# Comments on EOI Model

## Introduction

My December 2009 comments opposed the EOI concept on the grounds it added no more visibility to TLD load than would be achieved by opening the actual application window.   Given that a useful EOI must: (1) be mandatory; (2) have a large, non-refundable fee; and (3) commence after a communications period, I continue to believe that opening the application window is preferable to an EOI.

## The Staff Model Will Work

Having said that, if the Board decides to proceed with an EOI I endorse the Staff's recommended model, as I believe it is the only practical approach to an EOI.   An EOI must be mandatory and expensive or it will not accurately reflect subsequent applications. Also, there must be a communications period before the EOI window closes or the mandatory nature of the EOI will penalize those not currently aware of new TLDs.

## Will An EOI Work?

Will the EOI achieve its goals?  The principle information it will provide is good data to assist in root scale planning.  If there are 300 unique EOI strings, and we believe 400 to 500 strings can be safely added to the root over a 12-month period, we could comfortably open the TLD application window as soon as the DAG is complete.  If there are 600 unique EOI strings we will either need to increase root resources, or advise TLD applicants they may face some delay in entry to the root.

I doubt the EOI will affect our current planning for strings that generate morality, trademark or geographic concerns at the top level. Having talked with a wide variety of prospective applicants I believe these strings are rare.  The cost of preparing, submitting and managing a string to root entry is $US500K (at a minimum).  In addition, the risk of rejection for these strings is high.   Parties with access to $US500K have cheaper and more successful ways of

achieving their goals than applying for a gTLD.

## Countering Criticisms of the EOI

Claims have been made the proposed EOI model: (i) has a fee that penalizes small non-profits and developing country applicants; (ii) favors ICANN insiders;  (iii) will create a market for EOI positions; and (iv) requires detailed GAC input.    I would like to rebut each of these criticisms:

### 'Penalizes Small Non-Profits and Developing Country Applicants'

The EOI is actually beneficial to these applicants as its $55K fee places less burden on them than the previous DAG model -- which required them to provide $185K up-front (and offered a $130K refund if they subsequently withdrew).  If the argument is that $55K (and then $130K) is simply too expensive for some applicants we're not really in a discussion about EOI.  Rather, we're in a separate discussion about the subsidization of applicants with limited resources.   I have two observations on that.

First, small non-profits and developing country applicants are not the only entities with limited resources. To manage such a program fairly ICANN would have to audit the resources of all applicants and provide subsidized funds to all who fell below a certain net asset level.  I don't know where this subsidization money would come from. Presumably ICANN would have to charge more than $185K to applicants above the asset level.  I see fairness and gaming issues with all of the above, and I do not believe it is within ICANN's charter to fund some entities to the detriment of others.

Second, the $55K EOI fee (and later $130K application fee) is the tip of the cost iceberg for any TLD applicant.  Running a registry has always been an expensive undertaking, and the DAG has been filled with new operational and financial requirements that make it even more expensive (e.g. DNSSEC).  If an applicant cannot afford the $55K EOI fee I don't believe they have any chance of meeting ICANN's financial and operational requirements for registry operation. Registries that cannot afford the EOI fee are likely to fail.

**'Favors ICANN Insiders'**

The EOI will be no different from the previous DAG model in terms of who can apply and how widely the application process is known.    In both cases (EOI or no EOI) there will be an extensive communications period after which any aware party has the option of participating.  As long as this communications period is well executed an EOI will provide no more or less advantage to insiders.

**'Will Create a Market for EOI Positions'**

For this concern there is, once again, little difference between the proposed EOI and the DAG process that has been developed over the last two years.  Under the DAG process an entity can apply for a TLD and this applying entity can be bought before or after contract award (noting that any acquiring entity must continue to meet all DAG obligations).   This situation will be no different under the EOI.

By having an EOI that is cheaper than an actual application ($55K up-front cash for the EOI versus $185K for the DAG) an argument could be made that more of these ownership transfers might occur (as it will be cheaper to 'play').  In practice there are several reasons why this behavior will be minimal.   First, trading will not occur for community or geographic strings as an EOI 'position' for those strings has little or no value until a full DAG application is processed.  Second, there will not be trading where there are multiple EOIs for the same string.  This means there will not be 'EOI trading' for popular generic strings (as there will be multiple EOIs for these).

A situation where EOI position trading may occur is where there is only one EOI for a given string.  Typically this will be for less popular generic strings.  This is a risky strategy for a prospective trader as no-one may be interested in buying the string.  If the trader cannot find a buyer for their EOI position they must either forfeit the $55K EOI fee, or put another $130K at risk by proceeding with a full application.

For the reasons discussed above, I think concerns about EOI position trading are overblown.   There may be some of this trading, but it will be limited and in any event I don't see it causing consumer harm (as

any buyer of an EOI position must continue to meet all DAG requirements).

**'Requires Detailed GAC Input'**

I do not believe the Affirmation of Commitment, or ICANN's By-Laws, require detailed GAC endorsement of every operational and administrative matter before ICANN. The EOI, <u>as proposed by ICANN staff</u>, is a purely operational mechanism that does not fundamentally change the policies developed in the DAG over the past two years.

## <u>Don't Let the EOI Become a Proxy for Changing Agreed DAG Procedures</u>

Some proposals regarding the EOI have little to do with measuring the number and nature of intended strings (the goal of the EOI) and more to do with re-engineering the way strings are allocated to applicants. As a community we have spent the last two years discussing and refining the way strings are allocated (Modules 3 and 4 of the DAG). We should not allow an EOI, whose function is purely measurement, to change the outcome of two years of policy work.

For example, the GAC representative from France, whose intellect and integrity I greatly admire, has proposed an EOI model that would amend the string allocation policy in Modules 3 and 4 of the DAG. I submit that the EOI is simply an administrative mechanism for measuring the volume and type of anticipated strings. It should not be a tool for revisiting agreed DAG procedures.

## <u>My Recommendations</u>

**1. Make a Decision.** The Board should consider comments on the Staff paper and make a vote on this paper. Either approve it or reject it. Do not allow it to become yet another delaying tool for those who are opposed to new TLDs. By now the pattern for behavior from those parties is clear. Find an issue that appears contentious and fuel debate over it, calling for further studies, discussions and

analyses.

**2. Initiate the Communications Period.** If there is an affirmative vote on the EOI, the Board should immediately start the Communications Period. There will be some unresolved DAG issues (e.g. vertical integration and two character TLDs) but the open nature of these issues can be adequately explained in the communication period. If resolution of the issues means an EOI fee must be refunded, then this can be adequately handled. I believe there will be few cases of refund.

**3. Finalize the DAG.** After two years of work the DAG is 98% complete. Lets use the next four months to close out the last 2%.

I greatly appreciate your consideration of these views

Richard Tindal