



# Comment on Proposed Amendments to Base New gTLD Registry Agreement

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**Business Constituency Submission**

**GNSO//CSG//BC**

## Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

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.

## General Comment

The Business Constituency (“BC”) appreciates the opportunity to provide comments regarding proposed amendments to the base New gTLD Registry Agreement, posted for public comment on 31-May-2016 at <https://www.icann.org/public-comments/proposed-amend-new-gtld-agreement-2016-05-31-en>

The BC has several proposed changes, as well as an overarching concern and request for action relating to how proposed amendments to the New gTLD Registry Agreement are developed and finalized.

## Specific Comments

### 1) Fee Reductions Only for Registries That Support and Enhance Internet Security

The BC supports enabling ICANN to reduce registry fees to incentivize Registry Operators to engage in practices that help mitigate the proliferation of abusive domain names in their TLDs, and thereby support and enhance internet security and contribute to a healthy domain name ecosystem. There is strong precedent for ICANN unilaterally reducing contracted party fees to promote such good behavior. For example, at various times in the past ICANN unilaterally reduced fees for registrars that adopted a new RAA, ended “drop catching,” and stopped “domain tasting.”

The proposed fee reduction text is wholly insufficient, as it includes no objective criteria on which fee reductions will be based, nor a process to determine appropriate criteria, and as such could result in market distortion. The BC opposes enabling ICANN staff to waive fees “at [their] sole discretion” with no stated criteria or requirement for public disclosure. As with previous fee reductions for registrars, fee reductions should be based on clear, objective criteria and data. Analysis of DNS data, domain registration service data, and other data associated with domain names conducted by ICANN’s CTO/IS-SSR Team should be applicable. Data is available indicating that some new gTLD registries have a high percentage of malicious domain names, and these registries must not be eligible for a fee reduction.

**Action:** The BC requests that section 6.7 be revised to require that ICANN staff administer a data-driven fee reduction process with clear criteria that encourages the mitigation of abusive domain names in new gTLDs, and thereby promotes internet security and a healthy domain name ecosystem. The development of such criteria should be done in a transparent manner, and involve ICANN CTO/IS-SSR staff, and security and domain name analytics experts.

## 2) Registry Pricing Safeguards

The BC supports maintaining the requirement that a Registry Operator provide notice to ICANN if a change to a Registry-Registrar Agreement relates exclusively to price increases. To date, a small number of Registry Operators have engaged in a variety of pricing practices, including giving away domain names for free or at an extremely low cost without safeguards to avoid malicious use, and this has correlated strongly with those TLDs having a substantial increase in malicious domains (malware, phishing, etc.), damaging the overall security of the Internet. Other examples of problematic pricing behavior include .xyz domain names being registered for registrants at no cost and without registrants' knowledge or approval, and Registry Operators engaging in predatory pricing on top of sunrise domain name pricing.

While it is not ICANN's role to set and regulate prices, it may be useful for ICANN to collect data on a range of registry (and registrar) activities, including pricing at the wholesale and retail level (and domain name abuse). This data might establish a correlation between free/ low prices without abuse safeguards and abusive domain name practices. This proposal is consistent with previous BC input on the development of a new gTLD Health Index.<sup>1</sup>

**Action:** The BC requests that ICANN staff advise on the utility of collecting pricing data in terms of compliance and SSR responsibilities, and community review and policy development. This advice should be factored into action regarding this section.

## 3) Brand Registry Operator Approval

This amendment provides an important safeguard for Brand registries, however the method of voting for the Applicable Brand Registry Operator Approval is not ideal. The BC is concerned about the proposal in Spec 13, Section 9.4 to base "Brand Registry Operator Approval," in part, on "the affirmative approval of the Applicable Brand Registry Operators whose payments to ICANN accounted for two-thirds of the total amount of fees ... paid to ICANN by all the Applicable Brand Registry Operators during the previous calendar year pursuant to the Applicable Brand Registry Agreements, ..." ICANN fee collection from .BRAND registries has no place in this approval process. There are hundreds of .BRAND registries with valid business models that are not based on the number or cost of domain name registrations. Brand Registry Operator Approval should fully acknowledge this and not bias approval requirements in favor of those registries that provide ICANN with more money.

**Action:** The BC requests that the proposed subsection (i) referenced above be deleted and subsection (ii) modified to recommend a simple two-thirds majority vote

## 4) Dotless Domains

The BC appreciates the enumeration of approved services proposed for Exhibit A (Approved Services), including the parenthetical text declaring "The above language effectively does not allow, among other

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<sup>1</sup> 22-Jan-2016, BC comment on New gTLD Marketplace Health Index Proposal, at <http://www.bizconst.org/assets/docs/positions-statements//bc-comment-on-gtld-marketplace-health-index.pdf>

things, the inclusion of DNS resource records that would enable a dotless domain name (e.g., apex A, AAAA, MX records) in the TLD zone.” However, in view of the significant security concerns that were identified during the SSAC process of evaluating dotless domains, the BC is concerned that the text as drafted may suggest dotless domains could potentially be enabled through the RSEP process. We strongly oppose this apparent change based on the potential for security and stability problems, as highlighted by SSAC and IAB.<sup>2</sup> An ICANN Board resolution regarding a key security issue should not be overridden by contract negotiation.

**Action:** The BC requests that the proposed text be amended to clarify that there is no avenue for the introduction of dotless domains, as follows: “If Registry Operator wishes to place any DNS resource record type or class into its TLD DNS service (other than those listed in Sections 1.1 or 1.2 above), it must describe in detail its proposal and submit a Registry Services Evaluation Process (RSEP) request. This will be evaluated per RSEP to determine whether the service would create a risk of a meaningful adverse impact on security or stability of the DNS. **However, in no circumstance will introduction of dotless domains be evaluated or permitted through the RSEP process.**”

### 5) Registry Operators Excluded From Negotiations

ICANN staff engaged in discussions and negotiations with a small working group created by, and from, Registry Stakeholder Group (RySG) members *on* “the form and substance of mutually acceptable proposed contract amendments.” The BC is concerned about the exclusion from these negotiations of a significant number of accredited registries that are not members of the RySG. According to posted records, over 90% of dot Brand registry operators are not listed as members of the RySG<sup>3</sup> and may have been unable to participate in the negotiation of this contract to which they are bound. If a Registry Operator declines to expend the substantial resources required to join the RySG, they should not forfeit their right to participate in contract negotiations. How is ICANN treating all new gTLD registries as equal if ICANN staff only negotiates with a subset that pays RySG fees?

**Action:** The BC asks that ICANN staff reach out to all Registry Operators who are not members of the RySG.

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<sup>2</sup> See “New gTLD Dotless Domain Names Prohibited” page on ICANN website, at <https://www.icann.org/news/announcement-2013-08-30-en>

Total Number of .BRAND Registry Operators	364
Total Number of .BRAND Registry Operators <b>NOT</b> RySG Members	<b>334</b>
Percentage of Total .BRAND Registry Operators <b>NOT</b> RySG Members	<b>92%</b>

## 6) Non-Transparent, Closed Negotiations

The BC is concerned about the closed, non-transparent nature of the process that yielded these proposed amendments. The following should be publicly posted in conjunction with discussions and negotiations on proposed amendments to the base agreement: the names and affiliations of individuals who developed the proposed contract changes (ICANN staff and members of the RySG Working Group); meeting summaries and minutes of these closed-door negotiations; fulsome explanations and background on the proposed changes; and explanations of proposed changes that were not included, and why. Unfortunately, none of this was posted for the ICANN community's consideration. The approach to public disclosure used by ICANN staff during negotiations of the 2013 RAA (although incomplete) would have been a more appropriate process to use and it is puzzling why no similar efforts at transparency were made here. This runs counter to numerous ICANN commitments to accountability and transparency and should have been a priority for ICANN, especially considering the pending IANA transition commitments.

It is vital that ICANN operate in an open and transparent manner and involve the multistakeholder community, particularly when contracted parties are involved. As has been stated by the BC previously, changes to registry and registrar template agreements directly affect the broader community and the internet in enumerable ways. Therefore, discussions and negotiations on changing them is the business of the entire ICANN community and as such we all should have access to the information listed above.

**Action:** The BC again requests transparency and seeks the public posting of negotiation participants' names and affiliations, meeting documents, and more detailed explanations and background on proposed changes, and proposed changes that were discussed by the Working Group but not included. This should be done for any and all registry or ICANN staff efforts to change the template agreement. Further discussions with the broader community should be conducted regarding changes to these proposed amendments before they are finalized and sent to the ICANN Board for consideration.

The following are additional items that the BC would like to see included in proposed amendments, but don't seem to have been addressed.

## 7) Specification 11 terminology

"Pharming" should be removed because it is a methodology for phishing and not a unique attack, and spam needs to be included. Spec 11 should explicitly restrict the referenced set of security risks and require Registry Operators to perform technical analyses on these risks and provide them to ICANN. As the meeting organized by Board Director, Bruce Tonkin, with ICANN community representatives at the ICANN 56 in Helsinki demonstrated, and as ICANN Chair, Steve Crocker, stated in recent correspondence, more needs to be done to gain "a better understanding of the provisions in ICANN's contracts."<sup>4</sup>

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<sup>4</sup> Letter from Steve Crocker to Greg Shatan [Published 30 June 2016]

**Action:** The BC requests that the relevant text be amended as follows: "Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies, **including registration policies prohibiting abuse registrations.**"

**8) Compliance with Specification 9**, the Registry Operator Code of Conduct, is a priority for the BC. Unfortunately, no compliance action is stipulated for violations of the Code.

**Action:** The BC requests that text be added specifying ICANN compliance actions for violations of this Code of Conduct.

**9) Contractual and Operational Compliance Audits**, Section 2.11 requires additional text to ensure accountability and transparency.

**Action:** The BC requests that text be added to ensure that ICANN collects and publishes information regarding all audits (excluding business sensitive information), and that stipulates enforceable actions that ICANN should take when registries fail audits.

**10) Section 2.8** states: "Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law." The BC supports this requirement, but additional text is needed to ensure accountability and transparency.

**Action:** The BC requests that text be added requiring a Registry Operator to notify ICANN of receipt of the reports referenced above, in the aggregate (without personally identifying information), and that ICANN then publish this data.

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This comment was drafted by Denise Michel, with edits from Paul Mitchell and Cecilia Smith. It was approved in accord with our charter.