New gTLD Draft Guidebook v.2 Comments on Registry-Registrar Separation and Section 2.8 of the New gTLD Agreement v. 2

13 April 2009

The comments below are submitted on behalf of the gTLD Registries Constituency regarding Registry-Registrar Separation as well as Section 2.8 of the New gTLD Agreement contained within the Draft Applicant Guidebook Version 2 dated 18 February 2009. They begin with some general comments followed by definitions and a new Section 2.8. A minority position is stated at the end.

I. INITIAL COMMENTS

Drawing on its review of the economic principles and the history of the gTLDs, the authors of the CRAI Report[1] encouraged ICANN to re-examine the economic case for the separation requirement, and in particular to consider whether it might be possible to relax the requirement, initially only in limited cases. Recognizing that it would be "difficult to pull back once regulations have been pulled back," CRAI encouraged ICANN to move slowly, but deliberately and in consultation with the industry, towards permitting integration of registry and registrar services under many, but not all, circumstances.

In order to assist ICANN in determining how to slowly and deliberately introduce vertical integration, the CRAI Report recommended two possible test cases: The Hybrid TLD and the Single Registrant TLD. However, it cautioned that "ICANN may want to consider taking steps towards relaxing one or both of these requirements under certain, limited, conditions." Further it argued that:

> *If ICANN should decide to go ahead with these test cases, it should be ready actively to monitor the performance of these new TLDs. If, after a reasonable period of time, ICANN is satisfied that competition is not being harmed – or, better, if it concludes that competition has been enhanced by their introductions, it may then want to consider relaxing one or both of the vertical separation and equal access requirements for a somewhat broader pool of TLDs.*

Despite the plea by the CRAI Report to move slowly and deliberately only with the two test cases identified in the report, the ICANN staff, swayed by a few registrars seeking to enter the gTLD Registry market, ignored the authors of the CRAI Report and recommended an approach to the registry/registrar issue that is not only inconsistent with the CRAI Report, but is rife with so many loopholes that the solution is certain to be gamed by new registry operators, registrars, resellers and their technical back-end providers.

[1] http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf

The gTLD Registries Constituency, however, submits that its proposal below is not only consistent with the limited exceptions set forth in the CRAI Report, but also believes that it has significantly reduced the potential loopholes existing in the current gTLD Agreements as well as the proposed language contained in Section 2.8 of the new gTLD Agreement contained within the Second Version of the Draft Applicant Guidebook.

II. SPECIFIC CONTRACTUAL PROVISIONS

A. Definitions

"*Affiliate*" shall mean a specified person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

"*control*" (including the terms "controlling", "controlled by" and "under common control with") shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

"*Community-based TLD"* shall mean a gTLD that (a) is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community and (b) applied for the TLD on behalf of the existing community and was awarded the TLD on such basis. For purposes of Section 2.8, the following shall not be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities and (iii) a country or other region that is represented by a ccTLD, or (iv) a language except in cases where the TLD directly relates to a UNESCO recognized language.

"*single registrant*" TLD shall mean a TLD in which (i) all domain name registrations are registered to a single person, business or other entity and not to any party other than the single person, business or other entity, and (ii) proxy and anonymous domain name registrations are not offered.

B. New Section 2.8

2.8 Use of Registrars. Registry Operator must use only ICANN accredited registrars in registering domain names. Affiliates of Registry Operator or of any entity providing Registry Services for the TLD may be ICANN-accredited registrars, provided that such Affiliates or entities providing Registry Services for the TLD may not distribute domain names in the TLD unless (i) the TLD is a "single registrant" TLD, or (ii) the TLD is "community-based", provided however that in such event (a) the Affiliates or entities providing Registry Services for the Community-based TLD together may act as a distributor for no more than 50,000 names registered in the TLD and (b) neither Registry Operator nor any entity providing Registry Services for the Community-based TLD may themselves act as an authorized registrar, reseller or distributor of domain names within the TLD through the same entity that provides Registry Services for the TLD. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with Registry

Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN.

C. Notes on Section 2.8

Note 1: The RyC believes that for true Single Registrant TLDs, as stated in the provision above, we do not necessarily believe that 50,000 names restriction must apply. However, until we can be sure that this cannot be gamed, we would recommend the ICANN setting the 50,000 name threshold, but allow the Single Registrant TLD to present to the ICANN Board any information why they believe the 50,000 name threshold may need to be exceeded (i.e., the TLD will be used by employees of a company with more than 50,000 employees). We would like input from the rest of the ICANN community to figure out other ways to stop the potential gaming of these restrictions.

Note 2: The restrictions we have placed in Section 2.8 are not limited to the official registry or registry operator that signs an Agreement with ICANN. Rather, the restrictions are towards ANY entity (or affiliate of any entity) providing Registry Services for the TLD. This would include back-end registry operators. It is only this type of restriction that will effectively put a stop to the gaming and prevent an argument from existing registrars (or affiliates of registrars) that since they are not the entity signing an agreement with ICANN. The RyC will submit in a separate paper its rationale for this.

Note 3: In addition, the restrictions above do not just apply to being a "registrar" in the TLD, but rather distributing domain names in the TLD as either a registrar, reseller or any other form of distributor. This too would close a "loop hole" that has existing in the Agreements to date.

Note 4: The registries in support of this proposal have indicated that they would imposing these restrictions on themselves if the RyC proposal is adopted by the ICANN Board for future TLDs; provided that existing sponsored TLDs are considered "Community-based TLDs" under the language above.

GNSO gTLD Registry Constituency Statement of Support

Issue: Registry-Registrar Separation

Date: April 13, 2009

General RyC Information

- Total # of eligible RyC Members[2]: 14

[2] All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the "effective date" set forth in the operator's or sponsor's agreement (Article III, Membership, ¶ 1). The RyC Articles of Operations can be found at http://www.gtldregistries.org/about_us/articles .

- Total # of RyC Members: 14
- Total # of Active RyC Members[3]: 14
- Minimum requirement for supermajority of Active Members: 10
- Minimum requirement for majority of Active Members: 8
- # of Members that participated in this process: 13
- Names of Members that participated in this process:
    1. Afilias (.info)
    2. DotAsia Organisation (.asia)
    3. DotCooperation (.coop)
    4. Employ Media (.jobs)
    5. Fundació puntCAT (.cat)
    6. mTLD Top Level Domain (.mobi)
    7. Museum Domain Management Association – MuseDoma (.museum)
    8. NeuStar (.biz)
    9. Public Interest Registry (.org)
    10. RegistryPro (.pro)
    11. SITA (.aero)
    12. Telnic (.tel)
    13. The Travel Partnership Corporation – TTPC (.travel)
    14. VeriSign (.com, .name & .net)
- Names & email addresses for points of contact:
    - Chair: David Maher, dmaher@pir.org
    - Alternate Chair: Jeff Neuman, Jeff.Neuman@Neustar.us
    - Secretariat: Cherie Stubbs, Cherstubbs@aol.com

Regarding the issue noted above, the level of support in the RyC is summarized below.

1. **Level of Support of Active Members**: Supermajority

    1.1. # of Members in Favor: 11

    1.2. # of Members Opposed: 2

    1.3. # of Members that Abstained: 1

    1.4. # of Members that did not vote: 0

2. **Minority Position**(s):

[3] Per the RyC Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as "Active" or "Inactive". A member shall be classified as "Active" unless it is classified as "Inactive" pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

During the course of our deliberations, VeriSign, who voted against the gTLD Registries Constituency Statement had put forth the following as a new Section 2.8 (including definitions). This view, however, was not adopted by a Supermajority of the gTLD Registries Constituency. RegistryPro joins VeriSign in submitting this minority position, with additional comments added by RegistryPro at the end to clarify intent.

Comment on Section 2.8, Use of Registrars

We believe that in order to promote a competitive marketplace between TLDs, the Registry/Registrar Cross-Ownership rule must be applied in a uniform manner. This requires that the current rules be refined to eliminate existing loopholes by (i) adopting a clear definition of "affiliates"; and (ii) imposing consistency in the ownership restrictions faced by registries in owning registrars by applying the same restriction to registrars owning registries. Limiting Registry/Registrar cross-ownership promotes a level playing field. We believe that there should be no exceptions to the cross-ownership restrictions but would allow smaller registries (less than 50K names, e.g.) which are intended to serve smaller communities or a single business, and which would otherwise have a hard time attracting registrar support to work with either a single or a few unaffiliated ICANN-accredited registrars. We believe that at some size, even defined communities and single company TLDs should become a market option and should be treated as a non-restricted gTLD. Accordingly, we would recommend that Section 2.8 be revised as follows:

2.8 Use of Registrars. (a) Registry Operator must use only ICANN-accredited registrars that are not Affiliates of the Registry Operator, in registering domain names within the TLD. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN-accredited registrars that enter into and are in compliance with Registry Operator's registry-registrar agreement for the TLD. Registry Operator must use a uniform agreement with all registrars authorized to register names in the TLD, which may be revised by Registry Operator from time to time, provided however, that any such revisions must be approved in advance by ICANN. As long as the number of names registered in the TLD is no more than 50,000 and either (i) the TLD is a "single registrant" TLD, or (ii) the TLD is a "community-based" TLD, the Registry Operator may limit the number of ICANN accredited registrars with whom it enters into a registry-registrar agreement.

(b) "Affiliate" shall mean a specified person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity specified.

(c) The term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting or debt securities, by contract, or otherwise.

(d) The term "single registrant" TLD shall mean a TLD in which (i) all domain name registrations are registered to a single person, business or other entity and not to any party other

than the single person, business or other entity, and (ii) proxy and anonymous domain name registrations are not offered and (iii) no person, business or entity who is not an Affiliate is granted rights to use any of the domain names.

(e) The term "community-based" TLD shall mean a TLD that is operated for the benefit of a defined existing community consisting of a restricted population which self-identify as members of the community. The following shall <u>not</u> be deemed to be a community: (i) a subscriber or customer base; (ii) a business and its affiliated entities; (iii) a country or other region that is represented by a ccTLD; or (iv) a language except in cases where the TLD directly refers to a UNESCO-recognized language."

<u>RegistryPro additional comment</u>:

In the event that ICANN's resolution to this issue includes restricting the services that registries can provide, by ownership of registrars or otherwise, an exception for early stage, small, community based and single owner registries ought to be considered so that these registries are not unduly constrained in their ability to distribute names.