



**Comments on
New gTLD
Registry Agreement,
Including Public Interest
Commitments Specification**

Status: FINAL
Version: 2
20-Mar-2013

Business Constituency Submission

GNSO//CSG//BC

ICANN opened a public comment period seeking feedback on the revised new gTLD Registry Agreement, which includes a Public Interest Commitments Specification.

The Business Constituency (BC) comments here on 4 parts of the proposed New gTLD Registry Agreement:

Specification 11: Public Interest Commitments

Base Agreement Article 4: Transition of Registry upon termination of Agreement

Base Agreement Article 7: Amendments to the Registry Agreement

Specification 5: Reserving Country and Territory Names at the Second Level

The BC's comments arise from the perspective of Business users and registrants, as defined in our Charter¹:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

The BC premised these comments upon prior positions adopted by the BC in accordance with its charter.

Three specific BC position documents are cited here:

Implementation Improvements request to ICANN Board of Directors and CEO, Feb-2012

<http://www.bizconst.org/Positions-Statements/BC%20request%20for%20implementation%20improvements.pdf>

BC Comments on New gTLD Applicant Guidebook – April 2011 Discussion Draft, May-2011

<http://www.bizconst.org/Positions-Statements/BC+on+Final+App+Guidebook+May+2011+v3.pdf>

BC Position on Process for Amendments to new gTLD Registry Agreements, Apr-2010

http://www.bizconst.org/Positions-Statements/BC_on_TLD_contract_amendments.pdf

Specification 11: Public Interest Commitments

From the BC's perspective, the most significant change in the new Registry Agreement is the addition of Specification 11 for Public Interest Commitments. First, we address section 1 of the Specification 11:

1. Registry Operator will use only ICANN accredited registrars that are party to the Registrar Accreditation Agreement approved by the ICANN Board of Directors on _____, 2013 (or any subsequent form of Registrar Accreditation Agreement approved by the ICANN Board of Directors) in registering domain names. A list of such registrars shall be maintained by ICANN on ICANN's website.

The BC enthusiastically supports this requirement. Beginning in 2012 the BC requested that ICANN require all registrars distributing names in the new gTLDs to be held to the amended RAA (Registrar Accreditation Agreement). Here's how the BC explained this request in our Feb-2012 letter to ICANN Board and CEO²:

¹ Business Constituency Charter, at <http://www.bizconst.org/charter.htm>

² BC Implementation Improvements request to ICANN Board of Directors and CEO, Feb-2012.

<http://www.bizconst.org/Positions-Statements/BC%20request%20for%20implementation%20improvements.pdf>

4) Amend the Registrar Accreditation Agreement (RAA) for registrars distributing names in new gTLDs. With all the focus on new registry agreements, the new gTLD program missed the opportunity to strengthen ICANN's contractual agreements with registrars who will sell and manage names in new TLDs. When millions of new registrants enter the market, it is registrars — not registries — they will be dealing with. New TLDs are just as important for registrars as for registries, especially now that cross-ownership and vertical integration are permitted.

With the benefit of hindsight, the ICANN community probably should have pushed for an improved registrar agreement as a requirement to sell names in new TLDs. But it is not too late to create a new registrar agreement—one that incorporates the consensus recommendations of law enforcement agencies from around the world.

Citing urgency to address law enforcement issues, ICANN's Board adopted a resolution in Dakar directing RAA negotiations to commence immediately. While ICANN has a protective and often prolonged process for amending *existing* contracts like the RAA, these negotiations can quickly generate a *new* RAA covering new gTLDs.

ICANN should require registrars to comply with the amended RAA in order to gain accreditation to distribute names in new gTLDs. At a minimum, ICANN should encourage each new gTLD registry to require this improved RAA for any registrar distributing or managing its domain names.

Sections 2 and 3 of Specification 11 provide a way for applicants to list commitments and statements of intent that would become part of the Registry agreement and thereby enforceable by ICANN.

The BC supports this change to the registry agreement.

Beginning in 2012 the BC requested that ICANN could enforce restrictions and commitments relied upon by actual and potential objectors, particularly law enforcement and government regulators. Here's how the BC described and justified this request in our Feb-2012 letter to ICANN Board and CEO³:

1) Ensure that ICANN can enforce all registry restrictions and commitments made to potential objectors. Perhaps the most important promise ICANN made to the GAC and to its government representatives was to allow early warnings and objections to proposed TLDs that may offend cultural, religious or national sensibilities. However, the BC is concerned that the planned process won't empower ICANN to deliver on that promise.

While ICANN is asking governments and other stakeholders to base their response to proposed strings on the proposed terms in the application, those terms won't actually be enforceable unless they are included as part of the formal Registry Agreement. This raises the risk that for some applicants, promised restrictions on registrants or uses of domain names could be ignored after their applications are approved. That would leave ICANN with little leverage to hold TLD operators to the restrictions that were relied upon to satisfy governments and other potential objectors.

This loophole should be closed before the first applications are accepted, or ICANN risks breaking a critical promise made to governments that are already skeptical of the multi-stakeholder model.

³ BC Implementation Improvements request to ICANN Board of Directors and CEO, Feb-2012.
<http://www.bizconst.org/Positions-Statements/BC%20request%20for%20implementation%20improvements.pdf>

While it was helpful to add the capability for enforceable public interest commitments, the BC notes with concern that a small minority of applicants have thus far elected to insert relevant commitments into Specification 11.

Governments are likely to expect greater participation by applicants. The US Government, for instance, encouraged applicants “to take advantage of this opportunity to address the concerns expressed by the GAC in its Toronto Communiqué, the individual early warnings issued by GAC members, and the ICANN public comment process on new gTLDs, as appropriate”⁴

There were over 200 applicants receiving GAC Early Warnings, but only 83 applicants added any commitments to their Specification 11. It may be that the early warnings on the other applications did not lead to adding new enforceable commitments to the registry contract. But the BC encourages applicants, the GAC, and ICANN to examine all GAC early warnings and objections to ensure that ICANN can enforce any relevant commitments as part of new registry agreements.

Base Agreement Article 4: Transition of Registry upon termination of Agreement

The BC believes that the transition of a new gTLD registry upon termination should be subject to approval by the TLD operator ***in cases where all of the domains are registered by the TLD operator***. Here is how the BC argued for that principle in our May-2011 comments on the Draft Applicant Guidebook⁵:

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.

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)

⁴ Comments of the US Government on the New gTLD Registry Agreement. 26-Feb-2013.
<http://forum.icann.org/lists/comments-base-agreement-05feb13/msg00018.html>

⁵ p. 10, BC Comments on New gTLD Applicant Guidebook – April 2011 Discussion Draft, May-2011
<http://www.bizconst.org/Positions-Statements/BC+on+Final+App+Guidebook+May+2011+v3.pdf>

- 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.

Article 4 of the proposed Registry Agreement comes close to meeting the BC position, except that ICANN would retain sole discretion for transferring control if the registry had allowed any non-affiliates to use of any domains it had registered. Here is how the proposed Registry Agreement has it (emphasis added):

provided, however, that if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, (ii) 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.

To accommodate use by entities that are not Affiliates of the operator (such as subscribers and customers), the BC recommends striking "or use" from the above paragraph in the Registry Agreement.

Base Agreement Article 7: Amendments to the Registry Agreement

The BC is concerned about Section 7.6(c), the proposal to allow unilateral amendments to the New gTLD registry agreement if approved by supermajority of the ICANN Board.

The BC addressed this issue in April 2010 during a public comment regarding the process for amendments to the New gTLD Registry Agreement⁶:

As a matter of policy, the BC believes that businesses should not be subject to agreements where the other party has the unilateral right to amend such an agreement. ICANN's proposal in which the ICANN Board could unilaterally impose a change to registry agreements notwithstanding the objections of a majority of registry operators, the BC, or any other ICANN organization is an anathema to ICANN's bottom-up policy making roots.

...

The BC analyzes the issue based on whether proposed changes are within the so- called "picket fence" – and subject to Consensus Policy – or not. All contractual changes should be made in a transparent manner with input from the community.

For issues within the picket fence, there is an existing Policy Development Process that carries the power to change all registry and registrar agreements. As described in current and proposed registry contracts, the picket fence includes most conceivable ways that community and BC members would need to control registry practices:

- 1.2.1. issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS;
- 1.2.2. functional and performance specifications for the provision of registry services;
- 1.2.3. Security and stability of the registry database for the TLD;

⁶ BC Position on Process for Amendments to new gTLD Registry Agreements, Apr-2010

http://www.bizconst.org/Positions-Statements/BC_on_TLD_contract_amendments.pdf

- 1.2.4. registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars; or
- 1.2.5. resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).
- 1.3.1. principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);
- 1.3.2. prohibitions on warehousing of or speculation in domain names by registries or registrars;
- 1.3.3. reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and
- 1.3.4. maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.

Source: <http://icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-04oct09-en.pdf>

By way of example, a picket fence PDP was how the BC and other community members put a stop to domain tasting that was occurring by abuse of the add-grace period. While many felt that a 2-year PDP and implementation process took too long, this experience showed that the system works, generating a policy outcome that became part of all registrar and registry agreements.

Therefore, ICANN shouldn't have the ability to unilaterally change such agreements without community consent, and the BC does not see any need for a separate process for amendment on top of the current PDP process. The ICANN community is tasked with making policy; not the ICANN Board or staff. We have a process to make changes now. If that process needs improvement, let's improve it. Giving ICANN the ability to unilaterally amend the Registry contract is not the answer.

Certain other issues outside the picket fence also should not be subject to unilateral changes, such as pricing, ICANN fees, and other similar topics where neither party can unilaterally amend an agreement without consent of the other party to the contract.

There are some issues outside the picket fence, however, where ICANN and/or the community should be able to amend registry agreements without the specific consent of every single registry operator, as long as there is a consensus of the community. These issues should include security and stability issues, enforcement tools, registrant protections, and promoting a stable marketplace, and should be enforceable against all registry operators. Compliance staff must have the tools to enforce the registry agreements against 'rogue' or potential bad actor registries, for example, a registry that after delegation engages in undertakings that are deemed to damage the integrity of the Internet and ICANN, or harms registrants and specific communities, or engages in actions which are deemed to create technical risks. Rogue by definition refers to unprincipled or dishonest actors. One rogue registry should not be able to veto changes that the rest of the community supports. Similar changes to the Registrar Accreditation Agreement were recently adopted without each registrar being able to veto the changes.

Even with such rogue issues, neither the ICANN staff nor the Board should be able to amend registry agreements without community involvement and input from the registry operators. All changes – regardless of the issue -- must be transparent and exhibit the appropriate level of accountability to the community.

--end of excerpt from 2010 Position--

The BC continues to hold to the principles expressed in 2010, and therefore has concerns with the amendment process as proposed in Section 7.6(c).

It should also be noted that many of the new gTLD registries in sensitive or regulated industries will be operating with registrant restrictions and policies designed to avoid or satisfy objections from governments and regulators. ICANN should not be empowered to unilaterally amend all registry agreements if that would interfere with some registries' prior obligations to enforce registrant restrictions and policies.

Specification 5: Reserving Country and Territory Names at the Second Level

The BC continues believes that the proposed new gTLD Registry Agreement should include an exception or a centralized mechanism for **single-registrant TLDs** to request release of reserved country and territory names.

Specification 5 of the proposed registry Agreement continues to require default reservation of country and territory names, only to be released by express agreement of each applicable government:

The country and territory names contained in the following internationally recognized lists shall be initially reserved at the second level and at all other levels within the TLD at which the Registry Operator provides for registrations

...

provided, that the reservation of specific country and territory names may be released to the extent that Registry Operator reaches agreement with the applicable government(s), provided, further, that Registry Operator may also propose release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN.

In the BC's May-2011 comments, we proposed that single-registrant TLDs be exempt from the requirement to obtain express authorization from governments for each country and territory name⁷:

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.

⁷ p.8, BC Comments on New gTLD Applicant Guidebook – April 2011 Discussion Draft, May-2011
<http://www.bizconst.org/Positions-Statements/BC+on+Final+App+Guidebook+May+2011+v3.pdf>

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).

Now that there are several hundred single-registrant TLDs in this new gTLD round, the BC reiterates our request for an exception that allows single-registrant TLDs to register domains for their markets and operations based in countries and territories. (e.g. Canada.canon; Haiti.redcross, etc.)

If not an exception for single-registrant TLDs, ICANN should propose a centralized mechanism where single-registrant TLDs can request authorization from all governments in a consolidated request.

For purposes of this comment, the BC repeats its 2011 proposed definition for "Single-registrant TLD"⁸

Current Guidebook:	BC Recommended Change:
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.	

These comments were prepared in accordance with the BC Charter. Steve DelBianco served as Rapporteur.

⁸ p.8, BC Comments on New gTLD Applicant Guidebook – April 2011 Discussion Draft, May-2011
<http://www.bizconst.org/Positions-Statements/BC+on+Final+App+Guidebook+May+2011+v3.pdf>