



**Comments on proposed
Specification 13 to the
ICANN Registry Agreement
to Contractually Reflect
Certain Limited Aspects of
.BRAND New gTLDs**

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC). The BC's comments arise from the perspective of Business users and registrants, as defined in our Charter¹:

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

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

ICANN opened a public comment period on a proposal requested by the Brand Registry Group to incorporate a new Specification 13 to the new gTLD Registry Agreement, which would be available to a Registry Operator that operates a TLD that ICANN determines qualifies as a ".Brand TLD".

BC Comment: The BC Supports the proposed Specification 13 into the Registry Agreement

The BC greatly appreciates the time taken by ICANN staff to gather community input and to develop these proposals. As a representative of business user interests, the BC strongly supports the incorporation of the proposed Specification 13 into the Registry Agreement, as we believe these changes address the unique positioning of .BRAND applicants and will benefit consumers by paving the way for new and innovative registry models.

The BC has historically recognized the importance of the single-registrant model proposed by .BRAND TLDs to the new gTLD program, as well as the distinct nature of this registry model. In past public comments pertaining to such registries, the BC has advocated for, among other things, adjustments to Section 2.9 of the Registry Agreement regarding non-discriminatory access to registrars, as well as to Section 4.5 regarding the transition of a registry upon termination of the agreement.² We are pleased that Specification 13 acknowledges these positions, and in the case of Section 4.5, takes concrete steps to address the protection of intellectual property rights.

The proposed amendments diminish the potential for consumer confusion posed by the immediate transition of exclusive use TLDs by creating a two-year period in which the .BRAND registry operator must consent to transition of the TLD to another registry. We think this is a reasonable compromise that mitigates the risk of consumer confusion while acknowledging ICANN's desire to continue operation of TLDs where appropriate.

Suggested Improvements to Specification 13

While the BC supports the incorporation of the Proposed Specification 13 into the Registry Agreements of .BRAND applicants, we wish to echo several of the recommendations proposed during the initial comment period. We believe the following modifications, though modest in nature, would strengthen Specification 13 and expand its potential to benefit the Business Community and Internet users.

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

² See Business Constituency Comments on Proposed Final Applicant Guidebook, December 6, 2010.

Inclusion of Affiliates in .BRAND Definition

The BC supports a clarification of Sections 5.1(i)d and 5.1(i)f to expressly include Affiliates of the Registry Operator. This modification would take into account the many recognized corporate brands that applied for TLDs through subsidiaries that do not necessarily use the trademark in their ordinary course of business or which may have been formed specifically for the purpose of the New gTLD Program.

The inclusion of “Affiliates” in these provisions is consistent with Section 5.1(ii) of Specification 13, which defines .BRAND TLDs as registries which limit registration of and control over domain names to the Registry Operator, its Affiliates, and its Trademark Licensees. Such language would also be consistent with 5.1(i)b and 5.1(i)c, which define a .BRAND TLD as a registry which is comprised of the textual elements of a registered trademark owned by and issued to a Registry Operator or its Affiliate.

Deferral of Sunrise

Under the current version of the Registry Agreement, .BRAND applicants are required to hold a Sunrise Period wherein registrations for Second-Level Domains (SLDs) are limited to trademarked terms registered in ICANN’s Trademark Clearinghouse.³

The BC has consistently supported the Sunrise Period as a means of reducing the costs and risks to businesses faced with the challenge of protecting their intellectual property across an expanding domain name space. However, the current framework of the Sunrise Period for .BRAND TLDs is impractical. Given the registration restrictions inherent to .BRAND applicants⁴, unaffiliated trademark holders are, as a rule, unable to register domains during a Sunrise Period following initial launch. Conversely, if a .BRAND eventually decides to open up the TLD to registrations by third parties downstream, brand owners would be left exposed to increased risk of infringement, as the registry operator would not be required to conduct a Sunrise Period at this time.

As such, it is our belief that businesses would be better served if the requirement of a Sunrise Period for .BRAND TLDs was deferred to such a time that the Registry Operator actually opened up registrations to third parties. Until such a time, we recommend that the requirement to provide Claims Notifications to right holders remain in place for .BRAND TLDs, to protect businesses during the period of exclusive use.

Andy Abrams and Stephanie Duchesneau led drafting of these comments, which were approved in accordance with the BC Charter.

³ The Trademark Clearinghouse Rights Protection Mechanism Requirements (“RPM Requirements”), incorporated into the Registry Agreement through Section 2.8 and Specification 7, obligate registry operators to offer a Sunrise period in which registration of domains is restricted to holders of Trademark Clearinghouse verified trademarks.

⁴ See Specification 13, Section 5.1(ii), 5.2 of Specification 13, which defines .BRAND TLDs as registries which limit registration of and control over domain names to the Registry Operator, its Affiliates, and its Trademark Licensees.