

# **Exhibit 44**

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requestor Information**

Requestor:

**Name:** dotgay LLC

**Address:** Contact Information Redacted

**Email:** Jamie Baxter 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.**

dotgay LLC (the “Requestor”) seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 (collectively, the “Resolutions”), which accepted FTI Consulting, Inc.’s (“FTI”) three reports on its independent evaluation of the community priority evaluation process (collectively, the “CPE Process Review Reports”).<sup>1</sup>

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<sup>1</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

On 15 March 2018, the ICANN Board adopted four resolutions related to the independent review of the community priority evaluation (“CPE”) process.<sup>2</sup> The Resolutions held that the ICANN Board (1) “acknowledges and accepts the findings set forth in the three CPE Process Review Reports” (Resolution 2018.03.15.08);<sup>3</sup> (2) “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” (Resolution 2018.03.15.09);<sup>4</sup> (3) “declares that the CPE Process Review has been completed” (Resolution 2018.03.15.10);<sup>5</sup> and (4) “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” (Resolution 2018.03.15.11).<sup>6</sup>

**4. Date of action/inaction:**

ICANN acted on 15 March 2018 by adopting 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

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<sup>2</sup> The ICANN Board directed its “President and CEO, or his designee(s), to undertake an independent review” of the CPE process. Exhibit 02, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>. FTI conducted its review as part of this directive.

<sup>3</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>. ICANN’s “CPE Process Review was conducted by [FTI] ... and consisted of three parts” that were discussed in three separate reports. Exhibit 03, ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>. The first report involves “reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider” (“Scope 1 Report”). *Id.* The second report involves “an evaluation of whether the CPE criteria were applied consistently throughout each CPE report” (“Scope 2 Report”). *Id.* And the third report consists of “a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests” (“Scope 3 Report”). *Id.*

<sup>4</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

the Resolutions during a public meeting of the ICANN Board.<sup>7</sup>

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

Requestor is materially and adversely affected by ICANN’s decision to adopt the Resolutions. As described further in **Section 8** below, Requestor is the community applicant for the .GAY gTLD and therefore participated in the CPE process.<sup>8</sup> Requestor seeks reconsideration of the Board Governance Committee’s (“BGC”) decision to affirm the second .GAY CPE. Requestor’s Reconsideration Request 16-3 (“RR 16-3”) raises several significant concerns about the evaluation—such as the discriminatory and inconsistent application of the CPE criteria.<sup>9</sup> FTI’s independent review of the CPE process, which includes a review of Requestor’s own CPE, serves as contrary evidence to the discrimination and inconsistency arguments in RR 16-3.<sup>10</sup> However, unlike the expert opinions supporting RR 16-3, the CPE Process Review Reports are based on a flawed methodology and insufficient substantive analysis.<sup>11</sup> Despite being aware of these problems with the CPE Process Review Reports,<sup>12</sup> the ICANN Board nonetheless fully

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<sup>7</sup> See Exhibit 04, “ICANN Board Meeting,” ICANN|61 (last visited 3 Apr. 2018), <https://61.schedule.icann.org/meetings/647631>.

<sup>8</sup> See Exhibit 05, “Community Priority Evaluation Report for .GAY” (6 Oct. 2014), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>; see also Exhibit 06, “Community Priority Evaluation Report for .GAY” (8 Oct. 2015), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>9</sup> See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (seeking reconsideration of the determination on Reconsideration Request 15-21); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (requesting reconsideration of the second .GAY CPE).

<sup>10</sup> Exhibit 09, Community Priority Evaluation Process Review Update (2 June 2017), <https://www.icann.org/news/announcement-4-2017-06-02-en>. The review determined that “the CPE Provider consistently applied the CPE criteria throughout all Community Priority Evaluations.” Exhibit 10, 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>.

<sup>11</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, *Persona Data Redacted* (31 Jan. 2018), p. 9, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>12</sup> See *id.*; Exhibit 12, 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>.

“acknowledge[d] and accept[ed]” them.<sup>13</sup> It then directed the BAMC to “move forward with consideration of the remaining Reconsideration Requests relating to the CPE process,” which includes RR 16-3, in light of the Board’s decision regarding the CPE Process Review Reports.<sup>14</sup> The BAMC’s consequential reliance on the fallacious CPE Process Review Reports will directly affect its consideration of RR 16-3 and, therefore, will directly and materially affect Requestor.

The BAMC simply cannot proceed with evaluating RR 16-3 based on the Resolutions because the ICANN Board not only rubber-stamped a set of flawed reports but also violated ICANN’s Bylaws. The ICANN Board must act “consistent with procedure designed to ensure fairness, including implementing procedures to ... encourage fact-based policy development work”<sup>15</sup> The CPE Process Review Reports are based on an incomplete and unreliable universe of documents biased in favor of ICANN, as explained in **Section 8.3** below. 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.

Furthermore, 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.”<sup>16</sup> It has failed to comply with this obligation in the following ways:

1. The ICANN Board has 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[.]” It has not acted for the public benefit by accepting the conclusions of reports that rubber-stamp an evaluation process for community applicants that legal

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<sup>13</sup> Exhibit 10, 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>.

<sup>14</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

<sup>15</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Section, 1.2(a)(iv), <https://www.icann.org/resources/pages/governance/bylaws-en/>.

<sup>16</sup> *Id.* at Article 1, Section, 1.2.

experts, including human rights organizations, and ICANN itself has recognized as problematic—as seen in **Section 8.2** below.

2. The ICANN Board has 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.”<sup>17</sup> As explained in **Section 8.2** below, the ICANN Board is aware of *several* independent experts that concluded the Economist Intelligence Unit (“EIU”) discriminatorily applied the CPE criteria and that determined the CPE Process Review Reports themselves were significantly deficient. Yet, instead, the ICANN Board 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 has 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.”<sup>18</sup> Any neutral, objective, and fair examination of the CPE Process Review Reports would conclude that they are deficient, as explained in Requestor’s past submissions to the ICANN Board.<sup>19</sup> The ICANN Board has thus made a decision in contravention of the aforementioned principles by accepting FTI’s CPE Process Review Reports.
4. The ICANN Board has violated its core value to “[o]perat[e] with efficiency and excellence.”<sup>20</sup> It is evident that the knowing acceptance of a deficient independent evaluation does not constitute operating with any degree of excellence.

The ICANN Board’s decision to adopt the Resolutions, therefore, violates ICANN’s Bylaws because it knowingly adopted the flawed CPE Process Review Reports.

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<sup>17</sup> *Id.* at Article 3, Section, 3.1.

<sup>18</sup> *Id.* at Article 1, Section, 1.2(a)(v).

<sup>19</sup> Exhibit 12, Letter from A. Ali on behalf of dotguy to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Persona Data Redacted (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>20</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Section, 1.2(b)(v), <https://www.icann.org/resources/pages/governance/bylaws-en/>.

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

ICANN’s action materially affects the global gay community because a community-operated .GAY gTLD is necessary to provide for the community’s needs. Personal Data Redacted, explained in her expert legal opinion, the gay community still faces “stigma, discrimination, and violence around the world.”<sup>21</sup> In fact, 71 countries—comprising 37% of the United Nations—still enforce laws criminalizing same-sex behavior.<sup>22</sup>

In order to help combat these significant problems, Requestor submitted a community priority application for the .GAY gTLD. Requestor plans to operate the gTLD in order to “create an environment on the Internet that addresses important and primary needs of the Gay Community; safety, visibility, and support.”<sup>23</sup> A community-operated .GAY gTLD will (1) provide a safe space on the Internet to “encourage more community members to come out and thrive in the .gay network;” (2) promote the community’s visibility because “to be visible is to be counted and to be counted is to be relevant to society and the economy;” and (3) “support the Gay Community with access to trusted resources, as well as with funding.”<sup>24</sup> Requestor aims to achieve these goals through its operation of the .GAY gTLD; for example, Requestor has already committed to maintain “community resource websites,” establish a Registry Advisory Board to ensure that

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<sup>21</sup> Exhibit 14, Letter from A. Ali to ICANN Board, attaching the Expert Opinion of Personal Data Redacted (17 Oct. 2016), p. 5, <https://www.icann.org/en/system/files/correspondence/al-to-icann-board-17oct16-en.pdf>.

<sup>22</sup> Exhibit 15, Personal Data Redacted, “State-Sponsored Homophobia, A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition,” ILGA (May 2017), p. 37, [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf).

<sup>23</sup> Exhibit 16, “New gTLD Application Submitted to ICANN by: dotgay llc,” ICANN (13 June 2012), pp. 7-8.

<sup>24</sup> *Id.* at p. 8.

the .GAY gTLD “reflects the true needs of the community,” and “broaden its access to all members of the Global Gay Community.”<sup>25</sup>

As explained in **Section 6** above, the ICANN Board’s adoption of the Resolution materially and adversely affects Requestor’s community priority application for the .GAY gTLD. Through RR 16-3, Requestor is contesting the EIU’s discriminatory and inconsistent application of the CPE criteria to the second .GAY CPE—which denied community status to Requestor’s application.<sup>26</sup> The ICANN Board’s acceptance of the procedurally and substantively defective CPE Process Review Reports, as explained in **Section 8.3** below, will consequentially permit the BAMC to use the reports as a basis for affirming the EIU’s second .GAY CPE. By accepting the second .GAY CPE, and therefore denying Requestor community priority status, ICANN “would generate economic and social costs [for the global gay community] by creating a barrier to the development of a vibrant and successful gay economic community.”<sup>27</sup> Without community oversight, the .GAY gTLD “would become highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people,”<sup>28</sup> creating social and economic costs that “would add to the existing stigma and discrimination faced by LGBTIA people around the world.”<sup>29</sup> The ICANN Board’s action thus adversely affects the entire community for which Requestor has submitted its community priority application: the global gay community.

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<sup>25</sup> Exhibit 17, dotgay LLC, Specification 11 Public Interest Commitments (19 Feb. 2013), pp. 1-3, <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/444?t:ac=444>.

<sup>26</sup> See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (seeking reconsideration of the determination on Reconsideration Request 15-21); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (requesting reconsideration of the second .GAY CPE).

<sup>27</sup> Exhibit 14, Letter from A. Ali to ICANN Board, attaching the Expert Opinion of Personal Data Redacted (17 Oct. 2016), p. 5, [https://www.icann.org/en/system/files/correspondence/al\\_Personal Data Redacted-to-icann-board-17oct16-en.pdf](https://www.icann.org/en/system/files/correspondence/al_Personal Data Redacted-to-icann-board-17oct16-en.pdf).

<sup>28</sup> *Id.* at p. 7.

<sup>29</sup> *Id.* at p. 8.

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

### **8.1 Requestor’s Participation in the CPE Process**

Requestor submitted a community priority application for the .GAY gTLD as part of ICANN’s New gTLD Program, intending to create a safe space on the Internet for members of the gay community to communicate, engage in economic activity, and promote social change.<sup>30</sup> In order to qualify for community priority status, Requestor’s application must pass the CPE by meeting certain CPE criteria. The EIU evaluated Requestor’s application pursuant to the CPE criteria in early 2014 and determined that Requestor did not prevail as a community applicant – having only received 10 of 16 points.<sup>31</sup>

In response, Requestor, supported by multiple community organizations, filed a reconsideration request with the BGC, seeking to have its application re-evaluated by the EIU.<sup>32</sup> Among other problems with the CPE process, Requestor explained to the BGC that the EIU improperly interpreted and inconsistently applied CPE criteria.<sup>33</sup> The BGC granted the request because the EIU did not follow procedure during the CPE process. As a result, Requestor’s application was re-evaluated by the EIU.

Although the EIU again evaluated Requestor’s community priority application, it awarded the application the same score based on the same arguments.<sup>34</sup> Hence, as with the first .GAY CPE, the EIU inconsistently and discriminatorily applied the CPE criteria to Requestor’s application. For example, the EIU made the following inconsistency errors when evaluating the CPE criteria:

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<sup>30</sup> *See id.*

<sup>31</sup> Exhibit 05, Community Priority Evaluation Report for .GAY (6 Oct. 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>. In order to obtain community priority status, Requestor needed to obtain a score of 14 points. *Id.*

<sup>32</sup> *See* Exhibit 18, Revised Reconsideration Request 14-44 (29 Nov. 2014), <https://www.icann.org/en/system/files/files/request-dotgay-redacted-29nov14-en.pdf>.

<sup>33</sup> *Id.* at pp. 3-4.

<sup>34</sup> *See* Exhibit 06, Community Priority Evaluation Report for .GAY (8 Oct. 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

- The EIU inconsistently applied the CPE criteria, as set forth in the New gTLD Applicant Guidebook (“AGB”) and the CPE Guidelines, in regards to the nexus criteria. The EIU awarded .GAY zero points because it found that a “small part of the applicant’s defined community is not identified by the applied-for string.”<sup>35</sup> Yet, the EIU awarded points for the nexus criteria in the .HOTEL, .SPA, and .RADIO CPEs—all of which included entities that are not automatically associated with the gTLDs.<sup>36</sup>
- The EIU inconsistently interpreted the support criteria. Requestor received only one point because, although it had significant support from the community and its organizations, it did not have support from a single organization recognized as representing the entire community. No such organization exists. The EIU, though, awarded full points to .HOTEL and .RADIO’s community applications even though their communities also have no single representative organization.<sup>37</sup>

As a result of the problems with its second .GAY CPE, Requestor began the reconsideration request process.<sup>38</sup> This process resulted in RR 16-3, which is now pending before the BAMC.<sup>39</sup>

## 8.2 Concerns with the CPE Process

Both participants and observers of ICANN’s New gTLD Program have recognized that the CPE process is flawed. Several of them have publically expressed their concerns, particularly (1) other community priority applicants, (2) legal experts, and (3) ICANN itself.

<sup>35</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Persona Data Redacted Persona Data Redacted (31 Jan. 2018), pp. 20-24, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>36</sup> *Id.* at pp. 39-41; Exhibit 19, **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. 49-50, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>37</sup> *Id.* at p. 50.

<sup>38</sup> See Exhibit 20, Reconsideration Request 15-21 (22 Oct. 2015), <https://www.icann.org/en/system/files/files/reconsideration-request-redacted-15-21-dotgay-22oct15-en.pdf> (requesting reconsideration of the EIU’s second .GAY CPE); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (amending Reconsideration Request 15-21); Exhibit 21, Determination of the Board Governance Committee (BGC) on Reconsideration Request 15-21 (1 Feb. 2016) <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf> (denying Amended Reconsideration Request 15-21); Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (contesting the 1 February 2016 Decision by the BGC on Amended Reconsideration Request 15-21 and asking ICANN to “set aside” the determination).

<sup>39</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en> (“the Board directs 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”).

Requestor is not the only participant in the CPE process that has recognized problems with the CPE. The community priority applicants for .MUSIC,<sup>40</sup> .CPA,<sup>41</sup> and .MERCK<sup>42</sup> all submitted requests for reconsideration related to their individual CPEs, having each separately found problems with the CPE process. Significantly, even community priority applicants that passed their CPE have complained about the inherent problems with the CPE. The European Broadcasting Union, which was awarded community priority status for its .RADIO application, found that the CPE process “was far from being impartial and flawless ... [with] numerous and evident inconsistencies.”<sup>43</sup>

The community priority applicants’ concerns with the CPE process are supported by legal experts. The Council of Europe, a leading human rights organization with an observer status within ICANN’s Governmental Advisory Committee (“GAC”), issued a report by its own experts that determined the EIU inconsistently applied the CPE criteria.<sup>44</sup> Two independent legal experts further criticize the CPE process. <sup>Persona Data Redacted</sup>

<sup>Persona Data Redacted</sup>, performed an independent review of Requestor’s CPE and found that it (1) shows an “incomplete understanding” of the CPE’s criteria,<sup>45</sup> (2) contained “interpretive errors,” and (3) contained “errors of inconsistency and discrimination.”<sup>46</sup> <sup>Persona Data Redacted</sup>

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<sup>40</sup> See Exhibit 22, Reconsideration Request 16-5 (24 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>41</sup> See Exhibit 23, Reconsideration Request 16-8 (15 July 2016), <https://www.icann.org/resources/pages/reconsideration-16-8-cpa-australia-request-2016-07-18-en>.

<sup>42</sup> See Exhibit 24, Reconsideration Request 16-12 (25 Aug. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-request-redacted-25aug16-en.pdf>.

<sup>43</sup> Exhibit 25, Letter from the EBU to dotgay LLC (6 Mar. 2018), pp. 1-2, [https://www.icann.org/en/system/files/correspondence/Persona Data Redacted-baxter-06mar18-en.pdf](https://www.icann.org/en/system/files/correspondence/Persona%20Data%20Redacted-baxter-06mar18-en.pdf).

<sup>44</sup> Exhibit 19, **Persona 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>.

<sup>45</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of <sup>Persona Data Redacted</sup> <sup>Persona Data Redacted</sup> 31 Jan. 2018), p. 74, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>46</sup> *Id.* at pp. 20-21.

## Personal Data Redacted

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concluded that the EIU improperly applied the CPE criteria to community priority applicants as part of the CPE process.<sup>47</sup>

Even ICANN—through its Board of Directors, key participants in ICANN policy-making, and Ombudsman—has recognized that there are problems with the CPE. Cherine Chalaby, member of the ICANN Board, and Mark Carvell, Vice Chair of the GAC, have acknowledged the inconsistencies<sup>48</sup> and unfairness<sup>49</sup> in the CPE process. ICANN’s own Ombudsman examined Requestor’s CPE and found that “the EIU process should perhaps in retrospect[] have been much more open to scrutiny.”<sup>50</sup> Most significantly, in September 2016, the ICANN Board recognized the “certain concerns that some applicants have raised with the CPE process”<sup>51</sup> and “direct[ed] [its] President and CEO, or his designee(s), to undertake an independent review” of the CPE process.<sup>52</sup> Had the ICANN Board not acknowledged that problems with the CPE process existed, then they would not have initiated an independent review of the CPE process.

### 8.3 The Independent Review of the CPE Process by FTI

ICANN’s “independent review” of the CPE process, which concluded with the acceptance of the CPE Process Review Reports, is the core issue of this reconsideration request. Despite the

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<sup>47</sup> See Exhibit 26, Expert Legal Opinion by Honorary Professor in International Copyright Personal Data Redacted (17 June 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-redacted-17jun16-en.pdf>.

<sup>48</sup> Exhibit 27, 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](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 rational for all scoring decisions but I understand from feedback that this has not been achieved in all cases.”).

<sup>49</sup> *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.”).

<sup>50</sup> Exhibit 28, Chris LaHatte, “Dot Gay Report” (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

<sup>51</sup> Exhibit 29, Letter from Christine Willett to Jamie Baxter (16 May 2017), p. 2, <https://www.icann.org/en/system/files/correspondence/willett-to-baxter-et-al-16may17-en.pdf>.

<sup>52</sup> Exhibit 02, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

importance of the CPE review, ICANN has been remarkably nontransparent throughout the review process.<sup>53</sup> It was not until 2 June 2017 that Requestor learned ICANN hired FTI to conduct an independent review of the CPE process.<sup>54</sup> ICANN has, and continues to, rebuff all efforts to obtain detailed information about FTI's independent review. The only substantive information available to the public about the independent review is the CPE Process Review Reports themselves, which were not published until 13 December 2017.<sup>55</sup>

Even a cursory examination of the CPE Process Review Reports reveals significant problems with the methodology adopted by FTI. ICANN represented to the Internet community that FTI will be “digging in very deeply” and that there will be “a full look at the community priority evaluation.”<sup>56</sup> As seen in the CPE Process Review Reports, however, FTI failed to meet ICANN's apparent expectations. For instance, the CPE Process Review Reports contained the following problems:

- **The CPE Process Review Reports relied upon incomplete and unreliable supporting evidence.** FTI only relied upon documents from ICANN as part of its review, since the EIU refused to produce documents and it did not accept submissions from community priority applicants.<sup>57</sup> FTI further only interviewed individuals associated with ICANN and the EIU, and those interviews were equally deficient. Even though the EIU produced no documents, FTI interviewed only two EIU staff members—and none of the

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<sup>53</sup> Requestor has previously expressed its concerns regarding the transparency of the independent review. *See* Exhibit 30, Letter from A. Ali to ICANN Board (8 Aug. 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-crocker-08aug17-en.pdf>; Exhibit 31, Reconsideration Request 17-3 (30 June 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>; Exhibit 32, Reconsideration Request 17-4 (25 July 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>; Exhibit 33, Reconsideration Request 18-2 (15 Mar. 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-request-redacted-15mar18-en.pdf>.

<sup>54</sup> Exhibit 09, Community Priority Evaluation Process Review Update (2 June 2017), <https://www.icann.org/news/announcement-4-2017-06-02-en>.

<sup>55</sup> Exhibit 03, ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>56</sup> Exhibit 34, John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, [http://sched.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf).

<sup>57</sup> *See* Exhibit 35, 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>.

independent evaluators, project coordinators, or project directors.<sup>58</sup> Accordingly, the CPE Process Review Reports are based only on interviews with the two EIU members, six ICANN staff members, and documents produced by ICANN.<sup>59</sup> A review based on this limited, one-sided and incomplete universe of documents cannot be considered independent.

- **The CPE Process Review Reports’ conclusions are inconsistent with other independent evaluations of the CPE.** There are a significant number of independent evaluations addressing the CPE; FTI did not address any of them, even though they all directly contradict FTI’s conclusions on the CPE process.<sup>60</sup> For example, the Independent Review Process 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.”<sup>61</sup> FTI, though, concluded that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring, or conclusions reached by the CPE Provider.”<sup>62</sup> Furthermore, FTI determined that the CPE “scoring decisions were not the result of any inconsistent or disparate treatment”<sup>63</sup> without taking into consideration the expert legal opinions discussed in **Section 8.2** above, which directly contradict FTI’s conclusion and, unlike FTI, were developed after (1) re-evaluating the CPE applications; (2) relying upon the substance of the reference material; and (3) assessing the propriety or reasonableness of the research undertaken by the CPE Provider.<sup>64</sup>

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<sup>58</sup> See *id.* at pp. 7-9, 14-15; Exhibit 10, 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>.

<sup>59</sup> See Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 3-7, 13-14, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>60</sup> *Id.* at p. 3.

<sup>61</sup> Exhibit 43, *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>.

<sup>62</sup> Exhibit 35, 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>.

<sup>63</sup> Exhibit 10, 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>.

<sup>64</sup> See Exhibit 19, **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), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>; see also Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of **Personal Data Redacted** (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

- **The CPE Process Review Reports are “long on description and conclusory statements and short on actual evaluation.”**<sup>65</sup> As explained by <sup>Persona Data Redacted</sup> in his Second Expert Opinion, “the approach followed by FTI was a ‘description’ of the CPE [Process Review] Reports, but not an ‘evaluation’ to determine whether the CPE Reports were actually following the applicable guidelines.”<sup>66</sup> Therefore, “[b]ecause its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as the CPEs.<sup>67</sup>

The ICANN Board was aware of the significant problems with the methodology adopted by FTI and the conclusions reached in the CPE Process Review Reports.<sup>68</sup> In fact, ICANN Board member Avri Doria even abstained from voting on the Resolutions because she could not accept the flaws with the CPE Process Review Reports:

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 the 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 [*sic*] only interviewed two of the evaluators from a larger set of evaluators.

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<sup>65</sup> Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of <sup>Persona Data Redacted</sup> (31 Jan. 2018), p. 9, <https://www.icann.org/en/system/files/correspondence/ali-to-ica-31jan18-en.pdf>.

<sup>66</sup> *Id.* at p. 23.

<sup>67</sup> *Id.* at p. 25.

<sup>68</sup> *See id.*; Exhibit 12, 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>.

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-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.<sup>69</sup>

Yet, despite the obvious procedural and substantive issues with the CPE Process Review Reports, the ICANN Board fully accepted them on 15 March 2018 through the Resolutions.

**9. What are you asking ICANN to do now?**

Requestor asks ICANN to reconsider and, subsequently, reject its decision to adopt the Resolutions. ICANN cannot acknowledge and accept the CPE Process Review Reports.

**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.**

Requestor is materially affected by the ICANN Board's decision to pass the Resolutions. As stated in **Section 8** above, Requestor is a community priority applicant for the .GAY gTLD that participated in the CPE process.<sup>70</sup> The EIU discriminatorily applied the CPE criteria when evaluating Requestor's application.<sup>71</sup> The resulting discriminatory and flawed CPE is currently

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<sup>69</sup> Exhibit 36, "SAN JUAN – ICANN Board Meeting" ICANN (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>70</sup> See Exhibit 05, "Community Priority Evaluation Report for .GAY" (6 Oct. 2014), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>; see also Exhibit 06, "Community Priority Evaluation Report for .GAY" (8 Oct. 2015), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>71</sup> See Exhibit 37, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Nov. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>; see also Exhibit 38, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the First Expert Opinion of **Personal Data Redacted** (13 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

before the BAMC for reconsideration as part of RR 16-3.<sup>72</sup> However, FTI’s independent review of the CPE process claims that there are no problems with the CPE process. Its conclusion, as put forth in the CPE Process Review Reports, is based on a procedurally and substantively deficient independent review of the CPE process.<sup>73</sup> And, yet, the ICANN Board has decided to accept the CPE Process Review Reports through the Resolutions and conclude its investigation of the CPE process *despite being aware of the significant problems with FTI’s independent review*.<sup>74</sup> ICANN’s acceptance of FTI’s flawed independent review will directly affect the BAMC’s consideration of RR 16-3,<sup>75</sup> and therefore will directly affect Requestor.

And, further, the community that Requestor represents—the gay community—is materially affected by ICANN’s decision to accept reports that whitewash the discriminatory treatment of Requestor’s community application to operate the .GAY gTLD for the gay community.<sup>76</sup>

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<sup>72</sup> Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en> (“the Board directs 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”).

<sup>73</sup> See Exhibit 12, 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>; Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of **Personal Data Redacted** (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>; see also Exhibit 36, “SAN JUAN – ICANN Board Meeting” ICANN (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137> (ICANN Board Member Avri Doria explains that “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. ... [T]he documentation describes their inability to fully apply that methodology.”).

<sup>74</sup> Exhibit 12, 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>; Exhibit 39, Letter from A. Ali on behalf of dotgay to the ICANN Board (20 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of **Personal Data Redacted** (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>75</sup> See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>; Exhibit 40, dotgay’s Presentation to the ICANN Board on Reconsideration Request 16-3 (15 May 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>76</sup> See Exhibit 41, Letter from National LGBT Chamber of Commerce to ICANN Board (1 Mar. 2018), <https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>; Exhibit 42, Letter from SERO to ICANN Board (18 Feb. 2018), <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>.

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

No, Requestor is not bringing this request on behalf of multiple persons or entities.

**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?**

This is 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.*



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Arif Hyder Ali

April 13, 2018

Date

# **Exhibit 45**

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-4  
14 JUNE 2018**

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The Requestor, dotgay LLC, 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.<sup>1</sup> Specifically, the Requestor claims that, “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and is inconsistent with ICANN organization’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.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .GAY generic top-level domain (gTLD) (Application or dotgay Application), which was placed in a contention set with three other .GAY applications.<sup>3</sup> The Requestor participated in CPE, but did not prevail (First CPE). The Requestor then challenged the First CPE results in Reconsideration Request 14-44 (Request 14-44), which the Board Governance Committee (BGC) granted and directed a re-evaluation of the Requestor’s Application. The re-evaluation of the Application (Second CPE) was not successful.<sup>4</sup> The Requestor then challenged the results of the Second CPE in

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<sup>1</sup> Request 18-4, § 3, at Pg. 1.

<sup>2</sup> Request 18-4, § 6, at Pg. 4-5.

<sup>3</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>4</sup> BGC Determination on Request 14-44, <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <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), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

Reconsideration Request 15-21, which the BGC denied.<sup>5</sup> Thereafter, the Requestor filed Reconsideration Request 16-3, challenging the BGC's denial of Request 15-21. Request 16-3 is pending evaluation by the BAMC.<sup>6</sup>

While Request 16-3 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.<sup>7</sup> The 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) compilation of the research relied 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.<sup>8</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.<sup>9</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>10</sup>

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

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<sup>5</sup> BGC Determination on Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>6</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

<sup>7</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>8</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>9</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>10</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>11</sup>

On 13 April 2018, the Requestor submitted Request 18-4, challenging the Resolutions.<sup>12</sup> The Requestor claims that, “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and is inconsistent with ICANN org’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.<sup>13</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-4 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>14</sup>

The BAMC has considered Request 18-4 and all relevant materials and recommends that the Board deny Request 18-4 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.<sup>15</sup> The CPE Process Review Reports identify the materials considered by FTI.<sup>16</sup> 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.<sup>17</sup>

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<sup>11</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>12</sup> Request 18-4, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>.

<sup>13</sup> Request 18-4, § 6, at Pg. 4-5.

<sup>14</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-2, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

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

<sup>16</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>17</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

## II. Facts.

### A. The CPE Provider's Evaluations of the Requestor's .GAY Application.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 April 2014, the Requestor's Application was invited and the Requestor accepted to participate in CPE.<sup>18</sup>

On 6 October 2014, the CPE panel issued a "First CPE Report," concluding that the Application did not qualify for community priority.<sup>19</sup> The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report.<sup>20</sup> The BGC granted reconsideration on Request 14-44 on the grounds that the CPE Provider had inadvertently failed to verify some letters of support for the Application.<sup>21</sup> Subsequently, the CPE Provider conducted a "Second CPE" of the Application.<sup>22</sup> The Application did not prevail in the Second CPE.<sup>23</sup>

On 22 October 2015, the Requestor sought reconsideration of the Second CPE Report (Request 15-21),<sup>24</sup> and filed a DIDP Request seeking the disclosure of documents relating to the Second CPE (2015 DIDP Request).<sup>25</sup> Following ICANN org's response to the 2015 DIDP Request,<sup>26</sup> the Requestor revised Request 15-21 to include a challenge the response to the 2015

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<sup>18</sup> 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>. *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

<sup>19</sup> *See* CPE Report at 1.

<sup>20</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>21</sup> *Id.* at Pg. 2.

<sup>22</sup> *Id.* at Pg. 1.

<sup>23</sup> *Id.* at Pg. 2.

<sup>24</sup> *Id.*

<sup>25</sup> DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>26</sup> Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

DIDP Request in addition to the Second CPE Report.<sup>27</sup>

On 1 February 2016, the BGC denied Request 15-21.<sup>28</sup> On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the Second CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.<sup>29</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>30</sup>

#### **B. The CPE Process Review.**

While Request 16-3 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).<sup>31</sup>

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 exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>32</sup> 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

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<sup>27</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>28</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>29</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>30</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>31</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>32</sup> *Id.*

that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-3, would be on hold until the CPE Process Review was completed.<sup>33</sup>

On 13 December 2017, ICANN organization published FTI's reports issued in connection with the CPE Process Review.<sup>34</sup>

With respect to Scope 1, FTI concluded:

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.<sup>35</sup>

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."<sup>36</sup>

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."<sup>37</sup> FTI observed that all eight of the relevant CPE reports (which are the ones at issue in the Reconsideration Requests placed on hold) referenced research. Two of the eight relevant CPE reports included citations for each reference to research. Of the remaining six relevant CPE reports, while the reports themselves did not include citations to each reference to research, in five of the six instances, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports. In the Requestor's case (for which two CPE reports were

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<sup>33</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>34</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>35</sup> Scope 1 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>36</sup> Scope 2 Report, at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>37</sup> Scope 3 Report, at Pg. 3-4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

completed, as discussed above) FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. However, FTI did find that the citation supporting the research referenced in the Second CPE Report may have been recorded in the working papers associated with the First CPE.<sup>38</sup>

On 15 March 2018, as detailed above, the Board adopted the Resolutions.<sup>39</sup> The Board 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),<sup>40</sup> and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).<sup>41</sup> 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.<sup>42</sup>

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

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<sup>38</sup> Scope 3 Report, at Pg. 4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>39</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>. One Board member, Avri Doria, abstained from voting on the 2018 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>. However, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting. Id.

<sup>40</sup> Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

<sup>41</sup> 2018 Resolutions. See also Roadmap, available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

<sup>42</sup> Roadmap, at Pg. 2.

addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.<sup>43</sup>

### **C. The Requestor’s Response to the CPE Process Review.**

On 15 and 20 January 2018, the Requestor submitted letters to the Board, claiming that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.<sup>44</sup> In the 15 January 2018 letter, the Requestor asked the Board to take no action with respect to the conclusions reached by FTI until the parties have had an opportunity to respond to the CPE Process Review Reports and to be heard as it relates to their pending reconsideration requests.<sup>45</sup>

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Requestor to “submit additional information relating to Request 16-3, 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 16-3. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-3 and that is not already covered by the written materials.”<sup>46</sup>

On 23 March 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.<sup>47</sup> The Requestor reconfirmed its position on 5 April

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<sup>43</sup> *Id.*

<sup>44</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>;

<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

<sup>45</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>46</sup> Attachment 1, 19 March 2018 Email From ICANN to the Requestor.

<sup>47</sup> 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>.

2018.<sup>48</sup>

**D. Request 18-4.**

On 13 April 2018, the Requestor submitted Request 18-4, which challenges the Resolutions.<sup>49</sup>

**E. Relief Requested**

The Requestor asks the Board to “reconsider and, subsequently, reject its decision to adopt the Resolutions.”<sup>50</sup>

**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.<sup>51</sup>

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<sup>48</sup> Attachment 2, 5 April 2018 Email From the Requestor to ICANN.

<sup>49</sup> Request 18-4, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>.

<sup>50</sup> *Id.*, § 9, at Pg. 15.

<sup>51</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

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.<sup>52</sup> 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.<sup>53</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>54</sup>

On 19 May 2018, the BAMC determined that Request 18-4 is sufficiently stated and sent Request 18-4 to the Ombudsman for review and consideration.<sup>55</sup> The Ombudsman thereafter recused himself from this matter.<sup>56</sup> Accordingly, the BAMC has reviewed Request 18-4 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 Reviews. 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

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<sup>52</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>53</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>54</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>55</sup> Ombudsman Action Regarding Request 18-4, Pg. 2, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-ombudsman-action-21may18-en.pdf>.

<sup>56</sup> Ombudsman Action Regarding Request 18-4, Pg. 1.

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 former employees of the CPE Provider; and (3) FTI did not accept materials from, or interview, CPE applicants in the course of its investigation.<sup>57</sup>

As a preliminary matter, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.<sup>58</sup> The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.<sup>59</sup> The Requestor has not identified a 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.<sup>60</sup> 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

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<sup>57</sup> Request 18-4, § 8, at Pg. 12-13. *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); 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf> (FTI did not interview or accept materials from applicants, and “received almost no input from the CPE Provider”)

<sup>58</sup> *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>.

<sup>59</sup> *See* CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>60</sup> *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>.

CPE process and evaluations.<sup>61</sup> 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 that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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 not identified a policy or procedure requiring FTI to do more because none exists. Reconsideration is not warranted on this ground.

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<sup>61</sup> 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>.

<sup>62</sup> 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\_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>63</sup> *Id.* at Pg. 9.

<sup>64</sup> 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>.

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.

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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

## 2. FTI was Not Required to Agree with the Findings of Prior Third-Party Reports.

The Requestor argues that the Board should not have accepted the findings of the CPE Process Review Reports because those findings are inconsistent with conclusions that third parties have reached concerning the CPE process.<sup>68</sup> The Requestor asserts that certain third parties, such as the former Ombudsman,<sup>69</sup> the Council of Europe (in its 4 November 2016 Report

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<sup>65</sup> *Id.* at Pg. 8.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at Pg. 8.

<sup>68</sup> Request 18-4, § 8, at Pg. 13.

<sup>69</sup> Request 18-4, § 8, at Pg. 11, quoting Ex. 28, Chris LaHatte, "Dot Gay Report" (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>. See also 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 9-10, quoting CoE Report, at Pg. 69-70 (in turn quoting Ombudsman's dotgay report).

on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (CoE Report),<sup>70</sup> and the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC (Dot Registry IRP)<sup>71</sup> all identified concerns with the CPE process that the Requestor believes are inconsistent with and not addressed in the CPE Process Review Reports. According to the Requestor, these reports—all of which were issued *before* FTI completed the CPE Process Review Reports—should be taken to mean that any conclusion *other than* that the CPE Provider’s process was inconsistent with the Applicant Guidebook and that ICANN org exerted undue influence over the CPE Provider must be incorrect.<sup>72</sup> The Requestor believes that the Board’s decision to undertake the CPE Process Review “acknowledged that problems with the CPE process existed.”<sup>73</sup>

This argument is both contrary to the facts and completely inconsistent with proper investigative methodology. First, 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 evidence<sup>74</sup>—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,” specifically allegations that

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<sup>70</sup> Request 18-4, § 8, at Pg. 10. *See also* 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 9-10, quoting CoE Report, at Pg. 69-70.

<sup>71</sup> Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-9.

<sup>72</sup> Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-10. The Requestor also points to reports that the Requestor and other CPE applicants submitted in support of their CPE applications. For the same reasons that the independent reports identified in text are not determinative of the outcome of the CPE Process Review, the CPE applicants’ expert reports are likewise not determinative. *See* Request 18-4, § 8, at Pg. 10, 13.

<sup>73</sup> Request 18-4, § 8, at Pg. 11.

<sup>74</sup> *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>.

the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”<sup>75</sup> Second, as noted in the CPE Process Review Reports, FTI considered all available evidence, including but not limited to, relevant IRP documents (including the Dot Registry IRP Final Declaration), relevant Reconsideration Requests (including the documents submitted in support of such Requests such as the First <sup>Personal Data Redacted</sup> and COE Reports), and the report from the Ombudsman’s Own Motion Investigation on the CPE process.<sup>76</sup>

Based upon the *evidence* available, FTI concluded that the CPE Provider applied the CPE criteria in a consistent manner, and differences in scoring outcomes “were not the result of inconsistent application of the criteria,” but rather of different underlying circumstances.<sup>77</sup>

FTI was not directed to conduct an investigation that supported (or contradicted) the Dot Registry IRP, or that supported (or contradicted) the Ombudsman’s Report, the CoE Report, applicant submissions (including expert opinions), or any other commentary on the CPE process.<sup>78</sup> 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.”<sup>79</sup> This decision was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the 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

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<sup>75</sup> Scope 3 Report, at Pg. 3.

<sup>76</sup> Scope 1 report, at Pgs. 3-6.

<sup>77</sup> *Id.*

<sup>78</sup> See Transcript of ICANN Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar, 18 January 2017, comments of M. Carvell and C. Chalaby, at Pg. 12, 20-21, *available at* [https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2).

<sup>79</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

conducting the review in the first place. The Requestor’s arguments do not support reconsideration.

Finally, the Board’s discussion of the CPE Process Review Reports does not support reconsideration. That 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,”<sup>80</sup> does not render the Board vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting.<sup>81</sup>

3. Personal Data Redacted Criticisms of the CPE Process Review Do Not Support Reconsideration.

The “Second Expert Opinion of Personal Data Redacted ” (Second Personal Data Redacted Opinion), which the Requestor submitted in support of Request 16-3 and referenced in Request 18-4,<sup>82</sup> makes several arguments criticizing the scope of the CPE Process Review:

- FTI “failed to recognize or engage the many criticisms of the [CPE Provider’s] application of ICANN’s and CPE’s guidelines to the dotgay and other applications;”<sup>83</sup>
- FTI’s conclusion that “the CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements . . . was supported by no independent analysis [and] the approach followed by FTI was a ‘description’ of the CPE Reports, but not an ‘evaluation’ to determine whether the CPE Reports were actually following the applicable guidelines;”<sup>84</sup>
- “Because its personnel simply repeated the analysis announced by the [CPE Provider] for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as those made in the CPE Reports; and<sup>85</sup>
- FTI “completely failed to examine the [CPE Provider’s] analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these

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<sup>80</sup> San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>81</sup> *Id.*

<sup>82</sup> Request 18-4, § 8, at Pg. 14.

<sup>83</sup> Second Personal Data Redacted Op., ¶ 3.

<sup>84</sup> *Id.* ¶¶ 37-38.

<sup>85</sup> *Id.* ¶ 42.

applications.”<sup>86</sup>

While these claims will be addressed as part of the BAMC and Board’s consideration of Request 16-3, it should be noted that <sup>Personal Data Redacted</sup> primary complaint is that FTI did not re-evaluate the merits of the CPE applications or consider the substance and reasonableness of the CPE Provider’s research.<sup>87</sup> However, as discussed above, that was not what FTI was tasked to do and the Requestor provides no evidence of any policy or procedure requiring that the Board instruct FTI to re-evaluate the applications. These claims do not support reconsideration.

Additionally, the BAMC notes that the Board has already considered and rejected the Requestor’s “assertion that ‘a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.’” As the Board explained, neither the Requestor nor <sup>Persona Data Redacted</sup> “offers any support for this baseless claim, and there is none.”<sup>88</sup> Therefore, reconsideration is not warranted.

#### 4. The Third-Party Letters of Support Do Not Support Reconsideration.

The BAMC has considered three letters submitted to the Board by third parties in support of the dotgay Application, criticizing the CPE Process Review.<sup>89</sup> Although all three letters express “frustration” or dissatisfaction with the findings of the CPE Process Review, none states grounds for reconsideration, nor do they identify any policy or procedures that ICANN organization or FTI violated in the course of the CPE Process Review. Accordingly, they do not support reconsideration.

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<sup>86</sup> *Id.* ¶ 76.

<sup>87</sup> Request 18-4, § 8, at Pg. 13.

<sup>88</sup> 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>.

<sup>89</sup> <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>;  
<https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>;  
<https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

5. The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-3.

The Requestor claims that the BAMC’s “reliance on” the CPE Process Review Reports would “directly affect its consideration of [Request] 16-3.”<sup>90</sup> 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.<sup>91</sup> The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-3 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-3), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-3.

The BAMC will “carefully review and consider”<sup>92</sup> all of the materials that the Requestor submitted in support of Request 16-3 since 2016, including both <sup>Personal Data Redacted</sup> Opinions, the “Expert Opinion of <sup>Personal Data Redacted</sup>, in Support of dotgay’s Community Priority Application No: 1-1713-23699” ( <sup>Personal Data Redacted</sup> Opinion), the CoE Report, and the ICC Determination in *ILGA v. Afiliias*, as the Requestor has asked it to do. The BAMC notes that it also provided the Requestor an opportunity to “be heard [concerning the FTI Report] as it relates to [the] pending reconsideration requests,” which the Requestor sought on 20 January 2018,<sup>93</sup> but declined to accept the opportunity when offered in March 2018.<sup>94</sup>

6. ICANN Organization Adhered to its Transparency Obligations.

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<sup>90</sup> Request 18-4, § 6, at Pg. 4.

<sup>91</sup> 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>.

<sup>92</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>. See also

<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

<sup>93</sup> <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>94</sup> 23 March 2018 Letter from Ali to ICANN, available at <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

Finally, the Requestor asserts that ICANN organization “has been remarkably nontransparent throughout” the CPE Process Review, and “has, and continues to, rebuff all efforts to obtain detailed information about FTI’s independent review,” because the “only substantive information available to the public about the independent review is the CPE Process Review Reports themselves.”<sup>95</sup>

The Requestor has not explained how making the CPE Process Review Reports public somehow falls short of ICANN organization’s transparency obligations. The Board addressed and resolved this claim in its determination on the Requestor’s Request 18-2,<sup>96</sup> which is incorporated herein, and will not repeat itself here, except to say that the Requestor has raised no additional argument here that warrants reconsideration based on this assertion.

For all of the reasons discussed above, reconsideration is not warranted.

## **VI. Recommendation**

The BAMC has considered the merits of Request 18-4 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 18-4.

Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. The first opportunity that the BAMC has to consider the Request is 14 June 2018.

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<sup>95</sup> Request 18-4, § 8, at Pg. 12.

<sup>96</sup> See BAMC Recommendation on Request 18-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.

# **Exhibit 46**

**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.<sup>1</sup>

- 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

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<sup>1</sup> 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 47**

**Subject:** Re: [Reconsideration Request] Update on Reconsideration Request 16-3  
**Date:** Thursday, April 5, 2018 at 1:02:50 PM Pacific Daylight Time  
**From:** Wong, Rosey (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** reconsideration@icann.org  
**CC:** Scott Seitz, Jamie Baxter, WAS DECHERT DOTGAY  
**Attachments:** ATT00001.txt

Dear ICANN:

We write in response to your April 4, 2018 email on behalf of our client, dotgay LLC ("dotgay"). The email requests that dotgay respond to several invitations from the BAMC regarding Reconsideration Request 16-3, specifically whether (1) dotgay would like to make an additional submission to the BAMC, (2) dotgay's 31 January 2018 submission of Personal Data Redacted's Second Expert Report is its supplemental submission to the BAMC, and (3) dotgay 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>).

As we have previously made clear to the BAMC, dotgay rejects ICANN's attempt to impose artificial constraints on any additional submissions regarding Reconsideration Request 16-3. In order to provide ICANN with further substantive comments on the CPE Process Review, dotgay 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 dotgay to review the documents and prepare additional submissions.

The BAMC must identify its specific concerns regarding Reconsideration Request 16-3 after reviewing dotgay's additional submission, and provide dotgay with the opportunity to make an *in-person* presentation that addresses those concerns. Furthermore, the BAMC's review of Reconsideration Request 16-3 must involve a substantive review of the merits of the .GAY CPE report, taking into account all of the submitted materials supporting the community priority application.

We would appreciate a response from the BAMC by noon on 6 April 2018.

Sincerely,  
Rose Marie Wong

**Rose Marie Wong**  
Associate

**Dechert LLP**

Contact Information Redacted

**From:** Reconsideration <[Reconsideration@icann.org](mailto:Reconsideration@icann.org)>  
**Date:** April 4, 2018 at 7:27:00 PM EDT  
**To:** Contact Information Redacted

Contact Information Redacted

**Cc:** Reconsideration <[Reconsideration@icann.org](mailto:Reconsideration@icann.org)>  
**Subject:** Update on Reconsideration Request 16-3

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 16-3, 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, on 31 January 2018, you submitted the “Second Expert Opinion of Personal Data Redacted in Response to FTI Consulting, Inc.’s Independent Review of the Community Priority Evaluation Process.” (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>). If you would like us to deem that as dotgay LLC’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 31 January 2018 as dotgay LLC’s supplemental submission or if you intend to submit additional materials in support of Request 16-3 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 16-3 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

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Dear Messrs. Baxter 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\[jicann.org\]](#) document.”

To ensure that the review of the pending Reconsideration Requests are conducted in an efficient manner, the BAMC has developed a [Roadmap\[jicann.org\]](#) for the review the requests. In accordance with the [Roadmap\[jicann.org\]](#), the BAMC invites you to submit additional information relating to Request 16-3, 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\[jicann.org\]](#), 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 16-3 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

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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 48**

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"<sup>1</sup> 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.<sup>2</sup> The Board kept silent for nearly two months since that request and then implicitly rejected our request by

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<sup>1</sup> ICANN's 17 September 2016 Board Resolution.

<sup>2</sup> 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 Persona Data Redacted 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

.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>3</sup> See 20 January 2018 Letter from Arif Ali to ICANN.

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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,<sup>8</sup> including

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

<sup>6</sup> Page 8, FTI’s Scope 2 Report.

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

<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup>
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).

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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").

<sup>9</sup> 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.

<sup>10</sup> 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 49**

To: Arif Ali on behalf of dotgay LLC

Date: 14 February 2018

Re: Request No. 20180115-1

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Thank you for your request for documentary information dated 15 January 2018 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the CPE Process Review or the Review):

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 .GAY, both with and without comments;
7. All draft CPE Reports concerning .GAY 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, and Christine Willett;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. The original Request for Proposal (RFP) pertaining to the FTI's review of the CPE process;
12. All of the "CPE Provider's working papers associated with" dotgay's CPE;
13. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
15. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
16. FTI's investigative plan used during its independent review;
17. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
18. All communications between ICANN and FTI regarding FTI's independent review;
19. All communications between ICANN and the CPE Provider regarding FTI's independent review; and
20. All communications between FTI and the CPE Provider regarding FTI's independent review.
21. All documents and communications regarding the scope of FTI's independent review.

## **Response**

### The CPE Process Review

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications. ([Applicant Guidebook](#), Module 4.2 at Pg.

4-7; see also <https://newgtlds.icann.org/en/applicants/cpe>.) 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. ([Applicant Guidebook](#) at Module 4.2 at Pg. 4-7.) 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 previous stages of the new gTLD evaluation process.

CPE is performed by an independent provider (CPE Provider). As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement.

Consistent with ICANN organization's Mission, Commitments, and Core Values set forth in the Bylaws, and specifically in an effort to operate to the maximum extent feasible in an open and transparent manner, ICANN organization provided added transparency into the CPE process by establishing a CPE webpage on the New gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding to the Application ID, string, contention set number, applicant name, CPE invitation date, whether the applicant elected to participate in CPE, and the CPE status. (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>)
- CPE Provider Contract and Statement of Work Information (SOW) (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>)
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>)
- Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>)
- Community Feedback on Draft CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe#invitations>)
- Updated CPE Frequently Asked Questions (<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>)

- CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>)

On 17 September 2016, the Board 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 Board’s oversight of the New gTLD Program (Scope 1). (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.) The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process.

Thereafter, the Board Governance Committee (BGC) determined that the review should 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 research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3). (<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.) Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the following pending Reconsideration Requests would be on hold until the CPE Process Review was completed: 14-30 (.LLC),<sup>1</sup> 14-32 (.INC),<sup>2</sup> 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). ([Letter from Chris Disspain, 26 April 2017](#).)

In November 2016, FTI Consulting Inc.’s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE Process Review following consultation with various candidates. On 13 January 2017, FTI was retained by ICANN’s outside counsel, Jones Day, to perform the review. ([CPE Process Review Update, 2 June 2017](#).)

On 2 June 2017, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner, and to provide additional transparency on the progress of the CPE Process Review, ICANN organization issued a status update. ([CPE Process Review Update, 2 June 2017](#).) Among other things, ICANN organization informed the community that 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. (See [CPE Process Review Update, 2 June 2017](#).)

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<sup>1</sup> Reconsideration Request 14-30 was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-30-dotregistry-request-redacted-07dec17-en.pdf>.

<sup>2</sup> Reconsideration Request 14-32 was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

The [2 June 2017 update](#) also provided the community with additional information regarding the CPE Process Review, including that it 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 organization issued the 2 June 2017 status update. (See [CPE Process Review Update, 2 June 2017](#).)

On 1 September 2017, ICANN organization issued a second update on the CPE Process Review. ICANN organization advised that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed. ([CPE Process Review Update, 1 September 2017](#).) 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. (See [CPE Process Review Update, 1 September 2017](#).) On 4 October 2017, FTI completed its investigative process relating to the second track. (See [Minutes of BGC Meeting, 27 Oct. 2017](#).)

On 13 December 2017, consistent with its commitment to transparency, ICANN organization published FTI's three reports on the CPE Process Review (CPE Process Review Reports or the Reports) on the CPE webpage, and issued an announcement advising the community that the Reports were available. (<https://newgtlds.icann.org/en/applicants/cpe#process-review>; <https://www.icann.org/news/announcement-2017-12-13-en>.)

For Scope 1, "FTI conclude[d] that 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....While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization." ([Scope 1 Report](#), Pg. 4.)

For Scope 2, "FTI conclude[d] that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE." ([Scope 2 Report](#), Pg. 3.)

For Scope 3, "[o]f 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 reports. 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 found 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.” ([Scope 3 Report](#), Pg. 4.)

### dotgay’s DIDP Request

dotgay’s DIDP Request seeks the disclosure of documentary information concerning the CPE Process Review. First, as a preliminary matter, the Request seeks many of the same categories of documents that it previously requested in prior DIDPs, to which ICANN has responded, and 17 of the 21 categories of documents requested are identical to categories of documents requested by Mr. Ali on behalf of DotMusic Limited on 10 January 2018.<sup>3</sup> (See Requests [20141022-1](#), [20151022-1](#), [20170518-1](#) (all on behalf of dotgay), [20170610-1](#) (on behalf of dotgay and DotMusic Limited), and [20180110-1](#) (on behalf of DotMusic Limited).) Further, the Request seeks documentary information which ICANN organization has already made publicly available. As ICANN organization explained in its responses to dotgay’s previous Requests, and as further discussed below, ICANN organization has provided extensive updates concerning the CPE Process Review on the CPE webpage. ([CPE Webpage, New gTLD microsite](#).) ICANN organization provided updates concerning the CPE Process Review in April 2017, June 2017, and September 2017, and published all three of FTI’s Reports in December 2017. ([CPE Webpage, New gTLD microsite](#).) Additionally, a September 2016 Board resolution and October 2016 BGC minutes, both available on ICANN organization’s website ([Board Resolution 2016.09.17.01](#), [BGC Minutes dated 18 October 2016](#)) reflect more information about the status and direction of the CPE Process Review. Many of the Items sought in the Request were addressed in these publications.

Second, in addition to having been previously requested, many of the Items within the instant Request are overlapping and seek the same information. For example, and as discussed below, Item 1, which seeks emails among relevant ICANN organization

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<sup>3</sup> Items 1 through 5 of Request 20180110-1 and the instant Request are identical. Items 6 and 7 seek “draft CPE Reports concerning” .GAY in the instant Request and .MUSIC in Request 20180110-1. Items 8 through 10 and 12 through 20 of the instant Request are identical to Items 8 through 19 of Request 20180110-1. Items 11 and 21 of the instant Request were not included in Request 20180110-1.

personnel relating to the CPE process and evaluations, Item 2, which seeks emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations, and Item 5, which seeks three categories of emails provided to FTI, are all encompassed by Item 4, which requests all emails provided to FTI by ICANN organization. Thus, in responding to the Requests, ICANN organization grouped the Items that are overlapping.

Third, dotgay's blanket assertion that none of the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions) apply because ICANN's commitment to transparency under the Articles of Incorporation and Bylaws requires the disclosure of the materials used by FTI in the CPE Process Review misstates the DIDP Process and misapplies ICANN organization's Mission, Commitments, and Core Values, and adopting it would render the Nondisclosure Conditions meaningless. (See Request at Pgs.1-2.)

The DIDP exemplifies ICANN organization's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. ([DIDP](#).) Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN organization has published process guidelines for responding to requests for documents submitted pursuant to DIDP (DIDP Response Process). (See [DIDP Response Process](#).) The DIDP Response Process provides that following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization's website]." ([DIDP Response Process](#); see also [Nondisclosure Conditions](#).) Thereafter, if ICANN organization concludes that a document falls within a Nondisclosure Condition, "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure." ([DIDP Response Process](#).) "Information that falls within any of the [Nondisclosure Conditions] 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." ([DIDP](#).)

Moreover, the Nondisclosure Conditions, and the entire DIDP, were developed through an open and transparent process involving the broader community. The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN organization, which included extensive public comment and community input. (See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Following the completion of the independent review of standards of accountability and transparency in 2007, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and

principles to “outline, define and expand upon the organisation’s accountability and transparency,” (<https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>), and sought additional community input on the proposed changes before implementing them. (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.)

However, neither the DIDP nor ICANN organization’s Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in ICANN organization’s possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that the community has agreed are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L.* Independent Review Process Panel confirmed are consistent with ICANN’s Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.” (ICANN Bylaws, 22 July 2017, [Art. 1, Section 1.2\(c\)](#).)

Indeed, a critical competing Core Value here is ICANN organization’s Core Value of operating with efficiency and excellence (ICANN Bylaws, at [Art. 1, Section 1.2\(b\)\(v\)](#))) by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. ICANN organization’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN organization is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.” (New gTLD Program Consulting

Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.) Confidential Information includes “all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information.” (<https://newgtlds.icann.org/en/applicants/cpe>.) The materials that the CPE Provider shared with ICANN organization, ICANN organization’s counsel, and FTI reflect the CPE Provider’s Confidential Information, including confidential information relating to its operations, products, and services (i.e. its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees’ personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, ICANN seeks consent from the contractor to release information.<sup>4</sup> (See, e.g., [Response to Request 20150312-1](#) at Pg. 2.) Here, ICANN organization endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations. ICANN organization’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN organization to breach its contract with the CPE Provider. The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN organization’s contract with the CPE Provider: there is a Nondisclosure Condition for “[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ([DIDP](#).)

#### Items 1, 2, 4, 5, and 9

Items 1, 2, 4, 5, and 9 seek either the same or overlapping documentary information. Items 1, 2, 4, and 5 seek email correspondence among ICANN organization personnel (Item 1), between ICANN organization personnel and CPE Provider personnel (Item 2), and that ICANN organization provided to FTI (Items 4 and 5). Item 9 seeks documents provided to FTI by ICANN organization personnel Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, and Christine Willett. dotgay previously requested these materials in Requests 20141022-1 and 20151022-1, both of which sought disclosure of, among other things, policies, guidelines, directives, instructions or guidance from ICANN organization to the CPE Provider, and Request 20170518-1, which sought disclosure of, among other things, “materials provided to the evaluator [FTI] by” the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-6; [Response to Request 20151022-1](#), at Pgs. 5-6; [Response to Request 20140122-1](#), at Pgs. 3-5.)

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<sup>4</sup> Of note, and as discussed within the Transparency Subgroup of the Work Stream 2 effort for the Cross Community Working Group on Enhancing ICANN Accountability, ICANN’s contracting practice has evolved such that nondisclosure agreements are not entered into as a matter of course, but instead require a showing of business need.

As set forth in the Scope 1 Report, FTI requested that ICANN provide “[i]nternal emails among relevant ICANN organization personnel relating to the CPE process and evaluations,” and “[e]xternal emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations.” ([Scope 1 Report](#), at Pg. 6). FTI’s request encompassed the documents that dotgay now requests in Items 1, 2, 4, 5, and 9. In response to FTI’s request, ICANN organization provided FTI with 100,701 emails, including attachments. The time period covered by the emails received dated from 2012 to March 2017. The 100,701 emails (including attachments) produced to FTI include the documents responsive to Items 1, 2, 5, and 9 that are in ICANN’s possession, custody or control, subject to the applicable Nondisclosure Conditions below.

As noted in the Scope 1 Report, a large number of the emails were not relevant to FTI’s investigation, because the search terms were designed to be over-inclusive. ([Scope 1 Report](#), at Pgs. 10-11.) The terms included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process, and other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. After confirming that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI’s investigation, FTI performed a targeted key word search to identify emails relevant to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. ([Scope 1 Report](#), at Pgs. 10-12.)

The Scope 1 Report states that the relevant emails “generally fell into three categories. First, ICANN organization’s emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider’s draft reports.” “Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization’s efforts to understand how the CPE Provider came to its conclusions on a specific evaluation.” Third, ICANN organization’s emails included “emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.” ([Scope 1 Report](#), at Pgs. 11-12).

The vast majority of the non-relevant emails related to the CPE process were administrative in nature, such as communications to schedule meetings and conference calls. The emails also concerned correspondence between ICANN organization and its counsel, Jones Day, internal discussions regarding the standards applied to new gTLD applications, correspondence concerning invoices, correspondence with new gTLD and CPE applicants, and correspondence concerning public comments.

ICANN organization’s internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) described in the foregoing paragraphs are subject to the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.

- 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.

Indeed, dotgay acknowledges in the instant Request that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”<sup>5</sup>

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- 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.

dotgay asserts that “the attorney-client privilege does not bar disclosure of any requested document” because all requested documents were provided to FTI, which dotgay describes as a third party. (Request at Pg. 2.) dotgay cites California’s Evidence Code and *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (2004) for support of its argument. (*Id.*) However, under California’s Evidence Code, “[a] disclosure that is itself privileged is not a waiver of any privilege.” (Cal. Evid. Code § 912(c).) And *McKesson HBOC* explains that

where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person’s assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege.

(115 Cal. App. 4th 1229, 1236-37 (2004).) Here, ICANN organization’s outside counsel, Jones Day—not ICANN organization—retained FTI.<sup>6</sup> 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.<sup>7</sup> Therefore, FTI’s draft and working materials are protected by the attorney-client privilege under California law.

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<sup>5</sup> Request at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

<sup>6</sup> See FTI’s CPE Process Review Reports, each of which indicate they were “Prepared for Jones Day”, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>7</sup> See also *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013) (application of attorney-client privilege to communications to third parties “to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . clearly includes communications to a consulting expert” (internal quotation marks and citations omitted)).

Further, 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. ([DIDP](#).) Accordingly, such documentary information is subject to a Nondisclosure Condition.

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) described above are subject to the following Nondisclosure Conditions:

- 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.

Again, dotguy acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."<sup>8</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's correspondence with ICANN organization contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or

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<sup>8</sup> Request at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>9</sup>

ICANN organization notes that the correspondence between the CPE Provider and ICANN organization reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those communications, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. As noted, ICANN sought the CPE Provider's consent to waive the confidentiality, but this was not granted.

- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 5 seeks

[a]ll 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

To the extent that this Item includes internal email correspondence among the CPE Provider personnel, as noted in the Scope 1 Report, FTI did not receive such documents. ([Scope 1 Report](#) at Pg. 6.) As such, ICANN organization is not in possession, custody, or control of those documents.

#### Items 3, 14, 15, and 16

Items 3, 14, 15, and 16 seek FTI's list of search terms (Item 3), notes, transcripts, recordings, and documents created in response to FTI's interviews of ICANN organization personnel (Item 14) and of CPE Provider personnel (Item 14), and FTI's investigative plan (Item 16). dotgay previously requested certain of these materials in Request 20170518-1 Item 13, which sought "materials provided to ICANN by [FTI] concerning the [CPE Process] Review." (See [Response to Request 20170518-1](#), at Pgs. 3-4.)

The CPE Process Review Reports includes the information responsive to these Items. Specifically, concerning Item 3, the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN organization with a

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<sup>9</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that ‘hit’ on a search term. The search terms were designated to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI’s investigation...the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website.” ([Scope 1 Report](#), at Pg. 10.)

With regard to Item 16, all three CPE Process Review Reports contain detailed descriptions of FTI’s investigative plan. ([Scope 1 Report](#), at Pgs. 3-7; [Scope 2 Report](#), at Pgs. 3-9; and [Scope 3 Report](#), at Pgs. 5-8.)

With respect to documents responsive to Items 3, 14, 15, and 16, these documents are subject to the following Nondisclosure Conditions:

- 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.

As noted above, dotgay acknowledges in the instant Request that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”<sup>10</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

FTI’s interviews of CPE Provider personnel referenced the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

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<sup>10</sup> Request at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>11</sup>

ICANN organization notes that FTI's notes of interviews of CPE Provider personnel reflect the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those materials, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency. ICANN organization does not have possession, custody, or control over any transcripts, recordings, or other documents created in response to these interviews.

- 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.

#### Items 6, 7, and 8

Items 6, 7, and 8 seek draft CPE reports concerning .GAY (Items 6 and 7) and draft CPE reports reflecting communications between ICANN organization and the CPE Provider concerning ICANN's questions about "the meaning the CPE Provider intended to convey" (Item 8).

The CPE Provider provided to FTI, at FTI's request, "all draft CPE reports, including any drafts that reflected feedback from ICANN organization." ([Scope 1 Report](#), at Pg. 15.) Also, as noted above, ICANN organization provided FTI with emails between ICANN organization and the CPE Provider reflecting questions or suggestions made to clarify how the CPE Provider came to its conclusions on a specific evaluation. As discussed above, the CPE provider has objected to disclosure of its work product, including working papers and draft CPE reports, some of which were attached to emails between ICANN organization and the CPE Provider, and ICANN organization is contractually obligated to maintain the confidentiality of the draft CPE reports, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE Provider has not waived.

Although the draft CPE reports may not be disclosed pursuant to the nondisclosure provision, FTI endeavored to describe the relevant aspects of the draft CPE reports in the Reports without violating the nondisclosure provision of ICANN organization's

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<sup>11</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

contract with the CPE Provider. As noted in the Scope 1 Report, ICANN organization's feedback on draft CPE reports was in redline form. All of the comments that FTI was able to attribute to ICANN organization "related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions." ([Scope 1 Report](#), at Pg. 16.) ICANN organization's feedback included "an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey." ([Scope 1 Report](#), at Pg. 16.) It was "clear" to FTI "that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another."

FTI concluded in the Scope 1 Report that "ICANN organization had no role in the [CPE] evaluation process and no role in the writing of the initial draft CPE report." ([Scope 1 Report](#), at Pg. 9.) Further, based on its interviews of ICANN organization and CPE Provider personnel, and its review of relevant email communications, FTI concluded that "ICANN organization was not involved in the CPE Provider's research process." ([Scope 1 Report](#), at Pg. 9.) Only after the CPE Provider "completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization," which "provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls." ([Scope 1 Report](#), at Pg. 9.) "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." ([Scope 3 Report](#), at Pg. 10.)

dotgay previously requested these materials in Requests 20151022-1 and 20141022-1, both of which sought disclosure of, among other things, policies, guidelines, directives, instructions or guidance from ICANN organization to the CPE Provider, and Request 20170518-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-4; [Response to Request 20151022-1](#), at Pgs.5-6; [Response to Request 20141022-1](#), at Pgs. 3-5.)

With respect to documents responsive to Items 6, 7, and 8 as described above, these documents are subject to the following Nondisclosure Conditions:

- 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.

dotgay acknowledges that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”<sup>12</sup>

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>13</sup>

ICANN organization notes that draft CPE reports reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- 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.

#### Item 10

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.

ICANN organization described the scope of FTI’s review (i.e. the terms of its engagement) and provided links to ICANN organization’s CPE Process Review Update, 2 June 2017, in response to Item 7 of dotgay’s Request 20170518-1. ([Response to Request 20170518-1](#), at Pgs. 4-5; [CPE Process Review Update, 2 June 2017](#).)

As described in the CPE Process Review Update, dated 2 June 2017, the scope of the Review consisted 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

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<sup>12</sup> Request at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

<sup>13</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

reference materials exist for the evaluations which are the subject of pending Reconsideration Requests. (See [CPE Process Review Update, 2 June 2017.](#))

The 2 June 2017 Update further explained that the Review was being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focused on gathering information and materials from ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE provider. (See [CPE Process Review Update, 2 June 2017.](#))

Further, even if documents responsive to Item 10 existed, this request is subject to the following Nondisclosure Condition:

- 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.

#### Item 11

Item 11 seeks the original Request for Proposal (RFP) pertaining to FTI's review of the CPE [P]rocess. ICANN did not issue an RFP concerning the CPE Process Review. As such, the requested documentary information does not exist.

ICANN organization informed the community in the 2 June 2017 CPE Process Review Update that FTI was chosen following consultation with various candidates. FTI was selected because it had 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. (See [CPE Process Review Update, 2 June 2017.](#))

#### Items 12 and 13

Items 12 and 13 seek the CPE Provider's working papers associated with dotgay's CPE (Item 12) and the CPE Provider's internal documents relating to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets (Item 13). dotgay previously requested these materials in Request 20170518-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-6.)

As discussed above, the CPE provider has objected to disclosure of its work product, including working papers, and ICANN organization is contractually obligated to maintain the confidentiality of the working papers, because they are subject to the nondisclosure provision of ICANN organization's contract with the CPE Provider, which the CPE

Provider has not waived. Although FTI was unable to disclose the contents of the working papers in its Reports, FTI endeavored to describe the relevant aspects of the working papers in the Reports without violating the nondisclosure provision of ICANN organization's contract with the CPE Provider, although ICANN organization was required to redact some of the information that FTI originally included in the Scope 3 Report before publishing it, pursuant to ICANN organization's contractual obligations. (See, e.g., [Scope 3 Report](#), at Pgs. 18-19.)

As noted in the Scope 3 Report, FTI learned in its investigation "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." ([Scope 3 Report](#), at Pg. 9.)

As explained in the Scope 2 Report, FTI also learned that after two CPE Provider evaluators assessed and scored a CPE application in accordance with the Applicant Guidebook and CPE Guidelines, a "Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team [evaluating the CPE application] then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet." ([Scope 2 Report](#), at Pg. 8.)

With respect to documents responsive to Items 12 and 13 described in the foregoing paragraphs, these documents are subject to the following Nondisclosure Conditions:

- 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.

dotgay acknowledges in that the materials it seeks reflect “ICANN’s deliberative and decision-making process.”<sup>14</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider’s working papers include references to the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization’s contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>15</sup>

ICANN organization notes that the CPE Provider’s working papers reflect the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of those documents, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Item 17

Item 17 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 17 because no such documents exist.

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<sup>14</sup> Request at Pg. 3 (“Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN’s transparency obligations, and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process.”).

<sup>15</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

### Items 18, 19, 20, and 21

Items 18, 19, 20, and 21 seek communications between ICANN organization and FTI (Item 18), ICANN organization and the CPE Provider (Item 19), the CPE Provider and FTI (Item 20) regarding FTI's review, and documents and communications regarding the scope of FTI's review (Item 21).

dotgay previously requested some of these materials in Requests 20141022-1 and 20151022-1, both of which sought disclosure of, among other things, policies, guidelines, directives, instructions or guidance from ICANN organization to the CPE Provider, and Request 20170518-1, which sought disclosure of, among other things, "materials provided to the evaluator [FTI] by" the CPE Provider and by ICANN organization. (See [Response to Request 20170518-1](#), at Pgs. 3-6; [Response to Request 20151022-1](#), at Pgs. 5-6; [Response to Request 20140122-1](#), at Pgs. 3-5.)

With respect to documents responsive to Items 18, 19, 20, and 21, these documents are subject to the following Nondisclosure Conditions:

- 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.

dotgay acknowledges that the materials it seeks reflect "ICANN's deliberative and decision-making process."<sup>16</sup>

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

The CPE Provider's correspondence with ICANN organization and FTI contains the Personal Information of CPE Provider personnel. The CPE Provider has expressed concern about revealing the Personal Information of its personnel, and has required that that information not be disclosed pursuant to the nondisclosure clause in ICANN organization's contract with the CPE Provider. ICANN organization is contractually obligated to maintain the confidentiality of that information, and the CPE Provider has not agreed to waive the

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<sup>16</sup> Request at Pg. 3 ("Full disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process.").

nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.<sup>17</sup>

ICANN organization notes that the CPE Provider's correspondence reflects the CPE Provider's Confidential Information, including its processes and methods for completing CPE reports. Therefore, pursuant to the nondisclosure clause in its contract with the CPE Provider, ICANN organization is contractually obligated to maintain the confidentiality of that correspondence, and the CPE Provider has not agreed to waive the nondisclosure provision. The DIDP does not require ICANN organization to breach its contractual duties in support of its commitment to transparency.

- Confidential business information and/or internal policies and procedures.

Additionally, documents responsive to Item 18 and 21 are subject to the following Nondisclosure Condition:

- 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.

#### Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization 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.

#### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. We encourage you to

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<sup>17</sup> New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# **Exhibit 50**

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

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.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary 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 DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly 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 DIDP 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:

- 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.

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.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# **Exhibit 51**

To: Arif Ali on behalf of dotgay LLC

Date: 18 June 2017

Re: Request No. 20170518-1

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Thank you for your request for documentary information dated 18 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the Review):

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;"
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," and (b) all communications between the EIU and ICANN regarding the request;
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;
4. The identity of the individual or firm ("the evaluator") undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
12. The most recent estimates provided by the evaluator for the completion of the investigation; and

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

## Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (See Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain 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, as part of the President and CEO's review, 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 to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. (See Letter from Chris Disspain to Concerned Parties, 26 April 2017,

<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; see also, Minutes of BGC 18 October 2016 Meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.>)

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, ICANN undertook the process to find the most qualified evaluator for the review. 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.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, 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 panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

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 March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. 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. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

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

Items 1, 2, 3, 8, 9, and 13 seek the disclosure of overlapping categories of documents relating to the Review. Specifically, these items request the following:

- 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" (Item 1);
- "[D]ocuments from the EIU provider 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,' and

(b) all communications between the EIU and ICANN regarding the request” (Item 2);

- “[D]ocuments 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” (Item 3);
- Materials provided to the evaluator by the EIU (Item 8); and
- Materials provided to ICANN by the evaluator concerning the Review (Item 13).

As stated in ICANN’s [Response to DIDP Request 20170505-1](#) that you submitted on behalf DotMusic Limited, 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.

#### Items 4, 5, 6, 7

Items 4 through 7 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 4), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 5), the date of appointment (Item 6), and the terms of instructions provided to the evaluator (Item 7). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive

conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

#### Item 9

Item 9 seeks the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board." 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 March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>
- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

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 dotguy. Rather than repeating those here, see Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>. The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing.

#### Item 10

Item 10 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application.

#### Items 11

Item 11 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 7 and 9. The information responsive to the overlapping items has been provided in response to Items 7 and 9 above.

#### Item 12

Item 12 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

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.

#### **About DIDP**

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# **Exhibit 52**

## **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](mailto: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.<sup>1</sup>
- 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.

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<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>2</sup> 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](http://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 53**

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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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).<sup>4</sup> 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.

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

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>4</sup> *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.<sup>5</sup> Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.<sup>6</sup> On 2 June 2017, ICANN organization issued a status update.<sup>7</sup> 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.<sup>8</sup> 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.

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<sup>5</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>6</sup> 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).

<sup>7</sup> <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

<sup>8</sup> <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),<sup>9</sup> 14-32 (.INC),<sup>10</sup> 14-33 (.LLP), 16-3 (.GAY),<sup>11</sup> 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,<sup>12</sup> 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

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<sup>9</sup> 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>.

<sup>10</sup> 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>.

<sup>11</sup> 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.

<sup>12</sup> 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.<sup>13</sup>

### 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),<sup>14</sup> 14-32 (.INC),<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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<sup>13</sup> 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>).

<sup>14</sup> 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>.

<sup>15</sup> 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>.

<sup>16</sup> 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>).

<sup>17</sup> *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.<sup>18</sup>

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

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<sup>18</sup> <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.<sup>19</sup>

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.<sup>20</sup> Specifically, according to the CPE Panel Process Document, the CPE

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<sup>19</sup> 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.

<sup>20</sup> 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.”<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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

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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.

<sup>21</sup> CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

<sup>22</sup> *Id.*

<sup>23</sup> See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>24</sup> See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).<sup>25</sup>

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.<sup>26</sup> 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

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<sup>25</sup> *Id.*

<sup>26</sup> <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.<sup>27</sup> 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.

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<sup>27</sup> 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	<b>Total</b>
.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
<b>Total</b>	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.”<sup>28</sup> The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, “Delineation;” and (ii) 1-B, “Extension.”<sup>29</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *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.”<sup>30</sup> The Nexus criterion is measured by two sub-criterion: (i) 2-A, “Nexus”; and (ii) 2-B, “Uniqueness.”<sup>31</sup>
- **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.”<sup>32</sup>
- **Criterion 4: Community Endorsement.** The Community Endorsement criterion evaluates community support for and/or opposition to an application.”<sup>33</sup> The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, “Support”; and (ii) 4-B, “Opposition.”<sup>34</sup>

## 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),<sup>35</sup> 14-32 (.INC),<sup>36</sup> 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

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<sup>30</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>31</sup> *Id.* at Pgs. 4-12 and 4-13.

<sup>32</sup> See *id.* at Pgs. 4-14-4-15.

<sup>33</sup> See *id.* at Pgs. 4-17.

<sup>34</sup> *Id.*

<sup>35</sup> 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>

<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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.”<sup>39</sup>

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.

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<sup>37</sup> .LLC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

<sup>38</sup> *Id.*

<sup>39</sup> 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,”<sup>40</sup> 2) the “LLC” webpage on [www.sba.com](http://www.sba.com),<sup>41</sup> and 3) the “corporation” webpage on [www.sba.com](http://www.sba.com).<sup>42</sup> 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.<sup>43</sup>

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<sup>40</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company](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.

<sup>41</sup> <http://www.sba.com/legal/llc/>.

<sup>42</sup> <http://www.sba.gov/content/corporation>.

<sup>43</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company](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.<sup>44</sup> 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.<sup>45</sup>

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,”<sup>46</sup> 2) the “LLC” webpage on

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<sup>44</sup> .LLC CPE Report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

<sup>45</sup> *Id.*

<sup>46</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company).

www.sba.com,<sup>47</sup> and 3) the “corporation” webpage on www.sba.com.<sup>48</sup> 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.<sup>49</sup>

## 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.<sup>50</sup> 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

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<sup>47</sup> <http://www.sba.com/legal/llc/>.

<sup>48</sup> <http://www.sba.gov/content/corporation>.

<sup>49</sup> 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).

<sup>50</sup> .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).”<sup>51</sup> 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.”<sup>52</sup> This requirement is a component of sub-criterion 2-A, Nexus.<sup>53</sup>

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,<sup>54</sup> 2) a “Web search on [REDACTED],” and 3) the “International equivalents” sub-page for the Wikipedia page for LLCs.<sup>55</sup> 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.

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<sup>51</sup> .LLC CPE Report Pg. 5 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

<sup>52</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>53</sup> See *id.*

<sup>54</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company).

<sup>55</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_company#International\\_equivalents](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.<sup>56</sup>

### 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.<sup>57</sup>

## 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).

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<sup>56</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company](http://en.wikipedia.org/wiki/Limited_liability_company); and

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company#International\\_equivalents](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.

<sup>57</sup> The working papers cite:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_company#International\\_equivalents](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.<sup>58</sup>

### 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.<sup>59</sup>

### 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.<sup>60</sup>

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<sup>58</sup> They are:

[http://icannwiki.com/index.php/Dot\\_Registry\\_LLC](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.

<sup>59</sup> 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.

<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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.”<sup>63</sup>

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

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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.”

<sup>61</sup> .INC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

<sup>62</sup> *Id.*

<sup>63</sup> 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,<sup>64</sup> and 2) the website for the National Association of Secretaries of State.<sup>65</sup> 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.<sup>66</sup>

### 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.<sup>67</sup> 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

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<sup>64</sup> <http://www.sba.gov/content/corporation>.

<sup>65</sup> <http://www.nass.org/>.

<sup>66</sup> 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.

<sup>67</sup> .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.<sup>68</sup>

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,<sup>69</sup> and 2) the website for the National Association of Secretaries of State.<sup>70</sup> 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.<sup>71</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> <http://www.sba.gov/content/corporation>.

<sup>70</sup> <http://www.nass.org/>.

<sup>71</sup> 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.<sup>72</sup>

### 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.<sup>73</sup>

## 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).

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<http://en.wikipedia.org/wiki/Corporation>.

<sup>72</sup> They are:

[http://en.wikipedia.org/wiki/Types\\_of\\_business\\_entity](http://en.wikipedia.org/wiki/Types_of_business_entity); and  
<http://en.wikipedia.org/wiki/Inc>.

<sup>73</sup> They are:

[http://en.wikipedia.org/wiki/Types\\_of\\_business\\_entity](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.<sup>74</sup>

### 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.<sup>75</sup> 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

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<sup>74</sup> <http://www.companieshouse.gov.uk/links/usaLink.shtml>;  
[http://icannwiki.com/index.php/Dot\\_Registry\\_LL\\_C](http://icannwiki.com/index.php/Dot_Registry_LL_C);  
<http://dotregistry.org/> (cited three times); and  
<https://www.cscglobal.com/global/web/csc/home>.

<sup>75</sup> .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.<sup>76</sup>

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."<sup>77</sup>

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"),<sup>78</sup> and 2) the "LLP" webpage on [www.sba.com](http://www.sba.com).<sup>79</sup> 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.<sup>80</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>78</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States).

<sup>79</sup> <http://www.sba.com/legal/llp/>.

<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>

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

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<http://www.biztree.com/company/>;  
[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States) (cited two times);  
[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership);  
<http://www.sba.com/legal/llp/>; and  
<http://dotregistry.org/corporate-tlds/llp-domains>.

<sup>81</sup> .LLP CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

<sup>82</sup> *Id.*

not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Partnership” (specifically, the sub-page for “United States,”<sup>83</sup> and 2) the “LLP” webpage on [www.sba.com](http://www.sba.com).<sup>84</sup> 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.<sup>85</sup>

## 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.”<sup>86</sup> 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

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<sup>83</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States).

<sup>84</sup> <http://www.sba.com/legal/llp/>.

<sup>85</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership#United\\_States](http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States) (cited two times);

[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](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

<sup>86</sup> .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.”<sup>87</sup> This requirement is a component of sub-criterion 2-A, Nexus.<sup>88</sup>

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,<sup>89</sup> 2) the Wikipedia page for LLPs (cited three times),<sup>90</sup> 3) a British government webpage answering Frequently Asked Questions about LLPs,<sup>91</sup> and 4) a Google search for **Confidential Business Information**.<sup>92</sup> 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.

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<sup>87</sup> See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>88</sup> See *id.*

<sup>89</sup> <http://dotregistry.org/corporate-tlds/llp-domains>.

<sup>90</sup> [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership).

<sup>91</sup> <http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>.

<sup>92</sup> <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.<sup>93</sup>

### 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.<sup>94</sup>

## 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.<sup>95</sup>

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<sup>93</sup> They are:

[http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](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>.

<sup>94</sup> One working paper cites [http://en.wikipedia.org/wiki/Limited\\_liability\\_partnership](http://en.wikipedia.org/wiki/Limited_liability_partnership) in its consideration of this sub-criterion.

<sup>95</sup> 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.<sup>96</sup>

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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.

<sup>96</sup> 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 Evaluation<sup>97</sup>

### 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.<sup>98</sup>

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.<sup>99</sup>

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<sup>97</sup> 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.

<sup>98</sup> They are:

<http://www.hrc.org/campaigns/coming-out-center>;

[http://www.lalgbtcenter.org/coming\\_out\\_support](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](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.

<sup>99</sup> 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](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.<sup>100</sup>

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."<sup>101</sup> The CPE Provider is referring to the Applicant Guidebook's requirement that the community be of considerable size.<sup>102</sup> Size is a component of sub-criterion 1-B, Extension.<sup>103</sup>

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,<sup>104</sup> FTI analyzed the CPE Provider's working papers for the second .GAY evaluation to determine if the working papers reflected such research.

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[http://en.wikipedia.org/wiki/Gay\\_and\\_Lesbian\\_International\\_Sport\\_Association](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/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](http://en.wikipedia.org/wiki/LGBT_history); and  
[http://en.wikipedia.org/wiki/Timeline\\_of\\_LGBT\\_history](http://en.wikipedia.org/wiki/Timeline_of_LGBT_history).

<sup>100</sup> 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>.

<sup>101</sup> .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

<sup>102</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>103</sup> *Id.*

<sup>104</sup> .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.<sup>105</sup> 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.<sup>106</sup>

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<sup>105</sup> They are:

[www.census.gov/popclock](http://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>.

<sup>106</sup> 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.<sup>107</sup>

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.<sup>108</sup> These references are contained in three excerpts of the second final CPE report, each of which addresses whether the proposed

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<http://en.wikipedia.org/wiki/Gay>;  
<http://en.wikipedia.org/wiki/LGBT>;  
[http://en.wikipedia.org/wiki/LGBT\\_history](http://en.wikipedia.org/wiki/LGBT_history); and  
[http://en.wikipedia.org/wiki/Timeline\\_of\\_LGBT\\_history](http://en.wikipedia.org/wiki/Timeline_of_LGBT_history).

<sup>107</sup> 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](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>.

<sup>108</sup> .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”.<sup>109</sup>

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.”<sup>110</sup>

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.”<sup>111</sup> 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.”<sup>112</sup>

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<sup>109</sup> *Id.* at Pgs. 5-6.

<sup>110</sup> *Id.* at Pg. 6 n.10. This footnote is repeated at page 7, note 19.

<sup>111</sup> *Id.* at Pg. 6.

<sup>112</sup> *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.’”<sup>113</sup> 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.<sup>114</sup>

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.”<sup>115</sup> 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.”<sup>116</sup>

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

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<sup>113</sup> *Id.* at Pgs. 7-8.

<sup>114</sup> *Id.* at Pg. 8 n.22.

<sup>115</sup> 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>).

<sup>116</sup> 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.<sup>117</sup>

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<sup>117</sup> 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.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.<sup>118</sup>

## 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).

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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.

<sup>118</sup> 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.<sup>119</sup>

### 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.<sup>120</sup>

### 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

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<sup>119</sup> 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.

<sup>120</sup> 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.<sup>121</sup>

## 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.<sup>122</sup>

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.<sup>123</sup>

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.’”<sup>124</sup> The CPE Provider is referring to the Applicant Guidebook’s requirement that a “community” demonstrate “more of cohesion than a mere commonality of interest.”<sup>125</sup>

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<sup>121</sup> 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).

<sup>122</sup> 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.

<sup>123</sup> .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>124</sup> *Id.*

<sup>125</sup> 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;<sup>126</sup> (2) the United Nations International Standard Industrial Classification (ISIC) system;<sup>127</sup> and (3) the Wikipedia page for “Music.”<sup>128</sup> 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.<sup>129</sup>

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

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<sup>126</sup> <http://www.census.gov/eos/www/naics/>.

<sup>127</sup> [http://unstats.un.org/unsd/publication/seriesM/seriesm\\_4rev4e.pdf](http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf).

<sup>128</sup> <https://en.wikipedia.org/wiki/Music>.

<sup>129</sup> .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.”<sup>130</sup> 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.”<sup>131</sup> Organization is a component of Delineation,<sup>132</sup> and this reference to “the Panel’s research” is noted in the final CPE report’s sub-section on “[o]rganization.”<sup>133</sup>

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);<sup>134</sup> (2) the Wikipedia page for “Music;”<sup>135</sup> (3) the Wikipedia page for “Recording Industry Association of America;”<sup>136</sup> and (4) the Wikipedia page for “American Federation of

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<sup>130</sup> *Id.*

<sup>131</sup> See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>132</sup> *Id.*

<sup>133</sup> .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

<sup>134</sup> [http://www.ifacca.org/vision\\_and\\_objectives/](http://www.ifacca.org/vision_and_objectives/) (This is no longer an active link).

<sup>135</sup> <https://en.wikipedia.org/wiki/Music>.

<sup>136</sup> [https://en.wikipedia.org/wiki/Recording\\_Industry\\_Association\\_of\\_America](https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America).

Musicians.”<sup>137</sup> 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.<sup>138</sup>

### 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.<sup>139</sup>

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<sup>137</sup> [https://en.wikipedia.org/wiki/American\\_Federation\\_of\\_Musicians](https://en.wikipedia.org/wiki/American_Federation_of_Musicians).

<sup>138</sup> 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](http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf);

[https://en.wikipedia.org/wiki/Recording\\_Industry\\_Association\\_of\\_America](https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America) (cited two times);

[https://en.wikipedia.org/wiki/American\\_Federation\\_of\\_Musicians](https://en.wikipedia.org/wiki/American_Federation_of_Musicians) (cited two times);

[http://www.ifacca.org/vision\\_and\\_objectives/](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://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf);

[http://www.ifacca.org/ifacca\\_events/](http://www.ifacca.org/ifacca_events/) (This is no longer an active link); and

[https://en.wikipedia.org/wiki/History\\_of\\_music](https://en.wikipedia.org/wiki/History_of_music).

<sup>139</sup> They are:

[https://en.wikipedia.org/wiki/History\\_of\\_music](https://en.wikipedia.org/wiki/History_of_music) (cited two times); and

[http://media.ifacca.org/files/IFACCA\\_Stratplan\\_english\\_web\\_July2015FINAL.pdf](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.<sup>140</sup>

## 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.<sup>141</sup>

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<sup>140</sup> They are:  
[https://en.wikipedia.org/wiki/Definition\\_of\\_music](https://en.wikipedia.org/wiki/Definition_of_music); and  
Oxford English Reference Dictionary.

<sup>141</sup> 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.<sup>142</sup>

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.<sup>143</sup>

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<sup>142</sup> 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).

<sup>143</sup> 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](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.<sup>144</sup>

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.<sup>145</sup>

## 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.<sup>146</sup>

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.<sup>147</sup>

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<sup>144</sup> They are:

<https://www.cpaaustralia.com.au/about-us>; and

[http://docs.employment.gov.au/system/files/doc/other/2211accountantaus\\_1.pdf](http://docs.employment.gov.au/system/files/doc/other/2211accountantaus_1.pdf) (cited two times)  
(This is no longer an active link).

<sup>145</sup> They are:

[http://en.wikipedia.org/wiki/CPA\\_Australia](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).

<sup>146</sup> 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/>.

<sup>147</sup> 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](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.<sup>148</sup>

## 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).

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<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).

<sup>148</sup> 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](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.<sup>149</sup>

### 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.<sup>150</sup> 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.”<sup>151</sup>

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<sup>149</sup> They are:

<http://www.aicpa.org/Pages/default.aspx>; and

[http://www.aicpa.org/about/leadership/pages/melancon\\_bio.aspx](http://www.aicpa.org/about/leadership/pages/melancon_bio.aspx).

<sup>150</sup> 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.

<sup>151</sup> 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,<sup>152</sup> (2) a webpage on the IH&RA website,<sup>153</sup> (3) four websites for HOTREC,<sup>154</sup> 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,<sup>155</sup> (5) a webpage from ETurbo news<sup>156</sup> which, according to the working papers, indicates that HOTREC signed a Memorandum with IH&RA; (6) the Hotel News Resource website;<sup>157</sup> and (7) the website for Green Hotelier,<sup>158</sup> which the working papers indicate is the

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<sup>152</sup> <http://www.dothotel.info/>.

<sup>153</sup> <http://ih-ra.com/achievements-in-advocacy/>.

<sup>154</sup> 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>.

<sup>155</sup> <http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-signmemorandum-Understanding>.

<sup>156</sup> <http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandumunderstanding> (This is no longer an active link).

<sup>157</sup> <http://www.hotelnewsresource.com/article70606.html>.

<sup>158</sup> <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.<sup>159</sup>

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<sup>159</sup> 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](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](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.<sup>160</sup>

## 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.<sup>161</sup>

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<sup>160</sup> 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://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://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>.

<sup>161</sup> 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.<sup>162</sup>

## 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.<sup>163</sup>

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<sup>162</sup> 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.

<sup>163</sup> 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://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.<sup>164</sup>

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<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.

<sup>164</sup> 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](http://www.marketline.com)’s report on “Global Hotels & Motels October 2012”;

A printout of [www.marketline.com](http://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.<sup>165</sup>

#### 1-B Extension

The final CPE report reflects two references to research or reference material for sub-criterion 1-B, Extension.<sup>166</sup>

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.<sup>167</sup>

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<sup>165</sup> The working papers cite <http://www.merckgroup.com/en/index.html> three times under this sub-criterion.

<sup>166</sup> They are:  
[http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA\\_v3\\_tcm2252\\_143783.pdf?Version=](http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA_v3_tcm2252_143783.pdf?Version=); and  
“Applicant’s website.”

<sup>167</sup> It is: [www.who.int/trade/glossary/story073/en/](http://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.<sup>168</sup>

### 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.<sup>169</sup>

## 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).

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<sup>168</sup> They are:

[https://en.wikipedia.org/wiki/Merck\\_%26\\_Co](https://en.wikipedia.org/wiki/Merck_%26_Co) (cited two times);  
[https://en.wikipedia.org/wiki/Merck\\_Group](https://en.wikipedia.org/wiki/Merck_Group); and  
<http://www.merckgroup.com/en/index.html>.

<sup>169</sup> 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_%26_Co);  
[https://en.wikipedia.org/wiki/Merck\\_Group](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.<sup>170</sup>

### 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

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<sup>170</sup> They are:

[www.merckgroup.com/](http://www.merckgroup.com/); and

[https://en.wikipedia.org/wiki/Merck\\_Group](https://en.wikipedia.org/wiki/Merck_Group).

was cited in the CPE Provider's working papers associated with the first .GAY evaluation.

# **Exhibit 54**

## **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 independent<sup>1</sup> 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:

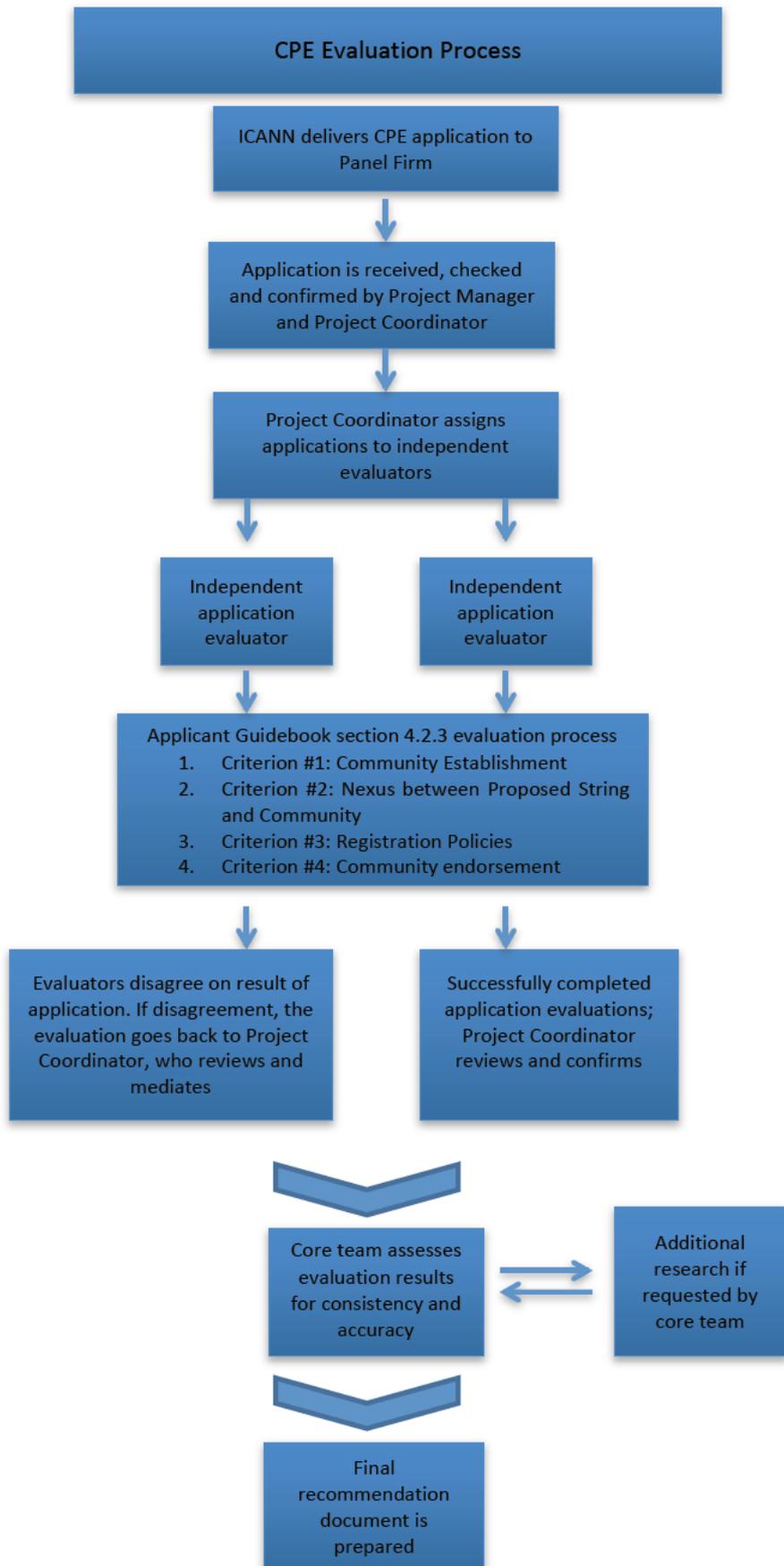
- The Panel Firm's Project Manager is notified by ICANN that an application for a gTLD is ready for CPE, and the application ID and public comments are delivered to the EIU. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant 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

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<sup>1</sup> 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.