



January 27, 2010

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 “Aspects of an Expressions of Interest and Pre-Registration Model”

Dear Messrs. Dengate Thrush and Beckstrom:

Microsoft Corporation (“Microsoft”) welcomes this opportunity to provide its comments to ICANN on “Aspects of an Expressions of Interest and Pre-Registration Model” (“EOI Model”).

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 the Expression of Interest (“EOI”) process and Working Group Report, and is well positioned to provide its comments on the EOI Model.

Executive Summary. Microsoft has significant concerns about the process deficiencies – specifically, those relating to consideration of public comment – associated with the EOI Model and suggests that the Board of Directors not take a decision at its February 4 meeting. Substantively, adoption of the EOI Model cannot achieve the stated “objective of . . . obtain[ing] reliable data for use in connection with issues such as root scaling or operational

Mr. Peter Dengate Thrush
Mr. Rod Beckstrom
January 27, 2010
Page 2

readiness.” To the contrary, it will create a process that generates “false positives”, effectively forces entities to participate “defensively”, and will quite likely result in a highly speculative secondary market.

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

Significant Process Concerns Exist and No February 4 Vote Should Be Taken. Microsoft reiterates the process concern highlighted in its earlier comments on the EOI process and Working Group report. The Board of Directors’ actions create the perception that the Board deems public comment irrelevant. Not only did the Board of Directors discuss the EOI process and Working Group report while the public comment period was ongoing, it also decided to instruct staff to proceed with the EOI Model before the initial public comment period was even closed. Moreover, the Board has resolved that “ICANN staff shall present a proposed EOI process model *for approval* at the ICANN Board's February [4] 2010 meeting.” (emphasis added) The Board’s February 4 meeting occurs five business days after the public comment period on the EOI Model ends. The possibility that, in that short window of time, ICANN staff will have read and incorporated all public comment into the EOI Model, and will have presented a public comment summary and revised EOI Model to the Board with sufficient time for full consideration and discussion by the Board is slim at best. Further, the Board has already made clear that it intends to approve “an” EOI Model at its February 4 meeting, which suggests that public comment in opposition to any EOI Model will effectively be disregarded. We urge the Board of Directors to allow itself sufficient time to review and consider all of the public comments before making a decision to proceed with an EOI process and to not vote on an EOI Model at its February 4 meeting.

An EOI Process Should Not Circumvent ICANN’S Commitment to Adequately Address the Outstanding Overarching Issues. ICANN’s acceptance of deposits for new gTLDs, which is what the \$55,000 fee is, will generate tremendous pressure on ICANN to open the first application round as soon as possible. This pressure will focus on those aspects of the DAG that are not yet final, several of which correspond to overarching issues. ICANN must not allow the existence of the EOI Process and EOI Applicants to circumvent ICANN’s commitment to adequately address the outstanding overarching issues. As discussed further below, a mandatory EOI Process will undoubtedly generate numerous “false positives” in the form of entities that participate in the EOI Process solely to preserve their ability to participate in the first new gTLD round even if they have not yet made a final decision to apply for a new gTLD. It would be inappropriate and incorrect for ICANN to extrapolate from this volume of participation that these entities believe that the overarching issues have been adequately addressed. In particular, if numerous trademark owners participate in the EOI for .brand TLDs, ICANN should not infer that these entities all believe that ICANN has adequately addressed the overarching issue of trademark protection and that no further work on that issue is necessary.

Mr. Peter Dengate Thrush
Mr. Rod Beckstrom
January 27, 2010
Page 3

Similarly, any reliance on such “defensive” applications as a true indication of demand for new gTLDs is misplaced.

An EOI Process Should Not be Mandatory. Participation in an EOI process should not be a mandatory prerequisite for participation in the first application round for new gTLDs. Because the overarching issues of trademark protection and protection against malicious conduct remain outstanding, many entities that are potential new gTLD applicants and are aware of the planned introduction of new gTLDs have not yet made a decision about whether to apply.¹ A mandatory EOI process will likely result in many of those entities filing “defensive” EOI applications to preserve the ability to do so once a final decision has been made. Those “defensive” EOI applications will have the effect of “false positives”, which will preclude ICANN from achieving its stated “objective of . . . obtain[ing] reliable data for use in connection with issues such as root scaling or operational readiness.” As for those entities that are not now aware of the planned introduction of new gTLDs, it seems highly unlikely that ICANN’s planned 4-month communications campaign about the EOI process could achieve awareness that ICANN has thus far failed to achieve in the 19 months since the Board of Directors adopted in June 2008 the GNSO new gTLD policy recommendations. Accordingly, a mandatory EOI process will likely exclude entities in this latter category and, as a result, could reinforce the perception by many in the business community that ICANN is an “insider’s game.”

Instead, any EOI process should be voluntary. If ICANN believes that a strictly voluntary process will not “lend greater certainty to the process and reliability to the information received,” it should incentivize voluntary participation. For example, ICANN could offer EOI process applicants the opportunity to have their first round new gTLD application for that string processed before applications received from those entities that did not participate in the EOI process. ICANN could create a parallel disincentive.

EOI-derived New gTLD Application Slots Should Not be Transferable Except to Wholly-owned Subsidiaries. The possibility of an active secondary mark in new gTLDs has been a long-standing concern. See Microsoft’s comments on DAG1 (p. 6),² DAG2 (p. 5),³ and DAG3 (p. 11).⁴ Microsoft has repeatedly recommended that ICANN take action to

¹ To be clear, Microsoft believes that the overarching issues of root scaling and economic demand for new gTLDs are fundamental issues that must be adequately addressed before ICANN introduces an unlimited new of new gTLDs. We have highlighted the issues of trademark protection and prevention of malicious conduct as these two issues are more likely to affect an entity’s decision of whether to apply for a new gTLD while the other two issues go to whether new gTLDs should be introduced at all and, if so, on what scale.

² <http://forum.icann.org/lists/gtld-guide/msg00156.html>

³ <http://forum.icann.org/lists/2gtld-guide/msg00124.html>

⁴ <http://forum.icann.org/lists/3gtld-guide/msg00144.html>

Mr. Peter Dengate Thrush
Mr. Rod Beckstrom
January 27, 2010
Page 4

minimize the likelihood that such a market will come to fruition. Permitting EOI-derived new gTLD application slots to be transferred will encourage an environment highly conducive to a secondary market. That market, in turn, will result in a significant number of speculative EOI applications. Such speculation is directly contrary to and will undermine ICANN's stated objective of "obtain[ing] reliable data for use in connection with issues such as root scaling or operational readiness." Accordingly, ICANN should not permit transfer of EOI-derived new gTLD application slots. If, however, ICANN insists that EOI-derived new gTLD application slots be transferable, it should limit transfers to wholly owned subsidiaries of EOI applicants.

EOI Participant and String Information Should Be Submitted to a Third-Party Auditing Firm and Remain Confidential. Publishing the EOI participant and string information is irrelevant to ICANN's stated "objective of . . . obtain[ing] reliable data for use in connection with issues such as root scaling or operational readiness." To the contrary, ICANN does not need to know the identity of an EOI participant or the string it intends to apply for in order to assess root scaling impacts and ensure that operational readiness has been achieved. Aggregate data about the number of EOI participants and the number of strings applied for is sufficient to achieve these objectives.

Moreover, publishing the identity of EOI participants and the strings they have applied for will adversely impact those applicants that intend to apply for a certain gTLD in connection with a specific, confidential business model. This is especially true given the significant time lag expected between the close of any EOI application window and the date when ICANN publishes the string and applicant information for gTLDs applied for in the first round. If ICANN truly believes that new gTLDs will introduce innovation, forcing the disclosure of strings tied to confidential business models seems quite unlikely to advance that goal.

We recognize ICANN's concern about retaining confidential business information. Accordingly, ICANN should retain a third-party auditing firm to which EOI participants submit their EOIs. To prevent "insider trading" activity, the auditing firm, its affiliates, and related companies must be prohibited from (i) providing other services to ICANN in connection with the new gTLD launch such as acting as an Initial Evaluation services or Trademark Clearinghouse Service Provider; (ii) being an EOI applicant or first round new gTLD applicant; and (iii) providing services to new gTLD applicants in connection with the preparation, submission, and prosecution of an EOI or new gTLD application or the operation of a new gTLD registry.

The auditing firm would then release aggregate data to ICANN for publication. For example, the auditing firm could report that:

- 100 entities participated in the EOI process.
- 97 different strings, 20 of which are IDNs, were applied for in the EOI process.

Mr. Peter Dengate Thrush
Mr. Rod Beckstrom
January 27, 2010
Page 5

- The EOI process disclosed 3 contention sets. Contention set A consisted of 5 EOI applicants, contention set B consisted of 3 EOI applicants, and contention set C consisted of 2 EOI applicants.

This type of aggregation should provide ICANN with all of the information it claims to need. If ICANN decided to make the EOI process mandatory for participation in the first new gTLD round or to provide incentives for voluntary participation, the auditing firm could, at the opening of the round, provide ICANN with the specific data submitted by EOI participants so that ICANN could match the two sets of applicants and strings.

Refundability. If ICANN makes any material changes to the DAG after the EOI process closes, ICANN should refund the EOI fee to any EOI participant that requests a refund.

* * *

Microsoft urges the Board of Directors to reject an EOI process as proposed. As set forth in the EOI Model, the process cannot achieve the stated “objective of . . . obtain[ing] reliable data for use in connection with issues such as root scaling or operational readiness.” To the contrary, the EOI Model will create a process that generates “false positives”, effectively forces entities to participate “defensively”, and will quite likely result in a highly speculative secondary market.


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) or Peter Becker (peterbe@microsoft.com).

Respectfully submitted,

Microsoft Corporation



Russell Pangborn
Associate General Counsel – Trademarks



Peter Becker
Senior Attorney - Trademarks