

To: comments-org-renewal-18mar19@icann.org

Re: [Proposed Renewal of .org Registry Agreement](#)

I have been a continuous .ORG domain name registrant for 19 years. I **oppose** the [proposed .org renewal registry agreement](#).

Reasons for opposition:

1. All of those reasons set out in the [comment submitted by the Internet Commerce Association \(ICA\)](#) (of which I am NOT a member), as if fully set out herein, and with which I fully concur. ICA comment attachment #1 hereto. In accordance with ICANN's own bylaws, It is simply wrong and inappropriate for ICANN org management and staff on its own, to "make policy" in regard to legacy gTLDs, such as .ORG, by deleting all pricing controls and allowing unlimited price gouging by legacy registry operators, and applying RPM policies specifically adopted for new gTLDs, but not legacy gTLDs, especially when those same RPMs are currently under review for further revisions by the "ICANN community." ICANN org ALWAYS fails to represent the interests of domain name registrants (which indicates ICANN is a *domain-name-industry-captured-organization*), and its process for gTLD registry renewals needs a complete overhaul in conformance with attachment #2 hereto, discussed further below. In addition I concur with the following:

The economics of domain name prices-- <https://domainnamewire.com/2019/04/29/the-economics-of-domain-name-prices/> : "... high switching costs make domain owners hostages to the registries that operate their domains. They simply have to pay whatever they are charged. The cost to switch is too much. For this reason, renewal costs must be capped. How domain registration and renewal costs should be managed--Some top level domains have market power at the time of registration. All top level domains have tremendous power over registrants at the time of renewal. For this reason, ICANN should consider capping initial registry fees for top level domains that have some level of market power, such as .com and .org. It should limit prices on *all* domains at the time of renewal. The organization [ICANN] has stated that registrants have some protection because they can renew domains for up to ten years at current prices before price hikes take effect. There are two problems with this. First, the registries must notify the registrars of the price increase. It's up to the registrars to notify customers. Busy customers might overlook these notices or not have the cash to renew for ten years today. Second, and most importantly, this just kicks the can down the road. What does a company do ten years from now when it has to pay the new rates?"

2. All of those reasons set out in my blog post [News Review 1\) ICANN Org Policy-Making Trashes Legacy gTLD .ORG](#), as if fully set out herein, including, but not limited to:

"[T]his **ICANN & PIR .ORG proposal** crafted in secret, is **policy-making at its worst**, by the management and staff of ICANN, a California corporation, operating as a rogue "global internet

coordinator" without any governmental mandate and accountable only to itself and its non-representative "ICANN community" dominated by its own "contracted parties" and lawyers and lobbyists representing "special interests." ICANN shows once again it has **little regard** for **domain name registrants**, and is **unfit for any role** in global internet governance.

"This proposal, apparently agreed to by the current .ORG Registry Operator [PIR's management](#) and its [Board of Directors](#), also indicates that **PIR is unfit** to manage the TLD **.ORG** in the **global public interest** in accordance with [RFC 1591](#) and its contract should therefore be terminated, and **.ORG opened for bidding** in conformance with the advice of the **U.S. Department of Justice Antitrust Division**, attached to a letter sent to ICANN in 2008, by [NTIA.gov](#)."

That [DOJ Antitrust Division advice](#) (attachment #2 hereto) states:

"ICANN's approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition at the registry level." (p.8)

The **"proposed registry agreement should include provisions that would enable ICANN to constrain ... registry operators from exercising market power. In particular, ICANN should establish competitive mechanisms for ... 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 benefits."** (p. 2) (emphasis added)

"ICANN's request for bids should expressly call for bids to specify an initial maximum price that would be charged by the operator for domain registrations, as well as limitations on price increases over time." (p.7)

"... ICANN should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition. Such a mechanism would both assist in disciplining the conduct of the incumbent during the initial term insofar as the incumbent would want to maximize the likelihood of renewal, and ensure the benefits of competition when potential operators bid for the right to operate the gTLD in the renewal term ... Experience with the .net TLD and other gTLDs has shown that ... periodic rebidding has served as an effective tool for managing the interests of registrants in gTLDs. Indeed, competitive bidding has resulted in lower domain prices and higher operating specifications than what ICANN has achieved through non-competitive negotiations. In particular, competitive bidding prompts bidders to propose and accept registry improvements, higher operating standards, and lower registration fees to win the contract." (pp.7-8)

3. Registry Operator PIR Does Not Own .ORG—top level domains do not constitute property--see U.S. government's Amicus Curiae brief filed 29 Dec 2015 in [Weinstein vs IRAN](#) (US Court of Appeals for the DC Circuit, USCA Case #14-7193), at page 20 of 32: "To the contrary, a foundational 1994 Internet

governance policy statement, **still regarded by the Internet community as authoritative**, explicitly rejects efforts to assert property rights in such domains: “Concerns about ‘rights’ * * * are inappropriate. It is appropriate to be concerned about ‘responsibilities’ and ‘service’ to the community.” See [RFC 1591](#), DNS Structure and Delegation 4-5 (Mar. 1994).” (emphasis and link added)

Since the current and proposed renewal registry operator of .ORG, **Public Interest Registry (PIR)**, claims to be “[acting in the public interest](#),” I am sure they will happily endorse and agree to all of the points raised above and in the attachments hereto, and will be excited when granted the opportunity to participate in a competitive bidding process for renewal of the .ORG registry agreement to include “maximum fee schedules” for .ORG domain name registrations and renewals, and likewise in registry renewals of all other gTLDs, including [.INFO](#), [.ASIA](#), and [.BIZ](#).

Respectfully submitted,

John Poole, .ORG domain name registrant, and *editor*, [DomainMondo.com](#)

cc: U.S. Department of Justice Antitrust Division; Federal Trade Commission (FTC); NTIA (David Redl); European Commissioner for Competition Margrethe Vestager; European Commission Directorate-General for Competition For the attention of the Antitrust Registry; European Data Protection Supervisor Giovanni Buttarelli; ICANN Board Chair Cherine Chalaby.



Via Email: globalsupport@icann.org

April 10, 2019

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Attn: Mr. Russ Weinstein, Global Domains Division

Dear Mr. Weinstein:

Re: Proposed Renewal of .org Registry Agreement

I write to you on behalf of members of the Internet Commerce Association. Founded in 2006, the Internet Commerce Association (the “ICA”) is a non-profit trade organization representing domain name registrants, including domain name investors, domain name secondary marketplaces, domain name brokers, escrow service companies, and related service providers. The ICA’s mission is to assist with the development of domain name related policy. ICA members own a substantial percentage of all Internet domains and provide crucial domain name-related services to millions of Internet users.

We are pleased to provide herein, our comments on the Proposed Renewal of the .org Registry Agreement (the “Proposed .org Renewal Agreement”).

1. ICANN Once Again Circumvents Dedicated Volunteers When it Comes to URS and So-Called “Bottom-up Multi-Stakeholder” Policy Development

ICANN prides itself on bottom-up multi-stakeholder policy development, but yet again, ICANN staff has attempted to circumvent the established policy development process. The Proposed .org Renewal Agreement includes Uniform Rapid Suspension (“URS”) when ICANN Staff are well aware that the question of whether URS should become a Consensus Policy is currently undergoing extensive review by the Rights Protection Mechanism Working Group (the “RPM

WG”). In fact, the question of whether URS should be applicable to all gTLD’s as a Consensus Policy is one of the primary questions that numerous experts from the ICANN community have been engaged in for the last two years. These experts have dedicated thousands of person hours to determining whether URS should be a Consensus Policy and yet ICANN Staff has purported to circumvent them and render all these efforts largely moot with the unilateral implementation of URS in registry agreements as they come up for renewal.

It is an affront to the ICANN Community, and in particular to those dedicated volunteers that are following the established policy development process, that right under the noses of the ICANN Board, ICANN Staff continue to subvert and circumvent the required procedures by unilateral implementation of policy. This is at least the 7th instance where the Global Domains Division (“GDD”) has circumvented the policy development process by unilateral introduction of the URS and ICANN has been put on notice through Comments by various parties on each occasion.ⁱ

The question then becomes whether there is any point in continuing to engage in the established “bottom-up multi-stakeholder model” if efforts from volunteers, included members of the Internet Commerce Association, are ostensibly engaged in mere “busy work” at tremendous expense and opportunity cost, when the actual policy making happens behind closed doors by ICANN Staff.

Given that ICANN Staff has ignored all previous entreaties to abide by the established policy development procedure when it comes to URS, it must be concluded that ICANN pays mere lip service to the bottom-up multi-stakeholder model and putting the Proposed .org Renewal Agreement out for public comment is mere window dressing.

Nevertheless, once again, and despite every indication that ICANN Staff remains intent upon continuing their unilateral policy making mission and circumventing its dedicated volunteers, we must demand that ICANN await the completion of the Working Group’s deliberations on the inclusion of URS as a Consensus Policy and refrain from unilateral imposition.

2. **Does ICANN Care About Non-Profit Registrants and the Public Interest?**

We are very troubled by the what appears to be ICANN Staff’s complete disregard for registrants and the public interest when it comes to the removal of all price caps in the Proposed .org Renewal Agreement.

The .org registry is one of the original top-level domains, established in 1985 along with .com, .us, .edu., .gov, .mil, and .net, and has grown to become the third largest gTLD registry comprising more than 11 million registrations and 6.4% of all gTLD registrationsⁱⁱ.

According to Public Interest Registry, the current .org registry operator under contract with ICANN, “since its inception in 1985, org has empowered and mobilized over 10 million websites, serving as a reliable online venue for organizations, companies, clubs, and individuals to communicate with their core audiences about a shared interest, passion or cause”. As such, the

.org gTLD has a unique and crucial place in the name space for millions of non-profit organizations who have invested in their .org web presence and rely upon the continued affordability of their .org domain name.

Non-profit organizations all over the world who rely upon .org, include the American Cancer Society (Cancer.org), Wikipedia (Wikipedia.org), Unicef (Unicef.org), Children International (Children.org), Save the Children (SaveTheChildren.org), and millions more, including much smaller organizations, non-profits, and charities started by individuals established to raise awareness and assist with various causes in the public interest.

The .org registry operator itself, Public Interest Registry, as its name implies, and as it expressly states, “serves the public interest” as a not-for-profit organization created by the Internet Society (InternetSociety.org), a non-profit organization that is a “global cause-driven organization” that is “dedicated to ensuring that the Internet stays open, transparent and defined by you”.

Accordingly, the .org registry holds a special place in the namespace; it is primarily and specifically used by non-profits and similar public interest organizations, and thereby is substantially different in character both in relation to primarily commercial legacy gTLD’s such as .com, and in relation to new open gTLD’s such as .xyz and .dev, which were essentially created, bought, and paid for by commercial enterprises relatively recently, and which do not have an established mandate or registrant base dedicated to non-profit activities.

Moreover, the new gTLDs created entirely new namespaces where any registrant knew that they were subject to price changes and price increases at the whim of the new gTLD operator. It was clearly ‘buyer beware’ in the new gTLDs. In contrast, with legacy extensions such as .org, the name spaces were not bought and paid for by the registry operator and the reasonable expectation of .org registrants was that prices would be capped in order for pricing to remain stable and reasonable, particularly having regard to the nature of the namespace which is expressly and decidedly not commercial in nature. The operators of legacy extensions such as .org don’t “own” those name spaces. They were created for the public at large and are to be administered in the public interest by ICANN as essentially a trustee. The contracted registry operators are merely providing a service of maintaining the database and the underlying infrastructure on behalf of ICANN which is the caretaker of the public interest in the name spaces.

That is why it is so surprising and concerning that ICANN Staff expressly stated that the ostensible objective in removing the price caps on .org registrations under the existing Registry Agreement, was to “align” it with the current “base registry agreement”. First of all, the crucial problem with this purported “alignment” is that in effect it constitutes a fundamental policy making initiative that is beyond the scope of ICANN Staff without the support of the established policy development process. Second, this purported “aligning” totally disregards the fact that .org is a unique legacy registry that caters to non-profit and similar organizations, in the public interest. Although “alignment” may be convenient from an administrative perspective, there is no factual or legitimate policy basis for treating the .org registry the same as all others, when it is clearly different and clearly unique, with millions of non-profits and similar organizations who

are already established and ones which are yet to be established in the future, all relying upon a distinct domain name space that is geared towards their specific needs.

So, other than conveniently “aligning” registry agreements to purportedly treat all registries alike despite their respective and dramatically different mandates, registrant base, and histories, what justification is there for unlimited price increases? There is no evidence whatsoever that the .org registry requires unlimited additional funds to maintain reliable operations. There is no evidence that the .org registry requires unlimited additional funds to finance the good works of the Internet Society. There is no evidence that the .org registry needs unlimited funds in order to “compete” with other for-profit registries, particularly when the current operator, PIR, is a not-for-profit organization. In short, there is simply no justification for permitting the .org registry operator to raise prices at all, let alone with a sky-is-the-limit approach.

What would the effect of a 25% price increase on the current \$9.05 wholesale cost be on the more than 11 million .org registrants? It would raise an additional \$2.26 per domain name, for a windfall of nearly \$25 million in a single year. Over 10 years, such a raise would amount to nearly \$250 million – in addition, new money on top of the already satisfactory and lucrative \$9.05 that the registry currently charges. What would a 100% price increase look like? It would likely mean a nearly \$100 million additional profit in a single year alone, and nearly \$1 billion over the course of ten years.

And who would be responsible for paying? Of course, it would be the 11 million .org registrants, many of which are charities and non-profit organizations working in the public interest. In other words, there would be a massive, unjustified transfer of money from charities and non-profits to a contracted registry operator, paid for with charitable donations and membership dues from charities and non-profits. This is not to begrudge PIR, which we have immense respect and admiration for and which is run in an exemplary fashion whereby it is fortunately able to fund the good works of the Internet Society. Rather, we find it incomprehensible and entirely unjustified that ICANN would decide to fund one particular non-profit working for the public interest on the backs of millions of others.

ICANN should also be especially cognizant of the fact that millions of charities and not-for-profits who may not be paying close attention to the .org domain name contract renewal negotiation, and have implicitly placed their trust in ICANN to look after them. Even if a price hike were only a couple dollars per year for a charity or non-profit, an increase which of course is generally “affordable”, across millions of organizations this collectively amounts to a massive sum, and it is ICANN which is exclusively in the position of being entrusted for looking at the collective amount being charged and must justify it to itself and to the public. The public interest in the .org registry must be looked after by someone, and that someone is ICANN.

Moreover, the millions of .org registrants can’t simply pick up and move to a different domain name if prices are jacked up. For example, a charity or non-profit who chose to “build a home” in .org and who invested heavily in web development, branding, and marketing all connected to the .org extension, did so with the reasonable expectation that ICANN would ensure, as the trustee of the .org registry in the public interest, that reasonable prices would be maintained. If a non-profit .org registrant is faced with a substantial price increase for renewing their domain name they would have little choice but to pay it or face the potentially even greater costs of

moving locations, rebranding, and remarketing, not to mention to potentially massive issue of losing their original email address. Similarly, if a new non-profit rightly wants to take its place in the most suitable namespace for such organizations, and is met with a totally unjustifiable and expensive registration fee, it will force them to take their place in another less suitable registry. As such, existing registrants are a captive audience with little practical means of avoiding a registry-imposed price hike, and prospective non-profit registrants would be hugely disadvantaged if the price of a .org became unaffordable.

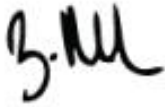
Of course, it may be argued that ‘just because ICANN has permitted the .org registry to jack up prices in an unlimited fashion, doesn’t necessarily mean that the registry will’. Certainly, there has been price stability to-date because of the justifiable ICANN-imposed price caps, and the current registry operator has not always raised prices within the limits, even though they were permitted to do so pursuant to their existing Registry Agreement. Nevertheless, the Proposed Renewal Agreement takes all pricing caps off the table so that if the registry operator were to decide for one reason or another to take an entirely different pricing approach than it has to-date, such as jacking up prices by 100% even if it meant losing 20% of its existing registrant base and thereby garnering an even larger net profit despite the rise in prices, it would be ICANN that is left to explain how it could possibly have permitted its registry operator to act so oppressively and self-servingly in its operation of a fundamentally public resource that is supposed to be managed in the public interest.

Even if such a contingency is unlikely, the question becomes why permit it at all. By altogether eliminating all price caps, ICANN is exposing itself to untold disaster to one of its most cherished and relied upon gTLD’s merely because it wants to unjustifiably “align” the .org registry agreement with totally different commercial ones. Clearly the more prudent policy approach is to prevent such a contingency in the first place rather than leave it entirely up to the hired registry operator to “do the right thing”. The .org registry is simply too important to be permitted to be the subject of its operator’s discretion, even if well meaning. ICANN, as the ultimate trustee of it, must not entirely abdicate its crucial fiduciary responsibility to a contracted party who may at some point in the future, act in its own best interest instead of the public’s best interest. Only ICANN can be responsible for the public interest in the .org registry.

It can also be argued that existing .org registrants are somehow “protected” because they can renew their .org domain name for ten years before being subjected to uncapped price hikes under the Proposed Renewal Agreement. The fact is however, that there is no requirement that registrants be expressly notified that they had better register for ten years in advance or be subject to unknown, indeterminate, and potentially game-changing renewal costs. As such, it is likely that millions of charities and non-profits will not take advantage of the ability to renew for ten years. Secondly, and perhaps more importantly, there is simply no justification for compelling the 11 million .org registrants to pay to PIR, the aggregate of ten years’ worth of fees in advance resulting in a massive cash infusion to the registry operator. Thirdly, once caps are removed, once the initial ten-year period has elapsed, every single registrant is subject to untold, indeterminate, and potentially substantial price hikes, meaning that this is nothing but a temporary reprieve. Lastly, the numerous prospective .org registrants who want to establish themselves in the most appropriate registry for a charity or non-profit at some point in the next ten years, could find themselves subject to capricious and expensive registration fees for .org domain names and as such receive no benefit whatsoever from the temporary reprieve.

The removal of all pricing caps would come with little or no notice to .org registrants, and with no assurance whatsoever that they would not be continuing to build their web presence in a namespace that could be effectively taken away from them one day based upon arbitrary and unpredictable price hikes by a contracted registry operator without any ICANN-imposed restrictions on pricing. If all price caps are to be removed for some unjustified reason, then at very least, ICANN should insist that the registry operator irrevocably undertake to not raise prices beyond an agreed amount for the duration of the term of the agreement. In that fashion at least, the registry agreements would be “aligned” but registrants would have the certainty and predictability of reasonable pricing, which is crucial particularly in a namespace dedicated to public interest endeavors.

Yours truly,
INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA

ⁱ See for example “Comments Run Overwhelmingly Against ICANN Staff Attempt to Impose URS on Legacy gTLD’s, June 22, 2015 (<https://www.internetcommerce.org/comments-oppose-dottravel-urs/>); see also “Comment on Proposed Renewal of .Coop Sponsored Registry Agreement, Business Constituency Submission, July 27, 2018 (https://www.bizconst.org/assets/docs/positions-statements/2018/2018_07July_27%20BC%20Comment%20on%20COOP%20Sponsored%20Registry%20Agreement.pdf); See also: “ICA Files ICANN Comment on Proposed .Museum RA Renewal”, October 22, 2017 (<https://www.internetcommerce.org/ica-files-icann-comment-on-proposed-museum-ra-renewal/>).

ⁱⁱ See; <https://domainnamestat.com/statistics/tldtype/generic> (March 29, 2019)



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December 3, 2008

Meredith A. Baker
Acting Assistant Secretary for Communications
and Information
National Telecommunications and
Information Administration
United States Department of Commerce
Washington, D.C. 20230

Re: ICANN's Draft RFP for New gTLDs

Dear Ms. Baker:

This letter responds to the United States Department of Commerce's ("DOC") request for advice regarding competition issues raised by the draft request for proposal ("RFP") that would govern the issuance of new generic top level domains ("gTLDs") published by the Internet Corporation for Assigned Names and Numbers ("ICANN"). The Antitrust Division has reviewed the RFP and related materials published on ICANN's website, including a proposed registry agreement that ICANN will require successful applicants to execute. Our analysis of the issues raised by these materials is informed by our extensive experience with competition matters as well as the analysis we conducted in connection with our 2006 review of the revised .com registry agreement.¹

As we explain below, some new gTLDs envisioned by the RFP likely would have market power, the exercise of which is not adequately addressed by the RFP or other constraints. Moreover, the creation of additional gTLDs is unlikely to constrain the exercise of market power by existing TLDs, especially the .com registry operated by VeriSign. Contrary to ICANN's apparent assumption, competition from existing TLDs – or from new gTLDs created pursuant to the RFP – is not likely to prevent the exercise of market power by new or existing TLD registries.

¹ See Letter from Thomas O. Barnett to John M. R. Kneuer, dated September 6, 2006.

As a result, although new gTLDs may generate some consumer benefits, ICANN should take additional steps to ensure that the process of creating new gTLDs incorporates to the maximum extent possible competition-based mechanisms and also imposes other constraints on the exercise of market power by gTLD operators.

The Division makes two specific recommendations. First, ICANN's general approach to new gTLDs should be revised to give greater consideration to consumer interests. ICANN should more carefully weigh potential consumer harms against potential consumer benefits before adding new gTLDs and renewing new gTLD registry agreements. Second, the RFP process and proposed registry agreement should include provisions that would enable ICANN to constrain new registry operators from exercising market power. In particular, 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 benefits.

Background:

***Introducing New gTLDs Likely Would Enable the Exercise of
Market Power by gTLD Operators and Likely Would Not Constrain the
Exercise of Market Power by .com and Other Existing TLDs***

Our investigation of the proposed .com agreement generated several findings that bear on the likely effect of creating new gTLDs. First, we found that VeriSign possesses significant market power as the operator of the .com registry because many registrants do not perceive .com and other gTLDs (such as .biz and .info) and country code TLDs ("ccTLDs," such as .uk and .de) to be substitutes. Instead, registrants frequently purchase domains in TLDs other than .com as *complements* to .com domains, not as substitutes for them. In other words, registrants of a particular .com domain (e.g., google.com) will frequently also perceive a need to register the same domain in all or most available TLDs (e.g., google.info and google.biz) because of a desire to expand their presence on the Internet and to protect their brands from being exploited by others.²

We also concluded that existing gTLDs likely would not become a competitive threat to .com registrations because the network effects that make .com registrations so valuable to consumers will be difficult for other TLDs to overcome. Due to a first-mover advantage and high brand awareness, .com registrations account for the overwhelming majority of gTLD registrations. As a result, when users do not know the TLD in which a domain is registered, they most often simply append ".com" to a product or company name when attempting to find the

² In this regard, we discovered that .info often seems to have little value as a stand alone gTLD. Many of the increased domain registrations in .info while those registrations were offered for free were simply bundled with purchases of the same domain in other TLDs or registered to existing users of the same domain in .com.

desired website. This phenomenon creates a strong preference for .com.³ Accordingly, there will continue to be a need for Section 7.3 of the .com registry agreement to replace the discipline that market competition does not provide in this setting, as well as continuing DOC oversight of the .com registry under the Cooperative Agreement, which precludes VeriSign from amending or renewing the .com agreement without DOC approval.

Finally, our investigation of the .com agreement found evidence that other gTLD registry operators may possess a degree of market power. The market power inherent in the other gTLDs is less than the market power in .com, but is still material. The need of many registrants to purchase domains in many or most gTLDs allows each gTLD registry operator to impose costs on registrants that purchase domains simply because a gTLD exists. With respect to existing gTLDs, this power is constrained to some extent by the registry agreements applicable to the other gTLDs. Without those constraints, the gTLD operators likely could profitably charge even higher fees that reflect their market power as to registrants that are willing to pay a premium for their domains, since it appears that the operators may be able to identify those customers and charge discriminatorily high domain registration prices.⁴ The fact that some registrants might view different gTLDs as substitutes would not necessarily constrain the gTLD operators from selectively exercising market power vis-a-vis those that are willing to pay a premium.

In light of these findings, we believe that the introduction of new gTLDs under the RFP could impose substantial additional domain registration costs on many consumers and that many new gTLD registry operators may have market power over registrants. Further, the introduction of new gTLDs is not likely to constrain the exercise of market power by existing gTLDs or ameliorate the continuing need for restraints to prevent VeriSign from exercising market power in the sale of .com domains.

³ VeriSign has argued that the increasing use of search engines will cause the importance of .com to diminish, but "direct navigation" continues to be a common practice. Computer users who type Internet destinations into their browser bars often assume that a domain is in the .com TLD whenever they are uncertain, due to the greater prevalence of .com names relative to other TLDs. As a result, new registrants often search for alternative domains in .com when their preferred .com domain is unavailable, rather than selecting their preferred domain in another TLD because investment in developing the domain in the new gTLD would likely benefit the owner of the domain in .com.

⁴ Registrants that are willing to pay a premium would include those that engage in defensive registrations to protect their trademark or trade name and registrants that make significant investments in their domain names. A registry operator's ability to impose increased prices on registrants willing to pay a premium for domain names in a new gTLD assumes that the registry operator can identify these registrants. The antitrust laws likely would not constrain the unilateral pricing decisions of a gTLD operator whose market power derived from the creation of a new gTLD by ICANN.

Recommendations

1. ***ICANN Should Give Greater Consideration to Consumer Interests before Creating New gTLDs and Renewing Registry Agreements***

ICANN is obligated to manage gTLDs in the interests of registrants and to protect the public interest in competition.⁵ ICANN appears to have assumed that the introduction of new gTLDs necessarily will enhance competition and promote choice and innovation, without offering any evidence to support that assumption. To our knowledge, ICANN has neither studied competition among gTLDs at the registry level, nor commissioned such a study, despite the ICANN Board of Director's specific direction to do so.⁶ On October 18, 2006, the ICANN Board directed ICANN's President to commission an economic study to address questions such as:

- whether the domain registration market is one market or whether each TLD functions as a separate market,
- whether registrations in different TLDs are substitutable,
- what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD to another,
- what is the effect of the market structure and pricing on new TLD entrants, and
- whether there are other markets with similar issues, and if so how are these issues addressed and by whom?⁷

⁵ See Articles of Incorporation of ICANN, 4, as revised November 21, 1998 (<http://www.icann.org/en/general/articles.htm>); Joint Project Agreement Between the U.S. Department of Commerce and ICANN, Section II.C., dated Sept. 29, 2006 (<http://www.icann.org/en/general/JPA-29sep06.pdf>).

⁶ ICANN has periodically referenced an OECD report published in 2004 as support for its position that introducing new gTLDs may enhance competition at the registry level. The OECD authors relied on data showing a decline in .com, .net, and .org registrations combined with a significant number of registrations in the new .info, .biz, and .name gTLDs during the six-month period immediately following the introduction of the new gTLDs in 2002. S. Paltridge and M. Matsui, OECD's Directorate for Science, Technology and Industry, *Generic Top Level Domains: Market Development and Allocation Issues*, 4, 22 (July 13, 2004). However, the authors acknowledge that the reduction in .com, .net, and .org registrations was at the end of the "internet bubble," and that registrations in those three gTLDs resumed growth during the succeeding six-month period, while registrations in the new gTLDs tailed off and actually declined in .info during the last six months of 2003, the last period for which registration data was available. *Id.* Indeed, with the benefit of additional, more recent information in our investigation of the new .com agreement, we found no indication that the other gTLDs impose a competitive constraint on sales of .com domains or on VeriSign's ability to charge the maximum .com registry price.

⁷ ICANN, Special Meeting of the Board Minutes (Oct. 18, 2006) (<http://www.icann.org/en/minutes/minutes-18oct06.htm>) (last visited Nov. 17, 2008).

The Board recognized that such a study could help in future negotiations with TLD registry operators.⁸ Now, more than two years later, ICANN has proposed to introduce a new gTLD approval process, complete with a new gTLD registry operator agreement, apparently without having even begun the requested study.

ICANN should revise its general approach to give greater consideration to potential consumer harms and benefits. The creation of new gTLDs could generate consumer harm. First, approval of new gTLDs would proliferate the number of TLDs in which registrants feel that they must purchase registrations to protect their domain names, increasing their costs.⁹ Second, new gTLD operators may be able to exercise market power vis-a-vis some group of customers (e.g., because of a desire to register for defensive purposes or because of investments they make in a domain name).

At the same time, new gTLDs could generate benefits. It is possible, for example, that they would intensify competition among gTLDs other than .com for customers that do not feel compelled to register their domain names in multiple gTLDs. Whether this is likely would require further analysis. In addition, new gTLDs may benefit unique registrant populations that might value a domain in a particular gTLD. An example of this could be a new gTLD that represents a particular community of people, a type of application that ICANN anticipates receiving in response to the RFP. However, we are unaware of any effort by ICANN to quantify this consumer benefit. ICANN has not attempted to distinguish the registrants that might value having a domain in a gTLD other than .com, including a new gTLD, from those registrants that would feel compelled to purchase one or more domains in the new gTLD only because the gTLD was created.

The RFP neither provides for any evaluation of what effect, if any, the new gTLDs will have on competition at the registry level nor allows for objections based on the likely adverse competitive effects of the gTLD. The RFP also does not establish any mechanisms or processes that would minimize the potential for harm from new gTLDs while enabling the potential benefits to be realized. For example, the proposed registry agreement (unlike the .com agreement and other existing gTLD registry agreements) does not include any price caps that would limit the ability of new gTLD registry operators to charge the highest possible prices for domains in the new gTLDs. Similarly, the proposed agreement does not include any restrictions against price discrimination, bundling, and tying. It also does not require registry operators to offer domains pursuant to long term contracts, meaning that registry operators would be free to raise

⁸ *Id.*

⁹ The circumstances under which registry operators may impose additional costs on registrants willing to pay a premium for a domain name depends on the registry operator's ability to price discriminate as well as their pricing strategy. The magnitude of the overall increase in costs will likely to some extent depend on the number of new gTLDs introduced as a result of the RFP process.

prices to registrants willing to pay a premium for specific domain names. The proposed registry agreement also allows for the perpetual renewal of every new gTLD registry agreement without regard to competitive effects or consumer-based objections.

ICANN should recognize that new gTLDs, while providing a desired choice for some registrants, are unlikely to restrain the exercise of market power by the .com registry operator and may impose significant costs on registrants, particularly those that will feel compelled to register their domains in the new gTLDs. ICANN should explicitly include this type of analysis as part of its evaluation of each new gTLD application, and should proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD.¹⁰ If ICANN is not prepared to act now to address the competition-related issues identified in this letter, it should at a minimum postpone the introduction of new gTLDs and the adoption of additional perpetually renewing gTLD agreements until it receives and reviews the study that the ICANN Board requested over two years ago.

2. *ICANN Should Revise the RFP Process and the Proposed Registry Agreement to Protect Consumers from the Exercise of Market Power*

ICANN should take steps to protect consumers from the exercise of market power by gTLD operators. First, the new gTLD approval and management process should be amended to reduce the potential adverse results of new gTLDs. The RFP process should require ICANN to consider, allow objections for, and retain authority to address any adverse consumer welfare effects that may arise during the new gTLD approval process and registry agreement renewal process. For example, ICANN should be sensitive to complaints that consumers may feel compelled to register domains in a new gTLD for defensive purposes, without expectation of receiving meaningful value from the new registration other than avoidance of even higher costs that would be incurred to combat third parties' improper use of the registrant's trade name in the new gTLD.

Second, once it has decided to authorize a new gTLD, ICANN should implement a process by which prospective gTLD operators compete for the privilege of operating a particular gTLD by offering terms that benefit consumers. Effectively implementing such a process would require

¹⁰ ICANN has consistently told us that its primary concern is with DNS management from a technical perspective and that it does not have the expertise or inclination to protect or preserve the public interest in competition and low domain costs, preferring instead to allow government competition authorities to take whatever action might be necessary to address issues of competitive abuse. The problem with ICANN's preferred approach is that the antitrust laws generally do not proscribe a registry operator's unilateral decisions made under the processes established by ICANN – such as, for instance, pricing decisions. See, e.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not . . . unlawful . . .”). Accordingly, ICANN should create rules fostering a competitive environment to the greatest extent possible.

that ICANN evaluate bids from the perspective of the benefits they provide consumers, not merely the amount bidders are willing to pay to ICANN for the right to operate the gTLD. ICANN's requests for bids should expressly call for bids to specify an initial maximum price that would be charged by the operator for domain registrations, as well as limitations on price increases over time. ICANN should also encourage improved performance by asking bidders to propose any operating specifications that exceed the minimum standards established by ICANN. ICANN's requests for bids should also solicit other proposals for providing consumer benefit, such as commitments not to discriminate in price across registrants (in order to avoid the ability to "hold up" registrants that have made investments in a domain name) and not to require the purchase of other services from the registry operator as a condition of registration (to limit price cap evasion). All such terms should be incorporated in the registry agreement so that ICANN can enforce them.

Third, although a competitive bidding mechanism likely is the best mechanism for simulating a competitive outcome in most circumstances, it may not be effective in all cases. Because ICANN's proposed registry agreement lacks any of the kinds of safeguards included in Section 7.3 of the new .com agreement or other gTLD agreements, ICANN should consider revising the proposed registry agreement, at least for instances where there is not competitive bidding to operate a new gTLD, to include provisions designed to limit the ability of the registry operator to exercise market power, i.e., price caps and commitments against price discrimination and tying. In addition, it may be preferable to require long-term agreements (the .com agreement, for example, requires that the operator offer domains for terms of up to 10 years). If a competitive bidding mechanism is infeasible, protections of this sort would prevent the exercise of market power by the operators of many of the contemplated gTLDs. Even if a competitive bidding mechanism is implemented, moreover, it might still be appropriate to incorporate some protections into the standard registry agreement, to anticipate the possibility that there is not effective competition for a particular gTLD.

Finally, ICANN should require competitive bidding for renewals of a gTLD registry agreement, rather than granting the incumbent operator a perpetual right to renew without competition. Such a mechanism would both assist in disciplining the conduct of the incumbent during the initial term insofar as the incumbent would want to maximize the likelihood of renewal, and ensure the benefits of competition when potential operators bid for the right to operate the gTLD in the renewal term. Instead, ICANN has conformed the proposed registry agreement to the existing gTLD agreements, effectively granting perpetual renewal rights to registry operators without the prospect of periodic rebidding, and without regard to potential adverse competitive effect. Experience with the .net TLD and other gTLDs has shown that competitive bidding in the award of gTLD registry agreements, and periodic rebidding, has served as an effective tool for managing the interests of registrants in gTLDs. Indeed, competitive bidding has resulted in lower domain prices and higher operating specifications than what ICANN has achieved through non-competitive negotiations. In particular, competitive

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bidding prompts bidders to propose and accept registry improvements, higher operating standards, and lower registration fees to win the contract.

Opponents of competitive bidding on renewals have contended that ICANN needs to grant perpetual registry contracts in order to motivate registry operators to invest in their registries. However, incumbent registry operators have an incentive to make investments in order to maintain their competitive advantage in a rebid situation.¹¹ Thus, the effect on innovation of potential termination of a registry agreement is at worst inconclusive. Further, experience demonstrates that any concern about the risk of transferring a new gTLD registry after a rebid is misplaced. Management and operation of many gTLDs and ccTLDs have been successfully transferred without imposing undue burdens on DNS stability or security. For example, VeriSign successfully transferred the .org registry to the Public Interest Registry in January 2003.

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ICANN's approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition at the registry level. We respectfully suggest that the DOC refrain from expressing satisfaction with ICANN's progress toward the goal of promoting competition among TLDs unless and until ICANN develops a credible and effective policy that compels it to employ tools such as competitive bidding to manage TLDs in a manner that safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices. To date, we believe that ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD registry operations.

Sincerely,


Deborah A. Garza

cc: Kathy D. Smith, Esq.

¹¹ We have identified no registry operator that reduced investment because of potential termination.