Listed below are my personal comments in connection with the proposed .NET Registry Agreement. In addition to this public comment, I will also be providing an additional private communication to the ICANN Board of Directors. The reason for this separate communication is that it will reference ICANN attorney-client privilege material that I had access to during my term on the ICANN Board which I believe the current ICANN Board should be aware of.

Advancing the Global Public Interest Through Uniform Registry Agreements

As the ICANN Board stated in Reconsideration Request 19-2, ICANN Org is "pursu[ing] the global public interest by migrating the legacy gTLDs to the Base RA."[1] To date, every ICANN legacy gTLD Registry Operator has voluntarily migrated over to the new Base RA except four TLDs, .COM, .NET, .POST and .XXX. It appears that .POST and .XXX are engaged in ongoing contractual negotiations with ICANN regarding the renewal of their respective RAs, with Verisign being the only legacy Registry Operator refusing to voluntarily migrate over to the new Base RA.

Unfortunately, ICANN Org has no authority or legal right to advance this global public interest as noted in Reconsideration Request 19-3,

> Although ICANN org proposes the Base RA as a starting place for the renewal discussions, because of the registry operator's presumptive right of renewal, ICANN org is not in a position to mandate the new form as a condition of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position.

To date, ICANN Org has only provided a red line between the 2017 .NET RA and the proposed 2023 .NET RA.

Recommendations:

ICANN Org should publicly post a red-line of the proposed 2023 .NET RA against the Base RA.

Accompanying this red-line, ICANN Org should post a separate scorecard document summarizing these differences and detailing any potential global public interest impact(s).

One ICANN, One Definition for Consensus Policy

A cornerstone of the ICANN multistakeholder model is the ability of ICANN Org to legally bind contracting parties (Registries and Registrars) to Consensus Policies. Therefore, it came as a great surprise when reviewing the proposed .NET Agreement, that it appears there are competing definitions in the Registry RAs. To fully appreciate how these subtle differences between RAs can have such a material effect, one needs to step back and look at how Consensus Policy is hardcoded into the Registry Agreements beginning with the Base RA.

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[1] https://features.icann.org/consideration-reconsideration-request-19-2-org-and-info-renewal

Specification 1 of the Base RA is the primary legal provision by which Registry Operators are contractually bound to follow Consensus Policies. There are three main components to the Base RA regarding Consensus Policy. The first component (Section 1.2) provides the meets and bounds of the ICANN Consensus Policy (aka the picket fence). The next two components provide enumerated lists of examples of what falls within the picket fence (Section 1.3), and examples of what falls outside the picket fence (Section 1.4).

In Section 1.2 the phrase "security and stability" is used twice. The first time in Section 1.2.1 where the phrase appears in lower case, and in Section 1.2.3 where the relevant words in the phrase are capitalized. The use of lowercase "s" in security and stability in Section 1.2.1 provides ICANN with a much broader mandate upon which it can impose Consensus Policy. Whereas the use of the capital "S" in Security and Stability in Section 1.3. provides a much narrower construct based on the definition in Section 7.3 of the Base RA.

The corresponding language in the existing and proposed .NET RA appears in Section 3.1(b)(iv). Similar to the Base RA, the phase "Security and Stability" is used twice in Section 3.1(b)(iv)(1) and 3.1(b)(iv)(3). However, in each instance, the phrase appears using the upper case "S" which is defined in Section 3.1(d)(iv)(G). For the reasons set forth below, it appears that this definitional choice was intentional, and Verisign has no intention of deviating from it.

First, Section 3.1(d)(v)(B) of the existing and proposed .NET RA prohibits ICANN from changing the definition of "Security" and "Stability." Second, it appears that Verisign itself fully appreciates the larger legal scope provided by lowercase "s" security and stability when it uses this same term in the Registered Name Holder Agreement (see Section 2.7(b)(ii)). Finally, ICANN and Verisign both seem to acknowledge the larger scope of lowercase "security" and "stability" in connection with the "special restricted fund."

> **Recommendation:**
>
> **ICANN Org needs to explain why it has permitted two different definitions of Consensus Policy to appear in the RAs and its impact on its mission.**

Better Understanding the Domain Name Ecosystem

Section 2.5 of the Base RA requires Registry Operator to "reasonably cooperate" with any ICANN Org "economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters." Neither Verisign's .NET or .COM RA appears to contain a similar provision, although these two TLDs account for approximately 80% of the global gTLD market.

There are several aspects of the domain name market that directly impacts ICANN Org's own economic well-being as well as its authority to impose bottom-up consensus policies on the contracting parties. Therefore, ICANN Org should be looking at the following trends within the domain name marketplace: e.g. impact of vertical integration, growing consolidation in registry operator and registry service provider marketplace, secondary domain name market, the role of resellers, privacy/proxy service providers, and the impact of new gTLD on retail domain name pricing, etc.

> **Recommendation:**

As part of its upcoming five-year strategic plan, ICANN Org needs to undertake a comprehensive economic analysis of the domain name marketplace.

<u>Addressing Public Comment Concerns Regarding the .NET Registry-Registrar Agreement (RRA)</u>

During ICANN's .NET Public Comment period, ICANN Org took the unusual step of providing an update to address comments regarding provisions in Verisign's RRA contained in Section 2.7 of Appendix 8. Several commenters expressed concerns about the potential for Verisign to unilaterally right to "deny, cancel, redirect or transfer any registration or transaction" 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."

On April 26th, ICANN temporarily provided links to the confidential RRAs of other Registry Operators containing similar provisions. While ICANN Org has limited authority to impose any specific provisions into Verisign's RRA, ICANN Org and Verisign have both mutually agreed to amend the existing Letter of Intent executed in connection with the .COM renewal which provides in relevant part:

A. **Work with the ICANN community and within ICANN processes to: (i) determine the appropriate process for developing "best practices" for registry operators to address "Security Threat(s)"** (defined as phishing, malware distribution, and botnet command and control), which definition may be expanded to include other threats or be revised to be more fully defined through the mutual agreement of the Parties; **(ii) develop and make public "best practices" for registry operators in accordance with the processes determined pursuant to Section 1(A)(i); (iii) develop new or enhanced contractual obligations based on the result of the work in Section 1(A)(i-ii), as appropriate; and (iv) convene subject matter experts within ICANN, the ICANN community and Verisign to meet monthly, or more frequently as appropriate, to work to effectuate the items described in Section 1(A)(i-iii) above.**

B. Within a reasonable period of time following the approval and promulgation by ICANN of the enhanced contractual provisions developed as a result of the work performed pursuant to Section 1A above into the new gTLD base agreement, Verisign will adopt in the .com Registry Agreement such promulgated provisions in a form reasonably appropriate for the .com TLD.

C. Verisign and ICANN will develop appropriate tools, methods and metrics, make available technical expertise, and identify funding sources where appropriate, to develop measurement and mitigation criteria for Security Threats targeting or otherwise leveraging the DNS and/or broader DNS ecosystem.

D. **Verisign and ICANN (on a periodic basis, but at least twice annually) will publish communications (either jointly or individually) to provide education about methods to help DNS stakeholders mitigate Security Threats.** (emphasis added)

Today there are a number of Registry Operators whose best practices include public disclosure of certain types of take-down statistics, see for example Public Interest Registry https://thenew.org/org-

people/about-pir/resources/anti-abuse-metrics/ and Identity Digital https://identity.digital/wp-content/uploads/2022/09/Anti-Abuse-Report-Q2-2022.pdf

Recommendations:

ICANN Org should immediately make available all documentation in connection with the bilateral negotiations on Security Threats that Verisign and ICANN Org have had in connection with the Letter of Intent.

Until such time that the ICANN Community can be part of these bilateral Security Threat discussions, ICANN Org should advocate for the inclusion of the best practices of PIR and Identity Digital in publishing aggregate take-down information.