ATTACHMENT A

Analysis of .NET Registry Agreement

Michael Palage & Bill Jouris

ALAC Consolidated Policy Working Group (CPWG)

26 April 2023

Agenda

- ICANN Contracting Basics 101

- Is this within ALAC's remit?

- Identify major differences between the baseline Registry Agreement and the current/proposed .NET Registry Agreement

- Is this within ALAC's remit?

- ALAC Options

ICANN Contracting Basics 101

- ICANN's ability to enforce the consensus policies is done through a series of contracts with accredited Registries and Registrars.

- There have been a total of five (5) Registrar Accreditation Agreements (RAA), see https://www.icann.org/resources/pages/registrars-agreements-archive-en

- Historically, there has been a much large iteration of Registry Agreements (RAs). Although these contracts can generally be grouped into the following buckets, see https://www.icann.org/en/registry-agreements

  - .COM, .NET, .ORG (legacy agreements)
  - 2000 Proof of Concept RAs
  - 2004 Sponsored RAs
  - 2012 Baseline RA

Baseline Registry Agreement (RA)

The Base RA was developed to support the new generic top-level domains (gTLDs) being created through the 2012 New gTLD Program. It was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment and aligns with the underlying Generic Names Supporting Organization's (GNSO's) policy recommendations for new gTLDs. Established in 2013, the Base RA now applies to over 1,200 gTLDs. The ICANN org has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements. The Base RA provides additional safeguards and security and stability requirements compared to legacy agreements. Since 2014, several legacy gTLDs have renewed their agreements adopting the Base RA: cat, .jobs, .mobi, .pro, .tel, .travel, and most recently, .asia, .biz, .info, and .org.

See, https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf

Limitations Regarding Baseline RA

Although all new gTLD registry operators must adopt the Base RA (but may request deviations from it), no consensus policy requires a legacy registry operator to adopt the Base RA. All RAs include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the RA at its expiration, provided the registry operator is in good standing (e.g., the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.

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, and has done so in at least one such instance.

See https://features.icann.org/consideration-reconsideration-request-19-3-org-renewal

Is this within ALAC's Remit?

ICANN Bylaw Section 12.2(d) - At-Large Advisory Committee

(i)   The role of the ALAC shall be to consider and provide advice
        on the activities of ICANN, insofar as they relate to the
        interests of individual Internet users. This includes policies
        created through ICANN's Supporting Organizations, as well as
        the many other issues for which community input and advice is
        appropriate. The ALAC, which plays an important role in
        ICANN's accountability mechanisms, also coordinates some of
        ICANN's outreach to individual Internet users.

Is this within ALAC's Remit?

ICANN Bylaw Section 12.2(d) - At-Large Advisory Committee

(i)   ==The role of the ALAC shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users.== This includes policies created through ICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate. The ALAC, which plays an important role in ICANN's accountability mechanisms, also coordinates some of ICANN's outreach to individual Internet users.

Is this within ALAC's Remit?

ICANN Bylaw Section 12.2(d) - At-Large Advisory Committee

(i) The role of the ALAC shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate. The ALAC, which plays an important role in ICANN's accountability mechanisms, also coordinates some of ICANN's outreach to individual Internet users.

"ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA."

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

Deviations Between .NET RA and Baseline RA

- It is not an easy task to provide a details analysis of the differences between the proposed .NET RA and the baseline RA

- This is NOT a comprehensive list of all deviations.

- Not <u>all</u> deviations are in favor of Verisign.

Deviation #1

Under the Representations and Warranties clause between the two RAs there is a difference regarding the consequences for

Baseline RA (2017)
Section 1.3(a)(i)

all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

.NET RA (2023)
Section 1.2(b)

The factual statements made in writing by both parties in negotiating this Agreement, were true and correct in all material respects at the time made. A violation or breach of this subsection shall not be a basis for termination, rescission or other equitable relief, and, instead shall only give rise to a claim for damages.

Deviation #2

It appears that the .NET RA has a narrower remit regarding the scope of Consensus Policy (a cornerstone of the ICANN multistakeholder model) based upon conflicting definitions of (S/s)ecurity and (S/s)tability.

Baseline RA (2017) **Spec 1, Paragraph 1.2**	**.NET RA (2023)** **Section 3.1(b)(iv)**
Consensus Policies … shall relate to one or more of the following:	Consensus Policies shall relate to one or more of the following: (1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, Security and/or Stability of the Internet or DNS; (2) functional and performance specifications for the provision of Registry Services (as defined in Section 3.1(d)(iii) below); (3) Security and Stability of the registry database for the TLD;
1.2.1 issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System ("DNS");	
. . .	
1.2.3 Security and Stability of the registry database for the TLD;	

Deviation #3

The Baseline RA and .NET RA have **almost identical** definitions of Security and Stability. While these definitions in the Baseline RA are subject to future ICANN Consensus Policy work, it appears that Verisign has an effective veto over any future community consensus policy work regarding the definitions of Security and Stability in the .NET and .COM RAs.

Baseline RA (2017)
Section 7.3

For purposes of this Agreement, ==unless such definitions are amended pursuant to a Consensus Policy at a future date==, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

.NET RA (2023)
Section 1.2(b)

(v) In addition to the other limitations on Consensus Policies, they shall not.

(B) modify the standards for the consideration of proposed Registry Services, ==including the definitions of Security and Stability== (set forth below) and the standards applied by ICANN;

Deviation #4

The Baseline RA includes a Registry Services Evaluation Policy (RSEP) provision that is incorporated by reference (URL) and subject to change by Consensus Policy, whereas the .NET RA RSEP process is hardcoded, and any change is excluded from the Consensus Policy remit.

Baseline RA (2017)
Article 2.1

Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the "ICANN Bylaws") applicable to Consensus Policies (the "RSEP").

.NET RA (2023)
Section 3.1(d)(iv)

Process for Consideration of Proposed Registry Services. Following written notification by Registry Operator to ICANN that Registry Operator may make a change in a Registry Service within the scope of the preceding paragraph:

See subparagraphs A thru I

Deviation #5

The Baseline RA requires the Registry Operator to cooperate in economic studies, however, Verisign appears to have no similar provision in either the .NET or .COM registry agreements.

Baseline RA (2017)
Section 2.15

.NET RA (2023)
Section 3.1(b)(iv)

If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study…..

Not Found

Deviation #6

Verisign is proposing to amend its Letter to include reporting security incidents for the .COM and .NET RA, see
https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-net-13-04-2023

Baseline RA (2017)	.NET RA (2023) Collateral Documentation
Not Found	To add an agreement that the parties develop mutually agreed upon requirements appropriate for the .COM and .NET TLDs for reporting security incidents to ICANN. This is based on recommendations by the Security and Stability Advisory Committee (SSAC) in its 3 November 2015 Advisory (SAC074) which were approved by the ICANN Board in February 2018.

Deviation #6 – Cont'd

- The Strengthening American Cybersecurity Act (SACA) was signed into law in March 2022 as part of a Consolidated Appropriations Act, See https://www.congress.gov/117/plaws/publ103/PLAW-117publ103.pdf

- Under SACA Sec 2242 Required Reporting of Certain Cyber Incidents Paragraph A:

    A covered entity that experiences a covered cyber incident shall report the covered cyber incident to the Agency not later than 72 hours after the covered entity reasonably believes that the covered cyber incident has occurred.

- SACA Paragraph 5 Exemptions states that

    (C) DOMAIN NAME SYSTEM.—The requirements under paragraphs (1), (2) and (3) shall not apply to a covered entity or the functions of a covered entity that the Director determines constitute critical Infrastructure owned, operated, or governed by multi-stakeholder organizations that develop, Implement, and enforce policies concerning the Domain Name System, such as the Internet Corporation for Assigned Names and Numbers or the Internet Assigned Numbers Authority.

Deviation #7

The Baseline RA has a ten (10) year term whereas the .NET RA has a six (6) year term., although both RAs have similar auto-renewal provisions.

**Baseline RA (2017)
Section 4.1**

The term of this Agreement will be ten (10) years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

**.NET RA (2023)
Section 4.1**

This Agreement shall be effective on the Effective Date through 30 June 2029 (the "Expiration Date"), subject to extension of such term upon renewal pursuant to Section 4.2 (together, the initial and any renewal terms shall constitute the "Term").

Deviation #8

The Baseline RA contains no price caps, whereas the .NET RA includes pricing and pricing adjustment provisions (see below). This provision is also materially different from the .COM RA. Although the .COM TLD was previously determined by the US Department of Justice Antitrust Division to have "significant market power", there appears to be no such finding in connection with .NET, see https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf

.NET RA (2023) - Section 7.3 (a) & (b)

(a) Pricing. The price to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another, shall not exceed a total fee of US$10.67, which fee consists of (A) a Registry Operator service fee ("Service Fee") equal to US$9.92, and (B) an ICANN fee equal to US$0.75. ……

(b) Adjustments to Pricing for Domain Name Registrations. Registry Operator shall provide no less than six months prior notice in advance of any price increase for domain name registrations and shall continue to offer domain name registrations for periods of up to ten years.

Deviation #9

The Baseline RA has no prohibition on vertical integration, whereas the .NET RA includes such a provision. Although the Cooperative Agreement imposes a prohibition on vertical integration within the .COM TLD there appears to be no such restriction in connection with .NET, see https://www.ntia.gov/press-release/2018/ntia-statement-amendment-35-cooperative-agreement-verisign

.NET RA (2023) - Section 7.1 (c) & (d)

(c) Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to the TLD. This shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar. ….

(d) Restrictions on Acquisition of Ownership or Controlling Interest in Registrar. Registry Operator shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar for the TLD.

Is this within ALAC's Remit?
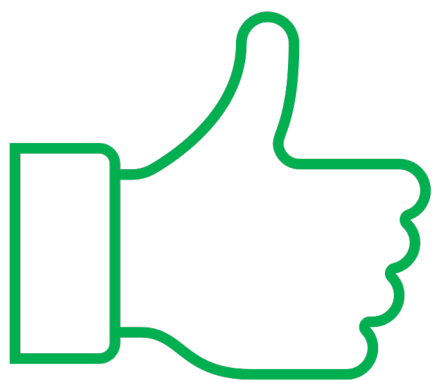
OR
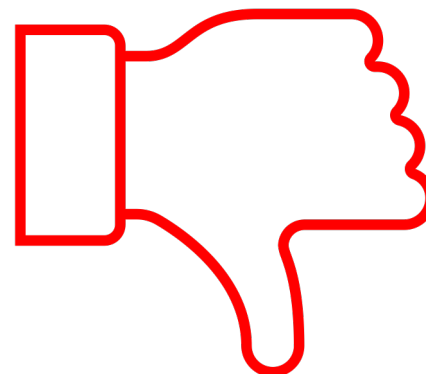
ALAC Options

Submit a public comment to help raise awareness of this issue and its potential impact on **global public interest**.

✓ Request that ICANN Legal provide a detailed redline analysis (with summary analysis) of the .NET RA versus the baseline RA.

✓ Request an extension of the .NET RA for the global internet community to review this more detailed analysis.

✓ Request clarification from ICANN on breach notification involving Security/security and Stability/stability issues under US Law.

✓ Analyze .NET RA's definition of Security and Stability on DNS Abuse negotiations

✓ Request ICANN Org to initiate an Economic Study.

Conclusion

One World, One Internet

One ICANN, One gTLD Registry
Baseline RA

ATTACHMENT B - Removed - Privileged & Confidential

ATTACHMENT C

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement"), effective this ____ day of _____ 2005, is made by and on behalf of the following entities: (i) Internet Corporation for Assigned Names and Numbers, a non -profit public benefit corporation organized under the laws of the State of California, United States of America ("ICANN"); and (ii) VeriSign, Inc., a corporation organized under the laws of the State of Delaware, United States of America ("VeriSign"). ICANN and VeriSign are referred to collectively as the "Parties."

WHEREFORE, ICANN and VeriSign are parties to the following agreements:
(i) Registry Agreement effective May 2001 with regard to the ".com" top level domain of the Internet (the "2001 .com Registry Agreement"); and (ii) Registry Agreement effective May 2001 with regard to the ".net" top level domain of the Internet (the "2001 .net Registry Agreement"); and

WHEREFORE, disputes have arisen between ICANN and VeriSign under the 2001 .com Registry Agreement and the 2001 .net Registry Agreement, which disputes have resulted in both litigation and arbitration; and

WHEREFORE, ICANN and VeriSign desire to settle and compromise certain of their disputes by entering into this Agreement as well as a successor registry agreement with respect to the ".com" top level domain of the Internet (the "2005 .com Registry Agreement").

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1.   VeriSign support of ICANN.

A.   Upon approval of this Agreement by the ICANN Board, the Parties shall issue separate press statements regarding this Agreement. VeriSign agrees that its statement shall reiterate its support for ICANN as the appropriate technical coordination body for the DNS , in particular with respect to Internet domain names, IP address numbers, root server system management functions, and protocol parameter and port numbers. VeriSign also agrees that it will continue to be an advocate for the private sector solution to the coordination of Internet names and addresses, including (without limitation) that VeriSign will advocate ICANN's appropriate role in that process.

B.   VeriSign agrees that, effective immediately upon the execution of this Agreement, it will not participate in, contribute monies for, encourage or provide other support for any activities by or for third parties that seek to undermine ICANN's role as set out in paragraph 1A above, and it will immediately cease any such ongoing activities. This does not (i) affect in any way VeriSign's obligations to respond truthfully to government inquiries, judicial proceedings, or required testimony; (ii) prohibit VeriSign from taking positions or advocating within the ICANN process on specific issues, consistent with its obligations in paragraph 1A above; or

(iii) preclude VeriSign from membership in organizations that may take positions with respect to ICANN or related subjects, so long as VeriSign does not use its membership as a device to avoid the obligations of this paragraph and does not advocate or support such actions by any organization in any way other than its membership.

      C.   The Parties agree to the following dispute resolution process for the issues referenced in paragraphs 1A and 1B:

      1.   Should any dispute arise as to whether VeriSign is complying with its obligations under paragraphs 1A or 1B above, senior management (meaning at least one of the two most senior executives in the respective companies or their affected business units and the companies' respective general counsel) will promptly confer concerning the issue in an attempt to resolve the issue. If senior management cannot resolve the issue within three business days, the issue shall be referred immediately to non-binding and informal mediation. The Parties hereby designate the Hon. Charles S. Vogel as the mediator, assuming he is available. If he is not available, the Parties agree that the Los Angeles office of JAMS shall select the mediator. The Parties agree that the mediation shall conclude within five (5) business days and that any briefing materials filed with the mediator shall be limited to five (5) pages.

      2.   If mediation does not achieve a resolution, the dispute shall be referred to binding arbitration by a single arbitrator under the most expedited schedule that is available, for the purpose of producing a final and binding decision within fifteen (15) business days of the initiation of arbitration. The parties agree that, if available, the arbitrator shall be Hon. Richard C. Neal. If he is not available, the Parties agree that the Los Angeles office of JAMS shall select an arbitrator. The arbitrator will be asked to decide only whether VeriSign has complied with its obligations in paragraphs 1A-B above. If the arbitrator issues an award in favor of VeriSign, the matter shall be concluded. If the arbitrator issues a finding in favor of ICANN, the arbitrator may impose appropriate remedies on VeriSign, limited to ordering a public retraction or corrective communication. The parties may seek judicial review of the arbitration only on the grounds available under the Federal Arbitration Act. Exclusive venue for such judicial review shall be in a court located in the County of Los Angeles, California. In the event the arbitrator issues an award in favor of ICANN, ICANN shall be entitled to commence further arbitration proceedings seeking damages for any breach of the provisions of sections 1A and 1B above (the "Subsequent Arbitration"). The Subsequent Arbitration shall be conducted before the same JAMS arbitrator and pursuant to the JAMS commercial arbitration rules. In the Subsequent Arbitration, the arbitrator shall permit reasonable discovery and other pre-trial proceedings. Further, in the Subsequent Arbitration, the decision of the initial arbitrator shall be non-binding and non-prejudicial to VeriSign.

      2.   <u>Stay and dismissal of pending litigation and arbitration.</u>

Within five (5) business days of the execution of this Agreement, the Parties shall file a stipulation to dismiss with prejudice the lawsuit styled *VeriSign, Inc. v. ICANN*, United States District Court, Central District of California, Case No. CV 04-1292 AHM, presently on appeal to the Ninth Circuit Court of Appeals, Case No. 04-56761 (the "Federal lawsuit").

Within five (5) business days of the execution of this Agreement, the Parties shall file a dismissal of the arbitration proceedings in connection with *ICANN v. VeriSign, Inc.*, International Chamber of Commerce, International Court of Arbitration, Case No. 13 568/JNK/EBS (the "ICC Arbitration").

Within five (5) days of the execution of this Agreement, the parties shall file a stipulation to dismiss with prejudice the lawsuit styled *VeriSign, Inc. v. ICANN*, Los Angeles Superior Court Case No. BC 320763 ("the Superior Court lawsuit").

3.   No admission of liability.

This Agreement constitutes the settlement of disputed claims. It does not and shall not constitute an admission of liability by either of the Parties and shall not be used by any Party or any other person or entity in any litigation or proceeding for that purpose. The Parties further agree that the disputes and allegations that resulted in the litigation referenced in paragraph 2 and are subject to this Agreement shall not be considered in any context except as may be required to respond truthfully to governmental inquiries or required testimony.

4.   Governing law, arbitration, and venue.

Except as expressly provided herein, this Agreement shall be governed by the laws of the State of California. Any disputes arising out of or in connection with this Agreement, except for disputes related to paragraph 1 above, shall be referred to binding arbitration before the ICC according to the procedures and as set forth in the .com Registry Agreement executed concurrently herewith.

5.   Costs and attorney's fees.

The Parties agree to bear their own costs and attorney's fees in connection with the litigation and arbitration referenced in paragraph 2 above and in connection with the negotiation of this Agreement.

6.   Releases.

Except as provided in this Agreement and the 2005 .com Registry Agreement, each of the Parties (on behalf of their respective affiliates, parents, subsidiaries, shareholders, officers, directors, employees, agents, attorneys, predecessors, successors and assigns) hereby releases and discharges the other (and their respective affiliates, parents, subsidiaries, shareholders, officers, directors, employees, agents, attorneys, predecessors, successors and assigns) from any and all claims and causes of action, whether known or unknown, that have arisen as of the date of this Agreement, including, without limiting the generality of the foregoing, any or all claims that were or could have been made in the Federal lawsuit, the ICC Arbitration, or the Superior Court lawsuit, except that the releases provided for in this Agreement shall not apply to the claims made by SnapNames, Inc. against ICANN in the Los Angeles Superior Court, Case No. BC 324782, or any other litigation that SnapNames might file related to the claims that SnapNames asserts in that lawsuit. Each of the Parties acknowledges and expressly waives the provisions of California Civil Code section 1542, which provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him, must have materially affected his settlement with the debtor."

7. Successors and assigns.

This Agreement shall be binding and inure to the benefit of the Parties and their respective successors and assigns.

8. Counterparts.

This Agreement may be signed in counterparts, each of which shall be deemed an original. This Agreement may only be amended in writing, which amendment may also be signed in counterparts.

9. Further assurances.

The Parties agree to execute and deliver any additional papers, documents and other assurances, and take all acts that are reasonably necessary to carry out the intent of this Agreement.

10. No third-party beneficiaries.

Nothing in this Agreement shall confer any rights upon any person or entity who is not a party to this Agreement, nor shall anything in this Agreement be construed as creating an obligation by either ICANN or VeriSign to any non-party to this agreement.

11. Notices.

The referral notice to the appropriate competition authority or authorities provided in section 3.1(d)(iv)(E) of the 2005 .com Registry Agreement shall be in the form of Exhibit __ hereto. Further, the parties agree that the appropriate authority or authorities for reference of such issues for the .com Registry Operator shall be the Department of Justice and/or the Federal Trade Commission of the U.S. Government.

Along with that information provided to ICANN under Section 3.1(d)(iv)(B) of the 2005 .com Registry Agreement, VeriSign shall provide a description of the proposed Registry Service sufficient to describe the purpose of the proposed Registry Service and its effect on users of the DNS, that VeriSign shall identify as appropriate for forwarding with the letter attached hereto as Exhibit B, and which ICANN shall use as the enclosure with Exhibit B.

Any notices that are provided pursuant to this Agreement or in connection with the 2005 .com Registry Agreement shall be provided via both electronic mail and writing (either facsimile or U.S. Mail) to the other party as follows:

To VeriSign: VeriSign, Inc.
Attn: Senior Vice President, VNDS
21345 Ridgetop Circle
Dulles, VA 20166
Facsimile: 703-421-2129

With a copy to:

VeriSign, Inc.
Attn: Chief Litigation Counsel
21355 Ridgetop Circle
Dulles , VA 20166
Facsimile: 703-450-7326

To ICANN: Internet Corporation for Assigned Names and Numbers
Attn: President and Chief Executive Officer
4676 Admiralty Way, Suite 300
Marina del Rey, CA 90292-6601
Facsimile: 1-310-823-8649

With a copy to:

Internet Corporation for Assigned Names and Numbers
Attn: General Counsel
4676 Admiralty Way, Suite 300
Marina del Rey, CA 90292-6601
Fascimile: 1-310-823-8649

12. Mutual contribution.

This Agreement was drafted by both of the Parties and, thus, shall not be construed against any Party because that Party initially drafted any particular provision.

Wherefore, the Parties have executed this Agreement as of the date set forth above.

Internet Corporation for Assigned Names
and Numbers

VeriSign, Inc.

_____
Paul Twomey
President and CEO

_____
James Ulam
Senior Vice President, General Counsel and
Secretary, VeriSign

Exhibit A

Dear _____ :

The Internet Corporation for Assigned Names and Numbers (ICANN) is a nonprofit public benefit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions.

Under the February 2005 agreement between ICANN and VeriSign, Inc., the operator of the registry for the ".com" Internet top level domain, VeriSign is to advise ICANN of proposed new registry services, which ICANN preliminarily reviews for potential implications for security and stability of the domain name system and competition. The agreement between ICANN and VeriSign, including a description of the review by ICANN, may be found on the ICANN website at www.icann.org.

This letter is to inform you that VeriSign has advised ICANN of its intention to introduce a new registry service. This service potentially could have an affect on competition. Attached is information from VeriSign describing the service.

For further information regarding these matters, you may contact _____ at ICANN or the General Counsel at VeriSign.

ATTACHMENT D - Removed- Privileged & Confidential

ATTACHMENT E - Removed - Privileged & Confidential

ATTACHMENT F - Removed - Privileged & Confidential

ATTACHMENT G - Removed - Privileged & Confidential