



Comments on Closed Generic TLDs

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Business Constituency Submission

GNSO//CSG//BC

ICANN has opened a public comment period ([link](#)) asking whether to classify certain TLD applications as "closed generic", and to determine "circumstances under which a particular TLD operator should be permitted to adopt open or closed registration policies."

The board resolution puts it this way:

Resolved, the New gTLD Program Committee directs the President and CEO to open a 30-day public comment forum on this topic, which should include a call for identification of proposed objective criteria to classify applied-for TLDs as "closed generic" TLDs.

As written, this comment solicitation steers away from the question of whether a registry may own all the domain names in its new gTLD. Instead, ICANN is asking whether we need new policies regarding who may register a domain, as is apparent from this "background" statement under the public comment:

Many of the communications link the issue of registration restrictions for a TLD with the Code of Conduct (Specification 9 to the gTLD Registry Agreement). However, it should be clarified that the Code of Conduct refers to registry-registrar interactions, rather than eligibility for registering names in the TLD. Rather than the Code of Conduct, the true issue of concern being expressed appears to be that in certain applications, the proposed registration policies are deemed inappropriate by some parties.

That points us to the Registry Code of Conduct (see Appendix B), which was created partly in response to BC concerns about potential abuse if ICANN allowed vertical integration of registries and registrars. Here's the restriction in the Code of Conduct that is most relevant to this discussion (emphasis added):

1. In connection with the operation of the registry for the TLD, Registry Operator **will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity**, to the extent such party is engaged in the provision of Registry Services with respect to the TLD to:

b. **register domain names in its own right**, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD

Reasonable people have interpreted 1b differently. Does 1b prohibit a registry from owning names in its own TLD, except for limited circumstances? Or does 1b allow a registry to own any and all names that suit the purpose of their TLD?

ICANN may further clarify its intentions with 1b, but thus far ICANN's legal department is suggesting that 1b allows a "closed generic" TLD operator to own all of the names in the TLD, since they could be "reasonably necessary for the management, operations, and purpose of the TLD".

Whatever the interpretations of ICANN legal, the BC appreciates this opportunity to comment on what should be the interpretation and implications for closed generic TLDs.

In February, the BC conducted a poll of BC members to assess convergence around a desired policy outcome that could form the basis of a BC Comment on closed generics.

First, BC members were given a 3-page history on the BC's prior positions to support for restricted TLDs, starting in 2007 with sponsored TLDs, and then in 2009 for dot-brand TLDs. (See Appendix A).

Beginning 17-Feb, BC members considered 3 potential outcomes for closed generic TLDs:

Outcome #1: Anything Goes. The registry Code of Conduct clearly allows a TLD operator to have control over who registers domains in their TLD, and the operator can own all the domains if they wish. Under this outcome, a registry could own all the domains in their TLD without having to ask ICANN for an exemption from the Code of Conduct.

Outcome #2: Exemption Required. The registry Code of Conduct prohibits a TLD operator from registering names in its own TLD, except for names reasonably necessary for operating the TLD. Under this outcome, the 1b "except for" does not swallow the rule and thereby allow control of all domains in the TLD. A registry that wants to own all the domains in its TLD can still do so, however, if it obtains an exemption from the Code of Conduct, as provided in section 6 of the Code:

6. Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, 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, **and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.**

All that remains is for ICANN to develop & publish the process and criteria for determining whether giving an applicant this exemption is "in the public interest" as required by section 6 of the Code of Conduct. Presumably, the public interest would include considerations of consumer protect, freedom of expression, competition, innovation, and relevant pledges made by ICANN in the 2009 Affirmation of Commitments.

Outcome #3. Only dot-brands may get an exemption. Only dot-Brands should get the Code of Conduct Exemption. That would allow .Hilton, .Apple, .Google to pursue the exemption, and they should have no trouble getting it. But Goodyear would not be eligible for an exemption that allow it to own all names in .tires TLD, for example.

As a result of the above poll, BC membership did not indicate significant support for any of the above outcomes. BC member comments included: concern about changing the rules at this time; disagreement with the way ICANN has positioned this as a matter of classification; acknowledgment that governments and regulators can enforce competition laws post-delegation -- whether or not ICANN granted a TLD an exemption to the registry Code of Conduct.

Since there was not significant support for a single outcome, the BC is not at this time taking a position on the Board's question of whether to create a new classification for "closed generic" TLDs.

Instead, the BC submits this analysis, which includes a history of BC positions on whether a gTLD operator should be permitted to own all domains in the TLD, and whether such an operator should be required to use registrars. Included in the BC prior positions are several areas where the BC argued for increased flexibility for single-registrant / dot-brand TLDs.

The BC will watch the progress of this issue and remains ready to answer questions from ICANN board and staff.

Appendix A Prior BC Positions relevant to Closed Generic TLDs

In Apr-2007 the BC submitted comments on initial policy development for the anticipated round of new gTLDs. Our comments were subtitled “Adding value to the namespace” and included support for community namespaces in the form of chartered and sponsored TLDs.

While this position shows early recognition of the value of closed TLDs, it does not discuss whether closed TLDs should be operated by a community organization or a single competitor in the target industry. ([link](#)) and excerpt below:

The BC supports the concept of top-level domain names that are targeted towards a community as the optimal way to expand the name space because they create this sort of added-value competition. Such names may include chartered and sponsored TLDs.

Chartered TLDs are ones proposed by an applicant registry where the registry does not represent the community targeted but seeks to define and appeal to a targeted community. The public interest justification in awarding a monopoly-like right on the TLD is thus lower than that for a sponsored TLD and so allocation criteria for competing applications may be different to those appropriate for sponsored TLDs.

Sponsored TLDs are ones proposed by a sponsor (with or without plans to provide the back office and front office functions of the registry) where the sponsor defines and represents the community targeted. This ability to represent the community is the public interest justification for the awarding of a monopoly-like right to a unique domain name. Example: Tralliance was awarded the .travel TLD because it was able to show the sponsor was representative of the world’s travel trade community.

Such community supported or targeted TLDs have five key benefits:

- they establish competition with .com because they provide TLDs that have an identity: companies are provided an incentive to migrate to the TLD to take advantage of a form of brand identity within their sector,
- they identify a community that has reason to maintain and encourage registration in the TLD space,
- they provide improved searchability with more relevant results,
- they identify a community that has reason to maintain an accurate and authenticated WHOIS,
- they prevent cyber-squatting, phishing and other forms of consumer harm because there is control and validation of who registers in the space.

The BC first requested flexibility for dot-brand TLDs in our comments on Ry/Rr Separation (Vertical Integration) in Aug-2009 ([link](#) and below):

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. e.g. 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.

The BC clarified those requests in Aug-2010:

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.

By late 2010 we began using the phrase "Single registrant TLD" instead of "dot-brand", but this was still intended for use by brands. This began on a BC member call, where Berry Cobb suggested the new term, and several members agreed.

The BC re-iterated these requests in Dec-2010. (pages 9-12 are shown below)

See pages 9-12, where we suggest specific edits to the Guidebook on Ry Contract and Code of Conduct.

At the Toronto ICANN meeting in Oct-2012, Steve DelBianco posed a question to the board during the Public Forum:

The Business Constituency advocated a way to create an exemption to the new gTLD Registry Contract, such that dot-brands would be allowed to use just one registrar - perhaps even their own registrar - and that dot-brands be allowed to register their own names and control them.

So we were glad to see the Guidebook included a Registry Code of Conduct exemption. Dot-brands, in fact, will probably avail themselves of that exemption.

But we were quite surprised-maybe even naïve- when we saw hundreds of corporate applications for generic keywords, not just dot-brands. And these applications came from companies who want to use the keyword in a closed way. And some of those companies even have a significant market presence as a competitor in those keyword markets.

We expect those closed keyword applicants to apply for the exemption. And the Board of ICANN then will have to decide whether to grant the exemption. The way it reads now is that you need to determine whether the Code of Conduct is needed to protect the public interest.

My question for you is Who and How will we determine whether exempting an applicant from the Code of Conduct is in the public interest?

The BC and I have advocated for many years a simple, limited definition for Public Interest, which should make that decision easier. As you recall, that definition is, "For ICANN, the Public Interest is the Availability and Integrity of Registrations and Resolutions."

Isn't it time we let the community settle on a definition for Public Interest so we can decide these exemption requests?

In the Jan-2013 Intersessional at ICANN, the Business Constituency (BC) asked senior staff (David Olive and Christine Willett) this question:

Hundreds of applicants will need to obtain an exemption from the Code of Conduct, so they can bypass registrars and own all second level domains. That is, run a closed TLD, whether as a dot-brand or a closed generic keyword TLD. When and how will you develop / publish how ICANN will determine whether giving an applicant this exemption is "in the public interest" as required by the Guidebook?

No answers were given. A few days later, ICANN opened a public comment period on "closed generic" gTLD applications."

Appendix B

SPECIFICATION 9: Registry Operator Code of Conduct

- 1) In connection with the operation of the registry for the TLD, Registry Operator will not, and will not allow any parent, subsidiary, Affiliate, subcontractor or other related entity, to the extent such party is engaged in the provision of Registry Services with respect to the TLD (each, a "Registry Related Party"), to:
 - a. directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services, unless comparable opportunities to qualify for such preferences or considerations are made available to all registrars on substantially similar terms and subject to substantially similar conditions;
 - b. register domain names in its own right, except for names registered through an ICANN accredited registrar that are reasonably necessary for the management, operations and purpose of the TLD, provided, that Registry Operator may reserve names from registration pursuant to Section 2.6 of the Registry Agreement;
 - c. register names in the TLD or sub-domains of the TLD based upon proprietary access to information about searches or resolution requests by consumers for domain names not yet registered (commonly known as, "front-running");
 - d. allow any Affiliated registrar to disclose user data to Registry Operator or any Registry Related Party, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such user data on substantially similar terms and subject to substantially similar conditions; or
 - e. disclose confidential registry data or confidential information about its Registry Services or operations to any employee of any DNS services provider, except as necessary for the management and operations of the TLD, unless all unrelated third parties (including other registry operators) are given equivalent access to such confidential registry data or confidential information on substantially similar terms and subject to substantially similar conditions.
- 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, ensure that such services are offered through a legal entity separate from Registry Operator, and maintain separate books of accounts with respect to its registrar or registrar-reseller operations.
- 3) Registry Operator will conduct internal reviews at least once per calendar year to ensure compliance with this Code of Conduct. Within twenty (20) calendar days following the end of each calendar year, Registry Operator will provide the results of the internal review, along with a certification executed by an executive officer of Registry Operator certifying as to Registry Operator's compliance with this Code of Conduct, via email to an address to be provided by ICANN. (ICANN may specify in the future the form and contents of such reports or that the reports be delivered by other reasonable means.) Registry Operator agrees that ICANN may publicly post such results and certification.
- 4) Nothing set forth herein shall: (i) limit ICANN from conducting investigations of claims of Registry Operator's non-compliance with this Code of Conduct; or (ii) provide grounds for Registry Operator to refuse to cooperate with ICANN investigations of claims of Registry Operator's non-compliance with this Code of Conduct.
- 5) Nothing set forth herein shall limit the ability of Registry Operator or any Registry Related Party, to enter into arms-length transactions in the ordinary course of business with a registrar or reseller with respect to products and services unrelated in all respects to the TLD.
- 6) Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, 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, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.