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12061 Bluemont Way
Reston, VA 20190
t: 703-948-3200

Verisigninc.com

May 2, 2013

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094-2536

Re: Comment by Verisign to New gTLD Registry Agreement Posted on April 29, 2013

Dear ICANN:

I am submitting these comments on behalf of Verisign. I am also submitting them from my personal perspective as one who has been very actively involved in ICANN from its inception. I have always been whole-heartedly supportive of ICANN and the multi-stakeholder model and will continue to be. But I am seriously concerned about what I have seen in the last few months as detailed in these comments.

Verisign is extremely troubled by ICANN's recent actions in pursuit of a unilateral right to amend provision in the new gTLD Registry Agreement. Our fundamental concerns relate equally to timing, process and substance. In each of these areas, ICANN has demonstrated its willingness, or even preference, to ignore the bottom-up, consensus-based process, including rejecting previously agreed-to compromise positions, in favor of its own unilateral top-down desires and decision-making. Under its new leadership, ICANN the organization has chosen to elevate itself above the ICANN community. ICANN appears to have abdicated its role as a facilitator and is working hard to install itself as a top-down regulatory body governing the DNS industry. Verisign objects on principle to each of these developments. This comment letter focuses on the process and policy issues raised by ICANN's continued efforts to secure inappropriate and unacceptable unilateral powers.

Verisign is fundamentally opposed to any extraordinary amendment process beyond the 2010 compromise language in the Applicant Guidebook (AGB), which appropriately requires Registry Operator Approval for a Special Amendment. ICANN's newly proposed language is deeply concerning as it unravels the 2010 compromise by granting ICANN a unilateral right to amend our Registry Agreements. Verisign has expressed this opposition repeatedly over the last several months, through public comments, through our



participation in the Registries Stakeholder Group (RySG), and directly with ICANN's leadership, staff, legal counsel, and individual Board members.

Nothing we have seen over recent weeks and months has changed that fundamental position. The proposed 7.6 language introduced on February 5, 2013, the proposed "Public Interest Amendment," the proposed "Extraordinary Amendment Process" introduced on April 1, 2013, and the newly introduced 7.7 language all amount to the same thing: A unilateral right permitting ICANN to amend provisions in the new gTLD Registry Agreement. In Verisign's view, ICANN staff and its legal counsel have attempted to dress up or disguise the unilateral right to amend provisions with ineffectual checks and balances and a laborious process and timeline, while ignoring the fundamental and principled problem that existed in the February 5 proposal, and has survived in all of its subsequent forms.

In October 2008, with the posting of Version 1 of the AGB, ICANN first introduced contractual language granting itself a unilateral right to amend the Registry Agreements, which was correctly rejected by the RySG the first time it was proposed and each time it was included thereafter, and which ultimately resulted in a negotiated compromise position – the "2010 Compromise." For more detail on the important history of this critical issue, refer to the RySG public comments of February 26, 2013:

<http://forum.icann.org/lists/comments-base-agreement-05feb13/pdf9aMq5amCU0.pdf>. A portion of the RySG public comment is also attached hereto as the "History of the 2010 Compromise."

To summarize the history:

- In 2008, ICANN proposed a unilateral right to amend provision in DAGv1.
- In 2008 and 2009, the RySG objected to that proposal.
- In 2009 and 2010, a working group was formed, including ICANN staff and legal counsel, which resulted in a compromise position.
- In June 2012, the Final AGB was posted including the compromise language.
- On February 5, 2013, ICANN unilaterally torpedoed the language in the Final AGB and re-introduced the unilateral right to amend language.



- On March 4, the RySG hosted a community teleconference to review and discuss the proposed language. Strong and fundamental objections to 7.6 were raised. ICANN's CEO Fadi Chehadé was in attendance for 90 minutes.
- On March 27, the RySG held its bi-weekly teleconference. Strong and fundamental objections to 7.6 were again raised. ICANN's CEO Fadi Chehadé was in attendance for the full two hours.
- Over the last 3 months, the community has objected to the inclusion of 7.6 in its various iterations. There were zero public comments in support of 7.6 and over 30 of the 41 substantive comments submitted were directly opposed to the provisions.
- On April 1, just days prior to the Beijing meeting, ICANN posted a new version of the New gTLD Registry Agreement, which continued to include a version of 7.6.
- ICANN indicated that the ICANN Board could consider and vote on the New gTLD Registry Agreement as early as April 20. This news placed significant pressure on applicants, who feared unacceptable language would be approved by the Board.
- At the last minute, ICANN incorporated language from the recently concluded Registrar Accreditation Agreement (RAA) negotiations into the latest Registry Agreement red-line as Section 7.7.
- From April 8-29, discussions took place between an ad-hoc group of registries/applicants and ICANN staff and legal counsel. These hastily organized discussions were initiated following news of the possible ICANN Board vote on April 20. No prior notice was given.
- On April 29, ICANN posted for public comment a new red-lined version of the new gTLD Registry Agreement, which still includes the unacceptable 7.6 and the equally unacceptable new 7.7 language.

Among the 41 substantive comments submitted during the public comment period on the February 5 proposal, there was no support for ICANN's proposed "unilateral right to amend" language inserted in Section 7.6(c) and 7.6(d). This was predictable and must have been anticipated by ICANN before issuing the February 5, 2013, draft. As described in detail in several comments, this proposal was originally and soundly rejected by the community in 2010. The "Compromise of 2010," which was included in the final version of the AGB, was the negotiated agreement surrounding the concept of ICANN's unilateral right to amend. As such, it was inexcusable for ICANN to reintroduce what was largely their original position at the eleventh



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hour. As noted in several comments, this proposed language was a non-starter and should have been replaced by the original 2010 compromise language. By not doing so, ICANN has created a credibility gap that now threatens its own legitimacy.

The April 1, 2013, ICANN staff summary of public comments submitted in response to the February 5, 2013, amendments glossed over the nearly universal opposition (and complete lack of support) to the unilateral right to amend provisions in 7.6 and said, *“ICANN recognizes the need to maintain the centrality of the consensus-based policy development process, and the need to carefully restrict the applicability of the amendment provision.”* Unfortunately, ICANN’s actions since posting that report have neither maintained the centrality of the consensus-based policy development process, nor adequately restricted the applicability of the still-unilateral amendment provisions. ICANN staff, in effect, watered down its own analysis and then proceeded to ignore it anyway. Worse, ICANN not only continued to include 7.6, but then at the last minute added 7.7 as yet another opportunity to amend registry contracts without mutual consent. This is wholly unacceptable.

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.”*

Over the last three months, we have asked the below three questions. To date, we have not received a clear, compelling or satisfactory response:

1. Why does ICANN feel it needs a unilateral right to amend provision?
2. Why was the 2010 Compromise language insufficient?
3. What are examples of the unilateral right to amend process in action?

ICANN’s failure to respond to these three basic questions, which have been asked repeatedly by multiple parties in a variety of venues, is a clear refusal to act in a transparent manner.



We are concerned that ICANN is attempting to force through a new version of the RA that a subset of anxious applicants could feel compelled to accept, further empowering ICANN to establish these last minute changes as the new baseline for all new gTLD registry operators. In fact, new gTLD applicants are under significant duress thanks to the ongoing delays, which are a direct result of ICANN's February 5 proposed amendment. ICANN is sitting on \$350 million in application fees while applicants themselves are burning cash waiting for ICANN to deliver on its obligations. As such, ICANN has leverage over applicants and knows it can wait them out to secure the contractual terms it prefers, even if those terms were previously rejected by the community. This is clearly not in good faith. It is not in good faith because it was introduced at the last minute after the compromise had been in place for more than two years. It is not in good faith because it reverses the multi-stakeholder process that produced the compromise. And it is not in good faith because it is not good policy from a legal or business point of view and leaves ICANN unaccountable to the community.

Verisign believes that, in many respects, ICANN's proposed revisions have introduced more confusion than clarity into the process, and have in fact caused substantial delays to the program. We call on the ICANN Board to take this opportunity to exercise its authority and ensure that ICANN remains committed, in action and in words, to its core mission, values and principles. Will the ICANN Board resist the temptation to impose its views without legitimacy, or will it uphold the bottom-up multi-stakeholder process that previously rejected the unilateral right to amend through a negotiated compromise in 2010? Unfortunately, the current ICANN staff has demonstrated its willingness to undermine these principles for its own short-term organizational desires. In the interest of time, accountability and transparency, and demonstrating its commitment to the multi-stakeholder model, the ICANN Board should vote "no" on sections 7.6 and 7.7 of the Registry Agreement and revert to the 2010 compromise language included in the Final Applicant Guidebook.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Chuck Gomes', written over a light blue horizontal line.

Chuck Gomes
Vice President, Policy



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ENCL.



ATTACHMENT 1

HISTORY OF THE 2010 COMPROMISE

Excerpt from Registries Stakeholder Group (RySG) public comments of February 26, 2013:

<http://forum.icann.org/lists/comments-base-agreement-05feb13/pdf9aMq5amCU0.pdf>

ICANN first sought to expand the Board's authority to unilaterally amend the registry agreement in October 2008, when it published Version 1 of the new gTLD Applicant Guidebook. The draft registry agreement contained in that document, like the February 5, 2013 version, gave the ICANN Board the right to impose new obligations on registries over their objection and without going through the policy development process. But unlike the New Draft, ICANN only sought authority to use that expanded authority in circumstances "justified by a substantial and compelling need related to *the security or stability of the Internet or the Domain Name System.*"

The RySG rejected the 2008 proposal as completely unacceptable, arguing that:

The unilateral right to amend would make it more difficult for applicants to attract capital and measure the commensurate amount of capital required to sustain operations; it would also make it more difficult for existing Registry Operators to prioritize necessary investment for continued operations against what may be an unnecessary operational change for specific purpose TLDs;

The current Consensus Policy mechanism is sufficient for critical changes and ensures that any implementation is appropriately balanced across multiple constituencies and stakeholder groups. In addition, truly important and time-sensitive issues can be addressed via Temporary Policies which can, at a later stage, can become permanent changes through Consensus Policies; and

As a matter of principle, unrestrained and unilateral change of terms and conditions by one party is an unsuitable approach for private contracting. Even governments that have a right to amend an agreement are bound by



certain regulatory processes and procedures, including the provision of just compensation when such a change is required.

The RySG continued to object when the same basic right to amend was included in subsequent versions of the Guidebook. In response to the RySG objections and the discussions that took place at the ICANN meeting in Seoul in late 2009, the ICANN Board of Directors directed staff to form a working group made up of legal representatives from ICANN (both in-house and external counsel), the registries and other legal representatives from the community. That group had an active archived mailing list, held a number of conference calls and met in person in Marina del Rey in April 2010.

Over the course of these discussions and meetings, the Working Group identified a compromise solution that was published for comment on May 27, 2010. In the analysis document that accompanied the “Special Amendment” compromise, ICANN acknowledged the legitimacy of registry concerns about unilateral amendment authority, and described the proposed compromise:

After further consultation with the working group, ICANN has proposed a compromise provision. Pursuant to the new provision, ICANN will have no ability to unilaterally amend the registry agreement. Rather, after consultation with and vetting by a working group, ICANN may propose amendments to the Registry agreement that, if approved in the manner set forth below, would automatically amend all registry agreements that contain the new amendment provision. The working group is constituted from representatives of the Applicable Registry Operators and other members of the community that ICANN appoints, from time to time, to serve as a working group to consult on amendments.

That “Special Amendment” compromise was posted for public comment and later included in the Final Applicant Guidebook in January 2012, which each applicant relied on deciding to submit the more than 1900 applications, and to write checks to ICANN totaling over \$350 million. The “Special Amendment” process was supported by the ICANN community, ICANN staff and the ICANN Board of Directors. This agreed-upon strategy provided a means to amend the registry agreements in a predictable and stable bottom-up fashion while at the same time preserving the principle of mutuality of contracts. In addition, it gave ICANN a mechanism to amend the new gTLD registry agreements for those topics that were outside the Consensus Policy



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process, while still preserving the ability to impose Temporary Policies on registries if there was a substantial and compelling need for issues involving the security and stability of the Domain Name System. With both registries and ICANN in support of the new “Special Amendment” compromise, the issue was put to rest so that one could concentrate on other important implementation issues necessary to move forward with the new gTLD process.

On February 5, 2013, nearly five years after originally proposed, and three years after a bottom-up compromise position was agreed to by the community, without notice, consultation, or justification, ICANN re-introduced the notion of granting ICANN a unilateral right to amend the gTLD Registry Agreement. Whatever ICANN’s reasons may be, this proposal remains as unacceptable today as it was in 2008. To repeat the RySG comments from 2008-2009, the RySG believes that the unilateral right to amend any private contract constitutes an unreasonable abuse of power and puts at risk the contracting scheme that has served the community well, particularly in terms of, providing legal security and certainty, while providing for a certain flexibility to amend registry agreements within the bounds of the consensus policy process. Once more, even governments that have a right to amend an agreement are bound by certain regulatory processes and procedures, including the provision of just compensation when such a change is required, not to mention other limitations applicable to the so-called “adhesion” or standard form contracts.

In the event of any emergencies or threats to security and stability, ICANN already does have the right to propose Temporary Policies by a supermajority of the Board if such measures are necessary to maintain the stability or security of the Registry Services. The proposed amendments would make it more difficult for registry operators to attract capital and to plan for their capital requirements. The current Consensus Policy mechanism is sufficient for critical changes and ensures that any implementation is appropriately balanced across multiple constituencies and stakeholder groups. As already stated above, truly important and time-sensitive issues can be quickly addressed via Temporary Policies, which can, at a later stage, become permanent changes through Consensus Policies. And, keep in mind that the Final Agreement gives ICANN authority to make amendments supported by a specific percentage of the registry operators effective across the entire group.



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We are in the midst of dramatic change in the administration of the top-level domain name system. All businesses – whether for profit or nonprofit - require a measure of predictability, stability and certainty of contracts. Public and multi-national company applicants are subject to regulatory regimes that cannot be reconciled with the expanded unilateral authority ICANN is seeking. In deciding whether or not to utilize new gTLDs for their critical infrastructure assets, a key goal of the new gTLD program, registries cannot be subject to the whim of one private entity, even those acting under the guise of public interest, regardless of how well intentioned that private entity purports to be.

In order to ensure the stability, predictability and reliability of the domain name system, ICANN *must* respect the longstanding arrangement that legitimizes its status with contracted parties. We recognize that this can be challenging given staff and board changes, and the determination of those who are not happy with the outcome of policy development to exploit all avenues of taking another bite at the apple. The failure to proceed in good faith to implement fully informed decisions of the past undermines the private-public partnership and ultimately the multi-stakeholder model.