The ICANN GNSO "Business Constituency"

Comment on New gTLD Program Implementation Review Draft Report

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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.

New gTLD Program Implementation Review Draft Report

On its face, the scope of this review is limited to "the experiences of the ICANN staff members charged with executing the New gTLD Program." The report does not identify which staff members, does not indicate whether former staff members were contacted about their experiences, does not represent that this report is an exhaustive summary (as opposed to illustrative), and does not disclose the methodology used to determine which experiences are included – and which are excluded. Accordingly, the review in its current form warrants correspondingly limited deference by the CCT Review Team, and should be rewritten in time for CCT Review deliberations, taking into account the Business Constituency's input and other public comments. In particular, it is important that the draft Program Implementation Review report is updated to include the data and analysis needed to address the relevant issues raised by BC.

The BC acknowledges the complexity of the new gTLD program, and given this complexity, we feel that ICANN has handled many aspects of implementation well. That said, there have been undeniable, serious missteps along the way by the ICANN Board and staff. We believe this report would have been an excellent opportunity for ICANN to fully address and accept those missteps. Unfortunately, the report all too often provides limited summary information of missteps and security breaches and relies on the passive voice rather than directly accepting fault. For just one instance, section 8.1.4.2 describes troubling security breaches associated with the Customer Portal, but the conclusion merely states that "the system development process may have benefited from leveraging industry standard best practices for product development." We believe ICANN has missed an important opportunity to earn the full trust of the community by accepting full responsibility of all aspects of program implementation, and publishing details of the failings and improvements that will help prevent future missteps.

Application Processing

1.1 Application Processing

ICANN should take the steps and make the investment necessary to ensure that the TLD Application System (TAS), or successor system, is secure and that the numerous failings in this version of TAS, including those that disclosed applicant confidential data to third parties, do not occur.

In the previous round ICANN had no specific guidelines for single-registrant .BRAND applications, despite BC comments alerting ICANN to special brand applicant considerations in 2010[1]. A better approach will be to take into account different applicants and purposes, and benefit from efficiencies in providing a different process for .BRAND applications.

1.2 Prioritization

The BC acknowledges the challenge of identifying and engaging knowledgeable, neutral individuals to serve on the Evaluation Panels. ICANN should take additional steps to ensure that employees and contractors of third-party firms retained as Evaluation Panels should not be permitted to participate in those panels if such employee or contractor has been an active member of an ICANN Supporting Organization, Advisory Committee, Stakeholder Group, or Constituency in the preceding year. This prohibition will avoid the appearance of impropriety and conflicts of interest.

1.3 Application Comments

The BC supports ICANN's exploration of implementing additional functionality that would improve utility of the Application Comments Forum.

1.4 Application Withdrawals and Refunds

Any process considered to move applications with a "will not proceed" status to a final state "if the applicant does not initiate an application withdrawal" must not move an application until the applicant has pursued or had an opportunity to pursue (under relevant procedures) applicable accountability mechanisms.

Application Evaluation

2.2 Background Screening

The broad wording of the "history of cybersquatting behavior" question required applicants that had sought to protect their brands from cybersquatting (e.g., UDRP Complainants) to provide detailed information about relevant proceedings. The BC is concerned that ICANN, in turn, did not use this information to properly screen applicants. An applicant should indicate if they have ever been named as a respondent in a UDRP or other arbitration concerning a domain name and provide information on any actions they have filed as a complainant in which they lost. It is critical that ICANN use this information to screen out bad actors who attempt domain name hijacking through a UDRP, URS or similar method.

When TLD re-assignments occur, the BC believes that the new prospective operator of the TLD should be subject to the same screening process as initial applicants.

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[1] 2 *See* Business Constituency Comments on Proposed Final Applicant Guidebook, 6-Dec-2010, at http://www.bizconst.org/wp-content/uploads/2014/06/BC-on-Final-App-Guidebook.pdf

2.3 String Similarity Evaluation

The BC believes the review mechanism for string confusion is too narrow.[2] In future rounds, ICANN should conduct a more comprehensive review, based on more specific objective criteria for evaluation. In the BC's Jul-2014 comments, we recommended:

> A more comprehensive review is necessary for singular/plural string confusion objections and thus reiterate the following standing requests to ICANN:
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>> 1. Publish any evidence considered by expert panels, arbitration providers, and ICANN staff in its evaluation of string confusion determinations; and
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>> 2. Publish more specific objective criteria used to judge string similarity, while creating a broader appeal system to allow parties to challenge prior ICDR decisions on singular/plural TLDs.

In advocating for a broader appeals mechanism for singular/plural objection proceedings, we first wish to challenge the NGPC's rationale that the only situation which merits additional review is the one where objections were raised by the same objector against different applications for the same string, resulting in a different outcome. While that particular scenario is indeed problematic, such parameters are crafted too narrowly to encompass the flawed process in which an early ICDR panel somehow came to the conclusion that .HOTEL and .HOTELS were *not* confusingly similar, while the clear pattern in later rulings pertaining to singular and plural strings has been directly contrary to that finding.

2.4 DNS Stability Evaluation

The BC submitted two public comments on ICANN's collision mitigation plans, supporting ICANN's attention to the risks while raising questions about specific procedures[3]. ICANN was slow to respond to SSAC's concern about collisions, then reacted with a Day in the Life (DITL) plan that swept millions of domain names onto the protected list without an assessment of specific risks. While that created delays in registration of strings that presented no risk, the protected DITL strings were eventually released.

ICANN should reconsider whether the Round 1 name collision process based on Day in the Life (DITL) data is appropriate, or even necessary, for subsequent rounds. In retrospect there were very few risks or incidents of collision actually reported by users of the DNS. ICANN ultimately released a substantial number of these names—of which many were trademarks and registered in the TMCH—initially without requiring that they go through the Sunrise Period. When the Sunrise Period was

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[2] 23-Mar-2014, BC comment on string confusion objections, at http://www.bizconst.org/wp-content/uploads/2014/07/BC-Comment-Review-for-inconsistent-decisions-on-string-confusion.pdf

[3] Sep-2013 BC comment on ICANN's Proposal to Mitigate Name Collision Risks from new gTLDs, at http://www.bizconst.org/wp-content/uploads/2014/06/BC-Comment-Name-Collision-Risk-FINAL1.pdf and Apr-2014 BC comment on Namespace Collision Mitigation Report, at http://www.bizconst.org/wp-content/uploads/2014/07/BC-Comments-JAS-Collision-Mitigation-Report.pdf

subsequently used, several registries then attempted to use predatory pricing for these trademark names.

In addition, the criteria for how these names were identified were not revealed, and there was no due process to get them removed. As noted, many of the names included brands that were registered in the TMCH, thereby denying many brand owners from use of the Sunrise Period, or even obtaining the domains altogether. This created safety and security concerns for brands wanting to mitigate malicious use of their brands in domain names and to protect consumers from such harm. Other names were also reserved for name collision thereby removing valuable strings from use without publishing any data on the risk of harm.

If reserved name lists are used for collision mitigation or other security concerns, names that are eventually released from reserved lists should be subject to sunrise and other applicable rights protection mechanisms.

2.5 Geographic Names Evaluation

ICANN should retain the current definition of and approach to Geographic Names, which was developed after multiple iterations of the AGB (and community comment) as well as a Board-GAC consultation. There should be no purpose to the Geographic Name designation other than the limited evaluative purpose in the AGB; it should not be used as a proxy for national and international law. A vague definition of Geographic Names creates uncertainty for potential applicants and the community; an overly broad definition of Geographic Names interferes with existing proprietary rights.

2.6 Technical and Operational Capability Evaluation

ICANN should explore a program to accredit Registry Service Providers, which would be more efficient and would allow ICANN to assess an RSP's ability to support multiple TLDs.

2.7 Financial Capability Evaluation

ICANN should consider alternative approaches to the Financial Capability evaluation. If ICANN retains the approach set out in the AGB, ICANN should (a) devise a method to assess an applicant's financial scalability if the applicant has applied for multiple TLDs; and (b) provide clear guidance as to how applicants that use consolidated financial statements and do not have "consolidating" financial statements can meet the financial statement requirement.

2.8 Registry Services Evaluation

ICANN should update the process for collecting registry services information to better support both evaluation and contracting. ICANN should also more clearly state in the AGB that an applicant wishing to provide a registry service not included in its application will need to pursue the RSEP process after contracting; clearer notice may improve efficiency, especially as to applicants that are not currently registry operators.

Objection Procedures

3.1 GAC Advice

ICANN should revise the GAC Advice criteria to require the GAC to (a) provide a rationale for all GAC advice regarding gTLD applications; and (b) certify that its advice is consistent with national and international law, in order for such advice to benefit from the presumptions set forth in the AGB.

ICANN should clarify in the AGB that an Early Warning is issued on behalf of individual GAC members, and not the GAC itself (and is not entitled to any presumptions).

ICANN must provide applicants whose applications have received GAC Advice that the application should not proceed the opportunity to present to the NGPC in person. The NGPC's consideration of such GAC advice demonstrates that, in some instances, the NGPC did not have a clear understanding of the issue, and providing an applicant with the opportunity to present to the NGPC in person would have avoided such lack of understanding.

The report focuses on the GAC's role in developing advice on Category 1 strings, and the associated safeguards. It should be noted that many others in the ICANN community, including the BC, joined the GAC in calling for safeguards for strings associated with highly-regulated sectors.[4] Any subsequent round should establish a community-developed process for implementation of safeguards by applicants of strings deemed Category 1.

3.2 Objections and Dispute Resolution

Because Community Objection and Limited Public Interest Objection Panels inconsistently applied the AGB criteria, further clarification of those criteria should be provided for any future rounds. Generally, applicants and the community considered the fees for all objections except for Legal Rights Objections to be high (and higher than expected). ICANN should require Dispute Resolution Service Providers (DRSPs) for the Community and Limited Public Interest Objections to provide lower fees.

As set forth in the AGB, the objection filing window should be open until 2 weeks after all Initial Evaluation (IE) results are complete and published. The intention of this requirement is to avoid the expenditure of resources in objecting to an application that has failed IE.

ICANN should provide training to all DRSPs to ensure that all panelists have a consistent baseline understanding of the objection criteria, should require all DRSPs to publish their panelist selection criteria before the objection window opens, and should require all DRSPs to include in their RFP responses strict timelines that will apply to the processing and resolution of all objections (and that are shorter than the timelines used by the DRSP for Community and Limited Public Interest Objections).

The Independent Objector (IO) (if the community decides to retain this function for future rounds) must be contractually required to withdraw his/her objection if a third party has objected to the

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[4] http://www.bizconst.org/wp-content/uploads/2014/12/BC-comment-on-safeguards-for-Category-1-gTLDs.pdf

same application on the same ground. The fact that the Independent Objector claimed to some applicants that "the quality of the third-party objection" constituted an "extraordinary circumstance" demonstrates that the IO should not have such discretion in the future.

Because multiple applicants argued that the IO had a conflict of interest that should have precluded the IO from filing an objection against their respective applications and at least one Community Objection Panel dismissed the IO's objection on this ground, there must be an initial procedure/process through which allegations that the IO has a conflict of interest can be addressed and resolved. It is shocking that applicants were forced to spend tens of thousands of dollars to defend against IO objections in which the IO appeared to (and in one case, found to) have a conflict of interest. Moreover, it is ironic that ICANN staff highlight the fact that the Independent Objector "has represented governments as Counsel and Advocate in the International Court of Justice in many significant and well-known cases" (173) given that this representation formed the basis of the IO's conflict of interest that led one Community Objection Panel to dismiss the IO's objection.

The BC believes that community should consider whether to retain the Independent Objector function.

Contention Resolution

4.2 Auction: Mechanism of Last Resort

Section 4.2.4 on auctions says that ICANN received comment on indirect contention sets, that ICANN did a great job, and there should be no change. The BC commented on indirect contention set auctions: http://www.bizconst.org/wp-content/uploads/2014/12/BC-comment-on-new-gTLD-auction-rules.pdf

Transition to Delegation

5.1 Contracting

The BC supports the recommendations in the Report. Specifically, the BC supports exploration into the feasibility of finalizing the base RA before applications are submitted, and a process for updating the RA after execution, in certain circumstances. The BC also supports a separate RA for.BRAND TLDs.

The BC supported the adoption of Specification 13.[5] We continue to support the inclusion of affiliates in the .BRAND definition, allowing recognized brands to apply through subsidiaries.

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[5] 31-Jan-2014, BC Comment on proposed Specification 13 to the ICANN Registry Agreement to Contractually Reflect Certain Limited Aspects of .BRAND New gTLDs, at http://www.bizconst.org/wp-content/uploads/2014/06/BC-Comments-Spec-13-for-dot-brand-Registry-Agreement.pdf

In Oct-2012, the BC and IPC jointly agreed that it was essential for ICANN to "Enforce compliance of all registry commitments for Standard applications."[6] That was a reflection of the BC's Feb-2012 letter to ICANN leadership (http://www.bizconst.org/wp-content/uploads/2014/06/BC-request-for-implementation-improvements.pdf) indicating the #1 implementation improvement needed for the new gTLD program[7]:

> 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 concern was motivated by more than just addressing objections from governments and other formal objectors. The BC continues to believe that commitments associated with DNS security and stability and RPMs voluntarily offered by a registry applicant should become enforceable aspects of the registry's contract with ICANN.   This is essential to protect business registrants and users who relied upon an applicant's commitments in order to create (or move) their registration and marketing materials to a new gTLD. For example, the .BANK registry applicant proposed these Content and Use Restrictions in its new gTLD application:

> By registering a .bank domain name you agree to be bound by the terms of this Acceptable Use Policy (AUP). In using your domain, you may not:

> 1. Use your domain for any purposes prohibited by the laws of the jurisdiction(s) in which you do business or any other applicable law. For banking companies specifically, use your domain name for any purposes prohibited by the bank's charter or license.[8]

Banking businesses may spend significantly to convert their branch signage, advertising, and marketing materials from .COM to .BANK.   These banks might later observe that .BANK was not enforcing its Content/Use Restrictions against some registrants who were undermining the trust promised by .BANK TLD.   Those banks might well demand that ICANN find .BANK in breach of its registry agreement.

Continuing with this example, if the .BANK registry determined to change its business plan it should amend its registry agreement to reflect its revised restrictions on content and use of domains in its TLD. ICANN has published procedures for registry operators to amend their registry agreements.

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[6] 12-Oct-2012, Essential Improvements to Rights Protection Mechanisms for new gTLDs, at http://www.bizconst.org/wp-content/uploads/2014/06/Consensus-Improvements-to-RPMs-for-new-gTLDs.pdf

[7] 27-Feb-2012, BC letter to Crocker and Beckstrom, at http://www.bizconst.org/wp-content/uploads/2014/06/BC-request-for-implementation-improvements.pdf

[8] Sep-2014, .BANK Registry Agreement, at https://www.icann.org/sites/default/files/tlds/bank/bank-agmt-pdf-25sep14-en.pdf

Further, the draft report does not adequately address certain registry practices, such as Qualified Launch Programs, Reserved Names, Premium Names, and Sunrise Pricing. The BC requests greater transparency and detailed data on the effect that such practices have on such RPMs at the second level.   On 30-Nov-2015 the BC submitted extensive comments on the "Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs."[9] Below is an excerpt from that comment, regarding concerns with implementation of the Sunrise registration process:

> The BC has consistently called for a standardized Sunrise process to minimize the confusion and costs to registrants to participate in the Sunrise period. Currently, some registry operators are taking unfair advantage of the premium name carve-outs from RPM requirements and intentionally charge exorbitant fees for those marks listed in the TMCH.
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> Another concern is the notion of "Promotional Names". Specification 5 enables registry operators to self-allocate and use up to 100 domain names "necessary for the operation or promotion of the TLD" regardless if they are trademarks in the Trademark Clearinghouse and prior to the Sunrise period. By doing so, they are able to self-register and use the domain prior to the Sunrise Period, clearly at the expense of the trademark owner. Although the trademark owner can later register the domain during the Sunrise Period, this again allows certain registry operators to game the system for a hefty profit.
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> The Business Constituency believes that Trademark owners should be afforded an opportunity to dispute 'premium names' prior to registration, and a mechanism to support this should be developed prior to the next new gTLD round. Currently, registry operators are not required to provide a list of premium names prior to the registration. This gives them the unfair advantage of waiting for registrants to request domains and then charging a premium fee based on what's requested. It is critical that ICANN closely review the registry allocation practices to ensure such gaming is addressed and to allow registrants to clearly understand what is premium prior to registration.
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> The release of reserved names should go through the same process as required by the Sunrise period, allowing trademark holders the opportunity to be notified and first right to register the released domain that matches their mark. Registry operators should provide justification on why they intend to withhold well-known and distinctive trademark names.

With regard to Trademark Claims Notices and the TMCH, greater transparency and metrics, particularly in connection with user awareness and usability, would be helpful to the community in determining points of needed improvement. It is apparent that the TMCH has been generally underutilized, which in turn affects the usefulness of other RPMs. Accordingly, the BC advocates for further outreach to rights owners in underserved areas or areas underutilizing the RPMs to ensure greater global participation.

Again quoting from the BC's Nov-2015 comment on Rights Protection Mechanisms in all gTLDs[10]:

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[9] 30-Nov-2015, BC comment on Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs, at http://www.bizconst.org/wp-content/uploads/2015/12/BC-comment-on-Prelim-Issues-Report-on-RPM-reviews.pdf

[10] Ibid.

To achieve better protection and prevent abuse, the BC believes that consideration should be given to modifying the current TMCH matching rules to include plurals and other common variations that relate to the mark.

In regard to typographical variations, in its January 2013 comments on the "Strawman Solution" the BC endorsed a Limited Preventative Registration (LPR) approach as a mechanism for trademark owners to prevent second- level registration of their marks (exact matches, plus character strings previously determined to have been abusively registered or used) across all gTLD registries, upon payment of a reasonable fee, with appropriate safeguards for registrants with a legitimate right or interest. A variation of this approach was adopted as an implementation detail for the new gTLD program in the form of the "trademark plus fifty" program, which allows a rights holder to register in the TMCH database up to fifty "typosquatted" domain names that have been recovered in a UDRP or court action. The BC believes that the limitation to 50 labels is arbitrary and has proven insufficient in certain instances, and should be lifted or eliminated.

While consideration should be given to broader registration of typographical variations beyond those recovered by rights holders, it should consider such questions as whether such expansion would dilute the purpose of the TMCH as a repository of validated trademarks, or generate excessive "false positive" Trademark Claims notices to registrants with no intent to infringe. Once the TMCH has been affirmed or modified by the contemplated review, each trademark record should include a list of the mark and all variations to be protected under the same record.

The BC believes that Trademark Claims Notices effectively communicate the fact of the registration to the brand owner, allowing the brand owner to conduct additional investigation and follow-up as necessary, and that this benefit outweighs any hypothetical chilling effect. However, as we commented in May 2015, we support consideration of adding further language to the Claims Notice which clarifies the basic elements of trademark infringement, notes that particular laws vary by jurisdiction, and urges registrants to consult with counsel with any questions; such additional language would be of assistance to legitimate registrants with no infringing intent.

Applicant support

6.1 Applicant Support Program
    If ICANN retains the Applicant Support program, ICANN should take cost-effective steps to promote global awareness of the program.

Continued Operations Instrument

7.1 Continued Operations Instrument

The Continued Operation Instrument (COI) process created significant challenges that required most applicants to expend far more time on obtaining an ICANN-acceptable COI than the dollar value of the COI would otherwise merit. If ICANN retains a COI requirement, it should consult with financial institutions in the countries that accounted for 75% of the applications to ensure that ICANN's requirements are consistent with the actual letter of credit practices in those countries.

Program Management

8.2 Service Provider Consideration

> The BC concurs with the report's conclusions that ICANN should "provide transparency and predictability to the procurement process following ICANN's procurement guidelines, [p]ublish selection criteria, providers' process documents, and other relevant and non-confidential material in a timely manner."

The ICANN Compliance Department seems to continually be unclear about what registries can or cannot do and what their responsibilities are or are not. This should be addressed in the draft report and ICANN should redouble its efforts in this area.

This comment was drafted by Andrew Harris, Steve Coates, Andy Abrams, Denise Michel, and Steve DelBianco.

It was approved in accordance with our Charter.