

**Recommendation Of The Board Governance Committee
Reconsideration Request 10-2
9 December 2010**

On 20 August 2010, the .JOBS Charter Compliance Coalition (the “Coalition”) submitted a request to the ICANN Board Governance Committee (“BGC”) to reconsider the 5 August 2010 decision of the ICANN Board of Directors (“Board”) to approve an amendment to the .JOBS Registry Agreement (*See* Reconsideration Request 10-2, <http://www.icann.org/en/committees/reconsideration/reconsideration-petition-jobs-20aug10-en.pdf>, hereinafter the “Request”). The Coalition also requested that the BGC recommend that the Board adopt procedures for consideration of future requests that have the affect of amending the Charter of a sTLD. The Coalition further requested that the Board “stay Employ Media’s launch of the Phased Allocation Program pending its review of [the Request].”

I. Relevant Bylaws.

Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information.

The Bylaws do not provide for reconsideration where “the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act.” Bylaws, Art. IV, § 2.2 (emphasis added). Similarly, the Bylaws do not provide for reconsideration of material information that was considered by the Board. Bylaws, Art. IV, § 2.2(b) (stating that reconsideration addresses Board actions “taken without consideration of material information . . .”).

If an entity is requesting reconsideration of ICANN staff action or inaction, a request must contain, among other things, “a detailed explanation of the facts as presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies).” Bylaws, Art. IV, § 2.6(g). When challenging a Board action or inaction, a request must contain, among other things, “a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act. Bylaws, Art. IV, § 2.6(h).

Dismissal of a request for reconsideration is mandatory if the BGC finds that the requesting party does not have standing because it failed to satisfy the criteria set forth in the Bylaws. In addition, the BGC may dismiss a request “where it is repetitive, frivolous, non-substantive, or otherwise abusive.” Bylaws, Art. IV, § 2.16. These standing and application

requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge a decision with which someone disagrees, but that it is limited to situations where the Board did not have access to information that, if available, may have resulted in a different decision.

The Request was received on 20 August 2010, making it timely under the Bylaws. Bylaws, Art. IV, § 2.5. On 20 September 2010, the BGC announced that it would consider the Request in conformity with ICANN's Bylaws. (See <http://www.icann.org/en/announcements/announcement-20sep10-en.htm>). It was impractical for the BGC to issue this final recommendation to the Board by 18 November 2010, the 90-day time period suggested in the Bylaws (Bylaws, Art. IV, § 2.17), as the Coalition requested a meeting with the BGC to present the Coalition's position on the matter prior to the BGC's issuance of the final recommendation. (See the Coalition's 15 November 2010 letter, at <http://www.icann.org/en/committees/reconsideration/burr-to-jeffrey-15nov10-en.pdf>.) The BGC is therefore issuing its recommendation now, as soon as practicable after that meeting.

II. Background.

On 9 June 2010, Employ Media, the registry operator of the .JOBS sTLD Registry, submitted a Registry Services Evaluation Process proposal ("RSEP Proposal") to ICANN seeking to amend portions of the .JOBS Registry Agreement to allow for registration of geographical identifier (non-country) names and occupational names. This represented a change to the prior limitations within the .JOBS sTLD, which restricted registrations to "companyname.jobs" names (e.g., icann.jobs) for the legal name of an employer and/or the name by which an employer is commonly known. The companyname.jobs restriction was detailed within Employ Media's application for the .JOBS sTLD.

As an sTLD, there is a sponsoring organization responsible for setting the policies of the .JOBS sTLD in the interests of the sponsored community. Here, The Society for Human Resource Management ("SHRM") serves as the sponsoring organization, representing the "international human resource management community . . . the organizational function that focuses on the management and direction of people. The Community consists of those persons who deal with the human element in an organization – people as individuals and groups, their recruitment, selection, assignment, motivation, compensation, utilization, services, training, development, promotion, termination and retirement." (See .JOBS Agreement, Appx. S, at Part VII.) This community definition is included within the .JOBS Charter, which is set forth in full in Part VII of the .JOBS Agreement.

The Charter also limits the scope of who may register second-level domains within the .JOBS TLD:

- members of SHRM; or
- persons engaged in human resource management practices that meet any of the following criteria: (i) possess salaried-level human resource management experience; (ii) are certified by the Human Resource Certification Institute; (iii) are supportive of the SHRM Code of Ethical and Professional Standards in

Human Resource Management, as amended from time to time, a copy of which is attached hereto.

SHRM, in its role as the Sponsoring Organization, implemented its Policy Development Process as set forth in Appendix S of the .JOBS Agreement, after Employ Media submitted a proposed amendment. (See <http://policy.jobs>.)¹ The Council minutes are available at <http://policy.jobs/councilmeetings.php>, and the results of the vote and “Notice of Decision” are available at <http://policy.jobs/>. These results were reported in Employ Media’s RSEP Proposal. The SHRM Policy Development Council approved the following by a supermajority vote:

To the extent that any policies, practices or business rules in .JOBS govern Employ Media’s ability to provision, allocate, register (to third parties or itself), allow use of in the DNS (by third parties or itself), reserve or remove from reserve, any non-“companyname” domain names, including industry and occupational domains, geographic domains, dictionary term domains and two-character domains, all such policies, practices or business rules are amended to allow Employ Media, at Employ Media's discretion (provided that Employ Media maintains adherence to the .JOBS Charter), to provision, allocate, register (to third parties or itself), allow use of in the DNS (by third parties or itself), reserve and remove from reserve, all such non-“companyname” domain names.

(See RSEP Proposal.)

As a result of the Policy Development Council’s vote, Employ Media proposed that the .JOBS Agreement be modified as set forth at <http://www.icann.org/en/tlds/agreements/jobs/proposed-jobs-amendment-15jun10-en.pdf>, which encompasses the amendments approved by the Board on 5 August 2010. To effectuate the Policy Development Council recommendation, Employ Media proposed the implementation of a “Phased Allocation Process” for the non-companyname.jobs second-level registrations, beginning with a Request for Proposals for the registration of the non-companyname.jobs registrations, then proceeding to an auction, and finally to a first-come, first-served registration period for any remaining names. This Phased Allocation Process is similar to phased allocations approved in other sTLDs, including .MOBI, .PRO, and .TRAVEL.

Because the RSEP Proposal included a revision to the .JOBS Agreement, the proposed amendment was posted for public comment for a 30-day period. The public comment is

¹ One of the former members of SHRM’s Policy Development Council – a member who resigned prior to the vote on the amendment (see <http://policy.jobs/files/06032010.pdf>) – is also a member of the International Association of Employment Web Sites (“IAEW”), one of the members of the Coalition bringing the Request. Jobing, Inc. is identified on Attachment 1 to the Request.

available at <http://www.icann.org/en/public-comment/public-comment-201007-en.htm#jobs-phased-allocation>.

The public comment period closed on 15 July 2010. The Summary and Analysis of Public Comments, prepared by ICANN staff, was posted on 2 August 2010. Over 300 comments – some of which were duplicates – were submitted on this topic. Many of the comments were similar and demonstrated the existence of at least one coordinated campaign. The Summary and Analysis of Public Comment document included discussion of comments both for and against the proposals.

The Board considered the proposed amendment at its 5 August 2010 meeting, passed a Resolution approving the amendment to the .JOBS Agreement and authorizing the CEO and the General Counsel to take the necessary steps to implement the amendments. The Resolution was publicly posted on that same day. The Preliminary Report of the Board meeting, noting the vote tally for the Resolution, was posted on 16 August 2010. The Board has not yet considered Minutes of the 5 August 2010 Board Meeting, which will constitute the official record of the meeting; therefore, those minutes are not yet approved or public. In addition, Staff has not yet posted the Board Books of the 5 August 2010 meeting, which is scheduled for posting contemporaneously with the approved Minutes.

In line with the Board's Resolution, on 6 August 2010, ICANN staff executed the approved amendment to the .JOBS Agreement. Since that time, Employ Media launched its RFP process on 26 August 2010.

III. The Coalition's Request.

The Coalition seeks reconsideration of Board's 5 August 2010 approval of Employ Media's Phased Allocation Program to, in the words of the Coalition, "permit registration of names at the second level in the .JOBS TLD for purposes inconsistent with the .JOBS Charter." (Request, Page 1, defining the "Action".)² The Coalition seeks relief in the form of two recommendations from the BGC:

- (1) The Reversal of the 5 August 2010 Board Action (Request, Page 2); and
- (2) The establishment of clearly defined and publicly available procedures for consideration of future requests that have the affect of amending the Charter of a sTLD.

² The Coalition is comprised of eight association members: (1) AHA Solutions (American Hospital Association); (2) the American Society of Association Executives; (3) the American Staffing Association; (4) CareerBuilder, LLC; (5) the International Association of Employment Web Sites; (6) Monster Worldwide, Inc.; (7) the Newspaper Association of America; and (8) Shaker Recruitment Advertising & Communications) and eighteen individual members of the International Association of Employment Web Sites. (Request, Page 1.) The Coalition states that no member is a part of the .JOBS Sponsored Community, and under the .JOBS Charter, no member is allowed to offer their products or services through a .JOBS domain. (Request, Page 4.)

(Request, Page 2.)

The Coalition also requests a stay of the Board Action pending a decision on the Reconsideration Request, to purportedly alleviate the costs and burdens that will be imposed on Coalition members and trademark holders around the globe. (Request, Page 7.) According to the Coalition, “[c]ommencement of the second level registrations under the Phased Allocation Program process may create enforceable interests in non-company name registrations at the second-level of the .JOBS TLD, making it extremely difficult to undo the harm to members of the Coalition and others affected by the Action.” (Request, Page 8.)

On 2 September 2010, the Coalition submitted to the BCG a Supplement to Reconsideration Request (“Supplement”) providing more discussion on the assertion that Employ Media’s implementation of the approved Phased Allocation plan will violate the .JOBS Charter. (See <http://www.icann.org/en/committees/reconsideration/reconsideration-petition-jobs-supplement-03sep10-en.pdf>.) The Supplement states that the plan “simply ignores the limitation on registrations in the .JOBS Charter” through the consideration of RFPs from applicants who propose to “serve the needs of human resources managers [the Community], whether or not such proposals are submitted by an individual engaged in human resources management.” (Supplement, Page 3.) Further, the Coalition views Employ Media’s solicitation of proposals from Coalition members and others “to operate employment web sites in .JOBS” as an indication “that [Employ Media] has no plans to honor its obligation under the Charter to limit registration at the second level to individuals engaged in human resources management.” (Supplement, Page 3.)

The Coalition points to a proposal from the DirectEmployers Association to operate the “.JOBS Universe” that will provide cross-industry and cross-company job boards in a way that “will perform the core functions of an employment website or career portal, much like the services operated by members of the Coalition.” (Supplement, Pages 4-5.) These sites “provide services to corporate resources managers, but are not themselves engaged in human resources management.” (Supplement, Page 4.) However, the “.JOBS Charter limits registration at the second level in .JOBS to individuals engaged in human resources management. . . . Accordingly, neither DE, nor any member of the Coalition is permitted to register a .JOBS name to provide employment services.” (Supplement, Pages 4-5.)

The Coalition claims that “ICANN is sanctioning a registry operator’s decision to disregard the commitments contained in its Charter, which was the fundamental basis upon which the sTLD was awarded.” (Supplement, Page 5.)

On 20 September 2010, the BGC announced that it would proceed to consider the Request. Shortly thereafter, the BGC crafted questions for Employ Media to assist the BGC in identifying whether all material information was presented to the Board at the time of the Board’s 5 August 2010 decision. Prior to BGC transmittal of those questions to Employ Media, on 14 October 2010, the Coalition provided the BGC with a list of proposed questions for Employ Media. (See <http://www.icann.org/en/committees/reconsideration/coalition-questions-to-bgc-14oct10-en.pdf>.) The Coalition’s questions, however, failed to identify, or relate to, any material information that the Board did not consider at the time of the 5 August 2010 decision. The Coalition’s questions were in large part directed towards compliance-related issues not

before the BGC in this Request. After reviewing the Coalition's proposed questions and the BGC's proposed questions for Employ Media, the BGC concluded that information important to the issue of whether the Board failed to consider available material information were included in the BGC's set of questions for Employ Media. Accordingly, the BGC forwarded its questions to Employ Media on 18 October 2010.

(See <http://www.icann.org/en/committees/reconsideration/bgc-questions-to-employ-media-18oct10-en.pdf>.)

Employ Media responded to the BGC's questions on 25 October 2010.

(See <http://www.icann.org/en/committees/reconsideration/employ-media-answers-to-bgc-25oct10-en.pdf>.) This response confirmed Employ Media's view that the .JOBS Charter was not changed as a result of the Board's approval of the amendment to the .JOBS Registry Agreement, and confirmed Employ Media's intentions to require registrants to meet the Charter requirements. Employ Media also stated that material information relating to the SHRM Policy Development Council vote was available to the Board prior to the 5 August 2010 decision, and Employ Media did not take any steps to interfere with the provision of relevant material to the Board.

On 4 November 2010, the Coalition provided a further supplement to the Request, referencing the board materials and minutes from the 5 August 2010 Board meeting. (See <http://www.icann.org/en/committees/reconsideration/reconsideration-jobs-supplement-04nov10-en.pdf>, hereinafter "Second Supplement".) In this Second Supplement, the Coalition presented the following additional arguments:

- o The Board should have independently confirmed that the SHRM Policy Development Council considered whether the Charter was going to be altered; reliance upon Employ Media's statement that the Charter was not modified was not sufficient (*see* Second Supplement, Pages 2-3);
- o The minutes of the SHRM Policy Development Council show that it never considered whether the proposed change was a Charter amendment, and Staff did not bring this to the Board's attention (*see* Second Supplement, Pages 3-4); and
- o The Board only relied upon the conclusory statement that there is no change to the .JOBS Charter, and Staff did not answer the Board's questions on this point, including questions of who will operate the registrations (*see* Second Supplement, Page 4).

Attached to the Second Supplement, the Coalition provided an analysis of Employ Media's responses to the BGC's questions. (*See* Analysis of Employ Media's Responses to the BGC's Questions, attached to Second Supplement.) In this analysis, the Coalition called for the BGC to "require Employ Media to account for its statements, positions, and plans." The Coalition identified areas where it believes Employ Media "must" explain or more clearly state its positions, such as explanations of who can register names, an explanation of its relationship with DirectEmployers, and explanations of the "self-managed" class of names. The Coalition also identified additional questions that could be put to Employ Media, including questions relating to RFP responses and the current operations of the Registry.

On 4 November 2010, the BGC submitted questions to SHRM to assist in identifying whether the Board failed to consider material information when it approved the amendment to the .JOBS Registry Agreement. (See <http://www.icann.org/en/committees/reconsideration/bgc-questions-to-shrm-04nov10-en.pdf>.) The questions sought information on SHRM's position of whether the amendment approved by the Board modified the Charter of the .JOBS sTLD, and whether there were changes to the community for the .JOBS sTLD. The questions also sought information regarding SHRM's expectations as to the content on web pages for registrations within the .JOBS sTLD.

SHRM responded to the BGC's questions, on 12 November 2010, noting its belief that the .JOBS Charter had not been changed through the Board's Action, that there have been no changes to the definition of the community served by the .JOBS sTLD, and that the approved changes served the needs of the international human resource management community. (See <http://www.icann.org/en/committees/reconsideration/shrm-answers-to-bgc-questions-12nov10-en.pdf>.)

Thereafter, the Coalition sent a letter to ICANN claiming that SHRM and Employ Media failed to address the questions of the BGC and suggesting that the Coalition and Employ Media (along with SHRM, the BGC and ICANN Staff) meet to address the issues set forth in the Request and clarify any misunderstandings between the parties.

(See <http://www.icann.org/en/committees/reconsideration/burr-to-jeffrey-15nov10-en.pdf>.) On 15 November 2010, SHRM responded to the Coalition letter, noting its disagreement with the characterization of SHRM's responses, as well as the disagreement with the suggestion that SHRM should be a participant in the requested meeting.

(See <http://www.icann.org/en/committees/reconsideration/shrm-response-to-coalition-letter-15nov10-en.pdf>.) SHRM also noted that Employ Media should have been copied on the Coalition's letter.

IV. Purported Grounds For The Request.

The stated ground for the reversal of 5 August 2010 Board Action is: "The Phased Allocation Program violates the .JOBS Charter and as such exceeds the authorization granted to Employ Media by the .JOBS PDP Council." (Request, Page 2.) The Coalition also argues that the Board failed to consider material information in its possession when it took the 5 August 2010 Board Action. (Request, Page 8; Second Supplement, Pages 5-6.) The Coalition does not specify the grounds for seeking the establishment of procedures for future requests that have the affect of amending, but the Coalition discusses ICANN's credibility, ICANN's ability to enforce sTLD commitments, and ICANN's authority to enforce community-based new gTLD commitments as the reasons for seeking this relief.

A. Claims that the Phased Allocation Program Violates the .JOBS Charter.

The Coalition argues that, despite the .JOBS Charter limitation on who may register second-level domains within the .JOBS sTLD, the planned Phased Allocation Program will "remove the Charter limitations on second level registrations by permitting independent job site operators – who are neither members of SHRM or engage in human resources management practices – *to expand 'their product and service offerings' into the .JOBS TLD.*" (Request, Page

3.) According to the Coalition, despite Employ Media’s assertions that the Phased Allocation Program does not amend the .JOBS Charter, “the Phased Allocation Program described in the Application is demonstrably inconsistent with the .JOBS Charter” because it will permit independent employment site operators to use second-level registrations in the .JOBS sTLD.” (Request, Page 3.) “Thus, absent a Charter amendment, the Phased Allocation Program violates the .JOBS Charter.” (Request, Page 3.) In its Supplement, the Coalition argues that Employ Media’s RFP process makes clear that Employ Media is not abiding by the registration limitations imposed by the Charter, but is instead looking to applicants who can service the Community without analysis of qualification. (Supplement, Page 4.) And in its Second Supplement, the Coalition claims that there is “abundant evidence of Employ Media’s plan to expand the universe of potential registrants in .JOBS to ‘any business’ for any purpose.” (Second Supplement, Page 6.)

The Coalition argues that the SHRM Policy Development Council did not give authority to Employ Media to change the .JOBS Charter, as Employ Media is restricted to “registrations that are consistent with the .JOBS Charter.” (Request, Page 3.) Further, “even if the [SHRM Policy Development] Council had authorized Employ Media to seek a change in the .JOBS Charter, any such change should be the subject of careful consideration by the ICANN Community and the ICANN Board.” (Request, Page 3.)³

The Coalition also argues that this alleged Charter amendment has the practical effect of changing the scope of those allowed to register second-level domains within the .JOBS sTLD without any corresponding ability for these new registrants to be members of the community served by the .JOBS sTLD. (Request, Page 5.) These independent job site operators do not have a “voice in the policies that will govern their registrations in .JOBS.” As such, they will “bear the costs of, but will have no meaningful voice in the development of, .JOBS policies and procedures.” (Request, Page 5.) The Coalition highlights the increased burdens that will be placed on its members, as well as others, in needing to protect trademark interests “without providing any of the mechanisms for affected parties to protect their trademark interests that [Draft Applicant Guidebook, Version IV] requires of all new gTLD operators.” (Request, Page 5.) According to the Coalition, this broadening of the community is counter to the representations made by Employ Media at the time of application for the sTLD, where Employ Media focused on the benefits achieved by the “narrow community to be served and the value of a TLD that reflected the ‘relationship of employer and job seeker.’” (Request, Page 5, citing Employ Media’s Responses to Questions, at <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppC.pdf>.)

The Coalition further argues that the trademark costs that will be borne by its members and others “reverse” the commitments made by Employ Media in its application for the .JOBS

³ The Coalition also cites to language within the .JOBS Registration Agreement, at <http://www.goto.jobs/reg.agreement.asp>, regarding the a restriction for using a companyname.jobs registration for third party information, including the restriction that an entity holding a companyname.jobs registration cannot contain listings for outside of its company. (Request, Page 2.) The Request also cites to the .JOBS sTLD Application, but the cited language is not included therein.

sTLD, where it noted that: “trademark infringement, is of lesser concern as such relates to the .jobs TLD. *As the Charter ...prohibits all registrations which are not trade names or commonly-known names*, few (if any) applications for trademark.jobs will get through Employ Media’s screening process. This means that there will be little pressure on current trademark holders to believe that they have to defensively obtain all of their “trademark.jobs.” (Request, Pages 6-7.) Had this broader scope of the .JOBS sTLD been made apparent at the time of application, the Coalition notes that “[independent employment sites could have and would have had the opportunity to register their opposition to the sTLD application. . . . [or] ensure that the interests and concerns of independent employment site operators received meaningful consideration in the policy formulation process for .JOBS.” (Request, Page 7.) The Coalition’s focus on the limited scope of the trademark protections required at the start-up of the .JOBS sTLD is understood to reference that, if the types of registrations within the .JOBS sTLD had been broader from the outset, members of the Coalition would have sought for sunrise provisions to be included in the .JOBS sTLD start up plan. Here, the types of registrations are broadened without any opportunity for sunrise trademark protections for those who may have trademark or other intellectual property rights in the combinations of geographic and industry identifier-names that will be allowed under the approved amendment.

According to the Coalition, this broadening of the .JOBS sTLD will create a precedent for any new community-based TLD to return to ICANN in the event the initial business model does not “work out,” and to allow the elimination of “registration limitation that allowed [the applicant] to win ICANN Board approval in the first place.” (Request, Page 7.)

B. Claims that the Board Failed to Consider Material Information.

The Coalition also bases its Request on its assessment that, in taking the 5 August 2010 Action, the Board only considered the ICANN Staff Summary and Analysis of Comments for Phased Allocation in .JOBS, which was finalized three days before the Board’s consideration. The Summary, according to the Coalition, was “clearly rushed” and “failed to adequately account for either the breadth or depth of comments and boils down complex argument to a form that loses most if not all of its meaning.” (Request, Page 8.) Further, according to the Coalition, the Summary did not give adequate consideration of the coordinated responses against the Amendment as it did the coordinated responses in favor of the amendment. (Request, Page 8.) Therefore, “Board members relying on the staff summary of the comments submitted in response to the Employ Media Application necessarily failed to consider significant information regarding this Application.” (Request, Page 8.)

In support of its assertions of the lack of Board consideration of material information, the Coalition presents what it deems an independent evaluation of the Summary, which provides additional statistics analyzing the public comment forum and then provides commentary on the flaws in the ICANN Public Comment and review process. (Independent Evaluation, at Attachment B of Request.) The Coalition, states that “the failure of the process in this case, which led to an immediate Board decision, is the clearest indication so far that ICANN needs to develop standard Rules, procedures and guidelines for what is a crucial component of the organization’s decision-making processes.” (Request, Page 9.)

The Coalition also argues that this “information vacuum” is demonstrated in the statements of Mike Silber, who abstained from voting on the Amendment, wherein he asserted that “I have no principle objection to policy development in the sponsored gTLDs, however the proposed extension purports to extend one element of the Charter - namely the names that can be registered - but not the pool of registrants. I do not believe that this has been sufficiently explored for me to support the resolution and yet have no objective indicator of potential negative impact to oppose it. As such, I am compelled to abstain.” (See Second Supplement, Page 5.)

VI. Analysis of the Request and Recommendation.

As an initial matter, it is the recommendation of the BGC that the Request for a stay of the Board Action pending a decision on the Request is moot as the Amendments were executed prior to the Coalition’s submission of the Request and given the recommendation below.

As to the Coalition’s Request for reconsideration of the 5 August 2010 Board Action, it is the recommendation of the BGC that the Request be denied as unsupported. First, the Coalition bases its Request on an assumption that Employ Media will operate the .JOBS sTLD in a manner that violates the .JOBS Charter, and not on facts borne out by the publicly-available information on the Amendment. The SHRM PD Council restricted Employ Media to “maintain adherence to the .JOBS Charter.” (<http://policy.jobs>.) Further, Employ Media notes that “Plans will be evaluated by Employ Media for compliance with the .JOBS Charter.” (RSEP Proposal, Page 5.) As discussed above, this was confirmed in Employ Media’s and SHRM’s responses to the BGC’s questions.

The Coalition’s only support for its assertion that the Charter will be violated is the statement in the RSEP Proposal that “Independent job site operators in other TLD’s may be affected by the introduction. Some have indicated a positive interest to submit an RFP if such were made available. Others have indicated that the proposed registry service could enable an expansion of their product and service offerings in new/innovative ways.” (RSEP Proposal, Page 10.) But this statement does not suggest that independent job site operators who do not qualify for registration under the .JOBS Charter will be allowed to take advantage of the .JOBS “expansion” opportunities. If implementation of the Amendment causes Employ Media to violate its contractual requirements set out in the .JOBS Charter, that is something that ICANN’s Contractual Compliance Department must address.

Further, the Coalition notes that no member of the Coalition is a member of SHRM or a member of the sponsored community, and they will therefore be harmed by alleged expansion of the pool of registrants without a voice in the community. Jobing, Inc., one of the individual members of the Coalition, previously had a representative on the SHRM Policy Development Council – a member that resigned immediately prior to the vote on the proposed Amendment. Moreover, there is no indication that the independent job site operators – such as Jobing – are prohibited from qualification as members of SHRM (or the community) and from participation in the policy development process for the .JOBS sTLD. Instead, the record shows that such operators are able to participate in the process.

In terms of the trademark harms that are alleged to result from the expansion of the .JOBS sTLD, the Request is based on the assumption that modifications to all existing TLD Registry Agreements shall be subject to the trademark protections that are anticipated for inclusion in the New gTLD program. The New gTLD program has not been finalized, and holding existing registries to trademark protections developed for the New gTLD Program is not contemplated in any event. Moreover, contrary to the suggestion that no trademark protections will exist in the wake of the amendment, the .JOBS sTLD already has trademark protections built in; as with all other gTLDs in existence, all registrations in the .JOBS sTLD are subject to the Uniform Domain Name Dispute Resolution Process (“UDRP”). Further, requirements for companyname.jobs registrations are not relaxed.

ICANN has the RSEP process so that Registries are able to innovate. Within the sTLD realm, such innovation may require the involvement of a sponsoring organization, to oversee the creation of and implementation of policies in the interests of the community. The RSEP process contains the protections that the Coalition is seeking, ensuring public comment and Board review for material changes to registry agreements, therefore no action is necessary or recommended on this item in the context of the Reconsideration Request.

The Coalition’s assertion that the Board failed to consider material information available at the time of its Action is also not supported. The Coalition bases this argument on the claimed insufficiency of the Staff Summary and Analysis of Public Comments. Many of the issues raised in the Coalition’s Request appear within the Staff Summary and Analysis of Public Comments, including discussions regarding the modification of the sponsored community within the .JOBS sTLD, the potential implication on ICANN’s introduction of community-based TLDs, and the lack of representation of the coalition members through SHRM. The Board also had access to the Public Comment forum to review the letters in full. Moreover, the Coalition did not offer any additional material information to support its Request aside from the Independent Analysis of the Summary – a document that was not available at the time of the Board decision. Based upon a comparison of the arguments raised in the Request to the matters included within the Summary, the Board had available to it all material points that the Coalition raised. Finally, contrary to claims in the Coalition’s Second Supplement, the Minutes of the 5 August 2010 Board Meeting demonstrate that a fulsome deliberation was undertaken on issues raised in the Request, such as compliance with the .JOBS Charter as well as the positions of those opposed to the amendment, in order to reach the non-unanimous Board decision. (See <http://icann.org/en/minutes/minutes-05aug10-en.htm>.) Although the Coalition claims that Mr. Silber’s abstention demonstrates that the Board was not provided with material information on this topic, the ability for Mr. Silber to frame his objection as he did makes clear that the concerns presented in the Request were before the Board. The fact that one Board member wished for additional information does not support an inference that the Board – as a whole – did not have material information sufficient to act.

In sum, the Coalition’s concerns regarding potential violations of the Charter in the implementation of the Phased Allocation Program is not a proper ground for reconsidering the Board’s 5 August 2010 Action. Further, the Board did not fail to consider material information available at the time of the Action. Nevertheless, the BGC does think that Employ Media’s compliance with its Charter is crucial. Given the highly disparate views presented by the parties involved with the Request, the BGC is not at all clear that it has a full picture of how Employ

Media intends to implement the Phased Allocation Process. For example, when concerns were raised about the self-managed class of names referenced in the proposal and Employ Media's responses to the BGC questions, that potential implementation method was withdrawn by Employ Media. Therefore, the BGC recommends that the Board direct the CEO, and General Counsel and Secretary, to ensure that ICANN's Contractual Compliance Department closely monitor Employ Media's compliance with its Charter.⁴

⁴ The BGC also thinks that the Board should address the need for a process to evaluate amendments that may have the effect of changing, or seeking to change, an sTLD Charter or Stated Purpose of a sponsored, restricted or community-based TLD. Because such a process may impact gTLDs greatly and is a policy issue, the GNSO is the natural starting point for evaluating such a process. We therefore further recommend that the Board direct the CEO to create a briefing paper for the GNSO to consider on this matter, and for the GNSO to determine whether a policy development process should be commenced.