



December 11, 2009

VIA EMAIL

Mr. Peter Dengate Thrush
Chairman of the Board of Directors
Mr. Rod Beckstrom
President and CEO
ICANN
4676 Admiralty Way, Suite 330
Marina del Ray, CA 90292

Re: Comments of Microsoft Corporation on Expressions of Interest in New gTLDs

Dear Messrs. Dengate Thrush and Beckstrom:

Microsoft Corporation ("Microsoft") welcomes this opportunity to provide its comments to ICANN on an "Expressions of Interest in New gTLDs" ("EOI") process.

Microsoft is a worldwide leader in the IT industry, with a mission to enable people and businesses throughout the world to realize their full potential. Since the company was founded in 1975, it has worked to achieve this mission by creating technology that transforms the way people work, play, and communicate. Microsoft is also an owner and champion of intellectual property rights. It maintains sizable trademark and domain name portfolios and takes pride in the worldwide recognition of multiple of its trademarks. Further, Microsoft's businesses rely heavily on the Internet and the current system of top level domains, and Microsoft is an ICANN-accredited registrar. As such, Microsoft was well positioned to provide meaningful comments to ICANN on the first three versions of the new gTLD Draft Applicant Guidebook ("DAG 1", "DAG 2", and "DAG 3"), and is well positioned to provide its comments on a possible EOI process.

At the outset, Microsoft wishes to incorporate by reference the objections and concerns articulated in its comments to ICANN on DAG1, DAG2, and DAG3.

Before providing its substantive comments, an important process point merits consideration, namely, the Board's stated intention to not consider public comment received in the last 14 days of 30-day public comment period.¹ ICANN's handling of public comment has historically been criticized by the business community. More recently, ICANN appears to have placed greater emphasis on the collection and consideration of public comment. Moreover, in the recently signed Affirmation of Commitments, ICANN committed to "adhere to . . . responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration". In light of ICANN's historically poor reputation for considering public comment, its more recent greater emphasis on public comment, and the even more recent AoC commitment, the Board's decision to effectively reject public comments submitted during the last half of the comment period is surprising and unacceptable.

Executive Summary. An EOI process is destined to be counter-productive. Such an EOI process will not achieve any of potential informational, resolution, planning, or understanding goals set out in the Board resolution and discussed in the EOI Working Group Report ("EOI WG Report"). The ability of an EOI process to achieve such goals is based several flawed assumptions, two of which are dispositive.

First, it is simply incorrect to assume that the universe of viable potential applicants is, in fact, aware of the impending introduction of new gTLDs and anticipated associated application process, and could be timely informed about the EOI process. Indeed, numerous mid-sized companies have little awareness of the new gTLD program. If they do not, it seems likely that smaller companies also do not. Given the length of time that ICANN has reportedly been engaged in its new gTLD communications efforts, the existence of so many potential applicants without appreciable knowledge of the program does not bode well for ICANN's ability to educate all such potential applicants about any EOI process that may be adopted. Second, it is unrealistic to assume that potential applicants who are aware of the new gTLD process have made a decision to proceed given the number and import of the outstanding overarching issues and the fact that ICANN has not yet issued a final DAG. This is particularly true for those companies whose business is not principally Internet-related.

¹ The public comment announcement states that "[t]he public comment forum will be open until December 11, 2009, *however*, community members that wish to have their input considered by the Board during its December meeting [sic] should submit comments no later than November 27, 2009." (emphasis in original) In its October 30, 2009 resolution on the EOI, the Board "direct[ed] staff to study the potential impact of a call for formal "expressions of interest," and **provide a plan for Board consideration at ICANN's next Board meeting, in December 2009. The plan should include possible options and a risk analysis relating to the proposed action.**" (emphasis added). Because the referenced Board meeting will occur on December 9, it is clear that the Board has no intention of considering any public comment submitted after November 27.

Moreover, the adoption of any EOI process seems far more likely than not to further delay the introduction of new gTLDs. At a minimum, it will be necessary to develop the guidelines (and take public comment on them), to prepare EOI “application” interfaces, and to process EOI “applications”. These efforts will take time and money that would presumably otherwise be spent on resolving the overarching issues. In addition, objections (whether informal or formal) to an EOI process seem inevitable. Responding to and resolving those objections will be an additional drain on ICANN’s resources.

Questions Posed in Public Comment Announcement

1. How do we ensure that participation in the EOI accurately represents the level of interest? For the reasons noted above, it will be impossible to “ensure that participation in the EOI accurately represents the level of interest.”

2. Should only those who participate in the EOI be eligible to participate in the first round when the program officially launches? No. Restricting participation in the first round to those entities that participate in an EOI excludes those entities that do not yet have sufficient information about the application process to proceed and penalizes those entities that are deferring a decision whether to apply for a new gTLD at all until the overarching issues are addressed. Moreover, such a restriction would certainly reinforce the perception by many in the business community that ICANN is an “insider’s game.”

3. Should a deposit be required for participation in the EOI? No. If ICANN decides to proceed with an EOI and charge a fee, that fee must be based on a cost-recovery method. There is no justification for using a cost-recovery basis for the new gTLD application fee and a different basis for an EOI “application” fee.

4. If there is a fee, under what circumstances should there be a refund? If ICANN proceeds with an EOI and charges a fee, ICANN should refund the fee if (a) the amount collected exceeds ICANN’s actual cost; and (b) the application window for the first round of new gTLD applications does not open before 2011.

5. What information should be collected from EOI participants? If ICANN proceeds with an EOI, EOI participants should provide the full name and contact information of the “applicant” entity, identify the applied-for string, and state if the application will be community or standard. ICANN should not make the information public as doing so has no bearing on a better understanding by ICANN of economic demand, the number of gTLDs that are likely to be applied for, and relevant industry data.

The EOI WG Report posits that making the information public will “allow companies and organizations to understand any competitive or infringement threat,” “to contact their competitors to ascertain if they can reach an arrangement in lieu of an auction”, and will give brand owners “insight into what applications, if any, should be objected to, and will have time to adequately prepare such objections.” There is no basis for the position that conducting an EOI

process and making certain information public is more likely to facilitate any of these goals than not having an EOI process would be. Today there are at least two announced potential applicants for each of several strings -- .eco, .gay, and .music, for example. These coexisting potential applicants can contact their competitors now and, based on their continued coexistence, it appears that they have been unable to “reach an agreement in lieu of an auction.” Why should adding an EOI process make any difference? With regard to infringement issues, an EOI process should not enhance a new gTLD applicant’s understanding of an infringement threat as prudent new gTLD applicants should have conducted trademark searches to identify potential objectors and potential objectors are unlikely to take action unless and until an actual new gTLD application is filed. As for giving brand owners more time to prepare objections, a more suitable alternative – and one called for in many public comments on DAG3 – would be to extend the period for filing objections to 30 days after the Initial Evaluation period closes.

6. Must the responder commit to go live within a certain time of delegation? No.

7. What are the implications for potential changes to the Applicant Guidebook after the EOI participation period closes? An EOI process must have no implications for potential changes to the Applicant Guidebook, and any potential changes to the Applicant Guidebook must be independent of whether an EOI process has been announced, is ongoing, or has closed. Indeed, the possibility that EOI participants could seek to prevent potential changes to the Applicant Guidebook based on their EOI participation is yet another reason why ICANN should not have an EOI process.

8. What are the potential risks associated with the EOI? The two principle potential risks are further delay to the new gTLD process and harm to ICANN. The time and resource allocation necessary to develop the guidelines (and take public comment on them), to prepare EOI “application” interfaces, and to process EOI “applications” will inevitably impact the time and resources available to resolve the overarching issues. As a result, such a resource misallocation will impede ICANN’s progress in resolving the overarching issues and will cause further delay in the introduction of new gTLDs. The most likely forms of harm to ICANN are negative reputational harm and financial harm. Negative reputational harm is an almost definite outcome of an EOI process because holding such a process will reinforce the widely held perceptions that ICANN is an “insider’s game”, that ICANN makes decisions that favor the interests of its current and potential contracted parties, and that engaging in the public comment process on the Draft Applicant Guidebook is an exercise in futility. In addition, it seems likely that some aspect of the EOI process may result in litigation – whether it’s by an EOI participant who objects to a post-EOI change to the Applicant Guidebook, a potential EOI participant who misses a deadline, or by an entity that wishes to participate in the EOI process but is unable to do so in the requisite time frame.

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In conclusion, Microsoft recommends against an EOI process. Such a process cannot achieve any of the of potential informational, resolution, planning, or understanding goals

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set out in the Board resolution and discussed in the EOI WG Report. To the contrary, an EOI process will likely result in further delay in the introduction of the new gTLDs, an outcome that an EOI process is intended to avoid.

Thank you for your consideration. If you have questions or wish to discuss any of the points raised herein, please contact Russell Pangborn (russpang@microsoft.com).

Respectfully submitted,

Microsoft Corporation

Russell Pangborn
Associate General Counsel – Trademarks