

**INTA Internet Committee Comments on the
RySG Alternative Proposal for Continuity Operations Instrument
December 1, 2011**

I. Introduction.

The Internet Committee of the International Trademark Association ("INTA") has provided extensive input to ICANN on its new gTLD program, and appreciates this opportunity to comment on the Registry Stakeholder Group's (RySG) proposal for the Establishment of a Continued Operations Fund ("COF") (the "Proposal").

Core value No. 1 of the ICANN bylaws states that preserving and enhancing the operational stability, reliability, security and global interoperability of the Internet should guide ICANN's decisions and actions.¹ To protect registrants, the Applicant Guidebook and Specification 8 of the Base Registry Agreement provide that the applying registry must obtain a Continuing Operations Instrument ("COI") that evidences sufficient financial resources to ensure the continued operation of the critical registry function for a period of time following termination of the registry agreement in the form of either a letter of credit or irrevocable cash escrow deposit.

The RySG Proposal suggests amending the Applicant Guidebook to replace the COI with a risk-pooling Continued Operation Fund (COF). The justification for this revision is contained in an addendum to the Proposal, which states the purpose of the COF is to lower the financial barrier to entry for new generic top-level domain applicants. For the reasons discussed below, we believe the RySG Proposal for a COF is likely to produce a number of unintended, but harmful consequences and should not be incorporated into the new gTLD program.

II. A Continued Operations Fund increases risk by lowering capitalization requirements.

It is of critical importance to fund and ensure that there is an efficient mechanism to protect registrants in the event of a registry failure. However, the RySG's goal of lowering the barrier to entry for new gTLD registry operators by lowering the amount of capital "to be tied up", interjects risks to the stable and reliable operation of the domain name system because the Proposal would attract undercapitalized companies that otherwise could not meet the current COI requirements in the Applicant Guidebook. Accordingly, the Proposal seeks to subsidize certain registry operators instead of allowing the market itself (via letter of credit based upon applicant viability) to determine the level of risk for each applicant.

¹ See ICANN Bylaws, Article I, Section 2, Core Values. <http://www.icann.org/en/general/bylaws.htm#I>

By lowering the capitalization requirements there is a risk that the COF model allows market entrants without appropriate funding levels. Registries that are not capable of properly assessing and calculating their total expenses and risks in connection with the application process will have little flexibility to raise funds at a later stage. The COF therefore may attract undercapitalized companies that are more likely to fail. In other words, by lowering the capitalization requirements, the result will be a higher risk speculation at lower costs.

III. A Continued Operations Fund is unfair because it externalizes the risk of more speculative applications to better-funded applicants with less risky business models.

In addition to the COF attracting applications that are more likely to fail by undercapitalized companies or more speculative registry proposals for which customer demand does not exist, the COF proposal would unfairly externalize that increased risk to other applicants.

The new gTLD application process must be fair and predictable to be appealing to the kinds of stable, long-established organizations that will qualify to acquire a letter of credit. The proposed COF, however, favors undercapitalized start-ups, and forces well-capitalized applicants such as a .brand applicant to pay much more than they would pay under the COI model.

Spreading the risk of failure equally among all new gTLD applicants is fundamentally unfair to the financially sound and less risky entities that may apply. Undercapitalized new ventures are far more likely to fail than established applicants. The extra financial burden may discourage financially healthy applicants from applying, which would hamper the goals of ICANN.

As the economic studies commissioned by ICANN pointed out, “the costs and benefits of introducing a new gTLD can vary considerably depending on the policies adopted by the registry operator as well as the nature of the gTLD itself.”² The COF proposal, it seems, would serve to subsidize the very applications for which the demand and therefore benefit of the gTLD’s introduction is the slightest.

IV. ICANN should not be in the business of being an insurer.

The Proposal removes the security measures and much of the responsibility for ensuring reliability of each registrar as a going concern from the registry applicants and places it on ICANN directly by, in effect, forcing ICANN to act as an insurer in addition to its normal oversight roll. However,

² Michael L. Katz, et al., *Economic Considerations in the Expansion of Generic Top-Level Domains: Phase II Report*, (Dec. 2010) <http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf>.

there is nothing in the plan showing that ICANN is prepared or able to take on this additional responsibility.

Considering ICANN's mission, it is not appropriate for it to act as an insurer nor does ICANN have the requisite experience and staffing. There is nothing in the plan for additional actuarial staff or infrastructure to support this additional activity, or to pay for the same. More importantly, insurance providers are heavily regulated, and to the extent the COF is determined to be insurance, there is no indication that ICANN can be licensed in the necessary jurisdictions or that the same entity is even permitted to act in both oversight and insurer capacities under each of the potentially applicable laws. While proper legal analysis and a system whereby payment is made based on the particular risk profile of each insured entity may be feasible, the present proposal does not provide the time or the means to carry out such a system.

The RySG asserts that there will be an incentive for registry-applicants to underestimate the projected size of the new registry, and therefore lower the cost of the COI to below what it should be to protect registrants. However, we propose that ICANN deal with any potential for underestimation in an independent examination of such data during the application process. ICANN is in the position to amend Specification 8 of the Base Registry Agreement to require periodic inventories of the domains under management and an adjustment of the required letter of credit or escrowed money.

For the reasons outlined above, we strongly recommend against ICANN adopting the COF model.

Thank you for considering our views on these important issues. If you have any questions regarding our submission, please contact INTA External Relations Manager, Claudio DiGangi at: cdigangi@inta.org.

About INTA & the Internet Committee:

The International Trademark Association (INTA) is a more than 131-year-old global organization with members in over 190 countries. One of INTA's key goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last decade, INTA has served as a leading voice for trademark owners in the development of cyberspace, including as a founding member of ICANN's Intellectual Property Constituency (IPC).

INTA's Internet Committee is a group of over two-hundred trademark owners and professionals

from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.