

Maarten Botterman, Board Chairman
Members of the ICANN Board
March 31, 2021

RE: Change of control of Donuts Inc. – Acquisition by Ethos Capital

Dear Maarten and ICANN Board members,

We write to express our concerns about the change in control of registry operator Donuts Inc. as a result of its acquisition by Ethos Capital. This transaction raises the same sorts of concerns as did Ethos’s proposed acquisition of Public Interest Registry, a change of control that the ICANN Board wisely declined last year. Like the Ethos/PIR transaction, the acquisition of Donuts raises the risk of expanded censorship-for-profit business models that are inimical to the rights and needs of registrants in many important and politically sensitive top-level domains. ***We urge you to apply the same level of scrutiny to this change of control as you did to PIR’s last year, including a review at the Board level, and to insist on the removal of harmful and controversial “Public Interest Commitments” from Donuts’ registry agreements.*** Those clauses embroil ICANN in the operation of registrant-unfriendly policies that have been considered and rejected by the multistakeholder process, and in the regulation of Internet content.

When Ethos proposed to buy PIR, many of us pointed out the danger of a sensitive domain, whose owners and officers have a track record of pursuing censorship-for-profit opportunities, being subjected to the profitability demands of private equity investors. We also pointed out the lack of meaningful accountability to and oversight by registrants that would have resulted. And we decried the lack of transparency into Ethos’s finances and proposed corporate structure (a Byzantine network of shell corporations).

In declining to approve the change of control last year, the ICANN Board acknowledged some of these concerns, noting a “lack of meaningful engagement with that [registrant] community in the design of the proposed transaction,” and the “lack of transparency concerning Ethos Capital's exit strategy for the PIR investment or its plans relating to capital disbursements from PIR's operations.” The Board also observed that “Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator.”¹

All of these concerns also apply to Ethos’s purchase of a controlling stake in Donuts today. Donuts already engages in censorship-for-profit. The company has a policy of suspending domain registrations at the request of U.S. movie studios through their trade

¹ ICANN Bylaws Section 1.1(c), <https://www.icann.org/resources/pages/governance/bylaws-en> (“ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a).”).

association MPA. Registrants have little or no transparency into this mechanism, as neither Donuts nor MPA has released any data on these takedowns since 2017.

Donuts also places the rights of third parties ahead of registrants' rights by allowing trademark holders to, in effect, pre-register portfolios of second-level domains across all of Donuts' approximately 240 top-level domains for a 10-year period with a single transaction. This "DPML Plus" product was considered and rejected by ICANN's multistakeholder process, in part because it unjustifiably removes second-level domains (likely including common dictionary words) from registration across a large portion of the entire gTLD namespace, eroding registrants' rights to free expression in the use of domain names. DPML Plus gives power to brand holders that goes far beyond those granted in any country's trademark laws, and the need for such sweeping rights has never been established.

These mechanisms are enshrined in Donuts' registry agreements as so-called "Public Interest Commitments" (PICs), also known as "Registry Voluntary Commitments" (RVCs), which are not in ICANN's standard registry agreement nor the product of any multistakeholder process. In particular, Donuts' registry agreements guarantee the company extraordinary powers "at its sole discretion and at any time and without limitation, to deny, suspend, cancel, or transfer any registration or transaction, or place any domain name(s) on registry lock, hold, or similar status as it determines necessary" to a vague and open-ended set of goals. These include protecting "a third party's rights or acceptable use policies," which might include any policy that Donuts or its non-registrant customers choose to include. (See, e.g., <https://itp.cdn.icann.org/en/files/registry-agreements/business/business-agmt-html-07nov13-en.htm>, Specification 11(4)(c-d)) In effect, these clauses give Donuts unchecked power to suspend or transfer domains, leaving them free to make a registrant's websites or services go dark in furtherance of third-party business models. These contractual terms enshrine censorship-for-profit in Donuts' relationship with ICANN, and they necessarily entangle ICANN in the regulation of Internet content, a function that ICANN has always wisely avoided and in fact expressly disclaims in its bylaws.

These problems will only grow worse, and likely expand, with Ethos in control of Donuts and its existing registry agreements. As the review of the proposed PIR acquisition amply showed, Ethos has very high profit expectations for its acquisitions. Controlled by Ethos, we can expect Donuts to increase and expand the services it provides to non-registrant third parties, even when those services conflict with the rights and legitimate expectations of registrants, and potentially including the censorship of domains at the request of powerful industries or governments.

The potential for abuse is magnified by Donuts' recent acquisition of Afilias, which runs the technical operations of over 30 gTLDs and ccTLDs, including the .ORG domain. Through Ethos's acquisition of Donuts, it will now exercise indirect control over .ORG, less than a year since ICANN determined that it could not be entrusted to do so. Afilias

also operates about 20 registries in its own right, including .info, the most widely used new gTLD. And it operates several other domains that, like .ORG, are used to host sensitive political and other critical speech, such as .VOTE, .VOTA, and .LGBT. Therefore, although Donuts and its subsidiaries are organized as for-profit corporations, this change of control will have outsized impact on the public interest. ICANN does not appear to have considered the implications of allowing Donuts to expand the reach of its PICs to Afilias domains before approving that change in control, which happened without public input. ICANN now has an opportunity to take a closer look at these issues.

Moreover, the proposed transaction is not simply the substitution of one private owner for another. As former California Attorney General Xavier Becerra pointed out in his letter to ICANN last year, “Little is known about Ethos Capital Even less is known about how these for-profit corporate entities and private investors will operate their businesses.” (<https://www.icann.org/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf>).

ICANN should review this transaction thoroughly, as it did the proposed PIR change of control, and that review should likewise occur at the Board level rather than be left to staff. Moreover, ICANN should insist that Donuts amend its registry agreements to remove the PIC/RVC clauses that give Donuts an effectively unlimited right to suspend, cancel, or transfer domain names.

Sincerely,



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