

Post-Hearing Submission by AICPA  
April 12, 2016 BGC Hearing for AICPA Reconsideration Request 15-17  
April 28, 2016

As requested by the BGC during the April 12, 2016 telephonic hearing for Reconsideration Request 15-17, the AICPA submits the following document to provide further written support reflecting the arguments and evidence presented during the hearing.

Once again, the AICPA would like to thank the BGC for the opportunity to make a telephonic presentation regarding the AICPA's community-based application for the .CPA gTLD. This is a very important application for the AICPA, and for the CPA community worldwide.

## I. Introduction

As AICPA President Barry Melancon said during the telephonic hearing, the AICPA is the world's largest professional accountancy organization. We are a nonprofit organization that serves as the community leader for the CPA community worldwide. In our view, ICANN's community priority process for gTLD strings was aimed squarely at organizations like ours, who are not designed, and do not have the resources, to compete with commercial entities, but whose very purpose is to serve a particular community. We believe there is no organization in the world better suited to monitor, regulate and administer the .CPA gTLD to avoid confusion and protect CPAs and consumers of CPA services. That is the function the AICPA already serves in the real world, and it is the function the AICPA seeks to serve in the online world through administration of the .CPA gTLD.

AICPA's Reconsideration Request 15-17 sets out in detail six distinct errors committed by ICANN staff and the Economist Intelligence Unit (EIU) on behalf of ICANN that contradict established ICANN policy, each of which errors warrant reconsideration and reversal by the BGC, or at least remand, of the EIU panel determination that the AICPA's .CPA application (Application ID: 1-1911-56672) (the "AICPA Application") failed Community Priority Evaluation. Given the time constraints and the purpose of the hearing, we focused on three of the procedural and policy errors, and on providing relevant context for proper evaluation of those errors, without waiving or diminishing the remaining errors. We encourage the BGC to carefully consider those remaining errors set forth in the AICPA Reconsideration Request.

The EIU determined that the AICPA Application failed Community Priority Evaluation ("CPE") essentially because the AICPA gTLD application did not show a sufficient connection or nexus to the US and international CPA communities. In fact, the exact opposite is true – no other organization worldwide has as deep a connection to the CPA community. The procedural and policy errors by ICANN in connection with the AICPA Application prevented the EIU from understanding or recognizing this basic fact. These errors constitute action or inaction by ICANN staff that contradict established ICANN policies, and while the errors may seem minor when viewed in isolation, they had a direct impact on the outcome and must be rectified. It is

within the BGC's power to review and reverse those errors (*see* Article IV, Section 2.2 of ICANN's Bylaws), and that is why we have sought reconsideration by the BGC.

- II. The EIU's determination that AICPA's Application failed CPE was a direct result of errors by ICANN staff and the EIU that contradict established ICANN policies

The EIU panel awarded the AICPA Application 0 points (of a maximum of 4) for "Criterion #2: Nexus between Proposed String and Community" in its Community Priority Evaluation. Because the AICPA Application missed a passing score by 3 points, the determination of lack of nexus was fatal to AICPA's Application. However, the panel's determination was based on two demonstrably erroneous conclusions: that the AICPA Application does not have a nexus with CPAs in the US, nor with CPAs worldwide, including an Australian sister organization, CPA Australia. Both of those conclusions are wrong, and are the direct result of key procedural errors of ICANN staff: (1) a failure to issue Clarifying Questions instead of relying on its own erroneous interpretation of data; and (2) an improper deferral of a Change Request submitted by AICPA in response to a request from ICANN that specifies that foreign CPAs, including those from CPA Australia, are included in the community. Moreover, the EIU ignored ICANN policy established by the Governmental Advisory Committee (GAC) in giving no weight to .CPA as a recognized regulated string. We address each error in further detail below.

- a. The EIU failed to issue a Clarifying Question on a key fact it relies on to find lack of nexus

The EIU found that the AICPA did not have a nexus to CPAs in the US because it concluded there are 650,000 CPAs in the US, but only 412,000 who are AICPA members, and therefore there are more than 200,000 CPAs in the US that are not covered. In reaching the conclusion that there are 650,000 CPAs in the US, the EIU cited a Forbes article and information from the website of an association of state regulatory agencies (NASBA). It is important to note that the EIU apparently uncovered this information itself – the information was not submitted by any applicant or objector, but instead was obtained by the EIU completely outside of established procedure. Although the Applicant Guidebook does not specifically prevent the EIU from obtaining insights from third parties or performing its own factual research, the reliability of any such information is essential if it is to be used in the CPE process.

As noted in Reconsideration Request 15-17, when investigating factual issues, the Applicant Guidebook provides that evaluators such as the EIU should use Clarifying Questions. In the absence of any rules of evidence, the use of the Clarifying Questions is the procedural mechanism that allows the reliability of evidence to be ascertained through explanation and debate. In fact, the EIU sent Clarifying Questions to the AICPA on many topics throughout the Initial Evaluation and the Community Priority Evaluation – but not this one. The procedural mechanism of Clarifying Questions allows applicant a chance to respond on substantive issues that will form the basis of a denial. Without that process, there is no opportunity for substantive response and review by the applicant. It was fundamental procedural error for the

EIU to rely on its own research concluding that the AICPA community does not include substantially all of the CPA's in the US without submitting a Clarifying Question on the topic.

We have submitted a declaration from Alfonso Olaiz, Strategy Manager for AICPA with direct knowledge of CPA licensing and member counts, explaining that the Forbes article and the NASBA statistics reflect the number of state CPA licenses issued, but that number does not correspond to the number of CPAs. In reality, many CPAs have multiple licenses in multiple states. For example, CPAs in the New York metropolitan area often have licenses in New York, New Jersey and Connecticut. Also, many CPAs who are not AICPA members nonetheless use AICPA services and are part of the community as defined in AICPA's Application. In sum, we believe 90+% of CPAs in the US are included within our defined community.

- b. ICANN staff improperly deferred consideration of AICPA's Change Request specifying that foreign CPAs are included in our community

The EIU also found that accounting professionals outside the US were excluded from the community, and cited the 150,000 members of CPA Australia as an example of CPAs outside the US that were not included. However, AICPA submitted a Change Request that included CPAs around the world, and in fact specifying that CPA Australia's 150,000 members were included. Craig Loughton, General Counsel of CPA Australia, joined the telephonic hearing to voice his organization's support of the AICPA Application, and to confirm that the vast majority of CPAs worldwide would be included in the community.

ICANN's deferral of AICPA's Change Request until after the application completes CPE was improper because the Change Request was made necessary by ICANN's actions, was recommended by ICANN, and was specifically to clarify the application for CPE. On May 30, 2012, the AICPA submitted its original community-based Application for the .CPA gTLD. In that application, the AICPA described its plans to administer the .CPA domain for the benefit of CPAs worldwide to the best of its ability under the rules as they existed at the time, through an initially exclusive process in the first phase that would become open, and include AICPA's sister organizations around the world, in the second phase. AICPA's Change Request was made necessary by three subsequent events:

- On November 20, 2012, AICPA received a "GAC Early Warning" in connection with the AICPA Application recognizing that .CPA was a regulated string relating to a broad market sector and warning against exclusive access. The GAC Early Warning was sent under the authority of ICANN, and had instructions stating "**ICANN** strongly encourages you to work with relevant parties as soon as possible to address the concerns voiced in the GAC Early Warning" (emphasis added). Thus, even though GAC Early Warnings are not necessarily binding on ICANN, they are sanctioned and recognized by ICANN. (See Applicant Guidebook Section 1.1.2.4.) The Early Warning received by AICPA went on to recommend that to continue to pursue the application, remediation steps would include submitting a change request.

- On April 11, 2013, the GAC issued a communiqué (the “Beijing Communiqué”) in which it (1) identified specific safeguards and procedures that should be implemented for a gTLD in a regulated or professional sector, such as and specifically including the .CPA domain, and (2) expressed its concerns in relation to “Exclusive Access” gTLDs.
- AICPA and CPA Australia realized they were both pursuing community-based applications for .CPA and entered into a partnership, for the specific benefit of CPAs worldwide.

After ICANN amended its Change Request procedures in September 2014, the AICPA submitted a Change Request in December 2014 amending its .CPA Application to clarify that CPAs from sister organizations worldwide were part of the community (as had been contemplated in phase two of the initial application), including CPA Australia’s 150,000 members and organizations in Canada, South Korea, Japan and many others, and other amendments to reflect the concerns of the Beijing Communiqué.

On March 27, 2015, ICANN notified the AICPA that it was deferring consideration of the Change Request until after the application completes CPE, purportedly to avoid gamesmanship in having applicants tailor their applications once they know who their competition is for the string. This general consideration does not apply for .CPA – AICPA submitted the Change Request in direct response to ICANN’s Early Warning and Beijing Communiqué, and in fact reflects a partnership with the only other community applicant – CPA Australia. Furthermore, ICANN’s deferral rendered AICPA’s Change Request completely moot, as the amendments were for the purpose of CPE.

In sum, ICANN improperly deferred consideration of AICPA’s Change Request until after CPE. If not for the improper deferral, the AICPA Application would have expressly included CPAs from sister organizations around the world in the community, including CPA Australia’s 150,000 members.

The AICPA intends to continue to expand our international network of sister organizations, and we commit not to exclude any practicing CPA that is certified by the relevant national authority, anywhere in the world, from participating in the .CPA gTLD string.

- c. The EIU failed to give proper weight to .CPA as a regulated string in evaluating nexus.

As recognized by the GAC in the Beijing Communiqué, as a profession, CPAs are held in a position of trust. That trust is vital to the profession, and to customers of CPA services. Accordingly, the Beijing Communiqué reflects ICANN policy recognizing .CPA as a regulated string requiring greater safeguards.

The AICPA is a nonprofit organization that serves as an international community leader for the CPA community. We intend for the .CPA TLD to become the digital designation for CPAs worldwide. Our intent is for .CPA domains and email addresses will become permanent digital business cards for CPAs, and CPAs will create a virtual digital presence using .CPA.

Therefore it is a vital public protection that .CPA domains accurately reflect members of the global CPA community, so that non-CPAs may not pass themselves off as CPAs. Such fraudulent passing off could irreparably harm consumers of CPA services worldwide and the global CPA community, and create liability for both the administrator of .CPA and perhaps ICANN itself. As the world's largest professional accountancy organization that has been representing the interests of CPAs for more than 125 years, other commercial applicants are manifestly and demonstrably not as familiar with the complex regulatory requirements that underpin certification as a CPA in various countries worldwide as is the AICPA. We believe – and many sister organizations worldwide agree – there is no organization in the world better suited to monitor, regulate and administer the .CPA gTLD to avoid confusion and protect consumers of CPA services.

It is important to note that AICPA has a stronger connection to the global community, and is better positioned to administer the .CPA string, than the organizations that submitted the five community priority applications that have successfully passed Community Priority Evaluation to date: .ECO, .RADIO, .OSAKA, .SPA and .HOTEL. For example: (1) the operator of .SPA is connected with only 400 licensed spas out of an acknowledged body of 40,000 spas worldwide; (2) the operator of .ECO was formed only three years before the gTLD application was filed; and (3) the operator of .RADIO, like the AICPA, is one of the largest associations of broadcasters and relies on the involvement of sister broadcasting organizations worldwide. AICPA compares favorably to each of the successful community-based applicants, and we believe none of these operators has as long a history of service, and as close a connection, to the relevant community that AICPA has, and AICPA's global network of partnerships is more extensive and robust than these operators.

### III. Reversal by the BGC is appropriate

Although remand is a more popular remedy for reconsideration, we understand the BGC has the power to reverse decisions as well. AICPA believes that reversal is the appropriate remedy here.

The AICPA Application has been pending for almost four years, since May 2012. If the procedural error are corrected, there are no remaining factual disputes and the outcome is clear, as an award of 3 or 4 points for Nexus would grant the AICPA Application a passing CPE score. In this situation, remand would service only to engender further delay.

For most procedural errors, the appropriate remedy would be remand to correct the procedural error and proceed with the application. For example, if certain evidence had not been considered, remand would be appropriate to consider that evidence. In sharp contrast, in this instance the EIU had no other basis for determining that the AICPA Application overreached "substantially beyond the community," and therefore full credit for Criterion #2: Nexus is appropriate. A remand to the EIU would result in a delay of months to reach the same result before the Board today – that the AICPA Application should be granted a passing CPE

score. Furthermore, remand to the same EIU panel that made the errors in the first place cannot be appropriate as that panel would no longer be objective.

#### IV. Conclusion

AICPA respectfully requests the BGC to reverse the determination of the EIU based on the errors of the ICANN staff and EIU that contradict established ICANN policies. If clarification or additional detail would be helpful on any points raised in Reconsideration Request 15-17 or this Post-Hearing Submission, AICPA would be happy to provide that information to the BGC in whatever form is most efficient, including by oral hearing or written submission. Thank you once again for your time and careful attention.

Respectfully submitted,

/s/ Erik Asgeirsson

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on behalf of the American Institute of Certified Public Accountants (AICPA)