V**IRTUALAW LLC

Philip S. Corwin, Founding Principal
1155 F Street, NW Suite 1050
Washington, DC 20004
202-559-8597/Direct
202-559-8750/Fax
202-255-6172/Cell
psc@vlaw-dc.com**

 April 26, 2012

By E-mail to: com-renewal@icann.org

Internet Corporation for Assigned Names and Numbers (ICANN)

4676 Admiralty Way, Suite 330

Marina del Rey, CA 90292-6601

**Re: .com Registry Agreement Renewal**

Dear ICANN:

I am writing on behalf of the members of the Internet Commerce Association (ICA) in regard to ICANN’s initial comment period on the proposed renewal of the .com Registry Agreement which would allow VeriSign to continue operating the largest gTLD for an additional six-year term running from December 1, 2012 through November 30, 2018. This Reply Period was opened on March 27th and closes today, April 26th.

ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

Executive Summary

* **We applaud ICANN’s rejection of trademark interest entreaties that it impose URS and other untested new RPMs on .com through contractual fiat, as well as ICANN’s recognition that the rights and legitimate expectations of registrants require that any consideration of this matter be within the normal policy development framework. We also urge ICANN to initiate the long-delayed implementation process for URS so that the community may review its operational aspects and the qualifications of prospective arbitration providers well in advance of the first delegations of new gTLDs.**
* **We lament the fact that the perpetual renewal and pricing provisions of the current .com agreement preclude ICANN from subjecting the agreement to competitive rebid and permits additional price increases without any justification or public explanation. Notwithstanding the manner in which ICANN has unwisely restricted its own bargaining latitude, we believe that a requirement should be imposed on VeriSign and all other gTLD registry operators to provide a public explanation of the justification for any future price increases, and that such a requirement would not be a material term or condition that ICANN is precluded from imposing or altering. Because of these serious contractual flaws, it is even more critical that the batching process for new gTLDs facilitate the rapid introduction of new, general purpose gTLDs that can exert pricing competition against .com and other incumbent registries.**
* **We generally approve of other modifications of the agreement that enhance cybersecurity, bolster ICANN’s audit powers, continue to prohibit the offering of universal wildcard services, and set high performance requirements enhanced by registrar payment credits in the event they are not adhered to.**
* **We have no objection to the imposition of “thick” WHOIS requirements on .com if mandated by the GNSO.**

Imposition of URS on .Com via Contract Renewal

**One of the most significant aspects of this renewal agreement is what it does not contain – imposition of Uniform Rapid Suspension (URS) or any of the other new Rights Protection Mechanisms (RPMs) developed for new gTLDs, through contractual fiat, on this largest and most important of incumbent gTLDs.**

**ICA is extremely pleased by ICANN’s announcement that no attempt will be made to impose URS or other new gTLD RPMs on .Com through the contract renewal process. It appears that that this decision has been made in a way that effectively closes the door on attempts by trademark interests to foist these untested mechanisms on incumbent gTLDs through a backdoor that avoids ICANN’s multi-stakeholder policy process.**

On this point, your announcement states:

*New trademark protections:* ***The .com renewal proposal does not include a requirement to comply with the rights protection mechanisms (RPMs) developed for new gTLDs: Uniform Rapid Suspension (URS), Post-Delegation Dispute Resolution Process (PDDRP), and the Trademark Clearinghouse.*** *Taking them in reverse order, the Trademark Clearinghouse currently works in the period of a registry operational start-up and so would not be applicable to .com.*

*URS and PDDRP have so far only been approved in the context of new gTLDs.* ***The URS and PDDRP are new and untested****, and arguably should enjoy a "ramp-up" period to ensure that they are robustly designed and implemented before they are asked to absorb the full workload of the entire gTLD namespace.* ***Secondly, registrants have procured domain names in existing gTLDs with an understanding of the landscape of existing RPMs. New RPMs affect registrants, as well as registries and registrars. They should arguably be introduced in existing gTLDs after a bottom-up discussion.*** *Finally, these RPMs are not in any other existing registry agreement, and ICANN has no basis for requiring them – as described above, the renewal agreement should be similar in terms with the other largest registries.*

*The malicious conduct and rights protections were added because the community stated that ICANN should implement new gTLDs in order to make sure that there is as little harm as possible caused by the introduction of new gTLDs.* ***When creating the new gTLD rules, existing registrants (and registries) were not consulted with the idea that those protections would be implemented in existing gTLDs without further community discussion.*** *(Emphasis added)*

**ICA is particularly gratified by ICANN’s recognition that registrants in .Com and other incumbent gTLDs acquired their domains with an expectation of being subject to UDRP, but not these new and untested mechanisms; that “new RPMs affect registrants”; and that any consideration of imposing URS on new gTLDs should occur after they have been tested – and then “after a bottom-up discussion” that is the hallmark of ICANN’s policy development process. These are all points that ICA has made on a consistent basis over an extended period of time.**

We take serious issue with comments on the proposed contract such as those of the International Trademark Association (INTA) which assert that ICANN’s reasoning on this critical matter is somehow inconsistent with its prior statements regarding RPMs at new gTLDs. Rather, what is inconsistent is for INTA and other trademark interests that called for delay of the initiation of UDRP reform consideration so that the performance of the new RPMs could be considered in that context to now try to subvert ICANN’s standard policymaking process by urging imposition of URS on .com absent any experience with it. We also take issue with the notion that “harmonization” requires imposition of URS on .com and other incumbent gTLDs at some future point in time. We believe that the experience with URS and other new RPMs needs to be thoroughly evaluated after a substantial period of use at new gTLDs before that debate should be initiated, and also believe that the .com registry is qualitatively differentiable from all other gTLDs and may well deserve and require some distinct contractual anomalies well into the future.

ICA spoke out against a similar attempt to require URS in the renewed 2011 .Net contract (see <http://internetcommerce.org/ICA_Tells_ICANN_No_URS_at_dot_Net>); and has objected to its consideration for .Com at multiple ICANN gatherings and in our recent comment letter on defensive registrations at new gTLDs (see <http://internetcommerce.org/Defensive_Registrations_Second_Level>). That letter stated:

**We are unalterably opposed to this suggestion for 2012 contractual imposition of URS on .Com , both on its own demerits as well as because it would usurp the policymaking role of the Generic Names Supporting Organization (GNSO) Council.**

More than 100 million domains are registered in .Com. It is by far the largest gTLD and constitutes almost half of all existing domains in both gTLDs and ccTLDs. Non-infringing domains registered at .Com tend to have substantial secondary market value – sometimes reaching the $millions. The reckless notion that a thoroughly untested RPM should be foisted on the most important gTLD absent any experience – indeed, absent any assurance that a qualified provider can even be located and retained – is absurd on its face.

Second, imposing URS on .Com through a contract negotiation would completely undermine the December 2011 policy decision made by the GNSO in regard to initiation of a policy development process (PDP) for UDRP reform.

Motion 20111215-1(see <http://gnso.icann.org/resolutions/#201112> ) states in relevant part:

*Whereas, a Final Issue Report was published on 3 October 2011 (*[*http://gnso.icann.org/issues/udrp/udrp-final-issue-report-03oct11-en.pdf*](http://gnso.icann.org/issues/udrp/udrp-final-issue-report-03oct11-en.pdf)*) in which* ***ICANN staff recommended the GNSO Council consider the "perspective of the majority of the ICANN community, and the advice of the Government Advisory Committee (GAC), and the At-Large Advisory Committee" and that "a PDP be delayed until after the New gTLD Uniform Rapid Suspension System (URS) has been in operation for at least eighteen months. . . to allow the policy process to be informed by data regarding the effectiveness of the URS, which was modeled on the UDRP, to address the problem of cybersquatting.”***

*… RESOLVED further, the GNSO Council requests a new Issue Report on the current state of all rights protection mechanisms implemented for both existing and new gTLDs, including but not limited to, the UDRP and URS, should be delivered to the GNSO Council by no later than eighteen (18) months following the delegation of the first new gTLD. (Emphasis added)*

ICA did not agree with that GNSO Council decision, which defers the initiation of UDRP reform until at least mid-2014 – 18 months after the likely launch of the new GTLD program. We believed and repeatedly stated, verbally and in writing, that after more than ten years of operation and in light of substantial grievances from both registrants and complainants, the UDRP was deserving of at least procedural policy reform.

But trademark interests vigorously resisted initiation of UDRP reform at this time, in large part to assure that any deferred reform process would consider the imposition of the URS and other new gTLD RPMs on incumbent gTLD registries, including .com. Having achieved their objective, it is rather astonishing for some to now suggest that ICANN should undermine the GNSO’s policymaking role by imposing URS through contract negotiations. ICANN should firmly reject that suggestion.

ICANN staff recommended that UDRP reform be delayed so that the policy process could be informed by data regarding the effectiveness of the URS. Their clear intent was to allow any consideration of imposing the URS on incumbent gTLDs to be informed by the URS experience with new gTLDs, and to subject that consideration to the rigors and multi-stakeholder review of the standard PDP.

We agree that any consideration of URS for incumbent gTLDs, especially .Com, should only occur within the full PDP context. If trademark interests wish to have their concerns about the UDRP addressed then they should join with ICA in urging the GNSO to reconsider its decision to defer initiation of a UDRP reform PDP for more than two years.

The ICA's view is that the numerous procedural and structural flaws in the UDRP fail to provide adequate protection of the legitimate rights of domain registrants from abuses perpetrated by some overreaching trademark holders.  ICANN's priority should be reforming the flaws in the current UDRP to assure adequate balance to the UDRP process, chief among them the elimination of forum shopping and forbidding the empanelment of Complainant attorneys as 'neutrals' in third-party cases.

Further undermining the rights of legitimate domain registrants, who constitute  99% of domain owners -- including small businesses, non-profit organizations, and myriad individuals -- by the premature adoption of an untested URS system for any incumbent gTLD would create an environment ripe for abuse by those who already abuse the UDRP.  This would be the wrong decision for ICANN and for the Internet community as a whole."

In addition to these public statements and written filings, ICA’s concerns have also been conveyed in conversations with ICANN Board members and staff. We are pleased that our message appears to have gotten through.

**We remain hopeful that ICANN will finally initiate the implementation process for URS as soon as possible so that we can understand in detail how it is expected to operate, and see whether any credible arbitration body can be secured to administer it at the ultra-low pricing promised to trademark owners. However, in this regard we are dismayed and bewildered that ICANN’s newly constituted New gTLD Program Committee adopted a Resolution at its initial April 10th meeting that “directs staff to provide a briefing paper on the topic of defensive registrations at the second level and requests the GNSO to consider whether additional work on defensive registrations at the second level should be undertaken”. This action has created additional confusion and anxiety about the final pre-launch status of URS and other new gTLD RPMs, and provides trademark interests with yet another opportunity to advance already-rejected arguments that the burden of complainant proof and post-decision options be altered to convert URS from a narrow supplement to the UDRP into a bargain basement supplement at a severe cost to registrant due process rights. We again urge ICANN to immediately initiate the long-delayed implementation process for URS, including publication of a request for Proposals (RFP) and establishment of an Implementation Advisory Group (IAG) similar to that constituted for the Trademark Clearinghouse. As URS is required to be in place at the time that the first new gTLD is delegated, an event likely to occur in the first part of 2013, it is critically important that ICANN provide sufficient time for development of the implementation process and feedback from the entire community including potential registrants in new gTLDs.**

Presumptive Renewal and Permissible Price Increases

The presumptive renewal and price increase provisions of the draft renewal agreement engender a sense of déjà vu, as they are unchanged from the provisions that engendered significant outcry in 2005-6. ICA was in significant part established in reaction to that controversy, which ensued when the draft of the 2006 .Com agreement was unveiled as the negotiated settlement of litigation brought against ICANN by VeriSign. Following our establishment, ICA filed an amicus brief with the 9th Circuit Court of Appeals that played a critical role in a June 2009 revival of the Coalition for Internet Transparency’s (CFIT’s) antitrust litigation against VeriSign that challenged the .Com contract terms. But CFIT settled that case with VeriSign in May 2011 and once it essentially abandoned the litigation the critical terms of this successor agreement were predetermined.

In reviewing the renewal and pricing provisions of the renewal agreement, we are reminded why the 2006 contract engendered so much enmity – because ICANN has effectively agreed to tie its own hands in regard to future renewal negotiating leverage (and this self-imposed restraint has, regrettably, been subsequently written into other existing gTLD agreements).

**Let us be clear – as a trade association representing free market entrepreneurs, ICA has no objection to the notion that a registry operator which performs in keeping with the terms of its agreement with ICANN should have a strong presumptive right to being re-awarded that operator agreement for an additional term. We also have no argument with the notion that a registry operator should have a right to implement justifiable price increases, and know from experience that ICANN is ill-equipped to function as a price control regulator.**

**However, the renewal agreement, like its predecessor, is deficient in several significant respects:**

* **Operation of each TLD registry is a “natural monopoly” because only a single entity may exercise control over registry operations. Traditionally, the possibility of excessive price increases imposed by the entity in control of a natural monopoly has been addressed either by a regulatory regime that controls such increases (a role that ICANN has declined to assume) or by periodic price testing in the marketplace – a possibility that is effectively precluded by the agreement’s presumptive renewal provisions. The possibility of excessive price increases is even more pronounced in this case, given the dominant position of .com in the TLD marketplace -- .com registrations constitute nearly half of all domain registrations, and the secondary marketplace as well as consumer behavior conclusively demonstrate that .com domains are by far the most valuable and that a registrant which believes it has been subject to excessive price increases has no practical alternative at present to moving their domain location to another TLD. In December 2008 the U.S. Department of Justice’s Antitrust Division advised the Department of Commerce that “*ICANN should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition…We respectfully suggest that the DOC refrain from expressing satisfaction with ICANN's progress toward the goal of promoting competition among TLDs unless and until ICANN develops a credible and effective policy that compels it to employ tools such as competitive bidding to manage TLDs in a manner that safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices. To date, we believe that ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD registry operations."* (**[**http://www.ntia.doc.gov/comments/2008/ICANN\_081218.pdf**](http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf)**) Unfortunately, ICANN declined to take that advice and has subsequently entered into renewal agreements with other incumbent gTLDs that embrace perpetual renewal and unjustified, unexplained, and often unlimited price increases, and has established a model agreement for new gTLD registry operators with the same fundamental flaws. Meanwhile, in 2009 the United States terminated its direct oversight of ICANN (although we would assert that, as a California non-profit corporation, ICANN remains subject to U.S. antitrust law).**
* **The presumptive renewal provisions are drafted in a manner that makes it nearly impossible for VeriSign to ever face potential termination of the agreement and its competitive rebid. Termination under Section 6.1 can occur only if VeriSign is notified by ICANN of a fundamental and material breach of its obligations, refuses to cure such breach, forces ICANN to take the matter to arbitration or court, and then refuses to comply with the decision of the arbitrator or court. This is a scenario that is unlikely to ever occur, that permits a registry operator to continue operating in breach of its agreement for months or even years, and that effectively converts presumptive renewal to guaranteed perpetual renewal. In our view, a registry operator should be required to cure any fundamental and material breach of its agreement with ICANN no later than 30 days after receiving notification, and the onus should be on the registry operator to seek redress if it believes that ICANN’s assertion is wrong.**
* **The pricing provisions of Section 7.3 (d) continue to permit VeriSign to raise prices by seven percent in four out of six contract years without any justification whatsoever, without any reference or indexing to overall inflation (which has been exceedingly low in recent years), and without any requirement to even state the rationale for such price increases. We also note that additional price increases may be imposed in the two remaining years under this agreement provision that references new Consensus Policies as well as both actual and threatened cyberattacks :**

***In any year, however, where a price increase does not occur, Registry Operator shall be entitled to increase the Maximum Price by an amount sufficient to cover any additional incremental costs incurred during the term of the Agreement due to the imposition of any new Consensus Policy or documented extraordinary expense resulting from an attack or threat of attack on the Security or Stability of the DNS…***

**At a minimum, we believe that VeriSign or any other gTLD registry operator should be required to publicly state its rationale for any price increase in keeping with ICANN’s principles of accountability and transparency. We believe that such a public rationale requirement would not be a material change in the contract’s terms and conditions and that ICANN could therefore place it within this renewal agreement. In addition, it is lamentable that ICANN has never authorized any economic study to determine the base cost of providing registry services or that addresses the issue of whether the operator of a large registry such as .com enjoys economies of scale that make its per domain operating costs lower than average. Like many others, we cannot help but note that domain registration pricing at the much smaller .net registry also operated by VeriSign is substantially less than for .com, even though the largest gTLD likely enjoys the most favorable economies of scale.**

* **Overall, we believe that ICANN has tied its own hands to a highly regrettable degree in this and other successor registry operator contracts by committing itself to renewal on essentially the same terms for an unlimited period other than for incorporation of new Consensus Policies, and that by doing so it has harmed the interests of general public registrants. Given the rapid evolution of the Internet as well as changes in the competitive structure of the DNS – changes that are likely to accelerate given the looming introduction of massive numbers of new gTLDs – it appears quite unwise and irresponsible for ICANN to have placed itself in a position where seeking to impose any fundamental change in a registry agreement would be a breach of the predecessor agreement and would expose it to litigation and significant potential damages. In this lopsided contractual context, putting the .com agreement out for competitive rebid would almost surely trigger litigation against ICANN by VeriSign that could well result in a settlement agreement that is even more adverse to the public interest than the proposed renewal.**

In regard to presumptive renewal ICANN’s notice correctly states the basic situation in a manner that reinforces the deficiencies we have noted:

***The registry agreement precludes a competitive bidding process to provide .com registry services.*** *The renewal provisions in the current .com Registry Agreement are consistent with all the other ICANN gTLD agreements.* ***All ICANN's gTLD registry agreements essentially provide that they will be renewed absent a serious breach of the agreement.*** *These renewal provisions encourage long-term investment in robust TLD operations, and this has benefitted the community in the form of reliable operation of the registry infrastructure.* ***ICANN does not have the right under the current .com Registry Agreement to unilaterally refuse to renew the agreement or to bifurcate registry functions. Breaching the renewal provision would expose ICANN to liability under the contract.*** *(Emphasis added)*

We do note for the record that we are not aware any fundamental and material breach of the current contract committed by VeriSign. Indeed, it appears that their .Com operations has been consistently reliable and quite secure.

On the matter of future price increases, ICANN’s notice provides this relevant description:

*Registry services pricing:* ***Both the current .com registry agreement and the proposed renewal agreement permit Verisign to increase the price it charges registrars for domain names registrations four times during the six-year term with each increase being no greater than 7%.*** *This provision was substantially negotiated between Verisign on the one hand, and the U.S. Department of Justice and the U.S. Department of Commerce, on the other.* ***The current agreement (Section 4.2) specifies that the pricing and renewal provisions (among others) are not subject to change through the agreement renewal process.*** *If the .com pricing provisions were to be changed to be similar to the other large gTLDs then that would most likely allow Verisign to raise prices by 10% per year in each of the six years of the agreement, as in the .biz, .info, .net, and .org agreements. Note: ICANN's registry agreement for new gTLDs and registry agreements for sponsored gTLDs (.aero, .asia, .cat, .coop, .jobs, .mobi, .museum, .post, .pro, .tel, .travel, and .xxx) do not include any price controls. (Emphasis added)*

Again, for the record, we concede that VeriSign would undoubtedly point out that .com continues to have the most restrictive price caps of any gTLD – with the other significant gTLDs allowed to raise wholesale prices by 10% every year, and with the less significant ones – and all the coming new gTLDs - subject to no price caps at all. VeriSign would probably also note that .Com will face potential competition from a slew of new gTLDs over the next six years (although we don’t yet know for how many it will be either registry operator or backend technical services provider). Nonetheless, as previously stated, we believe that .com is qualitatively differentiated from other gTLDs due to its market dominance and high secondary market domain valuations and that this difference justifies continues to justify more restrictive contractual terms. Further, the fact that ICANN has entered into even more adverse contracts for other gTLDs does not convert the .com contract into one that protects the broad public interest.

It will be several years before we can gauge whether a .Web or other lower price point general purpose generic gTLD operated by a party other than VeriSign can gain market share from .com. While VeriSign is not required to exercise the price increase capability that is extended under this Agreement, it is a public company and its management has a duty to maximize shareholder value. We therefore presume that it will use all four of the increase opportunities unless there is at least a significant decline in .com registry growth, much less an unprecedented decline in overall .com registrations. On the other hand, .com registry revenues will not immediately grow by 7% each time pricing is increased, as many registrants have or will take advantage of their ability to lock in current pricing for up to ten years.

**Since we are not to have any market testing of .com pricing through a contract rebid process, it is all the more important that the new gTLD program is managed in a way that maximizes the probability that one or more new general purpose generic gTLDs brings outside pricing pressure to bear on .com and other incumbent registries. Competition, after all, is the one of the promised benefits from new gTLDs.**

**In this regard, the most important aspect of the “digital archery” approach to new gTLD application batching recently announced by ICANN is that it does not discriminate between gTLD types, and thereby assures the maximization of diverse types of new gTLDs and the greatest introduction of potential new price competition between registries. This is highly preferable to a prioritization system that has been floated by some trademark interests, who would have ICANN process IDNs first, .geos second, .brands third, and all .generics dead last. We have nothing against new gTLDs in non-ASCII scripts or city, state, and nation gTLDs. And we believe that some savvy brand owners are going to find that owning their .brand at the top level of the DNS provides multiple benefits at very reasonable costs. But new .generics should be beneficial as well, and their greatest potential benefit is the fostering of domain price competition among registries.**

**While recognizing that new gTLDs will not be subject to pricing limitations, we hope to see a variety of new monetization models that include low cost or even free domains. In any event, new gTLD choices in the general purpose and vertical generic spaces will hopefully provide meaningful competitive benefits, especially those that are operated by new entrants into the registry space. Therefore, a non-discriminatory batching policy must be adhered to as a means of generating marketplace price competition against .com.**

Additional Matters

In reviewing changes negotiated between ICANN and VeriSign in this new draft agreement, we take note of and generally approve the following positive modifications:

* General modernization provisions consistent with post-2006 policy changes, including enhanced cybersecurity (implementation of IPv6 and DNSSEC), IDN compliance, and clarified point of abuse contact designation.
* Continued prohibition of universal wildcard services, such as last decade’s controversial ‘Sitefinder’ proposal, with new language limiting commercially usable traffic data to that available under a “thin” registry model even if .com is required to convert to “thick” WHOIS during the term of the renewal agreement.
* Required cooperation with ICANN registrar compliance actions, including registrar suspensions.
* Enhanced audit provisions that facilitate more robust contract compliance efforts by ICANN.
* New language in the draft Appendices which specifies extremely high required performance levels for VeriSign’s operation of .com (99.99% SRS Service Availability per calendar year, and 100% DNS Name Server and WHOIS), and that amend the Service Level Agreement (SLA) to require specified monetary compensation to registrars for any failure to meet these targets, with aggregate credits ranging from $100,000 to $1 million.

We also note that ICANN has deferred imposition of “thick” WHOIS implementation for .com, with the ultimate disposition of that issue to be decided by the GNSO Policy Council. For the record, ICA’s Code of Conduct requires our members to submit correct WHOIS contact information and to comply with lawful requests for data placed under privacy protection. And our understanding has been that VeriSign is neutral on whether .com should continue to have “thin” WHOIS - with the more detailed registrant data still available but residing at their registrars -- or should be required to convert to the “thick” WHOIS database maintained by other gTLDs. ICA has no position in regard to whether or not “thick” WHOIS requirements should be imposed on .com

Conclusion

ICA appreciates this opportunity to comment in the regarding the draft renewal Agreement for VeriSign’s continued operation of the .com registry.

Thank you for considering our views in this matter.

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association