

# COALITION FOR ONLINE ACCOUNTABILITY

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## COMMENTS OF COALITION FOR ONLINE ACCOUNTABILITY

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The Coalition for Online Accountability (COA)<sup>1</sup> appreciates this opportunity to comment on ICANN's plan to use a drawing to prioritize the processing of new gTLD applications, as set out in the paper issued October 10 and posted at <http://newgtlds.icann.org/en/applicants/batching/drawing-prioritization-10oct12-en.pdf>. (We will reference this Prioritization Draw Paper as the PD paper.)

### Process for Implementation Changes

COA commends ICANN for making this proposal to adapt the implementation of the new gTLD evaluation process to reflect the realities of the receipt of more than 1900 new gTLD applications. We support this effort even though the proposal would necessarily make significant changes in the Applicant Guidebook, and even though applicants and other parties might have relied upon provisions of the Guidebook which the prioritization draw proposal would change.

The fact that the Guidebook must be changed in the process of implementing ICANN's new gTLD policy is not a flaw or a weakness in ICANN's implementation strategy; to the contrary, it is an essential feature of effective implementation. The Guidebook was drafted based on (more or less informed) speculation about the volume, shape and characteristics of the new gTLD application pool. Now that speculation has been superseded by actual data, ICANN has a duty to adapt the Guidebook to better achieve its policy goals. To treat the Applicant Guidebook as a statement of policy that cannot be changed without invoking the ICANN policy development process would reflect a fundamental misunderstanding about the nature of

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<sup>1</sup> COA consists of eight leading copyright industry companies, trade associations and member organizations of copyright owners. COA and its participants have engaged actively in many aspects of ICANN's work since the inception of the organization, including more than 16 formal submissions regarding the new gTLD program. For further information, see [www.onlineaccountability.net](http://www.onlineaccountability.net).

implementation. The Guidebook is an implementation document, not a policy statement; and changes to it, even significant ones, may be appropriate based on the realities of the environment unveiled in the Big Reveal.

Without the necessity to start any sort of policy development process, ICANN is following the right path by explaining those implementation changes it believes are necessary to the evaluation process as outlined in the Guidebook, and offering the community an opportunity to comment on those proposed changes. It is critical that ICANN take these public comments seriously; that it consider whether the proposal should be modified in response to the comments; and that it fully explain its decision either way. A similar process should apply to all other changes to the Guidebook that would facilitate the achievement of ICANN's stated new gTLD goals.

#### Formal objection deadline

COA has serious concerns about one aspect of the proposal set forth in the PD paper: we strongly oppose the decision to require all formal objections to applications to be filed prior to the release of the initial evaluation results on any applications. We urge that the objection deadline be maintained at 14 days following the completion of initial evaluations; or, alternatively, that a rolling deadline be employed, under which all formal objections against a particular application would be due two weeks after the initial evaluation for that application was released.

Under the current provisions of the Guidebook, the deadline for filing a formal objection to a gTLD application (on grounds such as detrimental impact on a community, infringement of legal rights, or string contention) would not occur until fourteen days after the initial evaluation results for all applications had been disclosed.<sup>2</sup> The reason for this is obvious: potential objectors should not be forced to incur the expense of fully preparing and filing a formal objection unless the application to which they object first passes the hurdle of initial evaluation. If the application is rejected by the evaluators, filing a formal objection would be unnecessary and pointless.

The ICANN proposal stands this common-sense approach on its head. It now plans to set the deadline for filing all formal objections on a date (March 13) that precedes the release of ANY initial evaluation of new gTLD applications, the first of which will not be disclosed until "late March 2013." PD paper at 5. The risk that an objector will incur needless expense to prepare and file an objection against an application that fails initial evaluation was zero under the current Guidebook. If the proposal is adopted, it will be much higher than that, though how

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<sup>2</sup> The PD paper, at page 6, suggests there is some "ambiguity" in the Guidebook, because it also states that the period for filing formal objections "will last for approximately 7 months." There is no such ambiguity; the Guidebook anticipated that a period of about seven months would accommodate or even exceed the time needed to initially evaluate all applications. See charts in Guidebook section 1.1.3. This might well have been the case had there been in the neighborhood of 500 new gTLD applications, as initially predicted. In other words the two Guidebook statements quoted are perfectly consistent.

high depends on the number of objections, the number of applications that fail initial evaluation, and the match between these two sets.

One element of the expenses that the ICANN proposal needlessly requires objectors to incur is known: the non-refundable filing fee that must accompany the objection. ICANN estimated this amount at \$1000-5000 (see Guidebook sec. 1.5.2). In the case of string contention cases submitted to the ICDR, the nonrefundable fee appears to be \$2750 (see Attachment to Module 3 of the Guidebook). It appears to be at least \$2500 under Appendix II of the ICC Rules for Expertise, see [http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icc-rules-for-expertise/#article\\_2\\_1](http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icc-rules-for-expertise/#article_2_1), for objections on limited public interest or community grounds.

However, the unrecoverable costs imposed on objectors by the ICANN proposal is likely to be a significant multiple of the filing fee amount. As a matter of prudent planning and budgeting, under the current system, much of the costs for research, preparation, drafting, and legal review of a formal objection are likely to be deferred until it is known for certain that it will be necessary to file an objection because the offensive application has passed its initial review. Under ICANN's proposal, all these costs must necessarily be incurred, and the entire case in support of the formal objection must be developed and perfected, without knowing whether or not any objection will need to be filed.

The reasons stated in the PD paper for ICANN's about-face on the formal objection deadline are unpersuasive. The paper refers to unspecified "recent publications" by ICANN that purport to state that "the objection period should not be extended [sic] to a time after the end of evaluations (in June or July) in order to provide for certainty for applicants and avoid risks to the dispute resolution process integrity."<sup>3</sup> PD paper at 6. "Certainty for applicants" may be a worthy goal, but absolutely no reason is given why it should trump the concrete interests of potential objectors – which could also include applicants, in the case of string contention objections, and otherwise includes current gTLD operators; rightholders (including but not limited to trademark owners); established community institutions; governments; the At-Large Advisory Committee; the Independent Objector; or any member of the public with standing to bring a limited public interest objection. Furthermore, how much additional "certainty" would be afforded to an applicant whose initial evaluation is completed, say, on March 31, to know on March 13, rather than on April 15, whether there are any formal objections to its application?

As for the second stated reason, the integrity of the dispute resolution process will be far more threatened if numerous formal objections are prematurely filed, and then need to be withdrawn or dismissed, than by maintenance of the status quo under the Guidebook providing a

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<sup>3</sup> The implication of the parenthetical in this quote is that the formal deadline would be extended until two weeks after ALL initial evaluations are completed. While that would be the path most consistent with the current Guidebook, most of the benefits discussed in this submission could also be achieved through a rolling deadline, under which all objections for a particular application would be due two weeks after the initial evaluation for that application was released. The PDP paper indicates that 30 to over 100 initial evaluations results would be released each week from late March through the end of June. PD paper, at 5.

two-week window after the completion of initial evaluations before formal objections are due. ICANN must describe with specificity what “risks” it seeks to avoid by reversing the deadlines, and how requiring the filing of objections that prove pointless will avoid these risks.

The PD paper also states (page 6) that the March 13 deadline “ensures all objections are known before applications evaluation results are published.” This is an accurate statement, but why this is necessary or even desirable is never explained. Is ICANN suggesting that evaluators will take into account the presence or absence of formal objections in conducting their evaluations? That would indeed be a radical departure from the current Guidebook, which now stresses the “distinction” between the evaluation and formal objection processes; states that “the formal objection process was created to allow a full and fair consideration of objections based on certain limited grounds outside ICANN’s evaluation of applications on their merits” (emphasis added); and promises that “comments on matters associated with formal objections will not be considered by panels during Initial Evaluation.” Section 1.1.2.3.

Finally, COA is aware that the decision to set the deadline at March 13 is perceived by some as a Solomonic compromise that will not be revisited.<sup>4</sup> COA earnestly hopes this is not the case. We urge that our analysis of why “split the difference” is not a responsible approach in this case, and our concerns and those of other commenters in this regard, be seriously considered and responded to by ICANN.

Respectfully submitted,

Steve Metalitz, counsel to COA

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<sup>4</sup> See the following comments of the ICANN CEO to the Registry Stakeholder Group on October 16 in Toronto, as transcribed at <http://toronto45.icann.org/meetings/toronto2012/transcript-board-rysg-redline-16oct12-en.pdf>, page 8: >>FADI CHEHADE: The date won't slip. It is March 13th. That's it. And how we picked it, we split the difference. People wanted it in June. People wanted it in January. It is the midpoint. Split the difference. It is that simple. Yes, not everyone is happy but this date works. And if we start messing with that date, it will mess all of our initial evaluations releases, guys. So this date is set. Let's live with it. Let's get the initial evaluations out, and let's get this thing to be working. It is really not more complicated than this.