

## Comments of Coalition for Online Accountability (I)

I am counsel to the Coalition for Online Accountability (COA), and submit this comment on behalf of COA. It is the first of two comments that COA intends to submit in response to the notice at <http://www.icann.org/en/public-comment/#eoi-new-gtlds>.

Having attended the Seoul ICANN meeting on behalf of COA, I first learned of the idea of an “expressions of interest” phase of the new gTLD process on the morning of October 29, in Seoul, when Jothan Frakes and others raised it in the ICANN public forum. In response, I queued at the microphone and said the following:

“We welcome the initiative that Jothan talked about. And we're eager to find out if there is a viable way of getting the application process started without opening a formal application window. And I think that could be a useful approach. So we're eager to find out more about that and to participate in those discussions.”

On October 30, the Board adopted a resolution directing the staff to “provide a plan [regarding expressions of interest] 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.” That Board meeting is scheduled for December 9.

On November 11, ICANN opened a public comment forum on “Expressions of Interest in new gTLDs.” The closing date was listed as December 11. However, in the text of the notice the following was stated:

“The public comment forum will be open until December 11, 2009 *however*, community members that wish to have their input considered by the Board during its December meeting, should submit comments no later than November 27, 2009.”

Thus, it appears from this timetable that any comments received more than 16 days after the public comment period opened will not be considered by the ICANN Board before it takes up the staff-generated plan (which will not, apparently, be released to the public) on the novel and complex topic of whether to accelerate the entire new gTLD process by soliciting and receiving formal “expressions of interest” from new gTLD applicants.

ICANN’s public comment process has been the subject of much controversy. This is reflected in the Affirmation of Commitments (AOC) that ICANN signed with the Department of Commerce on September 30, in which ICANN committed to “responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy considerations.” AOC paragraph 7. In the AOC,

ICANN also committed to “maintain and improve robust mechanisms for public input,” and to “continually assessing and improving the processes by which ICANN receives public input.” AOC paragraph 9.1. As one who has submitted comments in dozens of ICANN public comment proceedings over the years, I believe that ICANN is making some progress toward the fulfillment of the commitments made in the AOC. However, the 16-day deadline in the EOI public comment notice certainly looks like a step backward.

It is unfortunate that within weeks after signing the AOC, ICANN has issued a call for public comment, on a complex and novel issue, in a way that strongly implies that comments will not be considered by the Board unless they are received within 16 days from the date of posting of the notice. It is doubly unfortunate that the eleventh day of this sixteen day period (November 22) marks the deadline for five other ICANN public comment periods, notably including comments on version 3 of the Draft Applicant Guidebook for new gTLDs and associated documents, which total many hundreds of pages. I could add that it is triply unfortunate that the November 27 date coincides with a holiday period in the United States, and that three other very significant ICANN public comment periods expire either that day (which is a Friday), or on the following weekend – but I think the point is clear.

COA plans to submit comments by the December 11 deadline. It is not in a position to do so by the November 27 “deadline” contained in the public comment notice. Nor do we think that a 16-day deadline for public comments on such a topic is reasonable.

We urge ICANN to issue a clear statement that all comments received by the December 11 deadline will be fully considered, and that the ICANN board will take no action on the “expressions of interest” topic until those comments have been considered. This would help to dispel the confusion that may have been created by the November 27 deadline stated in the public comment notice. It could also help forestall the type of public criticism that ICANN recently received regarding the timetable and process – wholly apart from the substance – of the recommendations of the Implementation Recommendation Team (IRT).

Finally, with respect to the comments I made at the Seoul public forum, I stand by them. COA is eager to participate in discussions about a possible “expressions of interest” plan – but only if those discussions take place in an environment that is transparent, respectful of the time and bandwidth of participants in the discussion, reasonable in terms of its pace, and consistent with the spirit and the letter of the public commitments ICANN has just made in the AOC. That environment does not exist today, but a clear statement from ICANN as outlined above could help to bring it closer.

Respectfully submitted,

Steve Metalitz, counsel to COA

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