Pharos Global[1] respectfully submits the following comments in connection with the proposed addition of Section 6.7 "Fee Reduction Waiver" to the baseline Registry Agreement. In principle there is no objection to ICANN reducing its fees for services that it is not providing, in fact this principle should be further enshrined in ICANN's operational ethos. However, the lack of any explanation regarding how ICANN would grant these waivers ("at its sole discretion") or how it would go about publicly disclosing these waivers is deeply problematic as set forth in further detail below, including perhaps potential legal liability for ICANN.[2]

Section 6.7 is a wholly new provision that has been proposed for inclusion into the baseline registry agreement and reads as follows:

> 6.7 Fee Reduction Waiver. In ICANN's sole discretion, ICANN may reduce the amount of registry fees payable hereunder by Registry Operator for any period of time ("Fee Reduction Waiver"). Any such Fee Reduction Waiver may, as determined by ICANN in its sole discretion, be (a) limited in duration, and (b) conditioned upon Registry Operator's acceptance of the terms and conditions set forth in such waiver. A Fee Reduction Waiver shall not be effective unless executed in writing by ICANN as contemplated by Section 7.6(i). ICANN will provide notice of any Fee Reduction Waiver to Registry Operator in accordance with Section 7.9.

Historical Analysis

In order to fully appreciate the significance of the proposed changes set forth in Section 6.7 it is important to step back and look at ICANN's historical precedence in connection with Registry Fees. Prior to 2005, ICANN charged Registry Operators a set fee based upon a tiered schedule[3] corresponding to the number of domain names under management. After a Registry Operator exceeded 1 million names under management, the fee was fixed aside from an optional annual percentage increase. This was unlike Registrars that historically paid a fixed annual accreditation fee in addition to a variable fee[4] based upon the number of domain names under management. This difference in fee structure could largely be attributed to the resources ICANN had to employ to service several hundred Registrars in 2004 versus only eight Registry Operators in 2004.

However, in 2005 ICANN's then President and CEO, Paul Twomey, undertook a radical shift in how ICANN collected fees from Registrars and Registries. He started with instituting a registry transaction model in the .NET RFP and in connection with all new 2004 Registry agreements, doing away with the previous multi-tier approach.[5] Twomey then shifted to a fixed-fee transactions model of $0.25 per domain name year for

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[1] In the interest of openness and transparency, Pharos Global provides consulting services to one or more existing Registry clients that may financially benefit by this proposal. However, these comments were not written on behalf of any previous, current, or future client. They were instead written consistent with a number of principles that Pharos Global's president and CEO, Michael Palage, has advocated for over the past seventeen years.

[2] ICANN has been named as a co-defendant in multiple legal proceedings involving a contracting party. This trend will likely continue as ICANN remains an attractive "deep pocket" to be named in any legal proceeding involving a less capitalized contracting party. While any legal analysis on the basis of how ICANN could be held contributory liable for the actions of a Registry Operator are outside the scope of this paper, it is important to note that this is a legitimate business risk to be accounted for when ICANN is presented with information about how the actions of a contracting party is causing harm to a third party.

[3] Tiers 1 thru 3, the top tier being anything over 1 million names under management.

[4] The reason this per domain name fee was variable was because registrars were invoiced on a quarterly basis based upon the number of domain names registered. As the number of domain names continued to increase, the per domain name fee decreased as it was calculated upon the approved budget.

[5] .ASIA, .CAT, .JOBS, .MOBI,.TEL,. TRAVEL, .POST and .XXX

Registrars.[6] There were two other revolutionary changes implemented in and around 2005. The first was the gradual removal of fee caps from the Registry Agreement. The first Registry Agreement that ICANN executed in 1999 for the .COM/.NET/.ORG agreement explicitly set forth the fees that a Registry Operator could charge a registrar. This restriction subjected ICANN to criticism in other fora by its detractors that it was acting in the capacity of a regulator since a Registry Operator could not raise its prices to Registrars without the explicit approval of ICANN.

The second major change was the reduction in the fixed component of the Registrar annual fee. However, instead of ICANN just reducing this fee at its sole discretion per Registrar, ICANN imposed certain objective criteria that promoted a healthy domain name eco-system. During the 2004-2010 time-frame there were two questionable business practices within the domain name industry in which certain registrars engaged. The first questionable business practice was "drop catching"[7] and the other was "domain name tasting."[8] ICANN developed objective criteria based upon the number of domain names under management and certain metrics to establish that a registrar was NOT engaged in either drop catching or domain name tasting. By way of example the 2007-2008 ICANN approved budget provided these objective criteria:

> Depending on registrar size and activity, some registrars will continue to be eligible for "forgiveness" of two-thirds of the standard per-registrar variable fee. The criteria for eligibility for partial forgiveness will be as follows: the registrar must have fewer than 350,000 gTLD names under its management, the registrar must not have more than 200 attempted adds per successful net add in any registry, and it must not have more than five percent (5%) of added names deleted during the add-grace period from any registry that offers an add-grace period.[9]

ICANN Should Be Rewarding Good Behavior, Not Incentivizing Bad Behavior

The problem with the current proposed Registry Fee Reduction Waiver is that there are no objective criteria that determines when ICANN will grant these waivers. Based upon ICANN's previous actions in connection with the Registrar Fee Waiver program, there should be clear objective criteria promoting a healthy domain name eco-system. Only those Registries meeting these objective criteria should qualify for any fee reduction waiver, and there are readily available criteria that could be used by ICANN staff to administer a data-driven fee-reduction process. For example, these criteria could include, and are not limited to: no successful UDRP actions[10]; no successful URS actions; and low levels of reported incidents of SPAM or Malware as reported by widely acknowledged and respected third party monitors. Other "good business" practices that could potentially result in a fee reduction waiver might be proof that Registry Operator has validated the credentials of each registrant

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[6] Because the Registrar per domain name fee was variable, Registrars generally assumed these fees as cost of goods sold. However, once ICANN fixed this fee a number of Registrars began appending this fee at check-out to the cost of a Registrant's domain name under the line item of ICANN Fee.

[7] This was the practice of Registrars submitting millions of add commands just before a domain name was deleted. This created a substantial strain on Registry systems, although Registries eventual addressed this problem through a technical solution that limited the number of connections that a Registrar could access for drop catching.

[8] This was the practice of permitting registrants to register large volumes of names (hundreds of thousand) during the initial five day Add Grace Period (AGP) to monetize and gauge traffic, and then delete the large majority of the names (over 99%) prior to the expiration of the AGP thus entitling them to a full refund of their registration fees.

[9] See https://www.icann.org/resources/unthemed-pages/proposed-budget-v1-fy07-08-2007-05-23-en

[10] A mere UDRP filing would not qualify, an adverse decision in which a trademark owner complaint prevailed would be required.

prior to the domain name being activated in the zone.[11] While this last criterion is not one provided by a third party data source, ICANN compliance is currently auditing this data point in connection with its Community Applicants as part of ICANN's newly revised audit process.[12]

ICANN could potentially use this approach to motivate Spec 13 ("Brand") Registry Operators. Specifically, ICANN could require that only those Registries that had activated and engaged in bona fide use of a domain name other than NIC.TLD could qualify for this fee reduction. To be clear, the brands would not have to fully migrate from their existing domain name, but they would have to promote and use more than just NIC.BRAND. This Fee Reduction makes sense in this situation because Spec #13 clients should not represent a compliance problem, and the use of these new domain names by major brands with significant advertising resources should help foster global awareness of new TLDs.

Openness and Transparency

With the pending evolution of ICANN's historic relationship with the United States Government, it is critically important that ICANN operate in an open and transparent manner in connection with contracted parties from which it extracts around 100 million dollars annually. Failure to maintain the trust and confidence of the broader Internet stakeholder community could foster fears and/or concerns of ICANN operating as a cartel. Therefore, ICANN should publicly disclose any fee reduction waiver that it provides to a Registry Operator. This public disclosure is not only important for third parties to make sure that ICANN's fee reduction program is not promulgating bad actions, but also as a check and balance for contracted parties to ensure that ICANN is not providing preferential treatment to certain Registries. In fact, ICANN staff should have learned from the concern expressed during the first GDD summit in LA last year, where numerous Registrars voiced concerns about certain Registry marketing programs that were not universally communicated to all Registrars. Finally, this approach to Fee Reduction Waiver is inconsistent with ICANN's prior practices where any fee reduction was publicly disclosed.[13]

Conclusion

ICANN has a unique opportunity to evolve the manner in which it collects fees from Registries, and Pharos Global supports the principle of ICANN implementing a Registry Fee Reduction Waiver. However, instead of a pure transaction model in which there is no direct and quantifiable association between the fees collected and services provided, (i.e. a tax), ICANN can instead reduce the fees it collects from Registries based upon objectively quantifiable good behavior that minimizes the burden on ICANN staff and reduces ICANN's costs. It would also provide a carrot that could complement the compliance team's existing stick. This carrot will then allow ICANN and the broader Internet stakeholder community to raise the operational bar for all ICANN gTLD Registry Operators.

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[11] Validated means more than just email verification, i.e. telephone, address verification, and other professional credentials or licensing.

[12] Question 17 asks Registry Operator if they are a Community based TLD, if they are they must "for the 25 domains selected below, please upload the evidence of your verification of the personal information provided to verify compliance with community registration policies."

[13] See https://features.icann.org/2007-03-13-consideration-mobi-stld-contract-amendment-regarding-icann-fees-and-recent-public-comment (.MOBI) and https://features.icann.org/2007-06-29-tel-icann-fee-amendment (.TEL).