

**Comment** re: [Proposed Renewal of .NET Registry Agreement | ICANN.org](#)

**Date:** May 30, 2017

**From:** John Poole, [legacy gTLD .NET](#) domain names *registrant* & editor of [DomainMondo.com](#)

### **I. Introduction:**

On April 20, 2017, ICANN opened for comment its *proposed renewal of the .NET Registry Agreement*. On April 25, 2017, I emailed the ICANN staff contact Karla Hakansson:

*“I have several questions about the proposed renewal of the .NET Registry Agreement which I need answered before I can comment on the “proposed renewal” as I find the disclosures provided by ICANN’s “Global Domains Division” in the public comment notice grossly inadequate. I am a domain name registrant and have several .NET domain names registered under my company name. Please advise as to whom at ICANN (name, title, email and/or phone number) I should direct my questions.”*

On April 26, 2017, I prepared and emailed in advance of the ICANN Quarterly Stakeholder Call on April 27, 2017, a [four-page document of questions](#), the last section of which, beginning at the bottom of page 3 and continuing through page 4, dealt **solely** with the proposed renewal of the .NET Registry Agreement.

After contacting the **ICANN Ombudsman** and the **ICANN Complaints Officer**, I finally received [a response from ICANN](#) signed by **Cyrus Namazi**, VP Domain Name Services & Industry Engagement, Global Domains Division, via email on Friday, May 26, 2017.

I have set out below my questions with the corresponding answers provided by Mr. Namazi, in the following format: each question followed by the corresponding answer (in italics), if any, provided by [Mr. Namazi on behalf of ICANN](#) (emphasis added)—

[From my email of April 26, 2017](#): “... **.NET Registry Agreement**: I have many questions about ICANN’s recently posted [Proposed Renewal of .NET Registry Agreement \(RA\)](#) and consider the disclosures made by the Global Domains Division in that posting to be grossly inadequate. I inquired of the staff contact listed in the posting (via her email listed in the posting) as to whom to contact regarding questions about the proposed .NET RA. To date, I have not received any response from that ICANN staff member, so I will pose the questions here:

1. Who (identify by name(s), title, division or department) at ICANN negotiated the terms of the “proposed renewal of .NET Registry Agreement”?

*In negotiating this renewal with Verisign, the **ICANN organization** was represented by **its lawyers** and a cross- functional team of **staff members from its Global Domains Division**.*

2. Was there among the ICANN “negotiating team” (see #1 above) anyone who was charged with protecting and advancing the interests of consumers (.NET domain name registrants) and what was their negotiating position at the outset-- demands, offers or positions—or was their position just to maintain the “status quo” of annual 10% increase in registrant fees? Forever in perpetuity?

*The **.NET Registry Agreement** includes a **presumptive renewal rights provision** and **ICANN’s ability to change the terms of the Agreement are limited** based on the existing terms of the Agreement as well as the prevailing consensus policy(ies). ICANN is soliciting public comments on the proposed renewal now and we encourage you to [submit any inputs](#) you might have. Further, ICANN organization is committed to protecting and advancing the interests of all constituents in the domain name industry including registrants. We encourage registrants such as yourself to be an active member of this opportunity to make your voice heard along with other constituents.*

3. Why are .NET registrants paying ICANN \$0.75 per .NET domain name when other gTLDs pay much less? What is the history of this provision and will this continue in perpetuity? Why was this not explained by ICANN and/or GDD in its posting for public comment?

*In connection with the **competitive bidding process** held in **2005** for the operation of the **.NET TLD**, **ICANN specified a US \$0.75 registry-level transaction fee for .NET**. The additional funds provided by this fee aid ICANN in its mission of enhancing the security and stability of the DNS and the Internet and in improving participation in the Internet community. ICANN utilizes the funds generated by Registry-Level Transaction Fees in accordance with the ICANN Budget, which is developed in consultation with the community and approved by the ICANN Board. ICANN organization is committed to utilize the funds for the purposes set out in the .NET Agreement but does not have a separate accounting or organizational structure to track it. That would be costly and overly complex, outweighing the potential added benefits. ICANN organization has, for example, created the [Fellowship Program](#), sponsored by and participated in many regional meetings, increased the number of languages available in translation services we provide, and fostered participation in new gTLDs. ICANN has also expended significant funds to bolster DNS security and stability, such as signing the root zone and implementing DNSSEC, participating in cross-industry security exercises, growing the ICANN security- stability-resiliency (SSR) team, and continuing to enhance the operational SSR and global*

*interoperability of the systems and processes that impact the internet's unique identifies.*

4. Why is Verisign allowed to continue increasing its .NET monopoly registration fees by 10% per year, every year? Contrast this with NTIA's [Amendment 32](#) (pdf) for .COM. Why can't ICANN be like NTIA? Is this because ICANN is a *domain name industry captured organization*? Isn't this proposed renewal of the .NET registry agreement just another indication that ICANN needs government oversight? That ICANN is incapable of negotiating in the public interest, that the U.S. government protects consumers (registrants) but ICANN always fails? Will this 10% per year increase in .NET domain names continue in perpetuity insofar as ICANN is concerned? Why was this not fully explained by ICANN and/or GDD in its posting for public comment? **Why do ICANN and its GDD always resort to obfuscation rather than full disclosure and transparency?** Old habits die hard and isn't this another indication that ICANN has a very sick, dysfunctional corporate culture?
5. Why weren't the actual costs to registrants under this "proposed renewal" fully disclosed (see [Kirikos comment](#)) by ICANN and/or GDD in its posting for public comment? Is it ICANN's position that "transparency" does not include the actual fee schedule of maximum costs to registrants per year under ICANN's negotiated proposed renewal of the .NET registry agreement? **In these kinds of negotiations who does ICANN represent? The registrants, registrars, or the registry operator?** Explain your answer and explain why **any** domain name registrant should trust ICANN to adequately, and competently, represent the interests of domain name registrants?

*Consistent with comparable gTLD registry agreements, the prices that registry operator may charge under the .NET Registry Agreement are capped, subject only to a permitted 10% annual increase. The permitted increase is designed to allow the registry operator to increase prices with inflation and increased costs of running a registry. ICANN organization did not highlight pricing in the public comment announcement because the announcement only highlights what has changed. The pricing provision in the agreement was not changed, therefore, it was not highlighted. You can find more information about the economic impact of the domain name space by reviewing the findings from the two-phase study conducted by Analysis Group in 2015 ([Phase One](#)) and 2016 ([Phase Two](#)).*

6. Was the market dominant position of Verisign, its .COM "cash machine" monopoly, its pending acquisition of the "most valuable" new gTLD .WEB ([for \\$135 million](#)), or its "fat" profit margins and "low" operating costs (compared to other publicly listed companies—see [Verisign SEC filings](#)), even considered by the ICANN "negotiating team" in its negotiations with Verisign, and if yes, how so?

Note: #6 not answered by ICANN so I can only assume ICANN never considered any of the factors listed. Also note in response to #5 that ICANN does not, and apparently cannot, identify who it represents!

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## II. Additional background documents:

1. [RFC 1591, March 1994, by Jon Postel](#) (emphasis added), which states in part:

“... 2. ... *In the Domain Name System (DNS) naming of computers there is a hierarchy of names. The root of system is unnamed. There are a set of what are called "top-level domain names" (TLDs). These are **the generic TLDs (EDU, COM, NET, ORG, GOV, MIL, and INT)**, and the two letter country codes from ISO-3166 .... The major concern in selecting a **designated manager [registry operator]** for a [top-level] domain is that it be able to carry out the necessary responsibilities, and have the **ability to do an equitable, just, honest, and competent job** .... 2) These designated authorities [registry operators] are **trustees** for the delegated domain, and have a **duty to serve the community**. **The designated manager is the trustee** of the top-level domain **for** both the nation, in the case of a country code, and **the global Internet community**. Concerns about "rights" and "**ownership**" of domains [TLDs] are **inappropriate**. It is appropriate to be concerned about "responsibilities" and "service" to the community. 3) The designated manager must be equitable to all groups in the domain [TLD] that request domain names ... 4)... it is also appropriate for interested parties to have some voice in selecting the designated manager ... 5)... In cases when there are **persistent problems** with the proper operation of a domain, the delegation **may be revoked**, and possibly **delegated to another designated manager**.... 4. **Rights to Names** 1) Names and Trademarks - In case of a dispute between domain name registrants as to the rights to a particular name, the registration authority shall have no role or responsibility other than to provide the contact information to both parties...”*

2. **My comments** recently submitted to ICANN:

[Recommendations to Improve SO/AC Accountability –my comment](#) (pdf)

[Competition, Consumer Trust and Consumer Choice Review Team Draft Report of Recommendations for New gTLDs–my comment](#) (pdf)

[GNSO Community Comment 2 \(CC2\) on New gTLD Subsequent Procedures Policy Development Process–my comment](#) (pdf)

### 3. Case law:

**a. Coalition For ICANN Transparency vs Verisign and ICANN**, U.S. District Court Order Dismissing (2006): <https://www.icann.org/en/system/files/files/order-on-cfit-08deco6-en.pdf>: "... CFIT contends that substitution among TLDs is *not* feasible because **many registrants' .com or .net domain names have become their trademark or tradename, are associated with consumer goodwill, and represent their online brand name and identity.**" [p. 4]... The 2001 .net Agreement was set to expire June 30, 2005. Competitive bidding was solicited prior to its expiration and VeriSign was again selected as the **.net registry operator**. Id. ¶ 34. Thus, in 2005, VeriSign and ICANN entered into a .net registry agreement (the "2005 .net Agreement"). [p. 5]... CFIT alleges that both the 2006 .com and 2005 .net Agreements include a renewal provision that allows ICANN to solicit competitive bids upon expiration of the agreement "only if a court or arbitrator issued a non-appealable final order finding VeriSign to be in breach of the agreement, and VeriSign failed to cure the breach." Id. ¶ 38. CFIT asserts that this renewal provision constitutes ICANN's "conspiratorial agreement to waive its right to impose competitive bidding" for operation of the .com and .net registries. Id. ¶ 87. **In comparison**, the renewal provisions in the **2001 .com and .net Agreements** allowed ICANN to solicit competitive bids upon expiration if ICANN deemed VeriSign to be in material breach. Id. ¶ 69. Second, VeriSign has been freed from pricing constraints formerly in place in the 2001 .com and .net Agreements. the 2005 .net Agreement sets the maximum price at \$4.25 until December 31, 2006 and then "[b]eginning in 2007, the price controls set forth in the 2005 .net Agreement will be eliminated." Id. ¶ 91. CFIT contends that "VeriSign will be unconstrained in setting prices and will charge the maximum cap allowed." Id. ¶ 88 ..."

**b. CFIT v. Verisign**, U.S Court of Appeals (2008)(emphasis added):

<http://cdn.ca9.uscourts.gov/datastore/opinions/2009/06/05/07-16151.pdf>

"... Harm to consumers in the form of higher prices [6754 CFIT v. VERISIGN, INC.] resulting from competitive restraints has long been held to constitute an actual injury to competition in the Section 1 context, see *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996) ("**[I]t is difficult to image a more typical example of anti-competitive effect than higher prices . . .**"), and CFIT's complaint adequately alleges that such injury has occurred and is still occurring. CFIT's complaint is therefore **sufficient to state a claim under Section 1 in connection with the pricing provisions of the 2006 .com Agreement**. [7] CFIT also attempted to allege a Section 1 violation in connection with the pricing terms in the 2005 .net Agreement. The .net contract imposed an initial price cap of \$4.25 per domain name registration, but provided that this cap would expire on December 31, 2006, leaving no price limitation in place. Although this claim involved terms comparable to those in the .com contract, **CFIT has not made out a Section 1 violation for the .net pricing agreement. The .net contract was reached as**

**a result of competitive bidding**, not conspiratorial action. CFIT's assertion that some terms of the agreement changed after VeriSign's bid was accepted, without allegations of materiality, does not suffice to state a claim for existence of a conspiracy and the intent to restrain trade. See *id.*

**c. Weinstein et al vs Iran et al**, U.S. Court of Appeals Opinion (2016)

<https://www.icann.org/en/system/files/files/litigation-haim-et-al-opinion-court-appeals-circuit-02aug16-en.pdf> regarding ccTLDs of Iran, Syria and North Korea: "... **Each TLD requires management. ICANN's first responsibility** relevant to this case **is its selection and approval of qualified entities to operate each of the Internet's TLDs**—"registry operators" in ICANN parlance. [p. 9]... ICANN's contention that ccTLDs and IP addresses **are not "property."** .... As the plaintiffs recognize, ICANN occupies its position only because "the global community allows it to play that role." Appellants' Br. at 34 (emphasis added). "[T]he operators of . . . top level domains" can "form a competitor to ICANN and agree to refer all DNS traffic to a new root zone directory." *Id.*; see also Br. for United States as Amicus Curiae at 13 ("As a technological matter, nothing prevents an entity outside the United States from publishing its own root zone file and persuading the operators of the Internet's name servers to treat that version as authoritative instead.") [p. 31].

4. [General history of TLDs](#) (top-level domains) and .NET.

5. The **U.S. Department of Justice Antitrust Division** told ICANN (December, 2008)(emphasis added):

**"ICANN is obligated to manage gTLDs in the interests of registrants and to protect the public interest in competition .... ICANN should establish competitive mechanisms for authorizing new gTLDs and renewals of gTLD registry agreements whereby prospective gTLD operators would compete for gTLDs by proposing registry terms – including maximum fee schedules – that would provide consumer [registrant] benefits."**—[U.S. Department of Justice, Antitrust Division, December 3, 2008](#) (pdf) (read the entire letter) via a [U.S. Department of Commerce \(NTIA\) letter](#) (pdf) in December, 2008.

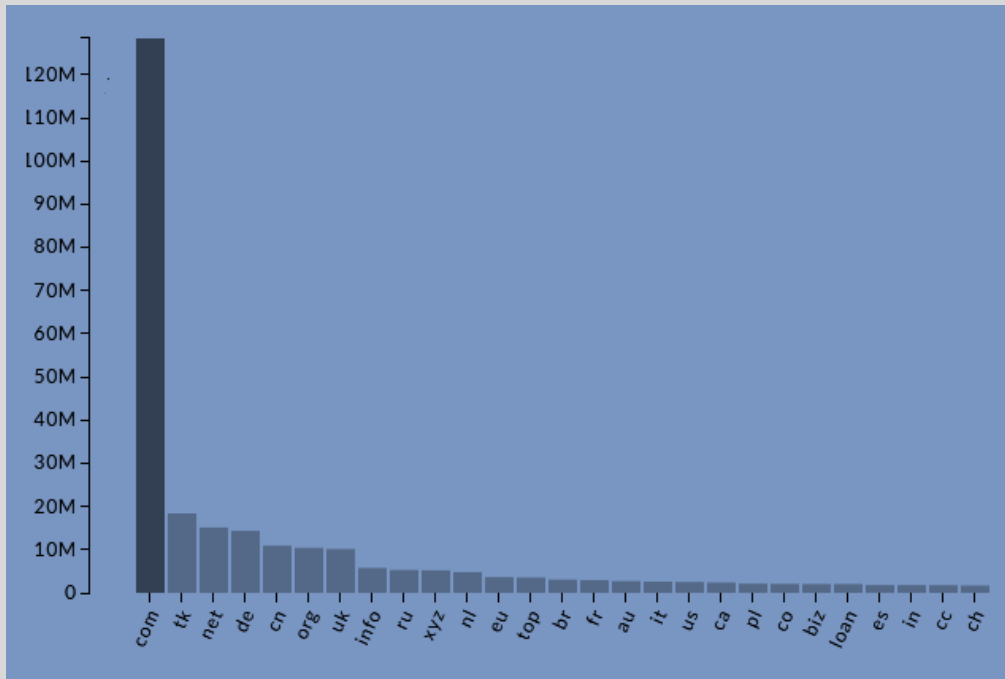
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### III. Discussion:

.NET is one of only **three** (.COM, .NET, .ORG) **legacy** (existing prior to the formation of ICANN in 1998) generic top-level domains (gTLDs) **open for registration by anyone in the world**. The other legacy gTLDs (.edu, .mil, gov, .int) are considered

“[sponsored](#)” and restricted as to use (.edu, .mil and .gov do not even have registry agreements with ICANN, while ICANN operates .int).

The **three open legacy gTLDs** (.COM, .NET, and .ORG) hold a special place in the development of the internet and global DNS. A recent snapshot of total domain registrations per TLD globally, so indicates:



Other relevant facts from sources and authorities above:

.NET, like [all other TLDs](#) is not private property. .NET is a global public resource of the global DNS available for domain name registrations and use by registrants. Some registrants have had their .NET domain names long before ICANN was formed in 1998, and therefore before [Verisign acquired Network Solutions](#) and started operating the .NET registry. The fiduciary standards of RFC 1591 (1994) cited above, are as applicable today to the management and operation of .NET, as they were in 1994. ICANN should therefore tread carefully with .NET, and likewise .COM and .ORG.

#### IV. Conclusion

**1)** RPMs specifically designed, and applicable to new gTLDs, are not appropriate for legacy gTLDs .COM, .NET, and .ORG, and I commend ICANN for resisting pressure from trademark and other special interests who may urge otherwise.

**2)** Verisign is a capable and qualified registry operator to continue operating the .NET generic top-level domain.

**3) However, I have three objections to the proposed renewal of the .NET registry agreement**, the first two are substantive and deal with pricing, and the third is an “ICANN process” objection:

**1. The Section 7.2 ICANN fee of \$0.75 per .NET domain name is discriminatory and unconscionable to .NET domain name registrants**, and ICANN should reduce it to \$0.25 (similar to other gTLDs). What may have been negotiated or appropriate in 2005, is no longer applicable 12 years later. ICANN should be ashamed for being so greedy and unfair to .NET registrants who are the ones bearing this cost.

**2. The Section 7.3(a) provision for 10% compounded annual increases in .NET registration, renewal and transfer fees is unconscionable**, particularly considering .NET has approximately 15 million domain name registrations, and the [publicly reported profitability of Verisign](#), and its low cost of operations. It may be easy for ICANN staff to “roll over” and continue using the same boilerplate from previous renewals, but it has no justification based on reality—industry operating costs, market conditions, economic factors, and other relevant financial factors. This “formula” would lead to a doubling of registration fees every 7.2 years ([Rule of 72](#)). ICANN legal and GDD staff and management need a refresher course on good public stewardship and how to represent the global internet community in the global public interest.

Compare the ccTLD pricing for [ccTLD .US \(\\$6.50\)](#) with only about 2.5 million domain name registrations.

Approval of this proposed renewal with the \$0.75 ICANN fee and 10% compounded annual increases in registration/renewal/transfer fees intact, will most likely cause renewed calls for government(s) to oversee ICANN, or replace ICANN with a new or existing intergovernmental multi-party or multistakeholder organization which can protect consumers (registrants), and the global public interest.

**3. ICANN’s process for gTLD registry renewals is dysfunctional.** Before beginning renewal “discussions” or negotiations with any registry operator, ICANN should first solicit comments from registrants, registrars, and other interested parties about the performance of the operator and suggestions for changes in the registry agreement. Only after that initial comment period has concluded should ICANN begin discussions with the registry operator. This is a simple change that will result in ICANN staff being much better informed and prepared to represent registrants, registrars, and the global internet community in renewal discussions with the registry operator.