



International Trademark Association

655 Third Avenue, 10th Floor, New York, NY 10017-5617 USA

+1-212-768-9887 • f: +1-212-768-7796 • www.inta.org • info@inta.org

Comments of the International Trademark Association (INTA)
Draft Expression of Interest / Pre-Registration Model
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Executive Summary

INTA thanks the ICANN community and staff for their efforts in considering a potential Expressions of Interest process and pre-registration model for new gTLDs. INTA believes that a properly constituted EOI process, implemented at the appropriate time, may bring potential benefits to the community and ICANN. However, INTA does not consider the draft EOI Model as an appropriate vessel for this effort. In regards to timing, at a minimum, a prerequisite to any EOI process must be the resolution of the five overarching issues ICANN has identified with its new gTLD program.

Since a poorly conceived and ill-timed EOI process may lead to significant public harm, INTA recommends that ICANN fully consult with the community so it can be informed of the potential benefits and harms that may result from any particular EOI process.

Public Comment

Since ICANN's decisions affect the public's interest, ICANN should take all practical measures to ensure the public's concerns are integrated into its decision-making. The Affirmation of Commitments requires nothing less. INTA remains concerned that despite its efforts, ICANN's processes have too often been insufficient in terms of time, scope, process, and resources needed to engage in truly meaningful public consultation.

This is particularly relevant in regards to the draft EOI Model, which represents a radical change to the established new gTLD program process. To date, there has been insufficient public consultation on the EOI Model, which became clearly visible when the public comment period on the conceptual EOI questions was open for only 16 days before the ICANN Board considered the EOI and determined next steps. INTA is also concerned with the staff analysis of the public comments received on the EOI conceptual questions, which were presumably considered by the ICANN Board when it chose to proceed with the publication of a draft EOI Model. That analysis categorized comments into majority and minority viewpoints without describing the basis or method staff used to make that distinction. Such categorization of comments may have led ICANN to an incorrect assessment of the community's view on the EOI process. Further, it appears some important community concerns were not reflected in the staff analysis at all. INTA encourages ICANN to reform these processes so it can begin meeting its obligations to the public under the Affirmation of Commitments.

Public Impact

INTA understands the frustration of those who are interested in acquiring a new gTLD with the perceived delays in the process, and thus the call for an EOI. Such frustration should not, however, shortcut ICANN's thorough consideration and resolution of the remaining unresolved issues with the new gTLD program. Failure to properly address outstanding implementation issues can lead to significant public harm, including jeopardizing the security and stability of the Internet DNS.

INTA also finds it essential for ICANN to evaluate policy considerations and their potential impact, from the perspective of the public, rather than from its own viewpoint. By doing so ICANN can properly assess how its decisions affect the public's interest, rather than its own interests. Such an evaluation should include assessing the costs, resource requirements, and any potential public harm, including to the stability and security of the DNS, that may result from any particular policy process it may adopt.

In terms of the draft EOI Model, while the EOI public announcement page states the draft Model, "is intended to convey the detail necessary for robust public discussion," the draft Model contains little to no assessment of the potential public harm that may result. In fact, the draft EOI Model provides only a brief assessment of various 'risks' – which are analyzed from ICANN's perspective. INTA encourages ICANN to assess the potential public costs and harms that may result from adopting any potential EOI Model, and publish the analysis so the public's interest can be properly taken into account.

Nevertheless, since the draft EOI Model produces significant burdens and resource requirements on the public, INTA recommends that ICANN engage in robust consultation with stakeholders so it can better understand how the proposed draft EOI Model might negatively affect the public's interest.

Purpose of the EOI Model is Unclear

As INTA noted in its previous comments, a mandatory pre-registration process clearly deviates from prior ICANN practice, which avoided such mandatory pre-registration in the 2000 proof of concept new gTLD round and, more recently, in the 2008 IDN ccTLD Fast Track Request for Information (ROI) process. While ICANN's current new gTLD program envisions an expansion of the gTLD space on a much broader scale than previous rounds, ICANN has not clearly indicated the purpose behind introducing the proposed EOI Model or why it feels a mandatory, fee-based EOI process is in the public's interest. INTA encourages ICANN to make this information available to the community as soon as possible.

The EOI Model Cannot Be Used to Effectively Gauge Demand

A significant concern with the mandatory, fee-based draft EOI Model is that current provisions in the new gTLD program are not adequately addressing or mitigating the market forces created from ICANN's removal of virtually all restrictions on entry in the gTLD market. As a result of these market forces, segments of the public who are otherwise not interested in applying for new gTLDs, are being compelled to apply to protect their rights.

Therefore, the draft EOI Model would create “false positives” through defensive EOI filings, and the process would yield applicant demand data that would be far from accurate. As a result, ICANN cannot use the draft EOI Model to effectively gauge applicant demand for new gTLDs. INTA encourages ICANN to consider the top-level domain defensive registration issue as part of the overall economic demand and impact overarching issue, and looks forward to evaluating the economic demand and impact studies that ICANN has committed to publishing as part of the new gTLD program.

Concerns with US\$55,000 Fee

In light of these market forces and other issues, INTA is very concerned that ICANN is considering relying upon a mandatory, fee-based EOI Model as a mechanism to inform the resolution of outstanding implementation issues with its new gTLD program.

As stated above, there are strong concerns that ICANN’s new gTLD program is compelling stakeholders to apply for a new gTLD for purely defensive purposes.

An EOI Process Should Not Bypass—or Pre-Judge—Consideration of Overarching Issues

INTA also remains concerned about launching the EOI process before critical overarching issues, such as trademark protection, the potential for malicious conduct, and internet security and stability are addressed by the community and thorough demand and economic analyses are conducted. INTA believes that once entities submit a deposit and are invested in the EOI process, ICANN may be pressured to launch the new gTLD program prior to resolving these overarching issues or implement ‘quick fix’ resolutions that are not fully and appropriately developed, so as not to prejudice those who have invested in the EOI process. Making the EOI deposit refundable if the program does not launch within a certain period of time would only add to that pressure. While ICANN noted these risks in its Draft EOI Model, INTA feels the potential impact of these pressures would be inevitable and much more significant than ICANN has anticipated.

INTA also is concerned that potential applicants will be forced to invest in the program before sufficient mechanisms for protecting trademarks and preventing consumer fraud are implemented, and before the rules governing their investment are finalized¹. While ICANN has emphasized that certain technical issues, such as vertical integration and IDN 3-character rules, will be resolved through the publication of version 4 of the Draft Applicant Guidebook (“DAG”), the Draft EOI Model includes no requirement that overarching issues, such as trademark protection, are to be adequately addressed prior to the launch of the EOI process. Subsequent amendments to the DAG and/or the failure to resolve overarching issues may significantly change the decision of potential applicants to apply for and operate new gTLDs. Notifying participants that there will be subsequent changes to the DAG will do nothing to assure them that the critical overarching issues will be resolved before the new gTLD program is launched or that resolution of issues will not adversely affect their plans to use a gTLD for which an application has been submitted.

¹ At the same time, we are concerned that profiteers and speculators may be willing to pay \$55,000 for certain strings on the theory that a lucrative market will likely follow.

Although ICANN states in the Draft EOI Model that “certain key provisions that significantly affect an entity’s decision to participate would have to be settled prior to the EOI launch,” it continues to ignore some of the most significant issues that would impact the decision of a brand owner to participate in new gTLD program.

The speed at which the new gTLD process continues to move, while important issues remain unaddressed, continues to be cause for concern. Exacerbating the risks that applicants would be adversely affected post-EOI are the short timelines which remain regarding communication to the general members of the Internet populous, who supposedly would benefit from the gTLD expansion. Even more unnecessary confusion and distraction would stem from the EOI process. INTA reiterates its concern that communication from ICANN, focused on the EOI or otherwise, is not getting to the people it intends to inform. As such, these community members will not be the likely beneficiaries of an EOI process, which will instead favour those regular ICANN participants with a first bite at the apple.

Uncertainty about gTLD Parameters Renders an EOI Process Premature

As expressed earlier, INTA is concerned that brand owners may be forced to disclose their intentions in the new gTLD space without knowing what the full process will require of them. This concern is partially founded on the information EOI applicants would be required to disclose under the draft EOI Model.

Data security raises serious competitive issues. For example, had Microsoft been required to apply for a new gTLD (Bing), by participating in an EOI process, Microsoft would have tipped off its competitors before it was ready to launch the brand. To ignore data security issues would force companies unnecessarily to spend additional funds in order to protect anonymity, business plans and other confidential or sensitive information.

Clearly, there are many additional risks created by introducing an EOI process into the new gTLD program. Until the risks outlined above have been mitigated, the concerns identified by INTA have been addressed, the overarching issues have been resolved, and members of the Internet community have been fully informed of the process so they are in a position to protect their rights and interests in regards to new gTLDs, these risks outweigh any benefits of the draft EOI Model. The draft EOI Model raises unnecessary complexities ripe for dispute. At a minimum, the draft EOI Model already has proven to be a large distraction to the community and to ICANN completing the next version of the DAG in as timely a manner as possible.

Conclusion

As a result of these deficiencies with the current draft EOI Model, and the insufficient level of public consultation that has taken place, ICANN should not adopt the draft EOI Model but engage in meaningful community consultation in order to consider the need, benefit and cost of introducing an EOI process into the new gTLD program.

Thank you for considering our views on these important issues. Should you have any questions regarding our submission, please contact INTA External Relations Manager, Claudio DiGangi at: cdigangi@inta.org

ABOUT INTA

The International Trademark Association (INTA) is a 131-year-old not-for-profit association of over 5,600 member organizations from over 190 countries. One of INTA's key goals is the promotion and protection of trademarks as essential elements of national and international commerce. During the last decade, INTA has served as a leading voice for trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency.