

# Expressions of Interest Working Group – Draft 2 (Nov. 13, 2009)

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## Background

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 for new top-level domains grows louder and more impatient, several important areas of concern remain unresolved around the implementation of the agreed policies. 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 their "delegation" 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"), represents different parts of the ICANN stakeholder community. The composition of a broader slate of points of contact for potential applicants, registrars, registries, intellectual property interests, the ALAC, the NCUC, the business constituency, the ISP constituency, the ccNSO and others is deliberate. An effort was made to include 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 are expected to act in a personal capacity and are not expected to represent any particular stakeholder group or constituency.

The WG proposes to draft the plan for Expressions of Interest and 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.*

## 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 14] 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 staff
4. Staff submits proposal for public comment as appropriate
5. Approval from Board on [9 December 2009] for the development of a formal plan with a start date of 12 March 2009 (beginning of ICANN Nairobi meeting).

## Expression of Interest Procedure

Those who wish to apply for a new TLD in the first round will, during a [month-long] window, send to ICANN the following for each TLD to be applied for:

1. Name of applying entity
2. Contact information
3. String(s) of the TLD to be applied for
4. [\$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:
  - a. The Fee is sufficiently large to discourage gaming.
  - b. The Fee is sufficiently small not to constitute an undue burden on less well-funded potential applicants
  - c. 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.
  - d. The Fee is in the range of what most participants thought was reasonable.

- e. 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.
  - f. 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).
5. 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:
- a. 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
  - b. It would be unfair not to return the Fee if the new gTLD process is halted or delayed unduly.
6. A statement releasing ICANN from liability in regard to the Expression of Interest or any eventual application for a new TLD.

Furthermore, only those who follow this process will be allowed to complete the application, and they will be allowed to apply only for the string(s) named in their communication. The WG achieved rough consensus on the this requirement after taking the following considerations into account:

1. 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.
2. Potential submitters would consider the process unreliable and would be discouraged from participating in the EOI process.

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 rough consensus on the publication requirement after taking the following considerations into account:

1. 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:
  - a. 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
  - b. 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

- c. The wider community will see how many strings are being applied for and use this knowledge to inform their consideration of root scaling, trademark infringement, public morality, malicious behavior concerns, and other aspects of the new gTLD process.
- d. The wider community will gain insight into what applications, if any, should be objected to.

The WG agreed that ICANN should disseminate information about the EOI Process widely in order to insure fairness and diversity, but reached rough consensus that the timing, duration, and advertisement of the EOI Process lay outside the remit of the WG and should be left to ICANN staff's determination.

## 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 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.
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 to 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.

## 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.

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.

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

## Outputs

The output of the Working Group will be a consensus implementation report which addresses each of the points in the Board Resolution with a timeframe and risk analysis.