

Electronic Frontier Foundation Response to Public Interest Registry Survey on Governance of .ORG

March 12, 2020

Q1. In response to concerns expressed by some .ORG registrants and community members, Ethos has voluntarily proposed to add an amendment to PIR's .ORG Registry Agreement with ICANN in the form of a PIC (Public Interest Commitment) following the closing of the proposed sale of PIR. Do you think that such a contractual amendment enforceable by ICANN and third parties is the appropriate mechanism to address stakeholder concerns? If yes, why? If no, why not?

A1. PICs are insufficient to protect non-commercial .ORG registrants from being harmed by the proposed takeover. To our knowledge, ICANN itself has never initiated an enforcement action for violation of a PIC. We also lack confidence in the PICDRP third-party enforcement option, which has been used only twice. In one of those two cases, the panel found that fraud perpetrated by the registry operator did not violate a PIC requiring the registry to prohibit fraudulent or deceptive practices by registrants, suggesting that PICs will be interpreted narrowly. More broadly, we question the suitability of an arbitration-like process to resolve issues implicating human rights and the needs of the NGO, especially given the current composition of the PICDRP Standing Panel. In addition to these concerns about PIC enforcement, ICANN has indicated it believes that voluntary PICs (such as those Ethos is proposing) may be revised or revoked through "bilateral negotiation" between ICANN staff and the registry operator—i.e., the same process by which the .ORG RA was amended in 2019 in the face of vocal opposition from .ORG registrants.

Q2. The PIC includes a provision related to maintaining the affordability of .ORG domain names. Do you think a 10% annual price cap will ensure predictability? If yes, why? If no, why not?

A2. Predictability is not the same as affordability. But even asking how much non-commercial .ORG registrants can *afford*—which will vary dramatically by registrant—obscures the more fundamental question of why we should just accept PIR siphoning ever more money from the NGO sector, while the actual cost of running a registry goes down every year. Each extra dollar a public interest organization has to spend on domain registration fees is a dollar that could have gone toward its mission. And while Ethos and PIR have cited a desire to invest money into developing "new products and services," they've now admitted that they don't actually know of any additional offerings that .ORG registrants want or need. That was no surprise to us: .ORG's value to its registrants lies in being a reliable and recognized domain for hosting

their websites and email systems—which it already offers, and for which registrants are already paying more than enough to keep PIR running.

Q3. The PIC includes a provision to create a .ORG Stewardship Council. The majority of TLDs do not have formal mechanisms or processes for registrants and stakeholders to provide input to registries about the policies of a TLD, such as the .ORG anti-abuse policy. Do you think .ORG needs such a mechanism? If yes, why? If no, why not? If yes, does a stewardship council meet that need, why or why not?

A3. It is critical for the .ORG registry to have safeguards that ensure PIR's policies are protective of the rights of non-commercial .ORG registrants and the populations they serve. But as EFF and other organizations have said repeatedly, Ethos's Stewardship Council proposal will not be effective in protecting NGO interests. The proposed structure, in which the initial members are chosen by PIR and all future members can be nominated by or vetoed by PIR, guarantees that the Council will not be meaningfully independent from PIR. What's more, the Council's remit is defined so narrowly as to be effectively toothless. For example, the Council's charter allows PIR to keep the vast majority of the company's actions or decisions outside of the Council's scope simply by framing them as operational or financial matters. We've already seen PIR do this to justify not consulting its existing Advisory Council about the Ethos deal before agreeing to it. It's also something we see frequently at ICANN, where any issue relating to registry contracts—including the 2019 changes to the .ORG RA—is framed as an operational, non-policy matter. With respect to free speech issues in particular, neither the Council's charter nor the proposed PICs include any substantive free speech protections, and the Council would have no power to stop PIR from taking actions harmful to free speech if PIR maintained they did not reflect a change in policy. These problems are compounded because the charter offers no guarantees that the Council will be kept informed about PIR's activities and provided the information it needs to meaningfully perform its promised role.

Q4. The PIC includes a provision to create a Community Enablement Fund to support activities that benefit .ORG registrants. Do you support the creation of such a fund? If yes, why? If no, why not? The .ORG Stewardship Council will provide recommendations and advice on how to allocate the fund. Do you support this role for the Council? If yes, why? If no, why not?

A4. PIR should ensure that the fees it charges will stay commensurate with the price of operating the registry. Giving out grants to particular organizations does not offset the burden shared by the entire sector of continually increasing registration and renewal fees.

Q5. The PIC includes a provision that will require PIR to publish an annual compliance report with the PIC commitments and the ways in which PIR pursued activities that benefit .ORG

registrants. Do you think annual reports are useful tools for assessing compliance? If yes, why? If no, why not? Do you think annual reports help with transparency? If yes, why? If no, why not?

A5. Annual reports may facilitate transparency and compliance assessments, but their usefulness is dependent on the quality, quantity, nature, and scope of the information they include. They also are not sufficient on their own. Real transparency is a full-time, 360-degree commitment, not a once-yearly exercise.

Q6. In addition to the PIC, Ethos has publicly posted the charter of the .ORG Stewardship Council. Do you support the charter as currently drafted? If yes, why? If no, why not? If no, what changes would you want to see in the charter?

A6. See response to Question 3.

Q7. It has been proposed that PIR be part of a Public Benefit LLC framework, which would allow the board to consider social, economic and environmental considerations without violating its fiduciary duty to act. Do you support PIR reorganizing within a Public Benefit LLC framework as opposed to a for-profit entity? If yes, why? If no, why not?

A7. The phrasing of this prompt misleadingly assumes a distinction between Public Benefit LLCs and for-profit entities that does not exist; Public Benefit LLCs (also called “benefit corporations”) are merely a type of for-profit entity. Structuring PIR as a benefit corporation would be less protective of non-commercial .ORG registrants than allowing PIR to continue as a non-profit. Pennsylvania law requires only that directors and officers of benefit corporations consider public benefit purposes as one factor when evaluating whether a decision is in the best interests of the corporation, alongside, e.g., effects on shareholders. Public benefit purposes do not need to be prioritized over shareholder interests or any other interests unless expressly stated in the articles; Ethos has not proposed the inclusion of any such provision. Ethos’s proposal to structure PIR as a benefit corporation fails to assuage our concerns for other reasons as well. For one, PIR has not proposed adopting any public benefit purposes addressing freedom of expression, sensitivity to the circumstances of noncommercial entities, or the rights of .ORG registrants more generally. On the contrary, Ethos and PIR have backtracked since introducing the PIC proposal, saying that they would forgo any specific public benefit commitments in favor of a “general statement of public benefit.” In addition, .ORG registrants will not have standing to enforce PIR’s public benefit commitments in court unless PIR’s bylaws explicitly state that they do. Again, Ethos has not proposed any such provision. A corporate form that would “allow the board” to apply a broader range of considerations is meaningless if the board has no legal requirement or financial incentive to do so. Furthermore, the proposed structure in which PIR would be owned by three nested Delaware corporations appears designed to inhibit meaningful legal responsibility to anyone besides Ethos’s anonymous owners and investors.

Q8. Do you have any additional input or feedback on either the PIC or the .ORG Stewardship Council? If so, please provide it below.

A8. Since the proposed sale was announced, Ethos Capital's communications with the NGO community have repeatedly demonstrated that it is unfit to serve as steward of the .ORG gTLD. NGOs' concerns have repeatedly been brushed aside, and Ethos has misrepresented the details of its proposals in public statements. Measures like the series of webinars and this survey are clearly being treated as PR exercises rather than an opportunity to work with NGO community leaders to find structures and processes that would actually earn the trust of the NGO sector.