
5.1 Contracting

5.1.1 Introduction

Contracting is a process by which applicants who have successfully completed all required Program steps entered into a Registry Agreement (RA) with ICANN to operate the applied-for TLD. This section of the Program Implementation Review report discusses the following aspects of the Contracting process:

- Base Registry Agreement
- Contracting Timelines and Extensions

5.1.2 Relevant Guidance

The following guidance is relevant to the topic of Contracting and will be discussed in further detail in Sections 5.1.3 and 5.1.4 of this report:

- GNSO Recommendation 10: “There must be a base contract provided to applicants at the beginning of the application process.”²⁷²
- GNSO Recommendation 14: “The initial registry agreement term must be of a commercially reasonable length.”
- GNSO Recommendation 15: “There must be renewal expectancy.”
- GNSO Recommendation 16: “Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.”
- GNSO Recommendation 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.”
- GNSO Recommendation 18: “If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.”
- GNSO Recommendation 19: “Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.”
- GNSO Implementation Guideline I: “An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.”
- GNSO Implementation Guideline J: “The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.”
- GNSO Implementation Guideline K: “ICANN should take a consistent approach to the establishment of registry fees.”
- Applicant Guidebook, Section 5.1: Registry Agreement²⁷³

²⁷² ICANN. (8 August 2007) ICANN Generic Names Supporting Organization Final Report Introduction of New Generic Top-Level Domains, Part A. Retrieved from <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

²⁷³ ICANN. (4 June 2012) gTLD Applicant Guidebook Version 2012-06-04. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

- ICANN Board Resolution 2011.06.20.01 (20 June 2011): Approval of the New gTLD Program (including the 30 May 2011 version of the AGB that contained a Base RA)²⁷⁴
- NGPC Resolution 2013.07.02.NG09 (02 July 2013): Registry Agreement (approval of the 02 July 2013 version)²⁷⁵
- ICANN Board New gTLD Program Committee Resolution 2014.07.30.NG01 - 2014.07.30.NG04 (30 July 2014): Name Collision Occurrence Management Framework²⁷⁶
- NGPC Resolution 2014.03.26.NG01 (26 March 2014): Approval of Registry Agreement Specification 13 for Brand Category of Applicants²⁷⁷

5.1.3 Background

The AGB anticipated that Initial Evaluation (IE) (see Section 2.1: Initial and Extended Evaluation of this report) would take five months to complete, all IE results would be published at the conclusion of IE, and the Contracting process would commence at the end of IE. This would allow applicants that passed IE to move expeditiously toward signing an RA if there were no other issues that the application must resolve (e.g., contention resolution, dispute resolution).

On 22 March 2013, ICANN began publishing IE results on a weekly basis by priority number (see Section 2.1: Initial and Extended Evaluation of this report).²⁷⁸ Although Section 5.1 of the AGB stated that the Contracting process would commence after IE, the final RA was not approved when the first IE results were published. Once the RA was approved by the ICANN Board New gTLD Program Committee (NGPC) on 02 July 2013, ICANN confirmed that applications were eligible to begin the Contracting process and began inviting applicants to Contracting on 05 July 2013. The same month that ICANN commenced the Contracting process, the first four RAs for four IDN new gTLDs were executed. RA execution continued with 218 RAs executed between August and December of 2013. As of 31 July 2015, 1,214 TLDs have been invited to Contracting and 1,147 have signed an RA.

Overview of the Contracting Process

In order to be eligible to be invited to Contracting, applicants were required to pass evaluation, resolve contention, clear objections, clear GAC Advice, and complete any outstanding change requests. Once eligible, applicants were invited to Contracting by priority number (see Section 1.2: Prioritization of this report), and invitations were sent in the form of a Contracting Information

²⁷⁴ ICANN. (20 Jun 2011) Approved Resolutions | Meeting of the ICANN Board. Approval of the New gTLD Program. Retrieved from <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en>

²⁷⁵ ICANN. (2 July 2013) Approved Resolutions | Meeting of the New gTLD Committee. Retrieved from <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-07-02-en#1.d>

²⁷⁶ ICANN. (30 July 2014) Approved Resolutions | Meeting of the New gTLD Program Committee. Retrieved from <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>

²⁷⁷ ICANN. (26 March 2014) Approved Resolutions | Meeting of the New gTLD Committee. Retrieved from <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-03-26-en#1.a>

²⁷⁸ ICANN. (22 March 2013) Announcement: Initial Evaluation Results Released for First Set of Applicants. Retrieved from <http://newgtlds.icann.org/en/announcements-and-media/announcement-22mar13-en>

Request (CIR).²⁷⁹ In October 2013, three months after ICANN began inviting applicants to Contracting, ICANN moved to a weekly Contracting operation cycle to increase efficiency and to provide applicants with a more complete understanding of Contracting process timelines.²⁸⁰

5.1.4 Assessment

5.1.4.1 BASE REGISTRY AGREEMENT

In accordance with GNSO Recommendation 10, a Base RA was drafted as part of the AGB development process with the community. When the ICANN Board approved the launch of the New gTLD Program on 20 June 2011, it also approved the 30 May 2011 version of the AGB²⁸¹ including the Base RA. This was the first version of the New gTLD Base RA approved by the ICANN Board. On 11 January 2012, ICANN published a revised AGB that included minor revisions to clarify some existing provisions of the Base RA.²⁸² This 11 January 2012 version of the RA became the Base RA available to applicants prior to “the beginning of the application process” as referenced in GNSO Recommendation 10.

Although intended to be the final form of the Base RA that successful applicants would enter into with ICANN, the RA was revised multiple times due to pending items provided for under the Program that required incorporation into the RA upon their completion, and new items that arose (e.g., GAC Advice, Name Collision).

The subject of Registry Agreement terms was identified by the ICANN Board as a topic that may be appropriate for discussion by the GNSO.²⁸³

4 June 2012 Version of the Base RA

On 4 June 2012, ICANN published a revised AGB that included a minor update to correct a reference in Specification 3 of the Base RA.²⁸⁴

²⁷⁹ ICANN. (15 July 2014) Contracting Information Request Guidance. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/cir-guidance-15jul14-en.pdf>

²⁸⁰ ICANN. Contracting Overview. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting#overview>

²⁸¹ ICANN. (30 May 2011) gTLD Applicant Guidebook. Retrieved from <https://archive.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf>

²⁸² ICANN. Applicant Guidebook Version 9. Retrieved from <http://newgtlds.icann.org/en/about/historical-documentation/matrix-agb-v9>

²⁸³ ICANN. (17 November 2015) Annex A to Resolutions 1014.11.17.10 – 2014.11.17.12. Retrieved from <https://www.icann.org/en/system/files/files/resolutions-annex-a-17nov14-en.pdf>

²⁸⁴ ICANN. (4 June 2012) gTLD Applicant Guidebook Version 2012-06-04. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

2 July 2013 Version of the Base RA

In its Toronto Communiqué of 17 October 2012, the GAC stated, "it is necessary or all of these statements of commitments and objectives [detailed in individual gTLD applications] to be transformed into binding contractual commitments, subject to compliance oversight by ICANN."²⁸⁵ In response to the GAC's Advice, ICANN asked applicants to submit Public Interest Commitments to turn public interest commitments made in the applications into binding contractual provisions.²⁸⁶ It was proposed that these commitments be included in Specification 11 to the Base RA.²⁸⁷

Also during this time period, ICANN and the Registrar Stakeholder Group were in the final stages of negotiating amendments to the 2009 Registrar Accreditation Agreement (RAA). The negotiations began in 2011, and the proposed new RAA was posted for public comment on 7 March 2013, with an updated version posted for public comment on 22 April 2013.²⁸⁸ In anticipation of the finalization of the 2013 RAA, the proposed Specification 11 to the Base RA included a provision requiring operators of new gTLDs to use registrars that were party to the 2013 RAA. The ICANN Board approved the 2013 RAA on 27 June 2013.²⁸⁹

On 5 February 2013, ICANN published an updated Base RA for public comment.²⁹⁰ A further updated version that incorporated community feedback was posted on 2 May 2013.²⁹¹ On 2 July 2013, the NGPC approved the updated version of the RA that incorporated, among other things, Specification 11 to the Base RA.²⁹²

16 October 2013 Version of the Base RA

On 7 October 2013, the NGPC approved²⁹³ the "New gTLD Collision Occurrence Management Plan"²⁹⁴ to mitigate the risks of potential name collisions caused by the introduction of new gTLDs. As the implementation of this plan required modifications to the Base RA, on 16 October 2013, ICANN

²⁸⁵ ICANN. (17 October 2012) GAC Communiqué-Toronto, Canada. Retrieved from

https://gacweb.icann.org/download/attachments/27132070/FINAL_Toronto_Communique_20121017.pdf

²⁸⁶ ICANN. (4 March 2013) Frequently Asked Questions | Specification 11 of the Revised New gTLD Registry Agreement: Public Interest Commitments. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>

²⁸⁷ ICANN (5 February 2013) Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification. Retrieved from <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>

²⁸⁸ ICANN. (7 March 2013) Proposed 2013 RAA Posted for Comment. Retrieved from <https://www.icann.org/public-comments/proposed-raa-2013-03-07-en>

²⁸⁹ ICANN. (27 June 2013) ICANN Resolutions Approval of 2013 RAA. Retrieved from <https://features.icann.org/approval-2013-raa>

²⁹⁰ ICANN. (5 February 2013) Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification. Retrieved from <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>

²⁹¹ ICANN. (5 February 2013) Draft New gTLD Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-05feb13-en.pdf>

²⁹² ICANN. (2 July 2013) Approved Resolutions | Meeting of the New gTLD Program Committee. Retrieved from <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-07-02-en#1.d>

²⁹³ ICANN. (7 October 2013) Approved Resolutions | Meeting of the New gTLD Program Committee. Retrieved from <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-10-07-en#1.a>

²⁹⁴ ICANN. (4 October 2013) New gTLD Collision Occurrence Management, Proposal to manage the collision occurrences between new gTLDs and existing private uses of the same strings. Retrieved from <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-07oct13-en.pdf>

published an updated version of the Base RA, which incorporated a “Name Collision Occurrence Management” section within Specification 6.^{295,296} This update to the Base RA was automatically incorporated into the 56 RAs that had already been executed at that time. All RAs sent for signature beginning 16 October 2013 contained the updated Specification 6.

9 January 2014 Version of the Base RA

The 9 January 2014 version of the Base RA^{297,298} is the current form of the Base RA and inserted URLs in the following sections of the RA (where placeholders had existed previously):

- Section 2.19 (RRDRP)
- Section 1 of Specification 7 (Trademark Clearinghouse Requirements)
- Section 2(a) of Specification 7 (PPDRP and RRDRP)
- Section 2(b) of Specification 7 (URS)
- Section 2 of Specification 11 (PICDRP)

5 February 2014 – Adoption of GAC Category 1 Safeguards

On 5 February 2014, the NGPC adopted an implementation framework to address GAC Category 1 Safeguard Advice for a broad category of strings related to “consumer protection, sensitive strings, and regulated markets.”²⁹⁹ The implementation framework required standardized safeguards to be added to Specification 11 of the Registry Agreement as public interest commitments. For TLDs that were specified in Category 1 Advice, the safeguards were mandatory requirements. This implementation framework allowed applicants who previously could not begin Contracting because they were subject to GAC Category 1 Advice to proceed to Contracting. On 31 July 2015, 151 applicants that were subject to GAC Category 1 Safeguards were invited to Contracting. For more information about the implementation of GAC Category 1 Safeguard Advice, see Section 3.1: GAC Advice of this report.

9 May 2014 – Adoption of Specification 13

On 26 March 2014, the NGPC passed a resolution approving Specification 13 to the Base RA for applicants of .Brand TLDs.³⁰⁰ This approval followed discussions with members of the ICANN community (including the Brand Registry Group) who stated that brand owners required unique RA provisions in order to protect their brands, promote and maintain trust in their registries, and foster

²⁹⁵ ICANN. (16 October 2013) Announcement: NGPC Resolution on Name Collision Requires Registry Agreement Modification. Retrieved from <https://newgtlds.icann.org/en/announcements-and-media/announcement-2-16oct13-en>

²⁹⁶ ICANN. Registry Agreement. Retrieved from <https://newgtlds.icann.org/en/applicants/agb/agreement-approved-16oct13-en.pdf>

²⁹⁷ ICANN. (14 January 2014) Announcement: Registry Agreement Modification. Retrieved from <http://newgtlds.icann.org/en/announcements-and-media/announcement-14jan14-en>

²⁹⁸ ICANN. Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/agreement-approved-09jan14-en.pdf>

²⁹⁹ ICANN. (5 February 2014) Approved Resolutions | Meeting of the New gTLD Program Committee. Retrieved from <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a>

³⁰⁰ ICANN. (26 March 2014) Approved Resolutions | Meeting of the New gTLD Program Committee. Retrieved from <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-03-26-en#1.a>

innovation. In addition to these discussions, ICANN also sought community-wide input through a public comment period in December 2013.³⁰¹

When the NGPC approved Specification 13 on 26 March 2014, implementation of a particular provision within Specification 13, which allowed .Brand registry operators to designate a limited number of preferred registrars for the TLD, was delayed for 45 days to provide the GNSO an opportunity to comment on this provision, in light of GNSO policy Recommendation 19 on the Introduction of New generic Top-Level Domains.³⁰² After considering the matter, the GNSO Council informed the ICANN Board in correspondence dated 9 May 2014³⁰³ that the provision in the Specification 13 allowing Registry Operators of .Brand TLDs “the right to only use up to three exclusive registrars [...] is inconsistent with Recommendation 19.” However, the GNSO Council stated it “does not object to the implementation of Specification 13 as a whole, including an additional clause which will allow a Registry Operator to designate up to three exclusive Registrars, given the specific circumstances and the fact that a public comment period on Specification 13 was conducted in 2013 without objections from the GNSO.” In the same letter, the GNSO stated it “reserves the right to initiate a policy development process, potentially resulting in Consensus Policy affecting both existing and future TLDs, if and when the right granted to .BRAND TLDs is at risk of, or bears the risk of, being used for augmenting and / or circumventing the conditions of Specification 13 or any subsequent provisions.”

Initiating Contracting

Although the Base RA went through multiple revisions and its final form was not known until 9 January 2014 for non-.Brand TLDs and 9 May 2014 for .Brand TLDs, in an effort to allow applicants to move expeditiously toward signing an RA, ICANN began inviting applicants to Contracting on 5 July 2013. Because the final form of the Base RA was not known when Contracting commenced, ICANN developed a Supplement to the RA in order to allow applicants to sign an RA while certain provisions were still under consideration.³⁰⁴ The Supplement to the RA stated that the following provisions of the Base RA could be modified by ICANN without consent from the Registry Operator:

- Specification 6 – Registry Interoperability and Continuity
- Section 1 of Specification 7 – TMCH Requirements
- Section 2.a of Specification 7 – PDDRP and RRDRP
- Section 2.b of Specification 7 – URS
- Specification 11 – Public Interest Commitments
- Any provision or term of the RA that is the subject of advice or comment from the GAC

³⁰¹ ICANN. Proposal for a Specification 13 to the ICANN Registry Agreement to Contractually Reflect Certain Limited Aspects of “.Brand” New gTLDs. Retrieved from <https://www.icann.org/public-comments/spec13-2013-12-06-en>

³⁰² ICANN. Proposal for a Specification 13 to the ICANN Registry Agreement to Contractually Reflect Certain Limited Aspects of “.Brand” New gTLDs. Retrieved from <https://www.icann.org/public-comments/spec13-2013-12-06-en>

³⁰³ Jonathan Robinson, ICANN GNSO Council. (9 May 2014) Letter from Jonathan Robinson to Cherine Chalaby. Retrieved from <http://gnso.icann.org/en/correspondence/robinson-to-chalaby-09may14-en.pdf>

³⁰⁴ ICANN. Supplement to Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/agreement-supplement-14jul13-en.pdf>

The implementation of this Supplement, which had an expiration date of 15 January 2014, allowed applicants to move forward in the process prior to resolution of the above items. ICANN signed the first four RAs for four IDN gTLDs, along with the Supplement, on 13 July 2013. By the time the Supplement expired on 15 January 2014, ICANN had signed 241 RAs with the Supplement. This represented 26% of all TLDs invited to Contracting by 15 January 2014.

Negotiation Process

As detailed in Section 5.1.2 of this report, there were several GNSO Policy Recommendations related to the contract. Additionally, AGB Section 5.1 states,

All successful registry operators are expected to enter into the agreement substantially as written. Applicants may request and negotiate terms by exception; however, this extends the time involved in executing the agreement. In the event that material changes to the agreement are requested, these must first be approved by the ICANN Board of Directors before execution of the agreement.

Section 7.7 of the Registry Agreement defines the annual negotiation process for revising the terms of the base RA between ICANN and the gTLD registries as a group.³⁰⁵ The process includes a public comment period and requires approval of the new base RA from the ICANN Board.

With respect to individual RAs, when responding to a CIR, applicants had the option to request negotiation. ICANN considered each request within the framework of existing Policy, the Registry Agreement, and the AGB. In order to be fair to all applicants and to ensure that the community interests represented in the RA were preserved, ICANN did not make significant changes to the RA without a justification which matched the rationale for including the updated language. Absent a showing of extraordinary circumstances unique to any particular applicant justifying some change, ICANN took the view that the terms of the RA should remain consistent among all new gTLD registry operators.

5.1.4.2 CONTRACTING TIMELINES AND EXTENSIONS

When the 9 January 2014 version of the Base RA was published, it served as the final form of the Base RA. With the final form of the Base RA available and the Supplement to the RA expiring on 15 January 2014, ICANN announced the start of the nine-month deadline for applicants to sign the RA, as per Section 5.1 of the AGB. The announcement that 29 January 2014 served as the start of the nine-month period was made during the 22 January 2014 Applicant Update Webinar.³⁰⁶ For the 957 applications whose nine-month period began on 29 January 2014, the RA signing deadline was 29 October 2014. Of these applicants, 440 (46%) signed the RA by the 29 October 2014 deadline.

Although ICANN envisioned that applicants would want to sign the RA quickly when the Contracting process was initiated, 517 applications did not sign by the 29 October 2014 deadline and required

³⁰⁵ ICANN. (9 January 2014) Registry Agreement. Retrieved from <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>

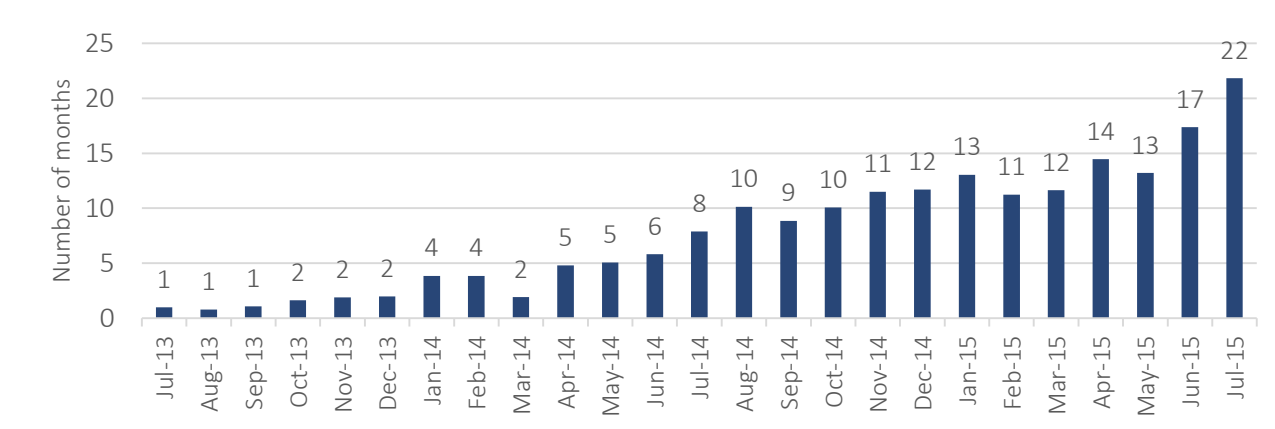
³⁰⁶ <https://icann.adobeconnect.com/p1dbhnyzmr/>

additional time. Due to the need for additional time to sign the RA, ICANN implemented an extension request process that was available to both applicants of .Brand TLDs and applicants of non-brand TLDs.^{307, 308}

For applicants of .Brand TLDs who had a 29 October 2014 deadline to sign the RA, the extension request process allowed them to receive an extension to 29 July 2015 if they satisfied certain criteria.³⁰⁹ Essentially, this gave these applicants a total of 18 months from the effective date they were invited to Contracting, 29 January 2014, to sign the RA. Three-hundred-fifty applications met the criteria and received the 29 July 2015 RA signing extension. For all other applications, ICANN considered extension requests on a case-by-case basis and granted extensions of up to nine months if the applicant could demonstrate that it was working in good faith toward signing the RA.

In granting extensions, ICANN imposed upon applicants interim deadlines for activities they must have completed in order to sign the RA. The implementation of the interim deadlines allowed applicants to demonstrate progress toward signing the RA. As of 31 July 2015, ICANN had granted 517 TLDs extensions, and 97% of applicants that were granted extensions met interim deadlines. On average, applicants that were provided extensions signed the RA in 16 months. Figure 5.1.i shows the average number of months for RA execution over time.

Figure 5.1.i: Average Number of Months for RA Execution



As of 31 July 2015, a small number (13 applications) had not met their deadlines and had their application statuses changed to “Will Not Proceed” which meant loss of eligibility to sign a Registry Agreement with ICANN. On 30 June 2015, ICANN released a process for applicants with applications in a "Will Not Proceed" status due to missing a contracting-related deadline to request reinstatement of the application's eligibility status within a defined period of time. In order to qualify for

³⁰⁷ ICANN. (3 September 2014) Announcement: Requests for Extension to Execute New gTLD Registry Agreements. Retrieved from <http://newgtlds.icann.org/en/announcements-and-media/announcement-03sep14-en>

³⁰⁸ ICANN. Announcement: Contracting and the Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/announcements-and-media/announcement-15sep14-en>

³⁰⁹ ICANN. Contracting and the Registry Agreement. Retrieved from <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting#deadlines-extensions>

reinstatement, applicants had to provide all pending information required for RA execution and post-contracting activities along with the reinstatement request.

5.1.5 Conclusion

The intent of GNSO Recommendation 10 to provide applicants with a base RA at the beginning of the application process was satisfied with the inclusion of the Base RA in Module 5 of version 9 of the AGB, which was published prior to the opening of the application window. The base RA went through several modifications during the Program, but these modifications were necessary to address topics such as GAC Advice, Name Collision, approval of the 2013 Registrar Accreditation Agreement, and community request for another form of the RA for .Brand TLDs. As these changes occurred after the base RA was published, the intent of GNSO Recommendation 10 was not fully achieved.

Consideration should be given to either not allowing changes to the base RA once the application window opens so as to provide applicants with predictability of the final form and substance of the RA, or to establishing a process for modifying the RA. Additionally, the classification of .Brand TLDs was new in this round. Consideration should be given to whether there should be different versions of the RA for different types of applications.

In summary:

5.1.a Explore the feasibility of finalizing the base Registry Agreement before applications are submitted or establishing a process for updating the Registry Agreement

5.1.b Explore whether different applicant types could be defined in a fair and objective manner, and if there are to be different applicant types, consider whether there should be different versions of the Registry Agreement