

Expressions of Interest Working Group Report

Background

We should be taught not to wait for inspiration to start a thing. Action always generates inspiration. Inspiration seldom generates action. – Frank Tibolt

ICANN and its various stakeholder groups have been working for many years on establishing an orderly and predictable method of introducing new generic top-level domains (gTLDs). That work has progressed through a rigorous policy development process, numerous associated working groups and fact-finding exercises.

As the call from some for new top-level domains grows louder and more impatient, several important areas of concern remain unresolved around implementation. In addition, ICANN is having to plan and allocate resources for a number of applications that has been estimated at "as few as 10, and as many as 10,000." As long as the concerns and the numbers remain theoretical, they are difficult to solve. When reduced to a practical level, however, the problems may not be intractable at all. The proposed Expressions of Interest Process (EOIP) is a simple mechanism that will make immediately apparent the implementation parameters of the new gTLD process. The EOIP will provide ICANN, new TLD applicants, and concerned members of the ICANN community a rich set of data that will answer many of the questions that have been holding back the process.

The de-coupling of the "introduction" of gTLDs from the substantive application review process and subsequent "delegation" of strings is a concept that derives in part from the *GAC Principles for the Introduction of New gTLDs*, promulgated by ICANN's Government Advisory Committee in March 2007. Specifically, sections 2.1 – 2.4 are addressed to "introduction," while 2.5 – 2.9 are addressed to "delegation."

ICANN Process

During the Seoul, Korea meeting several members of different parts of the ICANN community met to put forward a plan for Expressions of Interest as a mechanism to find a way forward to kick-start the new gTLD application process. This group, known as the EOI Working Group (the "WG"), draws from different parts of the ICANN stakeholder community. The inclusion of a broader slate of members consisting of potential applicants, registrars, registries, intellectual property practitioners, the ALAC, the NCUC, the business constituency, the ISP constituency, the ccNSO and others is deliberate. An effort was made to include members from most functional interest groups and to recognize the different skills residing within ICANN. An effort was also made to find areas of common ground that enables progress and

minimizes delay. The participants have acted in a personal capacity and do not represent any particular stakeholder group or constituency.

The WG proposes to draft the plan for Expressions of Interest and desires to serve as “points of contact” to their communities in order to bring ideas and concerns to the WG for presentation to the Board for its December 2009 meeting. The full resolution is found below and will drive the formation of the group, its working methods and its expected outputs.

Resolved (2009.10.30__), the ICANN Board directs staff to study the potential impact of a call for formal "expressions of interest," and provide a plan for Board consideration at ICANN's next Board meeting, in December 2009. The plan should include possible options and a risk analysis relating to the proposed action.

Approval Timeline

In order for the Board to properly consider a plan at their December [9] 2009 meeting, Board members will need to be provided with the plan at least ten days prior, or [November 27]. The WG will therefore need to present its plan to staff no later than [November 17] in order to give staff time to prepare it for Board consideration.

Key dates

1. Kick off conference call on 9 November 2009 with first draft of EOI circulated
2. Second conference call 13 November 2009 to finalize draft of paper for submission to staff
3. Submission of the draft paper 17 November 2009 to ICANN
4. Approval from Board at its December 2009 meeting for the development of a formal plan with a start date of 12 March 2009 (beginning of ICANN Nairobi meeting).

Expression of Interest Procedure

1. Procedure - Those who wish to apply for a new TLD in the first round will make a submission to ICANN during a window specified by ICANN:
 - a. Submission to ICANN. Potential applicants should send to ICANN during the EOI windows the following:
 - i. Name of applying entity
 - ii. Contact information
 - iii. String(s) of the TLD to be applied for
 - iv. \$55,000 USD (the “Fee”) for each string, which would be applied to the eventual full application fee. The WG reached rough consensus on the amount of the Fee after taking the following considerations into account:
 1. The Fee is sufficiently large to discourage gaming.
 2. The Fee is sufficiently small not to constitute an undue burden on less well-funded potential applicants

3. The Fee is consistent with the fee in the current Draft Applicant Guidebook, which allows for a refund of \$130,000 of the application fee of \$185,000 (a \$55,000 difference), thereby making the fee identical to the cost of applying and subsequently withdrawing.
 4. The Fee is in the range of what most participants thought was reasonable.
 5. The Fee will allow companies and organizations to understand any competitive or infringement threat (“risk clarity”) at a substantially lower cost than the cost of completing the full application, which would require substantial internal resources.
 6. In arguing for a higher Fee, it was noted that there is a great difference between paying a higher fee and getting a partial refund (as in the application process outlined in the DAG) as opposed to simply paying a lower initial fee (as envisioned by this EOI process).
- v. A statement acknowledging that the Fee would be placed in escrow, that the submitter’s entire fee was at risk, and that the Fee would be released back to them at ICANN’s sole discretion *except* if ICANN decides not to go ahead with the new gTLD process by [December 31, 2010], in which case the Fee would be refunded in full. The WG reached rough consensus on the escrow and refund policy after taking the following considerations into account:
1. The Fee must be non-refundable or the system will be easily gamed and the information derived from the EOI process will be an unreliable guide to the scope of the eventual application process
 2. It would be unfair not to return the Fee if the new gTLD process is halted or delayed unduly.
- vi. A statement releasing ICANN from liability in regard to the Expression of Interest process.
2. Other Requirements
- a. Mandatory Participation: Only those who participate in the EOI process will be allowed to file a new gTLD application in the initial round when the program officially launches, and they will be allowed to apply only for the string(s) named in their communication. The WG achieved near-unanimous consensus on this requirement after taking the following considerations into account:
 - i. If applications are allowed from those who did not participate in the EOI process, the system will be easily gamed and the information derived from the EOI process will be an unreliable guide to the scope of the eventual application process.
 - ii. Potential submitters would consider the process unreliable and would be discouraged from participating in the EOI process.
 - b. Open Publication. Once received, ICANN should publish information about the Expressions of Interest. The published information should include the

identity of the submitter and the string applied for, along with any other information that the ICANN staff deems relevant or useful. The WG reached unanimous consensus on the publication requirement after taking the following considerations into account:

- i. It is in the interest of both the submitters and the wider community to disclose the identities of the submitters and the strings they are submitting for:
 - ii. Submitters will, in the event that more than one submission is made for the exact match of their submitted string, understand the competitive landscape and be able to contact their competitors and to ascertain if they can reach an arrangement in lieu of an auction
 - iii. Submitters will, in the event that theirs is the only submission for their string, be able to concentrate on other aspects of their business plan
 - iv. The wider community will see how many strings are being applied for and use this knowledge to inform their consideration of root scaling, trademark protections, public morality, malicious behavior concerns, and other aspects of the new gTLD process.
 - v. The wider community, including governments and brand owners, will gain insight into what applications, if any, should be objected to, and will have time to adequately prepare such objections.
3. Communication Period. The WG agreed that ICANN should take care that the EOI process is not, nor should it be perceived as, an opportunity for ICANN insiders only. The EOI process should be therefore be widely and thoroughly advertised in order to insure fairness and diversity. The WG also noted that while determining the exact dates and deadlines lay outside of its remit and that ICANN staff, which has to consider a number of different issues in determining a timeline, should make a final determination, the WG should provide suggestions for ICANN staff to consider in establishing a timeline.
- a. Referring back to the four-month communication period recommended by the GNSO and ICANN staff,¹ the WG suggested that having a four-month communication period for the EOI would provide entirely sufficient notice to ensure fairness and diversity, for the following reasons:
 - i. A four-month communication period has already been adopted through the PDP on new gTLDs undertaken by the GNSO, and thus represents the consensus of a wide variety of stakeholders within the ICANN community.
 - ii. A longer communications period would be unlikely to be effective in alerting potential applicants.
 - iii. A longer communications period would unduly delay the process, thus undermining one of the major benefits of the EOI period.
 - iv. A significant number of WG members felt that the communications period could be much shorter while preserving fairness and diversity, for the following reasons:

¹ See, for instance, <http://syd.icann.org/files/meetings/sydney2009/transcript-gnsso-working-group-20jun09-en.txt>, comments by Chuck Gomes and Kurt Pritz.

1. The new gTLD process had already attracted newcomers who were previously unaware of ICANN, showing that the process was not limited to ICANN insiders.
 2. The new gTLD process has been discussed on numerous occasions in numerous widely-read publications, both print and online, in many languages, in general-interest, financial, and technical publications, and is well-known to most if not all potential applicants.
 3. ICANN has already taken out advertisements announcing the new gTLD program, beginning at least as early as January 2, 2009 with a large advertisement in the *Economist* magazine, and that in effect the communications period has already begun and has been ongoing for nearly a year.
 4. There is no strong evidence to show that an ICANN communications program would attract many more applicants, while there is ample evidence that delay would have already harmed existing potential applicants, and that further delay would harm them more.
- b. A variation suggested that the submission window should be concurrent with the communications period, with the proviso that no information about the EOI submission processed be made public prior to the closing of the windows. As an example, if the EOI window opened on Jan. 1, both the communications period and the window would close on May 1, at which point the submissions would be made public. Although this suggestion did not gain strong consensus, there were no arguments against it. Participants in favor of this variation gave the following reasons for their support:
- i. ICANN would receive partial but valuable information about eventual applicants earlier in the process.
 - ii. It would allow participants to put in their EOI without having to wait for the communications period to close, allowing them to move on with other aspects of their business plan.
 - iii. Some participants would publicize that they had made their submissions, which would reinforce and magnify the communications plan being carried out by ICANN because the press would consider actual submissions to be more newsworthy by the press than a plan to accept them.
4. EOI Submission Window. As it did in considering the communications period for the EOI process, the WG here also noted that while determining the exact dates and deadlines lay outside of its remit, the WG should provide suggestions for ICANN staff to consider in establishing a timeline.
- a. If a sufficient communications period is implemented, the EOI submission window does not need to be long because the submission itself is very simple and will not require extensive document preparation.
5. Special Consideration for Year 2000 applicants. The WG agreed that as ICANN has provided special consideration, in respect to fees and other matters, to those who had applied in the 2000 new gTLD application round, such consideration should be

extended to the EOI process. The WG did not consider the specifics of the consideration.

Other considerations

The WG provisionally rejected, or did not achieve rough consensus, on some other suggestions which may nonetheless be worthy of further consideration.

1. A suggestion was made that submitters should be able to check a box to identify themselves as either a community or open gTLD. Consensus was not achieved after taking the following considerations into account:
 - a. The designation as community or open would needlessly complicate the EOI procedure
 - b. The rules for judging whether an application is a community application or not are not yet complete
2. It was noted that the EOI procedure may be problematic for potential applications that may be disqualified under the current DAG, but may be allowed in the final DAG, as for example two-character IDN gTLDs. In such a case the EOI submitter might (unfairly) forfeit its Fee. Consensus was not achieved after taking the following considerations into account:
 - a. There are any number of reasons for disqualifying an application, and all EOI submissions entail a business risk
 - b. The penalty would be no different if an application did not pass the Initial Evaluation under the new gTLD application process outlined in the DAG.
 - c. In the case of two-character IDN applications specifically, ICANN could decide to release the Fee amount from escrow back to the submitter, and may even be likely to do so.
 - d. A suggestion was made that a special exception should be made for the case of one-letter and two-letter IDNs, on the grounds that there is a general feeling in ICANN that this is a substantive issue, even to the extent that a working group has been formed to study it. The exception could take the form of a guaranteed refund if one- and/or two-letter IDNs are found not to be valid forms for new gTLDs.
3. It was suggested that instead of “Expressions of Interest,” the EOI Process should be considered as “Stage One” of the full application. Concern was expressed that if the process were not officially made part of the application, submitters would be in danger of being subjected to a non-objective “filtering” process by powerful interests, designed to disqualify some applications even prior to being allowed the proceed to the full application procedure. Consensus was not achieved after taking the following considerations into account:
 - a. There was no indication that powerful interests would not be able to achieve the same filtering even after the full application procedure began, particularly through the Independent Objector process.
 - b. Until the other issues are sorted out, ICANN cannot commit to a new gTLD application round. Calling this “Stage One” would be an implicit commitment and would not be acceptable to ICANN.

4. A suggestion was made that in order to be as fair as possible to the wider universe of potential applicants, a second EOI submission window be opened, perhaps a short time ([one-month]) after the first submission window had been closed and the submissions made public. Overall, the WG did not warm to this suggestion, and several members very strongly objected to the notion of a second window as being unfair to both first-window applicants and to Year 2000 applicants. In general, it was felt that a second submission window would be workable if and only if the second window was restricted to strings that were not submitted during the first window – otherwise there would be no incentive to submit during the first window. Furthermore, in an eventual contention set, first-window submissions and Year 2000 applications should take priority over second-window submissions.

Answers to Questions Posed by ICANN staff

After commencing its activities, the WG learned that ICANN posted an Expressions of Interest comment area on the ICANN website, in which it posed a series of questions designed to gather community input about the Expressions of Interest process.

The EOI WG, in its plan, has answered all the questions (and more) posed by the ICANN comment request, but did not do so in the form of answers to the questions. Therefore, although the EOI WG did not consider the questions explicitly, the sense of the EOI Working Group is given here in abbreviated form order to assist ICANN staff and in order to be responsive the questions. ICANN is invited and encouraged to review our entire submission for more nuanced considerations of these questions.

1. *How do we ensure that participation in the EOI accurately represents the level of interest?*

The best way to ensure that participation in the EOI accurately represents the level of interest is threefold:

- (1) Widely publicize the EOI;
- (2) Ensure that participation in the eventual application round is limited to those who participate in the EOI; and
- (3) Ensure that the fee for participation in the EOI is sufficiently large to discourage gaming of the process.

2. *Should only those who participate in the EOI be eligible to participate in the first round when the program officially launches?*

Yes. For the EOI process to be credible, it must be mandatory. If a potential applicant could submit an application without first participating in the EOI process, it would gain an advantage over those who participate. In such a case, participation would be negligible and there would be minimal benefits for either ICANN or participants.

3. *Should a deposit be required for participation in the EOI?*

Yes, otherwise the process would be subject to bogus and illegitimate entries and the benefits of the process – actionable information for ICANN and certainty of process for applicants – would be negated.

4. *If there is a fee, under what circumstances should there be refund?*

If ICANN does not proceed with the new gTLD application process within a reasonable amount of time, EOI participants should be given a choice of either receiving a full refund (thereby losing their ability to apply), or to leave their fee with ICANN and preserve their right to apply when the new gTLD application process starts. There may be other special cases where refunds are disbursed, for instance if a potential applicant submits an EOI for a one- or two-character IDN name that ICANN determines does not qualify as a gTLD.

5. *What information should be collected from EOI participants?*

Very little information is required: contact information, the string (or strings, if there is more than one) to be applied for, and the fee for each string.

- 5.1 *What subset of applicant questions found in the Applicant Guidebook at <http://www.icann.org/en/topics/new-gtlds/draft-evaluation-criteria-clean-04oct09-en.pdf> should be answered?*

The following questions from the Applicant Guidebook should be answered:

- (1) Name of applicant
- (2) Address of applicant
- (3) Phone Number of applicant
- (4) Fax Number of applicant
- (5) Email address of applicant
- (6) Contact information for primary contact of applicant
- (12) Confirmation information that the EOI fee has been paid for each string for which an EOI is being submitted.
- (13) String to be applied for (for the EOI, more than one string may be specified)
- (14 a-e) For IDNs, all IDN string information

- 5.2 *Including applied-for strings?*

Yes: without knowing the string(s) to be applied for, ICANN would not have nearly as much information. In particular, ICANN would not be able to plan for contention sets or public morality and order issues. Nor would it know the total number of TLDs to be delegated, because it would not be able to see which submissions were duplicates. Finally, without knowing which strings were being applied for, potential applicants would not be able to make arrangements with contending applicants.

- *5.3 Should information be made public?*

It is the unanimous opinion of the EOI Working Group that at least the string name and the applicant name for each EOI should be made public (questions 1 and 13 in 5.1 above, as well as item 14 for IDN applications).

In keeping with the confidentiality guidelines set forth in Version 3 of the DAG, however, submitters may request to keep confidential all other information.

6. Must the responder commit to go live within a certain time of delegation?

The EOI Working Group made no determination on this point. It did, however, discuss the fact that brands (in particular) may wish to wait until convenient to go live.

7. What are the implications for potential changes to the Applicant Guidebook after the EOI participation period closes?

The major effect to the Guidebook itself is that, armed with the information provided by the EOI process, ICANN will be able to make firmer plans, which will translate into firmer commitments in the Guidebook with regard to timing and costs.

8. What are the potential risks associated with the EOI?

Some in the EOI Working Group identified the danger of out-of-process political interference if certain strings were seen as undesirable. To manage this risk, objections to new gTLD applications should be channeled exclusively through the identified ICANN objection processes.

Some participants noted that it may be difficult for some to justify using the EOI procedure when the DAG itself is not finalized, thereby exposing EOI participants to rule changes that, had they been known earlier, might have dissuaded them from the EOI process or from applying for a new gTLD. Most participants in EOI Working Group felt, however, that they had a good sense of what areas of the DAG might be changed, judged them to be likely to be minor, and were comfortable with the EOI process.

Some in the EOI Working Group expressed concern that the EOI process might actually delay the overall new gTLD application process by bringing to light new issues that the ICANN community would need to address before moving forward with the new gTLD application round. In response, others pointed out that new issues, if sufficiently serious, would need to be addressed regardless of how or when they were identified, and that it would be better to identify them earlier than later.

Overall, the very strong consensus of the EOI Working Group was that while the EOI process carries some risks, they are more than outweighed by its benefits to ICANN, to potential applicants, to the ICANN community, and to the wider public.

Benefits of the EOI Process to ICANN Staff

Once the Expressions of Interest window is closed ICANN staff will know:

- ✓ The number of new strings will tell ICANN the extent (if any) of root-scaling issues
- ✓ The number of new strings will tell ICANN how many evaluators it needs
- ✓ The number of strings in contention will inform ICANN as to the upper limit of the resources required to handle contention
- ✓ A look at the list of strings will give ICANN an idea of what (if any) morality and public order issues it will face
- ✓ The publication of the strings will be very effective in generating interest – and alerting possible objectors – and serve as a valuable ancillary to other communications plans

Benefits of the EOI Process to New TLD Applicants

Once the Expressions of Interest window is closed, prospective applicants will gain the following benefits:

- ✓ If the prospective applicant learns that it is the only entity applying for the string, it may reasonably presume, subject to passing all the tests in the application, and overcoming any objections, that it has an excellent chance of being awarded the TLD. It may decide therefore to undertake, among other things, any of the following activities:
 - Raising money
 - Marketing
 - Taking expressions of interest from prospective registrants
- ✓ If the prospective applicant learns that it is one of several entities applying for the string, it may opt to work out an arrangement with other contenders, or to drop out.
- ✓ All prospective applicants will informally benefit from “early warning” from potential objectors, who will be likely to contact them if EOI information is made public.

Benefits of the EOI Process to Other Parties

Other benefits accrue as well:

- ✓ Trademark holders will easily be able to decide which strings might infringe on their brands, and plan accordingly
- ✓ Governments and the GAC will be able to see which names infringe on the rights of governments, and plan accordingly
- ✓ The GAC will be able to see which strings might be a threat to public order or morality, and act accordingly

EOI Working Group Participants

Given the short time frame for the work to be completed, a core group of points of contact will be responsible for the work. The slate of participants is indicative of the WG's interest in providing advice to the ICANN staff and Board that has received input from a wide cross-section of the ICANN community. In establishing the points of contact slate, the Working Group looked for well-respected members of a wide range of constituencies from diverse geographical regions.

In addition to the Working Group members listed below, several interested parties participated on conference calls and corresponded using the Working Group email list. The archives of the list can be found at <http://lists.pra.im/pipermail/eoi-wg/>.

Participants are "points of contact" acting in a personal capacity only, and not in the capacity of a representative of their ICANN stakeholder group or constituency.

Name	Company/Association	WG Position
Alexander Schwertner	EPAG	Participant
Antony Van Couvering	Minds + Machines	Co-ordinator / Participant
Bertrand de la Chapelle	Gov't of France	Participant
Bolei Zhan or James Seng	Zodiac Corp.	Participant
Johannes Lenz-Hawliczek	Dot Hotel	Participant
Jothan Frakes	Minds + Machines	Co-ordinator / Participant
Liz Williams	Core	Participant
Nick Wood	Com Laude	Participant
Roger Castillo	NIC Mexico	Participant
Patrick Van de Walle		Participant
Paul McGrady	Greenberg-Traurig	Participant
Stephane van Gelder	Indom	Participant
Tim Ruiz	GoDaddy	Participant
Tony Harris	LACNIC	Participant

Outputs

The output of the Working Group is this report.