Summary

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

The BC is disappointed that so many of our concerns about the new gTLD Guidebook have been disregarded, despite repeated comments by multiple stakeholders. There are repeated instances where the majority of the comments call for a change but staff ignores that majority without adequate explanation.

BC members are particularly disappointed by ICANN's continued disregard of its stated concerns about effective Rights Protection Mechanisms (RPMs). The Final Guidebook proposes a substantially weakened version of the tapestry of RPMs initially outlined by the IRT. Both 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.

The BC has already presented many concerns in response to prior draft Guidebooks, and as part of the IRT process. Prior BC comments apply equally to the latest Guidebook, but to emphasize just a few:

URS:

1. The URS is not a rapid process and takes nearly as long as using the UDRP with a higher burden of proof. The URS provides little certainty: Even if the trademark owner wins by default, Registrant can seek de novo review up to 2 years after suspension. The suspension is temporary and only takes place for "balance of registration" period with option to extend for one year at commercial rates. The URS places brand owners in a perpetual monitoring situation with no permanent ability to transfer the domain name. With a 5,000 word limit, the URS winds up being a lengthy process with little certainty for brand owners.

Trademark Clearinghouse;

2. Trademark Clearinghouse is not a real "remedy" but is essentially just a database. A sunrise Period will encourage defensive registrations at high prices, especially because ICANN fails to impose any price cap on sunrise fees. The optional Trademark Claims service provides a warning notice to a potential domain name registrant, but 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. Because this service is entirely optional, it is unknown how many new registries would offer any warning service.   Moreover, trademark owners wind up bearing all costs associated with the clearinghouse.

POST DELEGATION DISPUTE PROCEDURE:

3. The Trademark Post Delegation Dispute Procedure contains unrealistically high burdens of proof at both the first and second level. The levels of proof actually 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 to investigate or sanction the Registry.

The BC is concerned that the Guidebook has moved to 'proposed-final' form before delivery of an Economic Study of costs and benefits. This study is required as one of the acknowledged 'overarching issues' for the introduction of new gTLDs. As the BC has previously commented, economic analysis must inform decisions about gTLD introduction, including IPR protections. The GAC shares the BC view on the importance of the Economic Study, and we firmly believe that the Guidebook should not be finalized until study results have been adequately considered and commented upon by stakeholders.

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 here our Jul-2010 comments on DAGv4, regarding:

Market Differentiation / Translations – IDNs / Community- based Evaluation Scoring.   see http://forum.icann.org/lists/bc-gnso/pdf7bS90kfqkn.pdf

Rights Protection Mechanisms.
See http://forum.icann.org/lists/bc-gnso/pdfSBXE8faU4Z.pdf

These recommendations are arranged by Module, and each is followed by a statement of rationale for the change.

These comments were developed in accordance with the BC Charter.

Steve DelBianco, vice chair for policy coordination

Module 1: Batching of applications	
Current Guidebook Approach:	**BC Recommended Changes:**
1.1.2.3 …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.** Also: **A significant proportion of the first batch should be comprised of Community-Based applications.**

Rationale for BC Recommendation:
The BC position is to support "*an orderly rollout of new gTLDs in-keeping with the requested implementation of the GNSO Final Report on the Introduction of New gTLDs, i.e. with market differentiation.*" (Jul-2010 BC Comments, at http://forum.icann.org/lists/bc-gnso/pdf7bS90kfqkn.pdf) The Guidebook recommends processing an initial batch of applications, acknowledging there are "capacity limitations due to extended evaluation, string contention, and other processes." These evaluation and objection processes are untested and complex, involving new arrangements with independent evaluators. Moreover, the BC believes that ICANN lacks staff to ensure contractual compliance today, before new gTLDs are introduced. This compliance challenge could become significantly larger with cross-ownership and 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 100 applications would prove the effectiveness of new processes, whereas a batch of up to 500 applications could overwhelm ICANN's new systems and undermine the new gTLD process. The BC is not alone in its call for a more limited, discrete rollout: • The GAC letter of Sep-2010 advised ICANN to conduct "a small pilot programme" "to refine and improve the application rules for subsequent rounds." • ICANN's recent economic report recommended that ICANN continue its "practice of introducing new gTLDs in discrete, limited rounds" . • The 2-Dec-2010 letter from the US Government (NTIA) raises even broader concerns about the introduction of new gTLDs and concerns about ICANN's affirmation of commitments 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. The BC supports the concept of non-controversial community TLDs as the optimal way to expand the name space because they create this kind of added-value competition.

Module 1: Applicant Eligibility Screening	
Current Guidebook Approach:	**BC Recommended Changes:**
1.2.1 Circumstances where ICANN may deny an otherwise qualified application include, but are not limited to instances where the applicant, or any individual named in the application: … (k) has been involved in a pattern of decisions indicating that the applicant or individual named in the application was engaged in cybersquatting as defined in the UDRP, ACPA, or other equivalent legislation.	1.2.1 Circumstances where ICANN may deny an otherwise qualified application include, but are not limited to instances where the applicant**, its affiliates, subsidiaries** or any individual named in the application: (k) ... Also, the definition of 'Affiliate' should be restored to the Guidebook,
Rationale for BC Recommendation: When the ICANN Board eliminated any restrictions on cross ownership or vertical integration, it raised the importance of screening applicants for patterns of abusive conduct. Staff made changes to the Guidebook for applicant screening, to include disqualification for prior instances of cybersquatting. But the cybersquatting disqualification applies 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 (k) to apply to affiliates or subsidiaries of the applicant.	

Module 1: Applicant fees for multiple scripts and languages	
Current Guidebook Approach:	**BC Recommended Changes:**
1.2.10 A variety of support resources are available to gTLD applicants.	1.2.10 A variety of support resources are available to gTLD applicants and should include a fee reduction 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 small or underserved languages. One such incentive mechanism would be a reduction of the $185,000 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 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 that may be used in later stages of evaluation.	[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: 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. 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 2: Applicant commitment to security standard for registry operation	
Current Guidebook Approach:	**BC Recommended Changes:**
Evaluation question 35: Security Policy: provide the security policy and procedures for the proposed registry,	Evaluation question 35: Security Policy: provide the security policy and procedures for the proposed registry, **including which security standard(s), if any**, the applicant is committing to operate under. The security standards committed to by the applicant will be publicly available.
Rationale for BC Recommendation: Applicants should be required to indicate specific security standards they intend to apply to their registry operations and their entire chain of control for registrations. Specific information will allow evaluators and potential objectors to assess TLD applications that call for higher security, such as those targeted to financial and e-commerce users.	

Module 3: Objections to Applications	
Current Guidebook Approach:	**BC Recommended Changes:**
3.1.2.3. Limited Public Interest ".. an applied-for gTLD string may be considered contrary to generally accepted legal norms…" The objector must prove substantial opposition within the community it has identified itself as representing.	The term "generally accepted" should be specifically defined. The term "substantial opposition" should be specifically defined.
3.1.5 Independent Objector A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet. The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant.	Add description of the methodology ICANN will use to solicit interest from independent Objectors. Add specific decision criteria regarding the selection and supervision of the Independent Objector.
Anyone may file a [Limited Public Interest Objection]. Due to the inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous and/or abusive objections.	Open-ended guidelines may create a perpetual loop of opposition. The BC recommends a more specific regime.
Rationale for BC Recommendation: The BC is concerned that confusion and controversy may result from subjective and undefined aspects of the Limited Public Interest and Community objections. The BC understands that ICANN may need to outsource objection and evaluation tasks during the new gTLD application process. But a decision to outsource services does not enable ICANN to escape accountability for decisions made by outsourcing vendors. ICANN's Board must be the final resolution body for disputes that arise during evaluation and objection processes. The challenges of managing both internal and outsourced objection processes underlies the BC's recommendation for an initial batch of fewer than 500 applications (see Module 1 above).	

Module 3: Fees paid by applicant to respond to objections	
Current Guidebook Approach:	**BC Recommended Changes:**
3.2.4 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.	3.2.4 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:**
4.2.1 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 (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. Thus 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.

BC Request for continued policy development of single registrant exception within the Working Group

Finally, the BC requests that ICANN continue the policy development process in order to define the eligibility criteria and conditions for the Single Registrant exception as part of the current round of new gTLDs.

The Working Group Initial Report included a preliminary draft of single registrant exception on pages 32-33 that contemplates a more restrictive definition of internal uses than what the BC has contemplated, listing only "the registry itself, its employees, agents and subcontractors."

The BC requests further exploration of the range of internal entities for which a single registrant may distribute and manage domains within its TLD. As noted above, the BC is interested in flexibility to allow a qualified single registrant to distribute and manage domains for its departments, employees, customers, subscribers, and registered users. However, the BC understands that there would need to be well-defined criteria and enforceable contractual terms.

On all issues regarding vertical integration, the BC expects that its position will evolve as the Working Group continues its policy development work.

While the Board eliminated Vertical Integration restrictions in this version of the Guidebook, Module 5 still includes provisions that could unduly restrict how a single-registrant TLD distributes and manages lower-level registrations that are entirely under their ownership and control.

The next 5 recommendations are intended to remove those restrictions for single-registrant TLDs.

Module 5: Registry Agreement needs flexibility for single-registrant (dot-brand) TLDs	
Current Guidebook Approach:	**BC Recommended Changes:**
Registry Base Agreement 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 ('dot brand') 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 ('dot brand') 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 (dot-brand) 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. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD, provided that such agreement may set forth non-discriminatory criteria for qualification to register names in the TLD that are reasonably related to the proper functioning of the TLD.	[insert an exception:] **A single registrant ('dot brand') Registry Operator must use an ICANN accredited registrar, but is not required to provide non-discriminatory access to all registrars where any name permitted for registration at the second level must be under the control of the Registry Operator or its affiliates.**
Rationale for BC Recommendation: The Registry Agreement should not unduly restrict single registrant ('dot brand') 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 (dot-brand) TLD	
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. After consultation with Registry Operator, ICANN shall determine whether or not to transition operation of the TLD to a successor registry operator in its sole discretion and in conformance with the Registry Transition Process.	[insert an exception:] **4.5 shall not apply to single-registrant ('dot brand') Registry Operators which own the intellectual property rights of the applied for TLD.**

Rationale for BC Recommendation:
Single-registrant ('dot-brand') 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 (dot-brand) 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 (dot-brand) 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 (dot brand) TLDs	
Current Guidebook Approach:	**BC Recommended Change/Question:**
Code of Conduct: 1. Registry Operator will not, and will not allow any parent, subsidiary, affiliate, subcontractor or other related entity to: a - d 2. If Registry Operator or a Registry Related Party also operates as a provider of registrar or registrar reseller services, Registry Operator will, or will cause such Registry Related Party to, maintain separate books of accounts with respect to its registrar or registrar-reseller operations. 3. Registry Operator will, and will cause each Registry Related Party to, ensure that no user data or proprietary information from any registrar is disclosed to Registry Operator or any Registry Related Party, except as necessary for the management and operations of the TLD.	[insert new item 4:] **4. Nothing set forth in articles 1, 2, or 3 shall apply to a single-registrant ('dot brand') Registry Operator acting with respect to user data that is under its ownership and control, or with respect to conduct reasonably necessary for the management, operations and purpose of the TLD.**
Rationale for BC Recommendation: The Code of Conduct should not restrict dot-brands 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.)	

Module 5: UDRP concerns for single-registrant (dot brand) 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 branded gTLDs. In the case of a single-registrant (dot-brand) registry 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 branded gTLD. Third-party registrations in a single registrant gTLD could cause consumer confusion and in extreme cases be a vehicle for fraud.	

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: Registry Code of Conduct and Front-Running of domain names	
Current Guidebook Approach:	**BC Recommended Changes:**
Registry Operator Code of Conduct: 1. Registry Operator will not, and will not allow any parent, subsidiary, affiliate, subcontractor or other related entity to: d. register names in the TLD or sub-domains of the TLD based upon a search of available names by any consumer (i.e., "front-running").	d. register names in the TLD or sub-domains of the TLD based upon **proprietary access to information about searches or resolution requests for domain names not yet registered.**
Rationale for BC Recommendation: Front-running is not defined in the Guidebook, though the term has been used to describe registrations based on contract parties' knowledge of user searches for available names. The Registry Code of Conduct should restrict abuse of proprietary data to acquire unregistered names, whether that occurs as front-running or by other inappropriate methods. For example, a registry has the unique visibility of nearly all traffic for non-existing records requested by resolvers. That means a registry can see all non-registered domain names that are typed (or mis-typed) by users, indicating potential names to acquire for their own speculative or monetization purposes.	

Module 5: Registry Agreement, Auditing for conformance with Registry Code of Conduct	
Current Guidebook Approach:	**BC Recommended Changes:**
2.11 Contractual and Operational Compliance Audits. ICANN may from time to time … conduct, or engage a third party to conduct, contractual compliance audits to assess compliance by Registry Operator with its representations and warranties …	Non-payment of registry fees shall not be a reason for ICANN to delay a registry audit that is otherwise called for.
Any such audit will be at ICANN's expense, unless (i) Registry Operator (A) controls, is controlled by, is under common control or is otherwise Affiliated with, any ICANN accredited registrar or registrar reseller or any of their respective Affiliates …	In situations where the Registry Operator must pay audit expenses, ICANN should ensure that delays in payment do not delay or undermine a compliance audit.
Rationale for BC Recommendation: The Board's decision to eliminate restrictions on cross-ownership and vertical integration will likely result in gTLD registry operators being affiliated with registrars. This will cause the TLD operator to pay the cost of audits of their own contractual and operational compliance. The BC is concerned that payments could be withheld or delayed in order to delay or distract auditors from compliance audit tasks. The BC reminds ICANN that contractual and operational compliance is ultimately the responsibility of ICANN, not the Registry Operator. The BC understands that ICANN may need to outsource audit services. But a decision to outsource services does not enable ICANN to escape accountability for non-compliance by its contracted Registry operators.	

The final BC recommendation to the Guidebook concerns requirements to qualify for inclusion in the Trademark Clearinghouse.

Our intent is to create qualification hurdles high enough to exclude cybersquatters seeking to register terms in the clearinghouse, without setting that hurdle so high that legitimate rights owners cannot qualify.

The BC therefore recommends a requirement for use of a trademark in order to enter the Clearinghouse database, as detailed in the recommendation below:

Module 5: qualification for TM Clearinghouse, URS, sunrise, and objections	
Current Guidebook Approach:	**BC Recommended Changes:**
URS 1.2.f.i that the registered domain name is identical or confusingly similar to a word mark: (i) in which the Complainant holds a valid registration issued by a jurisdiction that conducts a substantive examination (footnote1) of trademark applications prior to registration or (ii) …	that the registered domain name is identical or confusingly similar to a word mark **that: (i) is registered (not just applied for); and has been through the relevant period for opposition applied in the country of registration; and is not subject to a pending opposition, revocation or cancellation action; and is in use;** or (ii) …
	INSERT new footnote: Any appearance of the phrase "in use" should be accompanied by a footnote indicating: **"It will be sufficient for the rights owner to make a simple declaration of use".**
Footnote 1 Definition: Substantive evaluation upon registration has essentially three…	Footnote 1 DELETE (now redundant)
Sunrise 7.1.3 For Sunrise services - Registries must recognize all word marks: (i) nationally or multi-nationally registered in a jurisdiction that conducts a substantive examination evaluation of trademark applications prior to registration; or (ii) …	7.1.3 For Sunrise services - Registries must recognize all word marks: **(i) that are registered (not just applied for); and have been through the relevant period for opposition applied in the country of registration; and are not subject to a pending opposition, revocation or cancellation action; and are in use;** or (ii) ….
7.3 Definition: Substantive evaluation upon registration has essentially three requirements…	DELETE (now redundant)
7.4 Substantive evaluation by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.	DELETE (now redundant)

Module 5: qualification for TM Clearinghouse, URS, sunrise, and objections	
Current Guidebook Approach:	**BC Recommended Changes:**
TRADEMARK POST-DELEGATION DISPUTE RESOLUTION PROCEDURE 9.2.1 The Complainant is a holder of a word mark: (i) issued by a jurisdiction that conducts a substantive examination of trademark applications prior to registration; or (ii) …	The Complainant is a holder of a word mark: **(i) that is registered (not just applied for); and has been through the relevant period for opposition applied in the country of registration; and is not subject to a pending opposition , revocation or cancellation action; and is in use**; or (ii) …

Rationale for BC Recommendation:

The BC is addressing this problem with the Guidebook:
    a) with the opening phrase that puts this requirement as operating at the trademark registration stage rather than at the domain name application stage,
    b) an unnecessary distinction between countries with and without substantive review.
 	
The proposed wording is simpler. It works in the US/Canada system, and would additionally cover systems like Brazil or Benelux where you achieve registration before the opposition period.
 	
The requirement for *no pending opposition, revocation or cancellation action* would cover situations where infringers have registered trademarks with blatant disregard for prior rights.
 	
The *use* provision would go some way to stopping the use of trademarks that are totally descriptive in one class but registrable in others.
 	
The use requirement may prevent a few genuine brand owners from benefiting from the sunrise period but these will not be too numerous and cyber-squatters are less likely to target trademarks for products that have yet to be launched.
 	
As noted above, any appearance of the phrase "in use" should be accompanied by the footnote indicating, "It will be sufficient for the rights owner to make a simple declaration of use".