



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

MAR 20 2006

Mr. Sharil Tarmizi
Senior Advisor, Office of the Chairman
Malaysian Communications and Multimedia Commission
Chair, Government Advisory Committee of ICANN
63000 Cyberjava
Selangor Darul Ehsan, Malaysia

Dear Mr. Tarmizi,

Pursuant to the ICANN Government Advisory Committee (GAC) meeting in Vancouver in November, 2005, the Department of Commerce has undertaken an analysis of the proposed .xxx Registry Agreement to determine whether its provisions reflect the commitments made by ICM Registry. As you will recall, the ICM Registry presentation to the GAC outlined in some detail the anticipated public interest benefits of its application for the .xxx top level domain.

The attached assessment indicates that the key commitments offered by ICM Registry to the GAC are not reflected in the provisions of the proposed .xxx Registry Agreement. In your capacity as GAC Chair and GAC liaison to the ICANN Board, NTIA would appreciate your sharing this information with both the GAC and the Board prior to the Wellington, New Zealand meeting.

Sincerely,

John M. R. Kneuer
Acting Assistant Secretary

Attachment

Cc: Mr. Paul Twomey
ICANN Board of Directors

OMISSIONS IN THE PROPOSED .XXX REGISTRY AGREEMENT

In its application, supporting materials, and presentation to the Governmental Advisory Committee in November 2005, ICM Registry (ICM) promised certain public interest benefits as part of its bid to operate the .xxx domain. These promises, however, have not been included in the proposed .xxx Registry Agreement negotiated with ICANN, and thus, ICM is not obligated to provide these public interest benefits. Section 8.12 of the .xxx Registry Agreement provides in pertinent part: “This Agreement (including its Appendices, which form a part of it) constitutes the entire agreement of the parties hereto pertaining to the operation of the TLD and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, between the parties on that subject.” Thus, if ICM is not required to provide the public interest benefits by the terms of its registry agreement, it is not obligated to do so.

Below is a sample of the ICM promises that do not appear in the proposed .xxx Registry Agreement:

To Form a Non-profit Policy Development Entity to Create Rules for .xxx. In the .xxx application, ICM stated that it formed a non-profit Canadian entity (International Foundation for Online Responsibility (IFFOR)) to develop rules and policies to govern a new .xxx domain. ICM Application, Part B, at 2-5, 7-13. The proposed .xxx registry agreement does not require ICM to form or maintain this non-profit entity or to abide by any .xxx rules it would establish. Instead, the proposed .xxx Registry Agreement delegates all policy development authority for .xxx to ICM. In fact, the proposed .xxx Registry Agreement provides that the IFFOR board will not be created until the day that the agreement is signed and will not be in place until 90 days after signing. See .xxx Registry Agreement, Appendix S. Moreover, IFFOR is not a party to the proposed .xxx Registry Agreement.

To Require .xxx Registrants to adhere to Best Business Practices as a condition of .xxx registration. ICM promised that IFFOR would develop rules to this effect (ICM Application, at 3,16). There is no requirement to do so in the proposed .xxx Registry Agreement and IFFOR is not a party to this agreement.

To Require all .xxx Registrations to be ICRA Labeled. In its presentation to the ICANN Government Advisory Committee, November 29, 2005, ICM promised that it would require all .xxx registrations to be labeled according to the Internet Content Ratings Association (ICRA) ratings to permit filtering of content. ICM further promised that any web site that points to a .xxx site must also be ICRA labeled. There is no provision in the proposed .xxx Registry Agreement that would obligate ICM to require such labeling.

To Safeguard Children Online. ICM promised that IFFOR would sponsor the development of technology tools and education programs for parents. (ICM Application, at 3, 16; The Sponsored .xxx TLD Proposals: Executive Summary for the ICANN Board, at 2). ICM also promised that IFFOR would fund the participation of independent advocates for children (ICM Letter to ICANN, October 9, 2004, at 17). These promises are not reflected in ICM’s obligations

in the proposed .xxx Registry Agreement and IFFOR is not a party to this agreement.

To Combat Child Pornography. ICM promised that IFFOR would provide funding and tools to combat online child pornography and to prohibit child pornography in the .xxx domain as defined by international law. (ICM Application, at 3; ICM Letter to ICANN, August 15, 2005, at 2; ICM's Responses to Evaluators' Questions, Question 2). This promise is not reflected in ICM's obligations in the proposed .xxx Registry Agreement and IFFOR is not a party to the agreement.

To Implement a WHOIS Compliance Program. In its application (ICM Application, at 20-21), ICM promised to document false and inaccurate WHOIS data and to implement additional verification processes. This promise is not reflected in ICM's obligations in the proposed .xxx Registry Agreement.

To Provide Funds for Global Child Initiatives. ICM promised to give IFFOR \$10 per .xxx domain name so that IFFOR can make some of this funding available for global child advocacy community targeted especially to eradicate child pornography. (ICM Memorandum to the ICANN Board of Directors, November 2, 2004, revised December 7, 2004, at 5). ICM also promised that IFFOR would provide grants to developing countries in the area of child online protection. (ICM's Responses to Evaluators' Questions, Question 7). There is no obligation in the proposed .xxx Registry Agreement for ICM to fund IFFOR or for IFFOR to provide this kind of financial assistance to child advocacy groups or developing countries. Moreover, IFFOR is not a party to the .xxx Registry Agreement.

To Prohibit Child Exploitation including Requiring Proof of Age of Actors Portrayed in Content in .xxx Domain. In its presentation to ICANN's Board, April 3, 2005, ICM promised that this prohibition would appear as part of its registration agreement with .xxx domain name holders. There is no obligation in the proposed .xxx Registry Agreement to this effect.

To Promote Responsible Marketing Practices by Requiring .xxx Registrants to Agree to Combat SPAM and Not Use Malicious Codes and Technologies (ie Spoofing) and other Illegal and Questionable Marketing Practices. ICM Presentation to ICANN, April 3, 2005; White Paper, Thinking Outside the Porn Box, Annex B, ICM's Intentions. There is no obligation in the proposed .xxx Registry Agreement to this effect.