DRAFT December 1, 2011

The Intellectual Property Constituency thanks ICANN for the opportunity to provide these comments on the RySG's proposed Continued Operations Fund ("COF"). Since ICANN has asked specific questions, our comments below are in the form of responses to those questions. However, for the sake of clarity, the IPC does not support the proposed COF for the following primary reasons:

a. It is a cost-shifting mechanism which will shift costs away from undercapitalized applicants and place them on credit worthy applicants.
b. It allows more underfunded applicants into the application pool which will in turn lead to more registry failures, cost to ICANN, and poor outcomes for registrants. While this may be good in the short term for members of the Registry Stakeholder Group (RySG) who desire to provide backend services to such underfunded applicants, the short term economic gain of members of one SG should not be prioritized over the risks to registrants and ICANN that the COF represents.
c. It places ICANN in the position of insurer, which ICANN is not licensed to be. Any party seeking to delay or stop the new gTLD program will be handed an issue ripe for litigation and upon which ICANN will most certainly lose.

Turning now to the questions posed by ICANN:

1. Considering ICANN's Mission, what is the appropriate role for ICANN to create a fund or act as an insurer?

   It is inappropriate for ICANN to create a fund or act as an insurer. ICANN should not create a fund, which can be exhausted, and allow itself to be left "holding the bag" if enough registries fail to exhaust the fund and the remaining healthy registries refuse to continue to fund failed operations. The better approach is for ICANN to insist on the terms of the Guidebook as written. It would be reckless for ICANN to delegate a TLD to a party which ICANN knows cannot meet the obligations of the Guidebook as written.

   It is inappropriate for ICANN to act as an insurer or to otherwise provide some mechanism for a failed registry to avoid its obligations under its registry agreement with ICANN. ICANN is not licensed to act as an insurer and providing an insurance product is outside the scope of its corporate mission and formation documents.

   Under which circumstances?

   Under any circumstances in which ICANN remains unlicensed by the State of California to provide insurance products and so long as its formation documents do not anticipate it being an insurer.

   - Can the same end be accomplished through a third party?

   Yes. That process is already set forth in the Guidebook as written. A letter of credit can be provided for creditworthy applicants. If an un-creditworthy applicant cannot obtain a letter of credit, it has the option of depositing funds into escrow instead. If it doesn't have sufficient funds, it should refrain from applying and ICANN should certainly refuse to delegate that entity a TLD to operate.

Even if an insurer could be identified who would be willing to underwrite these sorts of risks, the premiums would undoubtedly be higher to creditworthy applicants than the administrative costs of obtaining a letter of credit. The problem of cost shifting would not be eliminated.

Will an insurance company underwrite this?

Not if they understand that undercapitalized applicants have no business applying to run a registry.

2. The current COI model outlined on the Applicant Guidebook (see: http://newgtlds.icann.org/applicants/agb) is designed to provide some safeguards regardless of the number of gTLD registries that fail.

   For the existing COI model:

   - There will be an incentive to underestimate the projected size of the new registry, and therefore lower the cost of the COI to below what it should be to protect registrants. How could this be addressed?

   ICANN should conduct its own due diligence on the market demand for a particular TLD and not rely on the representations of any undercapitalized applicant who may be tempted to underestimate.

   For the COF model:

   - Who should determine how much reserve must be set aside?
   - What criteria should be used to ensure sufficient funding and a mechanism to provide registrant protections?

We do not reply substantively to this question, since we believe the COF is ill conceived and ripe with peril.

3. In the estimates shown in the addendum (Proposed Continuity Operations Instrument), what are the assumptions that can be made in creating the basis for the proposed fund?

We do not reply substantively to this question, since we believe the COF is ill conceived and ripe with peril.

4. How should both the existing COI model and the newly proposed COF model ensure that it appropriately meets the needs of multiple registries sizes from small to large?

For the COI, presumably ICANN Staff undertook this analysis *before* it included the COI in the Guidebook and came to the conclusion that the COI accomplishes that goal. Regarding the COF, the analysis is not large registry vs. small registry, the analysis is creditworthy applicant vs. un-creditworthy applicant. If ICANN chooses to adopt the COF, creditworthy applicants must be given the opportunity to opt out of the very risky pool inhabited by un-creditworthy applicants and present ICANN with the letter of credit instead.

5. Will the allocation of costs need to be adjusted over time if new registries enter the pool after the target balance is achieved? How can this account for some level of predictability and fairness for all registries?

We do not reply substantively to this question, since we believe the COF is ill conceived and ripe with peril.

6. What appropriate level of internal resources should ICANN have for collections, tracking of deposits and outlays from the fund?

We do not reply substantively to this question, since we believe the COF is ill conceived and ripe with peril. However, ICANN will need to hire additional staff to effectuate the COF, driving up costs for all registries and registrants.

7. What are the foreseeable challenges to move funds in a timely manner to various parties as required in responding to emergency situations?

Since the COF will encourage undercapitalized applicants to apply, the primary challenge will be the exhaustion of funds, not their movement. Additionally, the free flow of funds outside of the United States is not a given, so ex-US registries may contribute to the fund but not be able to draw upon it quickly should the need arise.

Summary

There is no substitute for ICANN allowing only financially stable applicants into the registry pool as anticipated by the Guidebook. Although rejecting the proposed COF may shrink the pool of potential RySG customers, ensuring a large customer pool for the RySG is not part of ICANN's mission. Further, ICANN is not licensed or authorized by its formation documents to offer insurance products. The COF should be rejected by ICANN. At a minimum, ICANN should allow an opt-out for creditworthy applicants to supply the letter of credit anticipated in the Guidebook.