**Introduction:**

Verisign is grateful to the IRP IOT for the efforts that it has undertaken on the Updated Supplementary Procedures. This is important work toward establishing the revised IRP provided by the ICANN Bylaws adopted as part of the IANA Transition.

**Comments:**

On the subject of Rule No. 4, Time for Filing, Verisign offers the following comments.

The Bylaws, including their goals of fundamental fairness, reasonable certainty in community expectations, and the development of precedent, require the addition of a period of repose to Supplementary Rule 4. Periods of repose are a cornerstone of virtually every system of international and local civil and criminal law. The absence of such a limit in Supplementary Rule 4 would be contrary to ICANN’s Bylaws and the interests of the entire Internet community.

**The IRP IOT Proposals.** As originally proposed by the IRP IOT, a Claimant was required to file a written statement of a Dispute within 45 days after a Claimant “becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.”

Following submission of the proposed rule for public comment (“Comments”), the IRP IOT revised Rule 4 to state as follows: “An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware, or ought reasonably to have been aware, of the material effect of the action or inaction giving rise to the DISPUTE.”

In Verisign’s view, the expansion of the time period for bringing a claim from 45 to 120 days, and the addition of a constructive knowledge requirement, are consistent with the Bylaws. The elimination of a period of repose that requires that all claims be brought within a period of time from the date of the challenged action or inaction, however, is not consistent with the Bylaws. Verisign proposes that a repose period of 24-36 months be added back into Rule 4; the longer time period would address the concerns raised in the Comments while at the same time ensuring fundamental fairness and due process to other members of the Internet community impacted by the challenged action or inaction.

**Bylaw Provisions.** To frame our comments, it is important first to analyze the relevant Bylaw provision that gives rise to the subject timing rule. The relevant Bylaw provision is Section 4.3(n)(iv)(A), which provides: “(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements: (A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute.” (Emphasis added).

Importantly, this provision of the Bylaws *requires* the IOT to formulate a rule establishing the time within which a Claim must be filed. In addition, the provision requires that the rule include, at a minimum, provisions limiting the time for bringing a claim based on the date that the Claimant actually knew or *reasonably should have known* of its claim.

The IRP IOT revised Rule 4 incorporates the constructive notice limitation required by Section 4.3(n)(iv)(A) of the Bylaws and therefore fulfills an objective of the Bylaws. Verisign does not object to extending this deadline from 45 days to 120 days to allow additional time for a Claimant to file a claim, but notes that in prior versions of the Bylaws, a claimant was required to file a request for independent review within thirty days of the posting of the Board minutes that the claimant contended violated ICANN’s Bylaws. (ICANN Bylaws, Art. 4, § 3(3) (adopted July 30, 2014)). The new proposed deadline is four times longer than the previous limitation and should be more than sufficient. That said, Verisign has seen no evidence submitted to the IOT that the previous 30-day time period was insufficient for claimants to pursue their claims.

However, Verisign does not believe that, standing alone, the 120 day limitation period in revised Rule 4 fulfills the IOT’s obligations under the Bylaws to ensure the timeliness of IRPs. As set forth in the Bylaws, the Supplementary Procedures are intended to ensure “fundamental fairness and due process.” The Bylaws set forth a series of *minimum* requirements for the Supplementary Procedures, but do not limit the IOT’s rule making authority to the specific examples set forth in the Bylaws. Accordingly, the IOT is free to adopt elements beyond those identified in subsections A-G of Section 4.3(n)(iv) if necessary to ensure fundamental fairness and due process. In Verisign’s view, that obligation includes establishing an appropriate period of repose beyond which no claims may be brought with respect to an action or inaction of ICANN.

**The Bylaws Require A Reasonable Period of Repose.** ICANN’s Bylaws provide that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the *Internet community as a whole*, carrying out its activities *in conformity with relevant principals of international law and international conventions and applicable local law* . . .” (ICANN Bylaws, § 1.2(a)) (emphasis added). One of the cornerstone principals of virtually all international and local laws, explicitly for the purpose of ensuring fundamental fairness and due process, is a period of repose for legal actions, an outside limit for commencing actions.

We are aware of no situation under civil or common law where legal claims are not limited by repose periods. Repose periods are an important staple of legal jurisprudence, intended to achieve due process and fairness in dispute resolution.

The universality of repose periods for legal claims is based on several important policy considerations. First, repose periods encourage claimants to pursue valid claims with reasonable diligence. Second, important evidence necessary to disprove a claim may be lost if a claimant waits too long to pursue a stale claim. Third, pursuit of a long-dormant claim may result in more havoc and damage than justice, and would undermine the community’s interest in finality and the ability to act with reasonably secure expectations of the rules/precedent that will affect their rights and commercial interests.

This third consideration of achieving finality and serving the reasonable expectations of the community is particularly true with respect to ICANN policies. Members of the internet community regularly expend considerable time, energy and funds complying with ICANN policies, and develop business plans based on settled expectations regarding ICANN’s policies and procedures. Allowing long-dormant claims to be brought creates uncertainty and disrupts these settled expectations. This is a cause for harm to the entire internet community. Such a result is not fundamentally fair *to the community* and is inconsistent with the IOT’s obligations with respect to formulation of the Supplementary Procedures.

Verisign understands that a 12-month repose period may not be the appropriate time period. As noted in several of the Comments, ICANN policy changes may take a longer period to implement and thus a 12-month repose period may, in some instances, limit the ability of claimants to bring valid claims. That concern, however, is substantially eliminated by a longer repose period -- for example, 24 or 36 months. At the same time, settled expectations of the internet community are increasingly likely to be disrupted by claims brought more than 36 months after the action or inaction at issue.

Fundamental fairness and due process require that not only the rights of claimants, but also the rights of other members of the internet community affected by the subject action or inaction, be considered in the Supplementary Procedures. A reasonable period of repose is required to fully balance these competing interests consistent with the IOT’s obligations under the Bylaws.

Finally, the Bylaws provide that the IRP is a critical vehicle to “[r]educe Disputes by creating *precedent* *to guide and inform the Board…and the global Internet community* in connection with policy development and implementation.” (ICANN Bylaws, § 1.2(a)) (emphasis added). Binding precedent is critical to the fundamental concept of predictability that underpins a stable, secure, reliable DNS. The goal of predictability and the reduction of Disputes, however, is undermined by Supplementary Procedures that allow potential Disputes to remain unresolved for lengthy periods of time simply because there is no limitation on the time in which a Claimant must raise those Disputes. It serves the interests of the internet community for valid claims to be raised expeditiously so that all parties have the benefit of IRP decisions on those Claims to use in the further development of ICANN policy and in making business decisions that are contingent on ICANN policy. Delay in bringing such claims deprives the community of the *timely* benefit of IRP precedent, increasing unpredictability and fundamental unfairness to the community as a whole.

**Conclusion:**

Verisign believes in ICANN accountability, and the importance of accountability mechanisms, but such mechanisms should not be tilted in favor of one party and against the entire community. Clearly defined limitations and repose periods are universally applied because they help strike the proper balance among the competing interests of claimants and strong countervailing considerations, which in this context involve the interests of the entire internet community.