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November 5, 2024

To: ICANN org

Subject: Proposed Renewal of the Registry Agreement for .COM

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Dear ICANN org,

This submission is in response to the call for public comments on "Proposed Renewal of the Registry Agreement for .COM" as per the notice at:

https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-com-26-09-2024

ICANN has a long history of ignoring public input, especially input that originates from domain name registrants. For those who've read our past comment submissions over the past two decades to ICANN, this current submission will appear like "**deja vu all over again**", as it reiterates points that ICANN has ignored in the past. While ICANN staff will likely continue to ignore our input, we will continue to place such input on the public record to inform and educate more powerful entities that might one day intervene to hold this organization accountable for their mismanagement of the global DNS.

The proposed renewal of the Registry Agreement for .COM should be reconsidered and rejected by the ICANN Board. This renewal exemplifies ongoing and longstanding concerns regarding the protection of registrants' rights.

To align with ICANN's mission of fostering competition, the management of

the .COM registry should be subject to regular competitive tender processes for fixed terms. Additionally, this proposed renewal includes provisions that have not been sufficiently discussed within the ICANN community.

The current bilateral negotiations between ICANN and Verisign have not adequately represented the interests of all stakeholders, particularly registrants. Should outright rejection of the agreement not be feasible, ICANN and Verisign should revise and present an updated draft that incorporates public feedback, followed by an additional round of public consultation.

Sincerely,

George Kirikos

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1. INTRODUCTION

Leap of Faith Financial Services Inc., a privately held company based in Toronto, Canada, owns a portfolio of approximately 500 domain names, including notable assets such as school.com, math.com, leap.com, seeds.com, and options.com. This portfolio, worth many millions of dollars, is predominantly comprised of domains within the .COM TLD. Consequently, we have a vested interest in any policy changes affecting .COM, particularly those that may impact our legal rights or pose economic risks.

We have consistently advocated for the fundamental rights of domain name registrants in ICANN policymaking, and we approach this response to the proposed .COM renewal with the same commitment.

Over the past two decades, our analysis of ICANN policy proposals has been extensive and unparalleled. Below is a **selection** of our contributions:

- We opposed Verisign's proposed monopolistic "Wait Listing Service." Although the ICANN Board ultimately approved it, we feel validated by the fact that Verisign never implemented the service, likely due to potential antitrust challenges it would have faced.
- We spearheaded the opposition to Verisign's "Sitefinder" system, creating a petition that amassed over 20,000 signatures. Notably, we raised concerns before it even launched. Had ICANN heeded our advice, that controversy could have been avoided.
- We sounded the alarm about the proposed registry contracts which would have permitted tiered pricing in .biz, .info, and .org contracts (and which could have then propagated to other gTLDs). This led to a public outcry with thousands of comment submissions opposing the one-sided contracts, as registry operators' blatant greed and ICANN management's ineptitude in initially agreeing to such terms was made obvious to everyone. We were vindicated as price caps remained in place, with uniform pricing for all domain renewals.
- We have repeatedly defended balanced due process protections for registrants in relation to the UDRP/URS.
- We sounded the alarm about the deeply flawed "Expedited Transfer Reversal Policy" proposal which would have decimated the secondary market for domain names by enabling "sellers' remorse" to reverse legitimate domain name transfers. We worked tirelessly to educate affected stakeholders, and the IRTP-B working group was forced to back down from that flawed proposal.
- We repeatedly opposed the entire new gTLD program (with detailed submissions to the relevant public comment periods). Unlike others who lost substantially via bad investments in new gTLDs, our company was

vindicated by its decision to focus on .com domain names. ICANN's predictions, and those of its consultants and "experts" were widely off the mark, worse than even their own "worst case scenarios".

- We opposed the controversial .org contract renewal of 2019 which removed price caps (and the similar proposals for .info, .biz and .asia, as noted on our blog). We were the **only organization** to have **warned ICANN that private equity could take over the .org contract** (point #6 of our submission), and it was only the intervention of the California Attorney General (Xavier Becerra) that forced ICANN to back down from approving the sale of the registry. Furthermore, NameCheap's successful challenge of ICANN's foolish approval of that contract, via the IRP, once again vindicates our analysis and position. It is clear that this "contract" is now void, and must revert to prior terms. If ICANN's Board does not take steps to do this, they will likely face ongoing litigation in real courts (rather than another IRP), litigation that might be an existential threat to ICANN itself, or those responsible for the debacle. **I think a class action lawsuit that seeks reimbursement from ICANN of any price increases beyond the prior contracts (if they refuse to revert the contracts) would be successful, and would seek to eventually target ICANN's entire Reserve Fund.**
- We made substantial comments concerning the latest Transfer Policy Review, after sounding the alarm on our blog. While that working group has yet to complete its work, our intervention appears to have resulted in the preservation of the important "Losing FOA" safeguard and registrars have also backed down on their power grab that would have allowed them sweeping powers to prevent outgoing transfers.
- We opposed the final report from the EPDP on Specific Curative Rights Protections for IGOs. While the ICANN Board foolishly adopted that report, time will likely again vindicate our thoughtful analysis.

We have written extensively about Verisign on our blog, and those articles can be found using the “Verisign” tag, see:

https://freespeech.com/tag/verisign/

In particular, our comments in 2023 for the .net renewal:

https://freespeech.com/2023/05/24/our-comments-to-icann-opposing-the-dot-net-registry-agreement-renewal-with-verisign/

as well as our 2020 comments in relation to that year’s .com renewal:

https://freespeech.com/2020/02/14/comments-to-icann-opposing-proposed-amendment-3-to-the-com-registry-agreement/

are worth reviewing, to see that these themes have come up repeatedly. Google searches of:

site:icann.org “kirikos” “Verisign”

https://www.google.com/search?q=site%3Aicann.org+%22kirikos%22+%22verisign%22

site:circleid.com "kirikos" "verisign"

https://www.google.com/search?q=site%3Acircleid.com+%22kirikos%22+%22verisign

demonstrate that these are longstanding concerns that ICANN has never properly addressed, and that are also shared by many other stakeholders.

In summary, our expertise and insights **<u>should be taken seriously</u>**. Time and again, **<u>history has validated our positions and comprehensive analyses</u>**.

<u>While we have severe disagreements with the proposed agreement, we also make our comments in good faith, and propose viable alternatives</u>.

It’s important to note that we are not cybersquatters. We **despise** cybersquatting or other forms of online abuse, and applaud efforts to hold those bad actors fully accountable, especially in the courts (as Verizon did with iREIT[1], for example). We have advocated for **<u>balanced policies</u>** which target actual bad actors while ensuring that those falsely accused of violating laws are fully protected. When we oppose specific language in the .COM proposed agreement, it’s not to defend abusers, but to instead **defend due process for all registrants**.

This is not some theoretical debate. We personally faced a UDRP over a valuable short dictionary word dot-com (Pupa.com), despite registering it in good faith. Instead of waiting for the outcome of the UDRP (which eventually decided to defer to the courts), we exercised our right to go to court in Ontario, Canada, and our position was fully vindicated, with costs awarded against the defendant (an Italian cosmetics company).[2]

1 Verizon hits tiny iREIT with cybersquatting suit, April 22, 2007, https://www.bizjournals.com/houston/stories/2007/04/23/story4.html

2 Ontario Court Rules In Favor Of George Kirikos On Pupa.com & Awards $4,500 In Fees, April 8, 2013, https://www.thedomains.com/2013/04/08/ontario-court-rules-in-favor-of-george-kirikos-on-pupa-com-

We are sympathetic to those targeting online abuse. However, we must ensure that the rights of innocent domain name registrants who are falsely accused of abuse are fully protected, including their due process rights. Those due process rights include the right to have the merits of their dispute fully argued and decided in their national courts.

Article 8 of the ***Universal Declaration of Human Rights***[3] states that:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Section 2 of Article 17 of the ***Universal Declaration of Human Rights*** states that:

> No one shall be arbitrarily deprived of his property.

It is these fundamental rights that we are defending, to ensure that any mandatory policy imposed upon domain name registrants by ICANN fully reflects the existing legal rights of domain name registrants.

awards-4500-in-fees/ ; Canadian court orders company pay costs over wrongful domain claim, April 8, 2013, https://domainnamewire.com/2013/04/08/canadian-court-orders-company-pay-costs-over-wrongful-domain-claim/

3 https://www.un.org/en/about-us/universal-declaration-of-human-rights

2. FLAWED LANGUAGE OF SECTION 3.1(d)(i) RELATING TO RESERVED NAMES

At Section 3.1(d)(i) of the proposed agreement:

Clean Text page 5:

https://itp.cdn.icann.org/en/files/global-domains-division-gdd-operations/proposed-com-renewal-registry-agreement-26-09-2024-en.pdf

Redline Text page 7:

https://itp.cdn.icann.org/en/files/global-domains-division-gdd-operations/redline-of-the-proposed-and-2012-com-registry-agreement-as-amended-26-09-2024-en.pdf

the text was modified to **make a major policy change**. In particular, as the redline version demonstrates, the phrase:

"for initial (i.e., other than renewal) registration at the second level within the TLD"

was removed from the current version of the agreement's text. We believe this may have been an **inadvertent change**, given the **enormous consequences of the new language**, consequences that were not highlighted by ICANN staff as being "materially different" from the current agreement.

The current version reads:

(i) Registration Restrictions. Registry Operator shall reserve, and not register any TLD strings (i) appearing on the list of reserved TLD strings attached as Appendix 6 hereto or (ii) located at http://data.iana.org/TLD/tlds-alpha-by- domain.txt for initial (i.e., other than renewal) registration at the second level within the TLD.

We believe that ICANN and Verisign likely intended to remove only the item (ii) text, i.e.

"or (ii) located at http://data.iana.org/TLD/tlds-alpha-by- domain.txt"

(which as a side effect would also remove the "(i)" numbering before the word "appearing")

However, somehow the important phrase at the end of the sentence:

"for initial (i.e., other than renewal) registration at the second level within the TLD"

was eliminated too. **This was a phrase that applied to both items**, i.e. (i) and (ii), and should have been retained when item (ii) was removed.

The consequences of that removal are **severe**. In particular, it means that **existing domain name registrations would need to be cancelled by the registry operator**, if they appear on the reserved list in Appendix 6, in order to comply with the language of the proposed agreement. This would include single-character (e.g. x.com) and two-character (e.g. aa.com) domain names. <u>**This is unprecedented**</u>. Domain name registrants who own domains that match a reserved domain name, have always been able to continue to renew their domain names. It is only in the event that those domain names are not renewed by the registrant (and, as a result of the non-renewal, are deleted) that the registry operator is compelled to not allow **initial registrations** of those strings (i.e. "domain creation").

That's made clear by the inclusion of the:

"for initial (i.e., other than renewal) registration at the second level within the TLD"

language, that domain creation of the reserved strings is not permitted, but otherwise renewals are acceptable.

Appendix 6 also contains the phrase: "from initial (i.e. other than renewal) registration within the TLD", reinforcing longstanding policy that existing registrants are grandfathered.

However, the elimination of this important qualifying text in Section 3.1(d) threatens to overturn this longstanding grandfathering of existing registrations, **requiring the registry operator to cancel the domain names**.

The new language says:

"(i) Registration Restrictions. Registry Operator shall reserve, and not register any TLD strings appearing on the list of reserved TLD strings attached as Appendix 6 hereto."

That's unacceptable, as it **requires the registry operator to reserve the domain names** (which it would accomplish through cancellation of the existing registrations).

The obvious solution, then, is full restoration of the "protective" language. Here's what it **should** look like:

PROPOSED SOLUTION:

"(i) Registration Restrictions. Registry Operator shall reserve, and not register any TLD strings appearing on the list of reserved TLD strings attached as Appendix 6 hereto for initial (i.e., other than renewal) registration at the second level within the TLD."

This is a **complete solution** to the issue we've identified. It is entirely consistent with the first sentence of Appendix 6 and longstanding ICANN practice.

It is clear that there would be an enormous impact on the public and on registrants if owners of short 1- and 2-character domains had their property expropriated by the registry operator in order to be reserved from registration, without compensation. In the context of .COM, we're talking about some of the most valuable domain names on the planet (e.g. QQ.com is widely used in China, DB.com is a large financial institution, AA.com is a major airline, etc.). This is not something that ICANN staff and Verisign can unilaterally impose through their bilateral negotiations, given the ramifications for the property rights of existing registrants.

Given the severe and disproportionate impacts on registrants, we in "good faith" assume that this is an **inadvertent change**, made by mistake, and hope that ICANN staff will correct this error with great haste.

If this instead is an **intentional change**, we expect ICANN and Verisign will be the target of major litigation, as domain name registrants will not accept the expropriation of their property without full compensation.

It is important to note that we made this identical argument in 2023, in the context of the .NET renewal, but ICANN ignored it, claiming that their new language would not impact existing registrations. We remain unconvinced by their interpretation, and ask that ICANN make the above corrections to avoid any doubt as to how the contract should be interpreted.

3. RRA AMENDMENTS AND RELATED SECTIONS HARM REGISTRANTS' RIGHTS

In our blog post of April 19, 2023:

https://freespeech.com/2023/04/19/red-alert-icann-and-verisign-proposal-would-allow-any-government-in-the-world-to-seize-domain-names/

we brought to the community's attention our opposition to one-sided language in the .NET agreement's RRA, which was buried in Appendix 8.

In particular, we reject the language of 2.7(b)(i), 2.7(b)(ii)(4), 2.7(b)(ii)(5) and 2.7(b)(iii). We also reject the related provisions in 2.14, and all of Appendix 11.

While these are all related, in one way or another, to the laudable goal of addressing security and/or abusive online behaviour, **the means do not justify the ends**. The language is overly broad, vague, and ultimately does not **balance** the interests of the registry operator (Verisign) and the affected stakeholders (registrants in particular).

In response to the outpouring of opposition in the .NET comment period, ICANN made an "update" on April 26, 2023 to the .NET comment period announcement:

https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-net-13-04-2023

where they noted that these provisions had *already* been adopted (in 2022), via the RRA Amendment Procedure (a procedure which registrants are not able to participate in), and that those terms were also adopted for the past .COM agreement. In that 2022 comment period, we raised the identical concerns, yet ICANN ignored them.

Furthermore, ICANN misleadingly stated that "It does not guarantee any government can seize or delete any domain name in the TLD." which completely missed the point, namely that Verisign would have the **discretion** to allow the seizures or deletions, regardless of the rights of registrants to due process and ignoring jurisdictional issues completely. In other words, ICANN could have written:

"It does not guarantee any government CAN'T seize or delete any domain name in the TLD."

which is exactly our point. Instead, it pushed its own narrative, ignoring the "elephant in the room", pretending it didn't exist.

Also, ICANN ignored the fact that few people noticed the changes in .COM. We were likely the only company that addressed the issue in the 2020 comment period, via our own comment submission:

https://freespeech.com/2020/02/14/comments-to-icann-opposing-proposed-amendment-3-to-the-com-registry-agreement/

(see sections 11 and 12). ICANN ignored that input in 2020, and slipped through changes that diligent stakeholders are finally recognizing as being unacceptable.

This is obviously egregiously one-sided text that attempts to protect Verisign's interests, at the expense of registrants' fundamental rights. While we will analyze each of the offending sections in more detail below, for the record, the best "solution" to this problem is clear:

PROPOSED SOLUTION:

A. Removal of all the offending text from the existing RRA agreements (in both .COM and .NET), and
B. Convening a new PDP working group through the GNSO to create a Uniform RRA for all gTLD registries, with full representation of registrant interests.

It is evident that the RRA Amendment Procedure has significant shortcomings, as it depends on registrars to actively review changes for every TLD. Registrants, however, are excluded from participating in this process. Given the current demands on time, in-depth reviews are rarely feasible. When registrars do conduct reviews, their primary focus is on how changes affect their own operations, without any obligation to protect the interests of registrants. An examination of the RRA amendment mailing list underscores this point:

https://mm.icann.org/pipermail/rra/

with very limited participation or engagement. The analysis of changes is often superficial, at best.

As a hypothetical, suppose a registry operator added a section of text to the RRA that required that registrants in the TLD do a headstand every January 1st, in order to retain their domain name. To the extent that registrars even

noticed the silly change (who has time to review changes for 1000 TLDs?), they would likely ultimately decide that "this doesn't affect registrars directly, so we won't oppose this".

Yet, **the changes in the .COM and .NET RRA are far more impactful**, in a negative way, on registrants than a hypothetical requirement to do an annual headstand! Did the registrars say anything to defend registrants? Of course not, as they were either not reading the agreements at all, or did not care about changes that wouldn't directly affect themselves as registrars (as opposed to registrants).

Only via a **Uniform RRA** for all gTLD registries, openly debated with representatives of registrant interests, would there be a chance to come up with a balanced agreement (although there's the usual risk of capture of the working group, which has repeatedly happened in the past). Instead of having to review and understand hundreds or thousands of different RRA agreements, all stakeholders could focus on a single uniform agreement. This is far more efficient for all stakeholders.

Let's go through **some** of the offending sections, to better understand why they are unacceptable.

2.7(b)(i) [page 89 of "clean" text, page 96 of "redline" text]

Registrar's registration agreement with each Registered Name Holder shall also include the following:

(i) a provision prohibiting the Registered Name Holder from distributing malware, abusively operating botnets, phishing, pharming, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law and providing (consistent with applicable law and any related procedures) consequences for such activities, including suspension of the registration of the Registered Name;

The devil is in the details on this. First of all, **the text does not clearly require a nexus between the suspended "Registered Name" and the offending activities of the "Registered Name Holder."** This text can easily be interpreted as penalizing domain names for which there is no offending activity, **as long as the Registered Name Holder does something "bad", even offline.**

Suppose Jane Smith owns example.com. Jane publishes a novel which plagiarizes JK Rowling's "Harry Potter" novels. This is copyright infringement, and as such because Jane Smith is a "Registered Name Holder" who has committed copyright infringement, her example.net may be suspended, **despite example.com making no references to the copyright infringement**!

Another example would be if Fred Jones owns example.com, and commits a crime i.e. "otherwise engaging in activity contrary to applicable law", say jaywalking, tax evasion, assault, defamation or murder. **Despite none of the offending activity taking place on the domain name, the registrar might require a suspension of the domain name. This is very much like the "social credit" system that people have long warned about.**

Without such direct linkages, the penalty is unrelated and/or disproportionate to the "crime."

For example, Donald Trump was found to be liable for defamation, in a civil dispute in New York. Is this an "activity contrary to applicable law", and if so, should domains where he is the registrant be suspended?

We have long used the example of Barclays, the large financial institution that was guilty of criminal fraud

https://circleid.com/posts/20150520_should_barclays_lose_the_barclays_top_level_domain

and was fined $2.4 billion. Under the RRA for .COM and .NET, on what basis are they allowed to retain their domain names? By a strict reading of 2.7(b)(i), they've engaged in activity contrary to applicable law. Why are there no consequences for their domain name holdings in .COM and .NET?

It is clear that the list of "offending activities" is a wishlist that does not match any consensus definition of "domain abuse" within the ICANN community.

For example, no site with user-generated content would ever survive if "copyright infringement" is on the list, if the "rules" were enforced equally for all registrants. YouTube, operated by Google, is one of the biggest sources of copyright infringement on the internet. While their owners offer mechanisms to address the concerns of copyright owners, the strict language of 2.7(b)(i) does not recognize the nuances, the fundamental differences between YouTube and more extreme examples, like The Pirate Bay.

This unbalanced provision is made more laughable by the fact that Verisign added "cyberattack" to the "Force Majeure" section (page 105 of the redline, page 97 of the "clean" version, section 6.3). This is a double standard. Registrants might have their domains and websites hacked, with some parts of their websites distributing malware against the wishes of the owners. It is a disproportionate penalty if an innocent registrant is hacked, to have their domain name suspended, given the **enormous collateral damage** that might occur (e.g. loss of email access or other services related to a domain name). This lack of proportionality pervades the unbalanced agreement, applying the "death penalty" to even the most innocuous and subjective alleged breaches, with no independent arbiter making determinations. This is in stark contrast to ICANN and Verisign's own emphasis on protecting their own rights in the event of their own alleged breaches, with the explicit ability to cure those alleged breaches after due process has taken place.

For example, Section 6.1 (page 12 of the "clean" agreement) says:

Section 6.1 Termination by ICANN. ICANN may terminate this Agreement if and only if: (i) Registry Operator fails to cure any fundamental and material breach of Registry Operator's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 within thirty calendar days after ICANN gives Registry Operator written notice of the breach, which notice shall include with specificity the details of the alleged breach; and (ii) (a) an arbitrator or court has finally determined that Registry Operator is, or was, in fundamental and material breach and failed to cure such breach within the prescribed time period and (b) following the decision of such arbitrator or court, Registry Operator has failed to comply with the decision of the arbitrator or court.

This provides due process for Verisign, with ample time to cure alleged breaches. **Where are the comparable provisions for registrants in this document? They are completely absent!**

Furthermore, the important term "**applicable law**" is not defined anywhere in the agreement. As a Canadian company with no permanent establishment or presence outside Ontario, Canada, and using a registrar based in Ontario, Canada (Tucows/OpenSRS), it would be our position that the only applicable law for our domain names is the law of Ontario, Canada. Other registrants would likely hold similar positions as to their exposure to foreign laws.

Yet, some jurisdictions may seek to apply their laws with **extraterritorial effect**. The language of the registry agreement does not attempt to address

these complex jurisdictional issues. An engaged working group within ICANN must place limits on attempts to apply laws beyond the jurisdiction of the lawmakers. There must be limits, similar to the "mutual jurisdiction" clause of the UDRP, otherwise there would be chaos, as registrants cannot be expected to comply with or be subject to the laws of jurisdictions where they are not domiciled or have a permanent establishment.

2.7(b)(ii)(4) [pages 89-90 of "clean" text, pages 96-97 of "redline" text]

a provision that requires the Registered Name Holder to acknowledge and agree that Verisign reserves the right to deny, cancel, redirect or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status, as it deems necessary, in its unlimited and sole discretion:
...
(4) to protect against imminent and substantial threats to the security and stability of the Registry TLD, System, Verisign's nameserver operations or the internet,

While this text has a laudable goal, to ensure security, it can be misused by Verisign, given they have "sole discretion" on how to interpret it, and there is no recourse if they abuse their discretion.

No entity should have the "sole discretion" to do anything they like, without having to answer to a higher authority if their discretion is misused and/or abused. This attempts to create "certainty" for Verisign, but does so at the expense of registrants, who face increased uncertainty, as they would be exposed to a vague and subjective "standard of conduct", instead of a precise and transparent one. Such a provision would likely be deemed void and unenforceable, as it is unbalanced and unconscionable, completely ignoring the fundamental rights of registrants to due process.

2.7(b)(ii)(5) [page 89-90 of "clean" text, pages 96-97 of "redline" text]

a provision that requires the Registered Name Holder to acknowledge and agree that Verisign reserves the right to deny, cancel, redirect or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status, as it deems necessary, in its unlimited and sole discretion:
...
(5) to ensure compliance with applicable law, government rules or

regulations, or pursuant to any legal order or subpoena of any government, administrative or governmental authority, or court of competent jurisdiction

This is the text that received considerable attention in the community, via my company's blog post of April 19, 2023. It is simply horribly drafted, as it is overly broad, literally exposing registrants to the whims of "any government" around the world.

This was debated on the NamePros.com forum,

https://www.namepros.com/threads/red-alert-icann-and-verisign-proposal-would-allow-any-government-in-the-world-to-seize-domain-names.1300241/

[NB: we hereby include that entire thread **by reference**, as part of this submission]

where it was posited that perhaps a comma should be added after the word "court", to ensure that the "competent jurisdiction" applied to all prior elements in that section (thereby somewhat limiting things).

But, as I noted in that thread on NamePros.com,

"Even if ICANN and Verisign revised the text in such a manner that it's:

- any government of competent jurisdiction
- any administrative authority of competent jurisdiction
- any governmental authority of competent jurisdiction
- any court of competent jurisdiction

This would still be a very dangerous and problematic proposal, since under this proposal it's Verisign (the registry operator) that would make the determination as to whether it's a competent jurisdiction, rather than the relevant registrar."

Registrants have the right to select a registrar in order to limit their exposure to the laws of various undesired jurisdictions. However, in conjunction with Section 2.14 (see below), the registry would be superseding these registrant choices, and would apply their own standards.

2.14 [page 92 of "clean" text, page 99 of "redline" text]

2.14 Prohibited Domain Name Registrations. In addition to

complying with ICANN standards, policies, procedures, and practices limiting domain names that may be registered, Registrar agrees to comply with applicable statutes and regulations limiting the domain names that may be registered. Registrar further acknowledges and agrees that Verisign reserves the right to deny, cancel, redirect or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status, as it deems necessary, in its unlimited and sole discretion, for the purposes set forth in Section 2.7(b)(ii) of this Agreement.

This objectionable section makes the registry operator (Verisign) the judge, jury and executioner, overriding the registrar. Like before, there is no recourse or proportionality to this section for registrants. As such, it's unacceptable for the same reasons as stated above.

These are not theoretical or academic musings, but are issues that are being actively engaged at present. India, for example, has had a dispute with various registrars regarding blocking of various sites, as reported at:

https://www.namepros.com/threads/indian-isps-blocked-top-registars-like-namecheap-dynadot-etc-by-india-court-order.1297388/

Those registrars (including Tucows, Dynadot, NameCheap) insist that plaintiffs get US court orders to takedown various sites. Those registrars are even facing being blocked by ISPs in India, in order to protect the rights of registrants to due process in their own jurisdiction and national courts.

Domain name registrars take a very thoughtful and nuanced approach to jurisdiction, in order to protect the due process rights of registrants. There is no guarantee that Verisign, or another registry operator, would make the identical determinations as the relevant registrars. Verisign has operations in India (and China), according to:

https://www.verisign.com/en_US/company-information/contact-us/index.xhtml

"Verisign has business offices in North America, India, China, Switzerland, the United Kingdom and Australia."

Thus, Verisign might readily agree to takedown orders from Indian courts, over the objection of both registrars and registrants. What's needed is certainty for registrants, based on a precise policy, rather than the sole discretion of a registry operator like Verisign, an organization that attempts to shield itself from any accountability over its decisions.

ICANN policy is supposed to be determined through an open and transparent multistakeholder process through the GNSO (Generic Names Supporting Organization), which has representatives from non-commercial organizations, registrars, registries, businesses, and other stakeholders. It is not supposed to be determined through bilateral private and opaque negotiations between ICANN staff and Verisign.

Here are a few examples of what the "new world order" for domain names is, as envisioned by ICANN staff and Verisign:

- The government of China orders domain names operating websites that are critical of its policies to be suspended (or simply transferred to the Chinese government). [recall, Verisign has operations in China!]
- The government of Russia, at war with Ukraine, orders the transfer of pro-Ukrainian domain names to the control of the Russian government.
- The government of Ukraine, at war with Russia, orders the transfer of pro-Russian domain names to the control of the Ukrainian government.
- The government of Texas orders pro-abortion domain names to be transferred to the Texas government.
- The Taliban government in Afghanistan orders pro-abortion domain names, and those promoting education for girls, to be transferred to the government.
- The government of Iran orders all domain names around the world with "adult" content (i.e. pornography) to be transferred to the Iranian government.
- The government of Tuvalu, (which already licenses the .TV registry in order to raise funding) facing an economic crisis due to climate changes, orders that every 2-letter, 3-letter, and one-word dot-com be transferred to the Tuvalu government, in order to auction off the domain names to raise new funding for themselves.
- A government in Argentina launches a new program whose name happens to be identical to the domain name owned by a French company for the past 25 years. The government of Argentina orders that the domain name be transferred to them, without compensation for the expropriation.
- The government of Italy is upset about a social media company operating from China, and orders that the Chinese company's domain name be transferred to the Italian government.
- The UK government is upset that software published by a Swedish company has end-to-end encryption. It orders the domain name of the Swedish company be transferred to the UK government.

While these examples might seem fanciful to some, they are entirely at the discretion of Verisign, under the agreement. ICANN and Verisign cannot simply pretend that these examples are unrealistic, given that the plain text of the agreement says that they can be in play.

This text has a plain and simple meaning — to allow "any government", "any administrative authority" and "any government authority" and "court[s] of competent jurisdiction" to deny, cancel, redirect, or transfer any domain name registration.

"Any government" means what it says, so that means China, Russia, Iran, Turkey, the Pitcairn Islands, Tuvalu, the State of Texas, the State of California, the City of Detroit, a village of 100 people with a local council in Botswana, or literally "any government" whether it be state, local, or national. We're talking about countless numbers of "governments" in the world (you'd have to add up all the cities, towns, states, provinces and nations, for starers). If that wasn't bad enough, the agreement adds "any administrative authority" and "any government authority" (i.e. government bureaucrats in any jurisdiction in the world) that would be empowered to "deny, cancel, redirect or transfer" domain names.

A proper and acceptable contract would limit the number of relevant jurisdictions, instead of providing unlimited exposure when determinations are at the whim of Verisign with no recourse for registrants.

While Verisign attempts to limit its potential exposure, via the 2.7(b)(iii) text

2.7(b)(iii) [page 90 of "clean" text, page 97 of "redline" text]

(iii)a provision requiring the Registered Name Holder to indemnify, defend and hold harmless Verisign and its subcontractors, and its and their directors, officers, employees, agents, and affiliates from and against any and all claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses arising out of or relating to, for any reason whatsoever, the Registered Name Holder's domain name registration. The registration agreement shall further require that this indemnification obligation survive the termination or expiration of the registration agreement.

This unacceptable text is too one-sided to survive judicial scrutiny, and would likely be found to be void and unenforceable, as it is unbalanced and unconscionable.

The issue of "sovereign immunity" exacerbates the negative effects on registrants of these unacceptable sections. Sovereign immunity generally makes it nearly impossible to start an action against a foreign government outside the courts of their own nation. We saw this in the context of domain names when the US Supreme Court would not allow the dispute over the France.com domain name to be heard in US courts. If the Indian government took over a registrant's domain, that registrant would likely be left with no other option than to go to the courts of India to seek relief. If the Chinese government seized a domain, the registrant would have to go to the courts of China for justice. This is unacceptable to most registrants who have no presence in those jurisdictions.

Appendix 11 is also unacceptable. Legacy TLDs are not the property of registry operators, and are entirely different than new gTLDs. Thus, section (a) which incorporates the identical offending language as Section 2.7 of the RRA:

"a. Registry Operator will ensure that there is a provision in its Registry-Registrar Agreement that requires registrars to include in their registration agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences (to be enforced by the applicable registrar in accordance with such registrar's Registrar Accreditation Agreement) for such activities, including suspension of the domain name."

should be removed, for all the reasons previously stated above.

Sections (b) and (c) are also not acceptable in its current form, as all reports should be made public (not just to ICANN) by default, so that the public can determine whether "false positives" are taking place, and whether "actions taken" are proportionate to the alleged offence. Further, the term "appropriate" in section (c) are undefined, and no restoration remedies are specified for good faith registrants who appropriately correct hacking or other causes of alleged "DNS abuse".

Furthermore, "applicable law" needs to be explicitly and precisely defined in Appendix 11, and throughout the agreement. This should be an issue for a GNSO Working Group to define, with affected stakeholders (particularly registrants) as active and voting participants.

4. DOT-COM REGISTRY SHOULD BE PUT OUT TO COMPETITIVE TENDER

This sweetheart agreement with Verisign for the operation of the .COM registry is anti-competitive, due to the presumptive renewal clause. As such, to promote competition, ICANN should put out the contract to a competitive tender. The public interest requires that the regulatory capture of ICANN by Verisign be terminated.

We made the same points in the past comment periods for the .COM agreement which we include only by reference, for the sake of brevity:

https://freespeech.com/2020/02/14/comments-to-icann-opposing-proposed-amendment-3-to-the-com-registry-agreement/

(see sections 3 through 9) We endorse the submissions of others in the current comment period that echo our past positions in relation to Verisign's fees.

5. IGNORING CONTENT NEUTRALITY OBLIGATIONS

ICANN and Verisign have not fully and properly adopted the complete terms of NTIA's Amendment 35. For example, the preamble says that:

https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf

"WHEREAS, the parties agree that Verisign shall continue to operate the .com registry in a <u>content neutral manner</u> and will participate in ICANN processes that promote the development of <u>content neutral policies</u> for the operation of the Domain Name System (DNS);" (emphasis added)

Paragraph 1 then makes it even more explicit:

"1. Content Neutral Operations. The parties agree that Verisign will operate the .com registry in a content neutral manner and that Verisign will participate in ICANN processes that promote the development of content neutral policies for the operation of the DNS."

You'll note the phrasing used by NTIA was "**will**" (i.e. equivalent to "must"), not "**may**" for the content neutrality portion of Amendment 35.

Where is the language in the proposed .COM agreement that refers to "content neutrality" or "content neutral policies"?

"Content neutrality" is directly related to free speech:

https://www.mtsu.edu/first-amendment/article/937/content-neutral

"Content neutral refers to laws that apply to all expression without regard to the substance or message of the expression.

Such laws generally regulate only the time, place, and manner of speech in contrast to content-based laws, which regulate speech based on content. This distinction is important in First Amendment cases because courts hold content-based laws to strict scrutiny — the highest form of judicial review — while holding content-neutral laws only to intermediate, or mid-level, scrutiny."

It's clear that Verisign (and ICANN itself) has no respect whatsoever for free speech, given that I personally have been banned from participating in all ICANN GNSO Working Groups, disregarding and in violation of my free

speech rights.

https://freespeech.com/2019/04/05/update-my-participation-rights-have-now-been-eliminated-at-icann-working-groups/

and it was Mr. Keith Drazek of Verisign (as chair of GNSO Council) who sent the above letter. Mr. Philip S. Corwin of Verisign also played a role in that debacle, as documented on the FreeSpeech.com website.

Under questioning by Ted Cruz, past CEO of ICANN Goran Marby did not defend free speech or the first amendment, see:

https://www.cruz.senate.gov/?p=press_release&id=2811
https://youtu.be/1hI0SNCLaO8?t=430

Sen. Cruz to Mr. Marby: "Is ICANN bound by the First Amendment?"

Mr. Marby: "To my understanding, no."

(see 7:10 into video for the start of that segment)

Where is there any language in this agreement between ICANN and Verisign that compels Verisign and/or ICANN to respect free speech and content neutrality, and "to participate in ICANN processes that promote the development of content neutral policies for the operation of the Domain Name System (DNS);" It's not there. Instead, by its absence, ICANN and Verisign make a mockery of free speech by perpetuating my continued banishment from participating in ICANN GNSO and DNS policymaking working groups.

Consistent with their ongoing disrespect for free speech, ICANN and Verisign have not even attempted to implement the content neutrality provisions of Amendment 35.

6. ADDITIONAL OFFENDING SECTIONS

For completeness, we also object to the following sections:

A. **Section 6.3 of Appendix 8** (page 105 of "redline", page 97 of "clean" version), with its inclusion of the text "**cyberattack**" in the list of items for "Force Majeure". "Force Majeure" is referenced in other sections of the Agreement, and thus this inclusion of "cyberattack" represents an important inconsistency in promised service. One of the arguments for "high fees" is that Verisign uses the money to defend against security threats, including cyberattacks. But, by including "cyberattack" to the "Force Majeure", Verisign need not invest as much to prevent outages, if they can simply retain the contract by declaring such an outage as a "force majeure" event. This language was not always present in the past, but was added quietly without the public noticing it. It should be removed.

B. **Appendix 5B, Section 3.1** (page 57 of the "clean" version, page 64 of the "redline" version). These SLA requirements should be improved. 864 minutes of downtime per month for RDAP is 14.4 hours per month, or 7.2 days per year. This is far too high, and should be reduced by at least 80%.

The RDAP query RTT of 4000 ms (i.e. 4 seconds) is far too high. That might have been acceptable when people were using 300 baud modems, but no one wants to wait 4 seconds for a RDAP query. This should be reduced to 800 ms (i.e. 0.8 seconds).

Contrast this with Section 6.2.4 of Appendix 7 (page 81 of "redline", page 74 of "clean" version) where the WHOIS uptime was 100% for SLA. Similarly, Section 6.5.4 of Appendix 7 (page 84 of "redline", page 77 of clean version) specified a 5 millisecond response time. The relevant RDAP figures represent a degradation of service.

C. **Section 6.15(a) of Appendix 8** (page 109 of "redline" version, page 102 of "clean" version). A minor point but this template requires that a registrar be a corporation. This should be rewritten, to allow for other types of organizations (e.g. LLPs, cooperatives, etc.). Contrast this with the language at the top of Appendix 8 (page 94 of "redline" version, page 87 of "clean" version), where the organization type is left blank. This should be the more appropriate language.

D. **Appendix 10, Section 2** (starting on page 116 of "redline", page 109 of the "clean" version). This section lists a series of "credits" for not meeting SLA standards. Those credits are (1) insufficient, and (2) should be going to registrants, not registrars. We're talking about an annual contract exceeding

$1 billion for .COM, and these SLA credits are a joke. They should be **orders of magnitude higher for a breach**. Contrast this with the "death sentence" which Verisign wants registrants to face, i.e. suspension and/or loss of their domain, at Verisign's sole subjective discretion and without recourse.

If these are not changed, ICANN and Verisign would be once again applying double standards, with minor penalties for Verisign's breach of its agreement, but disproportionately high penalties for registrants. This is unacceptable.

E. New language related to "Business Continuity" in **Section 3.1(h)** (page 9 of clean version, or pages 10-11 of redline) includes the line:

"The parties agree that such implementation may include amendments to this Agreement mutually agreed upon by the parties in writing."

Any such changes must seek meaningful review and input from the public, via a separate comment period, before being adopted.

F. On page 1, the new term of the agreement is set to commence on December 1, 2024, just under two weeks after the staff report on the public comment period is due. It is notable that ICANN launched this public comment period only **after** the conclusion of ICANN80, with the comment period scheduled to close **prior to the start** of ICANN81. The fact that the comment period ends on November 5, 2024, conflicting with the U.S. presidential election, is significant.

These timing choices are not random or coincidence, They undermine public confidence in ICANN, as they restrict the opportunity for the public to pose questions concerning the agreement directly to ICANN staff and the board during public forums.

It is clear that ICANN staff intend to ignore public comments, as they have done repeatedly in the past, and have arranged the timing to minimize public participation.

G. **Section 4.1** (page 10 of clean version, page 12 of redline) extends the term of the contract for 4 years, until 2030. There is no justification for a 4 year renewal. Instead, if this contract is adopted, it should be for 1 year only (until November 30, 2025), so that long overdue economic studies can be done to inform future renewals. ICANN ignored similar concerns in 2020, and now is the time to start negotiating in an informed manner, rather than

repeating the mistakes of the past.

H. In **Appendix 5A, Section 4.3** (page 53 of clean version, page 59 of redline), the draft contract adds a new term:

Personal data included in the registration data must be redacted in accordance with ICANN Consensus Policies and Temporary Policies.

However, some registrants may prefer that their WHOIS/RDAP data be public and **unredacted** (for example, in order to have independent and verifiable public authoritative proof of ownership of their domain name). Some registrars (like Tucows/OpenSRS) allow registrants to **opt-in** to that unredacted WHOIS/RDAP. Verisign should be required to allow registrants the ability to opt-in too (in the event that they implement a "thick" WHOIS/RDAP for .com). Until such time as opt-in capabilities for unredacted WHOIS/RDAP are implemented, Verisign should refrain from transitioning to a "thick" WHOIS/RDAP, and instead allow registrars to continue to publish the WHOIS/RDAP data.

7. FINAL THOUGHTS

In conclusion, the Board should **reject the final proposed renewal agreement in its entirety**. It is a product of regulatory capture of ICANN by the abusive monopolist Verisign.

We documented obvious errors and weaknesses in the agreement, including flawed language related to reserved names.

The RRA must be changed to incorporate the interests of registrants, include rights to due process, that are completely absent in this one-sided agreement. We recommend a GNSO Working Group create a Uniform RRA for all gTLDs.

We reiterated that there should be a competitive tender for operation of the .COM TLD. These should be regular fixed term contracts, without presumptive renewal. These competitive tenders should be a regular part of ICANN's operations, to ensure that registrants are getting great service at the lowest possible fee.

We also pointed out additional problematic sections of the agreement.

Given ICANN's long history of ignoring public input, we are sympathetic to those who have decided to not submit comments. However, we will continue to act in good faith and put our views "on the record", in the hopes that some members of the ICANN staff or Board will finally act in the public interest. If that is not to be this time, then we will be able to say "we told you so" in the future, when ICANN is held accountable by a higher authority.