
Chapter 7: Continued Operations Instrument

7.1 Continued Operations Instrument

7.1.1 Introduction

The Continued Operations Instrument (COI) is a financial instrument in the form of an irrevocable standby letter of credit (LOC) or deposit into an irrevocable cash escrow account. The purpose of the COI is to temporarily fund the continued operations of the five critical registry functions³⁵⁶ of a new gTLD by an emergency back-end registry operator (EBERO) in the event of a TLD failure. This section of the Program Implementation Review report discusses the following aspects of the COI:

- COI Requirements
- COI Evaluation

7.1.2 Relevant Guidance

The following guidance is relevant to the topic of Continued Operations Instrument and will be discussed in further detail in Sections 7.1.3 and 7.1.4 of this report:

- GNSO Principle E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meet its obligations under the terms of ICANN’s registry agreement.”³⁵⁷
- GNSO Recommendation 8: “Applicants must be able to demonstrate their financial and organizational operational capability.”
- Applicant Guidebook, Attachment to Module 2: Evaluation Questions and Criteria³⁵⁸
- Applicant Guidebook, Section 5.1: Registry Agreement
- Applicant Guidebook, Section 5.4: Ongoing Operations
- New gTLD Registry Agreement, Specification 8: Continued Operations Instrument³⁵⁹

³⁵⁶ The five critical registry functions are 1) DNS resolution for registered domain names, 2) Operation of Shared Registration System, 3) Operation of Registration Data Directory Services (Whois), 4) Registry data escrow deposits, and 5) Maintenance of a properly signed zone in accordance with DNSSEC requirements.

³⁵⁷ ICANN. (8 August 2007) ICANN Generic Names Supporting Organization Final Report Introduction of New Generic Top-Level Domains, Part A. Retrieved from <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

³⁵⁸ ICANN. (4 June 2012) gTLD Applicant Guidebook Version 2012-06-04. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

³⁵⁹ ICANN. Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/agreement-approved-09jan14-en.pdf>

7.1.3 Background

Question 50 of the Applicant Guidebook (AGB) required that each applicant provide an estimate of the cost to fund the operations of the proposed registry’s five critical registry functions for at least three years. It further required that the applicant, “provide evidence as to how the funds required for performing these critical registry functions [would] be available and guaranteed,” in the form of an irrevocable standby LOC or a deposit into an irrevocable cash escrow account (these instruments are also collectively referred to as COIs”).

The requirements for the COI were specified in Question 50 of the AGB. However, because EBERO providers were not in place when the AGB was finalized, the EBERO’s cost to maintain operation of the five critical registry functions was not provided in the AGB. On 23 December 2011, prior to the opening of the application window (see Section 1.1: Application Submission of this report), ICANN published an announcement “Continued Operations Instrument Guidelines Available for New gTLD Applicants”³⁶⁰ and provided guidance on the EBERO’s estimated cost by projected number of domains. The publication of this announcement provided applicants with the information they needed to finalize their COI.

Applicants who demonstrated an additional level of financial commitment by submitting a fully funded COI with the application were eligible to receive the maximum number of points (three) for Question 50 of the application. Of the 1,930 new gTLD applications submitted, 1,446 satisfied the AGB requirements to receive three points.

7.1.4 Assessment

The COIs submitted with the new gTLD applications were evaluated during Initial Evaluation (IE) (see Section 2.1: Initial and Extended Evaluation of this report) by the Financial Capability Evaluation Panel (See Section 2.7: Financial Capability Evaluation and Section 8.2: Service Provider Coordination of this report) against the requirements in Question 50 of the AGB:

- COI amount must be equal to or greater than the EBERO’s cost to fund the operations of the five critical registry functions for a period of three years
- COI must name “ICANN or its designee” as the beneficiary
- COI must have a term of at least five years from the delegation date of the TLD
- COI must be issued by a reputable financial institution insured at the highest level in its jurisdiction
- COI must provide that ICANN or its designee shall be unconditionally entitled to a release of funds
- COI must allow for partial drawing
- If an LOC, COI must be subject to ISP 98 or UCP
- If a cash escrow deposit:

³⁶⁰ ICANN. 23 December 2011. Announcement: Continued Operations Instrument Guidelines Available for New gTLD Applicants. Retrieved from <https://www.icann.org/news/announcement-3-2011-12-23-en>

- ❑ Cash must not comingle with other funds
- ❑ Funds are not considered to be an asset of ICANN
- ❑ Interest earnings less bank fees are to accrue to the deposit and will be paid back to the applicant upon liquidation of the account

These requirements were in place to ensure that the COI was a viable financial instrument and could be drawn upon quickly by ICANN or the EBERO should a failure occur.

Based on the evaluation performed, the Financial Capability Evaluation Panel issued 1,531 Clarifying Questions (CQs) (see Section 2.7: Financial Capability Evaluation of this report) for Question 50. This number represents 35% of CQs issued during IE regarding the six questions in the Financial section of the AGB. This shows that a large number of COIs did not meet the criteria as described above and had issues that required correction (e.g., COIs with an insufficient COI amount, the COI being provided by a bank that did not meet the defined standard or errors in the address). Although the deficiencies spanned all of the requirements of Question 50, the requirements regarding two issues in particular resulted in the highest proportion of CQs.

1. COI must provide that ICANN or its designee shall be entitled unconditionally to a release of funds. In many cases, applicants specified “ICANN” as the beneficiary but not “ICANN or its designee” as required.
2. COI must provide that ICANN or its designee shall be entitled unconditionally to a release of funds. In many cases, the COI specified conditions for the release of funds.

Eighty-two percent of all applications received a CQ for Question 50. Within this population, 90% of the CQs included a question relating to the unconditional release of funds requirement, and 45% of the CQs included a question related to the beneficiary requirement.³⁶¹ To clarify the requirements of Question 50 and to assist applicants with responding to their CQs, ICANN published several advisories during IE:

5 December 2012 Advisory

On 5 December 2012, ICANN published the first of three Advisories on this topic. This Advisory was published to provide applicants with an explanation for the unconditional requirement (item 2 above):

The purpose of the continuing operations instrument (COI) is to ensure availability of funds needed to provide continuity of service to the registrants should an issue with the registry arise. ICANN's ability to exercise its rights under the COI are set forth in the new gTLD registry agreement (see Section 2.13, Section 4.5, Specification 8 and, for intergovernmental organizations and governmental entities only, Section 7.14(f)). As ICANN cannot envision all

³⁶¹ CQs were issued per question and each CQ may have contained multiple issues. For example, an applicant with issues relating to COI amount, unconditional requirement, and beneficiary requirement would receive one CQ for Q50 with all three issues specified. Percentage numbers provided are across all Question 50 CQs.

*possible scenarios that could result in the need to draw on the COI under these provisions, the "unconditional withdrawal of funds" requirement must be met.*³⁶²

The Advisory also provided examples of statements that were not considered to be conditions for withdrawal of funds so that applicants could work with their banks to arrive at language that would be suitable for them and meet the unconditional requirement.

5 February 2013 Advisory

On 5 February 2013, ICANN followed up with publication of a second Advisory regarding the beneficiary requirement (item #1 above). This publication addressed concerns expressed by applicants who informed ICANN that due to concerns about risks, their banks could not accommodate the requirements: “The LOC must name ICANN or its designee as the beneficiary.” and “Any funds paid out would be provided to the designee who is operating the required registry functions.”³⁶³ To help these applicants overcome this hurdle with their banks, ICANN provided an alternative to naming “ICANN or its designee” the beneficiary. The applicant could name ICANN as the beneficiary of the letter of credit and make the letter of credit fully transferable or assignable by ICANN, in ICANN’s sole discretion. This guidance was communicated in the Advisory and provided an option available to all applicants.

4 March 2013 Update to the 5 December 2012 Advisory

Following the publication of the 5 December 2012 Advisory and despite having provided examples of statements not considered to be conditions, ICANN continued to receive questions from applicants regarding what specific language would satisfy the unconditional requirement of Question 50 (item #2 above). On 4 March 2013, ICANN published an update to the 5 December 2012 Advisory to provide an additional example of an acceptable statement that was not considered to be a condition.

Despite good efforts by applicants to utilize the unconditional language examples that were provided in the Advisories, there continued to be confusion and inconsistent application and usage of the conditional language throughout IE. Complicating this was the fact that there were some banks that would not issue unconditional irrevocable standby LOCs. This was made more challenging because IE was not designed to facilitate extended exchanges and dialogue about these issues between the Financial Capability evaluation panel, ICANN, the applicant, and the banks. Based on the inconsistency of unconditional language and in order to allow applicants to move through IE in a timely manner, on 5 June 2013, ICANN announced during an Applicant Update Webinar that the evaluation of Question 50 would be focused on the financial aspects of the COI.³⁶⁴ The final evaluation of the COI against the requirements of Specification 8 of the Base RA, including the unconditional language, would be performed during Contracting (see Section 5.1 of this report).

³⁶² ICANN. 5 December 2012. New gTLD Advisory: Continuing Operations Instrument. Retrieved from <http://newgtlds.icann.org/en/applicants/advisories/coi-withdrawal-05dec12-en>

³⁶³ ICANN. 5 February 2013. New gTLD Advisory: Beneficiary Requirement on Letters of Credit. Retrieved from <http://newgtlds.icann.org/en/applicants/advisories/loc-beneficiary-requirement-05feb13-en>

³⁶⁴ ICANN. Web Conference Recording. Retrieved from <http://icann.adobeconnect.com/p8u06buwzwm/>; Additional Questions & Answers. Retrieved from <http://newgtlds.icann.org/en/applicants/webinar-qa-05jun13-en.pdf>

At the time that this announcement was made, IE results for 600 applications had been published, and the change did not affect the result (passing IE vs. being eligible for EE) of any of these applications. The change did result in ICANN updating the IE score for Question 50 from 1 point to 3 points for 15% of the 600 applications.

In July 2013, when ICANN began inviting applicants to Contracting, ICANN began reviewing the COIs against the requirements of Specification 8 of the Base RA for Contracting purposes. One of the requirements of Question 50 and Specification 8 of the Base RA was that the COI be in place for a period of five years from the delegation date of the TLD, or six years from the effective date of the RA (as the RA provides for a period of 12 months from the effective date of the RA for the TLD to be delegated). Because Contracting commenced over two years after the close of the application window, many COIs needed to be amended to meet this requirement. In addition, many applicants needed to amend the unconditional language of the COI to meet the requirements of Specification 8 of the RA. These two issues affected approximately 85% of all non-compliant COIs at the time of Contracting.³⁶⁵ The other COI issues that impacted applicants at Contracting included updating ICANN's office address, mailing to ICANN the physical original COI document, amending the COI to reflect appropriate choice of law, and amending the COI to ensure that the document could be transferred by ICANN.

When ICANN implemented the RA extension request process on 3 September 2014,³⁶⁶ only 1,059 of 1,1718 active applications had compliant COIs. In order to ensure that applicants could complete the Contracting process, which required that a compliant COI be in place as per Section 5.4.1 of the AGB, an interim deadline (see Section 5.1: Contracting of this report) of 31 October 2014 was set for the submission of compliant COI for applications that were in Contracting. Two-hundred-thirty applications were received by the 31 October 2014 deadline. Of this number, 217 met the final deadline. A small number, 13 applicants, did not meet this deadline and had their application status changed to "Will Not Proceed" which meant loss of eligibility to sign a Registry Agreement with ICANN.³⁶⁷ ICANN worked with these applicants on a one-on-one basis to address their outstanding issues.

As of 31 July 2015, 965 of the 1,390 non-withdrawn applications required at least one amendment to achieve a compliant COI, 607 required two amendments, and 316 required three or more amendments before reaching compliance.

7.1.5 Conclusion

COI was the financial instrument that applicants were required to submit with their applications to temporarily fund the continued operations of the five critical registry functions of a new gTLD by an emergency back-end registry operator (EBERO) in the event of a TLD failure. The majority of

³⁶⁵ ICANN did not track this specific statistic. This number is ICANN's estimate.

³⁶⁶ ICANN. 3 September 2014. Announcement: Requests for Extension to Execute New GTLD Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/announcements-and-media/announcement-03sep14-en>

³⁶⁷ ICANN. Contracting and the Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting#deadlines-extensions>

applicants had issues obtaining a COI that met the requirements of the AGB as evidenced by the fact that almost all applicants were required to make amendments to their COIs, and over 20% of applications had three or more amendments. As such, consideration should be given to whether there are other ways to fund an EBERO in the event of a TLD failure.

In summary:

7.1.a Explore whether there other more effective and efficient ways to fund emergency back-end registry operator in the event of a TLD failure