Verisign submits the following comments in response to the ICANN staff's proposed revision to the New gTLD Registry Agreement ("RA") dated April 29, 2013. The below comments identify Verisign's concerns with ICANN's failure to provide clarity and objective process around a number of newly revised provisions. Verisign's comments also restate a number of issues raised by Verisign in our comments to ICANN's February 5, 2013, version of the RA **(**http://forum.icann.org/lists/comments-base-agreement-05feb13/msg00005.html) that were not addressed by ICANN and remain unaddressed.

Please note that the following comments address multiple additional areas of the proposed revision of the RA beyond Verisign's other comments submitted during this comment period (referenced in point nine below) that addressed Sections 7.6 and 7.7.

COMMENTS TO ICANN'S APRIL 29, 2013, DRAFT REGISTRY AGREEMENT

1. Registrars (Section 2.9)

- While Verisign is in agreement with the concept that "immaterial" changes to the Registry-Registrar Agreement ("RRA") should not require ICANN's approval, ICANN's revisions to this section fall short of providing sufficient clarity to effectuate this concept. The process detailed by ICANN regarding changes to the RRA is not only uncertain, it leaves ICANN with too much discretion. Although ICANN states in its Summary of Changes that "immaterial" changes to an RRA do not require ICANN's consent prior to implementation, this explanation is misleading and unclear.

    - In fact, ALL revisions to an RRA require Registry Operators to provide ICANN with fifteen calendar days' notice, thereby creating inability by the Registry Operator to move forward with the revision(s) until ICANN has determined whether the change falls into the undefined "immaterial," "potentially material," or "material in nature" category. This leaves Registry Operators with no predictability as to the standard to be applied. We suggest that ICANN include examples of changes that would fall into each of the three identified categories.
    - ICANN has provided no standard or explanation by which they will make their determinations, thereby providing no assurance that their application of the standards will be fairly and consistently applied and no predictability for registries to manage their business. In fact, ICANN hedges its bets by allowing a change to an RRA to be held up as "potentially material." We suggest ICANN provide a definition of the standards.
    - ICANN's Procedure for Consideration of Proposed Amendments to the gTLD Registry-Registrar Agreements provides no clear timelines in which the process will take place. With terms such as "ordinarily" and "normally," a proposed revision to an RRA could literally be under

review in perpetuity. In fact, ICANN has not provided any timeframe by which the entire process, including the consultations, must take place.

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

- The Public Interest Commitments ("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 Public Interest Commitment Dispute Resolution Process ("PICDRP") that continues to be poorly defined, and insufficiently addresses the issue of a third party's standing. It is unrealistic for ICANN to require any new gTLD applicant or Registry Operator to accept a process that exposes the Registry Operator to actions by third parties that require a minimal and poorly defined threshold for standing. We suggest that applicants who submit PIC specs be permitted to define the third parties who would have standing to enforce the PIC spec against the applicant. In this way, the virtually unlimited pool of third parties who might challenge a PIC spec is limited to the community that the PIC spec is intended to address.

- Despite ICANN disavowing its desire to enforce the PIC Specifications during the February 5, 2013, webinar, the plain language of the proposed changes continues to clearly give ICANN enforcement rights, and moreover, gives ICANN the right to impose any remedy against a Registry Operator (including termination).

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

- ICANN has failed to address Verisign's concerns over the breadth of ICANN's access to the Continued Operations Instrument ("COI") funds. ICANN argues in its Report on Public Comments that if it breaches the agreement by abusing the rights to the COI funds, the Registry Operator could seek remedy through a dispute resolution procedure. However, given ICANN's insistence that it be entitled to a seemingly unconditional release of funds, ICANN has attempted to insulate itself from a Registry Operator's claim of breach. Thus, ICANN's explanation is unpersuasive.

    - 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 period for the Registry Operator to object or dispute such notice.

4. Mediation (Section 5.1)

- In response to comments by Verisign expressing concern about the introduction of a pre-arbitration mediation process, ICANN writes in its Report on Public Comments "[a]s the process is non-binding and either party can escalate disputes to arbitration, there would appear to be no pressing need for further defined rules and procedures . . . ." Accordingly, Verisign continues to maintain that it is pointless for ICANN to insist that parties participate in a pre-arbitration process that will result in delays to resolution and additional costs and expense for both parties, especially when the process is poorly defined.

- Although ICANN has added language requiring the mediator to consult with the parties regarding the rules and procedure for mediation, "consultation" is insufficient and the provision continues to create 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.

5. Limitation of Liability (Section 5.3)

- ICANN's last minute change carving out the Registry Operator's indemnification obligations from the liability cap creates a significant and unforeseen exposure for Registry Operators. Such a change would normally require substantive negotiations and discussions. Accordingly, ICANN should remove the carve-out and revert to the language agreed to by applicants in the June 4, 2012, version of the Applicant Guidebook.

6. Registry-Level Fees (Section 6.1(b))

- Further clarification is required around the timing of the Registry Operator's payment of the Registry-Level Fees. Specifically, language needs to be added to clarify that ICANN will not invoice the Registry Operator for Registry-Level Fees until sometime following the end of the quarter in which the fees are incurred.

- The date that starts the thirty (30) day clock ticking for Registry Operator's payment of Registry-Level Fees must be based on the date the invoice is received, not the date ICANN writes on the invoice.

7. Pass Through Fees (Section 6.4); Minimum Requirements for Rights Protection Mechanisms (Specification 7)

- The proposed language requires the Registry Operator to agree in advance to pay fees for Rights Protection Mechanisms pursuant to a specification (Spec 7), which has not been finalized.

- Registry Operators cannot review the provisions of this RA in a vacuum and the Rights Protection Mechanisms must be made publicly available for comment.

- ICANN has maintained in this provision the ability to unilaterally revise the Trademark Clearinghouse Requirements (Specification 7) in "immaterial respects" from time to time. Again, ICANN must provide definition around the term "immaterial" as such changes could require Registry Operators and Registrars to expend development time and cost to implement such changes whether it be to format, naming convention, or technical specifications. Further, in addition to resources and expense, the language leaves open for ICANN to subject Registry Operators and Registrars to timelines that could place a party at risk for non-compliance.

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

- ICANN continues to fail to address Verisign's concerns regarding this provision. In ICANN's Report on Public Comments, ICANN states that it "must have the flexibility to review assignment and change of control arrangements on a case by case basis, and listing specific standards is not required…." ICANN's refusal to define such criteria gives ICANN the flexibility to make inconsistent. discriminatory and/or dilatory determinations.

- The language states that 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. ICANN must provide companies certainty in this regard.

- 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 still not defined.
    - The criteria ICANN will use to evaluate an assignment or subcontract must be clearly set forth (based upon 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.
    - There are no clear time limits for ICANN's decision to approve a subcontractor or assignment (e.g., 30 calendar days of receipt of "all requested" information).

- ICANN has also removed important protections restricting ICANN's ability to assign the RA (including assignment 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, arguing simply it "needs the flexibility to assign the agreement in connection with the reorganization of ICANN." ICANN must realize that contracting is a two-way street. Just as ICANN "needs the flexibility," companies "need" certainty. ICANN should therefore revert back to the language in the RA that was included in the June 4, 2012, version of the Application Guidebook as it pertains to this provision.

9. Amendments and Waivers-Amendment Through Supermajority Board Approval (Sections 7.6); Negotiation Process (Section 7.7)

- Verisign has commented during this comment period to Sections 7.6 and 7.7. Verisign's comments can be found at the following links:

    - http://forum.icann.org/lists/comments-base-agreement-29apr13/pdfoPVbObzusd.pdf
    - http://forum.icann.org/lists/comments-base-agreement-29apr13/pdfRSuFNILrUf.pdf
    - http://forum.icann.org/lists/comments-base-agreement-29apr13/pdfoh3b5hME0s.pdf

- In addition, Verisign continues to believe that Section 7.6 and Section 7.7, to the extent they survive and are recommended to the Board for approval, must contain at a minimum a carve-out from the arbitration process to provide for judicial review of any action taken by ICANN thereunder. This carve-out was proposed to ICANN several times, and each time ICANN has rejected this common sense way to ensure accountability in the exercise of these extraordinary powers. ICANN should know that its failure to permit judicial review will not insulate the exercise of its power under Sections 7.6 and 7.7 from court actions that challenge the enforcement of any RA unilateral changes. Indeed, the record ICANN has created in refusing to permit judicial review will be evidence that such provisions should be held unenforceable.

10. Confidentiality (Section 7.15)

- While Verisign is pleased to see that ICANN added a confidentiality provision to the agreement, we are concerned that the language falls far short of the necessary protections found in standard confidentiality clauses.

- The term for confidential treatment of information should be extended from two years to three years with a caveat that confidential information that is a trade

secret under applicable law shall continue as long as the confidential information remains a trade secret under applicable law.

- The standard for disclosure, which includes the information being "useful," is too low and should be removed.

- The provision allows disclosure to an overbroad group of recipients, such as "third parties."

- A standard of care should be imposed to at least the degree of care the receiving party uses to prevent disclosure, publication or dissemination of its own confidential information, but in no event less than reasonable care.

11. Data Escrow Requirements (Specification 2-Part B, Section 6 (Release of Deposits))

- The language of this provision could result in the Registry Operator being in breach or otherwise penalized through no fault of its own, but due to the actions/inactions of the Escrow Agent. The language needs to distinguish between a failure of the Registry Operator and the failure of the Escrow Agent.

12. Registration Data Publication Services (Specification 4)

- As stated in Verisign's previous comments, ICANN has yet to provide information regarding the CZDA Provider (Section 2).

- The change from two business days to three calendar days (Section 3.2) is not comparable and should be increased to five calendar days. ICANN's revision from a business day requirement to a 365-day capability requirement could potentially pose additional unanticipated costs for some Registry Operators.

13. Schedule of Reserved Names (Specification 5)

- The new language in this provision states that upon ten calendar days' notice, ICANN can require Registry Operator to withhold additional names from registration (Section 5). However, the provision does not address how a Registry Operator is expected to resolve a situation where ICANN adds domain names to a list of domain names that are already registered. The same issue could occur if the Country and Territory Name list is updated (Section 4). Failure to address this problem now will result in Registry Operators assuming that such existing and registered domain names are not subject to any claw-back should ICANN decide to expand the list of reserved names in the future.

- ICANN has not provided rationale for removing the Tagged Domain Names (Section 3), which was put in place to minimize conflicts for future changes to the IDN tag (xn--).

14. Registry Operator Code of Conduct (Specification 9)

- ICANN still has not identified the process by which Applicants may seek to obtain a Code of Conduct Exemption.

- ICANN's determination as to whether to grant an Applicant's request for a Code of Conduct Exemption should not be, as is set forth in this provision, "in ICANN's reasonable discretion." Rather, it should be pursuant to defined criteria that ensure exemptions are granted in a consistent and non-discriminatory manner.

- Various sections in the RA (including Section 2.9) reference the requirement for all Registry Operators to use ICANN-accredited registrars, but it is unclear whether Registry Operators that have received an exemption to the Code of Conduct must use only ICANN-accredited registrars.

- ICANN's Summary of Changes do not explain the removal of Section 1(e) preventing Registry Operators from disclosing confidential registry data or information about its registry services or operations to any employee of any DNS service provider, except where equal access is provided. Please explain why this provision was removed.