

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-14-0001-5004

In the matter of an Independent Review Process

DOT REGISTRY, LLC,

Claimant,

v.

*INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS ("ICANN"),*

Respondent

Expert Report of Michael A. Flynn

July 13, 2015

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A. Introduction and Background

1. Claimant Dot Registry, LLC (“Dot Registry”) filed community-based gTLD (“generic Top-Level Domain) applications for the strings .INC,¹ .LLC² and .LLP³ in the gTLD application round that opened on January 12, 2012, under procedures established by the Internet Corporation for Assigned Names and Numbers (“ICANN”). In 2014, these applications apparently underwent three separate Community Priority Evaluations (“CPEs”) supposedly carried out by three separate Community Priority Evaluation Panels of the Economist Intelligence Unit (“EIU”) under contract to ICANN. In three *Community Priority Evaluation Reports* dated June 11, 2014,⁴ the EIU found that these three Dot Registry community applications “did not prevail”, owing to the fact that each received just 5 points, well short of the minimum 14 points (out of 16 possible points) needed to be granted “Community Priority” status. Dot Registry has requested an independent review of ICANN’s actions and inactions in connection with the performance and results of these three CPEs under the auspices of a panel of the International Centre for Dispute Resolution (hereinafter, the “ICDR Panel”).⁵
2. In connection with this ICDR proceeding between Dot Registry and ICANN, I have been asked by counsel for Dot Registry to review the record materials, to perform any research or other information gathering I deem necessary, and to form my expert opinion regarding:
 - a. Whether the determinations of the EIU in respect of Dot Registry’s community-based applications for the .INC, .LLC and .LLP gTLDs conformed to the principles and methodology set forth in Module 4 of ICANN’s *gTLD Applicant Guidebook* (the “AGB”),⁶ and

¹ Application 1-880-35979 (the “.INC Application”), attached as Exhibit 4.

² Application 1-880-17627 (the “.LLC Application”), attached as Exhibit 5.

³ Application 1-880-35597 (the “.LLP Application”), attached as Exhibit 6.

⁴ These EIU CPE Reports will be referred to, and attached as, respectively, the “.INC Report” (Exhibit 7), the “.LLC Report” (Exhibit 8) and the “.LLP Report” (Exhibit 9).

⁵ ICDR Case No. 01-14-0001-5004.

⁶ Version 2012-06-04, dated 4 June 2012 (attached as Exhibit 1).

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- b. Whether those determinations are consistent with the EIU's CPE determinations in connection with the .RADIO,⁷ .HOTEL,⁸ .OSAKA⁹ and .ECO¹⁰ community applications.
3. I am aware of the identity of the parties to this ICDR proceeding, their legal counsel and the members of the ICDR Panel. I consider myself to be independent from them, and I do not have a conflict of interest in acting as an expert in this proceeding.
4. I understand that I have an overriding duty to assist the ICDR Panel and to provide independent expert evidence. I also understand that my expert report is to be objective and impartial and that it is to include everything I consider relevant to the opinions I express.
5. A complete list of the documents and related materials I have reviewed in connection with this assignment may be found at **Attachment A**.
6. I have reached the conclusions set forth in this report following my review of the case-related materials that have been provided to me, and other research I have performed, through June 24, 2015. If additional information relevant to my assignment and opinions in this matter becomes available, and if asked to do so by counsel for Dot Registry or the ICDR Panel, I may supplement this report.

⁷ EIU CPE Report on Application 1-1083-39123 dated 11 September 2014 (the ".RADIO Report") and attached as Exhibit 10.

⁸ EIU CPE Report on Application 1-1032-95136 dated 11 June 2014 (the ".HOTEL Report") and attached as Exhibit 11.

⁹ EIU CPE Report on Application 1-901-9391 dated 29 July 2014 (the ".OSAKA Report") and attached as Exhibit 12.

¹⁰ EIU CPE Report on Application 1-912-59314 dated 6 October 2014 (the ".ECO Report") and attached as Exhibit 13.

B. Qualifications and Experience

7. I am a Director with Navigant's Oakland, California office. I have been both a testifying and consulting expert economist for over twenty-five years, specializing in antitrust, economic damages, intellectual property, class actions and other complex business litigation and consulting engagements. My *curriculum vitae* may be found at **Attachment B**.
8. Navigant is compensated on an hourly basis at a rate of \$590 per hour for my time spent on this engagement.
9. I have had earlier experience in connection with ICANN's current gTLD expansion program. In 2011, while serving as a consultant to the Association of National Advertisers, I co-authored a letter to Congress recommending that ICANN be required to fulfill its undertakings under its *Affirmation of Commitments*¹¹ with the U.S. Department of Commerce before embarking on its current gTLD expansion program. Following that, from 2012 through mid-2014, I was an independent, unaffiliated member of the ICANN community, during which time I briefly served as a community volunteer in connection with ICANN's effort to demonstrate, on an *ex post* basis, that its gTLD expansion then currently under way did in fact achieve the stated objectives of increased competition, consumer choice and consumer trust in the Domain Name System (DNS). I discontinued my involvement as a volunteer in 2014 following the U.S. government's announcement of its intention to transfer oversight of ICANN's Domain Name Functions to an appropriate successor.¹²

¹¹ <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

¹² "NTIA Announces Intent to Transition Key Internet Domain Name Functions", press release dated March 14, 2014 (<http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>).

C. Summary of Conclusions

10. Upon careful study, I conclude that each of Dot Registry's three community applications—for .INC, .LLC and .LLP—should have prevailed in their respective 2014 CPEs and have been awarded community priority status.
11. In particular, I conclude that Dot Registry's community applications for the .INC and .LLP strings should each have received scores of **15 points** (out of the maximum possible score of 16 points), one more than the 14 points each needed to be granted community priority status. Dot Registry's application for the .LLC string should have received the maximum possible score of **16 points**. These three correct scores are in sharp contrast to the identical scores of just 5 points each that the EIU actually awarded to the .INC, .LLC and .LLP applications.
12. The 5-point scores actually received by Dot Registry's .INC, .LLC and .LLP community applications were the result of what I consider to be the EIU failures to adhere to the AGB. These include:
 - a. Making unauthorized modifications to, or applying incorrect interpretations of, the criteria for CPEs set forth in the AGB before then "finding" that the Dot Registry applications failed to satisfy the EIU versions of the AGB criteria.
 - b. The EIU denial of Dot Registry's .INC, .LLC and .LLP community applications turned on its interpretations of just a handful of the AGB criteria:
 - i. Under Criterion #1: What is meant by—and needed to satisfy—the AGB requirement for "awareness and recognition of a community among [a community's] members", especially in view of the fact that this term is not defined by the AGB?
 - ii. Also under Criterion #1: Does the "Organized" criterion require that there be "at least one" entity mainly dedicated to the community, or "only one"? Also, does the "Organized" criterion's "mainly dedicated" term require that this entity have no other responsibilities besides those related to the community at issue?
 - iii. Under Criterion #2: What does it mean for a string to "over-reach *substantially* beyond the community [emphasis added]"? (The AGB does not include a definition or metric for this term.)

- iv. Under Criterion #3: What is the meaning of—or limitation posed by—the AGB requirement for “*appropriate* appeal mechanisms”, especially since the AGB states that with respect to “Enforcement”, “scoring of applications against [this criterion] will be done from a *holistic perspective with due regard for the particularities of the community explicitly addressed* [emphasis added]”?
13. The EIU applied markedly different—and less demanding—interpretations of these criteria in connection with its approval of the .RADIO, .HOTEL, .OSAKA and .ECO community applications. Had the EIU applied the same interpretations to Dot Registry’s applications for .INC, .LLC and .LLP, these applications would have prevailed, in my assessment.

D. Overview of ICANN’s Community Priority Evaluation (CPE) Process

14. **Community Priority Evaluation (CPE)** is one of the two methods¹³ established by ICANN to resolve “string contention” –the situation in which two or more applicants have applied for the same gTLD—arising under ICANN’s current program to further expand the number of gTLDs.¹⁴ The important point is that ICANN’s rules give priority to “community applications” over other applications for the same string. If there are multiple applicants for a given gTLD string, ICANN’s rules give first “priority” to any “community applicant” for that string. If a community application for a particular string prevails (i.e., achieves the necessary 14 the points) in its CPE, the applicant must be awarded the string over the other non-community applicants vying for the same string. Otherwise, the string contention would be resolved at auction, with the right to contract for the gTLD awarded to the highest winning bidder.

15. **Community Applications must prevail in their “Community Priority Evaluation” (CPE).** The CPE is to be conducted in accordance with ICANN’s AGB.¹⁵ ICANN contracted with the EIU to conduct the CPEs of community applications. The EIU has published two documents in connection with its selection by ICANN to perform CPEs:
 - a. **Community Priority Evaluation (CPE) Guidelines Prepared by The Economist Intelligence Unit.**¹⁶ This document explains how the EIU will interpret and implement the AGB’s *Community Priority Evaluation Criteria*. There is a clear statement in its first section titled **Interconnection between Community Priority Evaluation (CPE) Guidelines and the Applicant Guidebook (AGB)** that:

¹³ The other is an auction among the contending applicants.

¹⁴ Prior to the current expansion, there were twenty gTLDs: the first seven (.COM, .NET and .ORG , .EDU, .GOV, .INT, .MIL) were created in the 1980s. Anyone could register a second-level domain name under the first three, but special restrictions limited who could register second-level domains under the last four. Since 2000—but prior to the expansion currently under way—thirteen more gTLDs were added: .BIZ, .INFO, .NAME and .PRO (the “unsponsored” gTLDs) plus.AERO, .COOP, .MUSEUM, .ASIA, .CAT, .JOBS, .MOBI, .TEL and .TRAVEL (the “sponsored” TLDs that imposed restrictions on who could register a second-level domain under each).

¹⁵ Specifically, CPE’s are governed by 4.2.3 *Community Priority Evaluation Criteria* in Module 4 of ICANN’s gTLD APPLICANT GUIDEBOOK, version of 2012-06-04 (the “AGB”) pages 4-9 to 4-19 (Exhibit 1).

¹⁶ Version 2.0 dated September 27, 2013 (the “EIU Guidelines”) is attached as Exhibit 2.

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB. *This document does not modify the AGB framework, nor does it change the intent or standards laid out in the AGB. The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB.* The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process [emphasis added].¹⁷

Notwithstanding the foregoing, the EIU made material modifications to the AGB framework when applying it to Dot Registry's .INC, .LLC and .LLP applications.¹⁸

- b. **Community Priority Evaluation Panel and its Processes.**¹⁹ Regarding the CPE evaluations undertaken by the EIU pursuant to the EIU's selection by ICANN, this document reiterates on its first page that:

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* [emphasis added].

In my opinion, the EIU did not adhere to this commitment.

16. **The Community Priority Evaluation Criteria** are set forth in Module 4 of the AGB.²⁰ There are four principal criteria, each worth a possible maximum of 4 points. As mentioned, an application must receive a total score of at least 14 points in order to prevail.
17. **Criterion #1: Community Establishment** (4 points possible) is comprised of two main sub criteria: **1-A Delineation** (2 points) and **1-B Extension** (2 points).

¹⁷ EIU Guidelines, (Exhibit 2), p. 2.

¹⁸ The resulting modified criteria were not applied during the EIU's review of the .RADIO, .HOTEL, .OSAKA and .ECO community applications. Instead, as I discuss below, these latter applications were effectively given a "pass" regarding these criteria.

¹⁹ This document, attached as Exhibit 3, is dated 7 August 2014, by which point the EIU had already completed 10 of the total of 17 CPEs it has accomplished to date.

²⁰ Section 4.2.3, pp. 4-9 to 4-19 (attached at Exhibit 1).

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- a. Under the **1-A Delineation** prong of **Criterion #1: Community Establishment**, the Community's membership definition is evaluated to determine whether the Community is "clearly delineated, organized, and pre-existing." There are three determinants of the application's score under **1-A Delineation**:
- i. Delineation²¹ which in turn requires:
 - 1. A clear and straightforward membership definition, *and*
 - 2. Awareness and recognition of a community (as defined by the applicant) among its members.²²
 - ii. Organization²³ which in turn requires:
 - 1. Documented evidence of community activities, *and*
 - 2. At least one entity mainly dedicated to the community.
 - iii. Pre-existence²⁴ which requires that the community must have been active prior to September 2007.
- b. Under the **1-B Extension** prong of **Criterion #1**, the question to be answered is whether the Community is of "considerable size and longevity." There are two components:

²¹ "Delineation' relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low." (AGB, 4-11)

²² Despite the critical role played by this requirement in the EIU's review of the .INC, .LLC and .LLP applications, the AGB does not provide any definition or explanation for it. In addition, the EIU effectively waived this requirement for the .RADIO, .HOTEL, .OSAKA and .ECO community applications by "finding" the requisite "awareness and recognition of a community" in their respective community definitions themselves. See Exhibits 10 through 13.

²³ "Organized' implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities." (Ibid.)

²⁴ "Pre-existing' means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007." (Ibid.)

- i. Size²⁵ which requires that:
 1. The community is of considerable size, *and*
 2. There is awareness and recognition of a community among its members.
- ii. Longevity²⁶ which requires that:
 1. The community was in existence prior to September 2007, *and*
 2. There is awareness and recognition of a community among its members.

18. **Criterion #2: Nexus between Proposed String and Community** (4 points possible) also imposes two principal sub criteria: **2-A Nexus** (3 points possible) and **2-B Uniqueness** (1 point).

- a. Under the **2-A Nexus** prong²⁷ of **Criterion #2**, the essential question is whether the string
 - i. *Matches* the name of the community or is a well-known short-form or abbreviation of the community (3 points), *or*
 - ii. *Identifies* the community without matching the name of the community or “over-reaching substantially beyond the community” (2 points), *or*

²⁵ “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers.” (Ibid.)

²⁶ “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature.” (Ibid., 4-12)

²⁷ “With respect to ‘Nexus’, for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community...for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.” (Ibid., 4-13) The AGB does not define or explain the term “over-reaching substantially”.

- iii. Neither matches nor identifies the community (0 points).
 - b. Under the **2-B Uniqueness** prong of **Criterion #2**, the question is whether the string has any other significant meaning beyond identifying the community. Under the AGB, this question is reached only if the application first achieves a score of 3 or 2 on the **2-A Nexus** prong of **Criterion #2**.²⁸
19. **Criterion #3: Registration Policies** (4 points possible) tests the community application along four separate dimensions related to the registration policies that will be applied by registrars to applicants for second-level domain names.²⁹ There is 1 point possible for each these four elements: **3-A Eligibility**, **3-B Name selection**, **3-C Content and Use** and **3-D Enforcement**.
- a. Because all the three Dot Registry applications met and received 1 point each for each of the first three elements, only the fourth, **3-D Enforcement** is at issue in, and therefore relevant to, this proceeding. The first three are not discussed further in this report.
 - b. Under **3-D Enforcement**, the registration policies (set forth in the community application) that will be applied to prospective registrants of second-level domain names are evaluated to determine whether or not those

Policies include specific enforcement measures (e.g., investigation practices, penalties, take down procedures) constituting a coherent set with *appropriate* appeal mechanisms [emphasis added].³⁰

where

²⁸ According to the AGB, “uniqueness implies a requirement that the string does identify the community, i.e. scores 2 or 3 for ‘Nexus,’ in order to be eligible for a score of 1 for ‘Uniqueness’.” (Ibid., 4-14)

²⁹ If its community applications for .INC, .LLC and .LLP succeed, Dot Registry would eventually enter into agreements with *registrars* who would be the ones to actually register eligible second-level domains under .INC, .LLC or .LLP. The focus of the **3-D Enforcement** sub criterion is the set of rules that Dot Registry’s agreements would impose on these registrars to govern their dealings with would-be registrants of second-level domains under .INC, .LLC or .LLP.

³⁰ Ibid., 4-15. I regard the adjective “appropriate” to be significant, as I explain below.

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the [registration] conditions by registrants [of second-level domains].³¹

20. **Criterion #4: Community Endorsement** (4 points possible) has two components (each worth a maximum of 2 points): **4-A Support** and **4-B Opposition**:

a. Under **4-A Support** (2 points possible), it is determined whether

- i. “Applicant is, or has documented support from, the recognized community institution(s)/member organization(s) or has otherwise documented authority to represent the community (2 points),”³² *or*
- ii. The Applicant has “documented support from at least one group with relevance, but insufficient support for a score of 2 (1 point),”³³ *where*
- iii. “‘Recognized’ means the institution(s) [or] organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.”³⁴

b. Under **4-B Opposition** (2 points possible), the question is whether

- i. There is no opposition of relevance to the application (2 points), *or*

³¹ Ibid., 4-16. A community application was supposed to set out the applicant’s enforcement and appeals mechanisms in the application section titled: **20(e). Provide a description of the applicant’s intended registration policies in support of the community-based purpose of the applied-for gTLD.**

³² Ibid., 4-17. The AGB adds that “the plurals...for a score of 2 relate to case of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.” Ibid., 4-18.

³³ Ibid.

³⁴ Ibid., 4-17 and 4-18.

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- ii. The application has relevant opposition from one group of non-negligible size (1 point),³⁵ *or*
- iii. The application has relevant opposition from two or more groups of non-negligible size (0 points).

³⁵ As explained below, there was initial opposition from the European Commission (“EC”) to Dot Registry’s application for the .LLP string on the ground that the “LLP” abbreviation is used in the United Kingdom. However, the EIU erroneously attributed that opposition to all three of Dot Registry’s strings (.INC, .LLC and .LLP) rather than just .LLP. The EIU compounded its error by failing to notice that the EC “opposition” to the .LLP string was withdrawn almost immediately after its initial submission (and long before the EIU consideration of the .INC, .LLC and .LLP applications). See Exhibit 21.

E. Examination of the EIU’s Review of Dot Registry’s Community Application for the .INC TLD

21. As set forth in Exhibit 7, the EIU awarded these scores to the Dot Registry community application for the .INC string on the four principal criteria set forth in the AGB:

Criterion #1: Community Establishment	0 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	0 points (out of 4)
Criterion #3: Registration Policies	3 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>2 points (out of 4)</u>
Total	5 points (out of 16)

22. Having awarded it just 5 out of the minimum necessary score of 14 points, the EIU declared that the Dot Registry application for .INC did not prevail:

After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in community priority evaluation.³⁶

23. As I explain in greater detail below, had the EIU correctly adhered to the AGB, it instead would have awarded the following scores:

Criterion #1: Community Establishment	4 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	3 points (out of 4)
Criterion #3: Registration Policies	4 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>4 points (out of 4)</u>
Total	15 points (out of 16)

³⁶ .INC Report (Exhibit 7), p. 1.

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24. Thus, as I explain below, it is my conclusion that the Dot Registry community application for the .INC TLD would have prevailed if the EIU had evaluated it correctly according to the AGB.

E.1. .INC Criterion #1: Community Establishment

25. The *community* that is the subject of the Dot Registry application for the .INC string is the **Community of Registered U.S. Corporations**.³⁷ The AGB specifically provides for such communities under *Criterion 1 Guidelines*:

With respect to “Delineation” and “Extension,” it should be noted that *a community can consist of legal entities* [emphasis added, examples omitted]. All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.³⁸

26. Importantly, there is nothing in the AGB specifying how a community must “act” (as a community or anything else) nor does the AGB say anything about how community members must “associate themselves”.³⁹
27. This community is clearly delineated. The Community of U.S. Corporations is clearly delineated because membership in it requires the objectively-verifiable satisfaction of explicit, overt requirements. This is because membership requires the successful, active completion of the requirements to register as a corporation with the Secretary State or equivalent authority in one of the U.S. states, territories or the District of Columbia,⁴⁰ coupled with the continued maintenance of such registrations in conformity with the applicable laws and regulations. Thus, the .INC community (alternatively, the

³⁷ New gTLD Application Submitted to ICANN by Dot Registry LLC for the String INC, posted 13 June 2013, Application ID: 1-880-35979 (“.INC application”) (Exhibit 4), p. 2.

³⁸ AGB, (Exhibit 1), p. 4-12.

³⁹ Nevertheless, the EIU specifically faulted the .INC, .LLC and .LLP applications on this very point.

⁴⁰ This is the Secretary of State in 37 of the 50 U.S. states and Puerto Rico. The exceptions are: Alaska (Commissioner of the Department of Commerce, Community and Economic Development); Arizona (Arizona Corporation Commission); District of Columbia (Superintendent of Corporations); Hawaii (Director, Department of Commerce and Consumer Affairs); Maryland (Director, Department of Assessments and Taxation); Massachusetts (Secretary of the Commonwealth); Michigan (Director, Department of Licensing and Regulatory Affairs); New Jersey (State Treasurer); New Mexico (Public Regulation Commission); Pennsylvania (Secretary of the Commonwealth); Utah (Director, Division of Corporations and Commercial Code); Virginia (State Corporation Commission); Wisconsin (Secretary, Department of Financial Institutions); Guam (Director, Department of Revenue and Taxation); Northern Marianas Islands (Registrar of Corporations); and U.S. Virgin Islands (Commissioner, Department of Licensing and Consumer Affairs). For ease of exposition, “Secretary of State” will be used to refer to all of these authorities.

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Community of Limited Liability Companies or the Community of Limited Liability Partnerships) has “a clear and straight-forward membership definition” that should have been given a perfect score for Delineation under both the AGB and the EIU Guidelines.

28. There is at least one entity mainly dedicated to the Community of U.S. Corporations. The offices of the Secretaries of State were established by law in each state or territory to administer such registrations, which are the *sine qua non* of membership in the .INC, LLC and LLP communities. It is apparent that even the *EIU Guidelines* permit the several Secretary of State offices to have additional functions and responsibilities (such as, for example, administering elections). According to the *EIU Guidelines*,

“Organized” implies that there is *at least one entity* mainly dedicated to the community, with documented evidence of community activities [emphasis added].⁴¹

The *EIU Guidelines* immediately add the following:

“Mainly” could imply that *the entity administering the community may have additional roles/functions beyond administering the community*, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization [emphasis added].⁴²

29. Nonetheless, the EIU expressed the following view:

In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community *as they have other roles/functions* beyond processing *corporate* registrations [emphasis added].⁴³

Interestingly, the EIU used precisely the same wording to dispose of Dot Registry’s .LLC and .LLP community applications, even though the records that LLCs and LLPs file with their respective Secretaries of State obviously are not “corporate” records. This suggests that the Dot Registry community applications for .LLC and .LLP may not have been

⁴¹ Exhibit 2, p. 4.

⁴² Ibid.

⁴³ .INC Report (Exhibit 7), p, 2,

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evaluated as independent applications, as was required, but rather were evaluated as a group with the .INC application.

30. There is documented evidence of community activities. The publicly accessible records of corporate registrations maintained by the Secretaries of State constitute documented evidence of the activities of the Community of U.S. Corporations. Owing to the fact that these entities are the repositories of the documents needed to accomplish the initial registrations of community members as U.S. corporations and thereafter to maintain these registrations, there is considerable documentary evidence of these defining community activities.
31. The Community of U.S. Corporations has been in active existence since long before September 2007. Corporations have been formed in the U.S. since the early 1800s; thus the Community of U.S. Corporations easily satisfies this criterion.
32. The EIU Guidelines specifically provide that a community consisting of legal entities is permitted by the Applicant Guidebook. The EIU Guidelines specifically say that a community comprised of legal entities is a viable community under the AGB, “provided the requisite awareness and recognition of the community is at hand among the members.”⁴⁴ As I explain next, the members of the Community of U.S. Corporations possess that awareness and recognition.
33. The individual members of the .INC community have the requisite awareness and recognition of that community.⁴⁵ This is because its members are required to actively complete a number of conscious, overt and externally observable steps to register as corporations in the first place. Thereafter, they must regularly and consciously take additional overt and externally observable actions over time to maintain their memberships (i.e., their corporate registrations) in good standing. Thus, membership in the .INC community must be consciously sought and actively achieved; such membership is neither passive nor inadvertent.
34. Indeed, it is by that decision itself to become a corporation—and to satisfy the many legal steps required to register as a corporation and to maintain that registration—that

⁴⁴ Exhibit 2, p. 6.

⁴⁵ The AGB does not provide any further definition or explanation for “awareness and recognition of a community among its members”.

applicants demonstrate (1) their awareness and recognition of the community of corporations and (2) their intention to formally become members of it.

35. So the EIU got it right when it said that the only requirement for membership in the community of corporations “is formal registration as a corporation with the relevant US state.”⁴⁶ In other words, it is by their individual decisions to register as corporations and their completion of the steps necessary to do so that the members of the community of corporations evidence their awareness and recognition of that community and their intention to become members of that community. This by itself should have been sufficient to award the application the full 4 points.
36. According to the *gTLD Applicant Guidebook*, there are two criteria that must be achieved in order for Dot Registry’s community application for the .INC TLD to prevail on **Criterion #1: Community Establishment**. The EIU was supposed to determine whether or not the Dot Registry application for the .INC string evidenced the requisite **Delineation** (sub criterion **1-A**) and **Extension (1-B)**. In its CPE Report, the EIU concluded that the Dot Registry application failed both of these prongs of **Criterion #1: Community Establishment**. However, for the reasons explained below, I conclude otherwise.

- **.INC 1-A Delineation**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

37. Dot Registry’s score under sub criterion **1-A Delineation** was supposed to have been determined by whether or not the .INC community demonstrated the necessary Delineation,⁴⁷ Organization and Preexistence. According to the EIU’s interpretation of the *Applicant Guidebook*, the Delineation sub criterion in turn required, among other things, an “awareness and recognition of a community (as defined by the applicant) among its

⁴⁶ .INC Report (Exhibit 7), p. 2.

⁴⁷ The AGB unhelpfully uses “Delineation” at two different levels of the analytical framework for a community application: First, “1-A Delineation” is the name given to one of the two principal sub criteria under **Criterion #1: Community Establishment** (the other is “1-B Extension”). Then “Delineation” is used a second time to refer to one of the three “sub sub criteria” *under* “1-A Delineation” (the other two are “Organization” and “Pre-existence”). In this report—in an attempt to minimize the obvious potential for confusion—these different-level usages are distinguished as **1-A Delineation** and Delineation, respectively.

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members” as a necessary condition. If the EIU failed the application on this “awareness and recognition of a community among its members” requirement, it did not matter whether the other requirements for Delineation or the requirements for Organization and Preexistence were satisfied. The application would still lose both of the 2 points available under **1-A Delineation**.

Delineation

38. The EIU agreed that the .INC community shows a clear and straightforward membership, thus satisfying the first prong of the Delineation sub criterion:

While broad, the community is clearly defined, as membership requires formal registration as a corporation with the relevant US state. In addition, corporations must comply with US state law and show proof of best practices in commercial dealings to the relevant state authorities.

39. In my opinion, Dot Registry’s .INC community is in fact *better* defined than are the communities at issue in the .HOTEL, .RADIO, .ECO and .OSAKA applications that prevailed before the EIU. Neither the *Applicant Guidebook* nor the *EIU Guidelines* provide a concrete meaning for “define” and “definition”. If these are taken to mean or include—as I would regard as reasonable—a rule or standard that would enable an external observer to confidently say whether or not a particular entity was a community member, it is my opinion that each of the three Dot Registry communities (.INC, .LLC and .LLP) are *better* defined than the communities in the community applications (.HOTEL, .RADIO, .ECO and .OSAKA) that *did* prevail in EIU CPE Evaluations. For example:
40. The application for .HOTEL clearly stated that “only entities which fulfil [the ISO definition of “Hotel”] are members of the Hotel Community and eligible to register a domain name under .hotel.” Next, it quoted that definition (“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available”) before declaring

*“Therefore only entities which fulfill this definition are members of the Hotel Community and eligible to register a domain name under .hotel [emphasis added].”*⁴⁸

⁴⁸ .HOTEL Report (Exhibit 11), p. 2.

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41. But when the applicant then added “hotel marketing organizations”, “associations representing hotels and hotel associations” and “other organizations representing hotels, hotel owners and other solely hotel related organizations” – entities that clearly are *not* hotels under the definition provided by the applicant—the EIU concluded nevertheless that:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel [“a hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”].⁴⁹

The EIU’s conclusion in respect of .HOTEL makes no sense at all. The applicant’s community definition clearly included entities (such as marketing organizations, associations and organizations representing hotels, etc.) that do *not* satisfy the ISO criterion for what constitutes a hotel.

42. The EIU’s logic in scoring the .RADIO community application for Delineation is even more bewildering. First, the EIU approvingly quoted the applicant for the following:

The Radio industry is composed of a huge number of *very diverse* [emphasis added] radio broadcasters: public and private; international and local; commercial or community-oriented; general purpose, or sector-specific; talk or music; big and small. All licensed radio broadcasters are part of the .radio community, and so are the associations, federations and unions they have created... Also included are the radio professionals, those making radio the fundamental communications tool that it is.

However, the Radio industry keeps evolving and today, many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their audio content via the Internet. *Some are not broadcasters in the traditional sense* [emphasis added]: Internet radios are also part of the Radio community, and as such will be acknowledged by the .radio TLD, as will podcasters. In all cases certain minimum standards on streaming or updating schedules will apply.

⁴⁹ Ibid.

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The .radio community also comprises the often overlooked amateur radio, which uses radio frequencies for communications to small circles of the public. Licensed radio amateurs and their clubs will also be part of the .radio community.

Finally, the community includes a variety of companies providing specified services or products to the Radio industry.⁵⁰

43. Surprisingly, the EIU nonetheless concluded:

This community definition shows a clear and straightforward membership and is therefore well defined [emphasis added]. Association with, and membership in, the radio community can be verified through licenses held by professional and amateur radio broadcasters; membership and radio -related associations, clubs and unions; internet radios that meet certain minimum standards; radio-related service providers that can be identified through trademarks; and radio industry partners and providers.⁵¹

44. Even more surprising is what the EIU concluded next:

[T]he community as defined in the application has awareness and recognition among its members. This is because the community as defined consists of entities and individuals that are in the radio industry [footnote omitted], *and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community* [emphasis added].⁵²

45. One is left wondering whether the EIU's "standards" have any constancy at all if the EIU is able to conclude that the .RADIO community is "clearly defined" and that, *solely on the basis of their participation in this "clearly defined industry"*, they have "an awareness and recognition of their inclusion in the industry community."

⁵⁰ .RADIO Report (Exhibit 10), pp. 1-2.

⁵¹ Ibid. p. 2.

⁵² Ibid.

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46. Applying the EIU's logic to the .INC community (a community that the EIU also found to be "clearly defined"), it necessarily follows that members of the .INC community similarly have "an awareness and recognition of their inclusion" in the .INC community.
47. In any event, I conclude that the .INC community does meet the AGB requirement for Delineation because there is ample evidence that:
- a. membership in the .INC community is both clear and straightforward,
 - b. members of the .INC community possess the requisite awareness and recognition of that community, and that
 - c. INCs from different sectors and regions *do* associate themselves with being part of the broader Community of U.S. Corporations.

Organization

48. According to the EIU, "two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities. The *EIU Guidelines* add that:
- "Mainly" could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer [the community].⁵³
49. This requirement is satisfied by the individual Secretaries of State of the U.S. states, territories and the District of Columbia. These entities were constitutionally and/or legislatively established to administer the community of corporations within their respective jurisdictions. Moreover, these constitutional and/or legislative provisions clearly identify the community of corporations authorized to conduct business within their jurisdictions.
50. Inexplicably, the EIU decided otherwise. But it did so after first re-writing the requirements in the AGB and ignoring its own *EIU Guidelines*:

⁵³ Exhibit 2, p. 4.

The [.INC] community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, these government agencies are *fulfilling a function*, rather than *representing* the community. In addition, the offices of the Secretaries of State of US states are not *mainly* dedicated to the community as they have other roles/functions beyond processing corporate registrations [emphases added].⁵⁴

51. According to the *Applicant Guidebook* and the *EIU Guidelines*, the relevant question is whether or not the several Secretaries of State are *dedicated* to the community of corporations, not whether they are merely “fulfilling a function” relevant to the community or whether they only “represent” it. It appears that the EIU first rewrote the requirement for Organization and then found that the .INC community failed to satisfy the EIU’s rewritten version.
52. Moreover, the EIU ignored its own *Guidelines*, which clearly provide that “the entity administering the community may have additional roles/functions beyond administering the community.”⁵⁵ All that is required is that “*one* of the key or primary purposes/functions of the entity is to administer” [emphasis added] the community.⁵⁶
53. Finally, the EIU decided that the .INC community “does not have documented evidence of community activities” for the reason that “there is no entity mainly dedicated to the community as defined in the .INC application.”⁵⁷ This was because, said the EIU, the several Secretaries of State were not *mainly* dedicated to the community of corporations. As discussed above, the EIU ignored its own *EIU Guidelines*, which explicitly allow for the possibility that “the entity administering the community may have additional roles/functions beyond administering the community.”⁵⁸
54. In view of the foregoing, I conclude that there is considerable evidence of community activities. It consists of the overt steps taken, and records created, in connection with the

⁵⁴ .INC Report (Exhibit 7), p. 2.

⁵⁵ Exhibit 2, p. 4.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

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individual decisions made on behalf of would be corporations to register as such under the applicable laws, and thereafter to maintain these registrations.

55. Also in view of the foregoing, I conclude that Dot Registry community application for the .INC string does fulfill both requirements for Organization.

Pre-existence

56. The only requirement for Pre-existence is that the .INC community must have been active prior to September 2007. The EIU concluded that this putative community could not possibly have been active prior to that date because it deemed the .INC community to be an invention of the Dot Registry applicant in order “to obtain a sought-after-after corporate identifier as a gTLD string.”⁵⁹ The EIU “justified” this conclusion on the ground that “corporations would typically not associate themselves with being part of the [.INC] community as defined by the applicant.”⁶⁰ The EIU did not offer any research or other evidence to support this assertion.
57. In my opinion, the EIU is clearly in error. First, it is implicitly imposing a requirement of its own invention—rather than one set forth in the AGB—regarding how putative community members must “associate themselves.” Second, there is ample evidence showing that corporations *do* associate themselves with being part of the community of U.S. corporations writ large. Such evidence is outlined below.
58. In view of the foregoing, it is my opinion that Dot Registry’s .INC application actually satisfies all three of the requirements—Delineation, Organization and Pre-existence—for **1-A Delineation**. The EIU should have awarded it the maximum possible 2 points.

- **.INC 1-B Extension**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

⁵⁹ .INC Report (Exhibit 7), p. 3.

⁶⁰ Ibid.

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59. Next, according to the AGB, Dot Registry’s score under sub criterion **1-B Extension** was supposed to be determined by whether or not the .INC community demonstrated the necessary Size and Longevity. But the EIU held that each of these two sub criteria also required the necessary “awareness and recognition of a community (as defined by the applicant) among its members.”⁶¹ Supposedly unable to detect the requisite “awareness and recognition of a community,” the EIU was unpersuaded by the fact that the .INC community met the other requirements for Size and Longevity. *Essentially, the EIU failed Dot Registry’s applications for .INC, .LLC and .LLP solely because the EIU did not find an “awareness and recognition” of a community among the respective members. To the EIU, this justified its decision to award 0 points under both 1-A Delineation and 1-B Extension in spite of the fact that these applications met all of the other AGB requirements. The loss of all 4 points under Criterion #1: Community Establishment effectively guaranteed that Dot Registry’s applications for .INC, .LLC and .LLP would not prevail.*

Size

60. The EIU conceded that the .INC community is of considerable size because it “is large in terms of [its] number of members [citing figures from the Dot Registry application on the number of new U.S. corporations registered in a single year and the total number currently registered].”⁶²
61. But the EIU discounted this showing on the ground that the .INC community did not have the requisite “awareness and recognition of a community among its members.”

This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. *Research showed* that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an INC. *Based on the Panel’s research*, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. These incorporated firms would therefore not typically associate themselves with being part of the community as defined by the applicant [emphases added].⁶³

⁶¹ Ibid.

⁶² Ibid. p. 3.

⁶³ .INC Report (Exhibit 7), p. 3 2. It would be very useful—and likely illuminating—to be able to review the EIU’s “research”. See Section J below.

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62. I have already addressed this particular misapprehension on the part of the EIU. To repeat, I find nothing in the AGB regarding how community members are supposed to “associate themselves”. And the EIU’s misapprehension is amply refuted by the examples below, which show that corporations do associate among themselves as corporations in general, without necessarily limiting themselves to particular industries, locales or sectors. There is no indication as to what research the EIU conducted.
63. In my opinion, the EIU should have concluded that Dot Registry’s .INC application satisfied both requirements for Size.

Longevity

64. The AGB requires that two conditions be fulfilled in order for Dot Registry’s .INC application to meet the Longevity sub criterion: the .INC community must demonstrate longevity and it must display an awareness and recognition of a community among its members. The EIU decided that the .INC application did neither, based on its previous misapprehensions that (a) the .INC community was “construed” because “corporations would typically not associate themselves with being part of the [.INC] community”, and (b) the putative .INC community “does not have awareness and recognition of a community among its members.”⁶⁴
65. Both of these judgments by the Panel are in error, as has already been explained above. Accordingly, I conclude that Dot Registry’s .INC application satisfied the Longevity requirement under **1-B Extension**.
66. Because the .INC application had also met the conditions for Size, the Panel should have awarded it the maximum possible 2 points for **1-B Extension**.
67. Next, I address the EIU CPE Panel’s general conclusions that Dot Registry’s .INC community failed to fulfill either of the two AGB requirements for Organization under **1-A Delineation**, namely that there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

⁶⁴ .INC Report (Exhibit 7), p. 4.

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68. There are several entities dedicated to the Community of U.S. Corporations. Chief among them is the **National Association of Secretaries of State (NASS)**⁶⁵ that was cited in Dot Registry's application for .INC.

69. According to the NASS website

Founded in 1904, the **National Association of Secretaries of State (NASS)** is the nation's oldest, nonpartisan professional organization for public officials. Members include the 50 states, the District of Columbia, Puerto Rico and American Samoa. NASS serves as a medium for the exchange of information between states and fosters cooperation in the development of public policy. The association has key initiatives in the areas of elections and voting and state business services, as well as issues-oriented Task Forces. NASS Committees cover a range of topics related to the Office of the Secretary of State/Lieutenant Governor...NASS is a 501(c)(3) non-profit that utilizes its support from *corporate affiliates* to help further the association's stated mission by funding daily operations, supporting high-caliber programming at NASS conferences, underwriting NASS research, surveys and other educational materials [emphasis added].⁶⁶

70. The membership of the **NASS** itself is limited to public officials such as Secretaries of State and Lieutenant Governors. According to the NASS website

Most NASS member offices handle the registration of domestic and/or foreign corporations (profit and non-profit). Transactions include filings of incorporation, partnerships (including limited partnerships), articles of merger/consolidation, and articles of dissolution.⁶⁷

71. On the NASS home page, the first two Featured Links are titled "Prevent Business ID Theft" and "Find Business Services". After these, the link to "Get Help with Voting" is listed third. This appears to undermine the EIU CPE Panel's dismissal of Secretaries of State on the ground that

⁶⁵ Website: <http://www.nass.org>

⁶⁶ "About NASS," accessed June 2015, <http://www.nass.org/about-nass/about/>

⁶⁷ <http://www.nass.org/state-business-services/corporate-registration/>

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[T]he offices of the Secretaries of State of US states are not mainly dedicated to the [community of corporations] as they have other roles/functions beyond processing corporate registrations.⁶⁸

72. Importantly, NASS prominently features the “NASS Corporate Affiliate Program”⁶⁹ as “an excellent way to share ideas and build relationships with key state decision makers while supporting the civic mission of [NASS].” These Corporate Affiliates include applicant Dot Registry LLC⁷⁰ and are listed individually at the NASS website.⁷¹ NASS also publishes “Surveys and Reports”⁷² that are primarily for the benefit of corporations and other businesses. These include:

- *Report: State Strategies to Subvert Fraudulent Uniform Commercial Code Filings* (Released 2012; updated April 2014)
- *NASS Summary of Business Entity Information Collected by States* (March 2014)
- *NASS Survey on Administrative Dissolution of Business Entities* (March 2014)
- *White Paper Streamlining for Success: Enhancing Business Transactions with Secretary Of State Offices* (February 2014)
- *Updated NASS Company Formation Task Force Report and Recommendations* (September 2012)
- *NASS White Paper - Developing State Solutions to Business Identity Theft: Assistance, Prevention, and Detection* (January 2012)

⁶⁸ .INC Report (Exhibit 7), p. 2.

⁶⁹ <http://www.nass.org/corppaffiliates/about-corp-affiliate-program/>

⁷⁰ Posted on the NASS website is a white paper authored by Dot Registry LLC titled “ICANN New gTLD Process” (**white-paper-dot-registry-winter 15.pdf**) that was distributed at the NASS Winter 2015 meetings.

⁷¹ <http://www.nass.org/contact/corp-affiliates/>

⁷² These are listed at <http://www.nass.org/reports/surveys-a-reports/>

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- *NASS Business Identity Theft Toolkit & NASS Business Identity Theft Fact Sheet* (July 2011)
- *Updated Report: State Business Entity Laws* (May 2009)

73. Perhaps the EIU CPE Panel's certainty that

[T]here is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community [of U.S. corporations] as defined by the applicant.⁷³

can partially be explained by the fact that corporations are legal, not human, persons. They can and do act only through their officers and their boards of directors. It is through such actions on the part of their officers and their boards, including their interactions with their regulators, that corporations also demonstrate their awareness and recognition of a community.

74. Despite the EIU CPE Panel's apparent certainty that they do not exist, there are many societies, associations and other organizations whose membership and activities coincide with the Community of U.S. Corporations. Importantly, none of these are limited to particular industries or regions of the U.S. They include:

75. **The Business Roundtable.**⁷⁴ According to its website:

Business Roundtable members are the chief executive officers of leading U.S. companies. Collectively, *they represent every sector of the economy* [emphasis added] and bring a unique and important perspective to bear on policy issues that impact the economy. Roundtable members are thought leaders, advocating for policy solutions that foster U.S. economic growth and competitiveness.

...

Business Roundtable was established in 1972 through the merger of three existing organizations.... These groups founded Business Roundtable on the belief that in a

⁷³ .INC Report (Exhibit 7), p. 2.

⁷⁴ Website: <http://businessroundtable.org/>

pluralistic society, the business sector should play an active and effective role in the formation of public policy.

76. **The National Association of Corporate Directors (NACD).**⁷⁵ According to its website

The National Association of Corporate Directors is the recognized authority focused on advancing exemplary board leadership and establishing leading boardroom practices. Informed by more than 35 years of experience, NACD delivers insights and resources that more than 15,000 corporate director members rely upon to make sound strategic decisions and confidently confront complex business challenges. NACD provides world-class director education programs, national peer exchange forums, and proprietary research to promote director professionalism, ultimately enhancing the economic sustainability of the enterprise and bolstering stakeholder confidence. Fostering collaboration among directors, investors, and governance stakeholders, NACD is shaping the future of board leadership.

77. **The Society of Corporate Secretaries & Governance Professionals.**⁷⁶ According to its website:

Founded in 1946, the Society of Corporate Secretaries and Governance Professionals, Inc. (the "Society") is a non-profit organization (Section 501(c)(6)) comprised principally of corporate secretaries and business executives in governance, ethics and compliance functions at public, private and not-for-profit organizations. Members are responsible for supporting their board of directors and executive management in matters such as board practices, compliance, regulation and legal matters, shareholder relations and subsidiary management.

The Society seeks to be a positive force for responsible corporate governance, providing news, research and "best practice" advice and providing professional development and education through seminars and conferences. The Society is administered by a national staff located in New York City, by members who

⁷⁵ Website: <https://www.nacdonline.org/>

⁷⁶ Website: <http://www.governanceprofessionals.org>

serve on board and standing committees and through the member activities of 21 local chapters.

78. **The Society of Corporate Compliance and Ethics (SCCE).**⁷⁷ According to its website

The Society of Corporate Compliance and Ethics (SCCE) is a 501(c)6 member-based association for regulatory compliance professionals. SCCE was established in 2004 and is headquartered in Minneapolis, MN. We provide training, certification, networking, and other resources to nearly 5,000 members. Our members include compliance officers and staff from a wide range of industries. The need for guidance in meeting regulatory requirements extends to a wide range of sectors, including academics, aerospace, banking, construction, entertainment, government, financial services, food and manufacturing, insurance, and oil, gas and chemicals. SCCE assists compliance managers and corporate boards in all. Our [events](#), [products](#), and [resources](#) aim to educate and update our members with the latest news and resources available. We offer training, certification, and publications committed to improving the quality and acknowledgment of the compliance industry. SCCE helps members protect their companies and advance their careers through services including education, updates on regulatory requirements and enforcement, and access to a rich professional network. SCCE currently has more almost 5,000 members. Plus over 2,500 compliance professionals hold the Corporate Compliance & Ethics Professional (CCEP) certification and over 500 hold the Corporate Compliance & Ethics Professional-International (CCEP-I).

79. In view of the NASS and the other organizations discussed above, it is my opinion that the EIU erred when it concluded that

[T]his application [for .INC by Dot Registry] refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string, *as these corporations would typically not associate themselves with being part of the community as defined by the applicant* [emphasis added].⁷⁸

80. In particular, the EIU erred in concluding that

⁷⁷ Website: <http://www.corporatecompliance.org>

⁷⁸ .INC Report (Exhibit 7), p. 4.

[C]orporations operate in vastly different sectors, which sometimes have little or no association with one another. 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 as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community as defined by the applicant* [emphases added].⁷⁹

Again, the AGB requires only that the constituents of a community be *members* of that community. There is no requirement that members of a community “*act*” as a community (whatever that might mean). Moreover, as I have shown above, there is ample evidence of INCs from different regions and economic sectors acting as members of—and associating themselves with—being part of the Community of U.S. Corporations that Dot Registry has defined. Again, it is not clear to me what research was undertaken by the EIU.

E.2. .INC Criterion #2: Nexus between Proposed String and Community

81. In applying this criterion, the EIU CPE Panel was supposed to determine whether or not Dot Registry’s .INC string is commonly known by others as the identification/name of the community of registered U.S. corporations (for a score of 3 points) or whether that .INC string closely describes that community without “over-reaching substantially beyond” the community of registered U.S. corporations.”⁸⁰
82. In its community application, Dot Registry itself disclosed that the .INC string is used outside of the U.S.:

Our research indicates that Inc. as [a] corporate identifier is used in three other jurisdictions (Canada, Australia, and the Philippines) though their formation regulations are different from the United States in their entity designations would not fall within the boundaries of our community definition.⁸¹

⁷⁹ .Ibid., p. 2.

⁸⁰ AGB, p. 4-13 (Exhibit 1)

⁸¹ .INC Application (Exhibit 4), p. 6.

- **.INC 2-A Nexus**

Maximum score	3 points
EIU score	0 points
Correct score	2 points

83. To receive the maximum, score of 3 points for **2-A Nexus**, Dot Registry’s .INC string must match the community of registered US corporations or be a well-known short-form or abbreviation of the community name. To receive a partial score of 2 points for Nexus, the [.INC] string must identify the community where “identify” means that the applied-for [.INC] string should closely describe the community [of registered U.S. corporations] or community members, without over-reaching *substantially* beyond that community.⁸²
84. The EIU CPE Panel faulted the Dot Registry application on the supposed ground that
- The applied-for string (.INC) over-reaches *substantially*, as the string indicates a wider or related community of which the applicant is a part that is not specific to the applicant’s community...While the string identifies the name of the community, it captures a wider geographical remit than the [.INC] community has, as the corporate identifier is used in Canada, Australia and the Philippines. *Therefore, there is a substantial over-reach* between the proposed [.INC] string and [the community of registered U.S. corporations] as defined by the applicant [emphases added].⁸³
85. It is unclear how—and according to what standard or metric—the Panel determined that the usage of “Inc.” in Australia, Canada and the Philippines caused the Dot Registry application (targeting the community of U.S. corporations) amounts to *substantial* overreach.
86. Based on the dictionary meaning of “substantial”,⁸⁴ the use of “Inc.” in Australia, Canada and the Philippines would have to be so “considerable” or “great” in comparison to its use in the U.S. that such usage would “largely” but not “wholly” equal to its usage in the U.S.

⁸² AGB, p. 4-13.

⁸³ .INC Report (Exhibit 7), pp. 4-5.

⁸⁴ According to the *Merriam Webster’s Collegiate Dictionary* (10th ed.), “substantial” is defined as “considerable in quantity: significantly great” (Definition 3 b) or “being largely but not wholly that which is specified” (Definition 5).

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itself. In my opinion, this would require that the economic magnitude/significance of the usage of “Inc.” in these three countries amounts to, at a minimum, significantly more than half of the appropriately-measured economic magnitude of its usage in the U.S. itself.

87. But on closer examination, it is clear that the EIU did not regard it as necessary to provide any quantification of the supposed “over-reach” in order to determine whether or not it was “substantial”. Instead, the EIU decided for itself that *any* over-reach was *ipso facto* “substantial,” without there being any need to measure it.⁸⁵
88. According to the AGB, only if a string “over-reach[es] *substantially* [emphasis added] beyond the community” would a community application be denied any points whatsoever under **2-A Nexus**. Importantly, the AGB does not provide any metric for determining whether any “over-reach” —even assuming it exists at all—is “substantial”. Presumably, if an applied-for string “over-reaches” only slightly, this should result in a score of 2 points. It would not be grounds for giving a community application 0 points under the **2-A Nexus** criterion, sufficient to ensure that the application could not prevail.
89. It appears that the EIU took it upon itself to first re-write the AGB criteria. Where the AGB is concerned only with *substantial* over-reach (something it neither defines nor quantifies), the EIU effectively dropped the *substantial* condition and decided that *any* “over-reach” —no matter how small or even trivial—is *ipso facto substantial*. Here is the criterion as restated by the EIU:
- “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.⁸⁶
90. In short, *any* “geographical or thematic remit” that is “wider” than the community—no matter by how little or how much, quantitatively speaking—is deemed to be a “substantial over-reach” by the EIU that justifies awarding the community application at issue 0 points under **2-A Nexus**.
91. It is my considered view that Dot Registry’s .INC string qualifies for at least a score of 2 points under **2-A Nexus** because it is commonly known as the identifying abbreviation for U.S. corporations. To the extent that “Inc.” is also used in Canada, Australia and the Philippines, such usage is not *substantial*, as I demonstrate next.

⁸⁵ EIU Guidelines (Exhibit 2), p. 7.

⁸⁶ EIU Guidelines (Exhibit 2), p. 6.

92. To test whether or not Dot Registry's .INC TLD string *substantially* overreaches, the EIU first should have assembled and analyzed data showing the incidence of the corporate delimiters "Inc." and "Corp." (in comparison to other possible business entity abbreviations such as "Ltd.", "GmbH", AB, SARL, and the like) in countries other than the U.S. Next, it should have determined the economic significance of such usage (for example, by determining the relative number and size of the business entities in Canada, Australia and the Philippines that use "Inc." or "Corp." and then compared that economic significance to the economic significance of U.S. companies that use "Inc." or "Corp.")
93. What the EIU should have done was to identify and analyze representative data on the actual usage of "Inc." in each of Australia and Canada and the Philippines in comparison to its usage in the U.S. But again, it does not appear that the EIU made any effort even to investigate, much less to quantify, the economic significance of the non-U.S. usage.⁸⁷
94. Upon investigation, it does appear that "Inc." is used in Australia, but not to designate corporations. Instead, its use there appears to be restricted to nonprofit associations. In Canada, "Inc." is used along with "Ltd.", "Limited", "Corporation" and "Incorporated". "Inc." also is used in the Philippines along with the abbreviations "Corp." and "Co." (although it also appears that the use of "Co." is reserved for partnerships in the Philippines.) I was unable to find any use of "Inc." (or "Incorporated") in any other country.
95. Next I turned to the actual incidence and economic significance of the usage of "Inc." in each of the three countries that Dot Registry identified. In order to do this, it first was necessary to identify and analyze a large, representative, publicly-available data set showing the distribution and economic significance of all corporate identifiers in each of Australia, Canada, the Philippines and the U.S.
96. I elected to use the *Forbes Global 2000* data set published by Forbes on May 7, 2014.⁸⁸ This data set identified the largest 2,000 of the world's public companies, based on a composite ranking using four metrics measured as of April 1, 2014: sales, profits, assets and market

⁸⁷ As noted above, the EIU appears to have looked no further than the information volunteered by Dot Registry itself.

⁸⁸ <http://www.forbes.com/sites/forbespr/2014/05/07/forbes-11th-annual-global-2000-the-worlds-biggest-public-companies/>. See Exhibit 14.

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value.⁸⁹ I chose to use the fourth metric—market value (alternatively, market capitalization or “market cap”)—as the measure of each company’s relative economic significance.

97. A total of 560 U.S. corporations were included in the *Forbes Global 2000*. These 560 corporations had an aggregate market capitalization of \$18,188.1 trillion dollars.⁹⁰ I adopted this figure as an appropriate proxy for the usage of “Inc.” or “Corp.” in the U.S. Then the relevant question I sought to answer was: What was the corresponding market capitalizations of the *Forbes Global 2000* companies in Australia, Canada and the Philippines that use the identifiers “Inc.” or “Corp.”?
98. It is my opinion that a comparison of these equivalent market capitalization figures for Australia, Canada and the Philippines to the \$18,188.1 trillion market cap of the 560 U.S. corporations in the *Forbes Global 2000* would provide a reasonable basis for determining the extent to which the use of “Inc.” or “Corp.” in these three countries was economically significant. This in turn would be an appropriate basis for determining whether or not Dot Registry’s .INC string *substantially* “over-reaches” the community of U.S. corporations. Here is what I found:
99. A total of 36 Australian business entities were included in the 2014 edition of the *Forbes Global 2000* data set. As I have tabulated in Exhibit 14, these 36 firms had an aggregate market capitalization of \$1,008.7 billion, or 5.5% percent of the aggregate market cap of the U.S. corporations in the same data set. Next, using information available in the *Forbes* data set, I was able to readily determine the identifier used by 29 of these 36 Australian entities: just one used “Inc.”; all of the remaining 28 were officially designated as “Ltd.” or “Limited”.
100. From this, I estimated that 1/29—or just 3.4%—of the Australian aggregate market cap of \$1,008.7 trillion (or \$34.8 billion) should be attributed to Australian entities using “Inc.” or “Corp.” This \$34.8 billion amounted to only 0.2% of the aggregate market capitalization of the 560 U.S. Corporations in the *Forbes Global 2000*. (Exhibit 14)
101. Similarly, a total of 57 Canadian businesses were listed in the 2014 *Forbes Global 2000* data set with an aggregate market capitalization of \$1,210.0 billion, or 6.7 percent of the

⁸⁹ Measured in U.S. dollars as of April 1, 2014, after conversion from the local currencies by Forbes.

⁹⁰ All four metrics reported in the *Forbes Global 2000* are measured in U.S. dollars, which greatly facilitated my calculations.

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aggregate market cap of the 560 U.S. corporations in the data set. Again, using other information available in the *Forbes* data, I estimated that 75.5% (i.e., 37/49) of these Canadian corporations were identified by “Inc.” or “Corp.” (The rest used “Ltd.” or “Limited”.)

102. From this, I estimated that 75.5% of the Canadian aggregate market cap of \$1,210.0 billion in the *Forbes* data set, or \$913.7 billion, could be attributed to Canadian entities using “Inc.” or “Corp.”
103. A total of 10 Filipino business entities were included in the 2014 edition of the *Forbes Global 2000* data set. As summarized in Exhibit 14, these 10 firms had an aggregate market capitalization of \$72.2 billion, or 0.4% percent of the aggregate market cap of the 560 U.S. corporations in the *Forbes* data. Then, using other information contained in the *Forbes* data set, I determined that 6 out of 9 or 66.7% used the identifiers “Inc.” or “Corp.”⁹¹
104. This enabled me to estimate that 66.7% of the aggregate \$72.2 billion in market capitalization—or \$48.1 billion—should be attributed to Filipino entities that used the “Inc.” or “Corp.” identifiers.
105. This finally allowed me to answer the question: In comparison to their usage in the U.S., can the usage of “Inc.” or “Corp.” in Australia, Canada and the Philippines *combined* be considered *substantial*? Put differently, is the non-U.S. usage of the .INC string so great that it “over-reaches substantially” beyond the U.S.?
106. As a result of the foregoing analysis (summarized in Exhibit 14), I have concluded that the Dot Registry’s restriction of the .INC string to the U.S. does *not* amount to *substantial* “over-reach”. This is because the best estimate of the aggregate market capitalization of the companies in Australia, Canada and the Philippines using the “Inc.” or “Corp.” identifier in the *Forbes Global 2000* is \$34.8 billion + \$913.7 billion + \$48.1 billion, or a total \$996.6 billion. This is just 5.5%—not a *substantial* fraction⁹²—of the total market capitalization of \$18,188.1 billion of the 560 U.S. corporations in the *Forbes* data.
107. But the data I analyzed do show that there is some—albeit small—usage of “Inc.” outside the U.S. While such usage is not “substantial”, it still means that the .INC string does not

⁹¹ The others used “Co.”, which I understand identifies a general partnership in the Philippines.

⁹² Specifically, it does not even begin to approach—much less exceed—half of the total market capitalization of the U.S. corporations in the *Forbes* data.

identify *only* U.S. corporations. While Dot Registry’s definition of the .INC community cannot be characterized as *excessively* broad, it does result in some “over-reach.” I conclude that this limits it to a score of 2 points on the **2-B Nexus** criterion.

- **.INC 2-B Uniqueness**

Maximum score	1 point
EIU score	0 points
Correct score	1 point

108. According to the EIU

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application *and must also have a score of 2 or 3 on Nexus*.

109. As has already been shown above, the Dot Registry application for the .INC string should have been given a score of 2 on the **2-A Nexus** criterion. Consequently, the only remaining question is whether or not the .INC string has any other significant meaning. The EIU did not address this question on the ground that it had determined (erroneously, in my opinion) that the Dot Registry application for the .INC string should be awarded 0 points for **2-A Nexus**.

110. While I understand that some in the ICANN community have suggested that the .INC string also signifies “Incomplete” or “Incoming”, it also is my understanding that these suggestions appear to have originated with rival, non-community applicants for the .INC string. In any event, it is difficult to imagine that the EIU would have taken these suggestions seriously if it had actually evaluated the Dot Registry application under **2-B Uniqueness** on the merits.

E.3. .INC Criterion #3: Registration Policies

111. In the EIU’s original evaluation, the Dot Registry application for the .INC string was awarded the maximum of 1 point for each of the first three sub criteria (**3-A Eligibility**, **3-B Name Selection** and **3-C Content and Use**) but 0 points for the **3-D Enforcement**, the fourth sub criterion.

112. I concur with the EIU’s analysis and scoring of the Dot Registry application on the **3-A Eligibility**, **3-B Name Selection** and **3-C Content and Use** sub criteria.

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- **.INC 3-A Eligibility**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

- **.INC 3-B Name Selection**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

- **.INC 3-C Content and Use**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

113. However, I understand that the EIU faulted the Dot Registry application for the .INC string under the **3-D Enforcement** criterion on the ground that, while it did articulate specific enforcement measures, it did not outline an “appropriate” appeals mechanism. I disagree.

- **.INC 3-D Enforcement**

Maximum score	1 point
EIU score	0 point
Correct score	1 point

114. The EIU found that Dot Registry’s application for the .INC string did not meet the criterion for **3-D Enforcement**, on the ground that—while it did include the requisite enforcement measures—it did not satisfy the AGB requirement for an appeals process:

The [Dot Registry] applicant outlined policies that include specific enforcement measures constituting a coherent set. For example, if a registrant wrongfully applied for and was awarded a second level domain name, the right to hold this domain name will be immediately forfeited. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline *an appeals process* [emphasis added]. The

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Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.⁹³

115. But in so ruling, the EIU misstated the requirement that the Dot Registry supposedly failed to meet. The AGB requires only “*appropriate* appeals mechanisms”, and states further that:

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

...

With respect to...“Enforcement,” scoring of applications against [this sub criterion] will be done from a *holistic perspective, with due regard for the particularities of the community explicitly addressed*. [Example omitted] More restrictions do not automatically result in a higher score. *The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD* and demonstrate continuing accountability to the community named in the application [emphases added].⁹⁴

116. The community-based purpose of Dot Registry’s .INC TLD is

To build confidence, trust, reliance, and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Corporations. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Registered Community of Corporations. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant’s right to conduct business in the United States.

...

The “.INC” gTLD will be exclusively available to members of the Community of Registered Corporations, as verified through the records of each registrant’s Secretary of State’s office (or other state official where applicable) [emphasis added].⁹⁵

⁹³ .INC Report (Exhibit 7), p. 6.

⁹⁴ AGB (Exhibit 1), p. 4-16.

⁹⁵ .INC Application (Exhibit 4), p. 7.

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117. It is important not to overlook the fact that the fundamental requirement for membership in the .INC community—and the right to register a second-level domain under the .INC TLD—is the possession and maintenance of a valid corporate registration with office of the appropriate Secretary of State. In this regard, the records of the relevant Secretary of State’s office are dispositive: Either the would-be registrant of a second-level .INC domain is validly registered with that Secretary of State, or it is not.
118. The essential point is that in order to register a second level domain under .INC, an applicant must be a duly, currently registered Corporation as determined by the relevant Secretary of State. That determination would *not* be Dot Registry’s or its registrars’ to make; their role would be limited to verifying that the applicant has secured the necessary registration from the relevant Secretary of State or equivalent authority and that that registration is current.
119. Dot Registry will verify that the registrant of a second-level domain is a registered U.S. corporation at the time of its registration.⁹⁶ Thereafter a registrant’s “active” status would be verified on an annual basis with the relevant Secretary of State, as detailed in the Dot Registry application for .INC:
- Dot Registry or its designated agent will annually verify each registrant’s community status. Verification will occur in a process similar to the original registration process for each registrant, in which the registrars will verify each registrant’s “Active” status with the applicable state authority. Each registrar will evaluate whether its registrants can still be considered “Active” members of the Community of Registered Corporations...⁹⁷
120. But because only duly registered corporations would be allowed to register second level domains under .INC, and because the several Secretaries of State are the ultimate arbiters of whether or not a putative corporation is indeed duly registered, it would not be within the authority of Dot Registry to provide a mechanism by which a would-be applicant could “appeal” a determination by a Secretary of State to Dot Registry or its registrars. The latter must respect the Secretary of State’s determination.

⁹⁶ .INC Application (Exhibit 4) at p. 7.

⁹⁷ Ibid.

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121. I also note that the Dot Registry application for the .INC string does provide opportunities for redress on issues that would not raise the possibility that Dot Registry or its registrars were arrogating the authority of the relevant Secretary of State. For example, Dot Registry's application did provide for a "quasi appeals process" in the event it was unable to verify an applicant's eligibility for the .INC string with the relevant Secretary of State. This is because the application made explicit allowance for a 30 day probationary period to allow registrants to directly address the relevant Secretary of State.

Any registrant found to be "Inactive," or [ceases to be registered with the State, is dissolved and/or forfeits the domain for any reason, or is administratively dissolved by the State] will be issued a probationary warning by their registrar, allowing for the registrant to restore its active status or resolve its dissolution with the applicable Secretary of State's office. If the registrant is unable to restore itself to "Active" status within the defined 30 day probationary period, their previously assigned ".INC" will be forfeited....

[A]ny entity acquiring a ".INC" domain through the processes described in this guideline that does not meet the registration criteria and wishes to maintain the awarded domain will be allowed a 30 day grace period after the renewal verification process to correct any non-compliance issues in order to continue operating their acquired domain.⁹⁸

122. Dot Registry has also committed to implementation of the full panoply of ICANN's registrant rights protection mechanisms, including but not limited to:

Support for and interaction with the Trademark Clearinghouse ("Clearinghouse"); use of the Trademark Claims Service; segmented Sunrise Periods allowing for the owners of trademarks listed in the Clearinghouse to register domain names that consist of an identical match of their listed trademarks; subsequent Sunrise Periods to give trademark owners or registrants that own the rights to a particular name the ability to block the use of such name; [and] stringent takedown policies in order to properly operate the registry.⁹⁹

Dot Registry will provide all ICANN required rights mechanisms, including Trademark Claims Service, Trademark Post-Delegation Dispute Resolution

⁹⁸ Ibid., pp. 17-18.

⁹⁹ Ibid., p. 18.

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Procedure (PDDRP), Registration Restriction Dispute Resolute Procedure (RRDRP), UDRP, URS and Sunrise service.¹⁰⁰

123. If the EIU had actually taken the “holistic perspective” called for by the AGB, it would have given “due regard for the particularities” of the .INC community discussed above, and awarded Dot Registry’s .INC application the maximum possible 1 point available under **3-D Enforcement**.

124. At the same time, it should be noticed how vague, unformed or merely aspirational were the provisions for an “appropriate appeals mechanism” for certain community applications (.RADIO, .HOTEL, .ECO, .GAY and .ART submitted by Dadotart) that nonetheless were awarded the maximum possible score for **3-D Enforcement** by the EIU.¹⁰¹

125. The .RADIO application provided only that

An appeals process is available for all administrative measures taken in the framework of the enforcement program. The first instance of the appeals process is managed by the .radio Registry, while appeals are heard by an independent alternative dispute resolution provider.¹⁰²

This is the *entirety* of the provision for an appropriate appeals process in the .RADIO community application.

126. The EIU concluded that the .ART (Dadotart) community application satisfied the requirement for an appeals mechanism on the basis of this provision (again, quoted in its entirety):

An appeals process will be available for all administrative measures taken in the framework of the enforcement program. The first instance of the appeals process will be managed by the registry service provider. The PAB [“Policy Advisory Board”] set up by Dadotart provides the second and last instance of an appeals process by itself or entrusted to an alternative

¹⁰⁰ .INC Application (Exhibit 4) at p. 23.

¹⁰¹ .RADIO application (Exhibit 16), .HOTEL application (Exhibit 17), .ECO application (Exhibit 19), .GAY application (Exhibit 20), .ART application (Exhibit 18).

¹⁰² .RADIO application (Exhibit 16), p. 24.

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dispute resolution provider the charter of the appeals process will be promulgated by the PAB.¹⁰³

127. And interestingly, the words “appeal” or “appeals” do not appear *at all* in the .HOTEL and .ECO community applications. Yet the EIU awarded each the maximum possible 1 point score for **3-D Enforcement**, saying

There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name.¹⁰⁴

and

There is also an appeals mechanism, whereby a registrant has the right to seek the opinion of an independent arbiter approved by the registry.¹⁰⁵

E.4. .INC Criterion #4: Community Endorsement

128. This section of my report relates to the .INC community as identified and defined in the Dot Registry application.

- **.INC 4-A Support**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

129. According to its CPE Report, the EIU determined that the Dot Registry application only “partially” met the criterion for **4-A Support**, in that it had documented support from at least one group with relevance to the .INC community. But the EIU did not award the maximum possible score of 2 points because the Dot Registry application did not have “documented support” from the “recognized” community institution(s), where

¹⁰³ .ART (Dadotart) application (Exhibit 18).

¹⁰⁴ .HOTEL report (Exhibit 11), p. 5.

¹⁰⁵ .ECO report (Exhibit 13), p. 8.

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“recognized” means the institution(s) that are clearly recognized by the community members as representative of the community.

130. I am baffled by the EIU’s “determination”. First of all, there can be no question that the Secretaries of State for the several U.S. states and the National Association of Secretaries of State (NASS) *are* recognized by U.S. corporations as representing the community of corporations. Nevertheless, the EIU once again invoked the notion that there is a meaningful distinction between government entities (in particular, the respective Secretaries of State of U.S. states) “fulfilling a function” as opposed to “representing the community” and, specifically, that the Secretaries of State of U.S. states

are not the recognized community institutions...as these government agencies are fulfilling a function, rather than representing the community.¹⁰⁶

One cannot help but notice that, in the context of the .OSAKA community application,¹⁰⁷ the EIU apparently was not troubled by the fact that the Osaka Prefectural government (the “entity mainly dedicated to the community”) was merely fulfilling its function. The EIU’s unwillingness to afford the same deference to US Secretaries of State or to their National Association is strikingly inconsistent.

131. It also is important to underscore the fact that the several Secretaries of State are either elected or appointed governmental officers. As such, they lack the freedom available to a non-governmental body or private organization to simply favor or even endorse one applicant for a particular string over rival applicants. But it must not be forgotten that:
- a. Several state-level Secretaries of State as well as NASS clearly expressed the position that the .INC TLD should be awarded *only* to a community applicant,
 - b. These same Secretaries of State and NASS were aware of the Dot Registry community application for the .INC string,
 - c. The Dot Registry application was the *only* community application for that string, and

¹⁰⁶ .INC Report (Exhibit 7), p. 2.

¹⁰⁷ See the .OSAKA Report (Exhibit 12).

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- d. These Secretaries of State and NASS communicated with ICANN at the request of Dot Registry. This constellation of facts strongly suggests that the several Secretaries of State and NASS—while not permitted to officially endorse it—nevertheless are in support of the Dot Registry application for the .INC string.¹⁰⁸

132. Next I address the several complaints referenced in the EIU’s CPE report, namely that “[T]he viewpoints expressed in these letters were not consistent across states” and that

- a. Dot Registry “was not the recognized [.INC] community institution.”
- b. Nor did Dot Registry “have documented authority to represent the [.INC] community.”
- c. Nor did Dot Registry have “documented support from a majority of the recognized community institutions.”

133. The EIU has acknowledged that it did receive letters of support from “a number” of Secretaries of State:

The application included letters from a number of Secretaries of State of US states, which were considered to constitute support from groups with relevance, as each Secretary of State has responsibility for corporate registrations and the regulations pertaining to corporate formation in its jurisdiction.¹⁰⁹

But the EIU summarily dismissed these letters on the ground that

These entities are not the recognized community institution(s)/member organization(s), *as these government agencies are fulfilling a function, rather than representing the community* [emphasis added].¹¹⁰

The viewpoints expressed in these letters were not consistent across states. While several US states expressed clear support for the applicant during the

¹⁰⁸ I understand that NASS was a joint requestor on Dot Registry’s Reconsideration Requests.

¹⁰⁹ .INC Report (Exhibit 7), p. 7.

¹¹⁰ Again, this is an irrelevant, meaningless distinction that is nowhere to be found in the AGB that I have already addressed above.

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Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request.¹¹¹

But I am not aware of any evidence that the EIU reached out to *every* explicit or implicit member of the .RADIO, .HOTEL, .OSAKA and .ECO communities or that it received an expression of “clear support” from *each* such member. Therefore, this appears to be another example of the EIU’s uneven treatment of the Dot Registry community applications, compared to the treatment the EIU accorded to the .RADIO, .HOTEL, .OSAKA and .ECO community applications.

134. In arguing that the EIU should have awarded the maximum possible 2 points to the .INC application for sub criterion **4-A: Support**, I both rely on and distinguish this passage from the AGB’s Criterion 4 Guidelines:

With respect to ‘Support,’ it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations... Also with respect to ‘Support,’ the plurals and brackets for a score of 2 relate to cases of multiple institutions/organizations. In such cases there must be documented support from institution/organizations representing a majority of the overall community addressed in order to score 2.¹¹²

135. I would argue first that the National Association of Secretaries of State is “the only national Association relevant to” the .INC community and that the .INC application has documented support from NASS. Second, in view of the fact that measured by the value of the registered corporations, the Delaware Secretary of State arguably represents the majority of U.S. corporations. His support for the Dot Registry .INC application can therefore be seen as evidence of majority support. This conclusion is further supported by the several additional letters of support offered by other Secretaries of State for the Dot Registry .INC application.

¹¹¹ .INC Report (Exhibit 7), p. 7.

¹¹² AGB (Exhibit 1), p. 4-18.

136. Since the Dot Registry application for the .INC TLD has the support of both NASS and the Delaware Secretary of State, the EIU should have awarded it the maximum 2 points for **4-A: Support**.

- **.INC 4-B Opposition**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

137. According to its CPE Report, the EIU determined that the Dot Registry application only “partially” met the criterion for Opposition “as the application received relevant opposition from one group of non-negligible size:”

The [.INC] application received several letters of opposition, *one of which was determined to be relevant opposition* from an organization of non-negligible size. This opposition was from a community that was not identified in the application *but which has an association to the applied-for string*. Opposition was on the grounds that limiting registration to US registered *corporations* only would unfairly exclude non-US businesses [emphases added].¹¹³

138. I have recently been able to review email correspondence¹¹⁴ between ICANN and the EIU regarding this particular “finding”. That correspondence confirms that the European Commission (“EC”) was the source of the supposedly “relevant opposition” that was submitted as an “Application Comment”¹¹⁵ on behalf of the EC on 4 March 2014. However, the only specific concern raised in that EC comment was in respect of Dot Registry’s separate community application for the .LLP string, not the .INC application. *There never was any relevant “opposition” to Dot Registry’s .INC application.*

139. In any event, just three weeks later, the EC submitted a follow-up “Application Comment”¹¹⁶ dated 25 March 2014 stating that its concern regarding Dot Registry’s .LLP application had been resolved and that the EC was withdrawing its previous “Comment”.

¹¹³ .INC Report (Exhibit 7), p. 7.

¹¹⁴ ICANN_DR-00215-217 and attached as Exhibit 21.

¹¹⁵ Ibid., Comment ID: tjwufnw.

¹¹⁶ Ibid., Comment ID: 7s164151.

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Notably, in this follow-up “Application Comment”, the EC specifically asked “that ICANN forward a copy of this communication to the Economist Intelligence Unit.”

140. Based on the email correspondence I reviewed, the EIU dismissed its lapse on the ground that it cost Dot Registry’s .INC application only 1 point at most and “this would have had no material impact on the final outcome of the [.INC] evaluation.”¹¹⁷
141. But in light of this recently produced email correspondence between ICANN and the EIU, it is clear that *there actually never was any relevant opposition at all* to Dot Registry’s .INC community application. The EIU should have awarded it the maximum score of 2 points that were possible under the **4-B Opposition** criterion.¹¹⁸

E.5. .INC Conclusion

142. It is my conclusion that, had the EIU CPE Panel correctly followed the AGB, and if it had accorded Dot Registry’s .INC application the same the same degree of deference it appears to have employed in connection with the .HOTEL, .RADIO and .OSAKA TLD applications, it would have awarded Dot Registry’s community application for the .INC string 15 points, one more than the 14 point minimum it needed to prevail.

¹¹⁷ ICANN_DR-00215-217 and attached as Exhibit 21.

¹¹⁸ While the EIU appears to have tried to minimize its error as “not material”, it actually should be seen as troubling: First, the EC opposition was *never* about Dot Registry’s .INC application. That should immediately have been apparent to both the EIU Panel and ICANN. Therefore, it is immaterial whether or not both the original EU “opposition” (to the .LLP application) and the EC’s subsequent withdrawal of that “opposition” were communicated to ICANN during the 14-day window that began on 19 February 2014. The more troubling fact is that ICANN and the EIU either never noticed—or did not care—that (1) the supposed EU “opposition” was to an entirely different string (.LLP), and (2) that opposition was withdrawn within three weeks of the date it was communicated to ICANN and nearly 80 days before the date of the EIU CPE Report on the .INC string.

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F. Summary of the EIU’s Review of Dot Registry’s Community Applications for the .LLC and .LLP TLDs

143. In its *Community Priority Evaluation Reports* (“EIU CPE Reports”) dated 11 June 2014 for applicant Dot Registry’s .LLC¹¹⁹ and .LLP¹²⁰ strings, the EIU CPE Panel awarded scores that were identical to those given Dot Registry’s .INC application:

Criterion #1: Community Establishment	0 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	0 points (out of 4)
Criterion #3: Registration Policies	3 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>2 points (out of 4)</u>
Total	5 points (out of 16)

144. Having awarded each of the .LLC and .LLP applications just 5 out of the minimum necessary score of 14 points, the Panel declared that the Dot Registry applications for .LLC and .LLP did not prevail.

145. For the same reasons set forth above in connection with Dot Registry’s application for the .INC TLD, had the Panel correctly adhered to ICANN’s AGB and its own *EIU Guidelines*, and had the Panel accorded the .LLC and .LLP applications the same degree of deference it gave to the .HOTEL, .RADIO, .ECO and .OSAKA TLD applications, it would have awarded both the .LLC and the .LLP application more than the 14 points needed to prevail.

F.1. .LLC and .LLP: Criterion #1: Community Establishment

146. The *community* that is the subject of the Dot Registry application for the .LLC string is defined as businesses registered as Limited Liability Companies within the United States or its territories.¹²¹ The *community* that is the subject of the Dot Registry application for the .LLP string is defined as businesses registered as Limited Liability Partnerships within the United States or its territories.¹²²

¹¹⁹ Dated 11 June 2014 for Application ID 1-880-17627 (Exhibit 8).

¹²⁰ Dated 11 June 2014 for Application ID 1-880-35508 (Exhibit 9).

¹²¹ .LLC Application (Exhibit 5), p. 12.

¹²² .LLP Application (Exhibit 6), p. 12.

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147. As noted above with respect to the .INC application, the AGB specifically provides for such communities under Criterion 1 Guidelines:

With respect to “Delineation” and “Extension,” it should be noted that *a community can consist of legal entities* [emphasis added, examples omitted]. All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.¹²³

148. These communities are clearly delineated. The Community of U.S. Limited Liability Corporations and the Community of U.S. Limited Liability Partnerships are both clearly delineated because membership in each requires the objectively-verifiable satisfaction of explicit, overt requirements. This is because membership requires successful, active completion of the requirements to register as an LLC or LLP with the Secretary State or equivalent authority in one of the U.S. states, territories or the District of Columbia,¹²⁴ coupled with the continued maintenance of such registrations in conformity with applicable laws and regulations. I conclude that the .LLC and .LLP communities have “a clear and straight-forward membership definition” that should have been scored high for Delineation under both the AGB and the EIU Guidelines.
149. There is at least one entity mainly dedicated to the LLC and LLP communities. The offices of the Secretaries of State were established by law in each state or territory to administer the LLC and LLP business registrations, which are the *sine qua non* of membership in these communities. To respond to the EIU’s apparent misunderstanding, the *EIU Guidelines* do permit the offices of the Secretaries of State offices to have additional functions and responsibilities, such as, for example, administering elections. It cannot be disputed that administering their respective jurisdictions’ LLC and LLP communities is a key purpose and function of these offices.
150. There is documented evidence of community activities. The publicly accessible records of LLC and LLP registrations maintained by the Secretaries of State constitute documented evidence of the activities of the LLC and LLP communities. Owing to the fact that these entities are the repositories of the documents needed to accomplish the initial registrations of community members as U.S. LLCs or LLPs and thereafter to

¹²³ AGB (Exhibit 1), p. 4-12.

¹²⁴ See footnote 40 above.

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maintain these registrations, there is considerable documentary evidence of these defining community activities.

151. Both the .LLC community and the .LLP community have been in active existence since before September 2007. I understand that the first U.S. LLC was formed under Wyoming law in the late 1970s. In 1980, the U.S. Internal Revenue Service issued a letter ruling accepting LLCs, and by 1996, nearly every U.S. state had an LLC statute. LLPs have been common in the U.S. since the 1990s, and by 1996, over 40 U.S. states had adopted LLP statutes. In light of the foregoing, I conclude that both the .LLC community and the .LLP community were in existence before 2007.

152. The EIU Guidelines provide that a community consisting of legal entities is permitted by the AGB. The *EIU Guidelines* specifically say that a community comprised of legal entities is a viable community under the AGB, “provided the requisite awareness and recognition of the community is at hand among the members.” For the reasons given in the next paragraph, I conclude that the members, respectively, of the LLC Community and of the LLP Community have the requisite awareness and recognition.

153. The individual members of both the .LLC community and the .LLP community have the requisite awareness and recognition of their communities.¹²⁵ This is because their respective members must consciously make a choice as to which community they want to be a member of and then actively complete a number of overt and externally observable and verifiable steps in order to register themselves as either limited liability companies or limited liability partnerships in the first place. Thereafter, they must regularly and consciously take additional overt and externally observable actions to maintain their memberships in either the .LLC community or the .LLP community in good standing. Thus, membership in either the .LLC community or the .LLP community must be consciously sought and actively achieved; such membership is neither passive nor inadvertent and membership in the community is readily verifiable.¹²⁶

¹²⁵ Again, the AGB does not provide any definition or explanation for “awareness and recognition of a community among its members”.

¹²⁶ The EIU agreed that both the .LLC community and the LLP community show a clear and straightforward membership. By the standard implicit in the EIU’s approval of the .RADIO, .HOTEL and .OSAKA community applications, that fact—combined with the fact that active, legal steps were needed in order to become members of both these communities—should have been sufficient to demonstrate that the members of the .LLC and .LLP communities have the requisite awareness and recognition of a community among their respective members.

154. The Dot Registry applications for the .LLC and .LLP TLDs satisfy the requirements under **Criterion #1: Community Establishment** because they evidence the requisite **Delineation** (sub criterion 1-A) and **Extension (1-B)**. Although the EIU concluded that each of the .LLC and the .LLP applications failed both of these prongs of **Criterion #1: Community Establishment**, I conclude otherwise, for the reasons explained below.

- **.LLC and .LLP: 1-A Delineation**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

Delineation

155. The Panel agreed that both the .LLC and the .LLP communities show a clear and straightforward membership. Thus each application satisfies the first prong of the Delineation sub criterion. The EIU agrees.

While broad, the [.LLC] community is clearly defined, as membership requires formal registration as a limited liability company with the relevant US state. In addition, limited liability companies must comply with US state law and show proof of best practice[s] in commercial dealings to the relevant state authorities.¹²⁷

Also, according to the EIU:

While broad, the [.LLP] community is clearly defined, as membership requires formal registration as a limited liability partnership with the relevant US state (LLPs operate in about 40 US states). In addition, limited liability partnerships must comply with US state law and show proof of best practice[s] in commercial dealings to the relevant state authorities.¹²⁸

156. In my opinion, the Panel was in error when it concluded that LLCs and LLPs

¹²⁷ .LLC Report (Exhibit 8), p. 2.

¹²⁸ .LLP Report (Exhibit 9), p. 2.

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operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an [LLC or LLP]. Based on the Panel’s research, *there is no evidence of LLCs [or LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these limited liability companies [or limited liability partnerships] would associate themselves with being part of the community as defined by the applicant* [emphases added].¹²⁹

157. It is by the actions they take *to become and remain* LLCs and LLPs that these entities associate themselves with being part of these communities as defined by Dot Registry. Again, the *Applicant Guidebook* requires only that the constituents of a community be *members* of that community. There is no requirement that members of a community must “*act*” as a community, whatever that might mean. Businesses make conscious decisions—legally, commercially and in respect of their tax liabilities—as to why they choose to organize as an LLC, LLP or INC. Through this choice of legal organization they make certain representations to the public-at-large and to other businesses regarding their business, tax status and regulatory obligations. Largely, the drivers that lead a business in any one industry sector to choose a particular legal form will be the same as those for a business in another business sector. In my opinion, there is, therefore, no doubt that there are distinct, identifiable and relevant communities associated with the LLC, LLP and INC corporate identifiers.
158. As I discussed above in connection with Dot Registry’s .INC community, both the .LLC and the .LLP communities actually are *better* defined than were the communities at issue in the .HOTEL, .RADIO, .ECO and .OSAKA applications that prevailed before the EIU. As I noted earlier, the AGB and the *EIU Guidelines* do not provide a concrete meaning for “define” and “definition”. If these are taken to mean or include a rule or standard that would enable an external observer to confidently say whether or not a particular entity was a community member, it is my opinion that the .LLC and .LLP communities are *better* defined than the communities in the community applications (.HOTEL, .RADIO, .ECO and .OSAKA) that prevailed in the EIU’s evaluations.
159. Because the evidence shows that

¹²⁹ .LLC Report (Exhibit 8) and .LLP Report (Exhibit 9), respectively, p. 2.

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- membership in the .LLC and .LLP communities is both clear and straightforward,
- members of the .LLC and .LLP communities possess the requisite awareness and recognition of their respective communities, and even that
- both LLCs and LLPs from different sectors and regions of the U.S. *do* associate themselves with being part of, respectively, the broader community of U.S. limited liability companies or the broader community of U.S. limited liability partnerships,

I conclude that the both the .LLC community and the .LLP community meet the AGB requirement for Delineation.

Organization

160. For the same reasons given above at paragraphs 48 through 55 regarding the EIU's scoring of Dot Registry's .INC community application, I conclude that Dot Registry's .LLC and .LLP community applications also fully meet the AGB requirements for Organization.
161. As is the case with the .INC community, this requirement is satisfied by the individual Secretaries of State of the U.S. states, territories and the District of Columbia. These entities were constitutionally and/or legislatively established to administer the LLC and LLP communities within their respective jurisdictions. Moreover, the records of the Secretaries of State of the U.S. states, territories and the District of Columbia clearly identify the community of LLCs and the community of LLPs authorized to conduct business within their respective jurisdictions.
162. As it did in respect of the .INC community application, the EIU decided that neither the .LLC nor the .LLP applications met the AGB requirements for Organization. But to get to this conclusion, the Panel first needed to rewrite the relevant AGB requirements:

The [.LLC or .LLP] community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for *corporate* [sic] registrations and the regulations pertaining to [sic] *corporate* formation are vested in each individual US state, these government agencies are *fulfilling a function*, rather than *representing* the community. In addition, the

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offices of the secretaries of State of US states are not *mainly* dedicated to the community as they have other roles/functions beyond processing corporate registrations [emphases added].¹³⁰

163. As a preliminary matter, LLCs and LLPs are not corporations, and the appearance in the quotation above of the “corporate” adjective strongly suggests that the Panel merely cut and pasted the conclusion quoted above from its .INC CPE Report. In other words, it does not appear that the Panel actually carried out any specific research relevant to the .LLC or .LLP communities to reach this conclusion.
164. But as I have noted above in connection with Dot Registry’s .INC application, the proper question under the AGB is whether or not the several Secretaries of State are dedicated to the .LLC and .LLP communities, not whether they are merely “fulfilling a function” relevant to these communities or whether they merely “represent” them. I conclude that the Panel was able to “find” that the .LLC and .LLP community applications failed to satisfy the AGB requirement for Organization only after effectively rewriting that requirement.
165. I am equally perplexed by the Panel’s supposed “finding” in respect of both the .LLC and .LLP applications that the Secretaries of State “are not *mainly* dedicated to the [.LLC and .LLP communities] as they have other roles/functions [emphasis added].” As I have pointed out earlier, the Panel ignored what the AGB and its own *Guidelines* have to say regarding Organization. The AGB explains that:

“Organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.¹³¹

The EIU’s own *Guidelines* add this further explanation:

*“Mainly” could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization [emphasis added].*¹³²

¹³⁰ Ibid.

¹³¹ AGB (Exhibit 1), p. 4-11.

¹³² EIU Guidelines (Exhibit 2), p. 4.

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166. There is sufficient documented evidence of .LLC and .LLP community activities. It consists of the overt steps taken and records created in connection with the individual decisions made on behalf of would be LLCs and LLPs to register as such under the applicable laws, and thereafter to maintain these registrations in good standing.
167. Yet the Panel’s sole justification for its identical findings that the .LLC and .LLP communities “[do] not have documented evidence of community activities” was that “there is no entity *mainly* dedicated to the community” in the .LLC and .LLP applications.¹³³ Because there is no such requirement in either the AGB or the *EIU Guidelines*, I conclude that the EIU had no basis for concluding that those applications did not fulfill the AGB conditions for Organization.
168. The previously discussed **National Association of Secretaries of State (NASS)**¹³⁴ also constitutes an entity mainly dedicated to the .LLC and .LLP communities. According to the NASS website
- Most NASS member offices handle the registration of domestic and/or foreign corporations (profit and non-profit). Transactions include filings of incorporation, *partnerships (including limited partnerships)*, articles of merger/consolidation, and articles of dissolution [emphasis added].¹³⁵
169. There are at least three LLCs listed among the NASS Corporate Affiliates.¹³⁶ The first two Featured Links listed on the NASS home page (“Prevent Business ID Theft” and “Find Business Services”) and NASS “Surveys and Reports”¹³⁷ are relevant to LLCs and LLPs. As previously noted, these include:

Report: State Strategies to Subvert Fraudulent Uniform Commercial Code Filings
(Released 2012; updated April 2014)

NASS Summary of Business Entity Information Collected by States (March 2014)

¹³³ .LLC Report (Exhibit 8), p. 3 and .LLP Report (Exhibit 9), p. 2

¹³⁴ Website: <http://www.nass.org>.

¹³⁵ <http://www.nass.org/state-business-services/corporate-registration/>.

¹³⁶ <http://www.nass.org/contact/corp-affiliates/>.

¹³⁷ These are listed at <http://www.nass.org/reports/surveys-a-reports/>.

NASS Survey on Administrative Dissolution of Business Entities (March 2014)

White Paper Streamlining for Success: Enhancing Business Transactions with Secretary Of State Offices (February 2014)

Updated NASS Company Formation Task Force Report and Recommendations (September 2012)

NASS White Paper - Developing State Solutions to Business Identity Theft: Assistance, Prevention, and Detection (January 2012)

NASS Business Identity Theft Toolkit & NASS Business Identity Theft Fact Sheet (July 2011)

Updated Report: State Business Entity Laws (May 2009)

170. In view of the foregoing, I conclude that Dot Registry community applications for the .LLC and .LLP strings fulfill both requirements for Organization.

Pre-existence

171. The only requirement for Pre-existence is that the .LLC and .LLP communities must have been active prior to September 2007. However, the EIU decided that these communities could not possibly have been active prior to that date because it deemed them to be Dot Registry's inventions in order "to obtain a sought-after-after *corporate*¹³⁸ identifier as a gTLD string [emphasis added]."¹³⁹ As was the case with Dot Registry's .INC application, the EIU sought to justify this conclusion on the ground that limited liability companies and limited liability partnerships "would typically not associate themselves with being

¹³⁸ As I have noted, the EIU did not appear to notice or care that neither LLCs nor LLPs are *corporations*, meaning that the EIU's use of the adjective "corporate" was clearly inappropriate. This supports the inference that the EIU did not independently evaluate each of the .INC, .LLC and .LLP applications. Rather, it appears likely that the Panel simply "cut and pasted" the text of its findings in connection with the .INC application into its CPE Reports for .LLC and .LLP. Note that all three CPE Reports bear the same 11 June 2014 date.

¹³⁹ .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 3.

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part of the community as defined by the applicant.”¹⁴⁰ (The Panel did not offer any research or other evidence to support this statement.)

172. This last conclusion by the EIU CPE Panel appears to be clearly erroneous. As previously discussed, it is predicated on a requirement of the EIU’s own invention—one not found in the AGB—regarding how supposed community members must “associate themselves.”
173. In summary, it is my conclusion that Dot Registry’s .LLC and .LLP community applications do satisfy all three of the requirements— Delineation, Organization and Pre-existence – for **1-A Delineation**. The EIU CPE Panel should have awarded each of these applications the maximum possible 2 points.

- **.LLC and .LLP: 1-B Extension**

Maximum score	2 points
EIU score	0 points
Correct score	2 points

174. According to the AGB, Dot Registry’s scores under sub criterion **1-B Extension** were supposed to be determined by whether or not the .LLC and .LLP communities demonstrated the necessary Size and Longevity. But as it did in connection with the Delineation sub criterion, the EIU CPE Panel held that each of these two sub criteria first required “awareness and recognition of a community (as defined by the applicant) among its members.” After declaring this “awareness and recognition” to be nonexistent, the Panel simply discounted the evidence showing that the .LLC and .LLP applications met the other requirements for Size and Longevity.

Size

175. The Panel concurred that both the .LLC and .LLP communities are of considerable size.
176. But the Panel discounted this showing on the ground that the .LLC and .LLP communities did not have the requisite “awareness and recognition of a community among [their] members”. Using the same language (complete with typo) it offered in connection with its rejection of the .INC application, the EIU offered this explanation:

¹⁴⁰ Ibid.

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This is because [alternatively, limited liability companies and limited liability partnerships] operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an [LLC or LLP]. Based on the Panel's research, there is no evidence of [LLCs or LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. These [limited liability companies or limited liability partnerships] would therefore not typically associate themselves with being part of the community as defined by the applicant.¹⁴¹

177. I have already addressed this misapprehension on the part of the Panel. But to repeat, I can find nothing in the AGB regarding how community members are supposed to “act” or “associate themselves”.
178. Since the EIU agreed that the communities in the .LLC and .LLP applications were both of considerable size, and since the overt actions taken by members to join the .LLC and .LLP communities evidence their “awareness and recognition” of these communities, the EIU should have concluded that Dot Registry's .LLC and .LLP applications satisfied both of the AGB requirements for Size.

Longevity

179. The AGB required that two conditions be fulfilled in order for Dot Registry's .LLC and .LLP applications to meet the Longevity sub criterion: each of these two communities must demonstrate longevity and each must display an awareness and recognition of a community among its members. However, the Panel decided that the .LLC and .LLP applications did neither, based on its previous misapprehensions that (a) the .LLC and .LLP communities were “construed” because LLCs and LLPs would typically not associate themselves with being part of the communities defined by Dot Registry, and (b) these putative communities do “not have awareness and recognition of a community among its members.”

¹⁴¹ Ibid.

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180. As I have explained above, it is my opinion that both of these judgments by the Panel are erroneous. I conclude that Dot Registry’s .LLC and .LLP applications satisfied the Longevity requirement under **1-B Extension**.

181. Because both the .LLC and .LLP applications also met the conditions for Size, the Panel should have awarded them the maximum possible 2 points for **1-B Extension**.

F.2. .LLC and .LLP: Criterion #2: Nexus between Proposed String and Community

182. In applying this criterion, the EIU CPE Panel was supposed to determine whether or not the .LLC and .LLP strings applied for by Dot Registry (a) match the names of, respectively, the community of limited liability companies and the community of limited liability partnerships or are well-known short-forms or abbreviations for those communities, and (b), have no other significant meanings beyond identifying these two communities.

- **.LLC: 2-A Nexus**

Maximum score	3 points
EIU score	0 points
Correct score	2 points

183. To receive the maximum score for **2-A Nexus**, the .LLC and .LLP strings must *match* the communities of U.S. limited liability companies and U.S. limited liability partnerships, respectively, or be well-known short-forms or abbreviations of these community names.¹⁴² In either case, the .LLC and .LLP strings must not “over-reach *substantially* [emphasis added]” beyond their respective communities.¹⁴³

184. According to the AGB, for an applied-for string to receive a score of 3 for **2-A Nexus**, it should be the case that the string is “*commonly* known by others as the identification/name of the community [emphasis added].” To qualify for a score of 2, “the applied-for string should closely describe the community or the community members, without over-reaching *substantially* beyond the community [emphasis added].”

¹⁴² AGB (Exhibit 1), pp. 4-12 to 4-14.

¹⁴³ Ibid.

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185. So the correct scores for the .LLC and .LLP strings under **2-A Nexus** should have been determined by whether or not these strings are *commonly* known by others to refer to **U.S.** limited liability companies and **U.S.** limited liability partnerships (for a score of 3 points) or, at a minimum, by whether any over-reach by the “LLC” and “LLP” strings beyond these U.S. communities is “substantial”. In the latter case, a score of 2 points would be indicated if such “over-reach” exists but is not substantial.
186. Using identically the same language that it employed in connection with the .INC application (including its reference to a “corporate identifier”), the EIU CPE Panel faulted the Dot Registry application for the .LLC string under **2-A Nexus** on the ground that

The applied-for string (.LLC) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the [.LLC] community has, as the *corporate* [sic] identifier is used in other jurisdictions (outside the US). Therefore, there is a *substantial* over-reach [emphasis added] between the proposed [.LLC] string and [the community of registered U.S. limited liability companies] as defined by the applicant [emphases added].¹⁴⁴

187. The Panel rendered identically the same judgment (and with the same misplaced reference to a “corporate identifier”) regarding Dot Registry’s application for the .LLP string under the **2-A Nexus** sub criterion:

The applied-for string (.LLP) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the [.LLP] community has, as the *corporate* [sic] identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is a *substantial* over-reach [emphasis added] between the proposed [.LLP] string and [the community of registered U.S. limited liability partnerships] as defined by the applicant [emphases added].¹⁴⁵

¹⁴⁴ .LLC Report (Exhibit 8), pp. 4-5.

¹⁴⁵ .LLP Report (Exhibit 9), pp. 4-5.

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188. I do not understand how the EIU decided that the .LLC string “over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community.”¹⁴⁶ In particular, the EIU does not appear to have conducted any independent research or fact-finding before rendering this judgment. Dot Registry’s .LLC application does not name any other countries that supposedly use the “LLC” string, saying only:

LLC is a recognized abbreviation in all 50 states and US territories denoting the registration type of a business entity. Our research 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.¹⁴⁷

Even if some non-U.S. jurisdictions have established business forms that, closely or distantly, are functional approximations of U.S. LLCs, *none* of these are called LLCs or are referred to by the English term “limited liability company”.

189. I am equally perplexed by the EIU’s finding that “The applied-for string (.LLP) over-reaches *substantially* [emphasis added], as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community.”¹⁴⁸ Again, the EIU does not appear to have conducted any independent research or fact-finding before arriving at this judgment. I note that Dot Registry’s .LLP application did volunteer that

Our research indicates that LLP as a corporate identifier is used in eleven other jurisdictions (Canada, China, Germany, Greece, India, Japan, Kazakhstan, Poland, Romania, Singapore, and the United Kingdom) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our [.LLP] community definition.¹⁴⁹

¹⁴⁶ .LLC Report (Exhibit 8), p. 4.

¹⁴⁷ .LLC Application (Exhibit 5), p. 17.

¹⁴⁸ .LLP Report (Exhibit 9), p. 4.

¹⁴⁹ .LLP Application (Exhibit 6), p. 17.

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But seizing on the information volunteered by Dot Registry itself, the EIU concluded immediately that:

While the [.LLP] string identifies the name of the community, it captures a wider geographical remit than the community has, as the *corporate* [sic] identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is *substantial over-reach* between the proposed string and the community as defined by the applicant [emphases added].¹⁵⁰

190. The EIU’s conclusions that both the .LLC and .LLP strings “over-reach substantially” is particularly troubling. According to the AGB, a string must “over-reach *substantially* beyond the community” before the EIU would be allowed to deny any points under **2-A Nexus**. As I have already pointed out, the AGB does not provide a metric for determining whether any “over-reach” – even assuming it exists at all – is “substantial”. If an applied-for string “over-reaches” only somewhat rather than “substantially”, a community application should still be awarded 2 points under **2-A Nexus**.
191. But the EIU first effectively re-wrote the AGB criteria. Where the AGB is concerned only with “*substantial* over-reach” (something it neither defines nor measures), the EIU deems *any* over-reach – no matter how little – to be “*substantial*”:
- “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.¹⁵¹
192. In other words, *any* “geographical or thematic remit” that is “wider” than the community – no matter how small or even *de minimis* the supposed “over-reach” – is deemed to be *substantial over-reach* by the EIU and justifies awarding the community application at issue 0 points under **2-A Nexus**. In my view this is incorrect.
193. Insofar as the EIU’s treatment of Dot Registry’s community applications for .LLC and .LLP are concerned, there are two related questions:
- a. Are the strings “LLC” or “LLP”, or the English language business legal forms “limited liability company” or “limited liability partnership” used at all outside of the U.S.?

¹⁵⁰ .LLP Report (Exhibit 9), p. 4.

¹⁵¹ EIU Guidelines (Exhibit 2), p. 7.

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b. Where the answer is “yes”, is that use *substantial* in comparison to the corresponding use in the U.S.?

194. It does not appear that any non-U.S. country authorizes the formation of limited liability companies. For this reason, no non-U.S. country uses the abbreviation “LLC” to designate a domestic limited liability company. I therefore conclude that Dot Registry’s application for the .LLC string does not “over-reach” at all.
195. With the exception India, Singapore and the United Kingdom, it does not appear that any other English-speaking, non-U.S. country uses the abbreviation “LLP” or the English legal designation “limited liability partnership”. The occurrence of LLPs in the United Kingdom can be distinguished because it is my understanding that UK LLPs actually are more nearly equivalent to U.S. LLCs. Moreover, because the EU has withdrawn the concern it initially expressed regarding Dot Registry’s .LLP application, I conclude that only the use of “LLP” in Singapore and India could even potentially amount to “substantial over-reach”.
196. To support its judgment that “there is a substantial over-reach between the proposed string and the community as defined by the applicant,” the EIU quoted this passage from the Dot Registry community application for the .LLP string:

Our research indicates that LLP as corporate identifier [sic] is used in eleven other jurisdictions (Canada, China, Germany, Greece, India, Japan, Kazakhstan, Poland, Romania, Singapore, and the United Kingdom) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our [LLP] community definition.¹⁵²

197. Apparently relying on that Dot Registry statement, the EIU then concluded:

While the [LLP] string identifies the name of the community, 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. Therefore, there is

¹⁵² .LLP Application (Exhibit 6), p. 17. I understand that the different legal form “limited partnership” or “L.P.” is used in Canada, rather than “limited liability partnership” or “LLP”.

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a substantial over-reach between the proposed string and [the] community as defined by the applicant.¹⁵³

198. Seven of these countries—China, Germany, Greece, Japan, Kazakhstan, Poland and Romania—that supposedly use “LLP” can be discounted immediately because none uses the *English* term “limited liability partnership” or the abbreviation “LLP” to refer to their possibly-equivalent domestic entities. That leaves only Canada, India, Singapore and the United Kingdom as potential sources of any “over-reach”. However, I understand that Canada uses only the different “limited partnership” or “LP” designation, not “LLP”. The U.K. does authorize the use of “LLP”, but I understand that in the U.K. this form actually is equivalent to the U.S. “LLC”, not the U.S. “LLP”. In any event, the European Union (of which the UK is a member), acting through the European Commission, affirmatively notified ICANN that the EC’s earlier opposition to Dot Registry’s .LLP community application “in the particular case of .llp (used in the UK)” was the result of “inaccurate research information” provided by unspecified “other interested parties.”¹⁵⁴
199. I conclude, therefore, that any “over-reach” by Dot Registry’s “LLP” string would be the result of its use in India and Singapore. Compared to the U.S., where the first LLPs were legally authorized in 1992, LLPs in India and Singapore are more recent phenomena; these were first introduced in Singapore in 2005 and in India around 2009.
200. It is my understanding that the “limited liability partnership” or “LLP” business form is adopted primarily by licensed professionals such as attorneys, accountants and architects who gain the economic efficiencies that can be achieved by combining their individual practices without at the same time incurring liability for their partners’ actions. Therefore, any “over-reach” due to the usage of “LLP” in India or Singapore in comparison to the U.S. should be proportional to the total number of attorneys, accountants and architects in India and Singapore in comparison to the U.S. totals.
201. A reasonable first approximation is that the number of firms comprised of attorneys, accountants and architects in India and Singapore compared to the U.S. should be roughly proportional to the economies of India and Singapore (measured by their respective GDPs) in comparison to the U.S. economy (measured by its GDP).

¹⁵³ .LLP Report (Exhibit 9), p. 4.

¹⁵⁴ Comment submitted to ICANN by Camino Manjon, GAC member, European Commission on 25 March 2014 (Exhibit 21) (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12413>)

202. According to World Bank data, in 2013 the U.S. GDP stood at \$16,768 billion (measured in U.S. dollars). Using the same data source, the GDPs of India and Singapore were \$6,776 billion and \$425 billion, respectively. By this measure, the size of the India and Singapore economies were 40.41% and 2.53%, respectively, of the U.S. economy, or 42.94% combined (i.e., slightly less than 43%).¹⁵⁵
203. Measured in this way, Dot Registry’s definition of the .LLP community does “over-reach”. However, because I estimate that the usage of “LLP” in India and Singapore combined is only about 43% of its usage in the U.S., I conclude that this “over-reach” is not “substantial”.¹⁵⁶
204. Again, this is based on the dictionary definition of “substantial”. Under that definition, the usage of “LLP” in India and Singapore would have to be so “considerable” or “great” in comparison to its use in the U.S. that such usage would be “largely” but not “wholly” equal to its usage in the U.S. itself. Because the usage of “LLP” in India and Singapore (in comparison to its usage in the U.S.) would be proportional to the size of these two economies (again, in comparison to the U.S.), “substantial over-reach” would require that the combined size of these two economies would have to be significantly greater than half the size of the U.S. economy.
205. But because there is some “over-reach” implicit in Dot Registry’s application for the .LLP string (even though it is not “substantial”), the AGB specifies that the .LLP application should have received 2 points, rather than the maximum possible 3 points.

- **.LLC and .LLP: 2-B Uniqueness**

Maximum score	1 point
EIU score	0 points
Correct score	1 point

206. According to the EIU

¹⁵⁵ See Exhibit 15.

¹⁵⁶ Again, I rely on the *Merriam Webster’s Collegiate Dictionary* (10th ed.), in which “substantial” is defined as “considerable in quantity: significantly great” (Definition 3 b) or “being largely but not wholly that which is specified” (Definition 5).

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application *and it must also score a 2 or 3 on Nexus* [emphasis added].¹⁵⁷

207. As I have already been shown above, the Dot Registry applications for the .LLC and .LLP strings should have been given scores of 3 and 2 points, respectively, on the **2-A Nexus** criterion. Consequently, Dot Registry’s scores on the **2-B Uniqueness** criterion depends only on whether the .LLC and .LLP strings have any other significant meaning beyond “Limited Liability Company” and “Limited Liability Partnership”. The EIU did not address this question because it had already decided (wrongly, in my opinion) that Dot Registry’s applications for these two strings amounted to “substantial over-reach”.
208. I have been unable to find any claim that the strings “LLC” and “LLP” have meanings other than “Limited Liability Company” and “Limited Liability Partnership”, respectively. Therefore, I conclude that Dot Registry’s community applications for .LLC and .LLP should have been awarded the maximum possible score of 1 point each for **2-B Uniqueness**,

F.3. .LLC and .LLP: Criterion #3: Registration Policies

209. In the EIU’s original evaluations, the Dot Registry applications for the .LLC and .LLP strings were awarded the maximum of 1 point for each of the first three sub criteria (**3-A Eligibility, 3-B Name Selection and 3-C Content and Use**) but 0 points for the fourth sub criterion (**3-D Enforcement**).
210. I concur with the EIU’s analysis and scoring of the Dot Registry application on the **3-A Eligibility, 3-B Name Selection and 3-C Content and Use** sub criteria.

- **.LLC and .LLP: 3-A Eligibility**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

¹⁵⁷ .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 5.

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- **.LLC and .LLP: 3-B Name Selection**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

- **.LLC and .LLP: 3-C Content and Use**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

211. However, I understand that the EIU faulted the Dot Registry applications for the .LLC and .LLP strings under the **3-D Enforcement** criterion on the ground that, while they did articulate specific enforcement measures, these applications did not outline an appeals process.

- **.INC 3-D Enforcement**

Maximum score	1 point
EIU score	0 point
Correct score	1 point

212. The EIU found that Dot Registry’s applications for the .LLC and .LLP strings did not meet the criterion for **3-D Enforcement**, because while they did include the requisite enforcement measures, these two applications did not satisfy the AGB requirement for an appeals process.

213. But here again, the Panel misstated the requirement that the Dot Registry supposedly failed to meet. The AGB requires only “*appropriate* appeals mechanisms”, and states further that:

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

...

With respect to...“Enforcement,” scoring of applications against [this sub criterion] will be done from a *holistic perspective, with due regard for the particularities of the community explicitly addressed*. [Example omitted] More restrictions do not automatically result in a higher score. *The restrictions and corresponding enforcement mechanisms proposed by the applicant should show*

an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.¹⁵⁸

214. The community-based purpose of Dot Registry's .LLC string is

To build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Limited Liability Companies. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Community of Registered Limited Liability Companies. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant's right to conduct business in the United States.

...

*The ".LLC" gTLD will be exclusively available to members of the Community of Registered Limited Liability Companies, as verified through each applicant's Secretary of States office" (or other state official where applicable) [emphasis added].*¹⁵⁹

215. Similarly, the community-based purpose of Dot Registry's .LLP string is

To build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Limited Liability Partnerships. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Community of Registered Limited Liability Partnerships. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant's right to conduct business in the United States.

...

The ".LLP" gTLD will be exclusively available to members of the Community of Registered Limited Liability Partnerships, as verified through each

¹⁵⁸ AGB (Exhibit 1), p. 4-16 [emphases added].

¹⁵⁹ .LLC Application (Exhibit 5), p. 7.

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applicants's Secretary of States office" (or other state official where applicable)
[emphasis added].¹⁶⁰

216. It is important not to overlook the fact that the fundamental requirement for membership in the .LLC and .LLP communities—and the right to register a second-level domain under these TLDs—is the possession and maintenance of a valid registration as either a limited liability company or a limited liability partnership with the office of the appropriate Secretary of State. In this regard, the records of the relevant Secretary of State's office are dispositive: Either the would-be registrant of a second-level .LLC or .LLP domain is validly registered with that Secretary of State, or it is not.
217. The essential point is that in order to register a second level domain under .LLC or .LLP, an applicant must be a duly, currently registered LLC or LLP as determined by the relevant Secretary of State. That determination would *not* be Dot Registry's to make; its role would be limited to verifying that the applicant has secured the necessary registration from the relevant Secretary of State or equivalent authority and that that registration is current.
218. Dot Registry will verify that the registrant of a second-level domain is a registered U.S. corporation at the time of its registration.¹⁶¹ Thereafter a registrant's "active" status would be verified on an annual basis with the relevant Secretary of State, as detailed in the Dot Registry applications for the .LLC and .LLP strings.
219. But because only duly registered LLCs and LLPs would be permitted to register second level domains under .LLC or .LLP, and because the several Secretaries of State are the ultimate arbiters of whether or not an applicant is indeed duly registered, it would not be within the authority of Dot Registry to provide a mechanism by which a would-be applicant could "appeal" a determination by a Secretary of State to Dot Registry or its registrars. The latter must respect the Secretary of State's determination.
220. I also note that the Dot Registry applications for the .LLC and .LLP strings do provide opportunities for redress on issues that would not raise the possibility that Dot Registry or its registrars were arrogating the authority of the relevant Secretary of State. For example, Dot Registry's applications do provide for a "quasi appeals process" in the event it was unable to verify an applicant's eligibility for the .LLC or .LLP string with the

¹⁶⁰ .LLP Application (Exhibit 6), p. 7.

¹⁶¹ .LLC and .LLP Applications (Exhibits 5 and 6), respectively, p. 7.

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relevant Secretary of State. This is because the application made explicit allowance for a 30 day probationary period to allow registrants to directly address the relevant Secretary of State.

221. Dot Registry has also committed to implementation of the full panoply of ICANN's registrant rights protection mechanisms, including but not limited to:

Support for and interaction with the Trademark Clearinghouse ("Clearinghouse"); use of the Trademark Claims Service; segmented Sunrise Periods allowing for the owners of trademarks listed in the Clearinghouse to register domain names that consist of an identical match of their listed trademarks; subsequent Sunrise Periods to give trademark owners or registrants that own the rights to a particular name the ability to block the use of such name; [and] stringent takedown policies in order to properly operate the registry.¹⁶²

Dot Registry will provide all ICANN required rights mechanisms, including Trademark Claims Service, Trademark Post-Delegation Dispute Resolution Procedure (PDDRP), Registration Restriction Dispute Resolute Procedure (RRDRP), UDRP, URS [and] Sunrise service.¹⁶³

222. If the EIU had actually taken the "holistic perspective" called for by the AGB, it would have given "due regard for the particularities" of the .LLC and .LLP communities discussed above, and awarded both Dot Registry applications the maximum possible 1 point available for **3-D Enforcement**.
223. I also refer to and incorporate here my remarks at paragraphs 124 to 127 above regarding the EIU's determinations in respect of **3-D Enforcement** in connection with certain other community applications.

¹⁶² .LLC and .LLP Applications (Exhibits 5 and 6), respectively, pp.18-19.

¹⁶³ Ibid., p. 24.

F.4. .LLC and .LLP: Criterion #4: Community Endorsement

• **.LLC and .LLP: 4-A Support**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

224. The EIU determined that the Dot Registry applications for .LLC and .LLP only “partially” met the criterion for **4-A Support**.¹⁶⁴ While the Panel acknowledged that these applications had documented support from at least one group with relevance to the .LLC and .LLP communities, it did not award the maximum possible score of 2 points because the Dot Registry applications did not have documented support from the “recognized” community institution(s), where “recognized” means the institution(s) that are clearly recognized by the community members as representative of the community.
225. Again, I cannot understand these “determinations”. First of all, there can be no question that the Secretaries of State for the several U.S. states and the National Association of Secretaries of State (NASS) *are* recognized by U.S. LLCs and LLPs as representing these two communities. Instead, the Panel once again invoked its unsupported position that there is a dispositive difference between a government entity’s “fulfilling a function” vs. “representing the community” and specifically that the Secretaries of State of US states
- are not the recognized community institutions...as these government agencies are fulfilling a function, rather than representing the community.¹⁶⁵
- As noted earlier, the EIU did not insist that the Osaka Prefectural government (the “entity mainly dedicated to the community”) was merely fulfilling its function. The Panel’s unwillingness to afford the same deference to US Secretaries of State or to their National Association appears to be strikingly inconsistent.
226. Also, as noted earlier, it is important to underscore the fact that the several Secretaries of State are either elected or appointed governmental officers. As such, they lack the freedom available to a non-governmental body or private organization to simply endorse one applicant for a string over competitors. But it must not be forgotten (a) that several

¹⁶⁴ .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 6.

¹⁶⁵ Ibid.

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state-level Secretaries of State as well as NASS clearly expressed the position that the .LLC and .LLP TLDs should be awarded only to a community applicant, (b) that these same Secretaries of State and NASS were aware of the Dot Registry community application for the .LLC and .LLP strings, (c) that the Dot Registry application was the *only* community application for these strings, and (d) that these Secretaries of State and NASS communicated with ICANN at the request of Dot Registry. This sequence of facts argues strongly that the several Secretaries of State and NASS—while not permitted to officially endorse them—do support these two Dot Registry applications.

227. It is also necessary to address the Panel’s complaint that “[T]he viewpoints expressed in these letters [it received from several Secretaries of State] were not consistent across states” and that

While several US states expressed clear support for the applicant during the Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request.¹⁶⁶

I can find no evidence in the record that the EIU reached out to *every* environmental organization in the world and insisted on getting positive expressions of “clear support” from each before approving the .ECO community application. Nor did the Panel require such unanimity from every organization relevant to the .RADIO, .HOTEL and .OSAKA applications. I regard this as another example of the Panel’s uneven treatment of these four community applications that it approved, compared to its treatment of the .INC, .LLC, and LLP applications.

228. In arguing that the EIU should have awarded the maximum possible 2 points to the .LLC and .LLP applications for sub criterion **4-A: Support**, I both rely on and distinguish this passage from the AGB’s Criterion 4 Guidelines:

With respect to ‘Support,’ it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations... Also with respect to ‘Support,’ the plurals and brackets for a score of

¹⁶⁶ .LLC Report (Exhibit 8), p. 7; .LLP Report (Exhibit 9), pp. 6-7.

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2 relate to cases of multiple institutions/organizations. In such cases there must be documented support from institution/organizations representing a majority of the overall community addressed in order to score 2.¹⁶⁷

- 229. In this context, I would argue first that the NASS is “the only national Association relevant to” the .LLC and .LLP communities and that these two applications have documented support from NASS.
- 230. In summary, since the Dot Registry applications for the .LLC and .LLP TLDs do have the support of NASS, the EIU should have awarded each application the maximum 2 points for **4-A: Support**.

- **.LLC and .LLPC 4-B Opposition**

Maximum score	2 points
EIU score	1 point
Correct score	2 points

- 231. According to its CPE Report, the EIU determined that the Dot Registry community applications for the .LLC and .LLP TLDs only “partially” met the criterion for Opposition “as the[se] application[s] received relevant opposition from one group of non-negligible size:”

The [alternatively, .LLC and .LLP] application received several letters of opposition, *one of which was determined to be relevant opposition* from an organization of non-negligible size. This opposition was from a community that was not identified in the application *but which has an association to the applied-for string*. Opposition was on the grounds that limiting registration to US registered *corporations* only would unfairly exclude non-US businesses [emphases added].¹⁶⁸

¹⁶⁷ AGB (Exhibit 1), p. 4-18.

¹⁶⁸ .LLC and .LLP Reports (Exhibits 8 and 9), p. 7.

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232. Again, I have recently been able to review email correspondence¹⁶⁹ between ICANN and the EIU regarding this particular “finding”. That correspondence confirms that the European Commission (“EC”) was the source of the supposedly “relevant opposition” that was submitted as an “Application Comment”¹⁷⁰ on behalf of the European Commission on 4 March 2014. However, the only specific concern raised in that EC comment was in respect of Dot Registry’s separate community application for the .LLP string, not the .LLC or .INC applications.
233. In any event, just three weeks later, the EC submitted a follow-up “Application Comment”¹⁷¹ dated 25 March 2014 stating that its concern regarding Dot Registry’s .LLP application had been resolved and that the EC was withdrawing its previous “Comment”. Notably, in this follow-up “Application Comment”, the EC specifically asked “that ICANN forward a copy of this communication to the Economist Intelligence Unit.”
234. It appears that the EIU tried to minimize its lapse on the ground that it only cost each of Dot Registry’s applications 1 point and “this would have had no material impact on the final outcome of the evaluation.”¹⁷²
235. But in light of this recently produced email correspondence between ICANN and the EIU, it is clear that *there actually never was any relevant opposition at all* to Dot Registry’s .LLC community application and that the supposed opposition to its .LLP application had been withdrawn. The EIU should have awarded the .LLC and .LLP applications the maximum score of 2 points that were possible under the **4-B Opposition** criterion.

¹⁶⁹ ICANN_DR-00215-217 (Exhibit 21).

¹⁷⁰ Exhibit 21, Comment ID: tjwufnw.

¹⁷¹ Exhibit 21, Comment ID: 7s164151.

¹⁷² While the EIU attempted to minimize its error by characterizing it as “not material”, it actually should be seen as troubling: First, the EU opposition was *never* about Dot Registry’s .LLC application. That should immediately have been apparent to both the EIU and ICANN. Therefore, it is immaterial to Dot Registry’s .LLC application whether or not both the original EU “opposition” (to the .LLP application) and the EU’s subsequent withdrawal of that “opposition” were communicated to ICANN during the 14-day window that began on 19 February 2014. The more troubling fact is that ICANN and the EIU either never noticed—or did not care—that (1) the supposed EU “opposition” was to a different string (.LLP) altogether, and (2) that opposition was withdrawn within three weeks of the date it was communicated.

F.5. .LLC and .LLP Conclusion

236. It is my conclusion that, had the EIU correctly followed the AGB and its own *EIU Guidelines*, and if it had applied the same standards it employed in connection with the .HOTEL, .RADIO, and .OSAKA TLD applications, it would have awarded Dot Registry's community application for the .LLC string the maximum possible 16 points, two more than it needed to prevail.
237. Similarly, it is my conclusion that, had the EIU correctly followed the AGB and its own *EIU Guidelines*, and if it had applied the same standards it employed in connection with the .HOTEL, .RADIO, and .OSAKA TLD applications, it would have awarded Dot Registry's community application for the .LLP string a total of 15 points, one more than it needed to prevail.

G. The clear and manifest differences in the EIU’s treatment of the .RADIO, .HOTEL and .OSAKA community applications compared to .INC, .LLC and .LLP

238. In this report, I rely on two fundamental assumptions:
- a. The EIU was required to apply the criteria for community applications as written in the AGB, and
 - b. The EIU was required to apply these criteria consistently across different community applications.
239. As supported by the discussion below, I find that the EIU did not apply the criteria for community applications as set forth in the AGB, and it did not apply the criteria consistently across different community applications. It is my opinion that the EIU treated the .INC, .LLC and .LLP applications differently both in terms of the criteria used to judge these applications as well as the standard of scrutiny applied. The EIU was not fair, balanced and consistent in its treatment of the .INC, .LLC and .LLP applications, and it is not possible to conclude that the EIU acted reasonably in exercising whatever discretion it may have been granted under the AGB criteria. Rather, the EIU’s failure to apply the AGB criteria, and its disparate treatment of the .INC, .LLC and .LLP applications with reference to other community priority applications is, in my view, manifest and evident.
240. When reviewing the EIU’s determinations regarding Dot Registry’s applications for the .INC, .LLC and .LLP strings, it is not possible to overlook the instances in which the EIU effectively rewrote the AGB criteria, rather than applying those criteria as written to these three community applications. In comparison to the uncritical, even highly deferential treatment it afforded to the .RADIO, .HOTEL and .OSAKA community applications, the EIU, in denying the applications for the .INC, .LLC and .LLP strings, applied requirements and distinctions that it simply invented out of whole cloth. Then, after finding that the .INC, .LLC and .LLP applications failed to satisfy its rewritten criteria, the EIU announced that these Dot Registry applications “did not prevail.”
241. Another unavoidable feature of the EIU’s determinations is its seeming animus toward the community applications for the .INC, .LLC, and .LLP strings. The EIU appears to have treated these applications with a level of unjustified skepticism—seemingly bordering on hostility—as it effectively condemned them as “construed” communities

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designed “to obtain a sought-after corporate identifier as a gTLD string.” This is evident in the determination that the EIU included conspicuously in its CPE Reports for each of the .INC, .LLC, and .LLP strings:

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after and after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). *The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string*, as [variously, these corporations, these limited liability companies, these limited liability partnerships, and the regulatory authorities and associations] would typically not associate themselves with being part of the community as defined by the applicant. *The community therefore could not have been active prior to the above date* [emphases added].¹⁷³

242. The EIU proceeded to award each these three applications 0 points under **Criteria #1: Community Establishment**, which was sufficient to insure that they would not prevail. At the same time, it accepted uncritically the more poorly delineated and more heterogeneous “communities” proposed in connection with the .RADIO, .HOTEL, and .OSAKA community applications.
243. In its CPE Report on .RADIO (Exhibit 10), the EIU offered this quotation from the European Broadcasting Union application in support of its finding that the .RADIO community “shows a clear and straightforward membership and is therefore well defined”:

The Radio industry is comprised of a huge number of very diverse radio broadcasters: public and private; international and local; commercial or community-oriented; general purpose for sector-specific; talk or music; big and small. All licensed radio broadcasters are part of the .radio community,

¹⁷³ .INC Report (Exhibit 7), p. 3; .LLC Report (Exhibit 8), p. 3; .LLP Report (Exhibit 9), p. 3.

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and so are the associations, federations and unions they have created ... Also included are the radio professionals, those making radio the fundamental communications tool that it is.

However, the Radio industry keeps evolving and today, many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their radio content via the Internet. Some are not broadcasters in the traditional sense: Internet radios are also part of the Radio community, and as such will be acknowledged by the .radio TLD, as will podcasters. In all cases certain minimum standards on streaming or updating schedules will apply.

The .radio community also comprises the often overlooked amateur radio, which uses radio frequencies for communications to small circles of the public. Licensed radio amateurs and their clubs will also be part of the .radio community.

Finally, the community includes a variety of companies providing specific services or products to the Radio industry.¹⁷⁴

244. In my opinion, this “definition” is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .RADIO “community” to be well-defined:

This [.RADIO] community definition shows a clear and straightforward membership and is therefore well-defined [emphasis added]. Association with, and membership in, the radio community can be verified through licenses held by professional and amateur radio broadcasters; membership in radio -related associations, clubs and unions; Internet radios that meet certain minimum standards; radio-related service providers that can be identified through trademarks; and radio partners and providers.¹⁷⁵

245. One is left to wonder just what—both in general and specifically—are “radio-related associations, clubs and unions”? How would membership in any of these be verified? What are the “certain minimum standards” that define “Internet radios” and how would

¹⁷⁴ .RADIO Report (Exhibit 10), pp. 1-2.

¹⁷⁵ .RADIO Report (Exhibit 10), p. 2.

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these be verified? How do “trademarks” unambiguously identify “radio-related services providers”, and what are these “trademarks”? What is a radio “partner”? What businesses, associations and individuals are “radio partners” or “providers”, and what businesses, associations and individuals would not be so regarded?

246. In its CPE Report on .HOTEL (Exhibit 11), the EIU offered this quotation from the HOTEL Top-Level Domain s.a.r.l application in support of its finding that the .HOTEL community “shows a clear and straightforward membership” and is “clearly defined”:

The .hotel namespace will exclusively serve the global Hotel Community. The string “Hotel” is an internationally agreed word that has a clear definition of its meaning: according to DIN EN ISO 18513:2003, “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available,” *Therefore only entities which fulfill this definition are members of the Hotel Community and eligible to register a domain name under .hotel* [emphasis added] .hotel domains will be available for registration to all companies which are which are member [sic] of the Hotel Community on a local, national and international level. The registration of .hotel domain names shall be dedicated to all entities and organizations representing such entities which fulfill the ISO definition quoted above:

1. Individual Hotels
2. Hotel Chains
3. Hotel Marketing organizations representing members from 1. and/or 2.
4. International, national and local Associations representing Hotels and Hotel Associations representing members from 1. and/or 2.
5. Other organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on [sic] members from 1. and/or 2.

These categories are a logical alliance of members, with the associations and the marketing organizations maintaining membership lists, directories and registers that can be used, among other public lists, directories and registers, to verify eligibility against the .hotel Eligibility [sic] requirements.¹⁷⁶

¹⁷⁶ .HOTEL Report (Exhibit 11), p. 2

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247. In my opinion, this “definition” also is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .HOTEL “community” to be “clearly defined”:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel. Furthermore, association with the hotel sector can be verified through membership lists, directories and registers.¹⁷⁷

248. But if—as the applicant HOTEL Top-Level-Domain s.a.r.l stated—only entities which fulfill the DIN EN ISO 18513:2003 definition (that “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available”) are members of the Hotel Community and eligible to register a domain name under .hotel, how could the EIU say the .HOTEL community “was clearly defined”? In the “definition” approvingly quoted by the EIU, the .HOTEL community also includes Hotel Marketing organizations representing individual hotels and hotel chains; international, national and local associations representing Hotels, and Hotel Associations representing individual hotels and hotel chains; and other organizations representing Hotels, Hotel Owners and other solely Hotel related organizations, individual hotels and hotel chains which *are not* included within the DIN EN ISO 18513:2003 definition.

249. In its CPE Report on .OSAKA (Exhibit 12), the EIU offered this quotation from the Interlink Co., Ltd. application in support of its finding that the .OSAKA community “shows a clear and straightforward membership” and is “clearly defined”:

Members of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following:

- a. Legal entities
- b. Citizens
- c. Governments and public sectors
- d. Entities, including natural persons who have a legitimate purpose in addressing community.¹⁷⁸

¹⁷⁷ Ibid.

¹⁷⁸ .OSAKA Report (Exhibit 12), p. 2.

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250. It also is my opinion that this “definition” of the .OSAKA community is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .OSAKA “community” to be “clearly defined”:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership is dependent on having a clear connection to a defined geographic area.¹⁷⁹

251. But if “members of the [Osaka] community are defined as those who are within the Osaka geographical area *as well as those who self-identify as having a tie to Osaka, or the culture of Osaka,*” who precisely are the “legal entities”, the “citizens”, and the “governments and public sectors” subsumed by this definition? Indeed, how would an outside observer verify such “self-identification”? Geographically, which of these lie outside of Osaka, or even outside of Japan? Where might one find a listing or specific delineation of the “entities, including natural *persons who have a legitimate purpose in addressing the [.OSAKA] community* [emphases added]. Also, what constitutes a “legitimate purpose”? Who are the entities and persons who would not be deemed to have such a “legitimate purpose”?
252. I conclude that none of the “communities” proposed in connection with the .RADIO, .HOTEL and .OSAKA applications actually is “well defined” at all—not even in principle and certainly not in comparison to the communities associated with the .INC, .LLC and .LLP strings. In my opinion, the “definitions” for the .RADIO, .HOTEL and .OSAKA “communities” fail to delineate clear boundaries around their claimed “memberships”. Although the EIU concluded that membership in each could be “verified”, the practical challenges to doing so would be enormous, indeed, impracticable.
253. Where the EIU’s “research” into the operations and organization of the members of the .INC, .LLC and .LLP communities allowed it to conclude that these communities “do not have awareness and recognition of a community among [their] members”¹⁸⁰ and was

¹⁷⁹ Ibid.

¹⁸⁰ Again, here is the complete statement of the EIU’s finding:

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sufficient to insure that these Dot Registry applications did not prevail, the EIU appears to have found it unnecessary to conduct similar “research” into the operations and organization of the .RADIO, .HOTEL and .OSAKA communities. Instead, the EIU appears to have found the necessary “awareness and recognition of a community among [their] members” *in the community definitions themselves*. For example:

254. The EIU found that the .RADIO community had the requisite “awareness and recognition of a community among its members” simply by virtue of the fact that it was defined to consist of entities and individuals in the radio industry:

[T]he community as defined in the application has awareness and recognition among its members. *This is because the community as defined consists of entities and individuals that are in the radio industry* [footnote omitted], and *as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community* [emphases added].¹⁸¹

As I have observed above, the “definition” offered for the .RADIO community reads more like an ad hoc laundry list.

255. The EIU appears to have had an even easier time discerning in “awareness and recognition of a community among its members” in the case of the .HOTEL community. All that it needed to do was to look at the definition proffered for that community:

[T]he community as defined in the application has awareness and recognition among its members. *This is because the community is defined in terms of its*

[T]he community as defined in the application does not have awareness and recognition of a community among its members. This is because [alternatively, corporations, limited liability companies, and limited liability partnerships] operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an [alternatively, INC, LLC and LLP]. Based on the Panel’s research, there is no evidence of [again, INCs, LLCs and LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these [alternatively, incorporated firms, limited liability companies and limited liability partnerships] would associate themselves with being part of the community as defined by the applicant.

¹⁸¹ .RADIO Report (Exhibit 10), p. 2.

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association with the hotel industry and the provision of specific hotel services
[emphasis added].¹⁸²

It is not clear to me how the mere satisfaction of DIN EN ISO 18513:2003 (“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”) causes the resulting “community” to have the requisite awareness and recognition among its members.

256. The EIU appears to have had a still easier time discerning the requisite “awareness and recognition of a community” on the part of the members of the .OSAKA community. All it needed was this non sequitur:

[T]he community as defined in the application has awareness and recognition among its members. *This is because of the clear association with the Osaka geographical area, as according to the applicant, “the Osaka Community is largely defined by its prefectural borders* [emphasis added].”¹⁸³

Again, it is anything but clear to me why the fact that “the Osaka Community is largely defined by its prefectural borders” — a questionable assertion at best when that community was vaguely defined to include “those who self identify as having a tie to Osaka, or the culture of Osaka” and “entities, including natural persons who have a legitimate purpose in addressing the [Osaka] community” — was sufficient to insure that the putative Osaka “community” possessed the necessary awareness and recognition among its members.

¹⁸² .HOTEL Report (Exhibit 11), p. 2.

¹⁸³ .OSAKA Report (Exhibit 12), p. 2.

H. The EIU’s imposition of invented requirements— not present in the AGB— on the .INC, .LLC, strings

257. All community applicants had to rely on— and adhere to— the same requirements set forth in the final June 2012 version of the AGB. But in comparison to the EIU’s seemingly uncritical treatment of the .RADIO, .HOTEL and .OSAKA applications under the AGB, and in spite of its clear commitment that the *EIU Guidelines* do “not modify the AGB framework, nor does it change the intent or standards laid out in the AGB,” the EIU appears— without input from or disclosure to the applicants— to have first made material modifications to the AGB criteria before applying them *only to* the .INC, .LLC, and .LLP strings.
258. For example, the EIU offered this “explanation” for its decision to award no points to these three applications in connection with the **1-A Delineation** sub criterion under **Criterion #1: Community Establishment**
- Based on the Panel’s research, there is no evidence of INCs [alternatively, LLCs, and LLPs] from different sectors *acting as a community* as defined by the Applicant Guidebook. There is no evidence that these incorporated firms *would associate themselves* with being part of the community as defined by the applicant [emphases added].¹⁸⁴
259. But in the context of community-based applications, the AGB requires only that the community (and its members) *be* a community. I find nothing in the AGB requiring community members to “*act* as a community”. Nor does the AGB include any requirement regarding whether— or how— community members “would *associate themselves*” with “being part of a community” or anything else. The EIU appears to have made these criteria up on its own. In fact, in my view, businesses do make a conscious and considered decision regarding the form of the business organization they adopt because of what the chosen form of business organization represents by way of rights and regulatory obligations.
260. In connection with the **1-A Delineation** sub criterion under **Criterion #1: Community Establishment**, the EIU also offered this “explanation” to justify its decision to award no points to Dot Registry’s .INC, .LLC and .LLP applications:

¹⁸⁴ .INC Report (Exhibit 7),, p. 2.

The community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, *these government agencies are fulfilling a function, rather than representing the community*. In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community *as they have other roles/functions beyond processing corporate registrations* [emphases added].¹⁸⁵

261. The AGB does not even contain the terms “fulfilling a function” and “representing the community”, much less does it state that there is a critical, dispositive distinction between them. In fact, the AGB actually requires only that a community be “organized”, meaning “that there is at least one entity mainly *dedicated* [emphasis added] to the community, with documented evidence of community activities.”¹⁸⁶ Importantly, I can find nothing in the AGB prohibiting this “dedicated entity” from having additional responsibilities.
262. By the EIU’s logic, the Osaka Prefecture (that the EIU deemed to be the entity mainly dedicated to the .OSAKA community) also is merely “fulfilling a function” rather than “representing” the community. Notably, the EIU found documented evidence of community activities for the .OSAKA community by accessing the website of the Osaka Prefectural government.¹⁸⁷ As I explain above, if the EIU had looked at the website of the NASS, it would have found similar evidence of the community activities of the .INC, .LLC and .LLP communities.
263. The EIU often imposed a hierarchical or prerequisite relationship among what actually are separate and mutually independent AGB requirements. At other times, the EIU used “therefore” to link conclusions to premises that actually have no necessary connection at all. These practices on the part of the EIU often resulted in obvious non sequiturs.
264. For example, in its evaluation of the .INC application for Organization (required under **1-A Delineation**), the EIU stated – correctly – that:

¹⁸⁵ Ibid.

¹⁸⁶ AGB (Exhibit 1), page 4-11.

¹⁸⁷ .OSAKA Report (Exhibit 12), p. 2.

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Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.¹⁸⁸

As stated, these are logically independent criteria, each capable of being satisfied and verified separately. But the EIU’s “logic” conflates them with its assertion that an applicant’s failure to satisfy one prong *necessarily* requires the conclusion—with no need to conduct any further investigation—that the applicant has also failed the second, independent prong:

As there is no entity that is mainly dedicated to the community as defined in the .INC application, [it follows that] *there is no documented evidence of community activities* [emphasis added].¹⁸⁹

In other words, by assuming the premise that “there is no entity that is mainly dedicated to the community,” the Panel was able to dismiss even the logical possibility that documented community activities could exist.

265. The EIU used similar “reasoning” in deciding that the .INC community “was not active prior to September 2007”:

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier

¹⁸⁸ .INC Report (Exhibit 7), p. 2.

¹⁸⁹ Ibid. In fact, there actually is considerable evidence. In addition to the voluminous documentary record created when community members actively seek to join the .INC community and thereafter to maintain their registrations that are maintained by the Secretaries of State, there also is the activity of associations of corporations *qua* corporations, as I have shown above. Similar documentary records combined with the activities of the associations that include LLCs and LLPs that are discussed above constitute similar evidence for the .LLC and .LLP communities.

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as a gTLD string, as these corporations would typically not associate themselves with being part of the community has defined by the applicant. *The community therefore could not have been active prior to the above date* (although its constituent parts were active) [emphasis added].¹⁹⁰

266. In its evaluation of the .INC application under **1-A Delineation** for Delineation and under **1-B Extension** for both Size and Longevity, the Panel “reasoned” as follows:
- a. Because corporations operate in vastly different sectors, which sometimes have little or no association with one another, and because the Panel’s research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC,¹⁹¹ it follows that there is no evidence of INCs from different sectors acting as a community as defined by the AGB.
 - b. Therefore, these incorporated firms would not *typically* associate themselves with being members of [the community of corporations].
 - c. Therefore, the community as defined in the .INC application does not have awareness and recognition of a community among its members.
 - d. Therefore, the Dot Registry applications for .INC, .LLC and .LLP did not satisfy the requirements under **1-A Delineation** for Delineation and under **1-B Extension** for both Size and Longevity.
267. In my opinion, the preceding is fraught with errors:
- a. First, is nothing in the AGB requiring communities to “act as a community” or even explaining what that might mean. Again, all the AGB requires is that the putative community *be* a community.
 - b. Even if it were true that “firms are typically organized around specific industries, locales, and other criteria” unrelated to whether or not they are

¹⁹⁰ .INC Report (Exhibit 7), p. 3.

¹⁹¹ As explained in the preceding footnote, the EIU’s “research” can be charitably described as, at best, incomplete.

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corporations (and the EIU has not offered evidence to support this assertion), it does *not* “follow” that they cannot *be* a community.”¹⁹²

- c. Whether or not incorporated firms would “*typically* associate themselves with being members” of the community of corporations is irrelevant. I am unable to find a “typicality” test or criterion in the AGB.
- d. “Awareness and recognition of a community” is not defined or explained at all by the AGB. Nor does the AGB make any attempt to explain why such “awareness and recognition of a community” can exist only if community members “act as a community” or “associate themselves with being members”.

268. Despite this, the EIU’s reliance on the above “logic” insured that the Dot Registry community applications for .INC, .LLC and .LLP would receive 0 points under **Criterion #1: Community Establishment**, which in turn assured that these applications would not prevail.

¹⁹² The communities at issue in the .RADIO, .HOTEL and .OSAKA applications include members whose organizing principles are, at best, only partially or tangentially related to their ostensible communities. These include, for example, the “variety of companies providing specific products or services to the Radio industry” (.RADIO Report, Exhibit 10) It appears that these “products or services” could include anything and their provision to hotels need not be a significant portion of the respective companies’ sales. Where the .HOTEL community was defined to include unspecified “Other organizations representing Hotels, Hotels Owners and other solely Hotel related organizations” (.HOTEL Report, Exhibit 11), that logically could also include chambers of commerce, visitor bureaus, travel organizations and publishers of business directories, to name but a few. Also, “those who self-identify as having a tie to Osaka or the culture of Osaka” (.OSAKA Report, Exhibit 12) could be located anywhere in the world and whose “tie” to Osaka might be secondary at best, or even inconsequential.

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I. The EIU's inconsistent treatment of different community applications.

269. In my opinion, it is important to understand the instances in which the EIU CPE Panel treated individual community applications differently.
270. Where the .INC community application was faulted by the Panel because it did not have awareness and recognition of a community among its members (owing to the “fact” that corporations “operate in vastly different sectors”), the Panel found that the .RADIO community possessed the requisite awareness and recognition among its members on the basis of little more than this circular, tautological argument:
- [T]he [.RADIO] community as defined in the application has awareness and recognition among its members. This is because the community as defined consists of entities and individuals that are in the radio industry [footnote omitted], and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community.¹⁹³
271. In .HOTEL, the Panel accepted “detailed information” on the website of the International Hotel *and Restaurant* Association (“IH&RA”, described by the applicant as “the only global business organization representing the hotel industry worldwide”¹⁹⁴) as sufficient to satisfy the requirement for documented evidence of .HOTEL community activities. The Panel appears not to have been troubled by the fact that the IH&RA also appears to be significantly devoted to the *restaurant* industry, which is *not* part of the .HOTEL community as defined by the applicant. Yet the Panel faulted Dot Registry’s .INC application’s citation to the offices of U.S. Secretaries of State for documented evidence of .INC community activities on the ground that “the offices of the Secretaries of States of US states are not mainly dedicated to the [.INC] community *as they have other roles/functions beyond processing corporate registrations* [emphasis added].” The EIU did not seem troubled by this inconsistency.
272. Nonetheless, the EIU found that the definition *alone* of the .HOTEL community was sufficient to demonstrate awareness and recognition of a community among its members “because the [.HOTEL] community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”¹⁹⁵

¹⁹³ .RADIO Report (Exhibit 10), p. 2.

¹⁹⁴ .HOTEL Report (Exhibit 11), p. 2.

¹⁹⁵ Ibid.

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273. The .INC community was not so fortunate. The Panel judged it to be “a ‘community’ construed to obtain a sought-after corporate identifier as a gTLD string, as these corporations would typically not associate themselves with being part of the community as defined by the applicant.”¹⁹⁶

274. The EIU reported—on the basis of no apparent research or data—that

[T]he .HOTEL string nexus closely describes the [HOTEL] community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels).¹⁹⁷ However, the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD.

However, these entities are considered to comprise only a small part of the community. Therefore the string identifies the community, but does not overreach substantially beyond the community, as the general public will generally associate the string with the community as defined by the applicant [emphasis added].¹⁹⁸

275. The EIU did not disclose the data or methodology that allowed it to “consider” the “entities that are related to hotels, such as hotel marketing associations, that represent hotels and hotel chains” to “comprise only a small part of” the .HOTEL community. If the EIU had been consistent, it would have concluded that, even though “these entities are considered to comprise only a small part of the community,” their inclusion would still amount to “over-reach”. And if the EIU viewed such “over-reach” in the same manner it employed in connection with the .INC, .LLC and .LLP community applications, it would have concluded that *any* such over-reach was *ipso facto*

¹⁹⁶ .INC Report (Exhibit 7), p. 3. Again, see above for evidence to the contrary.

¹⁹⁷ This actually is incorrect. The .HOTEL application clearly stated that only entities satisfying the relevant ISO definition—“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” (Exhibit 17, p. 2)—are members of the HOTEL community. Thus, hotel marketing organizations; international, national and local associations representing hotels and hotel associations; and other organizations representing hotels, hotel owners and other solely hotel related organizations are not included in the ISO definition and, therefore, not included in the .HOTEL community.

¹⁹⁸ .HOTEL Report (Exhibit 11), p. 4.

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“substantial” and would have given the .HOTEL application 0 points under **Criterion #2: Nexus between Proposed String and Community**.

276. This is because the .INC community application was not treated so generously in this respect by the EIU, which concluded (again, without any apparent research or data) that:

The applied-for string (.INC) over-reaches *substantially*, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While 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 Canada, Australia and the Philippines. Therefore, there is a *substantial* over-reach between the proposed string and the community as defined by the applicant [emphases added].¹⁹⁹

277. As discussed above, there is a major problem with this judgment by the EIU: the AGB does not specify any metric or ranges of permissible and impermissible values, or, most importantly, a “critical value” beyond which any “over-reach” is deemed “substantial.” Moreover, a close reading of the *EIU Guidelines*—which are intended to clarify, not replace the scoring criteria in the AGB—supports the conclusion that, to the EIU, *any* “over-reach”—no matter how small—would *ipso facto* be “substantial”.²⁰⁰

¹⁹⁹ .INC Report (Exhibit 7), pp. 4-5.

²⁰⁰ The *EIU Guidelines* (Exhibit 2) state (at p. 7) that “Over-reaching substantially” (which is sufficient to cost a community application all 4 points available under **Criterion #2: Nexus between Proposed String and Community**) “means that the string indicates a wider geographical or thematic remit than the community has.” Elsewhere in this report, I take and explain the position that any geographic “over-reach” must, at a minimum, significantly exceed 50 percent before it can be regarded as “substantial”.

J. The EIU’s Unsupported, Undocumented and Unverifiable Assertions Regarding its “Research” and “Evidence”

278. At a number of points in the CPE Reports for the .INC, .LLC, and .LLP community applications, the EIU alluded to its unspecified and undocumented “research” to support broad generalizations that it then used to justify awarding no points whatsoever to the Dot Registry applicant at important steps in CPE process. The following passage is typical:

Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC [alternatively, LLC and LLP]. Based on *the Panel’s research, there is no evidence* of INCs [alternatively, LLCs and LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. . . . *There is no evidence* that these incorporated firms would associate themselves with being part of the community as defined by the applicant [emphases added].²⁰¹

279. In my view, the EIU should be required to disclose the specific “research” it supposedly conducted in conjunction with its consideration of the .INC, .LLC and .LLP applications and to explain how that specific “research” supports each of its following conclusions:

- a. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC.²⁰²
- b. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC.²⁰³
- c. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLP.²⁰⁴
- d. There is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook.²⁰⁵

²⁰¹ .INC, .LLC and .LLP Reports (Exhibits 7, 8 and 9, respectively), p. 2.

²⁰² .INC Report (Exhibit 7), p. 2.

²⁰³ .LLC Report (Exhibit 8), p. 2.

²⁰⁴ .LLP Report (Exhibit 9), p. 2.

²⁰⁵ .INC Report (Exhibit 7), p. 2.

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- e. There is no evidence of LLCs from different sectors acting as a community as defined by the Applicant Guidebook.²⁰⁶
 - f. There is no evidence of LLPs from different sectors acting as a community as defined by the Applicant Guidebook.²⁰⁷
 - g. There is no evidence that these incorporated firms would associate themselves with being part of the [INC] community as defined by the applicant.²⁰⁸
 - h. There is no evidence that these limited liability companies would associate themselves with being part of the [LLC] community as defined by the applicant.²⁰⁹
 - i. There is no evidence that these limited liability partnerships would associate themselves with being part of the [LLP] community as defined by the applicant.²¹⁰
280. At the same time, the EIU should be asked to explain why it apparently did not find it necessary to look for similar evidence in connection with its evaluations of the .RADIO, .HOTEL and .OSAKA community applications.
281. In any event, I conclude that the EIU's supposed "research" cost each of Dot Registry's applications (for .INC, .LLC and .LLP) all 4 possible points under **Criterion #1: Community Establishment** (i.e., the 2 points that were possible for **1-A Delineation** as well as the 2 points available under **1-B Extension**). Put plainly, the EIU's supposed "research" was sufficient to insure that these three Dot Registry applications could not prevail.

²⁰⁶ .LLC Report (Exhibit 8), p. 2.

²⁰⁷ .LLP Report (Exhibit 9), p. 2.

²⁰⁸ .INC Report (Exhibit 7), p. 2.

²⁰⁹ .LLC Report (Exhibit 8), p. 2.

²¹⁰ .LLP Report (Exhibit 9), p. 2.

Respectfully submitted

July 13, 2015

A handwritten signature in blue ink that reads "Michael A. Flynn". The signature is written in a cursive style and is positioned above a horizontal line.

Michael A. Flynn
Director
Navigant Economics

Michael A. Flynn
Director

BIOGRAPHY

Mr. Flynn has been both a testifying and consulting expert economist for nearly twenty-five years, specializing in antitrust, economic damages, intellectual property, class actions and other complex business litigation and consulting engagements. In addition to assuming overall responsibility for the preparation of expert submissions, including designing and directing the supporting analyses and drafting the reports themselves, Mr. Flynn also serves as an expert economic consultant to counsel, assisting in preliminary case analysis, discovery strategy, expert discovery and dispositive motions and trial. He has case experience in a broad range of industries, markets and products, including, among others:

- **Insurance** (including business interruption, workers compensation, auto, life, and property and casualty).
- **Healthcare** (including hospital and physician services, brand name prescription drugs and other pharmaceuticals, and medical instruments and hospital products).
- **Energy** (including petroleum, natural gas and gasoline, with specific case experience in production, pipelines, royalties, refining, distribution, and marketing).
- **Professional sports** (including professional sports leagues, teams, stadiums and franchise relocations).
- **Computer and electronics hardware and software** (including network operating systems, digital media software and video game consoles and software).
- **Transportation** (including passenger airlines and waterborne freight).
- **Other consumer and producer goods** (including infant formula, high-pressure laminates, carbon dioxide and consumer credit reports).

Mr. Flynn was enrolled as a National Science Foundation Fellow in the PhD Program in Economics of the Massachusetts Institute of Technology, Cambridge, Massachusetts, from 1971 to 1974, where he completed all general and field qualifying examinations for the PhD degree. Mr. Flynn received his AB degree from the University of California, Berkeley, where he was the recipient of the Department of Economics Citation as the Outstanding Graduating Senior.

PROFESSIONAL EXPERIENCE

- 2012 – Present** **Navigant Economics, Oakland, California**
Director
- 2011 – 2012** **AFE Consulting, Oakland, California**
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- 1989 – 2011** **LECG LLC (formerly The Law & Economics Consulting Group), Emeryville, California**
Principal (1999-2011)
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Senior Economist (1989-1995)
- 1983 – 1988** **American President Lines, Ltd. (Now APL, Part of NOL Group), Oakland, California**
Director of Economics, Corporate Planning Department
- 1976 – 1982** **Data Resources, Inc. (now Global Insight, Inc.), Lexington, Massachusetts, and San Francisco, California**
Senior Economist and Managing Consultant

TEACHING EXPERIENCE

Instructor in Economics at Wellesley College (1974-1976), University of Massachusetts (1974-1975) and Boston University (1978).

Taught undergraduate and graduate courses, including *Introduction to Microeconomics*, *Introduction to Macroeconomics*, *Intermediate Economic Theory*, *Statistics and Econometrics*, *Mathematical Economics*, *Money and Banking*, and *Managerial Economics*.

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Michael A. Flynn
Director, Navigant Economics, LLC
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PROFESSIONAL AFFILIATIONS

Member, American Economic Association

Associate Member, Section of Antitrust Law, American Bar Association

Veteran, United States Army

Attachment A: Documents and Related Materials Reviewed

1 .ART Application (ID 1-1097-20833), Dadotart Inc.
2 .ART Application (ID 1-1675-51302), EFLUX.ART, LLC
3 .ART Community Priority Evaluation Report, Application ID 1-1097-20833, September 10, 2014
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