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**Leap of Faith  
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May 24, 2023

**To: ICANN org**

**Subject: Proposed Renewal of the Registry Agreement  
for .NET**

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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 .NET" as per the notice at:

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

We also attach, for the record, our past comment submission from February 14, 2020 relating to the .COM renewal (Amendment 3):

<https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/2020q1/008781.html>

as many of the points that were ignored by ICANN staff in that comment period are **still relevant today**. That submission is in **Appendix 1**.

Briefly, this Proposed Renewal of the Registry Agreement for .NET **should be rejected in its entirety** by the ICANN Board. It is just the latest example of ICANN staff and Verisign **betraying registrants' rights**.

The operation of the .NET registry should be put out to a competitive tender, in order to fulfill ICANN's mission of promoting competition. Furthermore, the proposed renewal contains terms that have not been adequately debated

within the ICANN community, or are outright errors that should be corrected.

Affected stakeholders, and particularly registrants, have not been adequately represented in the bilateral negotiations between ICANN and Verisign. As such, if the agreement isn't rejected outright, ICANN and Verisign should produce an **updated draft agreement, incorporating the public input**, for a **second round of public comments**.

Sincerely,

George Kirikos

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## 1. INTRODUCTION

**Leap of Faith Financial Services Inc.** is a privately held company based in Toronto, Canada. It is the owner of approximately 500 domain names, including school.com, math.com, leap.com, seeds.com, and options.com. This portfolio is worth many millions of dollars. Some of these domains are in the .NET TLD (e.g. LOFFS.net). As such, we have a direct interest in any changes to the .NET policies, to the extent that those changes deprive us of our legal rights or harm us economically.

We have long been defenders of domain name registrants' fundamental rights in ICANN policymaking, and make our comments in that same spirit in this response to the proposed .NET renewal.

Our track record of analysis of ICANN policy proposals is without equal in the past two decades. A **sample** of our work:

- We opposed the monopolistic "Wait Listing Service" proposed by Verisign. While this was ultimately foolishly approved by the ICANN Board, we feel vindicated that Verisign has **never launched** this service, as presumably it would not have survived antitrust challenges.
- We [led the opposition](#) to Verisign's "Sitefinder" system, [creating](#) a petition that generated over 20,000 signatures. In fact, we were opposed to it [before it even launched](#). Had ICANN heeded [our advice](#), that debacle would not have taken place.
- 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 further 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 issue a final report, 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 recently, time will likely again vindicate our thoughtful analysis.

In summary, **we know what we're talking about**, and our warnings should not be lightly dismissed. History has vindicated **each and every** past position and our thorough analysis.

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

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<sup>1</sup>, for example). We have advocated for **balanced policies** which

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

target actual bad actors while ensuring that those falsely accused of violating laws are fully protected. When we oppose specific language in the .NET 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).<sup>2</sup>

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***<sup>3</sup> 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.

2 [Ontario Court Rules In Favor Of George Kirikos On Pupa.com & Awards \\$4,500 In Fees](https://www.thedomains.com/2013/04/08/ontario-court-rules-in-favor-of-george-kirikos-on-pupa-com-awards-4500-in-fees/), April 8, 2013, <https://www.thedomains.com/2013/04/08/ontario-court-rules-in-favor-of-george-kirikos-on-pupa-com-awards-4500-in-fees/> ; [Canadian court orders company pay costs over wrongful domain claim](https://domainnamewire.com/2013/04/08/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 6:

<https://itp.cdn.icann.org/en/files/registry-agreement/proposed-net-registry-agreement-11-04-2023-en.pdf>

Redline Text pages 7-8:

<https://itp.cdn.icann.org/en/files/registry-agreement/redline-proposed-amendment-2017-net-registry-agreement-11-04-2023-en.pdf>

the text was modified in such a manner as 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. q.net) and two-character (e.g. az.net) domain names. **This is unprecedented**. 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.). While domains in the .NET TLD are generally less valuable, the principle is the same. 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.

### 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 agreement's RRA, which is buried in Appendix 8 (starting on page 98 of the "clean" version, and page 144 of the "redline" version).

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, ICANN made an "update" on April 26, 2023 to the 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 .COM agreement.

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 2000 comment period, via our own comment submission (see Appendix 1, sections 11 and 12). ICANN ignored that input in 2000, and slipped through changes that only now are being widely recognized as being unacceptable.

This was 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’s clear that the RRA Amendment Procedure is deeply flawed, as it relies upon registrars to be actively reviewing changes for each and every TLD. Registrants have no ability to participate. No one has time these days to do this review in depth. To the extent that registrars do any review at all, they are ultimately only concerned about the impact of changes upon themselves, and have no duty or obligation to look out for the interests of registrants. A review of the RRA amendment mailing list confirms this:

<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 1<sup>st</sup>, 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 101 of "clean" text, page 147 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.net. 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.net making no references to the copyright infringement!**

Another example would be if Fred Jones owns example.net, 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 recently, 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](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 158 of the redline, page 111 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 15 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 101-102 of "clean" text, page 148 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 102 of "clean" text, page 148 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 105 of "clean" text, page 151 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 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](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-net 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 starters). 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 102 of “clean” text, page 148 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.

Section (b) is 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.

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-NET REGISTRY SHOULD BE PUT OUT TO COMPETITIVE TENDER**

This sweetheart agreement with Verisign for the operation of the .NET 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 for the .COM agreement (see points #3 through #9 in Appendix 1), so we won't repeat them here. They obviously apply to .NET too (with minor variations). We'd expect the registry fees for .NET to drop below \$1.50/domain per year, with no decrease in service quality, under a competitive tender process.

Many of these points are echoed in the thoughtful submissions of **Jeffrey Reberry of TurnCommerce** and **Zak Muscovitch of the Internet Commerce Association**.

<https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-net-13-04-2023/submissions/reberry-jeffrey-19-05-2023>

<https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-net-13-04-2023/submissions/internet-commerce-association-23-05-2023>

We support and endorse their submissions, to the extent that they do not conflict with our own submissions on this topic.

A day of reckoning will eventually arrive, when these anti-competitive contacts are discarded. ICANN, its staff and its Board are on the wrong side of history, and they will eventually be held accountable for their bad decisions of the past. It has not gone unnoticed that few, if any, former ICANN staff or Board members have gone on to accomplish anything substantial in a post-ICANN "career". Perhaps they are already paying the price in the "real world" (non-ICANN world) for their bad decisions. The lesson to be learned is that each and every ICANN staff member and Board member cannot wipe away the stain on their careers from being complicit with Verisign in defending anti-competitive contracts and behaviour. The sooner they stop being complicit, the sooner they can salvage their careers outside of ICANN.

## 5. ADDITIONAL OFFENDING SECTIONS

For completeness, we also object to the following sections:

A. **Section 6.3 of Appendix 8** (page 155 of "redline", page 111 of "clean" version), with its addition of the text "**cyberattack**" in the list of items for "Force Majeure". "Force Majeure" is referenced in other sections of the Agreement (e.g. Section 4.5 of Appendix 10), and thus this addition of "cyberattack" represents a diminution of service. One of the arguments for "high fees" is that Verisign uses the money to defend against security threats, including cyberattacks. But, by adding "cyberattack" to the "Force Majeure", Verisign need not invest as much to prevent outages, if they can simply retain the contract by declaring an outage as a "force majeure" event.

B. **Appendix 5B, Section 3.1** (page 68 of the "clean" version, page 113 of the "redline" version). These SLA requirements are far too high. 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 135 of "redline", page 88 of "clean" version) where the WHOIS uptime was 100% for SLA. Similarly, Section 6.5.4 of Appendix 7 (page 139 of "redline", page 92 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 165 of "redline" version, page 117 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 144 of "redline" version, page 98 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 173 of "redline", page 125 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 a 9-figure annual contract for .NET (and 10-figure annual contract 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.

## 6. 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 (possibly an inadvertent change) 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 .NET TLD (and for .COM). 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.



## APPENDIX 1

### Comments of Leap of Faith Financial Services Inc. Opposing Proposed Amendment 3 to the .COM Registry Agreement (February 14, 2020)

Original at:

<https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/2020q1/008781.html>

Submitted by: George Kirikos  
Company: Leap of Faith Financial Services Inc.  
Website: <http://www.leap.com/>  
Date: February 14, 2020

We write to oppose the Proposed Amendment 3 to the .COM Registry Agreement, as posted by ICANN at:

<https://www.icann.org/public-comments/com-amendment-3-2020-01-03-en>

1. As a preliminary matter, we note with approval and fully support Reconsideration Request 19-2 filed by Namecheap, Inc. regarding the .org contract renewal:

<https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>  
<https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-request-redacted-12jul19-en.pdf>

where Namecheap wrote:

"The ICANN org will decide whether to accept or reject public comment, and will unilaterally (sic) make its own decisions- even if that ignores the public benefit or almost unanimous feedback to the contrary, and is based upon conclusory statements not supported by evidence. This shows that the public comment process is basically a sham, and that ICANN org will do as it pleases in this and other matters. It is a concern not only for the renewal of the .org and other legacy TLD registry agreements being renewed in 2019, but an even greater concern for the upcoming renewal of the .com registry agreement- as well as other vital policy issues under consideration by ICANN now and in the future." [p. 12]

These are strong but thoughtful words from a highly respected company in

the domain industry, whose views are shared by many, including those who've already submitted comments in this current period and who've explicitly noted ICANN's history of ignoring the public, e.g.

a) Arif Ali of Dechert LLP:

<https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/attachments/20200213/2d94b832/2020.02.13-Commenton.COMPriceChanges-0001.pdf>

"ICANN's apparent disregard for public comments violates both its Articles of Incorporation and Bylaws." (footnote 4, page 2)

and

b) Zak Muscovitch of the Internet Commerce Association:

<https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/2020q1/000012.html>

"We trust that you can appreciate (sic) that your request for Public Comments must be viewed with considerable skepticism considering that the last time that you requested feedback from the public on an amendment to a registry agreement, public comment resulted in exactly zero changes to the .org Registry Agreement despite near universal opposition and condemnation from stakeholders. Your failure to pay more than lip service to the multi-stakeholder model resulted in what is now widely considered to be the ".Org Fiasco". This has called into question whether ICANN is actually capable of representing the public interest."

One of the synonyms for the word sham is fraud, and it's apparent now that a fraud has been perpetrated on the public, namely ICANN deceiving the public into believing that these comment periods are legitimate opportunities for meaningful input. NameCheap's reconsideration request wasn't strictly limited to the .org renewal, but directly called into question the legitimacy of all of ICANN's public comment periods for all of the policy issues now and in the future. ICANN should not take their reconsideration request lightly, but should instead call for a full public investigation with full opportunity for the ICANN community to weigh in on this procedural matter which is at the core of ICANN itself. Until such an investigation has concluded, we call on ICANN to suspend all public comments periods, in order to ensure the process integrity of all policymaking. Of course, given ICANN's comment process is a sham, this comment itself will likely be ignored, but we place it on the public record for posterity so that a higher authority will eventually hold ICANN

accountable. Our remaining comments are thus made "in protest" given that the process itself is currently a sham, but we place them again on the record so that fair-minded members of the public can later scrutinize ICANN's processes, and hold them accountable.

2. We support and endorse the great groundswell of opposition as expressed in the thousands of thoughtful public comments opposed to this proposed contractual amendment.

<https://mm.icann.org/pipermail/comments-com-amendment-3-03jan20/2020q1/date.html>

There are over 8,700 submissions published at the time of this submission, compared with many ICANN comment periods which generate fewer than 50 submissions.

3. It should be noted that in the past ICANN trumpeted \*lower\* fees as one of its main achievements. For example, the testimony of ICANN General Counsel and Secretary John Jeffrey:

<https://www.govinfo.gov/content/pkg/CHRG-109hrg30233/html/CHRG-109hrg30233.htm>

"STATEMENT OF JOHN JEFFREY, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

...

Among ICANN's main achievements are the following:

...

Market competition. Market competition for generic top-level domain registrations established by ICANN has lowered domain name cost in some instances as much as 80 percent with savings for both consumers and businesses."

It is not consistent with those past statements for ICANN to abrogate its responsibilities, and permit unjustified fee increases by registry operators. Unjustified fee increases are not in the public interest, and do not balance the needs of registrants against those of registry operators. ICANN was handed a responsibility to balance the interest of affected stakeholders when it achieved (against our wishes) independence from US government oversight, and it's now clear that it is not living up to those commitments given such one-sided contracts that have been presented here for public comment. Unjustified fee increases are not balanced, and do not promote stability of the internet or competition. ICANN is engaging in corporate welfare and/or crony capitalism through such anti-competitive proposals.

4. Under competition the fees for providing registry services (really just the management of a central database plus the operation of various nameservers) would be under USD \$1.00 per domain name per year. This is evidenced by the .IN (India ccTLD) tender,

<http://domainincite.com/23364-afili-as-sues-india-to-block-12-million-neustar-back-end-deal>

where Neustar beat Afili-as with a winning bid of USD \$0.70 per domain name per year (70 cents/domain/yr).

A similar competitive tender process happened in France,

<https://www.thedomains.com/2012/08/07/afnic-awarded-new-contract-to-run-fr-registry-but-only-after-open-bidding-results-in-reduced-prices/>

where AFNIC had to lower the wholesale fees for .FR domain names, and the contract was for 5 years.

Similar competitions are held for the .US ccTLD.

[https://www.ntia.doc.gov/legacy/ntiahome/press/2007/Neustar\\_101907.html](https://www.ntia.doc.gov/legacy/ntiahome/press/2007/Neustar_101907.html)

You'll note that registry operators do not have presumptive renewal in those ccTLD contracts, yet are more than willing and able to compete effectively and make investments. It was a major policy blunder of ICANN to have agreed in the past to presumptive renewal, a decision that has had a multi-billion dollar negative impact upon registrants, compared to a situation where there are regular competitive tenders. Even the US government has argued for those competitive tenders for both initial agreements and for renewals of agreements

[https://www.ntia.doc.gov/files/ntia/publications/icann\\_081218.pdf](https://www.ntia.doc.gov/files/ntia/publications/icann_081218.pdf)

(Ms. Garza's analysis begins on the 3rd page of the PDF, after the covering letter by Ms. Baker of the NTIA).

Verisign is currently permitted to charge a fee of USD \$7.85 per domain per year, far above what it would be under a competitive tender process. This fact should be the starting point when considering any alteration to the status quo. A good faith negotiation \*must\* take this fact into account, but it appears that ICANN did not at all take this into account while conducting

its negotiations with Verisign.

ICANN conducted no RFP or other means of gauging the ability or willingness of others to take over the .COM contract. It conducted none of its own economic studies. Those would have served the public interest, but are absent.

The starting point of any good negotiation is to be aware of one's BATNA -- "best alternative to a negotiated agreement". ICANN should disclose what its BATNA was in this negotiation. This disclosure, when compared to the current proposal, will demonstrate how poorly ICANN represented the public in this negotiation.

5. ICANN claims that it is "not a price regulator and will defer to the expertise of relevant competition authorities. As such, ICANN has long-deferred to the DOC and the United States Department of Justice (DOJ) for the regulation of pricing for .COM registry services."

ICANN directly references Amendment 35 of the Cooperative Agreement:

<https://www.ntia.doc.gov/page/verisign-cooperative-agreement>

[https://www.ntia.doc.gov/files/ntia/publications/amendment\\_35.pdf](https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf)

However, that amendment took place without any public consultation by the Department of Commerce and without any opportunity for the public to provide their own input and research. Furthermore, the precise language of paragraph 2.a) of that amendment, with regards to pricing, says:

"Without further approval by the Department, at any time following the Effective Date of this Amendment 35, Verisign and ICANN \*\*\*\*may\*\*\*\* agree to amend Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement to....." (emphasis added)

The exact language says "may", and not "must". "May" has a precise and unambiguous meaning, as per RFC 2119:

<https://tools.ietf.org/html/rfc2119>

"5. MAY This word, or the adjective "OPTIONAL", mean that an item is truly optional. One vendor may choose to include the item because a particular marketplace requires it or because the vendor feels that it enhances the product while another vendor may omit the same item. An implementation which does not include a particular option MUST be prepared to interoperate with another implementation which does include the option, though perhaps with reduced functionality. In the same vein an implementation which does

include a particular option MUST be prepared to interoperate with another implementation which does not include the option (except, of course, for the feature the option provides.)"

Nothing in Amendment 35 \*requires\* ICANN to adopt that OPTIONAL pricing scheme, but rather that's the \*maximum\* Verisign can seek. ICANN is certainly within its powers to reject that maximum request, which it must do if it's to balance the interests of all affected stakeholders.

In a good faith attempt at a renegotiation of that clause, ICANN's starting position should have been a 91%+ reduction in fees, to \$0.70 per domain name per year (as per the .IN ccTLD tender). Verisign would be free to ask for an increase. If the two parties were unable to agree, then the status quo would remain, with fees capped at the current \$7.85 per domain name per year. If Verisign was unhappy with \$7.85 per domain name per year, they could certainly terminate the contract, which would then be allowed to go to tender to a successor registry operator (there'd be many who would relish the opportunity, even at \$1 or \$2 per domain per year).

Furthermore, a regular tender process is entirely consistent with not being a price regulator, as it would be the competitive market itself (lowest bidder, subject to meeting a SLA) that dictates the price, rather than ICANN itself setting a price. But ICANN refuses to engage in that regular tender process, suggesting they would rather have higher fees for registrants, entirely consistent with the regulatory capture by the current registry operators who would most directly benefit financially from those higher fees.

6. It is important to note that Amendment 35 did not alter paragraph 3(a) of Amendment 32 to the Cooperative Agreement:

[https://www.ntia.doc.gov/files/ntia/publications/amendment\\_32\\_11292012.pdf](https://www.ntia.doc.gov/files/ntia/publications/amendment_32_11292012.pdf)

"(a) At any time after the Effective Date of this Amendment 32, Verisign shall be entitled to seek removal of the pricing restrictions set forth in Section 7.3 of the .com Registry Agreement attached hereto if it demonstrates to the Department that market conditions no longer warrant such restrictions. Verisign shall be deemed to have made such a showing upon demonstrating that competition from other top level domains, use of alternative Internet navigation techniques (including search engines, browsers and URL shorteners, among others), reduced demand for domain names, or other factors \*\*\*\*are sufficient to constrain Verisign's pricing of Registry Services at the current Maximum Price.\*\*\*\*" (emphasis added)

Amendments 33 and 34 similarly did not alter or affect paragraph 3(a) of Amendment 32. Indeed, paragraph 4(b)(i) of Amendment 35 explicitly recognizes the continuation of paragraph 3(a):

"4(b)The parties agree that the following terms are the sole terms in the .com Registry Agreement that require the prior written approval of the Department:

i. Removal of the Maximum Price restriction under Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement, which by way of clarification \*\*\*\*\*will continue to be subject to Section 3(a) of Amendment 32\*\*\*\*\* setting forth the standard and process for removal;"

It's clear that the intention of paragraph 3(a) of Amendment 32 is to only allow pricing caps to change if Verisign was effectively \*\*constrained\*\* by market forces to the \*current\* Maximum Price. However, we know Verisign is not constrained, but instead has market power (of a monopolist) to raise fees. Verisign is certainly not going to lower their fees (which they could do already, under the current agreement). Verisign seeks to amend the .com agreement only to raise fees.

Indeed, if the current proposal before us is adopted, which allows for guaranteed fee increases, when would Verisign rationally pursue its right under paragraph 3(a) of Amendment 32? The answer is obviously "never", because if it did exercise that right, its future fee increases would be forever eliminated, constrained (by competition) to the then current Maximum Price.

7. ICANN staff are clearly trying to mislead the public, when they claim that "the devil made them do it", i.e. that they \*had\* to accede to Verisign's demands because the Department of Commerce forced their hand. That is not so. ICANN is attempting to shift the blame to others when they themselves are at fault. ICANN could have completely discharged their contractual obligations by entering into a good faith negotiation that resulted in no agreement at all, because Verisign refused to accept a \$0.70/domain/yr fee (the result under a competitive tender) proposed by ICANN, and ICANN refused to accept unjustifiable price increases proposed by Verisign.

ICANN itself certainly doesn't believe that they had to accede to Verisign's demands, otherwise how can they justify the \$20 million payment? There is absolutely nothing in Amendment 35 that says Verisign shall pay \$20 million to ICANN. Where did that number come from? Why isn't that number \$2 million? Or \$200 million? Or \$2 billion? The presence of that \$20 million is a "smoking gun", which betrays and undermines ICANN's false narrative that they were compelled to accede to Verisign's pricing demands due to

## Amendment 35.

Instead, the \$20 million is direct evidence of a "quid pro quo", in exchange for Verisign getting a multi-billion dollar financial windfall. Antitrust authorities should be investigating this regulatory capture by Verisign, where they clearly have control over the decision-makers who are not negotiating in the public interest.

If ICANN was honest about being compelled to make these changes, they would have made the \*\*\*minimal\*\*\* amount of changes needed. We need only see that precedent via Amendment 34 to the Cooperative Agreement, which was adopted \*verbatim\* by ICANN as FIRST AMENDMENT TO .COM REGISTRY AGREEMENT:

[https://www.ntia.doc.gov/files/ntia/publications/amendment\\_34.pdf](https://www.ntia.doc.gov/files/ntia/publications/amendment_34.pdf)  
<https://www.icann.org/sites/default/files/tlds/com/com-amend-1-pdf-20oct16-en.pdf>

But, ICANN is being dishonest, because nothing in Amendment 35 talks about the \$20 million. ICANN is saying one thing in public (that they were forced into this deal), but another thing in private to Verisign (that they want Verisign to give them things not enumerated in Amendment 35, in exchange for the fee increases).

That dishonesty alone by ICANN should disqualify them from being involved in this contractual negotiation, or having any trusted role as a steward of the domain name system. ICANN is lying to the public, because they are trying to "sell" this bad deal, pretending that it's in the public interest. ICANN's interests are not aligned with that of the public, but rather ICANN is aligning themselves with Verisign, as Verisign has fully captured their regulator.

8. A good faith negotiation would have extracted far greater concessions than \$20 million from Verisign, in exchange for the proposed fee increases (which are worth billions of dollars to Verisign). It's clear that this was a bad faith negotiation, otherwise there would have been either no fee increases at all, or much greater concessions from Verisign.

9. Verisign's own negotiating position demonstrates that they too believe that ICANN has the power to reject fee increases. Otherwise, why would they voluntarily agree to flush \$20 million down the toilet? That \$20 million is there for a reason --- it \*had\* to be there, from their perspective, otherwise there'd be no deal. That tells us that Verisign \*knows\* that ICANN could refuse the fee increases, that the term "may" is not the same as the term "must".



Given the choice of no deal, or this bad deal, then the best choice for the public interest is obvious --- there should be no change at all to the status quo.

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

"WHEREAS, the parties agree that Verisign shall continue to operate the .com registry in a content neutral manner and will participate in ICANN processes that promote the development of content neutral policies 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 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 amendment that refers to "content neutrality" or "content neutral policies"? [the words "neutral" or "neutrality" don't appear in the documents!]

"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, current 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://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 Proposed Amendment 3 from ICANN 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.

11. We also object to the major changes to the .COM Registry-Registrar Agreement (starting from page 47 of <https://www.icann.org/sites/default/files/tlds/com/com-proposed-amend-3-03jan20-en.pdf>

for those who didn't read that far!). Without mentioning all sections (we object to all the changes, out of an abundance of caution), we point out that the new language in section 2.7 is dangerous, potentially allowing Verisign the ability to override decisions by registrars as to how to handle various situations, which can result in elimination of due process for registrants. For example, 2.7(b) refers to:

"any legal order or subpoena of \*\*\*\*any government\*\*\*\*, administrative or governmental authority, or court of competent jurisdiction," (emphasis added)

which is not acceptable! For example, if this language is not modified, then it says that if a government from Cuba, North Korea, Iran or other totalitarian regime tells Verisign to transfer ownership of sites owned by my company, such as Math.com or FreeSpeech.com to their control, Verisign can go along! Or, why stop there? Why not allow Verisign to shut down Google.com, if the government of Iran or Turkey or Russia asks for it? Why bother with a shutdown -- suppose a government in one of those regimes orders the actual transfer of a domain name such as Google.com or Sex.com or School.com or Apple.com or Amazon.com or Microsoft.com?

Again, why stop there? A "crafty" government seeking to profit economically, say in a banana republic, can pass a law to say that they want all dictionary-word dot-coms, 2-letter and 3-letter dot-coms and other valuable domain names to be transferred to them! That's many billions of dollars worth of digital assets, all for the taking --- if those banana republics can sell passports, citizenship, their entire ccTLDs, and engage in other dubious activities, why wouldn't they be incentivized to simply pass laws to order the transfer of an \$872 million domain like Cars.com?

<https://www.godaddy.com/garage/the-top-20-most-expensive-domain-names/>

<https://www.dnacademy.com/the-definitive-guide-to-the-worlds-largest-domain-sale>

This is unacceptable. Registrants have an expectation that they will be governed by the laws of the jurisdictions in which they are based (or that of the registrar), and due process considerations demand that this continues.

All of the changes to section 2.7(b) should be eliminated. For example, why single out "copyright infringement" -- why not criminal activity by banks such as Barclays?

[http://www.circleid.com/posts/20150520\\_should\\_barclays\\_lose\\_the\\_barclays\\_top\\_level\\_domain/](http://www.circleid.com/posts/20150520_should_barclays_lose_the_barclays_top_level_domain/)

Or patent violations by Apple?

<https://www.theverge.com/2020/1/29/21114325/apple-broadcom-caltech-lawsuit-jury-award-1-1-billion-damages>

Even Google has an active case involving alleged copyright infringements with Oracle:

[https://en.wikipedia.org/wiki/Google\\_v.\\_Oracle\\_America](https://en.wikipedia.org/wiki/Google_v._Oracle_America)

If Google loses that case (now before the Supreme Court), why shouldn't they lose all of their domains, under the literal interpretation of the proposed Section 2.7(b)? It's clear to us that Section 2.7(b) is dangerous because it would only be selectively enforced. I doubt Google or Youtube has much to fear from Verisign, despite all the copyright infringement that takes place on their domains. But, by the strict language of that contract, conceivably they *should* be afraid. Instead, it'll be more vulnerable entities who would lose their domains, without proper due process. No one should have that power, except proper courts (in the proper jurisdictions, not "any jurisdiction"). Contracts should be read as to what's possible, and what's proposed here is potentially extremely dangerous.

12. The new language in Section 2.14 reinforces 2.7(b), and also must be eliminated, for the reasons above.

13. The new language in Section 6.3 of "Force Majeure" is also highly objectionable, and must be removed. In particular, force majeure would begin to apply to " cyberattack, to protect against imminent and substantial threats to the security and stability of the Registry TLD, System, Verisign's name server operations or the internet".

Verisign often attempts to justify its high fees by saying that it has to pay for defending against DDOS attacks (i.e. cyberattacks). It would incentivize Verisign to reduce its security costs and SLA standards if it can then simply rely on declaring "force majeure" for any attack that takes it down. Verisign has one main job, and one job alone, namely 100% uptime.

Verisign and ICANN are inconsistent when they say they want "to preserve and enhance the security and stability of the Internet or the TLD" but at the same time add new language in the "force majeure" section that detracts from and reduces security and stability, and which says less than 100% uptime is acceptable. SSAC should have spoken out immediately about this new language, but perhaps SSAC members are too busy drooling at the thought that \$20 million might come their way in one form or another, as the LOI says:

<https://www.icann.org/sites/default/files/tlds/com/com-proposed-loi-03jan20-en.pdf>

"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."

Who are the "subject matter experts within ICANN"? Probably some will come from the SSAC, which will now be in a conflict of interest, as they are not willing to bite the hand that feeds them by speaking out against this bad deal.

14. We object to the language in the Public Interest Commitments (page 68 of the PDF <https://www.icann.org/sites/default/files/tlds/com/com-proposed-amend-3-03jan20-en.pdf>) for the same reasons as discussed above in point 11 of this comment, namely the potential loss of due process rights for registrants.

15. We object to the proposed "Letter of Intent", in its entirety:

<https://www.icann.org/sites/default/files/tlds/com/com-proposed-loi-03jan20-en.pdf>

Verisign does not have a great "history of stewardship" --- remember SiteFinder and the ensuing litigation? (as noted by other commenters) They should not be equal partners with ICANN or have any superior position to any other stakeholder in deciding future binding policies. The Letter of Intent was a "quid pro quo", as noted earlier.

16. This proposal by ICANN staff and Verisign demonstrates everything that is wrong with ICANN. A brand new negotiation is required. The starting point should be a list of the absolute minimum set of changes required by the Cooperative Agreement, if any. As noted above, the "may" language, combined with the presence of the quid pro quo, implies that the "absolute minimal changes" are different than what has been presented to us for consideration. Indeed, one alternative is to simply refuse ALL changes, and let Verisign go to court, if they so desire, to have the courts interpret what is required and what is optional. No deal is better than this deal. Any court-ordered set of the absolute minimally-required contractual changes would likely be far better for the public than what has been presented to us.

17. As there is no immediate deadline (I believe October or November 2020 is the most relevant date for completing a "negotiation"), ICANN should hold a series of public webinars with Questions and Answers from the public and its important stakeholders. This is the most important contract, financially for ICANN, for registrars, and for registrants. It deserves the greatest

scrutiny.

Sincerely,

George Kirikos  
President  
Leap of Faith Financial Services Inc.  
<http://www.leap.com/>