumstances it might not be practical to have a written understanding of the engagement. For example, CFEs who work in-house might not have any sort of formal agreement or engagement letter with their employer concerning their assignments. Nevertheless, when a CFE conducts a fraud examination based on an oral agreement or oral instructions from an employer, it is a good idea for the CFE document his understanding of the agreement or assignment and make reasonable efforts to communicate his understanding of the engagement to the client/employer.

2. *Whenever the scope or limitations of a fraud examination or the responsibilities of the parties change significantly, a new understanding shall be reached with the client or employer.*

Guidance

Standard III.D.1, discussed above, requires CFEs to reach an understanding with the client/employer at the outset of the engagement about the scope and limitations of the fraud examination and the parties involved, but the full scope of a fraud examination might not be entirely foreseeable at the beginning of the engagement. During the examination, new evidence might emerge or new facts might be uncovered that shift the scope or alter the responsibilities of those conducting the examination. For example, a CFE might find that the fraud being investigated is significantly larger than was originally anticipated and additional resources will be required to identify and recover all missing funds. Alternatively, the CFE might discover that the examination will require him to retain professionals with specialized skills who were not originally included in the plan of examination.

When new issues significantly change the scope or limitations of a fraud examination or the responsibilities of the parties, the CFE is required to reach a new understanding with the client/employer. This rule reflects the fact that the CFE provides services for the benefit of the client/employer. If the nature of those services or the expectations about the engagement significantly change, then the client/employer must be notified and must consent to the changes. For example, if the changes are likely to involve significantly increased costs, it would be unfair and could lead to a subsequent dispute if the CFE were to proceed without the client's consent.

This Standard only requires a new understanding for *significant* changes in scope, limitations or responsibilities. Generally speaking, changes likely to cause materially higher costs or materially longer engagements would be considered significant. Changes affecting other aspects of the examination — such as the suspects, the theories of wrongdoing, the makeup of the examination team, the investigative techniques to be employed or other factors — might or might not be deemed significant depending on the circumstances of the case. The key question is whether the changes are likely to be deemed material by the client.

Finally, this Standard does not require that the modified understanding with the client be in writing, or even that it be in the same format as the original understanding. However, as a matter of best practice it is advisable for CFEs to note in writing any significant changes to the scope of the engagement and to obtain the client/employer's written consent to those changes where possible. Where the CFE only receives oral consent from the client/employer, it is advisable for him to make a written record that the client/employer was notified of the changes, to note that the client/employer consented to the changes, and to note the CFE's understanding of any changes to the engagement.

E. Communication with Client or Employer

1. *Certified Fraud Examiners shall communicate to those who retained them (client or employer) significant findings made during the normal course of the fraud examination.*

Guidance

Proper communication with the client/employer is essential to the success of fraud examinations. Communication will help ensure that the CFE keeps the client/employer informed about the progress of the engagement and it will provide assurance to the client/employer that the CFE is performing his professional duties with competence and due care. CFEs should be mindful that they perform fraud examination services for the benefit of the client/employer, and therefore CFEs have a responsibility to keep the client/employer reasonably informed.

This Standard only requires the CFE to communicate *significant* findings from the fraud examination. The question of what is significant will depend on the facts of the engagement, and the CFE should use his best judgment to determine if a finding would be significant to the client/employer. A CFE will not be deemed to have violated this Standard for failing to convey insignificant or irrelevant findings made during the normal course of the fraud examination.

While this Standard only requires the CFE to communicate significant findings, members should still promptly comply with reasonable requests from client/employers for information about an examination, even if the CFE does not consider the information requested to be significant. For one thing, the fact that the client requests information indicates that the client might believe it is significant. Furthermore, under the duty of Integrity (see Section III.A), the CFE is expected to deal honestly and straightforwardly with client/employers, and under the Standard of Due Professional Care (see Section III.C) the CFE is expected to perform services diligently and with consideration for the best interests of the client/employer.

F. Confidentiality

1. *Certified Fraud Examiners shall not disclose confidential or privileged information obtained during the course of a fraud examination without the express permission of a proper authority or the lawful order of a court. This requirement does not preclude professional practice or investigative body reviews as long as the reviewing organization agrees to abide by the confidentiality restrictions.*

Guidance

In general, *confidential* information includes any information:

1. that is held by or concerns the client/employer, whether technical, business, financial or otherwise
2. that the client/employer discloses to the CFE or that the CFE obtains in the course of a professional engagement and
3. that the client/employer treats as confidential or secret, or which the client/employer does not make publicly available

Privileged information means information obtained within the context of a legally protected relationship that the law protects from forced disclosure. In the context of a fraud examination, the most likely privileges to exist are the legal professional privileges

that protect communications between professional legal advisors (e.g., solicitors, barristers, attorneys, etc.), their clients and, in some situations, third-party consultants hired to help provide legal advice to clients. The requirements for the application of these privileges vary among jurisdictions, but generally, if a CFE is retained by and working under the direction of an attorney, then certain communications made between the CFE and the client/employer or the attorney might be deemed privileged.

Due to the nature of fraud examinations, CFEs often will come into contact with confidential or privileged information of the client/employer. This Standard provides that CFEs may not disclose such information without “the express permission of a proper authority or the lawful order of a court.” Obviously, the most common “appropriate authority” is the client/employer itself, who owns the confidential information. A CFE should generally not disclose a client/employer’s confidential information without the client/employer’s consent or else he will have breached that client/employer’s trust and would likely be found to have violated this Standard.

There are, however, certain exceptions. The Standard specifically permits CFEs to turn over confidential or privileged information when compelled by a lawful court order to do so. In some circumstances the CFE may also be permitted to turn over confidential information if authorized by the law of that CFE’s jurisdiction — for example, if the CFE becomes aware of an ongoing fraud and is obligated by statute to report the crime. Similarly, if the CFE is ordered to turn over confidential information by a legislative or regulatory body, an investigative review board or another entity with the proper legal authority to compel the production, then the CFE is permitted to disclose the information.

When presented with a lawful order directing him to turn over the client/employer’s confidential information, a CFE must alert the client/employer unless directed otherwise by the body issuing the order. If the CFE is notified that the client/employer will make a legal challenge to the compelled production, then the CFE may delay in producing the information until the challenge has been settled, provided that the CFE’s delay does not violate the order.

Section IV. Standards of Examination

A. Fraud Examinations

- 1. Fraud examinations shall be conducted in a legal, professional and thorough manner. The Certified Fraud Examiner’s objective shall be to obtain evidence and information that is complete, reliable and relevant.*

Guidance

This Standard addresses the general duty CFEs owe to their client/employers to operate within the bounds of the law of their jurisdictions, to exhibit high standards of professionalism and to be thorough in the performance of their duties.

The requirement that a CFE should act in a legal manner is similar to Standard III.A.5, which states that CFEs “shall not commit criminal acts or knowingly induce other to do so.” The obligation to act legally under this Standard not only reinforces the rule that CFEs shall not commit criminal acts, but it serves to bar other types of illegal behavior as well. For example, suppose a CFE were to intentionally violate a suspect’s privacy or knowingly publish defamatory facts about a suspect or a client/employer. In many jurisdictions these would be considered civil, not criminal violations. While this type of tortious conduct is not covered by the prohibition against criminal acts in Standard III.A.5, it would constitute a violation of this Standard because the conduct would still be deemed illegal. Negligent conduct is not generally deemed to constitute illegal conduct under this Standard; the CFE must have acted intentionally, knowingly, recklessly or with gross negligence.

The requirement for CFEs to conduct fraud examinations in a professional manner is essentially a reiteration of Section III.C.1, which requires CFEs to exercise due professional care in the performance of their services. The CFE should diligently perform the fraud examination to the best of his ability, with consideration for the best interests of the client/employer and with at least the degree of professionalism that a client/employer should reasonably expect from professional in the CFE’s field.

The requirement that CFEs must conduct fraud examinations in a thorough manner is explained, in part, by the second sentence of the Standard, which states that the CFE’s objective should be to obtain evidence that is reliable, relevant and complete.

Evidence is *reliable* if it comes from a trustworthy or believable source. *Relevant evidence* is evidence that tends to make some fact at issue more or less likely than it would be without the evidence. Evidence that has no relationship to any of the issues in the case is irrelevant and should not be used or relied upon.

The idea of seeking out evidence and information that is *complete* means the CFE should make a reasonable effort to gather sufficient evidence or information to complete the engagement or assignment. The CFE must use his judgment and the direction of the client/employer to determine whether the evidence he has gathered is complete and the assignment has been fulfilled, taking into account all aspects of the engagement, including resource, time and budget limitations.

The fact that a CFE is not able to resolve specific questions posed by the client/employer in a case does not necessarily mean the CFE has failed to gather complete evidence. For example, a CFE might be retained to identify the source of stolen funds from a client company. Suppose that after reviewing relevant documents, interviewing witnesses and suspects, discussing the matter with management and taking other reasonable steps, the CFE determines that the fraudster cannot be identified. The CFE is still in compliance with the Standards because he has made a reasonable effort to complete the engagement.

Finally, the CFE’s obligation to gather complete evidence extends only to the scope of the fraud examination — he is not obligated to collect evidence or follow leads that are

outside the scope of the examination agreed upon by the CFE and the client/employer. However, CFEs should be mindful that under Section III.E.1 they are required to communicate to the client/employer any significant findings made during the course of the fraud examination. So if the CFE encounters a new lead or piece of evidence that is outside the scope of the examination, and if, in the CFE's judgment, the lead or piece of evidence would be significant to the client/employer, then it should be disclosed. After disclosure, it is up to the client/employer to determine if the scope of the examination should be expanded.

2. *Certified Fraud Examiners shall establish predication and scope priorities at the outset of a fraud examination and continuously reevaluate them as the examination proceeds. CFEs shall strive for efficiency in their examination.*

Guidance

According to this Standard, members should not conduct fraud examinations without proper predication. As used here, *predication* is the totality of circumstances that would lead a reasonable, professionally trained and prudent individual to believe a fraud has occurred, is occurring or will occur.

The predication requirement applies only to the conduct of investigatory fraud examinations and does not bar CFEs from accepting other forms of engagements in circumstances where predication is lacking. For example, predication is not required for a CFE to conduct a risk assessment, provide consulting services or conduct a non-forensic internal or external audit.

This Standard also requires the CFE to identify the scope priorities of a fraud examination at its outset. Sections III.D.1 and 2 of the Standards require the CFE to reach an understanding with the client/employer about the scope and limitations of the fraud examination and to communicate changes as the fraud examination progresses. In order to do so, the CFE must first clearly understand what he believes the scope of the examination to be. The purpose of this Standard is to direct the CFE to constantly evaluate and identify the scope priorities of the examination and the underlying predication for the examination from the time it begins until its conclusion.

The CFE is obligated to communicate significant changes in the scope of the fraud examination to the client/employer (see Standard III.D.2). If new predication or scope changes are likely to cause significant changes to the examination — particularly increased costs or delayed deliverables — then the client/employer must consent to the changes before the CFE proceeds.

3. *Certified Fraud Examiners shall be alert to the possibility of conjecture, unsubstantiated opinion and bias of witnesses and others. CFEs shall consider both exculpatory and inculpatory evidence.*

Guidance

The requirement that CFEs must be “alert to the possibility of conjecture, unsubstantiated opinion and bias of witnesses and others” requires the CFE to exercise reasonable skepticism when conducting a fraud examination, particularly when interviewing witnesses and suspects. The CFE should maintain an open mind and objectively view the information provided by witnesses and suspects. The CFE should not begin any interview by assuming that a witness is either honest or dishonest, but instead should critically evaluate the information provided by that witness. The CFE should not accept questionable or illogical statements at face value, but instead should seek to corroborate such claims with other evidence before relying on them. The CFE should be cognizant of the potential motives that some witnesses or suspects might have for lying, which might include motivation to:

- Cover up his own wrongdoing or deflect suspicion away from himself.
- Act on a grudge he has against the suspected wrongdoer.
- Conceal information to protect others from getting in trouble.
- Protect his own career by not revealing information that could offend or implicate his superiors.
- Avoid confrontation.
- Fabricate reasons for terminating the suspected wrongdoer.
- See the perceived perpetrators suffer punishment.

The second part of this Standard requires CFEs to consider both inculpatory and exculpatory evidence during the fraud examination. *Inculpatory evidence* is evidence that helps establish that a person is guilty or at fault, while *exculpatory evidence* tends to clear an individual from fault or guilt. For example, in an inventory theft case, records showing that an inventory manager signed for the receipt of missing merchandise, which was subsequently resold to a third party, might tend to inculcate the inventory manager. However, travel records showing that the inventory manager was out of town on business when the thefts occurred would tend to exculpate the manager.

The requirement that CFEs consider both inculpatory and exculpatory evidence is intended to help ensure that CFEs perform fraud examinations objectively and without bias. A CFE is permitted to develop a hypothesis of how a fraud occurred and who is responsible for committing it, but he still must objectively evaluate the evidence that is gathered to see whether the hypothesis is proved or disproved. For instance, if the CFE were to only seek out or retain evidence tending to show Suspect A had committed a fraud, while ignoring evidence that pointed to another suspect or tended to show Suspect A was not responsible, then he would be found to have violated this Standard.

B. Evidence

1. *Certified Fraud Examiners shall endeavor to establish effective control and management procedures for documents, data and other evidence obtained during the course of a fraud examination. CFEs shall be cognizant of the chain of custody including origin, possession and disposition of relevant evidence and material. CFEs shall strive to preserve the integrity of relevant evidence and material.*

Guidance

This Standard requires CFEs to take appropriate steps to safeguard and preserve relevant evidence collected during fraud examinations, and to maintain effective chain of custody over such evidence. This is important for two primary reasons: (1) the evidence a CFE gathers might be useful to the client/employer or might even belong to the client/employer, and thus should be preserved; and (2) fraud examinations typically have the potential to result in legal action, including civil or criminal trials, so CFEs should strive to maintain evidence in such a way that it will be admissible in future legal proceedings.

The first sentence in this Standard provides that members shall strive to institute “effective control and management procedures for documents.” The determination of what constitutes an “effective” control and management procedure will depend on the facts of the case. Large, complex investigations may require very detailed procedures for managing documents and evidence, while some non-investigatory examinations (such as fraud risk assessments or internal control reviews) may not require the gathering of any evidence at all. Generally speaking, the CFE’s goal should be to preserve and safeguard relevant evidence in a way that allows the evidence to be located and retrieved with reasonable effort given the circumstances of the engagement.

The second part of this Standard requires CFEs to “be cognizant of the chain of custody including origin, possession and disposition of relevant evidence and material. Certified Fraud Examiners shall strive to preserve the integrity of relevant evidence and material.” This reflects the notion that evidence gathered in a fraud examination might one day be required at a trial or other legal proceeding. Although rules of evidence vary depending on the jurisdiction, typically a piece of evidence will not be accepted unless its chain of custody can be established.

The *chain of custody* is both a process and a document that memorializes who has had possession of an object and what they have done with it. Essentially, the chain of custody records the transactions of possession from initial contact through the end of the case and up through litigation. Establishing the chain of custody for a document demonstrates its *authenticity* (i.e., the document is in fact what the party offering the document says it is), and it helps ensure that evidence has not been altered or changed from the time it was collected through production in court.

CFEs should take reasonable steps and adopt appropriate procedures to record and track the origin, possession and disposition of relevant evidence they gather during an examination so that they can demonstrate the chain of custody for that evidence. It is the CFE’s responsibility to determine what constitutes reasonable procedures depending on the factors of the examination.

This Standard only requires CFEs to preserve the integrity of *relevant* evidence and material. As noted earlier, *relevant evidence* is evidence that tends to make some fact at

issue more or less likely than it would be without the evidence. Evidence that has no relationship to any of the issues in the case is irrelevant.

The fact that evidence gathered by a CFE is ultimately deemed inadmissible by a court of law does not necessarily mean that the CFE has violated this Standard. The Standard requires that CFEs must be cognizant of the chain of custody and must *strive to* preserve the integrity of relevant evidence and material. If a CFE makes a reasonable effort to preserve the chain of custody for relevant evidence given the facts and circumstances of the case, then he will not be deemed to have violated this Standard even if the evidence is ultimately ruled inadmissible at trial.

2. *Certified Fraud Examiners' work product may vary with the circumstances of each fraud examination. The extent of documentation shall be subject to the needs and objectives of the client or employer.*

Guidance

This Standard is intended to remind members that their work product should be tailored to the specifics of each fraud examination and to the needs of each client/employer. The scope, resources and deliverables of fraud examinations might vary significantly from case to case. CFEs should strive to communicate clearly with client/employers throughout the course of examinations to make sure that their expectations are met.

What constitutes adequate documentation and work product is something that can vary greatly from case to case. In some fraud examinations, CFEs might produce voluminous records, boxes of evidence, detailed diagrams and so on, while in other cases CFEs might only be called upon to produce a brief report.

Also, these Standards do not mandate any particular form for the CFE's work product, nor do they specify the amount of documentation that is to be produced in a fraud examination. The key for the CFE is to ensure that his work product and documentation is reasonable given all the factors of the case, including but not limited to the agreed-upon scope, the needs and objectives of the client/employer, the time constraints of the examination and the client/employer's budget.

Section V. Standards of Reporting

A. General

1. *Fraud examination reports may be oral or written, including fact witness and/or expert witness testimony, and may take many different forms. There is no single structure or format that is prescribed for a CFE's report; however, the report should not be misleading.*

Guidance

This Standard provides a great deal of latitude regarding the form of fraud examination reports. CFEs may choose to present their reports orally or in writing (in fact, the

Standard does not require that a fraud examination report be produced at all, although typically a report is required in most fraud examinations) and there is no requirement as to the structure or format the report should take.

The only specific requirement expressed in this Standard is that the report should not be misleading. Regardless of the report's format, the CFE is obligated to make a clear, accurate report so that the client/employer will not be confused or deceived about the CFE's findings and conclusions.

CFEs should be mindful that other Standards also have an effect on reporting obligations. In addition to Standards V.B.1 and 2 below, which address the content of the report, the following Standards might impact the CFE's reporting obligations:

- Standard III.A.3 requires that CFEs shall maintain objectivity in discharging their professional responsibilities. Thus, the fraud examination report must be objective and free from bias.
- Standard III.C.1 states that CFEs must exercise due professional care in the performance of their service, so the report must be prepared to the best of the CFE's ability with diligence, critical analysis and professional skepticism.
- Standard III.C.2 mandates that a CFE's conclusions must be supported with evidence that is relevant, competent and sufficient. Obviously, this applies to any conclusions contained in a fraud examination report.
- Standard III.E.1 says that CFEs must communicate significant findings made in the fraud examination to the client/employer, so a report might be mandated in some cases (though as noted earlier the report may be either written or oral, and it may be as formal or informal as the CFE and client/employer agree upon).

While no reporting structure is required by these Standards, it is advisable for the CFE and client/employer to agree in advance of the examination about the type of report to be produced, along with other anticipated deliverables. This will help prevent misunderstandings about the expectations for the CFE later in the engagement.

B. Report Content

1. *Certified Fraud Examiners' reports shall be based on evidence that is sufficient, reliable and relevant to support the facts, conclusions, opinions and/or recommendations related to the fraud examination. The report shall be confined to subject matter, principles and methodologies within the member's area of knowledge, skill, experience, training or education.*

Guidance

In general, fraud examination reports should establish and document relevant facts, reach appropriate conclusions based on the available evidence and provide information to help the client/employer determine an appropriate course of action. This Standard requires that fraud examination reports contain evidence that is sufficient, reliable and relevant to support the facts, conclusions, opinions and recommendations related to the fraud examination.

Relevant evidence is evidence that tends to make some fact at issue more or less likely than it would be without the evidence. Evidence that has no relationship to any of the issues in the case is irrelevant and generally should not be relied upon.

Evidence is *reliable* if it comes from a trustworthy or believable source. Evidence is *sufficient* to support a CFE's findings and conclusions where the weight of the evidence is such that a reasonable professional could draw the same or a similar conclusion to that of the member. As noted in the commentary to Section III.C.2, the fact that two professionals might draw different conclusions based on the same evidence does not necessarily mean that one of them has acted on insufficient evidence.

This Standard also states that examination reports should "be confined to subject matter, principles and methodologies within the member's area of knowledge, skill, experience, training or education." Standard III.B.1 prohibits members from accepting any assignment when they lack professional competence to perform the services required. Likewise, a CFE may not present facts or conclusions in a report that are outside the scope of the CFE's knowledge, skills, experience, training or education, nor is a CFE permitted to draw upon subject matter, principles or methodologies in the report when the CFE lacks professional competence in those areas.

A CFE may, however, meet the knowledge, skill, experience, training and education requirements necessary for the report through consultation or referral with other professionals who possess the requisite competence in a particular area or discipline. For example, a CFE who lacks any training or skills in data forensics may still produce a fraud examination report on a case that involved the recovery of data from a suspect's computer, provided that he consulted with or retained a professional with expertise in data recovery during the engagement and the report accurately reflects the facts, conclusions, opinions or recommendations provided by the expert.

2. *No opinion shall be expressed regarding the legal guilt or innocence of any person or party.*

Guidance

Standard III.C.2 permits CFEs to draw reasonable conclusions in a fraud examination if those conclusions are supported by evidence that is relevant, competent and sufficient. However, this Standard, which is taken directly from Article Five of the ACFE Code of Professional Ethics, makes clear that those conclusions may not include the CFE's opinion regarding the legal guilt or innocence of any person or party.

The reason for this rule is to prevent the CFE from inserting himself into the role of the judge or jury. The CFE's job in a fraud examination is to present evidence and draw reasonable conclusions from that evidence. But the CFE should draw a clear line between a report that essentially says, "Here is the evidence and the conclusions that can be drawn from it," and one that steps over the line and says, "Suspect A is guilty of committing fraud."

If a person is guilty (or innocent) of a crime is not a decision for the CFE to make. That determination must be made by a judge or jury. The CFE might adamantly believe that a suspect has committed fraud, but until that suspect has been convicted by a court of law, he is not guilty.

The CFE may still draw reasonable conclusions about a person's misconduct without violating this Standard. For example, it is permissible for a fraud examination report to include conclusions that a person misappropriated cash, misrepresented a transaction, concealed funds and so on. Provided that it has a reasonable basis in fact, any conclusion of this sort that focuses on a person's conduct, rather than on his legal guilt or innocence, is permissible.

A CFE's report may also contain evidence and conclusions relating to every element of a particular crime. For example, suppose a criminal fraud statute has four elements:

- (1) a material false statement
- (2) made with knowledge of its falsity
- (3) which was relied upon by a victim and
- (4) which caused harm to the victim

Assuming the evidence supports them, the CFE would be permitted to draw conclusions that a suspect made a material false statement, that the suspect knew the statement was false, that the victim relied upon the suspect's statement and that the victim suffered harm as a result. All of these conclusions focus on the conduct of the suspect or the victim and could be reasonably supported by the facts of the case. But this is where the CFE's conclusions must stop. He is not permitted to then give the opinion that the suspect is guilty of the crime of fraud, because that decision must be left to the judicial system.

Exhibit 42

13 DECEMBER 2017

COMPILATION OF THE REFERENCE MATERIAL RELIED UPON BY THE CPE PROVIDER IN CONNECTION WITH THE EVALUATIONS WHICH ARE THE SUBJECT OF PENDING RECONSIDERATION REQUESTS

PREPARED FOR JONES DAY

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I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization to conduct the CPE Process Review.

¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁶ See *id.* The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

This report addresses Scope 3 of the CPE Process Review. FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),⁹ 14-32 (.INC),¹⁰ 14-33 (.LLP), 16-3 (.GAY),¹¹ 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

II. Executive Summary

In connection with Scope 3, FTI analyzed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation. The CPE Provider's working papers were comprised of information inputted by the CPE Provider into a database, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, reference material,¹² and every draft of each CPE report.

In the course of its review and investigation, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in

⁹ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

¹⁰ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

¹¹ After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as "GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

¹² The CPE Provider's working papers associated with some evaluations contained the actual reference material relied upon by the CPE Provider, as compared to citations to reference material that appeared in the other working papers.

the CPE Provider's working papers to the extent that such material was not otherwise cited in the final CPE report.

Of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI's investigation, FTI finds that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider's working papers associated with the first .GAY evaluation.

Ultimately, FTI observed that the CPE Provider routinely relied upon reference material in connection with the CPE Provider's evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4). Each example of the reference material identified by FTI is attached to this report in Appendix A. FTI observed no citations to reference material in connection with the CPE Provider's

evaluation of the Registration Policies criterion (Criterion 3) for any of the eight relevant evaluations.¹³

III. Methodology

In Scope 3 of the CPE Process Review, FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),¹⁴ 14-32 (.INC),¹⁵ 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the BGC.¹⁶ Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC recommendations and/or determinations, as well as the Board's actions associated with these requests.¹⁷

¹³ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁴ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

¹⁵ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

¹⁶ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

¹⁷ *Id.*

Several requestors made claims that are relevant to Scope 3 of the CPE Process Review.

In particular, as noted in Mr. Disspain's letter of 26 April 2017:

[C]ertain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE Provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs.¹⁸

To complete its investigation, FTI first reviewed publicly available documents pertaining to CPE to gain a comprehensive understanding of the relevant background facts concerning CPE. The publicly available documents reviewed by FTI, and which informed FTI's investigation for Scope 3, are identified in FTI's reports addressing Scope 1 and Scope 2 of the CPE Process Review. FTI also interviewed relevant ICANN organization and CPE Provider personnel. These interviews are described in further detail in FTI's reports addressing Scopes 1 and 2 of the CPE Process Review.

In the context of Scope 3, following FTI's review of relevant background materials and interviews of relevant personnel, FTI reviewed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation.

FTI then identified each instance where the CPE Provider referenced research and provided a citation to that research in the eight relevant evaluations. FTI also identified each instance where the CPE provider referenced research but did not include citations to such research in the final CPE report. Finally, FTI identified each additional instance where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. For each reference material

¹⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified, FTI catalogued the CPE criterion and sub-criterion with which the reference material was associated.

In instances where the CPE Provider's final CPE report referenced research but did not provide a supporting citation, FTI undertook a review of the CPE Provider's working papers to determine if the referenced research was reflected in those materials. For example, if the final CPE report referenced research without providing a supporting citation in connection with sub-criterion 2-A, Nexus, FTI then reviewed the working papers for the relevant evaluation and determined if those materials reflected research associated with sub-criterion 2-A, Nexus. If the working papers provided citations to research undertaken in connection with the sub-criterion at issue, i.e., Nexus in this example, then FTI determined that the citations corresponded to the research referenced without citation in the final CPE report.¹⁹

FTI did not rely upon the substance of the reference material. Nor did FTI assess the propriety or reasonableness of the research undertaken by the CPE Provider. Both analyses are beyond the purview of Scope 3.

FTI defined "reference material" in a manner consistent with the CPE Panel Process Document.²⁰ Specifically, according to the CPE Panel Process Document, the CPE

¹⁹ The reference materials that were recorded in the working papers are URLs to websites that the CPE Provider visited or the URLs of research queries conducted by the CPE Provider. The working papers did not include a static rendering of webpages as they existed at the time of access by the CPE Provider. At times, FTI observed that some URLs cited in the CPE Provider's working papers were no longer active, which is not surprising because FTI received the CPE Provider's working papers long after the CPE Provider had completed the CPE process. As a result, FTI is not able to determine if the links were not active at the time they were accessed by the CPE Provider or if they were de-activated after the CPE Provider's evaluation process concluded. Similarly, in some instances, FTI observed that the URLs cited in the working papers contained typographical errors; however, FTI is not able to determine if the typographical errors appeared in the URLs at the time that the URLs were accessed by the CPE Provider or if they were incorrectly cited by the CPE Provider.

²⁰ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>). The CPE Panel Process Document explains that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions. The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including

Provider’s evaluators provided individual evaluation results based on their assessment of the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, application materials, and “secondary research without any influence from core team members.”²¹ Further, “[i]f the core team so decides, additional research may be carried out to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures.”²² FTI considered both the evaluators’ “secondary research” and any “additional research” conducted at the request of the core team to be within scope.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.²³ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.²⁴ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all

scoring rubrics, definitions of key terms, and specific questions to be scored. See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. The methodology that the CPE Provider undertook to evaluate the CPE criteria is further detailed in FTI’s report addressing Scope 2 of the CPE Process Review.

²¹ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

²² *Id.*

²³ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

²⁴ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).²⁵

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.²⁶ The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their “bible.” Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, "Is the community clearly delineated?"; the same question appears in the CPE Guidelines. The “Answer” field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a "yes" or "no" response. In the “Evidence” field, the evaluator provided his/her reasoning for his/her answer. In the “Source” field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition.

FTI observed that reference material was cited in the “Source” field of the database, spreadsheets generated by the Project Coordinator and core team for each evaluation and which reflect the scoring decisions, memoranda drafted by the evaluators, draft

²⁵ *Id.*

²⁶ <https://newgtlds.icann.org/en/applicants/agb>.

reports, and in the final CPE reports. FTI observed that the Project Coordinator at times requested that the member of the core team responsible for drafting the CPE report incorporate citations to the evaluator(s)' reference material into the draft report to strengthen the rationale with respect to a particular point.

FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.²⁷ Further, FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider.

V. The CPE Provider Performed Research in the Eight Evaluations Which are the Subject of Pending Reconsideration Requests.

With respect to the eight evaluations which are the subject of pending Reconsideration Requests, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider's working papers to the extent such materials were not otherwise cited in the final CPE report.

²⁷ See Applicant Guidebook Module 4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.")
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

The following chart provides the total number of citations to research or reference material in the final CPE report and working papers for each of the eight relevant evaluations, broken down by relevant CPE criterion:

String	<u>Criterion 1:</u> Community Establishment	<u>Criterion 2:</u> Nexus between Proposed String and Community	<u>Criterion 3:</u> Registration Policies	<u>Criterion 4:</u> Community Endorsement	Additional Research Materials Associated with String	Total
.LLC	18	5	0	11	2	36
.INC	13	4	0	6	0	23
.LLP	21	8	0	9	1	39
.GAY (Reevaluation)	27	51	0	9	1	88
.MUSIC (DotMusic Ltd.)	20	2	0	1	0	23
.CPA (Australia)	26	18	0	2	0	46
.HOTEL	42	3	0	12	6	63
.MERCK KGaA	6	8	0	2	0	16
Total	173	99	0	52	10	334

Below, FTI lists each reference material relied upon by the CPE Provider for the eight relevant evaluations, organized by criterion and sub-criterion. By comparing the final CPE reports to the CPE Provider’s working papers, FTI determined that some of the reference material that the CPE Provider relied upon during the CPE process was not cited in the final CPE report, but instead was only reflected in the CPE Provider’s working papers. As a result, below FTI identifies the reference material reflected in the final CPE reports as well as the reference material reflected in the working papers associated with those evaluations.

As detailed below, of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL,

and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider’s working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance, in the second .GAY final CPE report, FTI observed that while the final report referenced research, the citations supporting such research were not included in the final report or the working papers for the second .GAY evaluation. However, based on FTI’s review of the CPE Provider’s working papers associated with the first .GAY evaluation, FTI finds that the citations supporting the research referenced in the second .GAY final CPE report may have been cited in those materials.

Brief Note on CPE Criteria Definitions

FTI’s report addressing Scope 2 of the CPE Process Review extensively details the CPE criteria and FTI incorporates that discussion for purposes of this report. For the reader’s benefit, the following summary is provided:

- **Criterion 1: Community Establishment.** The Community Establishment criterion evaluates “the community as explicitly identified and defined according to statements in the application.”²⁸ The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, “Delineation;” and (ii) 1-B, “Extension.”²⁹

²⁸ *Id.*

²⁹ *Id.*

- **Criterion 2: Nexus between Proposed String and Community.** The Nexus criterion evaluates “the relevance of the string to the specific community that it claims to represent.”³⁰ The Nexus criterion is measured by two sub-criterion: (i) 2-A, “Nexus”; and (ii) 2-B, “Uniqueness.”³¹
- **Criterion 3: Registration Policies.** The Registration Policies criterion evaluates the registration policies set forth in the application on four elements, each of which is worth one point: (i) 3-A, “Eligibility”; (ii) 3-B, “Name Selection”; (iii) 3-C, “Content and Use”; and (iv) 3-D, “Enforcement.”³²
- **Criterion 4: Community Endorsement.** The Community Endorsement criterion evaluates community support for and/or opposition to an application.”³³ The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, “Support”; and (ii) 4-B, “Opposition.”³⁴

CPE Reports Subject to Pending Reconsideration Requests

As noted above, the following evaluations are the subject of Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),³⁵ 14-32 (.INC),³⁶ 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). The analysis below addresses each evaluation in the foregoing

³⁰ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³¹ *Id.* at Pgs. 4-12 and 4-13.

³² See *id.* at Pgs. 4-14-4-15.

³³ See *id.* at Pgs. 4-17.

³⁴ *Id.*

³⁵ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>

³⁶ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

order, which is the order in which the relevant Reconsideration Requests were submitted.

A. .LLC

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-A, Delineation.³⁷ The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel’s research, there is no evidence of LLCs from different sectors acting as a community.³⁸

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”³⁹

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

³⁷ .LLC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

³⁸ *Id.*

³⁹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise reflected in the final CPE report: 1) the Wikipedia page for “Limited Liability Company,”⁴⁰ 2) the “LLC” webpage on www.sba.com,⁴¹ and 3) the “corporation” webpage on www.sba.com.⁴² Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion, 1-A, Delineation, that were not otherwise cited in the final CPE report.⁴³

⁴⁰ http://en.wikipedia.org/wiki/Limited_liability_company. According to Wikipedia: About, “Anyone with Internet access can write and make changes to Wikipedia articles, except in limited cases where editing is restricted to prevent disruption or vandalism.” See <https://en.wikipedia.org/wiki/Wikipedia:About>. Further, “Unlike printed encyclopedias, Wikipedia is continually created and updated.” *Id.* For purposes of this report, FTI referenced Wikipedia pages as they appear now and not as they may have appeared at the time of review by the CPE Provider.

⁴¹ <http://www.sba.com/legal/llc/>.

⁴² <http://www.sba.gov/content/corporation>.

⁴³ They are:

http://en.wikipedia.org/wiki/Limited_liability_company;

<http://www.sba.com/legal/llc/>;

<http://www.sba.gov/content/corporation> (cited two times);

<http://dotregistry.org/>;

<http://dotregistry.org/about/who-is-dot-registry>;

<http://dotregistry.org/corporate-tlds/llc-domains> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nass-committees/nassbusiness-services-committee/> (cited two times and referenced as “Nass Business Services Committee website” one time without providing the URL) (This is no longer an active link); and

<http://www.llc-reporter.com/16.htm> (This is no longer an active link).

1-B Extension

The final CPE report makes two references to the Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-B, Extension.⁴⁴ The final report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel’s research, there is no evidence of LLCs from different sectors acting as a community.⁴⁵

Although this statement appears in both the “Size” and “Longevity” sub-sections of the CPE Panel’s discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel’s reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Company,”⁴⁶ 2) the “LLC” webpage on

⁴⁴ .LLC CPE Report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁴⁵ *Id.*

⁴⁶ http://en.wikipedia.org/wiki/Limited_liability_company.

www.sba.com,⁴⁷ and 3) the “corporation” webpage on www.sba.com.⁴⁸ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that were not otherwise cited in the final CPE report.⁴⁹

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report makes one reference to the Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 2-A, Nexus.⁵⁰ The final report states—without indicating the source of the information—that “[w]hile the string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in other jurisdictions

⁴⁷ <http://www.sba.com/legal/llc/>.

⁴⁸ <http://www.sba.gov/content/corporation>.

⁴⁹ They are:

<http://www.llc-reporter.com/16.htm> (This is no longer an active link); and

<http://www.sba.gov/content/limited-liability-companyllc> (This is no longer an active link).

⁵⁰ .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>). FTI understands that in Reconsideration Request 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), the Requestor made the following claim: “The Panel also states that its decision to not award any points to the .LLC Community Application for 2-A Nexus is based on “[t]he Panel’s research [which] indicates that while other jurisdictions use LLC as a corporate identifier, their definitions are quite different and there are no other known associations or definitions of LLC in the English language.” Reconsideration Request 14-30 (<https://www.icann.org/en/system/files/files/request-dotregistry-redacted-25jun14-en.pdf>), Pg. 7. The language the Requestor quoted from the CPE report is contained in a block quote that the CPE report states came from the “application documentation,” and drafts of the report indicate that the block quote originally said “Our research indicates that” .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf> and drafts). FTI therefore finds it reasonable to conclude that the statement references the *applicant’s* research, not the Panel’s research.

(outside the US).⁵¹ The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”⁵² This requirement is a component of sub-criterion 2-A, Nexus.⁵³

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion. Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Wikipedia page for LLCs,⁵⁴ 2) a “Web search on [REDACTED],” and 3) the “International equivalents” sub-page for the Wikipedia page for LLCs.⁵⁵ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

⁵¹ .LLC CPE Report Pg. 5 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁵² See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵³ See *id.*

⁵⁴ http://en.wikipedia.org/wiki/Limited_liability_company.

⁵⁵ http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

Including the citations listed above, the working papers reflect three references to research or reference material for this sub-criterion, which may be related to the research discussed in the final CPE report.⁵⁶

2-B Uniqueness

The final CPE report does not contain any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.⁵⁷

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

⁵⁶ They are:

http://en.wikipedia.org/wiki/Limited_liability_company; and

http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”); this document may relate to the statement in the final CPE report that LLC “is used in other jurisdictions (outside the US).”

FTI notes that the CPE Provider referenced a “Web search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

⁵⁷ The working papers cite:

http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents in a discussion of Uniqueness (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not contain any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect ten references to research or reference material for this sub-criterion.⁵⁸

4-B Opposition

The final CPE report does not contain any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers reflect one reference to research or reference material for this sub-criterion.⁵⁹

Additional Research Materials Associated with .LLC

The working papers include two documents not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLC CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.⁶⁰

⁵⁸ They are:

http://icannwiki.com/index.php/Dot_Registry_LLC;

Six references to <http://dotregistry.org/> or to the “Applicant website” without providing the full URL. FTI included each reference to the “Applicant website” as one of the ten references to research in this sub-criterion.

FTI notes that the CPE Provider made three references to “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for these searches. FTI included each of these searches as one of the ten references to research in this sub-criterion.

⁵⁹ FTI notes that the CPE Provider referenced the “Applicant website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as the one reference to research in this sub-criterion.

⁶⁰ The documents are:

A one-page Adobe PDF file named “businessRegisterStatisticsFeb2014.pdf” containing weekly data for the month of February, 2014 concerning registrations, liquidations, and dissolutions of companies

B. .INC

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.⁶¹ The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community.⁶²

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”⁶³

Because the final CPE report does not provide citations supporting the CPE Provider’s research, FTI analyzed the CPE Provider’s working papers in an effort to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider’s working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following

in the United Kingdom. This document may relate to the CPE Provider’s assertion, in sub-criterion 2-A, that “[t]he [LLC] corporate identifier is used in other jurisdictions (outside the US).”

A Microsoft Excel file named “Orbis_Export_1 (LLC).xls” containing data about the number of companies and their operating revenue in each of over 100 countries for the “last avai[able] year.”

⁶¹ .INC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

⁶² *Id.*

⁶³ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the “corporation” page for the United States Small Business Association,⁶⁴ and 2) the website for the National Association of Secretaries of State.⁶⁵ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers reflect eight references to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.⁶⁶

1-B Extension

The final CPE report makes two references to the CPE Panel’s research, but does not provide citations or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.⁶⁷ The final CPE report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research

⁶⁴ <http://www.sba.gov/content/corporation>.

⁶⁵ <http://www.nass.org/>.

⁶⁶ They are:

<http://www.companieshouse.gov.uk/links/usaLink.shtml> (cited three times);

<http://www.sba.gov/content/corporation> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nasscommittees/nass-business-servicescommittee/> (This is no longer an active link).

FTI notes that the CPE Provider referenced “[t]he NASS website . . . section on corporate registration” in the working papers. The working papers do not provide a full citation or identify the URL for the website. FTI included this website as one of the eight references to research in this sub-criterion.

⁶⁷ .INC CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel's research, there is no evidence of INCs from different sectors acting as a community.⁶⁸

Although this statement appears in both the "Size" and "Longevity" sub-sections of the CPE Panel's discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel's reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the referenced research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider's working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the "corporation" page for the United States Small Business Association,⁶⁹ and 2) the website for the National Association of Secretaries of State.⁷⁰ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.⁷¹

⁶⁸ *Id.*

⁶⁹ <http://www.sba.gov/content/corporation>.

⁷⁰ <http://www.nass.org/>.

⁷¹ They are:
<http://www.companieshouse.gov.uk/links/usaLink.shtml>; and

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain two citations to research or reference material.⁷²

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material relating to this sub-criterion.⁷³

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

<http://en.wikipedia.org/wiki/Corporation>.

⁷² They are:

http://en.wikipedia.org/wiki/Types_of_business_entity; and
<http://en.wikipedia.org/wiki/Inc>.

⁷³ They are:

http://en.wikipedia.org/wiki/Types_of_business_entity; and
<http://en.wikipedia.org/wiki/Inc>.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain six citations to research or reference material for this sub-criterion.⁷⁴

4-B Opposition

Neither the final CPE report nor the working papers reflect any reference to research or reference material for sub-criterion 4-B, Opposition.

C. .LLP

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the Panel's research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.⁷⁵ The final report states that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on

⁷⁴ <http://www.companieshouse.gov.uk/links/usaLink.shtml>;
http://icannwiki.com/index.php/Dot_Registry_LL_C;
<http://dotregistry.org/> (cited three times); and
<https://www.cscglobal.com/global/web/csc/home>.

⁷⁵ .LLP CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

the Panel's research, there is no evidence of LLPs from different sectors acting as a community.⁷⁶

The CPE Provider is referring to the Applicant Guidebook's requirement that the community demonstrate "an awareness and recognition of a community among its members."⁷⁷

Because the final CPE report does not provide citations supporting the CPE Provider's research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider's working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for "Limited Liability Partnership" (specifically, the sub-page for "United States"),⁷⁸ and 2) the "LLP" webpage on www.sba.com.⁷⁹ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain eleven citations to research or reference material for this sub-criterion.⁸⁰

⁷⁶ *Id.*

⁷⁷ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁷⁸ http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States.

⁷⁹ <http://www.sba.com/legal/llp/>.

⁸⁰ They are:

<http://www.nass.org/nass-committees/nass-business-servicescommittee/> (cited two times) (This is no longer an active link);

<http://dotregistry.org/about/who-is-dot-registry> (cited two times);

<http://dotregistry.org/>;

1-B Extension

The final CPE report makes two references to the Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.⁸¹ The final report states twice that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on the Panel’s research, there is no evidence of LLPs from different sectors acting as a community.⁸²

Although this statement appears in both the “Size” and “Longevity” sub-sections of the CPE Panel’s discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel’s reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were

<http://www.biztree.com/company/>;
http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States (cited two times);
http://en.wikipedia.org/wiki/Limited_liability_partnership;
<http://www.sba.com/legal/llp/>; and
<http://dotregistry.org/corporate-tlds/llp-domains>.

⁸¹ .LLP CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

⁸² *Id.*

not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Partnership” (specifically, the sub-page for “United States,”⁸³ and 2) the “LLP” webpage on www.sba.com.⁸⁴ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain seven citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.⁸⁵

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not directly reference any research or reference material for sub-criterion 2-A, Nexus, but it states—without indicating the source of the information—that “[t]he applied-for-string (.LLP) over-reaches substantially . . . [because it] captures a wider geographical remit than the community has, as the corporate identifier is used in Poland, the UK, Canada and Japan, amongst others.”⁸⁶ The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching

⁸³ http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States.

⁸⁴ <http://www.sba.com/legal/llp/>.

⁸⁵ They are:

http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States (cited two times);

http://en.wikipedia.org/wiki/Limited_liability_partnership;

<http://www.sba.com/legal/llp/> (cited two times);

<http://www.biztree.com/?a=biztree&s=google&c=ustop&gclid=CJPnqb6SwL0CFUNo7Aodtl8A8g>; and <https://www.google.com/search> Confidential Business Information

⁸⁶ .LLP CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

substantially beyond the community.”⁸⁷ This requirement is a component of sub-criterion 2-A, Nexus.⁸⁸

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Applicant’s website,⁸⁹ 2) the Wikipedia page for LLPs (cited three times),⁹⁰ 3) a British government webpage answering Frequently Asked Questions about LLPs,⁹¹ and 4) a Google search for **Confidential Business Information**.⁹² Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

⁸⁷ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸⁸ See *id.*

⁸⁹ <http://dotregistry.org/corporate-tlds/llp-domains>.

⁹⁰ http://en.wikipedia.org/wiki/Limited_liability_partnership.

⁹¹ <http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>.

⁹² <https://www.google.com/search> **Confidential Business Information**

Including the citations listed above, the working papers contain six citations to research or reference material for this sub-criterion.⁹³

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.⁹⁴

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect nine references to research or reference material.⁹⁵

⁹³ They are:

http://en.wikipedia.org/wiki/Limited_liability_partnership (cited three times);

<http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>;

<https://www.google.com/search> Confidential Business Information

and

<http://dotregistry.org/corporate-tlds/llp-domains>.

⁹⁴ One working paper cites http://en.wikipedia.org/wiki/Limited_liability_partnership in its consideration of this sub-criterion.

⁹⁵ They are:

<http://dotregistry.org/#http://dotregistry.org/about>;

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, opposition.

Additional Research Materials Associated with .LLP

The working papers include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLP CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.⁹⁶

FTI notes that the CPE Provider referenced a “Google search” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion;

FTI notes that the CPE Provider referenced three “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion; and

FTI notes that the CPE Provider made four references to the “Applicant[’s] website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

⁹⁶ The document is a one-page Adobe PDF file named “BusinessRegisterStatistics.pdf” containing weekly data for the month of February 2014 concerning registrations, liquidations, and dissolutions of companies in the United Kingdom.

D. Second .GAY Evaluation⁹⁷

1. Criterion 1: Community Establishment

1-A Delineation

The second final CPE report contains ten citations to research or reference material for sub-criterion 1-A, Delineation.⁹⁸

The working papers contain ten citations to research or reference material for this sub-criterion that are not otherwise cited in the second final CPE report.⁹⁹

⁹⁷ After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as ".GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

⁹⁸ They are:

<http://www.hrc.org/campaigns/coming-out-center>;

http://www.lalgbtcenter.org/coming_out_support;

<http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>;

<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>;

<http://community.pflag.org/page.aspx?pid=539> (This is no longer an active link);

<http://www.apa.org/topics/lgbt/orientation.pdf> (the CPE report notes that the applicant cited this as well);

<http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>;

<http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>;

http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html; and

a reference to "ILGA's website" without specifying the URL or a webpage within the website.

⁹⁹ They are:

<http://dotgay.com>;

<http://ilga.org/about-us/>;

<http://ilga.org/what-we-do/>;

http://en.wikipedia.org/wiki/International_Lesbian,_Gay,_Bisexual,_Trans_and_Intersex_Association;

1-B Extension

The second final CPE report contains two citations to research or reference material for sub-criterion 1-B, Extension.¹⁰⁰

Additionally, the second final CPE report makes one reference to the CPE Provider's verification of data submitted by the Applicant but does not contain a corresponding citation in the report. The second final CPE report states: "The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally."¹⁰¹ The CPE Provider is referring to the Applicant Guidebook's requirement that the community be of considerable size.¹⁰² Size is a component of sub-criterion 1-B, Extension.¹⁰³

Because the second final CPE report does not provide a citation in support of the referenced research conducted by the CPE Provider to verify and compare the referenced estimates,¹⁰⁴ FTI analyzed the CPE Provider's working papers for the second .GAY evaluation to determine if the working papers reflected such research.

http://en.wikipedia.org/wiki/Gay_and_Lesbian_International_Sport_Association;
http://en.wikipedia.org/wiki/International_Gay_and_Lesbian_Travel_Association;
<http://en.wikipedia.org/wiki/Gay>;
<http://en.wikipedia.org/wiki/LGBT>;
http://en.wikipedia.org/wiki/LGBT_history; and
http://en.wikipedia.org/wiki/Timeline_of_LGBT_history.

¹⁰⁰ They are:

Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000; and
<http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>.

¹⁰¹ .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹⁰² See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁰³ *Id.*

¹⁰⁴ .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

Based on FTI's investigation, FTI observed that the CPE Provider's working papers did not reflect research undertaken in connection with the Extension sub-criterion for the second .GAY evaluation. Specifically, with respect to sub-criterion 1-B, Extension, the database contains the following: "Question 1.2.1: Is the community of considerable size?" FTI observed no references to research or reference material in the corresponding "Source" field for this question.

However, because the CPE Provider performed two evaluations for the .GAY application, out of an abundance of caution, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the referenced research was reflected in those materials. Based upon FTI's investigation, FTI finds that the supporting research may have been cited in the working papers associated with the first .GAY evaluation. FTI observed in the working papers for the first .GAY evaluation that the CPE Provider recorded two references in the database's "Source" field for Question 1.2.1.¹⁰⁵ Both citations addressed the size of the gay community nationally and worldwide, which may have been used by the CPE Provider to verify the size of the community defined in the application. Based on the similarity between the two evaluations, FTI finds it reasonable to conclude that the research referenced without citation in the second .GAY evaluation may have been the same research that was cited in the working papers associated with the first .GAY evaluation.

Finally, the working papers associated with the second .GAY evaluation contain four citations to research or reference material for this sub-criterion that were not otherwise cited in the second final CPE report.¹⁰⁶

¹⁰⁵ They are:

www.census.gov/popclock (This is no longer an active link. The correct link to the United States Census Bureau U.S. and World Population Clock is <https://www.census.gov/popclock/>);
<http://en.wikipedia.org/wiki/InterPride>.

¹⁰⁶ They are:

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The second final CPE report contains 14 citations to research or reference material for sub-criterion 2-A, Nexus.¹⁰⁷

Additionally, the second final CPE report makes one reference to the CPE Panel's research and four references to the Panel's "survey" or "review of representative samples" of media and news articles, but does not provide the corresponding citation to the media, articles, and research reviewed.¹⁰⁸ These references are contained in three excerpts of the second final CPE report, each of which addresses whether the proposed

<http://en.wikipedia.org/wiki/Gay>;
<http://en.wikipedia.org/wiki/LGBT>;
http://en.wikipedia.org/wiki/LGBT_history; and
http://en.wikipedia.org/wiki/Timeline_of_LGBT_history.

¹⁰⁷ They are:

"gay, adj., adv., and n." OED Online. Oxford University Press, June 2015. Web. 19 August 2015;
<http://time.com/135480/transgender-tipping-point/>;
<http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>;
<http://transgenderlawcenter.org/>;
<http://srlp.org/>;
<http://transequality.org/>;
<http://transequality.org/issues/resources/transgender-terminology>;
<http://oii-usa.org/1144/ten-misconceptions-intersex>;
http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter (This is no longer an active link);
<http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;
<http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>;
<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;
<http://www.glaad.org/transgender/transfaq>; and
<http://www.glaad.org/about/history>.

¹⁰⁸ .GAY 2 CPE report Pgs. 5-8 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

string identifies all members of the identified community. Because the references relate to the same sub-criterion, FTI analyzed all three excerpts together for this review.

First, the second final CPE report states:

The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor, as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”.¹⁰⁹

In a footnote to the above text, the Panel added that: “While a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the data in the applicant’s own analysis as well as on the Panel’s own representative samples of media.”¹¹⁰

Second, the second final CPE report states that: “organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor ‘gay,’ preferring one of the more inclusive terms.”¹¹¹ The supporting footnote states: “While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes.”¹¹²

¹⁰⁹ *Id.* at Pgs. 5-6.

¹¹⁰ *Id.* at Pg. 6 n.10. This footnote is repeated at page 7, note 19.

¹¹¹ *Id.* at Pg. 6.

¹¹² *Id.* at Pg. 6 n.12.

Third, the second final CPE report states that “researching sources from the same periods as the applicant’s analysis for the terms ‘transgender’ or ‘intersex’ shows again that these terms refer to individuals and communities not identified by ‘gay.’”¹¹³ The supporting footnote states: “[t]he Panel reviewed a representative sample of articles from the same time periods” as LexisNexis search results provided by the applicant.¹¹⁴

As noted, each of these references relates to whether the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”¹¹⁵ The CPE Provider is referring to the requirement that “the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.”¹¹⁶

Because the second final CPE report does not provide citations for the Panel’s research, FTI analyzed the CPE Provider’s working papers for the second .GAY evaluation to determine if the working papers reflected such research. Based on FTI’s investigation, FTI observed that the CPE Provider’s working papers reflect the research referenced in the final report.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) a Google search on [REDACTED]; (2) the Wikipedia page for “Coming out”; (3) a Google search on

¹¹³ *Id.* at Pgs. 7-8.

¹¹⁴ *Id.* at Pg. 8 n.22.

¹¹⁵ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (cited in .GAY 2 CPE report Pg. 5) (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹¹⁶ See *id.* at Module 4.2.3 at Pgs. 4-13.

██████; (4) a second Google search on ██████ which included; (5) the Wikipedia page for “GAY” (cited two times).

Accordingly, FTI finds it reasonable to conclude that the research referenced in the second final CPE report refers to the research reflected in the working papers for the second .GAY evaluation identified above.

FTI observed 23 references to research or reference materials in a working paper entitled, “nexus research notes,” which also addresses this sub-criterion, that were not otherwise cited in the second final CPE report.¹¹⁷

¹¹⁷ They are:

<http://www.glaad.org/reference/transgender;>

[http://www.transpeoplespeak.org/trans-101/;](http://www.transpeoplespeak.org/trans-101/)

<http://www.out.com/news-opinion/2015/6/29/watch-john-olivers-breakdown-how-far-trans-rights-still-have-go;>

<http://www.lambdalegal.org/issues/transgender-rights;>

<https://www.aclu.org/issues/lgbt-rights/transgender-rights;>

http://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html?_r=1;

<http://www.newrepublic.com/article/politics/magazine/90519/transgender-civil-rights-gay-lesbian-lgbtq;>

[https://en.wikipedia.org/wiki/LGBT_community;](https://en.wikipedia.org/wiki/LGBT_community)

[http://www.tgijp.org/;](http://www.tgijp.org/)

[http://transgenderlawcenter.org/about/mission.](http://transgenderlawcenter.org/about/mission)

FTI notes that the CPE Provider referenced six “NYTimes” searches in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ in year 2010: 16 results, ██████ Year 2014: 311 results, ██████ 2014: 106 results, “Gay community” 2010: 51 results, ██████ 2010: 4 results, “LGBT community” 2014: 88 results. The working papers do not provide a full citation for the searches. FTI included the six searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the Washington Post in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ (174 results in past 12 months, 529 results since 2005), ██████ (77 results in past 12 months, 632 results since 2005). The working papers do not provide a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the “UK Guardian” in the working papers. The CPE provider described the searches in the working papers as follows: ██████ (7160 results) and ██████ (6120 results). The working papers do not provide

2-B Uniqueness

The second final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect three references to research or reference material for this sub-criterion.¹¹⁸

3. Criterion 3: Registration Policies

Neither the second final CPE report nor the working papers for the second .GAY evaluation reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced “HRC” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider made one reference to the “Trans Advocacy Network” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion; and

FTI further notes that the CPE Provider stated in the working papers that “The Panel’s research shows that there is a robust network of advocacy, support, and general organizations addressing issues specific to the intersex and transgender communities themselves.” The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion.

¹¹⁸ They are:

<http://en.wikipedia.org/wiki/Gay> (cited two times).

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

4. Criterion 4: Community Endorsement

4-A Support

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers for the second .GAY evaluation reflect six references to research or reference material for this sub-criterion.¹¹⁹

4-B Opposition

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers for the second .GAY evaluation contain three citations to research or reference material for this sub-criterion.¹²⁰

Additional Research Materials Associated with .GAY

The working papers for the second .GAY evaluation include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have collected in the course of its evaluation process. Based on its examination, FTI could not discern

¹¹⁹ They are:

<http://www.spimarketing.com/team>;

<http://dotgay.com/faq/>; and

<http://dotgay.com/endorsements/> (This is no longer an active link) (cited three times).

FTI notes that the CPE Provider made one reference to “Organisation websites, including ILGA: <http://ilga.org/about-us/>” in the working papers. The working papers do not provide full citations or identify the URLs for the “Organisation websites” other than ILGA. FTI treated this reference as one of the six references to research in this sub-criterion.

¹²⁰ They are:

<http://www.pdxqcenter.org/about/>;

<http://www.pdxqcenter.org/interim-board-appointed-to-stabilize-q-center-engage-community-about-centers-future/>; and

<http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355>.

if the CPE Provider intended this document to pertain to any particular criterion or sub-criterion.¹²¹

E. .MUSIC (DotMusic Ltd.)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report reflects one citation to reference material for sub-criterion 1-A, Delineation.¹²²

Additionally, the final CPE report makes three references to the CPE Panel’s research, but does not provide citations to, or otherwise indicate the nature of, that research.¹²³

First, the final CPE report states: “The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the [Applicant Guidebook] calls ‘cohesion.’”¹²⁴ The CPE Provider is referring to the Applicant Guidebook’s requirement that a “community” demonstrate “more of cohesion than a mere commonality of interest.”¹²⁵

¹²¹ The document is a copy of an article titled “They do: Same-sex couples are choosing marriage over civil partnership,” *The Economist*, 27 June 2015, <http://www.economist.com/news/britain/21656197-same-sex-couples-are-choosing-marriage-over-civil-partnership-they-do2/> (This link does not lead to the *Economist* article cited by the CPE Provider).

¹²² The CPE report cites “Oxford dictionaries” for the definition of “cohesion.” .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

¹²³ .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹²⁴ *Id.*

¹²⁵ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations supporting the “further research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such “further research.” FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

Specifically, as noted above, the database sets forth questions for each CPE sub-criterion. With respect to sub-criterion 1-A, Delineation, the database contains the following: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the U.S. Census Bureau’s North American Industry Classification System (NAICS) codes;¹²⁶ (2) the United Nations International Standard Industrial Classification (ISIC) system;¹²⁷ and (3) the Wikipedia page for “Music.”¹²⁸ Accordingly, FTI finds it reasonable to conclude that the “further research” referenced in the final CPE report refers to the research reflected in the working papers.

Second, the final CPE report states:

based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.¹²⁹

The final CPE report also states: “based on . . . the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories

¹²⁶ <http://www.census.gov/eos/www/naics/>.

¹²⁷ http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf.

¹²⁸ <https://en.wikipedia.org/wiki/Music>.

¹²⁹ .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

explicitly defined.”¹³⁰ In both instances, the CPE Provider is referring to the Applicant Guidebook’s requirement that a community be organized, which the Applicant Guidebook defines to mean that “there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”¹³¹ Organization is a component of Delineation,¹³² and this reference to “the Panel’s research” is noted in the final CPE report’s sub-section on “[o]rganization.”¹³³

Because the final CPE report does not provide citations supporting the “Panel’s research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the referenced research. FTI observed that the CPE Provider’s working papers reflect research undertaken in connection with the organization prong of the Delineation sub-criterion. Specifically, the database contains the following question: “Question 1.1.2: Is there at least one entity mainly dedicated to the community?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the website for the International Federation of Arts Councils and Culture Agencies (IFACCA);¹³⁴ (2) the Wikipedia page for “Music;”¹³⁵ (3) the Wikipedia page for “Recording Industry Association of America;”¹³⁶ and (4) the Wikipedia page for “American Federation of

¹³⁰ *Id.*

¹³¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³² *Id.*

¹³³ .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹³⁴ http://www.ifacca.org/vision_and_objectives/ (This is no longer an active link).

¹³⁵ <https://en.wikipedia.org/wiki/Music>.

¹³⁶ https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America.

Musicians.”¹³⁷ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹³⁸

1-B Extension

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain three citations to research or reference material for this sub-criterion.¹³⁹

¹³⁷ https://en.wikipedia.org/wiki/American_Federation_of_Musicians.

¹³⁸ They are:

<https://en.wikipedia.org/wiki/Music> (cited three times);

<http://www.census.gov/eos/www/naics/>;

http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf;

https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America (cited two times);

https://en.wikipedia.org/wiki/American_Federation_of_Musicians (cited two times);

http://www.ifacca.org/vision_and_objectives/ (This is no longer an active link);

http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf;

http://www.ifacca.org/ifacca_events/ (This is no longer an active link); and

https://en.wikipedia.org/wiki/History_of_music.

¹³⁹ They are:

https://en.wikipedia.org/wiki/History_of_music (cited two times); and

http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf.

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 2-A, Nexus.

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁴⁰

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain one citation to research or reference material for this sub-criterion.¹⁴¹

¹⁴⁰ They are:
https://en.wikipedia.org/wiki/Definition_of_music; and
Oxford English Reference Dictionary.

¹⁴¹ It is: <http://music.us/about/>.

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

F. .CPA (Australia)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report contains four citations to research or reference material in sub-criterion 1-A, Delineation.¹⁴²

The working papers contain 14 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴³

¹⁴² They are:

<https://www.cpaaustralia.com.au/member-services/fees/australia>;
<https://www.cpaaustralia.com.au/training-and-events>;
<https://www.cpaaustralia.com.au/training-and-events/conferences>; and
<https://www.cpaaustralia.com.au/about-us/ourhistory/archives> (This is no longer an active link).

¹⁴³ They are:

<http://www.cpaaustralia.com.au/> (cited three times);
<https://www.cpaaustralia.com.au/about-us> (cited two times);
<https://www.cpaaustralia.com.au/about-us/ourhistory> (This is no longer an active link);
<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link);
<https://www.cpaaustralia.com.au/member-services>;
<http://www.cpaaustralia.com.au/member-services/renew-my-membership>;
http://en.wikipedia.org/wiki/CPA_Australia (cited three times); and
<http://www.cimaglobal.com/Members/Membershipinformation/> (identified as the result of “A web search on [REDACTED]” (This is no longer an active link).

1-B Extension

The final CPE report contains three citations to research or reference material in sub-criterion 1-B, Extension.¹⁴⁴

The working papers contain five citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴⁵

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report contains two citations to research or reference material in sub-criterion 2-A, Nexus.¹⁴⁶

The working papers contain seven citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴⁷

¹⁴⁴ They are:

<https://www.cpaaustralia.com.au/about-us>; and

http://docs.employment.gov.au/system/files/doc/other/2211accountantaus_1.pdf (cited two times)
(This is no longer an active link).

¹⁴⁵ They are:

http://en.wikipedia.org/wiki/CPA_Australia (cited two times);

<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link); and

<https://www.cpaaustralia.com.au/training-andevents/conferences> (This is no longer an active link).

¹⁴⁶ They are:

<http://www.forbes.com/sites/peterjreilly/2013/06/26/enrolled-agents-deserve-more-respect/>; and

<http://nasba.org/blog/2010/01/07/january-2010-nasba-addresses-aicpa-sec-conference/>.

¹⁴⁷ They are:

<http://www.cpaaustralia.com.au/about-us>;

<http://www.cpaaustralia.com.au/become-a-cpa/about-the-program> (This is no longer an active link);

http://en.wikipedia.org/wiki/CPA_Australia;

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for criterion 2-B, Uniqueness, but the working papers reflect nine references to research or reference material for this sub-criterion.¹⁴⁸

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

<http://www.cimaglobal.com/Members/Membershipinformation/Global-alliances/CIMA-into-CPA/> (This is no longer an active link);

<http://www.aicpa.org/Pages/default.aspx>;

<http://www.acpa.org.uk>; and

<http://www.aicpa.org/About/Pages/About.aspx/> (This is no longer an active link).

¹⁴⁸ They are:

<http://www.cpahq.org/cpahq/Main/Home/Main/Home.aspx?hkey=98e6b3f2-25d9-4d37-8f03-9ac0745ce845>;

<http://www.cpa.org.au/>;

<https://www.cdnpay.ca/> (This is no longer an active link);

<http://www.cpa-acp.ca/>;

<http://www.cpa.gov.cy/CPA/page.php?pageID=31&langID=0>;

<http://www.cpa.de/en/products.htm> (This link does not lead to the “Products” page of CPA SoftwareConsult GmbH’s website);

http://en.wikipedia.org/wiki/Certified_Public_Accountant; and

<http://en.wikipedia.org/wiki/CPA>;

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in one of the working papers. The working paper does not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁴⁹

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

G. .HOTEL

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report reflects one reference to research or reference material in sub-criterion 1-A, Delineation.¹⁵⁰ Additionally, the final CPE report states that the Panel observed documented evidence of community activities on the International Hotel and Restaurant Association (“IH&RA”) website and “information on other hotel association websites,” without identifying the websites referenced. The CPE Provider is addressing the Applicant Guidebook’s provision that states that “‘organized’ implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”¹⁵¹

¹⁴⁹ They are:

<http://www.aicpa.org/Pages/default.aspx>; and

http://www.aicpa.org/about/leadership/pages/melancon_bio.aspx.

¹⁵⁰ The final CPE report references “International Hotel & Restaurant Association’s website.” International Hotel & Restaurant Association’s website is <http://ih-ra.com>, and is cited three times in the working papers.

¹⁵¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations for the “other hotel association websites,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the “other hotel association websites.” FTI observed that the CPE Provider’s working papers reflect research concerning hotel association websites in connection with the Delineation sub-criterion.

Specifically, with respect to sub-criterion 1-A, Delineation, FTI observed that the database contains the following: “Question 1.1.3: Does the entity . . . have documented evidence of community activities?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the Applicant’s website,¹⁵² (2) a webpage on the IH&RA website,¹⁵³ (3) four websites for HOTREC,¹⁵⁴ which the working papers identify as an organization of European hotels and restaurants; (4) a press release from the United Nations World Tourism Organization about its Memorandum of Understanding with IH&RA,¹⁵⁵ (5) a webpage from ETurbo news¹⁵⁶ which, according to the working papers, indicates that HOTREC signed a Memorandum with IH&RA; (6) the Hotel News Resource website;¹⁵⁷ and (7) the website for Green Hotelier,¹⁵⁸ which the working papers indicate is the

¹⁵² <http://www.dothotel.info/>.

¹⁵³ <http://ih-ra.com/achievements-in-advocacy/>.

¹⁵⁴ They are:

<http://www.hospitalitynet.org/news/4064407.html>;

<http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-signmemorandum-of-understanding.aspx> (This is no longer an active link);

<http://www.hotrec.eu/policy-issues/tourism.aspx>; and

<http://www.hotrec.eu/publications-positions.aspx>.

¹⁵⁵ <http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-signmemorandum-Understanding>.

¹⁵⁶ <http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandumunderstanding> (This is no longer an active link).

¹⁵⁷ <http://www.hotelnewsresource.com/article70606.html>.

¹⁵⁸ <http://www.greenhotelier.org/category/our-destinations/>.

magazine for the International Tourism Partnership. Accordingly, FTI finds it reasonable to conclude that the “other hotel association websites” referenced in the final CPE report refer to the websites listed in the working papers.

Including the citations listed above, the working papers contain 29 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁵⁹

¹⁵⁹ They are:

<http://ehotelier.com/directory/?associations> (cited two times)
<http://www.gha.com/> (cited three times)
http://www.theindependents.co.uk/en/hotel/location/united_kingdom (cited two times)
<http://hotel-tld.de/> (cited two times)
http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association (cited two times)
<http://ih-ra.com/who-are-our-members/>;
<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;
<http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandum-understanding>;
<http://www.hotelnewsresource.com/article70606.html>;
<http://www.greenhotelier.org/category/our-destinations/>;
<http://www.dothotel.info/> (cited three times);
<http://ih-ra.com/ihra-today/>;
<http://www.hospitalitynet.org/organization/17000749.html>;
<http://ih-ra.com/achievements-in-advocacy/>;
<http://www.hospitalitynet.org/news/4064407.html>;
<http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-sign-memorandum-of-understanding.aspx>;
<http://www.hotrec.eu/policy-issues/tourism.aspx>;
<http://www.hotrec.eu/publications-positions.aspx>;
<http://ih-ra.com/ihra-history/>;
<http://en.wikipedia.org/wiki/Hotel#History>; and
<http://en.wikipedia.org/wiki/Hotel>.

1-B Extension

The final CPE report did not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain ten citations to research or reference material for this sub-criterion.¹⁶⁰

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain one citation to research or reference material for this sub-criterion.¹⁶¹

¹⁶⁰ They are:

<http://www.dothotel.info/> (cited two times);

<http://hotel-tld.de/>;

<http://ih-ra.com/ihra-today/>;

http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association;

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>;

http://wiki.answers.com/Q/How_many_hotels_exist_in_the_world?#slide=1;

<http://travel.usatoday.com/hotels/post/2012/04/worldwide-hotel-rooms-2012-smith-travel-research/677093/1> (This is an active link to the website of USA Today, but it leads directly to the publication's "Travel" section, rather than to hotel-related content); and

<http://en.wikipedia.org/wiki/Hotel>.

¹⁶¹ The working papers cite <http://hotel-tld.de/>.

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect two references to research or reference material for this sub-criterion.¹⁶²

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect 12 references to research or reference material for this sub-criterion.¹⁶³

¹⁶² They are:

<http://en.wikipedia.org/wiki/Hotel>; and

FTI notes that the CPE Provider stated in the working papers that an “Internet search on [REDACTED] and [REDACTED] turns up mainly sites discussing the domain name and actual hotels, hotel chains etc[.]” The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the two references to research in this sub-criterion.

¹⁶³ They are:

<http://www.dothotel.info/> (cited three times);

<http://ih-ra.com/ihra-today/>;

<http://domainincite.com/10101-big-hotel-chains-pick-a-side-in-hotel-gtld-fight>;

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association;

<http://ih-ra.com/message-from-the-ihra-president/>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>; and

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

Additional Research Materials Associated with .HOTEL

The working papers provided to FTI by the CPE Provider include six documents that were not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its evaluation of the Hotel application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.¹⁶⁴

<http://www.otusco.com/Otus%20Hotel%20Analyst%20Size%20and%20Structure%201.pdf>.

FTI notes that the CPE Provider referenced two “web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the searches. FTI included these searches as two of the 12 references to research in this sub-criterion.

¹⁶⁴ The documents are five Adobe PDF files and one Microsoft Excel file:

A report by Mintel Group Limited: Hotel Trends – TTA. No. 1 February 2014;

A printout of www.marketline.com’s report on “Global Hotels & Motels October 2012”;

A printout of www.marketline.com’s report on “Global Hotels, Resorts & Cruise Lines July 2013”;

A printout of <http://www.eturbonews.com/22544/nepal-host-international-hotelioers-meets>, “International Hotel and Restaurant Association World Congress: Nepal to Host International Hoteliers’ Meets,” April 28, 2011 (This link does not lead to the article entitled Nepal’s hosting of international hoteliers);

A page which appears to be from a book published by the American Hotel and Lodging Association describing the history and current status of that association; and

A Microsoft Excel spreadsheet named “20140521 hotels research.xls” containing market information about the global and national hotel businesses.

H. .MERCK (KGaA)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-A, Delineation, but the working papers contain three citations to research or reference material for this sub-criterion.¹⁶⁵

1-B Extension

The final CPE report reflects two references to research or reference material for sub-criterion 1-B, Extension.¹⁶⁶

The working papers contain one citation to research or reference material for this sub-criterion that is not otherwise cited in the final CPE report.¹⁶⁷

¹⁶⁵ The working papers cite <http://www.merckgroup.com/en/index.html> three times under this sub-criterion.

¹⁶⁶ They are:

http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA_v3_tcm2252_143783.pdf?Version=; and

“Applicant’s website.”

¹⁶⁷ It is: www.who.int/trade/glossary/story073/en/ (This is no longer an active link).

FTI notes that the working papers also reflect one reference to Merck KGaA’s “company website,” which FTI understands to be synonymous with the “Applicant’s website” referenced in the final CPE report. Because the final CPE report references Merck KGaA’s website, FTI included that citation in its analysis of the final CPE report (even though the Panel did not include the URL in the final report); therefore, this reference to the company website was referenced in the final CPE report.

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain four citations to research or reference material for this sub-criterion.¹⁶⁸

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain four citations to research or reference material for this sub-criterion.¹⁶⁹

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

¹⁶⁸ They are:

https://en.wikipedia.org/wiki/Merck_%26_Co (cited two times);
https://en.wikipedia.org/wiki/Merck_Group; and
<http://www.merckgroup.com/en/index.html>.

¹⁶⁹ They are:

<http://www.bloomberg.com/news/articles/2014-02-10/a-tale-of-two-mercks-as-protesters-takeonwrong-company> (This is no longer an active link);
https://en.wikipedia.org/wiki/Merck_%26_Co;
https://en.wikipedia.org/wiki/Merck_Group; and
<http://www.merck.com/index.html>.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁷⁰

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

VI. Conclusion

FTI observed that of the eight relevant CPE reports, two (.CPA and .MERCCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced

¹⁷⁰ They are:
www.merckgroup.com/; and
https://en.wikipedia.org/wiki/Merck_Group.

was cited in the CPE Provider's working papers associated with the first .GAY evaluation.

Exhibit 43

COMMUNITY PRIORITY EVALUATION PANEL AND ITS PROCESSES

Overview

At the time of submitting the new gTLD application, applicants had the opportunity to designate themselves as a community-based application, as prescribed in the section 1.2.3 of the Applicant Guidebook (AGB).

Community Priority Evaluation (CPE) is defined in section 4.2 of the AGB, and allows a community based-application to undergo an evaluation against the criteria as defined in section 4.2.3 of the AGB, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus win the contention set.

Only community-based applicants are eligible to participate in a community priority evaluation. A determination by a community priority panel, appointed by ICANN, must be made before a community name is awarded to an applicant. This determination will be based on the string and the completeness and validity of supporting documentation.

There are two possible outcomes to a Community Priority Evaluation:

- Determination that the application met the CPE requirements specified in the Applicant Guidebook (Section 4.2.2) to receive priority over other applications for the same or confusingly similar string = Prevalled.
- Determination that the application did not meet the CPE requirements specified in the Applicant Guidebook (Section 4.2.2) to receive priority over other applications for the same or confusingly similar string = Did not prevail.

Section 4.2.2 of the AGB prescribes that the Community Priority Evaluations will be conducted by an independent panel. ICANN selected the Economist Intelligence Unit (EIU) as the panel firm for Community Priority Evaluations.

The Economist Intelligence Unit

The Economist Intelligence Unit (EIU) was selected as a Panel Firm for the gTLD evaluation process. The EIU is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 500 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. Consistency of approach in scoring applications is of particular importance. In this regard, the Economist Intelligence Unit has more than six decades of experience building evaluative frameworks and benchmarking models for its clients, including governments, corporations, academic institutions and NGOs. Applying scoring systems to complex questions is a core competence.

EIU evaluators and core team

The Community Priority Evaluation panel comprises a core team, in addition to several independent¹ 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.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.
- All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.
- EIU evaluators are highly qualified, they speak several languages and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.
- Language skills and knowledge of specific regions are also considered in the selection of evaluators and the assignment of specific applications.

CPE Evaluation Process

The EIU evaluates applications for gTLDs once they become eligible for review under CPE.

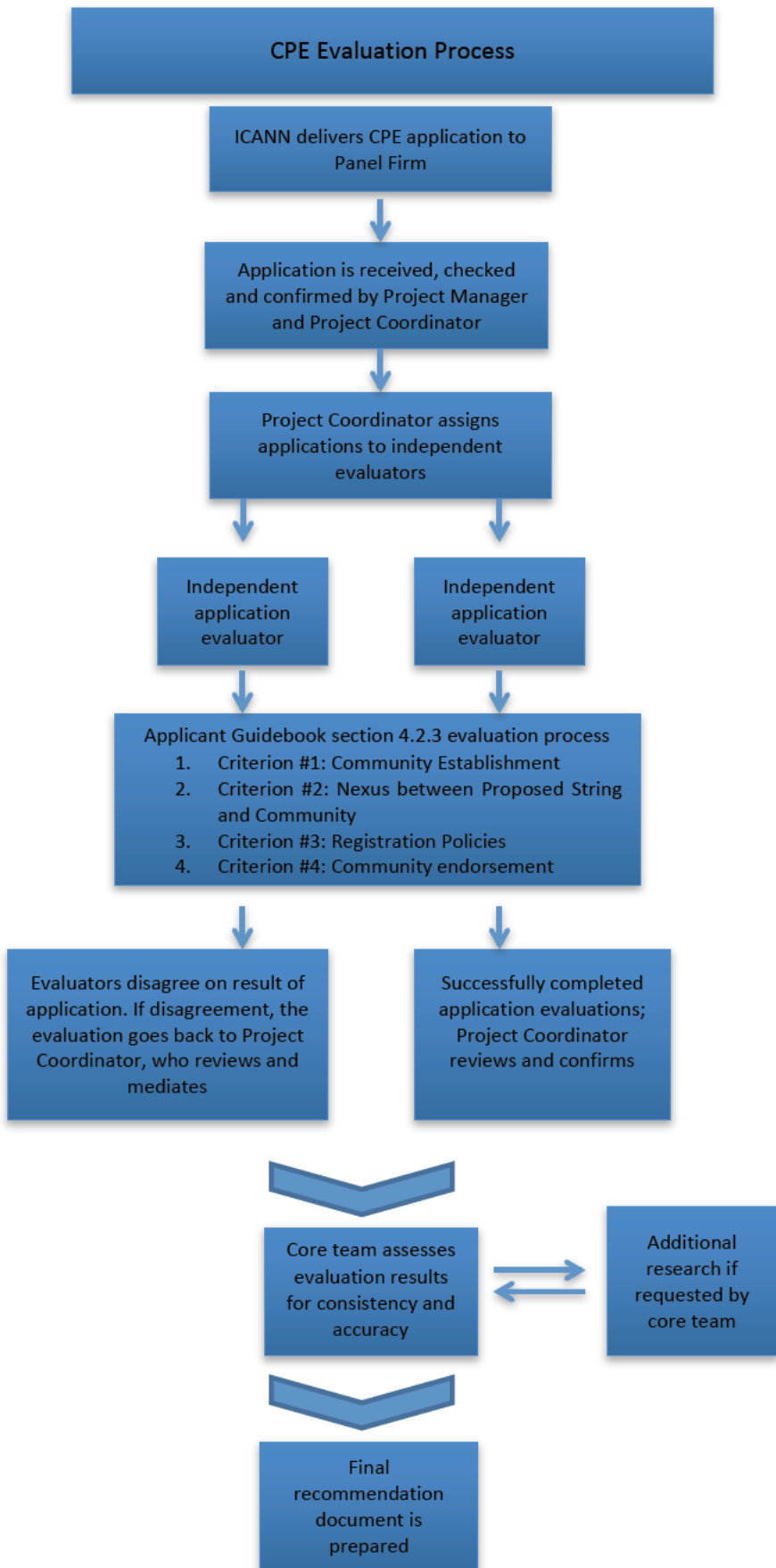
The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:

- The Panel Firm's Project Manager is notified by ICANN that an application for a gTLD is ready for CPE, and the application ID and public comments are delivered to the EIU. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website. The EIU Project Manager reviews the application and associated materials, in conjunction with the EIU Project Coordinator. The Project Coordinator assigns the application to each of two evaluators, who work independently to assess and score the application.
- Each evaluator reviews the application and accompanying documentation, such as letter(s) of support and opposition. Based on this information and additional independent research, the evaluators assign scores to the four CPE criteria as defined in the Applicant Guidebook.
- 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.)
- When evaluating an application the CPE Panel also considers the public application comments. The public comments are provided to EIU by ICANN following the close of the 14-day window associated with the CPE invitation. For every comment of support/opposition received, the designated evaluator assesses the relevance of the organization of the poster along with the content of the comment. A separate verification of the comment author is not performed as the Application Comments

¹ The term "independent" means that the evaluators do not have any conflict of interest with CPE applicants. It also means that the evaluators sit outside the core EIU team; they provide individual evaluation results based on their assessment of the AGB criteria, application materials, and secondary research without any influence from core team members.

system requires that users register themselves with an active email account before they are allowed to post any comments. However, the evaluator will check the affiliated website to ascertain if the person sending the comment(s) is at that entity/organization named, unless the comment has been sent in an individual capacity.

- Once the two evaluators have completed this process, the evaluation results are reviewed by the Project Coordinator, who checks them for completeness and consistency with the procedures of the Applicant Guidebook.
- If the two evaluators disagree on one or more of the scores, the Project Coordinator mediates and works to achieve consensus, where possible.
- The Project Director and Project Coordinator, along with other members of the core team, meet to discuss the evaluators' results and to verify compliance with the Applicant Guidebook. Justifications for the scores are further refined and articulated in this phase.
- If the core team so decides, additional research may be carried out to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures.
- If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified.
- When the core team achieves consensus on the scores for each application, an explanation, or justification, for each score is prepared. A final document with all scores and justifications for a given application, including a determination of whether the application earned the requisite 14 points for prevailing, is presented to ICANN.
- The Economist Intelligence Unit works with ICANN when questions arise or when additional process information may be required to evaluate an application.
- The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.



Verification of letter(s) of support and opposition

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:

- On a regular basis, the EIU reviews ICANN's public correspondence page (<http://newgtlds.icann.org/en/program-status/correspondence>) for recently received correspondence to assess whether it is relevant to an ongoing evaluation. If it is relevant, the public correspondence is provided to the evaluators assigned to the evaluation for review.
- 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 verification process.
- With few exceptions, verification emails are sent to every entity that has sent a letter(s) of support or opposition to validate their identity and authority.
- The exceptions noted above regarding sending verification letter(s) include but may not be limited to:
 - If there are no contact details included in the letter(s). However, the evaluator will attempt to obtain this information through independent research.
 - If the person sending the letters(s) does not represent an organization. However, if the content of the letter(s) suggests that the individual sending a letter has sent this letter(s) on behalf of an organization/entity the evaluator will attempt to validate this affiliation.
- The verification email for letter(s) of support/opposition requests the following information from the author of the letter:
 - Confirmation of the authenticity of the organization(s) letter.
 - Confirmation that the sender of the letter has the authority to indicate the organization(s) support/opposition for the application.
 - In instances where the letter(s) of support do not clearly and explicitly endorse the applicant, the verification email asks for confirmation as to whether or not the organization(s) explicitly supports the community based application.
- 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.
- A verbal acknowledgement is not sufficient. The contacted individual must send an email to the EIU acknowledging that the letter is authentic.