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Comments on the new gTLD Registry Agreement

I. Introduction

We respectfully submit the following public comments on behalf of several of our first-time new gTLD applicant clients ("Applicants") in response to the ICANN Staff's proposed revision to the New gTLD Registry Agreement (RA) posted on February 5, 2013.

Applicants are concerned not only with the most recent proposed revisions to the RA made on February 5, 2013, but with the way many of terms in the RA are currently drafted. Applicants consist of large corporations that negotiate a wide range of contracts with governments and vendors on a daily basis. We are writing to inform ICANN that Applicants are of the opinion that many of the terms in the RA do not meet commercially reasonable standards and need to be revised before the RA can be executed.

Applicants are first-time gTLD applicants and are thus relative newcomers to the ICANN community. As a result, Applicants were not engaged during the drafting and revising of the Applicant Guidebook and the RA, and decided to become applicants well after the Applicant Guidebook was nearing its final form. In light of the large number of such first-time corporate applicants participating in the new gTLD program, the concerns and reasonable commercial expectations of corporate applicants need to be heard and acted upon in order for the program to be a success. Otherwise, the program may stall when it comes time to execute the RA.

Although Applicants have numerous concerns with regard to the RA, this comment will focus on those terms and clauses that are unanimously of high priority to Applicants and that must be addressed before their corporate procurement divisions will be able to agree to execute the RA. The specific clauses of concern are set forth below.

II. Terms of Concern

A. Article 2.11 – Contractual and Operational Compliance Audits – One of the requirements set forth in the Applicant Guidebook section "What is Expected of a Registry Operator" (Section 5.4.1) is to "Cooperate with Contractual Compliance Audits." The fact that this is included in the Applicant Guidebook indicates that it is important to ICANN that registry operators comply with ICANN's audit requirements. The Applicant Guidebook explains that

such compliance audits are in order "to maintain a level playing field and a consistent operating environment." The Applicant Guidebook specifically references Article 2.11 of the draft Registry Agreement.

Applicants understand the need for audits to ensure that the new gTLD registry is being properly managed and operated. However, this clause as currently drafted is very vague. In most agreements that contain an audit provision, it is standard that the provision contains language that sets forth the following

- Clear timeline for advance notice of a compliance audit (at least 15 days);
- Clear timeline for how long such an audit may last (no more than 8 hours);
- Clear confidentiality language that all information revealed in audits must be kept under the strictest level of confidentiality;
- For site audits – the provision concerning site audits should include clear language regarding advance notice, as well as a requirement that a site audit is only allowable if it can be shown that there is a specific need or a cause, and additionally a cure provision before the site audit is allowed. Also, site audits should only be performed by authorized representatives who have undergone appropriate background and security checks and meet with appropriate corporate security standards, as well as other requirements regarding security and provisions; and
- Remedy and indemnification language in the event that any confidential information is released as a result of the audit or that was learned as a result of the on-site visit that allows for the registry operator to obtain a preliminary injunction and any damages as a result of the release of confidential information.

In addition, many applicants have contracted with third-party vendors to provide the technical registry services, or have designated the technical registry operations from their corporate parent to a specific subsidiary or division. Accordingly, there is no reason to have the entire corporation be subject to audits, which raise serious confidentiality concerns for highly-regulated corporations that provide other services, such as financial services, that have nothing to do with registry services. If the audit provision is truly to determine if the new gTLD is being managed and operated properly, then the audit should be limited to the actual technical service provider, and not unrelated divisions or affiliates of the registry operator. If the clause is revised to be limited to a technical audit, then it is far more likely that applicants would be willing to execute the RA.

B. Article 2.13 - Emergency Transition – This provision allows ICANN to designate an emergency interim registry operator ("Emergency Operator") for the TLD in accordance with ICANN's "registry transition process" in the event that any of the emergency thresholds for registry functions set forth in Section 6 of Specification 10 fails for a period longer than the

emergency threshold for such function set forth in Section 6 of Specification 10. The Emergency Operator will operate the TLD until such time as the original registry operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure.

While Applicants understand the importance of providing emergency services in order to ensure the stability of a TLD's websites, this provision as drafted is again vague as to the responsibilities of the Emergency Operator. This provision should be revised so that the Emergency Operator is required to use commercially reasonable efforts to maintain the intended purposes and restrictions of the TLD and comply with the applicant's registry services agreement with its registry services vendor until ICANN is willing to transition the TLD back to the applicant. Otherwise, registry operator management would lose control of the TLD and the goodwill it may represent. Similarly, the "registry transition process" is not clearly set forth and needs to be clarified so that applicants understand and are comfortable with this process.

C. Article 2.15 – Cooperation with Economic Studies – This provision requires the registry operator to provide data reasonably necessary for the purposes of the economic studies by ICANN. The provision states that any data will be fully aggregated and anonymized by ICANN.

It is our understanding that this provision was inserted as the result of concerns by the brand, GAC and other constituencies to ensure that fraud and abuse were limited within a TLD and to understand the economic impact of the TLDs before opening new application rounds.

However, the current clause as drafted is overly vague and burdensome. In order for new applicants to be able to agree to this provision it needs to be revised to include the following:

- Clear language as to what specific economic data would be gathered and for what specific purposes, or at least how such economic studies will be determined and what role registry operators will have in developing them. Regardless, the agreement should specifically provide that the confidential information may only be used for the specific purposes stated in any study and detail the types of data that ICANN would be allowed to gather;

- Specific time frame of notice to provide such data and information;

- Clear language that the data provided/requested must be in accordance with applicable law;

- Clear and strict confidentiality language;

- Remedy and Indemnification in event of disclosure of confidential information; and

- Requirement for ICANN to return or destroy the non-fully aggregated and anonymized data.

D. Article 4.5 – Transition Upon Termination - This clause states that upon termination of the Registry Services Agreement, it is within ICANN's sole discretion to transition operation of the TLD to a successor registry operator. There is a redelegation exception, however, where ICANN can only redelegate the TLD with the registry operator's approval (which shall not be unreasonably withheld, conditioned or delayed). Specifically, the Registry Agreement provides that the redelegation exception applies only where the registry operator can demonstrate to ICANN that:

- All domain name registrations in the TLD are registered to, and maintained by, the Registry Operator for its own exclusive use;

- The Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of the Registry Operator, and;

- Transitioning operation of the TLD is not necessary to protect the public interest.

ICANN has stated that "If Registry Operator makes registrations available to third parties, the exception to Section 4.5 of the Registry Agreement will not be met and ICANN may, without the consent of Registry Operator, transition operation of the TLD to a successor registry operator in ICANN's sole discretion and in conformance with the Registry Transition Process available at http://www.icann.org/en/topics/new-gtlds/registry-transition-processes-clean-30may11-en.pdf" regardless of whether the new gTLD is a .BRAND owned by a company with global trademark rights.

.BRAND applicants have specific rights protection concerns regarding transition because their TLDs are internationally famous brands and another party should not be able to have access to the TLD because then it would have the right to use and control the applicant's famous brand and mark. Therefore this provision needs to be revised so that:

- the exemption from transition should include closed registries whose TLDs consist of their trademark and that own all registrations within the TLD, even if they lease some or all of them to non-affiliate contracted parties;

- all .BRAND gTLDs will not be transitioned to other registry operators; and

- ICANN should not have the discretion to transition any gTLD based on its own breach of the registry agreement.

E. Article 5.2 – Arbitration - The Dispute Resolution provisions require binding arbitration for disputes that cannot be resolved by mediation. Many corporations typically do not include

binding arbitration clauses in their contracts. We note that the current Registrar Accreditation Agreement allows for disputes to be resolved in a court of competent jurisdiction or, at the election of either party, by arbitration. Registry operators should also have the opportunity to choose how it desires to resolve disputes with ICANN.

Moreover, as currently drafted, the arbitration procedures in the Registry Agreement also allow only one day for the hearing and page limits on the briefs submitted. Applicants have invested much time, money and effort into the new gTLD program. Moreover, any arbitration regarding the Registry Agreement would likely concern very complicated issues that may not be covered in a single day or covered in a certain amount of pages. Therefore, these limitations should be removed.

If ICANN is unable to remove the arbitration requirement from the Registry Agreement and allow for suits to be filed in a court of competent jurisdiction, then the arbitration clause should at least be revised as follows:

- It should be non-binding with an appropriate appeal process;
- It should not include punitive or exemplary damages, or operational sanctions
- It should have appropriate confidentiality requirements;
- It should have appropriate recovery requirements for legal fees; and
- It should not have any hearing limits or page limits on briefs.

F. Article 5.3 – Limitation of Liability – ICANN's aggregate monetary liability for violations of the agreement is limited to the Registry-Level fees paid by the registry operator in the preceding 12-month period. By contrast, the registry operator's monetary liability is limited to the ICANN fees paid in the preceding 12-month period, plus any punitive and exemplary damages. First, it is commercially standard that the liability limits in an agreement are reciprocal. Additionally, it is standard in corporate agreements that there is an exception to the liability limits for a breach of confidentiality, fraud, gross negligence, willful misconduct, any indemnity obligations, or real or personal property damages.

The provision should be revised so the limits are the same for each party and are more commercially reasonable, and registry operator should not be liable for punitive or exemplary damages. In addition, exceptions or carve outs should apply such as for claims associated with breach of confidentiality, fraud, gross negligence, or willful misconduct, any indemnity obligations, or real or personal property damage.

G. Article 7.1 – Indemnification of ICANN – Under the current draft of the RA, the registry operator must indemnify ICANN, except for those claims arising out of actions or admissions by ICANN and its subcontractors "occurring during the registry TLD process" or breaches by

ICANN of its obligations of the agreement. There is no reciprocal agreement, however, for ICANN to indemnify registry operators for its acts or omissions. It is usually standard in corporate agreements that any indemnification provision is reciprocal, and that such provisions apply for actions that occur during the life of the agreement.

This provision should thus be revised so that ICANN indemnifies the Registry Operators, at least, for its breach of any of its obligations and its willful misconduct. Additionally, the language should include an exception for any actions or omissions of ICANN regardless of when they occurred, not just acts or omissions of ICANN that occur "during the registry TLD application process."

H. Article 7.5 – Change in Control; Assignment and Subcontracting – This provision does not generally allow for assignment of the Registry Agreement without prior written approval of the other party. ICANN, however, may assign the agreement in conjunction with a reorganization or re-incorporation of ICANN to another non-profit corporation or similar entity without approval of the registry operator after receiving Board approval.

Many large corporations periodically restructure and reassign assets and agreements as part of the normal course of business. This provision should be revised so that Registry Operators are not prevented from transferring or assigning the Agreement where there is a change of control to an affiliated company, parent or subsidiary. In addition, this provision should clearly set forth the standards that would allow ICANN to withhold its consent to a transfer. At the very least, there should be a streamlined process to obtain ICANN's approval.

Also, as ICANN may recall from the application process, there was a corporate backlash to providing personal information regarding board members and corporate directors. Similarly here, the clause needs to be revised so that individual personal information from parent or affiliated companies to the new registry operator need not be provided or is kept strictly confidential.

In addition, the "Registry Transition Process" which governs the process for such a change in control or assignment is not specified in this provision or in Article 2.13 where it first appears. This needs to be specified before the Registry Agreement is executed.

I. Article 7.6(c) – **Special Amendments** - Under the provisions of Article 7.6, ICANN may seek a "Special Amendment" to the Registry Agreement that is submitted for approval by the registry operators as a whole following a public comment period. If the Special Amendment is not approved by the registry operators or the ICANN Board, the proposed Special Amendment will have no effect. "Registry Operator Approval" means the receipt of each of the following: (A) the affirmative approval of the Applicable Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees (converted to U.S. dollars, if applicable) paid to ICANN by all the Applicable Registry Operators during the immediately previous calendar year pursuant to the Applicable Registry Agreements, and (B) the affirmative approval of a majority of the Applicable Registry Operators at the time such approval is obtained.

ICANN recently proposed a new Article 7.6(c), however, which states that in the event that a Special Amendment does not receive approval from the registry operators, it will be approved and enforceable upon all registry agreements if the ICANN Board approves it by a two-thirds vote ("Supermajority Board Approval") and such Special Amendment is justified by a "substantial and compelling need."

The undersigned agree with and support the Registry Stakeholder Group (RySG) in its statement that:

> RySG believes that the unilateral right to amend any private contract constitutes an unreasonable abuse of power…. Once more, even governments that have a right to amend an agreement are bound by certain regulatory processes and procedures, including the provision of just compensation when such a change is required, not to mention other limitations applicable to the so-called "adhesion" or standard form contracts.

Applicants, especially those that are heavily scrutinized and regulated by shareholders and regulators, cannot execute an agreement where one side has the unilateral right to change the agreement. This clause must be removed in its entirety.

J. Article 7.11 - Ownership Rights – This provision states that "*Nothing contained in this Agreement shall be construed as establishing or granting to Registry Operator any property ownership rights or interests in the TLD or the letters, words, symbols or other characters making up the TLD string*." While this may be true of a .generic string, this is not the case where the new gTLD string is an existing trademark. Therefore, this paragraph needs to be revised to reflect that the RA does not affect trademark and brand owner's preexisting property interests, such as an exception covering those strings for which it a registry operator had previously obtained trademark or other intellectual property rights in the applied-for term.

K. Article 7.14 - Definition of Applicable Law – The definition of "Applicable Laws" in Article 7.14(a) is applicable only to "intergovernmental organizations or governmental entities" and limited to "public international law and treaties", which on a plain reading would not include corporate applicants, nor any local laws or potentially any European Union law that is not specifically created through treaty. This definition is thus underinclusive for international corporate applicants. The Registry Agreement nowhere else specifically defines "Applicable Law" or "Applicable Laws", although these terms appear. Therefore, it is critical that a more inclusive definition of Applicable Laws be added as a separate provision in Article 2 and 7, and that compliance with all Article 2 and 7 provisions be subject to Applicable Law.

A standard example of such a definition is:

> *"Applicable Law" means, for all countries, all national, state, provincial and local (i) laws, ordinances, regulations, and codes and (ii) orders, requirements, directives, decrees, decisions, judgments, interpretive letters, guidance and other official releases of any Regulator that are applicable to the Parties, the Affiliates, the Services or any other matters relating to the subject matter of this Agreement."*
>
> *"Regulator" or "Regulatory" refers to any government, authority, department or agency thereof, or any judicial or regulatory (including self-regulatory) organization having authority, oversight jurisdiction or similar power over any of the Parties or any Affiliates in any federal, state, provincial or local jurisdiction.*

L. Specification 4 – Article 1 – WHOIS – Article 1 and revised Article 1.10 of Specification 4 to the Registry Agreement allow ICANN to make unilateral changes to WHOIS reporting requirements that the registry operator must implement "as soon as reasonably practice."

There is concern regarding the special process for amendments to the WHOIS requirements. As with the Special Amendment process above, unilateral amendments to the Registry Agreement should not be allowed that may impose additional burdens on all registry operators for the reasons outlined above. Although enhanced WHOIS is important to brand owners, it should not be exempt from the amendment process just like any other amendment to the Registry Agreement. Therefore, this clause needs to be removed or revised so that it is not unilateral but something that both parties have agreed to and that has undergone the established amendment process.

Accordingly, the undersigned agree with and support the Registry Stakeholder Group's (RySG) substantive criticism of these provisions, and that this also unacceptably "amounts to a second set of provisions giving ICANN the unilateral right to amend the Registry Agreement"

M. Specification 5 – Article 5 - Reserved Names at the Second Level - Country and Territory Names – under this provision, country and territory names shall be initially reserved at the second level and at all other levels within the TLD. They may thereafter be released only to the extent that the registry operator reaches agreement with the applicable government(s), or the registry operator may also propose release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN. Most closed, multinational .BRAND registry operators will be interested in the use of geographic names on the second level, e.g. <Canada.Brand> or <Japan.Brand> for geographically-targeted consumer content in line with the stated purposes of their TLDs. Current restrictions in the second-level reserved names list make such use an unduly burdensome task for closed .BRAND TLDs, where any confusion with relevant governments among Internet users is unlikely. Accordingly, a more stream-lined approval process or exception for .BRAND and/or closed registries is required and should be placed into the Agreement.

N. Specification 9 – Article 6 – Exemption to Registry Operator Code of Conduct - Article 6 of Specification 9 allows for registry operators to seek an exemption to the Registry Operator Code of Conduct (Specification 9), which requires among other things that a registry operator make registrations available to all ICANN-accredited registrars, only if:

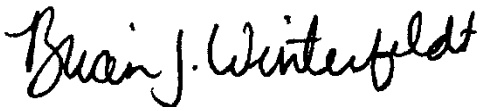
- all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use,
- Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and
- application of this Code of Conduct to the TLD is not necessary to protect the public interest.

Under ICANN's interpretation of this provision, a registry operator would not be eligible for the exemption if it leased the use of domain names to third parties, including contracted third-party partners. Most registry operators may wish to allow customers or other contracted third parties to control aspects of the websites within their TLDs, i.e., "use" the domain names", even if the registry operator is the registrant. Accordingly, the clause "control or use" should be stricken from subsection (ii) of this Article, as the registry operator would still have ultimate control over the relevant domain name even if third parties can dictate the content at the websites at such domain names and can ensure compliance with the stated purpose for the TLD.

III. CONCLUSION

The undersigned multinational, first-time new gTLD applicants are excited and honored to be part of the new gTLD program to expand the Internet space in exciting ways. However, it is important that the Registry Agreement which they must execute contain commercially reasonable terms. Accordingly, we respectfully request that the specific concerns listed above of these applicants be heard by ICANN and acted upon. Otherwise, what could have been an incredibly commercially successful endeavor may stall and delay the delegation of many desirable TLDs into the Domain Name System.

Respectfully Submitted,



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