

Congress of the United States
Washington, DC 20510

January 16, 2020

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Internet Corporation for Assigned Names and Numbers
12025 East Waterfront Drive
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Dear ICANN Leadership:

We write with concern about the proposed sale of the Public Interest Registry (PIR), the operator of the .ORG domain name registry, to the private equity firm Ethos Capital (Ethos). The bylaws of your organization, the Internet Corporation for Assigned Names and Numbers (ICANN), commit it to overseeing the Internet's domain name system (DNS) in a way that is in the public benefit and ensures "the operational stability, reliability, security...and openness of the DNS and the Internet."¹ Our review of the sale of PIR to Ethos indicates that this sale appears contrary to the public benefit and may undermine the reliability of .ORG websites. Documents and information provided to Congress² and to ICANN³ by PIR, Ethos, and the Internet Society (ISOC, the current controller of PIR) raise significant questions about the new arrangement, and fail to provide assurances that Ethos Capital will be a responsible steward of the .ORG registry, or that the registry will be operated under meaningful oversight. Accordingly, we encourage ICANN to exercise its authority to block the proposed transfer of ownership of the .ORG registry.

¹ ICANN Bylaws, Section 1.2(a)(iv) and (i), <https://www.icann.org/resources/pages/governance/bylaws-en>.

² Letter from Senators Ron Wyden, Elizabeth Warren, and Richard Blumenthal, and Representative Anna G. Eshoo to Andrew Sullivan, Jonathan Neve, and Erik Brooks, December 23, 2019, <https://www.wyden.senate.gov/imo/media/doc/122319%20RW%20Letter%20to%20PIR%20ISOC%20Ethos.pdf>; keypointabout.org, "The Internet Society, PIR and Ethos Respond to Congressional Letter," January 7, 2020, <https://www.keypointabout.org/blog/the-internet-society-pir-and-ethos-respond-to-congressional-letter>.

³ PIR, ISOC, Ethos Capital, and ICANN, "PIR's Notice of Indirect Change of Control and Entity Conversion submitted to ICANN on 14 November 2019; ICANN's requests for additional information dated 9 December 2019; PIR's responses to ICANN's requests for additional information provided to ICANN on 20 December 2019," <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

Background

ICANN manages the operation of the Internet's domain name system (DNS) via contracts with registries, organizations that administer domain names under a top-level domain (TLD) such as .ORG, .COM, and .NET.⁴ ICANN has the power to provide or withhold consent in response to a request for a change of control of a registry operator such as this one.⁵

In November 2019, PIR announced that the private equity (PE) firm Ethos Capital would acquire the organization and all of its assets, including the ability to operate the .ORG registry, from ISOC.⁶ Ethos is a new PE firm that came into existence last year, has no track record of running an operation as large or as critical to the public interest as the .ORG registry, and has only publicly named two employees.⁷

The timing of this acquisition does not appear to be a coincidence. Since 2003, the contract to operate the .ORG registry has included a 10% cap on yearly price increases for domain names,⁸ but the price limits were removed by ICANN earlier this year over the nearly unanimous objections of stakeholders.⁹ The new contract also gives PIR nearly free rein to regulate the content of websites in the name of implementing “protections of the legal rights of third parties”¹⁰—which one expert has said enable PIR to “sell censorship as a service.”¹¹ These

⁴ Congressional Research Service, “Internet Governance and the Domain Name System: Issues for Congress,” Lennard G. Kruger, November 18, 2016, <https://fas.org/sgp/crs/misc/R42351.pdf>.

⁵ ICANN, “Change of Control Guide,” November 2015, <https://www.icann.org/en/system/files/files/change-of-control-guide-30nov15-en.pdf>.

⁶ ISOC and PIR, “Ethos Capital to Acquire Public Interest Registry from the Internet Society,” press release, November 13, 2019, <https://www.internetsociety.org/news/press-releases/2019/ethos-capital-to-acquire-public-interest-registry-from-the-internet-society/>.

⁷ The Register, “Internet world despairs as non-profit .org sold for \$\$\$\$ to private equity firm, price caps axed,” Kieren McCarthy, November 20, 2019, https://www.theregister.co.uk/2019/11/20/org_registry_sale_shambles/; PIR, ISOC, Ethos Capital, and ICANN, “PIR’s Notice of Indirect Change of Control and Entity Conversion submitted to ICANN on 14 November 2019; ICANN’s requests for additional information dated 9 December 2019; PIR’s responses to ICANN’s requests for additional information provided to ICANN on 20 December 2019,” <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

⁸ ICANN, “.org Registry Agreement | Archive,” <https://www.icann.org/resources/agreement/org-archive-1999-11-10-en>.

⁹ Ars Technica, “ICANN eliminates .org domain price caps despite lopsided opposition,” Timothy B. Lee, July 1, 2019, <https://arstechnica.com/tech-policy/2019/07/icann-eliminates-org-domain-price-caps-despite-lopsided-opposition/>.

¹⁰ Registry Agreement between ICANN and PIR, effective June 30, 2019, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-html-30jun19-en.htm>.

¹¹ Electronic Frontier Foundation, “Opening the Door for Censorship: New Trademark Enforcement Mechanisms Added for Top-Level Domains,” Mitch Stoltz, August 6, 2019, <https://www.eff.org/deeplinks/2019/08/opening-door-censorship-new-trademark-enforcement-mechanisms-added-top-level>; Los Angeles Times, “The internet’s .org registry is snatched up by a private equity firm, provoking outrage,” Michael Hiltzik, December 12, 2019, <https://www.latimes.com/business/story/2019-12-12/dot-org-sale-outrage-internet-society-ethos-capital>.

changes may have substantially raised the value of the .ORG registry; after the new contract was made public, ISOC informed PIR that it had received multiple offers to purchase PIR.¹²

The .ORG TLD has been managed effectively and in the public interest by PIR for 17 years.¹³ But the potential sale to Ethos Capital of the rights to run .ORG puts that success at risk. It will saddle PIR with debt and give an unproven private equity firm substantial authority and virtually unlimited power to raise prices, reduce or modify services, monetize its power over the TLD, impose “arbitrary censorship,”¹⁴ and fail to run the domain in a manner consistent with the public interest.

The remainder of this letter provides additional detail on our concerns.

The Proposed Sale Saddles PIR with Debt

The structure of the acquisition imposes a new and significant debt burden on PIR, with associated costs to repay the loan. PIR will be acquired by Ethos Capital for \$1.135 billion in a leveraged buyout financed in part by “a \$360 million term loan facility entered into by lenders” that are “established U.S. financial institutions,” with the remaining \$775 million in funding coming from Ethos’s unidentified “equity partners.”¹⁵ When the purchase is complete, responsibility for repaying that debt will be transferred to PIR or its parent company, Purpose Domains Direct, LLC.¹⁶

That debt is likely to impose a substantial burden on PIR. In 2018, PIR’s net revenue from the .ORG TLD was \$92.9 million, and its operating income was \$45.9 million.¹⁷ In response to ICANN’s questions, the parties to the sale wrote, “PIR has contributed tens of millions of dollars annually to ISOC... in amounts more than twice that which will be required to service the debt obligations.”¹⁸ But they declined to accommodate ICANN’s request for “information on how the transaction will be funded and how that will affect the financial state of PIR and its ability to

¹² ISOC and PIR, “Ethos Capital to Acquire Public Interest Registry from the Internet Society,” press release, November 13, 2019, <https://www.internet-society.org/news/press-releases/2019/ethos-capital-to-acquire-public-interest-registry-from-the-internet-society/>.

¹³ ICANN, “Advisory Concerning .org Transition,” January 7, 2003, <https://www.icann.org/news/advisory-2003-01-07-en>.

¹⁴ Electronic Frontier Foundation, “We Need To Save .ORG From Arbitrary Censorship By Halting the Private Equity Buy-Out,” Mitch Stoltz, December 5, 2019, <https://www.eff.org/deeplinks/2019/12/we-need-save-org-arbitrary-censorship-halting-private-equity-buy-out>.

¹⁵ PIR, ISOC, Ethos Capital, and ICANN, “PIR’s Notice of Indirect Change of Control and Entity Conversion submitted to ICANN on 14 November 2019; ICANN’s requests for additional information dated 9 December 2019; PIR’s responses to ICANN’s requests for additional information provided to ICANN on 20 December 2019,” <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>; PitchBook, “Ethos Capital Private Equity, PE/Buyout Profile,” accessed January 12, 2020.

¹⁶ *Id.*

¹⁷ PIR then gave \$48.7 million to ISOC, reporting a net loss of \$3.1 million after other expenses. Public Interest Registry, “2018 Annual Report,” <https://thenew.org/app/uploads/2019/09/PIR-2018-Annual-Report.pdf>.

¹⁸ PIR, ISOC, Ethos Capital, and ICANN, “PIR’s Notice of Indirect Change of Control and Entity Conversion submitted to ICANN on 14 November 2019; ICANN’s requests for additional information dated 9 December 2019; PIR’s responses to ICANN’s requests for additional information provided to ICANN on 20 December 2019,” <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

operate a secure and stable registry.”¹⁹ This is a significant omission—the typical terms and lengths of loans of this type could result in costs that are a significant portion of PIR’s anticipated revenues.

Moreover, PIR’s new expenses after its acquisitions will not be limited to debt service. PIR will transition from a non-profit entity to an LLC,²⁰ requiring its members to pay taxes on its income. Ethos Capital and its investors will also presumably demand that PIR provide returns on its investment through dividends, fees, and other financial maneuvers that will have the effect of taking money out of PIR. While little data is available publicly about the returns promised to investors in most PE funds, including this one, the performance of funds launched by publicly traded PE firms is instructive of investors’ expectation. According to Bain & Company, annual returns from “[p]ublicly traded PE firms like Apollo, KKR[,] and Blackstone” averaged “in the mid to high single digits over the past five years.”²¹ To provide similar returns on its initial investment, we estimate that PIR would have to generate about an additional \$50–\$70 million each year on top of its debt service.²²

It is not clear that PIR’s current revenue and income are sufficient to pay the costs of the debt, earn a return for investors, and pay any additional costs imposed by the transition from a non-profit entity to an LLC. We are therefore concerned that repaying these costs will either require increases in fees, cuts in service, or other approaches to monetize the .ORG domain by Ethos Capital.

It Is Not Clear How PIR Would Alleviate Its Financial Burden

Ethos Capital, ISOC, and PIR have failed to provide clear and transparent information about how they intend to satisfy the new substantial financial burdens. ICANN asked questions related to this topic, but the respondents replied that, because “PIR is a mature registry with known costs and base of revenue,” they did not feel obligated to answer. Additionally, the respondents stated that, “[g]iven PIR’s longevity and its known and solid financial performance over the past 16 years in operating the .ORG registry, information regarding an equity investor does not seem pertinent.”²³ These assertions entirely ignore the substantial issues raised by the conversion from nonprofit to LLC, the imposition of debt, and the expectation of producing a return on investment, all of which would create significant new cost liabilities for PIR that will materially change its financial environment. PIR has claimed that attracting new .ORG registrants will

¹⁹ *Id.*

²⁰ *Id.*

²¹ Bain & Company, “Global Private Equity Report 2019,” https://www.bain.com/contentassets/875a49e26e9c4775942ec5b86084df0a/bain_report_private_equity_report_2019.pdf

²² Range reflects about a 6%–9% annual return on a \$775 million investment.

²³ PIR, ISOC, Ethos Capital, and ICANN, “PIR’s Notice of Indirect Change of Control and Entity Conversion submitted to ICANN on 14 November 2019; ICANN’s requests for additional information dated 9 December 2019; PIR’s responses to ICANN’s requests for additional information provided to ICANN on 20 December 2019,” <https://www.icann.org/en/system/files/files/pir-isoc-ethos-capital-10jan20-en.pdf>.

increase revenue, even though the number of .ORG domains under management has remained flat for years despite claims of similar efforts by PIR.²⁴

PIR's New Owners Would Have New Incentives and New Power to Raise Fees, Cut Service, Monetize .ORG Registry Data, and Censor the Internet

The private equity takeover of .ORG, combined with the shift to private equity ownership, provides substantial opportunities for abuse and degradation of services.

Most prominently, now that price caps have been removed from ICANN's contract with PIR, PIR will have the unlimited ability to raise prices for domain name registrants. Ethos Capital has claimed that its Certificate of Formation will limit price increases for .ORG domain name annual fees to an average of no more than 10% per year—a rate that would be more than three times higher than the average yearly price increase on the .ORG domain since 2003²⁵—but it is no longer bound to do so by the ICANN registry agreement, and it is unclear what mechanism ICANN or any other entity could use to enforce this stated commitment.

In addition, Ethos's commitments to date are loophole-ridden. It claims that its commitments will be “along the following lines” rather than sharing specific language. And these commitments as stated would not preclude them from imposing fees other than those for “initial or renewal registration” that would not be subject to the 10% maximum average yearly increase. These commitments suggest vaguely that the company's business strategy will merely “include consideration of” the affordability of domain name registration, but do not contain specific commitments.²⁶ Longer term, Ethos could also impose differentiated pricing that would keep prices low for new customers but massively raise prices on long-term ORG domain users—such as many non-profits—who have .ORG domain names that are so well-established that switching domains is not feasible.

PIR, under its new ownership, would also have the ability and incentive to slash operating costs, which could reduce the reliability of the .ORG registry. Packet Clearing House, a nonprofit organization that has provided technical services for the .ORG registry for the last 15 years, notes that websites providing critical services including “air traffic control, containment of communicable disease, and verification of nonproliferation of weapons of mass destruction,” depend on a reliable .ORG. It predicts that the cost-cutting measures required for Ethos to break even will have a severe impact on technical service.²⁷ It writes that, although the .ORG domain service has had zero public-facing downtime in the last 15 years, the required cost-cutting will likely increase to an average of about “[t]hree days per year of interrupted communications for millions of not-for-profit organizations, [which] would unacceptably damage the stability and functionality of the Internet.”

²⁴ PIR Annual Report 2018, p. 15, <https://thenew.org/app/uploads/2019/09/PIR-2018-Annual-Report.pdf>.

²⁵ Flother, “Price of .org domains has risen by 3% annually, far below 10% price cap,” Matt Riggott, December 14, 2019, <https://flother.is/2019/dot-org-prices/>.

²⁶ [keypointsabout.org](https://www.keypointsabout.org), “Commitments in Certificate of Formation,” January 13, 2020, <https://www.keypointsabout.org/blog/commitments-in-certificate-of-formation>.

²⁷ Letter from Packet Clearing House to ICANN, December 12, 2019, <https://www.icann.org/en/system/files/correspondence/mitchell-woodcock-to-jeffrey-12dec19-en.pdf>.

If the .ORG registry is transferred, Ethos will also have the ability and incentive to monetize DNS query data, potentially in violation of user privacy, and with few contractual limits. For example, Ethos is invested in Vidmob, a company that optimizes video advertising for clients. DNS query data from the .ORG registry could be used to more effectively deliver targeted ads.²⁸ Ethos could potentially use data gleaned from operating the .ORG registry to assist Vidmob clients, and provide new revenue to PIR. Other monetization strategies include selling query data to third-party entities.²⁹

We are also concerned about Ethos's ability to suspend or transfer domain names in the service of trademark enforcement or otherwise protecting "the legal rights of third parties"³⁰—and the extent to which it could use that ability to monetize its ownership of .ORG or impose "arbitrary censorship."³¹ The Electronic Frontier Foundation has explained how this could happen:

Registries [like PIR] have the power to suspend domain names, or even transfer them to other Internet users, subject to their contracts with ICANN. When a domain name is suspended, all of the Internet resources that use that name are disrupted, including websites, email addresses, and apps. That power lets registries exert influence over speech on the Internet in much the same way that social networks, search engines, and other well-placed intermediaries can do. And that power can be sold or bartered to other powerful groups, including repressive governments and corporate interests, giving them new powers of censorship... As the new operator of .ORG, Ethos Capital would have the ability to engage in these and other forms of censorship. It could enforce any limitations on nonprofits' speech, including selective enforcement of particular national laws.³²

As an example of how this power can be monetized, Donuts, another registry operator owned by a PE firm, has a private agreement with the Motion Picture Association of America to "suspend domains based on accusations of copyright infringement from major movie studios, with no court order or right of appeal."³³

Contractual agreements between PIR and ICANN contain few protections to prevent this type of censorship. Although trademark owners have a right to protection from infringing domain names, ICANN should be very cautious about to whom it gives the power to take down .ORG websites. .ORG domain registrants include many organizations working to hold governments

²⁸ SSRN, "How DNS over HTTPS is Reshaping Privacy, Performance, and Policy in the Internet Ecosystem," Kevin Borgolte, Tiithi Chattopadhyay, Nick Feamster, Mihir Kshirsagar, Jordan Holland, Austin Hounsel, and Paul Schmitt, July 29, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3427563.

²⁹ The Longest Now, "THE .ORG FIRE SALE: HOW IT SOLD FOR LESS THAN HALF ITS VALUATION," Sam Klein, December 2, 2019, <https://blogs.harvard.edu/sj/2019/12/02/the-dot-org-fire-sale-sold-for-half-its-valuation/>.

³⁰ Registry Agreement between ICANN and PIR, effective June 30, 2019, <https://www.icann.org/sites/default/files/tlds/org/org-agmt-html-30jun19-en.htm>.

³¹ Electronic Frontier Foundation, "We Need To Save .ORG From Arbitrary Censorship By Halting the Private Equity Buy-Out," Mitch Stoltz, December 5, 2019, <https://www.eff.org/deeplinks/2019/12/we-need-save-org-arbitrary-censorship-halting-private-equity-buy-out>.

³² *Id.*

³³ *Id.*

and moneyed interests accountable; they should not have to worry that the .ORG operator will sell out these organizations and shut down websites after specious claims of intellectual property infringement.

Ethos Capital Has Not Made a Meaningful Commitment to Operate .ORG in the Public Interest.

For decades, .ORG has been synonymous with nonprofits, charities, mission-driven organizations, and an open approach to the Internet. There are over 10 million .ORG domain holders,³⁴ many of which are nonprofits with financial sensitivities or free speech concerns. There is no reason to believe that Ethos Capital will act in their best interest. In fact, the opposite is true; the sale will create a situation in which PIR will have incentives to raise fees, worsen service, monetize data, and potentially censor these nonprofits. None of this serves the public interest. Given the issues with this sale, it is no surprise that Internet advocacy groups³⁵ and United Nations human rights experts³⁶ have raised strong concerns to ICANN, and that over 650 organizations and more than 20,000 individuals have signed a letter urging ISOC, PIR, and ICANN to cancel the sale.³⁷

Ethos Capital has stated that the new parent entity of PIR would act in the public benefit, but it has not proposed a structure of governance and accountability that would bind this commitment in a meaningful way. Ethos has committed to creating a “PIR Stewardship Council,” to “help guide PIR management and the board in considering the interests of .ORG stakeholders,” but, like other commitments made by Ethos, this one appears to lack enforceability, and contains numerous loopholes. According to Ethos, the Stewardship Council will “convey advice and recommendations”—not requirements for rules or actions—to PIR’s leadership.³⁸ It does not appear to have the ability to remove members of PIR leadership if they were not acting in the public interest, and there appears to be no role for the Council in the formal management or day-to-day operations of the .ORG domain. The proposed council simply does not appear to have a meaningful ability to enforce any commitment to act in the public interest. The ICANN registry contract offers a well-established mechanism to make commitments by registry operators enforceable, but Ethos and PIR have not offered to memorialize any of these commitments in the registry contract.

³⁴ Public Interest Registry, “2018 Annual Report,” <https://thenew.org/app/uploads/2019/09/PIR-2018-Annual-Report.pdf>.

³⁵ Letter from the Internet Commerce Association to ICANN, November 15, 2019, <https://www.icann.org/en/system/files/correspondence/muscovitch-to-icann-board-15nov19-en.pdf>; Letter from the Mozilla Foundation to ICANN, December 3, 2019, <https://www.icann.org/en/system/files/correspondence/surman-to-marby-03dec19-en.pdf>.

³⁶ Letter from United Nations Special Rapporteur on freedom of opinion and expression and United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association to ICANN, December 20, 2019, <https://www.icann.org/en/system/files/correspondence/kaye-voule-to-marby-20dec19-en.pdf>.

³⁷ Letter from organizations and individuals to ISOC, PIR, and ICANN, November 22, 2019, <https://savedotorg.org/>.

³⁸ [keypointabout.org](https://www.keypointabout.org), “Commitments in Certificate of Formation,” January 13, 2020, <https://www.keypointabout.org/blog/commitments-in-certificate-of-formation>.

ICANN Should Reject the Proposed Transfer of the .ORG Registry.

ICANN's bylaws commit it to acting for the public benefit "in all events."³⁹ Public interest should be at the forefront of any ICANN decision, but it should be especially so in determining who should be approved to operate the .ORG registry. The Ethos Capital takeover of the .ORG domain fails the public interest test in numerous ways: it threatens the quality and reliability of .ORG websites, and could severely limit access to these domains via price increases and "arbitrary censorship." And the current commitments and agreements made by Ethos Capital fail to mitigate these risks.

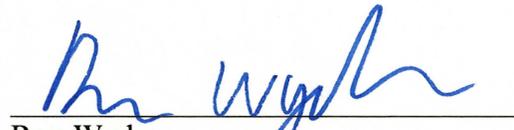
The proposed sale of .ORG is against the public interest and would violate ICANN's commitment to "preserve and enhance...the operational stability, reliability, security...and openness of the DNS and the Internet."⁴⁰

We urge you to reject this private equity takeover of the .ORG registry.

Sincerely,



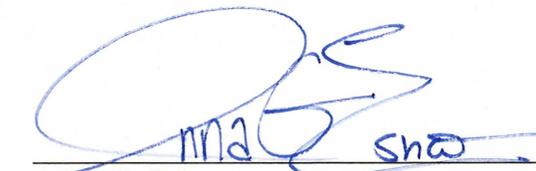
Elizabeth Warren
United States Senator



Ron Wyden
United States Senator



Richard Blumenthal
United States Senator



Anna G. Eshoo
United States Representative



Edward J. Markey
United States Senator



Mark Pocan
United States Representative

³⁹ ICANN Bylaws, Section 1.2(a)(iv), <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁴⁰ *Id.*, Section 1.2(a)(i).