



VERISIGN™

May 1, 2013

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

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

Dear ICANN:

ICANN's effort to obtain a unilateral right to amend the new gTLD registry agreement is not dead and is, in fact, alive and well in the latest agreement posted for public comment on April 29, 2013. Make no mistake -- under the revised Section 7.6, ICANN may unilaterally change the registry agreement on virtually any topic, except the so-called "Restricted Amendment." In fact, ICANN has broadened its unilateral amendment rights even further under a new and never before disclosed Section 7.7 which permits ICANN to make changes to the registry agreement on subjects that even the consensus policies are explicitly prohibited from considering--and beyond. As the community is well aware, the consensus policy topics were carefully considered and negotiated, and now at the final hour ICANN is making an end-run around the consensus policy process. To be sure, ICANN has given a nod in providing for "consultation" before it changes the agreement and allowed a select group of registry operators to propose alternatives to unilateral amendments proposed by ICANN, but, at the end of the day, nothing would deter a determined ICANN from proceeding to adopt a unilateral amendment. This is neither sound policy nor does it make good legal or business sense.

***ICANN Should Not Be Allowed to Usurp Power Unilaterally to Amend Registry Agreements, Determining Registry/Registrar Rights and Economics***

In its eleventh-hour revisions to the new gTLD registry agreement, ICANN seeks to create regulatory rule-making power for itself. The changes to Sections 7.6 and 7.7 would give ICANN the right unilaterally to change the terms of registry agreements -- during the term of those agreements -- without review by government authority and over the objections of registries. This is potentially not confined to registry operators of new gTLDs. ICANN may seek such power to affect existing registries, not only new ones, as those terms and unilateral amendments they will empower automatically could be incorporated in all existing registry agreements upon renewal. This dramatic expansion of power by ICANN would affect business certainty and registry

economics, and it is without regulatory precedent. Perhaps fittingly, ICANN has attempted to place these new powers for itself in registry agreements *after* thousands of applications have been filed, and millions of dollars paid to ICANN, to secure new gTLDs.

ICANN will no doubt claim that this broad power, as well as specific uses of that power to change contracts, will become part of all registry agreements upon their renewal. Common provisions of other registry agreements are incorporated into renewal agreements under the presumptive renewal provision of existing registry agreements.

***There are Few Limits on ICANN's Exercise of this New Power***

The new terms of the registry agreements would allow ICANN to determine issues reserved for consensus policies. It would also allow ICANN to determine issues even more far reaching than consensus policies are permitted to go.

Here are but a few examples of what ICANN would have the power unilaterally to do without governmental oversight and over the objections of registry operators as well as the community at large:

- ICANN unilaterally amends the agreement to re-impose the ban on cross-ownership for all registry operators (for example, under pressure from a competition authority or other governmental regulatory authority), affecting registry investments and business models.
- ICANN unilaterally determines that no new gTLDs should be operated in a closed manner and amends the agreement to require all gTLDs to be open, endangering established registry business models.
- ICANN unilaterally amends all registry agreements to require (under pressure from certain law enforcement entities) that registrants be cleared through some new international law enforcement database of suspected cyber criminals, and requires payment for the service, affecting registry costs, speed and reliability.
- ICANN unilaterally amends the agreements to require the permanent use of the Trademark Clearinghouse (for example, under pressure from the IP community), and doubles the fees for the service, increasing registry costs and efficiencies.

### ***The New Powers***

The new sections of the agreement would give ICANN these powers in the following manner. First (Section 7.6), two-thirds of the ICANN Board unilaterally may amend the agreement, over the objection of registry operators, where there has been a consensus policy process that was not completed with a recommendation or, even broader, where the subject is beyond the scope of what properly can be modified by consensus policy. Second (Section 7.7), a majority of the ICANN board may adopt amendments, over the objection of registry operators, where the subject goes beyond that allowable through a consensus policy.

These powers are subject to challenge in an ICANN-structured arbitration (not in a court or under normal rules of arbitration) and subject to “process” (window dressing) developed solely by ICANN’s staff. But the unilateral ICANN decision becomes part of the registry agreement so long as arbitrators find, in the case of Section 7.7, it is “consistent with a balanced application of ICANN’s core values... and reasonable in light of the ... public benefit,” or, in the case of 7.6, that it is in the “public interest,” thus resulting in mission creep.

What are the arbitrators likely to find when, under the decision-making process ICANN has established, the arbitrators are required to make a decision without any hearing, or following a hearing lasting no more than exactly one day? By contrast, how long did the community consider cross-ownership, rights protection mechanisms, etc.?

And what kind of limitation on ICANN’s powers is consistent with “ICANN’s core values” or the “public interest”? (Is cross-ownership in the public interest; are rights protection mechanisms in the public interest; is ICANN immunity in the public interest; indeed, are Sections 7.6-7.7 in the public interest?) Those are not legal standards. Those are legislative standards. Such decisions normally are made by democratically elected legislatures or administrations -- not by a private contracting party or a lawyer serving part time as an arbitrator.

### ***The New Sections are the Antithesis of Bottom-Up Policy Development***

ICANN should not possess regulatory powers without accountability to an independent authority in a competent jurisdiction, which can assess the validity of any such exercise of power against well understood criteria consistently and fairly applied. The terms and conditions of the Registry Agreement, even without Section 7.6 and 7.7, should be subject to judicial review as a facial challenge or as applied.

This new “regulatory” environment would raise substantial questions for ICANN and the DNS community. For example, would ICANN’s unilateral decisions have any legal force or affect? Would unilateral changes to the contract be unenforceable contracts of adhesion? Would

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ICANN's determination of economic questions determining registry practices lack antitrust immunity that ICANN may have enjoyed under the Memorandum of Understanding? The community needs certainty in which to do business and maximize Internet security and stability. The community does not need destabilizing uncertainty or legal challenges.

Under its bylaws, ICANN is to serve the Internet community based on bottom-up, transparent decision making. Sections 7.6 and 7.7 are the antithesis of ICANN's core values. They should not become part of registry agreements.

The Governmental Advisory Committee and DOC should rein in any such unprecedented expansion of ICANN's powers. In the Affirmation of Commitments, the DOC affirms its commitment to a private sector led, bottom-up policy development process. Sections 7.6-7.7 seek the opposite.

This public comment period is an opportunity for those that believe in the multi-stakeholder process to participate. Your opinion matters only if it's heard; let ICANN know what you think.

Sincerely yours,



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