Verisign Comments on the Proposed New gTLD Registry Agreement

Verisign respectfully submits the following comments in response to the ICANN staff's proposed revision to the New gTLD Registry Agreement (RA) posted on February 5, 2013. The previous version of the RA was published on June 4, 2012.

Verisign recognizes that the RA revisions are being proposed, in part, by ICANN staff in response to the October 17, 2012 Government Advisory Committee (GAC) Communiqué´ requesting that ICANN explain how commitments made by applicants in their applications will be overseen and enforced. While Verisign commends the ICANN staff for its efforts to respond to the GAC's request, we are concerned with the timing and substance of ICANN's proposed RA revisions. We are also extremely concerned that ICANN seeks to re-open major contractual terms that were previously decided and add unrelated and substantive changes to the RA.

Set forth below, Verisign provides its general comments regarding ICANN's timing of the proposed RA changes and we discuss why these proposed changes defeat applicants' reasonable expectations. We also provide specific comments with respect to the proposed changes.

GENERAL COMMENTS

ICANN's Timing of Proposed RA Changes Must be Rejected

ICANN's decision to propose these substantive changes now, after many years of multi-stakeholder input, has the potential to disrupt the expectations of new gTLD applicants and, in our view, amounts to a top-down action by ICANN that undermines the bottom-up multi-stakeholder model that ICANN has committed to uphold. Of particular concern is that these revisions are being posted for public comment via the shortest possible public comment period. Further, while we recognize that a longer comment period will likely require other schedule changes, including possibly changing the date ICANN recommends TLDs for delegation, we see no benefit to rushing important and material RA changes to meet artificial deadlines. Another significant problem with the timing of the proposed changes is that ICANN is also requiring applicants to formally submit public interest commitments, a brand-new concept, on March 5, 2013, just a few days after the RA comment period closes on February 26, and before the completion of the comment reply period on March 20, 2013. The March 5 date is too soon after the comment period closes, in our view, because it requires applicants to perform a rushed analysis, potentially resulting in business harm. Further, the March 5 submission date falls well before the receipt of possible government objections and GAC advice, which Specification 11 seems designed, in part, to address.

ICANN should not rush public comment review of this or any proposed changes and should, at a minimum, extend the March 5 deadline for parties to submit commitments to permit a reasonable amount of time after Specification 11 is finalized and after government objections and after GAC advice, if any, is received.

Another grave timing concern is that under ICANN's current timeline, applicants that wish to submit public interest commitments will be forced to make such commitments before ICANN has disclosed the new dispute procedure it contemplates creating to resolve disputes under Specification 11. We cannot, nor should any careful applicant, submit public interest commitments without knowing how, and especially who, will decide enforcement disputes that might arise. ICANN is effectively demanding that applicants make these public interest commitments on faith that the dispute process will be fair; that the outcomes will be predictable; and that the remedies will be appropriate. Because termination of the RA is a remedy available under ICANN's undefined dispute process, an applicant is literally granting control of its business to an unknown third party. ICANN's Specification 11 should be completely rejected for this reason alone. The push by ICANN to move these changes in the new gTLD program forward in an expedited manner is inconsistent with its obligations under Section 9.1(d) of the Affirmation of Commitments, pursuant to which, "ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community." Accordingly, ICANN must provide sufficient time for Verisign and the community to review and have meaningful input into each and every proposed change. The ICANN timeline for adoption of the changes must be revised accordingly.

Proposed RA Changes Defeat Applicants' Reasonable Expectations

Several of the proposed changes to the RA will upset the reasonable expectations of applicants. For example, ICANN's attempt to obtain a unilateral right to impose certain RA amendments (as proposed in Section 7.6) is particularly problematic in this regard because ICANN previously sought this same right during the development of the RA during the draft application guidebook process. ICANN knows that in light of comments and objections from the community, Version 4 of the draft application guidebook issued in May 2010 (developed through input from a multi-stakeholder working group) the prior language that would have provided for such a unilateral right was removed. ICANN is now revisiting, at this late date, what is and should be a settled issue and is using the shortest possible public comment period to do so. Frankly, we are left to wonder whether ICANN intended this disingenuous approach

from the start. Applicants, including Verisign, have made significant investments in reasonable reliance that such unilateral amendment rights would not be part of the RA.

We have similar concerns with other proposed changes. For example, ICANN is seeking to broaden its assignment rights under Section 7.5 in a way that was already rejected through consensus by the community. In November 2012, in Version 5 of the draft application guidebook, ICANN agreed, in light of community comments, to add language to clarify that an assignment pursuant to any ICANN reorganization would only be to an entity in the same jurisdiction in which ICANN is currently organized. ICANN's proposed changes to Section 7.5 remove this limitation, thereby completely upsetting all applicants' expectations in this regard.

As addressed more fully below, some of ICANN's proposed terms and processes are yet to be defined and/or allow ICANN "leave" to make unilateral updates and changes in the future. This vagueness and uncertainty in a contract creates unnecessary unpredictability making the registry operator's future compliance obligations wholly unclear. The undefined processes should not be left to after-the-fact development just so ICANN can meet its artificial deadline of April 23 to "recommend" delegation. This is simply foolish and undermines the multi-stakeholder model of Internet governance.

SPECIFIC COMMENTS

1. Amendments and Waivers -Amendment Through Supermajority Board Approval (Section 7.6)

    - ICANN has reintroduced language allowing the ICANN Board of Directors, through a supermajority vote, to unilaterally amend the RA without Registry Operator Approval. This concept was already considered by the community and ICANN's reintroduction of such terms after the community spent months of work finalizing the language could be considered an act of bad faith by ICANN staff because: 1) it unilaterally reverses a significant decision that had previously been finalized via community processes; 2) it forces applicants to accept undefined and problematic terms if they want to avoid delays; and 3) the changes are being presented at the end of the process, thereby leaving insufficient time for adequate vetting.
    - In addition to giving ICANN the overly-broad right to impose unilateral changes to the RA with a supermajority vote of the Board, the language would also allow ICANN to impose changes to the RA, even if those changes were different than originally submitted to the registry operators.
    - The standard by which ICANN may impose changes under the supermajority amendment process is based on the vague and undefined standard of "substantial and compelling need."
    - Even if a registry operator is able to obtain an exemption to such an amendment based on the incredibly high standard of "clear and convincing," ICANN can still impose

whatever line item amendments to the registry operator's RA it desires, thus undermining the exemption process.

- Verisign has consistently stated that we believe the consensus-based Policy Development Process is the appropriate vehicle to accomplish changes to the RA.

2. Public Interest Commitments (Section 2.17. 4.3(e), and Spec 11, Section 2-3)

- The Public Interest Commitment (PIC) process is completely undefined and the March 5 requirement to inform ICANN of PIC Specifications, before possible GAC objections and GAC advice may be received, appears to undermine the purpose of the PIC process.
- As currently drafted, the PIC specification would expose registry operators to multiple and unspecified parties for breach with unlimited exposure. The PIC process envisions enforcement by third parties through a completely undefined Public Interest Commitment Dispute Resolution Process (PICDRP). It is unrealistic for ICANN to require any new gTLD applicant or registry operator to accept such undefined terms.
- The enforcement of the PIC specification includes unknown potential remedies and no mechanism for a registry operator to dispute findings.
- Despite ICANN disavowing its desire to enforce these PICs during the February 5 webinar, the plain language of the proposed changes clearly gives ICANN enforcement rights, and moreover, gives ICANN the right to impose <u>any</u> remedy against a registry operator (including termination) with no apparent cure period (section 4.3(e)), and the ability to seek punitive or exemplary damages or operational sanctions.
- It is unclear whether failure of an applicant to sign up for a PIC specification will in any way disadvantage the applicant in the review and approval process. For example, in a case where an applicant has not received any GAC early warnings or government objections by ICANN's March 5 deadline for PIC specification submission and therefore, does not opt to include any PIC specifications in its application, the applicant could later receive GAC advice or a government objection resulting in its application's denial. Whereas, an applicant that received a GAC Early warning would have notice and could avail itself of the PIC process.

3. Change of Control; Assignment and Subcontracting (Section 7.5)

- The newly proposed language states ICANN will consent to subcontractors or assignment to compliant gTLD registry operators, but still allows ICANN to object based on undefined criteria, standard or process. This objection right completely undermines the consent provision.
- For subcontractors or assignees that are not gTLD Registry Operators:
    - The criteria for approval are based on the "ICANN-adopted specification or policy on registry operator criteria then in effect." Accordingly, applicants are being asked to comment on a process that is not defined.
    - The criteria ICANN will use to evaluate an assignment or subcontract must be clearly set forth (based off of the application process) and indiscriminately

applied. In addition, the criteria must not be a moving target that ICANN can change from time to time.
    - The information to be collected by ICANN as part of the review process must have set parameters and be consistently applied. Further, ICANN must maintain the information confidential as appropriate, and consistent with the standard applied during the application process.
    - There are no clear time limits for ICANN's decision to approve a subcontractor or assignment (e.g., 60 calendar days of receipt of "all requested" information).
- ICANN has also removed important protections restricting ICANN's ability to assign the RA (including assignment be to an organization organized for the same purpose in the same legal jurisdiction). This last minute change broadens ICANN's right to assign the agreement to an entity that may not be appropriate for running/monitoring registries (meaning technical expertise or commitment to the internet) and to an entity in an unknown jurisdiction.

4. Requirement to implement New or Revised gTLD Data Directory Services (Spec 4, Section 1.10)

- The proposed language requires a registry operator to implement a new or revised gTLD data directory service within 120 days of notification from ICANN. Registry operators cannot responsibly agree to implement a service within a specific timeframe without knowing the requirements for specification and implementation.
- The proposed revisions are also problematic as they require registry operators to implement a service without regard to cost.
- The proposed language provides for a possible exception, but is problematic because the requestor must demonstrate "to ICANN's satisfaction that implementation would be commercially unreasonable." This is not an objective criterion and unacceptably shifts the burden to the registry operator to prove commercial unreasonableness rather than ICANN showing why the implementation is commercially reasonable.

5. Mediation (Section 5.1)

- The proposed language creates a brand new pre-arbitration requirement that will result in lost time to resolution and creates additional cost and expense for both parties, including with regard to the cost of mediation which is shared.
- The mediation process is poorly defined, including:
    - The rules and procedure for mediation are determined by the mediator, this is extremely unusual and creates uncertainty and inconsistency in the process;
    - There is no mechanism in the event the parties are unable to agree to a mediation provider entity and there is no timeframe for resolution.
    - The mediator is not required to have technical knowledge, only general knowledge of contract law.

- The provision is vague as to whether parties may obtain relief from a court to remedy irreparable harm from a breach without going through the tedious and lengthy mediation/arbitration process.

6. Application of 2013 Registrar Accreditation Agreement (RAA) (Specification 11)

- The proposed language requires registry operators to use only ICANN Accredited registrars who execute an RAA that is currently under negotiation. By so doing, ICANN is forcing registry operators to enforce an agreement that is not yet publicly available and for which ICANN has not completed negotiations.
- Requiring a registry operator to limit distribution of its channel to registrars that have executed a yet to be finalized agreement could have the effect of disadvantaging those registry operators whose TLDs will be delegated into the zone first.
- The provision is inconsistent and does not track with several sections in the RA, including Specification 9, Section 6 (exemption for the Registry Operator Code of Conduct) and Section 2.9 (Registrars)

7. Renewal (Section 4.2(a)(ii))

- Section 4.2(a)(ii) introduces language into the summary of changes that is not included in the redlined RA. Specifically, the summary language adds a "court finding" that a registry operator is in breach of the RA to this list of items that would prevent the renewal of the RA.
- The proposed language should be removed given the serious implications of the change to expand ICANN's ability to prevent renewal of the RA and the confusion it introduces into the dispute resolution process.
- The revision is overbroad and is not even limited to a court of competent jurisdiction or a valid, final non-appealable court.

8. Continued Operations Instrument (Section 4.5 and Specification 9)

- ICANN has failed to clarify and narrow its right to an unconditional release of funds maintained pursuant to a Continued Operations Instrument ("COI").
- The language allowing ICANN to draw down on the COI in the event of an emergency transition or termination/expiration of the Registry Agreement for any reason is too broad and should be narrowed (i.e., termination for any reason should not be justification to access COI funds if there is not an urgent need to transition registry services).
- There is still no mechanism permitted in the COI for "checks and balances" on ICANN's right to access funds. At a minimum, there must be an obligation on ICANN to provide the registry operator notice of its intent to withdraw funds and a

commercially reasonable process for the registry operator to object or dispute such notice.

9. Domain and Designation (Section 1.1)

- Typo in regard to the term of the agreement. The agreement should be effective until the earlier of the expiration of the Term "or" (not "and") the termination of the agreement.

10. Reserved Names (Section 2.6)

- The language around a registry operator's ability to reserve and register names is inconsistent. The language stating (i.e., not register to third parties, delegate, use or otherwise make available) used in the second sentence should carry in full to the last sentence in the section.

11. Registrars (Section 2.9(b)

- The inserted language "or legal process" is vague and doesn't give the Registry Operator time for objection.
- The language should be revised to say "pursuant to a legal proceeding, provided ICANN provides the Registry Operator with applicable notice and opportunity to object."

12. For Registration Data Publication Services (Specification 4)

- The location of the specification for the WHOIS common interface, to our knowledge, has yet to be provided. (Section 1.8)
- There is no clarification as to what ICANN considers the primary website for the TLD.
- The information regarding the CZDA Provider has yet to be provided. (Section 2.1.1)

As stated above, Verisign has many serious concerns with ICANN's last minute proposed changes to the June 2012 RA, including the unilateral nature of many of the revisions. Under no circumstance should ICANN staff and the ICANN Board incorporate these proposed unilateral and unacceptable changes into the RA. We are concerned, in part, that ICANN is attempting to force through a new version of the RA that a subset of anxious applicants could feel compelled to accept, thereby empowering ICANN to establish these last minute changes as the new baseline for all new gTLD registry operators. Verisign believes that, in many respects, ICANN's proposed revisions introduce more confusion than clarity into the process. We look forward to working with ICANN, existing registries, new gTLD applicants, and other interested parties to move the process forward in a responsible and thoughtful manner that ensures that any and all revisions and changes receive consideration and proper input from the stakeholders.