



Comment on Draft Procedure for Community gTLD Change Requests

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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.

Comment on Draft Procedure For Community gTLD Change Requests

This comment regards the “Draft Procedure for Community gTLD Change Requests” posted for comment on February 14, 2018 (“Draft Procedure”).¹

The Draft Procedure is divided into two separate parts: (i) a definitions and procedural section delineating the timing and process of any community gTLD change request (“Change Request”), and (ii) an Annex A which sets forth particular information that will need to be provided by the gTLD Community Registry Operator (CRO) to ICANN Staff for evaluation. This comment will address each part individually.

A. General Comment

In accordance with their community gTLD Registry Agreements, CROs cannot seek changes to Specification 12 that would remove the Community Registration Policies, excessively broaden or narrow registrant eligibility and/or name selection requirement, or result in significant negative impact to its currently eligible TLD Community.

The BC agrees that there are instances in which a CRO may want to modify Specification 12 that would fall outside of this prohibition and require the filing of a Change Request form. For example, .BANK and .INSURANCE sought to add eligibility for regulated bank and insurance holding companies last year, but ICANN denied their request. Clearly, we need a transparent and standardized process to evaluate community TLD change requests.

A community or sponsored TLD operator might, for example, seek a change in the composition of the community, or a change in the community’s focus and/or purpose. In Oct-2017 the BC raised concerns about the .MUSEUM proposal to allow registrations to anyone with “an interest” in museums and “*bona*

¹ See ICANN public comment page at <https://www.icann.org/public-comments/community-gtld-change-procedure-2018-02-14-en>

fide museum users"². We said that these changes could turn this "Sponsored TLD" into an open TLD. We argued that anyone could register a .MUSEUM domain since there is no requirement to document "interest" or actual "use" of museums, and there would not be any practical means of verification.

On 2-Mar-2017 ICANN granted .MUSEUM's requested change, despite concerns raised by the BC and others about the lack of a standard or process to evaluate the change request.³ This decision by ICANN should have been deferred until the draft procedure for change requests was developed and approved.

Nonetheless, the new .MUSEUM Registry Agreement includes Specification 12, so .MUSEUM might have to go through the new procedure if it sought further changes to its registrant eligibility criteria. And the change that .MUSEUM just secured would not likely have been approved under the Draft Procedure, since it would "excessively broaden" registrant eligibility:

During the initial term of the Registry Agreement Registry Operator may not seek changes that would remove the Community Registration Policies, excessively broaden or narrow registrant eligibility and/or name selection requirements, or result in significant negative impact to the TLD Community.⁴

However, the Draft Procedure seems to apply only to "the initial term of the Registry Agreement", so the BC asks ICANN whether .MUSEUM and other formerly "Sponsored TLDs" are considered to be in their initial term when they renew using the new gTLD Registry Agreement.

More fundamentally, the BC believes that the Draft Procedure should apply to **all** terms of the Registry Agreement for Community TLDs – not just the initial term of the agreement. We can think of no justification to disenfranchise community registrants without their consultation and support, just because a Community Registry Operator has renewed their Agreement beyond its initial term.

The BC believes that the eligibility requirements of a community gTLD must be clearly described in order for a Change Request to be approved. Furthermore, any Change Request must describe with specificity the impact on the members of the community. In particular, we are concerned about impact on existing registrants in that TLD who invested time and money to tie their brand to the community TLD upon reliance that the community would be restricted as-described in the registry's original application. Examples of registrant investments include domain name management, advertising, marketing, business cards, collateral material, signage, etc.

² See BC comment on .MUSEUM at http://www.bizconst.org/assets/docs/positions-statements/2017/2017_10october_3%20bc%20comment%20on%20museum%20registry%20agreement.pdf

³ 2-Mar-2018, new .MUSEUM Registry Agreement, at <https://www.icann.org/resources/agreement/museum-2018-03-02-en>

⁴ See draft procedure for community gTLD Change Requests, at <https://www.icann.org/public-comments/community-gtld-change-procedure-2018-02-14-en>

It is therefore critical that a Change Request provide the ICANN community with ample information to evaluate the request. Moreover, answers to the questions required under the Draft Procedure must not simply be conclusory statements but instead should be anchored by documents and data that would support the statements made by the CRO's in the Change Request.

B. Timing and Procedure

ICANN has set forth a timeline for the filing and review of a change request in the Draft Procedure. However, as set forth below, there are some areas that require further clarification:

2.3. Change Request Comment Period

Section 2.3 of the Draft Procedure states that "Upon determination of a complete Request, ICANN will post it for a comment period of 30 days". However, Section 2.2 of the Draft Procedure states that after the completeness check, ICANN will further *conduct* a preliminary review and *then* prepare the Request and draft amendment for comment after a ten day period. Section 2.3 therefore appears to contradict Section 2.2. Section 2.3 could be changed to state that: "After an acceptable preliminary review of the Request, ICANN will post the Request and draft Amendment for a comment period of 30 days".

2.4 Registry Operator Response

Section 2.4 of the Draft Procedure states that: " In the event the comment period raises questions about the Request, ICANN will initiate consultation with the Registry Operator and request their response to comments received within 15 days".

This provision requires further clarity with respect to the timing of the CRO's response. In particular, it is unclear whether a response is required 15 days after the end of the comment period or 15 days after a response is requested by ICANN or even whether ICANN will initiate consultation with the Registry Operator within 15 days of the end of comment period. The intent of this provision appears to be that ICANN will require that CRO's respond within 15 days to ICANN's request for answers to questions raised during the comment period.

1.1 ICANN Review

a) Description of TLD Community - To determine the impact on the community, the Draft Procedure states that ICANN will determine whether: "...there a clear description of the TLD's eligibility requirements and how they are impacted by the Change Request?"

The BC agrees that ICANN's assessment for acceptance or rejection of the Change Request should encompass, among other things, whether a clear description of the TLD's eligibility requirements have been established by the community TLD. To the extent new members are being added, then additional information should be sought as to whether this new group has been consulted about a Change Request (and whether there is support in favor of such a change). To the extent, members are being removed

then additional information should be provided indicating the rationale for this elimination and the agreement (or disagreement) of the removed group with such change.⁵

d) Concerns raised during the comment period – ICANN’s review will include evaluating whether a CRO has provided an adequate response to concerns during the comment period that identified potential harm to the TLD community and/or Internet community.

It is unclear what an adequate response would entail. To the extent there is potential harm to the TLD community and/or Internet community which was identified during the comment period then this should necessarily require that the CRO have a heightened obligation to provide supporting evidence and data that would alleviate this (or these) concerns. To that end (and depending on the nature of the alleged harm), the evidence and supporting data might include information that demonstrates that: i) there will be no reputational damage to the community; ii) there is no interference with the core activities of the community; and/or, iii) there is no economic damage to the community.⁶

3.2 ICANN Determination

3.2.1 Approval

The Draft Procedure indicates that ICANN is to provide approval to the CRO within a target timeframe of 30 days (or longer depending on whether there are any delays). The assumption here is that ICANN Staff will be making the determination as whether a Change Request in the initial term is approved or rejected. The BC however believes that all gTLD community request approvals within the initial term of 10 years be timely made by the ICANN Board and, subsequently made by ICANN Staff after the expiration of the Initial Term⁷.

The BC also asks what would be the available process for community members or the registry operator to appeal an ICANN regarding a community change request.

⁵ Section 3.1 b sets out further evaluation criteria with respect to outreach and support. This should pertain to any new as well as existing members.

⁶ See Community gTLD Change Request Process Working Group initial draft submitted to ICANN Org July 2017 (<https://www.icann.org/en/system/files/correspondence/schwartz-to-atallah-19jul17-en.pdf>)

⁷ See Footnote 3 above. At the very least, the ICANN Board should approve any Community gTLDs change requests that were the subject of a CPE or Community Objection given the interests of third parties.

C. Annex A

Annex A of the Draft Procedure is divided into six (6) sections:

- 1) Description of the Community TLD Change;
- 2) Consultation; and
- 3) Specification 12 Provisions
- 4) Contract Amendments
- 5) Timeline
- 6) Other

Each section contains a series of questions designed to elicit the information that will assist ICANN and the Internet community in evaluating the materiality of this change *vis-à-vis* the relevant Specification 12 provisions. There are several areas where additional clarity is necessary.

1. Description of the Community TLD Change

As set forth above in this comment, additional information should be sought on whether any Change Request might directly or indirectly eliminate or increase the eligibility requirements of a community TLD. Section 1.6 of Annex A requests information as to whether a Change Request does not excessively broaden or narrow current eligibility requirements. However, the CRO should be required to disclose whether the change expands the eligibility requirements at all. The determination as to whether a community is excessively broadened or narrowed for that matter is subjective and can be viewed differently by different parties. For example, a slight change to a business model/rule/standard could potentially narrow a community. Whether it is narrowed or broadened excessively or not is a subjective determination. Therefore, the CRO should be required to disclose any potential narrowing or broadening of the community eligibility requirements. And, to the extent there are multiple groups or classes within a community, additional information should be sought as to whether there are some groups that might be negatively impacted by the Change Request while others are not. In particular, question 1.4 should request specific impact on existing registrants in that TLD who invested time and money to tie their brand to the community TLD upon reliance that at the community would be restricted as-described in the registry's original application.

It is not sufficient to merely ask the CRO to describe how they consulted the TLD community. At some point within questions 1 and 2 there should be an explicit request for the CRO to provide its assessment of documentation and evidence that shows the TLD community actually supports the requested change.

2. Consultation

Expert and professional consultations prior to the submission of a Change Request is highly encouraged. These consultations could allow the CRO to determine the materiality or non-materiality of the Change Request and the potential impact on the community.

These consultations could, for example, include surveys and/or interviews with existing TLD registrants in the community TLD. To the extent that any non-privileged written documents are derived from these consultations, then these written documents could be requested and provided to ICANN Staff for its review. In addition, to the extent that the community TLD is seeking to expand its membership and there have been consultative activities with this group, then the CRO could provide ICANN Staff with any information regarding consultations with these new groups, if any.

Section 2.2 states as follows: “What policies and/or procedures did the Registry Operator follow in development of Community gTLD change? Although important, this question does not elicit any information regarding any policies or procedures that govern the ability for the community TLD to potentially make a change to its bylaws or charter. Therefore, additional questions that should be asked might include the following: i) does the Community TLD have rules or standards (bylaws or charter) that governs these types of changes? ii) were those rules or standards followed? iii) if no defined rules or standards exist, then what percentage of the community needs to be on board in order for a change to be triggered?

6) Other

Section 6.3 of Annex A requires that the community TLD describe any contractual obligations that will need to be updated based on the Change Request. The BC would go one step further and ask that to the extent a Change Request will materially impact a third party’s contractual obligation, then the community registry should be required to describe with specificity the contractual obligation and third party affected by this Change Request.

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This comment was drafted by Faisal Shaw and Steve DelBianco, with help from Marilyn Cade and Andrew Mack.

It was approved in accord with the BC Charter.