

COALITION FOR ONLINE ACCOUNTABILITY

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Comments of Coalition for Online Accountability (COA)

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COA appreciates this opportunity to comment on proposed changes to the new gTLD registry agreement. See <http://www.icann.org/en/news/public-comment/base-agreement-05feb13-en.htm>.

COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners (listed below). COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization, including more than 18 formal submissions regarding the new gTLD program. For further information, see www.onlineaccountability.net.

At the outset, COA commends ICANN for acknowledging, in section II of its public comment announcement, that "the current version of the New gTLD Registry Agreement, published as part of the AGB [Applicant Guidebook] in June 2012, requires certain updates and changes before it can be finalized for use by successful applicants." This statement is equally applicable to other elements of the AGB. ICANN would be remiss in its public interest obligations if it did not modify provisions of the AGB as needed to reflect changed circumstances, unforeseen developments, advice from the Governmental Advisory Committee, and other inputs.

ICANN is also following the proper procedure for making such modifications, by providing an opportunity for public comment. COA urges ICANN to provide adequate time for community consideration and comment on these proposed changes¹, and to prepare promptly a summary of these comments and an explanation of how they have or have not been taken into account.²

1. Proposed Specification 11 – Public Interest Commitments

a. Qualified registrars

¹Because the proposed changes are important and in some cases complex, COA questions whether 21 days is an adequate duration for the public comment period. We reserve the right to amplify these comments during the Reply Comment period.

²See Accountability and Transparency Review Team recommendation 7.2: "the Board should publish 'a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.' ICANN should also articulate that rationale for accepting or rejecting input received from public comments and the ICANN community, including Supporting Organizations and Advisory Committees." <http://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec10-en.pdf>

American Society of Composers
Authors & Publishers (ASCAP)

Entertainment Software Association (ESA)

Software & Information Industry Association (SIIA)

Broadcast Music Inc. (BMI)

Motion Picture Association of America (MPAA)

Time Warner Inc.

Recording Industry Association of America (RIAA)

The Walt Disney Company

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COA strongly supports paragraph 1 of proposed Specification 11, requiring new gTLD registries to use only those accredited registrars that sign up to the new version of the Registrar Accreditation Agreement (RAA) once that is finalized. COA has long called for acceptance of an improved RAA to be the prerequisite for any registrar to enter the new gTLD market. Including this specification in the new gTLD registry agreement accomplishes this purpose.

We sound one note of caution having to do with timing, however. The new RAA version does not yet exist. Indeed, no draft of a revised RAA has even been released for public comment. ICANN stated in December that it would at least specify an anticipated date for release of this draft by the end of January. <http://www.icann.org/en/news/announcements/announcement-3-14dec12-en.htm> This did not occur in January, and still has not occurred as February draws to a close. Considering that the original Board resolution kicking off the RAA renegotiation called for a draft to be available in March 2012 (see Board Resolution 2011.10.28.31), we will not hazard a guess as to when this will actually happen. At the same time, the ICANN CEO has publicly committed to the final approval of at least some new gTLD applications by April 23, less than two months from today. <http://www.youtube.com/watch?v=Kymny74B9dM>

COA views the first paragraph of Specification 1 as a commitment to the community that no Registry Agreement will be executed until a new version of the RAA is in place. If the first new gTLD Registry Agreement is ready for signature before the ICANN Board has given final approval to the revised RAA, the community is now on notice that the former will have to wait until the latter is ready.

b. Registry public interest commitments

Paragraph 2 of proposed Specification 11 enables each new registry operator to specify which “commitments, statements of intent, and business plans” contained in its new gTLD application it wishes to incorporate into the Registry Agreement. While COA supports this paragraph in principle, as presented it could provide incentives that are perverse and indeed exactly the opposite of what they should be. Nothing in the proposal requires applicants to agree to live up to any of the “commitments, statements of intent, and business plans” on the basis of which they have been awarded the gTLD in question.³ Instead of inviting applicants to “opt in” to binding promises to do what they said in their applications they would do, ICANN should allow applicants to publicly “opt out” of commitments they no longer believe they can keep.

After all, to a great extent, members of the public relied on these “commitments, statements of intent, and business plans” in commenting on the applications. Members of the public (as well as the Independent Objector) rely upon these statements in deciding whether or not to file formal objections to applications; governments relied upon them in deciding to issue or to refrain from issuing Early Warnings; and even ICANN evaluators may be relying on them to decide whether the applications in question will pass satisfactorily through the evaluation phase. The presumption should be that everything in the application (including any ICANN-approved modifications thereto) can be relied upon by the community, and can be enforced by ICANN as the community’s representative, unless specifically stated otherwise.

COA urges applicants to use this opportunity to spell out that they intend for the commitments made in their applications to be binding ones, and we believe responsible applicants will do so. However,

³We recognize that section 1.3.a.i of the Registry Agreement is a warranty that all statements made in the application were true and correct as of the date made, and remain true except to the extent disclosed to ICANN in writing. Proposed Specification 11 deals with statements of intent, not statements of fact.

under the current proposal, applicants may have little incentive to “opt in” to any of these commitments, except possibly to the extent they feel compelled to do so by the threat of forthcoming GAC Consensus Advice. At least some consideration should be given to the interests of other sectors of the multi-stakeholder ICANN community that cannot wield the virtual veto power ICANN has accorded to a consensus of governments, but that may have relied in good faith on statements in the publicly accessible portions of the applications to refrain from opposition to specific applications. Moving to an “opt-out” approach would help vindicate this reliance interest.

COA also supports in principle the proposal that binding commitments in new gTLD applications would be enforceable, not only by ICANN, but also via a dispute resolution process that can be triggered by third parties. However, at the moment this dispute resolution process exists (to the extent it exists at all) in name only. COA looks forward to participating in the development of this dispute resolution process to ensure that it provide an effective, efficient, and fair means of holding new gTLD registries accountable for the representations they have made to the community.

Finally, as proposed in paragraph 3 of proposed Specification 11, registries should be enabled to enhance the commitments made in their applications through additional “public interest commitments” that would be incorporated in the registry agreement. This will be particularly useful in cases in which the commitments contained in the applications are worded very generally and need to be made more specific in order to clarify what it is the applicant is committing to do.

2. Other Proposed Changes to Registry Agreement

a. Change in control (Sec. 7.5)

COA has long been concerned by the risk that a newly delegated new gTLD registry could readily be “flipped” to another operator who would be an inappropriate choice for reasons of competence, credibility, history or otherwise. We support the proposed changes that would improve ICANN’s ability to conduct a thorough but expeditious investigation of the proposed successor registry operator, including necessary background checks.

At the same time, while we agree that transfer of a given registry to an entity that already (and in a compliant manner) operates a different gTLD registry poses fewer risks, we disagree that such a transaction should automatically be approved unless ICANN formally objects within 10 calendar days. Registry operations are not always fungible. An entity that satisfactorily runs a registry with five or ten second level domain registrants would not necessarily be competent to run a registry with a million registrations; the operator of a registry catering primarily to registrants who use one script might not have the capacity to run another registry that mainly employs a different script. Issues of competition and consumer trust also might be involved that cannot be fully resolved in 10 days and without any opportunity for investigation. Thus, clause (ii) of the proposed last sentence to section 7.5 should be revised to allow for a reasonable, if more limited, review before such a transfer is approved.

b. Whois (Specification 4)

COA generally supports the proposed modifications to Specification 4. We applaud the recognition that ICANN’s Internic web page could serve as a portal for cross-registry Whois access, as recommended by the Whois Policy Review Team, and that therefore Whois data from the new registries should be supplied in a compatible format. While we agree that ultimately new gTLD registries should be required to comply with the “next generation model” for gTLD directory services once that model is finally approved by the ICANN board, we of course reserve judgment on the output of the newly

established experts working group which is expected to form the basis of that new model. We also support the new requirement for registries to provide links to the forthcoming ICANN page “containing Whois policy and education materials”; but this provision should be expanded to cover links to any cross-registry registration data directory service operated by or on behalf of ICANN (such as the Internic service called for by the Whois Policy Review Team).

Respectfully submitted,

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