15 July 2016

Proposed Amendments to Base New gTLD Registry Agreement

Valideus provides new gTLD consultancy and registry management services to prospective and existing new gTLD registry operators. We co-ordinated over 120 applications for new gTLDs on behalf of a number of applicants all of whom are owners of global brands, both for Brand TLDs which qualify for Specification 13 and TLDs which will be operating a more open registry model. Valideus also works with Geo and Community registries to "get the right names into the right hands" through the provisions of registrant validation services.

We welcome the opportunity to comment on the proposed amendments to the Base New gTLD Registry Agreement (RA), following the negotiated process between ICANN and a working group of Registry Operators under the process set out in section 7.7 RA.

Overarching Comments

We welcome many of the proposed amendments, in particular the important amendment to Specification 13 and the helpful expansion to the intra-group assignment provision such that assignments to the registry operator's Affiliates do not need to go through an ICANN evaluation and approval process. However, we have some concerns about the precise manner in which it is proposed to amend Specification 13, which we consider could be improved. In addition, we are disappointed that this two-year process has largely dealt with the correction of matters which were clear inconsistencies, ambiguities or unintended consequences and that the opportunity has not been taken to produce a more tailored version of the RA which better meets the needs of Brand registry operators. Those Brand TLDs which qualify for Specification 13 are a clearly defined group. A number of the obligations in the RA are of little or no applicability to Brand registries, who do not sell names to the public, such as the letter of credit requirements, provision for transition of the registry to the EBERO, and ICANN approval of any changes to the RRA. For the future, we believe there would be significant benefits in the creation of a Brand agreement to reflect this distinct registry model.

Amendments to Specification 13

The proposed amendments to Specification 13 are a welcome improvement for Brand registry operators over the existing RA, and as such we support them although we would like to see improvements (as explained in more detail below).

The proposed amendments to Specification 13 are intended to address the concern that the existing RA amendment processes set out in sections 7.6 and 7.7 allow registry operators who do not have Specification 13 in their contracts to vote on changes to that Specification. At its worst, this could allow non-Specification 13 registries to force through an amendment to Specification 13 if they had sufficient weight of voting. The proposed amendment therefore addresses this concern by ensuring that an amendment to Specification 13 must have affirmative approval of the (newly-defined) Applicable Brand Registry Operators. We appreciate ICANN's agreement to making this important amendment.

We do however consider that there are some important improvements which ought to be made to these proposed revisions, both in order to fully reflect the intentions of the negotiating teams and to properly safeguard Brand registries:

(1) The definition of Applicable Brand Registry Agreements is ambiguous. It appears that, as currently drafted, this could be interpreted to mean that all of an Applicable Brand Registry Operator's RAs are counted, ie those which contain Specification 13 and those which do not.

This is not the intention of the parties and an amendment should be made to make it clear that only those agreements which contain Specification 13 are taken into account for this purpose (Spec 13 section 9.1).

(2) The Applicable Brand Registry Operator Approval is currently proposed to be by reference to both (i) Brand registry operators responsible for 2/3 of the fees payable to ICANN (which in turn is a reflection of the numbers of domains under management) and (ii) a majority of Brand registry operators, where there is one vote per TLD (Spec 13 section 9.4). For Brand TLDs the number of domains under management is not necessarily a true reflection of the value of registry: some Brands may never issue substantial numbers of second level domains but the TLD still matches their extremely valuable brand asset. In our view a more appropriate voting threshold would be based on one vote per TLD, ie deleting approval criterion (i) and relying on criterion (ii). If criterion (i) is not deleted altogether, then it also needs to be amended to remove a similar ambiguity to that referred to at point (1) above. As drafted, this could be understood to mean that all fees payable by an Applicable Brand Registry Operator are taken into account, ie those relating to Specification 13 TLDs and those relating to non-Specification 13 TLDs. This was not the intention and requires clarification.

(3) Most importantly, the proposed revision to insert Specification 13 section 11 builds in a veto power for all registry operators, so that no change will be made to Specification 13 under the collective process, even where approved by the Applicable Brand Registry Operators, unless it also has the approval of all registry operators. This veto power over changes to Specification 13 is inappropriate. When Specification 13 was negotiated non-Brands did not have a voting veto over the proposal, although they did have an opportunity to have their views taken into account during the public comment period. Any amendment to Specification 13 should be treated in the same way: it is appropriate that other registry operators should be given the opportunity to comment, along with others in the ICANN community, not that they should be able to exercise a veto.

It has been argued that the veto is required to ensure that Brand registries are not preferentially granted an amendment to their RA which all registry operators ought to have the benefit of. Adequate safeguard against this already exists. Section 3.2 RA requires that ICANN should not apply disparate treatment to registry operators "unless justified by substantial and reasonable cause". In other words, justified and reasonable disparate treatment is permissible; where such treatment is unjustified it can be challenged.

(4) Finally, there is some potential for differential interpretation within Specification 13 section 11 where it states at (i) "nothing in this section 11 of this Specification 13 shall restrict ICANN and the Registry Operator from entering into bilateral amendments and negotiations to this Specification 13 or any other provision of the Agreement". We do not understand this to mean that the only means to amend the contract is via the section 7.6 & 7.7 amendment processes or individually through a bilateral negotiation. Nothing prohibits such bilateral negotiations being conducted by a collective of Brand registries, for example those represented by the Brand Registry Group, or even by and on behalf of all Brand registries collectively. It may be advisable to clarify that this is the case to avoid later uncertainty.

Thank you for considering these points.

Yours sincerely,

Susan Payne
Head of Legal Policy
Valideus Ltd

28-30 Little Russell Street
London WC1A 2HN
T: +44 7421 8299 W: www.valideus.com