



Comment on Proposed Amendment 3 to .COM Registry Agreement

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

This document is the BC's response to the Proposed Amendment 3 to the Registry Agreement for legacy gTLD .COM, which was published for public comment on 3-Jan-2019.¹

The .COM registry agreement was previously amended in 2016, just after ICANN approved its Root Zone Maintainer Agreement with Verisign, which extended that agreement term to 2024². That Oct-2016 Amendment adjusted the .COM agreement term to 2024 in order to match that of Verisign's Root Zone Maintainer Agreement. It also committed ICANN and Verisign to further amend the .COM agreement to enhance Security, Stability and Resiliency (SSR) of the DNS and to make the agreement consistent with any changes to its Cooperative Agreement with the U.S. Department of Commerce:

*The parties shall cooperate and negotiate in good faith to amend the terms of the Agreement (a) by the second anniversary of the Amendment Effective Date, to preserve and enhance the security and stability of the Internet or the TLD, and (b) as may be necessary for consistency with changes to, or the termination or expiration of, the Cooperative Agreement between Registry Operator and the Department of Commerce.*³

The subject of this public comment, Amendment 3 to the .COM agreement and the accompanying Letter of Intent, is being proposed in order to implement the above commitments made in Amendment 2. As described by ICANN, Amendment 3 would accomplish 5 primary objectives:

- Alignment of certain terms of the .com RA with Amendment 35 to the Cooperative Agreement, including the .COM maximum pricing provision for registry services
- Alignment of certain technical and reporting obligations for the .COM TLD with those in the Base gTLD Registry Agreement
- Incorporation of commitments related to the implementation of the Registration Data Access Protocol (RDAP)
- Formalization of a framework by which ICANN and Verisign will work together to support additional enhancements to security and stability of the DNS, including to help combat DNS security threats
- Additional funding to ICANN to continue to conduct, facilitate and support activities that preserve and enhance the security, stability and resiliency of the DNS, in support of Verisign's and ICANN's longstanding commitment in this area and ICANN's core mission to ensure the stable and secure operation of the Internet's unique identifier systems

¹ See ICANN public comment page at <https://www.icann.org/public-comments/com-amendment-3-2020-01-03-en>

²9-Aug-2016 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.c>

³15-Sep-2016 Board Resolution, <https://www.icann.org/resources/board-material/prelim-report-2016-09-15-en>

Comment

In general, the BC supports the proposed renewal agreement negotiated between ICANN and the operator of .COM, because it incorporates important Public Interest Commitments from the Base Registry Agreement and provides \$20 million in committed funding for SSR.

Below, the BC offers specific comments and recommendations on aspects of the proposed amendment.

ICANN should seek community input *before* negotiating registry agreement renewals

In our comments on amendments to .BIZ, .ORG, .INFO, and .ASIA, the BC said that “ICANN should seek community input *before* negotiating registry agreement renewals.”

We acknowledge that Amendment 3 to the .COM agreement was generally described in Amendment 2 commitments when that was posted for public comment in Sep-2016.

However, as the BC noted in our 2016 comments on the proposed Base RA and recent renewal agreements, we are not content to merely comment after ICANN has already negotiated and approved changes. The BC again asks ICANN to solicit community input *before* it enters negotiations with contract parties, so that ICANN understands the priority concerns of business users and registrants when it negotiates on behalf of the community.

Implementing Thick Whois in .COM

The BC supports implementation of the already-approved consensus policy for Thick Whois, and we note that Verisign has yet to implement Thick Whois for its .COM and .NET registries.

Since 2018 Verisign has asked ICANN to delay its implementation deadline pending contractual changes and EPDP work, while acknowledging that it “has completed all technical and operational work necessary to begin accepting thick data from registrars.”⁴ That rationale was reflected in GNSO recommendation 7 from EPDP Phase 1, for data transfer from Registrar to Registry “provided an appropriate legal basis exists and data processing agreement is in place”.⁵

Negotiations for this Amendment 3 *could* have presented ICANN an opportunity to ask Verisign to implement Thick Whois without further delays. That *might* have entered the discussion if ICANN had solicited community input before negotiating, as we noted above.

However, ICANN Org already has authority to enforce Thick Whois as a consensus policy in .COM, so the BC asks ICANN Org is to expedite its evaluation of whether and how EPDP consensus policy could allow enforcement of the Thick Whois consensus policy for both .COM and .NET. Ultimately, as addressed in detail below, the continued absence of Thick Whois in .COM acutely diminishes potential benefits intended elsewhere in the Proposed Amendment 3.

⁴ 21-Sep-2018 Verisign letter to ICANN, at <https://www.icann.org/en/system/files/correspondence/kane-to-atallah-21sep18-en.pdf>

⁵ EPDP Phase 1 Recommendations, 21-Feb-2019, at page 9. <https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf>

Uniform Rapid Suspension (URS)

The BC notes that Amendment 3 does not require .COM to include Uniform Rapid Suspension (URS). URS was designed to give businesses a cost-effective way to stop an expected increase in cybersquatting in new gTLDs, because it is faster and less expensive than the Uniform Domain Name Dispute Resolution Policy (UDRP). Since its adoption with new gTLDs, URS has not been widely used by trademark owners, who continue to rely mainly upon the UDRP. As a result of its low uptake, the URS's standards have not yet resolved in terms of its uniform application and interpretation of clear and convincing evidence over a wide body of case law.

Nevertheless, the benefits of URS could be significant for small businesses and individuals.

In our comments on the proposed renewals for .MOBI and .NET in 2017, the BC said that renewing legacy gTLD operators should not be compelled to accept URS within the context of RyA renewal negotiations, because we hoped that URS would become GNSO consensus policy.⁶

We hope that URS will become GNSO consensus policy as an outcome of the ongoing *Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working Group*. This Working Group (WG) will be reviewing the efficacy and administration of the URS later this year and is charged by its Charter with recommending whether the URS and other relevant new gTLD RPMs should become ICANN Consensus Policy and thereby applicable to legacy gTLDs.

The BC continues to believe that the Policy Development Process (PDP) is the best path for the implementation of URS, since it works across all gTLDs, instead of depending on individual contract negotiations. A consensus policy for URS would be binding upon COM, and Verisign proposed that URS be considered for public comment as a potential Consensus Policy in its input to the RPMs PDP⁷:

... URS in practice has proven viable, efficacious, and fit-for-purpose as a rapid remedy for clear-cut instances of protected mark abuse. We believe that inviting public input will be valuable, indeed essential, in informing the RPM PDP WG in its future work.

...URS is a valued supplement to the UDRP, is targeting clearly infringing domains, is not being abused by complainants, and provides meaningful due process and appeals opportunities to domain name registrants.

However, the RPM Review WG has not yet made recommendations for URS as a Consensus Policy.

Despite our reservations about second-guessing a PDP, the BC supports importing registrant protections from the new gTLD base agreement—including Specification 7, Specification 11, and URS -- in any contractual negotiation opportunity that arises for legacy gTLDs.

This is consistent with our long-held support for RPMs and registry accountability and reflects our growing frustration with the GNSO Policy Development Process to advance these protections for business registrants. We welcome future implementation of consensus policy on RPMs. ICANN should not miss any opportunity to extend existing new gTLD registrant protections to legacy gTLDs, particularly to help small and medium enterprises protect their domain names and their customers.

⁶ BC comment on .NET renewal, May-2017, at https://www.bizconst.org/assets/docs/positions-statements/2017/2017_05May_30%20BC%20Comment%20on%20.NET%20RyA%20renewal.pdf

Also see BC comment on MOBI renewal, Feb-2017, at http://www.bizconst.org/assets/docs/positions-statements/2017/2017_02February_01%20BC%20Comment%20on%20MOBI%20RyA%20.pdf

⁷ Verisign proposal to the *Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP Working Group*, 30-Aug-2018, at <https://community.icann.org/download/attachments/93126760/URS-Proposal-31.pdf?version=1&modificationDate=1537973003000&api=v2>

Most recently, the BC approved this new position on the priority of obtaining RPMs and registrant protections in our comments supporting the proposed registry agreements for .ORG and .INFO⁸, and also for .ASIA⁹.

Combatting DNS Abuse via Public Interest Commitments (Spec 11)

The BC has been a tireless advocate for increasing the role and efforts of ICANN and contracted parties in fighting DNS Abuse, including our statements at the Montreal meeting¹⁰. And while the relative proportion of abusive domains in .COM is small, there are numerically many .COM domains used to facilitate abuse. So, the BC welcomes Amendment 3 as a way to increase Verisign's efforts to combat DNS abuse in .COM.

With inclusion of Specification 11 in Amendment 3, we appreciate that ICANN and Verisign acknowledge that efforts to ensure security, stability, and resiliency in .COM are not in conflict with Amendment 35 of Verisign's Cooperative Agreement with NTIA, which requires .COM to be operated in a "content neutral manner".¹¹ The Cooperative Agreement also states "Verisign will participate in ICANN processes that promote the development of content neutral policies for the operation of the DNS."

However, the BC wishes to highlight ICANN Org's statement in Montreal that it has limited enforcement powers to use Spec 11 to combat listed "DNS abuses". As the BC recommended in our letter of 9-Dec-2018¹²:

Enforce current contract language

In the immediate term, ICANN should proactively use existing tools within the RA and RAA to mitigate DNS abuse. The RA and RAA, particularly when taken together, outline:

- An obligation for registries to require registrars to include language in registration agreements prohibiting certain types of security threats;
- An obligation for registries to require registrars to include consequences for registrants who engage in prohibited abusive activities, up to and including suspension of the domain name; and
- Requirements for registrars to take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse.

More precisely, Specification 11.3(a) of the RA (with emphasis added):

Registry Operator will include 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

⁸ Apr-2019 BC Comment on Proposed Renewal of Registry Agreements for .INFO and .ORG, at

https://www.bizconst.org/assets/docs/positions-statements/2019/2019_04April_29%20BC%20Comment%20on%20.INFO%20and%20.ORG%20Registry%20Agreements.pdf

⁹ 7-May-2019 BC Comment on Proposed Renewal of Registry Agreement for .ASIA, at

https://www.bizconst.org/assets/docs/positions-statements/2019/2019_05May_07%20BC%20Comment%20on%20.ASIA%20Registry%20Agreement.pdf

¹⁰ BC Statement on DNS Abuse, 28-Oct-2019, at https://www.bizconst.org/assets/docs/positions-statements/2019/2019_10October_28%20BC%20Statement%20on%20DNS%20Abuse.pdf

¹¹ Amendment 35 to the NTIA-Verisign Cooperative Agreement, 28-Oct-2018, at https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf

¹² BC Follow-up regarding DNS Abuse discussions at ICANN66 , 9-Dec-2019, at https://www.bizconst.org/assets/docs/positions-statements/2019/2019_12Dec_09%20BC%20follow-up%20to%20DNS%20Abuse%20discussions%20at%20ICANN%2066.pdf

activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

Further, the RAA includes useful abuse mitigation language in Section 3.18 (emphasis added):

3.18 Registrar's Abuse Contact and Duty to Investigate Reports of Abuse.

3.18.1 Registrar shall maintain an abuse contact to receive reports of abuse involving Registered Names sponsored by Registrar, including reports of Illegal Activity. Registrar shall publish an email address to receive such reports on the home page of Registrar's website (or in another standardized place that may be designated by ICANN from time to time). Registrar shall take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse.

This language provides an avenue for mitigation of very specific types of abuse.

However, we learned at ICANN66 that ICANN Compliance narrowly construes this language as only requiring specific terms to be included in the registration agreement itself, but not requiring enforceable action on the registrar's part via the registration agreement.

However, this interpretation appears to ignore the second part of the section that requires “consequences for such activities, including suspension of the domain name.” **We note that imposition of consequences would need to be “consistent with applicable law and any related procedures,” so some violations may require immediate suspension, while it may be sufficient to defer to existing legal mechanisms for other violations.**

We suggest that ICANN Org monitor whether registrars have in fact created a procedure imposing consequences, and do impose these consequences, consistent with applicable law. Should ICANN Compliance determine that these procedures have not been created, or enforced in accordance with their terms, ICANN Compliance should have the ability to enforce the requirements in RA Section 11.3(a) and RAA Section 3.18.1 as a method of mitigating abuse.

Prioritize abuse complaint handling

Curiously, despite agreement in the ICANN community that DNS abuse is a significant and growing problem, and ICANN having contractual tools to hold contracted parties accountable for prohibiting registrants from engaging in certain abusive activities, ICANN's compliance department issued only seven breach notices and terminated one registrar over abuse-related issues between January 2014 and September 2019.

Without context, one may conclude that all registries and nearly all registrars are complying with the terms of their contractual agreements with ICANN, and that consequently, DNS abuse is a trivial issue. However, ICANN's own audit reports note that the second most common registrar deficiency is non-compliance with even the most basic elements of Section 3.18 of the RAA – such as publishing an abuse contact and actually monitoring that mailbox.

ICANN Org, simply put, must prioritize the handling of DNS abuse-related complaints. ICANN Compliance needs to shift from a model driven on churning through a high number of low impact issues (and tickets) to focusing on issues that present real threats to the security of the DNS and cause actual harm to consumers, businesses, governments, and NGOs. ICANN Compliance must now focus its efforts more precisely, including on contracted parties that operate in bad faith by either specifically marketing their services to bad actors or by engaging in bad acts that are prohibited under the RA and RAA themselves.

Strengthen contracts

ICANN Org is a third-party beneficiary of the Registry-Registrar Agreement (RRA), and can take action based on that status¹³.

Despite the above, if ICANN Org believes it is unable to meaningfully enforce current contractual language, as has been suggested, it is further incumbent upon the ICANN Board to direct ICANN Org to

¹³ See, e.g., Article 10.4 of [.OVH RRA](#): “Article 10.4. Third-Party Beneficiaries The Parties expressly agree that ICANN is an intended third-party beneficiary of this Agreement.”

proactively seek the necessary amendments to the RAA. ICANN's current negotiations with registrars to amend the RAA to address the adoption of RDAP presents ICANN Org with the perfect opportunity to clarify this language. Clarify action steps for registrars

The BC calls on the Board to direct ICANN Org to issue an advisory that clarifies what is meant by "reasonable and prompt steps to investigate and respond appropriately to any reports of abuse." ICANN may initially wish to look to the framework to address abuse for guidance on what constitutes "reasonable and prompt steps" with regard to particular forms of DNS abuse. The BC also notes that such an advisory has already been issued with respect to Specification 11 (3)(b).

We included that lengthy excerpt from our 9-Dec letter in order to show support for adding Spec 11 to .COM as part of Amendment 3, while focusing the Board on improving enforcement of both Spec 11 and the RAA. Our above recommendations would ensure that the obligations and efforts of Verisign and every other registry with Spec 11 might actually be helpful in fighting DNS abuse. Moreover, our recommendations for enforcement of the RAA (above) against rogue registrars are likely to be even more effective in combatting DNS abuse than any obligations enforced against the registries.

Importantly, despite such support and recommendations, the benefits of applying Spec 11 to .COM, are acutely diminished by the continued absence of Thick Whois in .COM. In particular, the periodic technical security threat analysis required under Spec 11, Section (b), will be severely hindered if performed using only Thin Whois data, and will most likely depend upon reactive third-party complaints as opposed to proactive security scans and measures.

Moreover, no specific rationale has been provided for the decision to exclude the Spec 11, Section 2, requirement that registry operators adhere to the Public Interest Commitment Dispute Resolution Procedure (PICDRP). The BC notes the absence of the PICDRP from Proposed Amendment 3, and concludes that the public itself lacks any ability to enforce any .COM Public Interest Commitments included in Spec 11. The ordinary Spec 11, Section 3(c), commitment to operate in "a transparent manner consistent with general principles of openness and non-discrimination" is also noticeably absent from the .COM Proposed Amendment 3. In conjunction, the .COM Public Interest Commitments included in Spec 11 appear to lack any real accountability to the public, and would be more aptly labeled as "Security Commitments".

Combatting DNS Abuse via Letter of Intent and \$20 million in new SSR funding

Amendment 3 is accompanied by a Letter of Intent (LOI) obligating ICANN and Verisign to "help combat Security Threats" and requires Verisign to contribute \$20 million for "conducting, facilitating or supporting activities that preserve and enhance the security, stability and resiliency of the DNS... including Security Threat mitigation".¹⁴

The LOI commits to processes where the ICANN community can develop "best practices for registry operators to address Security Threats." The BC is therefore keenly interested in the initial and evolving list of abuses that are included in the definition of Security Threats.

The LOI has an initial definition of "phishing, malware distribution, and botnet command and control". Those threats are indeed significant and match with Spec 11 3(b). Yet those activities include just 3 of the 8 DNS Abuses listed in Spec 11 3(a):

¹⁴ Proposed Letter of Intent (LOI) between ICANN and Verisign, at <https://www.icann.org/sites/default/files/tlds/com/com-proposed-loi-03jan20-en.pdf>

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

The BC recommends that ICANN and Verisign amend their LOI to add the other DNS Abuses in Spec 11 3(a). If not, we would insist that ICANN Org commit to quickly initiate a public process where the “definition may be expanded to include other threats,” as provided in the LOI.

Before ICANN Org makes decisions about how to spend the SSR funds provided by Verisign, it should follow recommendations of the most recent community SSR Review and seek the advice of the Security and Stability Advisory Committee (SSAC). Moreover, ICANN should publish its annual notice to Verisign “confirming that ICANN has incurred costs up to or in excess of the Payment Amount in conducting SSR Activities.”¹⁵

The BC recommendations above are intended to increase the reach and effectiveness realized from the additional \$20 million in funding from Verisign, and we fully support the LOI as part of Amendment 3.

Limiting increases in .COM Domain name registration prices

Under Amendment 3, .COM domain name wholesale prices would no longer be subject to the fixed cap of \$7.85 that has existed since 2012 per Verisign’s Cooperative Agreement with its national regulator, the U.S. Department of Commerce. ICANN is proposing to replace the fixed cap with the maximum permitted price increases approved by the Commerce Department in the Oct-2018 amendment to the Cooperative Agreement.¹⁶

The Cooperative Agreement allows Verisign to pursue with ICANN an increase in .COM prices up to 7% in the final 4 years of each 6-year agreement, such that .COM prices could not exceed \$10.26 until Oct-2026. If the maximum increases were applied, the average annual increase over the 6-year period would be about 4.5% per year.

The BC has no practical objection to price increases that average just 4.5% per year for businesses who register .COM domains. Some BC members are concerned that Verisign has not provided justification for increasing .COM prices, though we are not aware of any requirement for gTLD operators to provide such justification. And while some BC members would prefer that ICANN seek competitive bids to operate existing registries, the BC has generally supported *presumptive renewal* performance incentives in registry agreements.

In our 2016 comment on Proposed Amendments to Base New gTLD Registry Agreement, the BC said, “it is not ICANN’s role to set and regulate prices”.¹⁷ This position regarding price regulation was also adopted by the BC in its Apr-2019 comment on proposed renewals of ORG and INFO.¹⁸

¹⁵ Page 2 of Proposed Letter of Intent (LOI) between ICANN and Verisign, at <https://www.icann.org/sites/default/files/tlds/com/com-proposed-loi-03jan20-en.pdf>

¹⁶ Amendment 35 to NTIA-Verisign Cooperative Agreement, 28-Oct-2018, at https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf

¹⁷ Jul-2016 BC Comment on Proposed Amendments to Base New gTLD Registry Agreement, at https://www.bizconst.org/assets/docs/positions-statements/2016/2016_07july_20%20bc%20comment%20on%20proposed%20gTld%20base%20registry%20agreement%20final.pdf

¹⁸ Apr-2019 BC Comment on Proposed Renewal of Registry Agreements for .INFO and .ORG, at https://www.bizconst.org/assets/docs/positions-statements/2019/2019_04April_29%20BC%20Comment%20on%20.INFO%20and%20.ORG%20Registry%20Agreements.pdf

However, in 2017 the BC supported a proposed .NET registry agreement that retained historical price caps of 10% per year. We noted in that comment, “While the BC does not believe that ICANN should have the role of price regulator in a competitive market, we are comfortable with extending these price controls into the next term of the .NET contract.” Although we do not support ICANN regulating prices and prefer a genuinely competitive market, the BC was “comfortable” accepting that price controls were willingly negotiated and agreed to by Verisign and ICANN. And in the case of .COM, Verisign’s national regulatory body has set the terms of price regulation.

In our comments on .ORG’s new agreement with unregulated pricing, we recommended:

[W]henver price caps are removed, it is important for contracted parties to responsibly keep prices at reasonable levels, to maintain consumer trust and to ensure price predictability for their existing and prospective registrants. It would negatively affect business registrants if contracted parties were to take undue advantage of this greater flexibility by substantially increasing renewal prices for an existing registrant who has significantly committed to its domain name.

It is not now predictable how .ORG will change its domain pricing, but Amendment 3 provides some predictability for .COM, where prices would be limited to an average increase of 4.5% per year – assuming Verisign does not seek increases per Section 7.3(d)(iii), discussed below. Predictability is available to registrants who choose to lock-in prior prices for 10 years, through an existing provision of the .COM registry contract. In conjunction with Amendment 3, the BC suggests that ICANN and Verisign create a mechanism to notify .COM registrants about their option to lock in pricing.¹⁹

Consistent with prior BC positions and based on the above analysis and the benefit of adding Spec 11 and \$20 million in new SSR funding, the BC supports the price increase limits set forth in Amendment 3 to the .COM agreement.

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This comment was drafted by Steve DelBianco, Andy Abrams, Zak Muscovitch, Alex Deacon, Mason Cole, Barbara Wanner, and Jay Sudowski.

It was approved in accord with the BC charter.

¹⁹ Section 7.3(f), .COM Registry Agreement, <https://www.icann.org/resources/pages/agreement-2012-12-05-en>