

## Summary of Comments on the Proposed VeriSign Settlement

On 24 October 2005, ICANN announced a proposed settlement to its litigation with VeriSign and opened a forum for public comments on the proposed settlement documents <<http://www.icann.org/announcements/announcement-24oct05.htm>>.

Following this announcement, ICANN has received substantial feedback from multiple individuals and groups within the community, representing a diversity of perspectives. ICANN notes with appreciation the community's extensive contributions of time, information, and thoughtful commentary in response to its requests for input on the proposed VeriSign settlement during this time period.

In this public review process, ICANN has solicited concise, actionable comments. ICANN Board and staff have listened carefully to the statements put forward from the community and are considering the feedback received. The comments incorporate a diversity of views, with broader agreement on some issues than on others. ICANN will continue to consider the concerns expressed here as it moves forward in the process.

### Public Input Process

The following provides an overview of the public input process to date:

ICANN initiated the consultation process at the time of its original announcement with the opening of the public forum and with letters to the Chairs of ICANN's Supporting Organizations, constituencies, and advisory committees. Board liaisons also took actions within their designated communities. Consultations took place via individual and group conference calls with gTLD registrars, gTLD registries, the ccNSO, GNSO constituency chairs, NRO/ASO members, and GAC members.

ICANN continued the consultation process throughout its recent meeting in Vancouver (between 29 November and 1 December 2005). All constituencies and committees were asked for comments and invited to meet with the Board. No decision with regard to the settlement was planned for the Vancouver meeting. Rather, ICANN's intention was to use the meetings to continue to capture feedback and gather information before proceeding further.

Within the Generic Names Supporting Organization (GNSO), the ICANN Board and senior staff held face-to-face meetings with most constituencies during the Vancouver meeting. Additionally, Board and senior staff held consultations with the At-Large Advisory Committee (ALAC) and the Country-Code Names Supporting Organization (ccNSO). The following statements were received from ICANN's Supporting Organization Councils, constituencies and committees:

- GNSO Council - <http://gnso.icann.org/mailing-lists/archives/council/msg01613.html>
- ccNSO Council - <http://www.ccnsso.icann.org/minutes/minutes-02dec05.pdf>

- At-Large Advisory Committee - <http://www.alac.icann.org/announcements/announcement-02dec05.htm>
- gTLD Registries Constituency - <http://www.gtldregistries.org/news/2005/2005-12-06>
- Registrars Constituency - <http://gns0.icann.org/mailling-lists/archives/registrars/msg03679.html>
- Business & Commercial Constituency - <http://forum.icann.org/lists/settlement-comments/msg00398.html>
- ISP Constituency - <http://gns0.icann.org/mailling-lists/archives/ispcp/msg00180.html>
- Noncommercial Users Constituency - <http://www.ncdnhc.org/policydocuments/ncuc-icann-verisignsettlement.pdf>
- Intellectual Property Constituency - <http://forum.icann.org/lists/settlement-statements/msg00000.html>

On 29 November 2005, ICANN constituencies and an advisory committee sponsored a workshop on the proposed VeriSign settlement, which incorporated perspectives from various ICANN stakeholders, an open microphone for individual participants to comment, and a discussion of common themes to reach consensus on the primary areas of commentary. <[http://www.icannwiki.org/index.php/ICANN-Verisign\\_Settlement\\_Workshop](http://www.icannwiki.org/index.php/ICANN-Verisign_Settlement_Workshop)>.

During the public forum on 2 December 2005, ICANN President and CEO Paul Twomey presented the community with a briefing on actions leading up to the proposed VeriSign settlement, and a summary of comments and questions communicated to date on the proposed settlement <<http://www.icann.org/topics/vrsn-settlement/twomey-settlement-presentation.htm>>.

Following this presentation, members of the community were invited to present comments in response, particularly regarding any areas of concern, which had been omitted or mischaracterized. Those who were not present at the meeting in Vancouver were able to submit comments via email. A complete transcript of the public forum in Vancouver is available at <<http://www.icann.org/meetings/vancouver/captioning-public-forum-i-02dec05.htm>>.

On 4 December 2005, Vint Cerf, Chair, ICANN's Board, announced that written comments would be accepted (see <http://forum.icann.org/lists/settlement-comments/>) through 7 December 2005 and a public report summarizing, analyzing and organizing the feedback provided on the .COM proposal would be issued by 11 December 2005 <<http://www.icann.org/announcements/announcement-05dec05.htm>>.

## Summary of Comments Received

The following is a summary of the comments that have been submitted by members of the community in all of the fora mentioned above since the proposed settlement agreement was posted. The order of the comments presented is no indication of their relative importance. Some diversity clearly exists on these issues. There is broader agreement on some issues than on others, and there are counterpoints to many of the concerns.

This summary is organized into six general categories: (1) Comments Relating to ICANN's Security and Stability Mission; (2) Comments Relating to Registry Price Controls; (3) Comments Relating to ICANN Funding Mechanisms; (4) Comments Relating to Registry Renewal Terms;

(5) Comments Relating to Registry Responsibilities; and (6) Additional Process-Related Comments.

### ***1. Comments Relating to ICANN's Security and Stability Mission***

- An end to litigation with VeriSign will provide increased stability within the ICANN environment and eliminate a drain on resources that can be better used elsewhere.
  - The manner in which new registry services are considered under the proposal will improve transparency, predictability and timeliness.
    - The proposal addresses the need for certainty and quicker time frames for new registry services.
    - Use of binding arbitration is more in keeping with global norms and will avoid future litigation.
  - The same community benefits could potentially be achieved by continuing the litigation and re-bidding .COM.
  - Legal analysis is requested to help the community understand the merits of the proposal.
  
- The proposed settlement may hinder ICANN's ability to increase security and stability.
  - The agreement removes apparent incentives for implementation of improvements in security and stability.
  - The proposed agreement may expose ICANN to litigation risks from other parties.
  
- The procedure for approval of new registry services included in the .COM registry agreement (and all other recent ICANN registry agreements) is not identical to the procedure developed through the GNSO policy development process.
  - Inconsistency with other registry contracts is potentially unfair to other registries.
  - The proposed agreement freezes the .COM registry services approval process from any changes developed through the GNSO for a three-year period, matching the similar term contained in the .NET Registry Agreement signed earlier this year. If the process turns out to be flawed, it may be susceptible to abuse by VeriSign, within the three-year window.
  - Deleting the proposal's registry services process would allow the existing ICANN-adopted policy (and development and refinement process) to be used during the term of the agreement.
  - The current .COM agreement requires that any new registry agreement be in substantial conformity with other gTLD agreements; this is not the case with the proposed agreement.
  - Introduction of new registry services is a policy question already settled within ICANN. Addressing this in a bilateral settlement sets a bad precedent that might constrain the future policy development role of the GNSO.
  
- The Root Server Management Transition Agreement has positive aspects, but additional clarification and oversight would be helpful.

## 2. *Comments Relating to Registry Price Controls*

- Registry prices should be based only on costs.
  - VeriSign should be able to increase prices only based on increased costs, especially given the .COM market share compared to other gTLDs.
    - ICANN should have the capacity to seek competitive price proposals from other registry operators to ensure that the ICANN community receives the benefits of competition for the operation of the .COM registry.
    - Allowing VeriSign to raise its prices by up to 7% per year is inappropriate because of the .COM "monopoly"; the environment is not competitive, so pricing regulations need to take this into account.
    - Centralization of what amounts to over 50% of all names in one registry for perpetuity embeds a significant competitive dominance in the market; long-term supplier dominance typically runs counter to user interests.
    - In the recent competitive process for .NET, VeriSign significantly lowered its registry fees; there is no reason to allow VeriSign to raise prices for the larger .COM registry.
    - Presumptive renewal combined with the perpetual right to increase fees would enable VeriSign to exercise its market power to raise prices without regard to its costs or any competitive constraints.
    - Removal of price caps on the dominant player disadvantages less established registry operators.
  - The current .COM agreement requires a cost justification for increased registry prices
    - A “discovery” of costs is needed.
    - Increased per-domain name cost seems counter-intuitive to what is happening in the industry more generally.
    - An independent economist should study this market and the effects of VeriSign’s market share and potential price changes.
  - A policy needs to be developed within ICANN on registry operators' latitude to make pricing decisions.
  - A top-level domain should be operated as a public trust and for the public good, not to maximize the profits of the domain operator.
- The bilateral settlement pushes costs to third parties that weren’t involved in the negotiation.
  - Registrars will absorb increased prices.
    - Due to competitive aspects of the marketplace, registrars will bear costs out of dwindling margins.
    - Pricing increases diminish registrar capability to operate efficiently and differentiate; different registrars are affected differently.
  - Increased registry prices will be passed on to consumers (with developing countries being disproportionately affected by any price increases). While the effect to individual domain name holders may be small, the “small bits” amount to a significant amount of funds to be received from users as a whole.
    - Registrants are locked into their existing TLDs (due to investments and branding).
    - Registrants should be able to lock in existing rates for longer than the ten-years allowed under current agreements. Since registrars have so many

different pricing models and bundled services, ICANN might not easily be able to ensure that the 10-year lock is made available to registrants through all registrars offering .COM domain names.

- Registrants did not benefit from the price reduction in .NET registry prices from \$6.00 to \$4.25; ICANN may not be able to ensure that registrants benefit – or are not adversely affected – by .COM fee and price changes.
- The overall cost increase (if passed on to users) of a change from \$6-\$9 over seven years for today's 40.3 million .COM names is around \$0.4 billion (assuming that VeriSign increases its prices by the maximum allowable rate every year, and there were no resulting decreases in the total number of .COM names registered).

### ***3. Comments Relating to ICANN Funding Mechanisms***

- The settlement enhances the financial security of ICANN as an ongoing enterprise, eliminates a source of continuing distraction, and benefits the entire Internet community.
  - Additional resources provided to ICANN in the agreement can be utilized to improve contractual compliance efforts and other important purposes as determined by the community.
- The proposal makes VeriSign the permanent, concentrated source of the majority of ICANN's revenue.
  - ICANN makes itself significantly dependent on an entity not accountable to the public.
  - The concentration of revenue from a single source is not a good business model.
  - The proposal endangers ICANN independence and makes it appear beholden to VeriSign.
- ICANN and VeriSign could agree to raise fees in the future through their contract without providing the community an opportunity to have input. This would hamper transparency, predictability, and accountability.
  - Finance and funding models in the proposal can be improved by providing greater accountability and visibility.
  - If ICANN receives significantly more revenue, it should significantly improve the transparency of its budget and reporting processes.
- Greater input is needed from ICANN's constituencies, especially those whose members (as gTLD registrants) are the ultimate source of this funding.
  - ICANN should provide projections about the size and sources for the ICANN budget over the next few years, as contemplated by the proposed .COM agreement.
  - ICANN should consult with the registrant and At-Large community, which is the source of ICANN's funds, before it fundamentally reshapes its funding mechanism through new contracts with the registries.
  - ICANN funding is a policy decision and should not be set through bilateral negotiation.

- The GNSO should consider how the registry-registrar-registrant relationship works with respect to the funding model of ICANN.
  - Significant changes in ICANN’s funding levels and sources may call for significant restructuring of ICANN itself.
- The proposal bypasses the existing budget process and implements a “private arrangement” for funding.
  - The proposed new ICANN fee that would be assessed on VeriSign and passed on to the registrars would result in excess of approximately \$150 million dollars to ICANN over the term of the Agreement, and would be an end-run around the existing registrar fee approval process (which allows for registrars accounting for payment of one-third of ICANN fees to veto any registrar-level contributions).
  - The proposed agreement essentially eliminates the checks and balances against ICANN revenue increases provided by the present gTLD registrar fee approval mechanism.
  - Any transaction fees that ICANN needs to collect from registrars (and hence registrants) should be assessed through the current transaction fees charged by ICANN to registrars and be subject to the existing registrar fee approval process.
- The agreement creates the existence of “special funds” from a portion of the increased revenue that might allow ICANN to spend without appropriate community review; the Board should confirm that any special funds would be explicitly incorporated into the ICANN strategic planning process and the ICANN budget review process.
- There is support for creative short-term funding solutions (willingness to provide alternative funding arrangements), to allow more time to work out logistics for alternative sources of funding and budget approval, and to consider the settlement proposal.

#### ***4. Comments Relating to Registry Renewal Terms***

- Presumptive renewal provisions result in important benefits for the community.
  - Expectation of a renewed agreement encourages registry operators to make the necessary investments for security and stability.
  - The proposal acknowledges that an immense amount of investment and innovation is necessary to take the Internet to the next level.
  - The proposal allows companies to invest in the future knowing that they will be able to recover start-up costs.
- Presumptive renewal adversely affects the community.
  - The presumptive right of renewal grants VeriSign the .COM registry in perpetuity, precluding the existence of “real competition” in this sector of the DNS for a long time.
  - The guaranteed long-term dominance of one supplier runs counter to the principles of competitiveness, innovation, and accountability, which are core principles that are important to all ICANN stakeholders, and are the very measures on which ICANN will be judged by the outside world.

- This right, existing in the prior contract, did not need to be carried over into the new proposed agreement; presumptive right of renewal should be deleted.
- Presumptive renewal combined with the right to increase fees would enable VeriSign to exercise its market power to raise prices without regard to its costs or any competitive constraints (which leads to price increases); any settlement that includes both presumptive renewal and a unilateral right to increase fees should be rejected.
- Presumptive renewal provisions in the proposed agreement should be modified.
  - The factors by which ICANN can either terminate the proposed agreement or re-bid the agreement at its conclusion have been weakened in comparison to the current agreement.
  - The presumptive renewal clause in the proposed agreement should be replaced with the existing renewal provisions in the current .COM agreement.
  - Renewal should be compliance-based and procedural in nature – not a negotiation.
  - If ICANN allows presumptive renewal, such renewal should include guarantees of price reductions based on industry index or community review.
  - To the extent there is some automatic renewal process, it should be accompanied by guaranteed investment levels, improvements and/or other assurances that continued control of the .COM space by VeriSign is in the continued best interest of the Internet community. (If VeriSign is unwilling to sign a contract under such terms, there is no shortage of other organizations that would be eager to bid for the contract and make the appropriate commitments to ICANN.)
- To eliminate the possibility that the settlement could afford the dominant player an unfair competitive advantage, ICANN should commit to extending certain specific contract improvements, such as presumptive renewal, to similarly situated registry operators on an equitable and non-discriminatory basis. As provided in the existing .COM agreement, the resulting agreement should be substantially the same as existing registry agreements then in effect.
- Presumptive renewal of registry contracts is a policy issue and should be the subject of a PDP.

## ***5. Comments Relating to Registry Responsibilities***

- The proposed new .COM agreement allows VeriSign to make commercial use of traffic data regarding domain names for almost any purpose, and without any obligation to follow the procedure for new registry services with respect to such uses.
  - This raises concerns about competition, protection of proprietary activities, and personal privacy, which could adversely affect the Internet community.
  - Traffic data belongs to users, not to providers; traffic data could be abused; the proposal's provision on the use of traffic data should be amended.
  - Data mining allowed under the proposal would be illegal in countries with data privacy laws.

- The dividing line between traffic data used to monitor and improve the operation of the registry, and new registry services based on traffic data, should be more clearly delineated.
  - Traffic data provisions enable VeriSign to leverage its natural upstream monopoly position into downstream competitive markets (e.g. registrars and search engines); it is not in the interest of users to have competitive markets monopolized through capture of upstream inputs.
  - Any by-product of the monopoly registry service should be made available on a non-discriminatory basis to all downstream competitors.
- The issue of the ownership rights relating to traffic data should be incorporated into the GNSO PDP on New gTLDs.
    - The notion of exclusive rights to data obtained from the operation of the .COM domain needs to be clearly defined and qualified so that any associated policy aspects are adequately understood and dealt with in the appropriate forum. Without additional specificity, there is large-scale potential for abuse.
    - This traffic data could be an extremely valuable commercial asset; further discussion is warranted about whether it should be allocated to VeriSign without further restrictions.
- In the current agreement, VeriSign promised to invest at least \$200 million in research, development and infrastructure improvements, and a substantial proportion of this prior to November 2007.
    - VeriSign should account to the community for its actions to carry out Appendix W before the new .COM agreement takes effect, releasing a public report on spending/actions to date and whether previous obligations were met.
    - VeriSign pledged to prioritize in this effort the design and development of “a Universal Whois Service that will allow public access and effective use of Whois across all Registries and all TLDs.”
      - VeriSign should be asked to make a similar commitment to invest in improvements of the .COM registry, and to move toward greatly improved Whois service.
      - Consideration by ICANN of implementing requirements that registry operators meet specific levels of capital investment may be beneficial.
- ICANN should have a Service-Level Agreement with VeriSign to ensure minimum performance levels for query response times.

## ***6. Additional Process-Related Concerns***

In addition to the substantive comments on the above issues, ICANN received various statements about the process used for considering the proposed settlement. Some comments expressed a wish that the settlement, renewal and revenue collection processes could have been dealt with separately.



Some comments expressed concern that there might not be enough time for complete review to be undertaken and feedback to be given to ICANN before a decision was made on the proposal. Accordingly, some suggested that the Board postpone a decision on the proposed settlement until further dialogue could take place or until policy development on specific issues could be completed.

Some comments also referenced the Core Values found in the ICANN Bylaws and underscored the need for a change in process which promoted these values.

Finally, some comments indicated that the process and timing for consideration of the proposal had been confusing and unpredictable. Certainty about the timeline and process going forward was requested, along with clarity regarding the degree of flexibility in changing the proposal based on community input.