

Demand Media Comments on the “New gTLD program: Aspects of an Expressions of Interest and Pre-Registration Model”

We appreciate the opportunity to comment on ICANN’s paper describing a draft model for Expressions of Interest (“EOI”) and Pre-Registration for new gTLDs. Clearly a good deal of time, thought and effort has been put into this draft model over a relatively short period of time. We recognize there is support for an EOI among the ICANN board, staff and some potential gTLD applicants, and indications seem to point toward ICANN proceeding with a full blown EOI phase in the coming months. While we were negatively disposed to this process initially, the information contained in the brief allayed many fears and at this point we would like to respectfully offer a few constructive ideas/thoughts on the process. If ICANN does decide to move forward with the EOI phase, we request that you take into account our comments and suggestions and keep in mind the following ICANN staff objectives for the EOI:

A successful model would:

- Gauge the level of interest in the gTLD program
- Determine the likely strings to be requested
- Assist with the resolution of open issues
- Assist in operational readiness planning

The Deposit Should be Substantial and Transferable

For the EOI process to be successful, we agree that an applicant must be required to submit an EOI and substantial deposit in order to participate in the “first round” of new gTLD applications. \$55,000 is a reasonable amount that will allow ICANN to determine the number of “real” gTLD applicants and address Root Scaling and operational readiness issues.

There are some process improvements we would like to propose to ICANN regarding the nature of the deposit and submission:

1. The deposit should be accepted in the form of a Letter of Credit or cash. In essence, a Letter of Credit is the same as cash for ICANN’s EOI purposes. For applicants, it means they will not have to tie up capital in an uncertain process while they patiently await the eventual launch of new gTLDs. Cash deposits should be held in an interest bearing account and interest earned should be applied to the full gTLD application fee or returned to the applicant along with the deposit if full applications for new gTLDs are not accepted. Deposits should not be viewed as a way to offset the costs to ICANN to run a process.
2. The EOI submission and its deposit should be transferable to another party. Obviously, corporate and individual circumstances can change during the possible 18 month waiting period between EOI closing, full applications and the launch of new gTLDs. For example, a company could be sold, a subsidiary could be created, a bankruptcy could occur, etc. The EOI should not be a hindrance to an entity’s business and by allowing transfers of “slots” ICANN can complete its mission without affecting the ordinary course of business.

EOI Information Should and Can Remain Confidential

If the EOI goes forward then "participant and string information" must remain confidential, as the harm caused by publication will greatly outweigh the benefits, if any. We have not been able to determine the benefits of publicly releasing the information, nor has ICANN communicated how public disclosure meets the primary goals and justifications for the EOI process which are outlined in the four bullet points above. Conversely, we believe disclosure will only cause problems to the process and harm to the applicants, as we demonstrate below. We also believe confidentiality concerns can be addressed by implementing a simple solution that we also propose below.

1. Publishing information prematurely announces business models. The Internet operates at warp speed. Hours and days make a huge difference with respect to product launches. By disclosing the EOI submissions, many companies who have spent years and substantial capital developing new products and intellectual property will either be forced to disclose their hand or forced to wait until the next round, which may be years away, in order to launch their innovative products/services. The gTLD process was not designed to give companies advance notice of their competitors' business models, and publishing EOI information would do just that.

We understand that one argument may be that if potential applicants do not like this rule, they can just wait until Round 2 or 3. If the goal of new gTLDs is to promote competition and allow a greater degree of innovation and choice, forcing these applicants out goes against the gTLD process itself. Furthermore, it may be simply impractical to wait, as the gTLD they desire may be awarded in Round 1.

2. Publishing information prematurely begins the gTLD objection and dispute resolution process. By disclosing EOI information before the actual application process it will allow competitors to tailor alliances to compete with EOI applicants in a manner that they did not anticipate. We understand that ICANN does not intend for this process to begin with EOI submissions, but alliances between applicants and other types of maneuvering will begin as soon as this information is published. The DAG currently contemplates ample objection windows and time for companies to cooperate. The publication of strings will begin this mechanism before the DAG is completed and applicants even fully know what their options are relating to contentious strings.
3. Publishing information will lead to calls for "beauty contests". Finally, the public revealing of strings and their intended use prior to the finalization of the DAG will lead to renewed calls for string selection based on the "worthiness" of the string, applicant or their business models --- the "categories" approach. We believe that ICANN has learned from past gTLD rounds that "beauty contests" are not the best way to judge string worthiness, predict success or introduce competition. Who would have thought that "COM" would be the most popular extension, bigger than "NET" or other related terms? We need to let the markets and consumers decide what TLD extensions and business innovations they want to support and not arbitrarily choose them in advance.

We would like to propose a solution that will address the two main concerns about keeping the information private and confidential. The first being that ICANN cannot hold "classified" information and the second that there is an issue of "possession of insider information" by ICANN

staff if the information is not made public. We believe ICANN is fully capable of maintaining the confidentiality of information, but in the event concerns remain, we propose a simple solution. ICANN should use a third party auditing firm to store this information and provide specific information to ICANN that is necessary to facilitate informed decisions that are the goals of the EOI process. Anything beyond that will be kept confidential by the 3rd party auditing firm.

It is worth noting that there is precedent within ICANN for maintaining confidentiality of information. We understand the IDN-ccTLD applications have not been published, ccTLD re-delegation requests are not published until approved by the Board, and disclosure of the monthly registry reports are delayed for three months to protect market sensitive information.

Overarching Issues Must be Concurrently Resolved

As ICANN acknowledges many times throughout the document, "many issues (such as vertical integration and 3-character IDN requirements)" must be resolved before the EOI process can proceed. Thus, ICANN must, concurrent with the EOI development process, reach finality on unresolved DAG and overarching gTLD issues such as rights protection mechanisms, community scoring and vertical integration. Resolution of vertical integration is particularly critical because certain potential EOI applicants may be severely impacted if no registry-registrar integration is allowed. These entities will need to know these rules before risking significant sums in non-refundable EOI application fees.

Deposits Should be Kept No Longer than 6 Months

ICANN talks about a refund to EOI applicants if new gTLDs do not launch within "a defined time period (e.g., 18 months from the closing date of the EOI submission period.)" In our view, any time period longer than six months is unreasonable in light of ICANN's clearly stated goal of releasing the 4th version of the DAG and resolving many remaining operational and applicant issues *before* proceeding with EOI. Given the small number of issues to be resolved with EOI data, the final gTLD application should follow a few months after accepting EOI applications.

Keeping Information Private is Consistent with The Affirmation of Commitments

The goals of ICANN and the Affirmation of Commitments are to operate in an open and transparent manner. Let's be very careful about connecting the dots to conclude that this means EOI strings must be made public. If that is the case then all ICANN information needs to be made public including full transcripts of Board of Directors meetings and phone calls, notes from all ICANN staff meetings with "outside" interests, every ICANN employee salary, expense reports for each employee along with what they ordered for lunch. Of course these requests are ridiculous, but they are meant to show that operating in an open and transparent manner consistent with the Affirmation of Commitments does not mean releasing all confidential information.

Sincerely,

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