New gTLD Applicant Guidebook – April 2011 Discussion Draft

**Commercial & Business Users
Constituency Position Statement**

GNSO//CSG//BC

Summary

The BC has been engaged throughout policy development and Public Comment processes surrounding new gTLDs. Moreover, many BC members have also provided detailed comments.

First, the BC acknowledges and appreciates ICANN's acceptance of many BC recommendations:

- Applicants are now required to describe differentiation and planned benefits & cost mitigation measures for their proposed gTLD

- Applicants are now required to indicate specific security standards they intend to follow. (Evaluation question 30)

- The Registry Agreement and Code of Conduct now offer some flexibility and rights protection to single-registrant TLD Operators.

- The Code of Conduct now prohibits a Registry from registering names based on proprietary access to searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running")

- All users of TM Clearinghouse services – including registries and registrars -- will share costs of the Clearinghouse.

- In situations where the Registry Operator must pay for contractual and operational audits, ICANN has added reimbursement language to ensure that delays in payment do not delay an audit.

- Trademarks submitted to the TM Clearinghouse must now provide *proof of use*.

However, many other BC comments have been disregarded without explanation. Many of the BC recommendations find agreement from multiple stakeholders, including the Governmental Advisory Committee (GAC). Most notable are several previous BC recommendations to raise the integrity and availability of new gTLDs:

- The Guidebook calls for processing new applications in batches, with the first batch being 500 applications. The BC believes this first batch should be significantly fewer than 500 applications, in order to test the operational readiness of newly designed application processing and objection / contention systems.

- Applicants should be granted fee reductions for additional versions of the applied-for string in IDN scripts and other languages.

- String Similarity contention sets should not include similar strings requested by a applicant seeking linguistic variations of the applicant's other applied-for string.

- Applicants should be required to pay an objection Response Filing Fee in order to defend the rationale already included in their original application.

- Community priority should be given to applicants scoring at least 13 points, not 14.

- RPMs are still substantially weaker than those recommended by the IRT. Consumers and businesses will inevitably be harmed by cybersquatting and other fraud likely to occur in hundreds of new gTLDs, especially at the second level. Picking-up on discussions during a US Congressional Hearing on 4-May-2011, the BC reiterates its

support for Globally Protected Marks List (GPML). Absent a GPML, trademark holders must pay for unwanted defensive registrations.

- While not part of the Guidebook, effective Communications and Outreach activities are essential to the success of this gTLD expansion. ICANN's communications effort must do more than simply promote new gTLD applications.   It must also fully inform user and business communities around the world of all the major changes coming with the introduction of new gTLDs.

The BC has decided here to submit its highest priority comments on elements of the Guidebook that have changed since the prior draft. We note that this submission does not replace our previous positions, and should be considered in concert with those previous comments.

In particular, the BC incorporates these previous comments on draft Guidebooks:

Jul-2010 comments on DAGv4, Market Differentiation / Translations – IDNs / Community-based Evaluation Scoring.   see http://forum.icann.org/lists/bc-gnso/pdf7bS90kfqkn.pdf

Jul-2010 comments on DAGv4, Rights Protection Mechanisms.
see http://forum.icann.org/lists/bc-gnso/pdfSBXE8faU4Z.pdf

BC comments on the Nov-2010 Proposed Final Applicant Guidebook.
See http://forum.icann.org/lists/5gtld-guide/pdfpWA9bxOgob.pdf

BC recommendations are arranged by Module, and a statement of rationale for the change follows each recommendation.

Module 1: Batching of applications	
Current Guidebook Approach:	**BC Recommended Changes:**
1.1.2.5 …The first batch will be limited to 500 applications and subsequent batches will be limited to 400 to account for capacity limitations due to managing extended evaluation, string contention, and other processes associated with each previous batch.	**The first batch should be limited to significantly fewer than 500 applications, in order to test the operational readiness of newly designed application processing and objection / contention systems.** **A significant proportion of the first batch should be comprised of Community-Based applications.**
1.1.6 Subsequent Application Rounds ICANN's goal is to launch subsequent gTLD application rounds as quickly as possible.	…as quickly as possible, **but only after adjusting the application process and Guidebook to reflect experience learned in the initial round.**

Rationale for BC Recommendation:
The Guidebook recommends an initial batch of applications, acknowledging "capacity limitations due to extended evaluation, string contention, and other processes." These evaluation and objection processes are untested and complex, involving new independent evaluators. With the proposed objection process, each application in the initial batch could have its own public comment period. Clearly, it will not work to have 500 parallel public comment periods. Moreover, the BC believes that ICANN presently lacks adequate compliance staff, even before new gTLDs are introduced. This compliance challenge could become significantly larger with cross-ownership and enforcing the new registry code of conduct. ICANN should not attempt to manage high volumes until evaluation, objection, and contention processes are proven on a smaller, more manageable scale. An initial batch of 500 applications could overwhelm ICANN's new systems and undermine the new gTLD process. The BC therefore recommends an initial batch of significantly fewer than 100 applications, to prove the effectiveness of new processes and increased compliance. As to the composition of the first batch, the BC recommends that it include a substantial proportion of community-based applications. It is a long-standing position of the BC that name space expansion should create added-value. Where there is added-value there will be genuine user demand – not just defensive registrations—and expansion will enhance choice and competition in the global public interest. In a global market economy, added-value means differentiation from other gTLDs while providing competition for existing gTLDs.

Module 1: Applicant Eligibility Screening	
Current Guidebook Approach:	**BC Recommended Changes:**
1.2.1 Background screening at both the entity level and the individual level ...	1.2.1 Background screening at **the level of the entity, named individuals, and entity affiliates and subsidiaries …**

Rationale for BC Recommendation:

When the ICANN Board eliminated any restrictions on cross ownership or vertical integration, it increased the importance of screening applicants for prior abusive conduct.

The Guidebook includes applicant screening to include disqualification for prior instances of cybersquatting, but only if the applicant or named individuals were involved. Cybersquatting has been documented at affiliates and subsidiaries of the registrars and registries who are likely to be applicants for new gTLDs. ICANN should expand disqualification criteria to apply to affiliates or subsidiaries of the applicant entity.

Module 1: Applicant fees for multiple scripts and languages	
Current Guidebook Approach:	**BC Recommended Changes:**
1.1.2.1 Each application slot is for one gTLD. An applicant may submit as many applications as desired. There is no means to apply for more than one gTLD in a single application.	add: **However, applicants may be granted fee reductions for additional versions of the applied-for string in IDN scripts and other languages.**

Rationale for BC Recommendation:

Since 2009, the BC has encouraged ICANN to make it easier for gTLD applicants to offer multiple variations of their TLD string, so long as the variations are legitimate translations or transliterations of the applied-for string. The Joint Applicant Support WG recommended "Support for Build-out in Underserved Languages and Scripts" (item 2.2.1 in their Milestone Report).

ICANN should design incentive mechanisms to encourage the build-out of IDNs and underserved language-script communities. One incentive mechanism could be a reduction of the standard application fee for additional IDN versions and translations of the applied-for string. For example, the applicant for .museum should be allowed to pay one application fee for .museum, plus a reduced application fee for ".museo". The applicant could also pay incremental reduced fees for translations or transliterations in Korean, Arabic, etc.

ICANN Board and staff have acknowledged that some applicant processing costs would be avoided when evaluating additional strings from the same applicant. The reduced fee should be set such that all incremental costs are covered by the applicant and not shifted to other applicants.

If the applicant is seeking new translations of a current gTLD, the BC continues to believe that all registrants should have the option to register their second level names in all of the linguistic variations offered by that TLD. For example, the registry agreement should allow the registrant of [trademark].museum the option to register their equivalent second-level domain in the additional related scripts granted to the TLD operator.

Module 2: String Similarity Review	
Current Guidebook Approach:	**BC Recommended Changes:**
2.2.1.1 (page 2-5) Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, the String Similarity Panel will create contention sets....	[insert:] **String Contention Sets shall not include similar strings requested by a single applicant seeking linguistic variations of the applicant's other applied-for string.**

Rationale for BC Recommendation:

The BC has consistently recommended making it easier for gTLD applicants to offer multiple variations of their TLD string, so long as the variations are legitimate translations or transliterations of the applied-for string.   For example, an applicant for .museum should be permitted to apply for ".museo".

But if String Similarity Reviews were strictly applied, .museo might be placed into a contention set against .museum, even though these strings would be operated by the same applicant, for identical purposes, in multiple languages and/or scripts.

The BC does not believe that would be a logical or intended result of the String Similarity Review.

Module 3: Fees paid by applicant to respond to objections	
Current Guidebook Approach:	**BC Recommended Changes:**
3.3.4 Response Filing Fees. At the time an applicant files its response, it is required to pay a filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded, which will result in the objector prevailing.	3.3.4 DELETE

Rationale for BC Recommendation:

Applicants are rightly expected to underwrite the draw on ICANN resources triggered by seeking a gTLD or by objectors asking that the application be denied. However, if an application is contested, it ought not trigger a second fee just so that the applicant can defend the rationale already included in their original application.

This is made more appropriate in as much as, in the applicant guidebook, ICANN notes that some objections may be frivolous.

Module 4: Community Priority in String Contention	
Current Guidebook Approach:	**BC Recommended Changes:**
4.2.3 Eligibility for Community Priority An application must score at least 14 points to prevail in a community priority evaluation.	An application must score at least **13** points to prevail in a community priority evaluation.

Rationale for BC Recommendation:
 	
Name space expansion should create added-value. Where there is added-value there will be genuine user demand – not just defensive registrations—and expansion will enhance choice and competition in the global public interest.
 	
In a global market economy added-value means differentiation from other gTLDs while providing competition for existing gTLDs. The BC supports the concept of community TLDs as the optimal way to expand the name space because they create this sort of added-value competition.
 	
However, the intention of Community Priority will not be realized if Community applicants cannot reasonably reach the 14 point threshold. For instance, just 2 objection filings would make it impossible for an applicant to achieve the required 14 points. The BC remains unconvinced that staff has adequately analyzed the possibility and probabilities of applicants reaching 14 points.
 	
Moreover, other stakeholder groups have supported a 13 point minimum score. See page 91 of Summary of Comments DAG v4:
 	
       Community priority evaluation—revisit standards.
       ICANN staff should revisit the community priority evaluation standard. Previous public comments overwhelmingly sided with the 13 joint threshold. ICANN staff has not satisfactorily explained the basis for its insistence on a 14 joint threshold, which will be almost impossible for most community applications to achieve. COA (21 July 2010).
 	
       IPC has also supported a lowered threshold in multiple comments over the various DAGs

The next section of comments regards flexibility for single-registrant (sometimes called "dot-brand") TLDs.   In Aug-2010, the BC submitted this statement regarding dot-brand TLDs, as part of the public comment process for the Vertical Integration PDP:

Clarification of BC position on BC Recommendation 2:
The second recommendation from the BC September 2009 position supports a narrow exception for registries operated by a single registrant that is distributing second level names for internal use:

BC position (closed markets)
It is possible that in the forthcoming expansion of domain names there will be proprietary domain names **not for sale to the general public** (eg dot *brand)*. In this unique case the BC would accept that it makes no sense for a company owning its own name or trademark in the form of a domain name to be obliged to go to a third party to register its own second-level domain names. An opt-out for this special case of internal use seems appropriate.

Recommendation 2:
The BC believes that uniquely for domain names intended for internal use, the principle of registry-registrar vertical separation should be waived.

When the BC developed its September 2009 position, "internal use" was a term used for a range of entities that were under control of the single registrant and "not for sale to the general public". At the time, BC discussions of "internal use" included the following entities:

- Divisions and product names for a single registrant (e.g.copiers.canon)

- Employees of a single registrant, for use in second level domains and email addresses

- Subscribers, customers, and registered users of a single registrant, subject to approval and control by the single registrant.

The range of internal uses discussed by the BC should be considered by the Working Group as it develops consensus principles for single registrant exceptions its final report. The BC will continue its internal discussions on these categories.

Excerpt from: BC Comment on Vertical Integration Working Group Initial Report, August 2010   http://forum.icann.org/lists/bc-gnso/pdfoF21ENSQ61.pdf

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Vertical Integration restrictions were eliminated entirely in the Nov-2010 version of the Guidebook. And in the Apr-2011 version, single-registrant TLDs were exempted from the Code of Conduct.

However, Module 5 still includes some provisions that could unduly restrict how a single-registrant TLD distributes and manages lower-level registrations that are entirely under their ownership and control, as described in the next several recommendations.

First, the BC provides a recommended definition for single-registrant TLDs. Subsequent recommendations are intended to remove remaining restrictions for single-registrant TLDs.

Module 5: definition for single-registrant TLD	
Current Guidebook Approach:	**BC Recommended Change/Question:**
Single-Registrant TLD [no definition is provided]	The BC proposes to add a definition to the Guidebook and Registry Agreement: **Single-registrant TLD: a TLD where the Registry Operator is the registrant of record for all domain names in the TLD.**
Rationale for BC Recommendation: This definition makes a clear and objectively measured distinction between single-registrant TLDs and those that make registrations available to the public. Since 2009, the BC has maintained that TLDs intended for "internal use" include those registries that are "not for sale to the general public". BC discussions of "internal use" include the following entities: • Divisions and product names for a single registrant (e.g. copiers.canon) • Employees of a single registrant, for use in second level domains and email addresses • Subscribers, customers, and registered users of a single registrant, subject to approval and control by the single registrant. In all these cases, the registry Operator shall be the registrant of record for all second level domain names in the TLD.	

Module 5: Registry Agreement needs flexibility for single-registrant TLDs	
Current Guidebook Approach:	**BC Recommended Changes:**
Registry Agreement, Article 2, Covenants 2.6 Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, Registry Operator shall comply with the restrictions on registration of character strings set forth at Specification 5. (Includes geographical names a the second level)	Subject to approval from relevant national governments, a single-registrant TLD should be allowed to register both two-letter abbreviations and full country and regional names at the second level. 2.6 Reserved Names. Except to the extent that ICANN otherwise expressly authorizes in writing, **and except for single-registrant TLDs with respect to geographical names at the second level,** Registry Operator shall comply with the restrictions on registration of character strings set forth at Specification 5.
Rationale for BC Recommendation: Single-registrant TLDs will reasonably want to create second level domains for their operating units or chapters in each country or region. (e.g., Canada.Canon or Haiti.RedCross).	

Module 5: Registry Agreement needs flexibility for single-registrant TLDs	
Current Guidebook Approach:	**BC Recommended Changes:**
Registry Base Agreement 2.9 Registrars. (a) …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, provided that Registry Operator may establish non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD. Registry Operator must use a uniform non- discriminatory agreement with all registrars authorized to register names in the TLD.	The Base Agreement should be amended to include the same exception for single-registrant TLDs that is contained in item 6 of the Code of Conduct. Namely, **"Single-Registrant TLDs may establish discriminatory criteria for registrars qualified to register names in the TLD."**
Rationale for BC Recommendation: The Registry Agreement should not unduly restrict single-registrant TLDs from using only a wholly-owned or closely affiliated registrar to register and manage names that it controls. (e.g., for divisions, product lines, locations, etc.)	

Module 5: Concerns of single-registrant TLDs	
Current Guidebook Approach:	**BC Recommended Changes:**
Registry Agreement 4.5 Transition of Registry upon Termination of Agreement. Upon expiration .. or any termination of this Agreement …Registry Operator shall provide ICANN or any successor registry operator that may be designated by ICANN for the TLD with all data … necessary to maintain operations and registry functions that may be reasonably requested by ICANN or such successor registry operator. Provided however, that if all sub-domains in the registry for the TLD are registered or licensed to and used exclusively by Registry Operator or individuals or entities that are Affiliates of Registry Operator, then ICANN may not transition operation of the TLD to a successor registry operator without the consent of Registry Operator (which shall not be unreasonably withheld, conditioned or delayed).	The BC acknowledges the addition of this appropriate exception added to this version of the Guidebook. However, the exception should reference a common definition for a "Single-registrant TLD" instead of defining it separately here. Please consider the following change : "Provided however, **that for Single-registrant TLDs,** ICANN may not transition operation of the TLD …" And as noted above, the BC recommends the following definition for Single-registrant TLD: **"a TLD where the Registry Operator is the registrant of record for all domain names in the TLD."**
Rationale for BC Recommendation: Single-registrant TLDs will be operated by entities whose IP rights survive any termination of their registry operating agreement with ICANN. Moreover, all second level domains would be under control of the TLD operator, who is in the sole position to determine whether interests of domain owners are better served by transition or outright termination of the gTLD. In situations where a single-registrant owns or controls all second level domains, an expiration or termination of the Registry Agreement may lead to the closure of the gTLD or transfer to a new entity by a bankruptcy court or administrator instead of transition to a new operator. In these circumstances, the registry operator has reason to deny transition or transfer of registry data to a new operator designated by ICANN. In circumstances where ICANN transitions a single-registrant TLD to a new operator, intellectual property rights of the original operator should not be conveyed to the new operator or to ICANN, as transferring registry data may reveal trade secrets to a third-party, including customer lists.	

Module 5: Specification 9, Registry Code of Conduct and application to single-registrant TLDs	
Current Guidebook Approach:	**BC Recommended Change/Question:**
Code of Conduct: Notwithstanding anything set forth in the foregoing, this Code of Conduct shall not apply to Registry Operator if (i) Registry Operator maintains all registrations in the TLD for its own use and (ii) Registry Operator does not sell, distribute or otherwise make available to any unaffiliated third party any registrations in the TLD.	Recommend adding the bold text below: Notwithstanding anything set forth in the foregoing, this Code of Conduct shall not apply to Registry Operator if (i) … and (ii) Registry Operator does not sell, distribute or **transfer control of the registration** to any unaffiliated third party any registrations in the TLD.
Rationale for BC Recommendation: The Code of Conduct should not restrict single-registrant TLDs from using an owned or closely affiliated registrar to register and manage names that it controls. (e.g., for divisions, product lines, locations, customers, affiliates, etc.) The phrase "otherwise make available" is too broad, since it might be interpreted to include instances where a single-registrant operator allows non-affiliated parties to post content to websites where the registration is still entirely controlled by the operator.	

Module 5: UDRP concerns for single-registrant TLDs	
Current Guidebook Approach:	**BC Recommended Changes:**
UDRP specifies the sole remedy in the case of a complainant prevailing in a UDRP action is transfer of a second-level registration.	Existing rights protection mechanisms may not function in respect to single-registrant TLDs. In the case of a single-registrant TLD there should be an additional remedy as an alternative to transfer of the registration. Suggestion: allow the second-level name to be reserved and non-resolving.
Rationale for BC Recommendation: Single-registrant gTLDs should not be required to allow unaffiliated registrants to hold registrations in a single-registrant TLD. Third-party registrations in a single-registrant TLD could cause consumer confusion and in extreme cases be a vehicle for fraud.	

The next several recommendations pertain to Module 5 as it applies to all TLD Operators.

Module 5: Specification 9, Registry Code of Conduct	
Current Guidebook Approach:	**BC Recommended Change/Question:**
Registry Code of Conduct	Before or during the application process, ICANN should seek community input on potential abuses (including lists developed by the VI and RAP working groups), detection data, the data needed to detect, and protection mechanisms/compliance methods. Community input should also be sought on punitive measures to ensure compliance.
Rationale for BC Recommendation: The Registry Code of Conduct does not expose an exhaustive list of abuses, nor does it identify the data required to detect the abuses. Moreover, it does not expose the compliance mechanisms that will help protect registrants.	

Module 5: Specification 10, Registry Performance Specifications: TM Claims Service	
Current Guidebook Approach:	**BC Recommended Change/Question:**
3 Criteria 3.2.4 Other marks that constitute intellectual property	Other marks that constitute intellectual property **such as common law trademarks**.
6.1 Trademark Claims service 6.1.1 New gTLD Registry Operators must provide Trademark Claims services during an initial launch period for marks in the Trademark Clearinghouse. This launch period must occur for at least the first 60 days that registration is open for general registration.	BC reiterates its v5 recommendation: New gTLD Registry Operators must provide Trademark Claims services **at all times** for marks in the Trademark Clearinghouse**.**
Rationale for BC Recommendation: The extension to other marks needs clarifying. The TM Claims notification service provides a valuable service to both TM holders and registrants. This holds true any time a domain name is registered – not just during the launch period. The BC recommends that gTLD Registry Operators offer TM Claims service not only during launch, but at any time a domain name is registered.	

Module 5: Specification 10, Registry Performance Specifications: Sunrise Service	
Current Guidebook Approach:	**BC Recommended Change/Question:**
6.2 Sunrise service 6.2.1 This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match to the name to be registered during Sunrise.	This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match **or confusingly similar** to the name to be registered during Sunrise;
Rationale for BC Recommendation: The Sunrise service applies only to "identical marks" so the value of the warning is limited. The service does not notify based on broader matching requirements called for by the BC.	

Module 5: Specification 10, Registry Performance Specifications: URS	
Current Guidebook Approach:	**BC Recommended Change/Question:**
Uniform Rapid Suspension 2.2 A limited "loser pays" model has not been adopted for the URS. Complaints listing twenty-six (26) or more disputed domain names will be subject to an Response Fee which will be refundable to the prevailing party.	2.2 A limited "loser pays" model has not been adopted for the URS. Complaints listing **fifteen (15) or more** disputed domain names will be subject to an Response Fee which will be refundable to the prevailing party.
Rationale for BC Recommendation: The 26 threshold is arbitrary and too high. BC members real world experience suggests a more practical figure would be 15.	

Module 5: Specification 10, Registry Performance Specifications: TM PDDRP	
Current Guidebook Approach:	**BC Recommended Change/Question:**
Trademark Post-Delegation Dispute Resolution Procedure (Trademark PDDRP)	Comment: the Trademark Post Delegation Dispute Procedure contains unrealistically high burdens of proof at both the first and second level.
Rationale for BC Recommendation: The levels of proof exceed showing bad faith (must show "specific bad faith") and a pattern or practice of bad faith (must prove "substantial pattern and practice" by clear and convincing evidence. Even if a complainant wins, there are no sanctions against a registry and no corresponding duty by ICANN to investigate or sanction the Registry.	

Module 5: Specification 10: qualification for TM Clearinghouse, URS, sunrise, and objections	
Current Guidebook Approach:	**BC Recommended Changes:**
Sunrise 7.2 For Sunrise services - Registries must recognize and honor all word marks: (i) nationally or multi-nationally registered and for which proof of use – which can be a declaration and a single specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse; or (ii) that have been court-validated; or (iii) that are specifically protected by a statute or treaty currently in effect and that was in effect on or before 26 June 2008.	Question: The date 26 June 2008 has been deleted elsewhere in the 15-Apr Guidebook, so why is this date retained for 7.2 Sunrise services?

Level of Support of Active Members:

This document was posted to BC members for review and comment on 27-Apr-2011.

Several members provided comments and suggestions that were incorporated in a second draft circulated on 11-May.

Pursuant to our section 7.2 of the BC Charter, this document is deemed approved.

Rapporteur and Attesting BC Officer: Steve DelBianco, vice chair for policy coordination