

August 25, 2004

**VIA ELECTRONIC AND
FIRST CLASS MAIL**

John Jeffrey, General Counsel
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way #330
Marina del Rey, CA 90292

Re: Objections to the Criteria for Designating Successor .net Registry Operator

Dear Mr. Jeffrey:

I write to express our objections to and continuing concerns about the process employed to date to choose a registry operator for the .net registry, including the Final Report, "Designating a Successor Operator for the .net Registry," published by the GNSO, as well as past actions of ICANN. The process and criteria outlined in the Final Report, as well as the process followed by ICANN leading up to the publication of the Final Report, fail to comply with the procedural and substantive requirements of the existing .net Registry Agreement, with the Memorandum of Understanding between ICANN and the Department of Commerce (the "MOU"), and with ICANN's own Bylaws.

VeriSign previously set forth procedural and substantive deficiencies in the ICANN process for selecting a .net registry operator in VeriSign's June 18, 2004 formal comments in response to the GNSO .net subcommittee's request for comments. Further, in a letter to ICANN dated June 24, 2004, VeriSign objected to steps in the process taken by ICANN and set forth requirements for the process based on the .net Registry Agreement, the MOU, and ICANN's Bylaws. In each instance, VeriSign's objections have been largely ignored, and ICANN has made no attempt to remedy the prejudice to the selection process that already has occurred.

I. The Selection Process Is Not Open, Transparent, and Objective

The selection process must be open, transparent, and objective. (.net Registry Agreement sections 2.1.1 and 5.2.1; MOU Article V.C.8). The Final Report, however, lacks the procedural detail and substantive requirements necessary to ensure that the process has the proper transparency and accountability. The same is true of the earlier statements and actions of the GNSO and ICANN in regard to the .net process, as we advised you in our initial June 24, 2004 letter to you.

A. Lack of Detailed, Clear, and Objective Evaluation Criteria

The report describes itself as taking a “characteristic broad approach.” Rather than articulating detailed, clear, and objective evaluation criteria with relevant subfactors under each criterion, the report instead articulates “broad criteria” whose specification and implementation is left to others. Vague criteria, such as “maintain .net registry functions in an efficient and reliable manner,” fail to meaningfully inform participants of the standards against which their proposals will be measured. Vague evaluation criteria undermine fair and open competition, and promote arbitrary decision making.

B. Lack of a Defined Scoring Method

The Final Report identifies absolute and relative criteria to assess registry operator proposals. But the Report lacks a defined numerical scoring method to be used to rate each proposal against ICANN’s requirements and against each other. The Report also lacks clearly defined evaluation process to ensure that the evaluation criteria, associated subfactors, and scores for each bidder are fairly applied through a transparent, fair and objective process. Without a defined scoring method, the assessment of each proposal’s satisfaction of the criteria is too subjective

Furthermore, the scoring methodology must convey detailed information that fully explains the basis for each evaluator’s rating. The scores for each bidder and each bidder’s relative scores should be provided to all bidders upon the decision of the bid. In addition, it must be possible for all bidders to earn a perfect score under the scoring system and for each category (i.e., for each criterion, no bidder automatically loses points prior to the objective application of the scoring system to that criterion).

II. The Selection Process Fails to Ensure the Continued Stability of Internet

The selection process must recognize criteria relating to the stability of the Internet as the most important evaluation criteria. Section 5.2.4 of the .net Registry Agreement provides that in selecting the successor Registry Operator, ICANN shall take into account all factors relevant to “the stability of the Internet . . . including without limitation: functional capabilities and performance specifications proposed by the eligible party for its operation of the registry, the relevant experience of the party, and the demonstrated ability of the party to manage domain name or similar databases at the required scale.”

A. Lack of Requisite Absolute Criteria

ICANN must make an affirmative determination, based on objective, reliable information, that registry operator offerors are responsible. In its June 18, 2004 comments to the GNSO .net subcommittee, VeriSign recommended that the minimum (“absolute”) criteria should include (as more fully described in Appendix A to those comments): 1) Internet stability; 2) Stability of Resolution System; 3) Scale of Resolution System; 4) Stability of Registration

System; 5) Scale of Registration Systems; 6) Security of Infrastructure; 7) Operational Expertise; 8) Track Record; 9) Demonstrated Commitment to Performance; 10) Migration Plan; 11) Standards Compliance; 12) Support of New and Emerging Technologies; 13) Network Coverage/ Geographic Footprint; 14) Customer Service; 15) Feature Functionality; 16) Track Record of Opening New/Underserved Markets; and 17) Financial Stability. However, the Final Report relegates some of these to lower-weighted relative criteria and omits others altogether.

Furthermore, because of the high level of importance of each of these four items, stability, security, technical and financial competence, each one of these criteria should be considered as a separate subcategory for evaluation purposes. And specific minimum measures of performance must be required along with objective evidence demonstrating the experience, the expertise, and the resources to meet the minimum measures. Minimum performance measures are spelled out in Appendix A to VeriSign's June 18th comments.

Any of the bidder's proposals, as required by an RFP, should objectively demonstrate that minimum performance standards can be achieved in all four of these criteria. The concern, of course, is that, in an attempt to win a bid, performance can be subjectively described without any demonstration of real performance capabilities. Historically, .net has been used by Internet infrastructure providers, and contains large numbers of domain name registrations associated with name servers that are critical for the operation of the Internet. Some of the world's largest ISPs as well as many other TLDs rely on name servers with .net names. Because of the critical nature of the .net TLD, evaluators should verify the bidders' ability to fully satisfy objective requirements through further investigation and testing. This is consistent with the requirement in Section 5.2.4 of the .net registry agreement that ICANN select a party that has "demonstrated ability ... to manage domain name or similar databases at the required scale."

An on-site audit should be performed and prior performance of similarly sized directories should be evaluated by an independent, technically qualified firm for any finalists in the bidding process. This verification is critical to ensure that .net maintains current operating functionality.

These are common procedures in a complex selection process such as this one. They are especially necessary here due to the important role of the .net registry for the stability of the DNS. Requiring anything less than the procedures proposed here, would impact the accountability of the parties bidding for .net; limit the openness, transparency and accountability of the decision-making process; and risk the stability of the Internet.

B. Improperly Weighted Absolute Criteria

The Final Report notes that once the absolute criteria are met, the relative criteria "become relevant ... and are proposed as a basis for comparison and evaluation of competing applications." However, the degree to which a bidder exceeds the absolute criteria must be taken into account in the subsequent evaluation of the relative criteria. That is to say, the absolute criteria establish the baseline for competing bidders. If one bidder far exceeds the baseline, according to the identified performance metrics, that bidder's "score" on absolute criteria should

be factored into the bidder's overall performance in the relative criteria evaluation. Otherwise, all bidders who move on to the relative criteria evaluation will be incorrectly treated as capable of delivering identical levels of performance.

C. Improperly Weighted Relative Criteria

The Final Report states that the relative criteria are listed with the highest weight at the top of the list. But it weighs criteria related to the promotion of competition above relative criteria relating to stability, security, technical and financial competence.

Performance measurements in this category should be the most heavily weighted of all the relative criteria. Any other relative criteria would be of little or no consequence to the operation of .net, if the stability of the registry or security of the operating system were compromised, if technical qualifications are sub-par, or if the registry operator cannot provide the financial resources to provide service at the scale necessary to accommodate ongoing growth of the TLD.

The criteria must be weighted properly to reflect the importance of "relative criteria related to stability, security, technical and financial competence." Any other approach would require making one of the following incorrect assumptions: 1) all bidders are able to demonstrate the competence to deliver identical levels of stability, security, technical and financial competence; or 2) the variations in bidders' competence levels in these four areas are insignificant with regard to the .net registry operator selection. These assumptions would be unrealistic and adopting such an approach would prejudice the ability of this process to select an operator best able to preserve the stability of the registry.

Under "relative criteria," demonstrated capabilities to achieve performance levels at or beyond the minimum should be compared and evaluated for all bidders who satisfy the "absolute criteria," with the goal to ensure the selected registry operator has the highest levels of expertise, resources, experience and plan to maintain exemplary performance in the near and long-term. This should include, among others, resolution availability, response times, packet loss statistics, registration system availability, and operational performance statistics.

Due to the importance of the .net registry to the stability of the DNS, only a bidder who has maintained a substantial registry operation will be able to produce a reasonably supported and reliable record sufficient to establish that it can in fact fulfill these important requirements. At a minimum, any bidder without such a record of proven success at operating a registry must be required to produce other compelling evidence, based on a proven track record, of its ability to fulfill these critical requirements and must be subjected to an in-depth investigation prior to any transition being made in the operation of the .net registry.

III. The Selection Process Improperly Disadvantages VeriSign

The selection process, including the selection criteria, must not be arbitrary, inequitable, or unfair to VeriSign or other participants in the process. Furthermore, neither the process nor the fact that VeriSign is the incumbent Registry Operator shall disadvantage VeriSign in comparison to other entities seeking to serve as the successor Registry Operator. (.net Registry Agreement sections 2.1.3 and 5.2.2; MOU Articles V.C.4 and V.D.3).

The Final Report appears to accord the highest weight to relative criteria related to “promotion of competition” and “maximization of choice to DNS users.”¹ However, the proposed relative criteria regarding the promotion of competition has not been fully defined. As a general matter, any consideration of competition in the selection of a specific operator must be based on: 1) objective and quantifiable considerations aimed at continued investment in and innovation of the registry; 2) experience and strength of the bidder to ensure the continued competitive viability and strength of the .net registry; 3) valid data; 4) well supported professional economic analysis; 5) compliance with applicable antitrust laws; and 6) the requirements of the existing registry agreement.

ICANN must define any criteria related to the promotion of competition in such a way as to ensure that their application would not adversely affect consideration of VeriSign's proposal due to the fact that VeriSign is the current operator of the registry. In particular, it should be made clear that section 5.2.4 does not permit consideration in this context of: the number of domain name registrations serviced by VeriSign (alone or in relation to any other company), VeriSign's size, or VeriSign's incumbency as the registry for the .net and certain other TLDs.

IV. The Selection Process is Not Being Established as a Result of Consensus Policies

The selection process must be based on specifications and policies established as a result of a consensus among Internet stakeholders (“Consensus Policies”). (.net Registry Agreement sections 5.2.4 and 4.3; MOU Article V.C.4). The ICANN Board’s Rome March 6, 2004 resolution 04.18 did not properly authorize the President of ICANN to take steps to initiate the process specified in Section 5.2 of the .Net Registry Agreement. Furthermore, ICANN has not, in issuing its March 31, 2004 “formal request for guidance” to the GNSO, taken the appropriate steps to present and adopt a procedure under which a subsequent .net Registry Operator will be selected. Similarly, the GNSO subcommittee has not properly developed a report on the formal request for guidance.

¹ This is not consistent with the language in the net Registry Agreement. Section 5.2.4 requires ICANN to take into account factors relating to the “maximization of consumer choice.” If “maximization of choice to DNS users” means anything different, VeriSign disagrees.

ICANN also has not yet established the Independent Review Panel required by Section 4.3.2 of the .net Registry Agreement and ICANN's Bylaws, to review any challenge by the .net registry operator to "Consensus Policies" established by the ICANN Board.

V. The Selection Process Fails to Protect the Investments and Expectations of Existing Users

The selection process must protect the investments and expectations of existing users of .net. The process outlined in the Final Report fails sufficiently to do this.

While the Report includes "Absolute Criteria Related to Continuity" ("grandfathering"), which state that "existing registrants in .net should be able to maintain their registrations on terms materially consistent with their existing contracts," it relegates to the lowest weight relative criteria related to existing services. It seems inconsistent to have continuity as an absolute criterion, while at the same time not placing a high priority on maintenance of existing services, especially those that impact large numbers of users such as internationalized domain names. A lesson can be learned from the Public Interest Registry in their transition as the .org TLD registry operator: they decided to not continue supporting previously registered IDNs only to later reverse their position because of strong customer objections.

Criteria related to continuity should be weighted higher than certain other criteria related to consumer choice or price. Consumers have already made choices based on services currently offered with .net. Furthermore, discontinuance of existing services would have a direct impact on consumers, whereas consumers have little or no choice with regard to the registry operator except in the selection of the TLD and there is no documented correlation between registry price and the registrar price that consumers pay.

VI. The Selection Process Is Not Adequately Subject to Public Comment

The selection process and criteria must be subject to public explanation and comment. (MOU Article V.8.B). While the GNSO has solicited public comments on the draft criteria, and in the Final Report attaches as Annex 4 such comments, it is apparent that the subcommittee has not sufficiently considered the comments submitted. Virtually all of VeriSign's earlier comments and correspondence to ICANN and the GNSO have been ignored. In order to make the process meaningful, comments must be considered and feedback provided on which comments were accepted and rejected and the rationale behind such actions.

VII. The Selection Process Fails to Comply with ICANN's Bylaws

Annex A of ICANN's Bylaws, as amended, purports to prescribe the procedures by which the Generic Names Supporting Organization (GNSO) must conduct its policy

development process (“PDP”).² The Final Report and the actions of the .net subcommittee of the GNSO, as well as the actions of ICANN, have not complied with these requirements. The procedures in the Bylaws exist in part to ensure the openness, transparency and objectivity of ICANN’s decision-making process. The failure to follow these procedures prejudices the selection process.

These developed procedures should not be ignored nor changed, absent proper consideration and lawful process. If the Final Report is intended to serve another purpose, such purpose should be stated by the GNSO subcommittee referencing its authority under ICANN’s Bylaws or other relevant policies.

Regardless of the GNSO’s reasons for disregarding the PDP, the GNSO must strictly adhere to the PDP provisions, particularly in light of the importance of the issues and policies being considered, and in view of the provisions of the .net Registry Agreement requiring a fair, open and transparent process. Anything less distorts the process, decreases the legitimacy of the GNSO’s work, casts doubt on any “consensus” position that may result from that work, and exposes the process to claims of lack of transparency and fairness.

In addition to the specific comments below, it is not clear whether the GNSO Council decided to form a task force or decided to respond to ICANN’s request for a consensus “policy” statement without forming a task force.

The Council purported to form what it has referred to as a “subcommittee.” The GNSO Council is not a committee of the Board of Directors and therefore it lacks the capacity to form the appropriate subcommittee. Indeed, ICANN’s Bylaws do not appear to authorize the GNSO Council to form any committees. A review of the actions of the “subcommittee” to date leads to the conclusion that it has functioned more like what the PDP process calls a task force. The Draft Report fails to cite the relevant authority under which the subcommittee is acting and fails to address the deficiencies therein.

Specific cases where the PDP procedures were not followed are listed here in summary (without limitation) and described in further detail in Appendix B to VeriSign’s June 18, 2004 comments to the GNSO .net subcommittee, citing the applicable section from the ICANN Bylaws, Annex A:

Section 2 describes the process by which an Issue Report shall be created, its scope, required deadlines, and purpose. The process has been deficient in the following, among other, respects:

² Although VeriSign expresses no opinion at this time as to the propriety of the PDP or whether it is consistent with applicable requirements, it reserves its right to do so.

- The request of ICANN staff was sent to the GNSO Council 25 days after Board action instead of the required 15 days;
- There is no evidence that the required Issue Report, containing even the minimum information and instruction required by Section 2, was created or transmitted to the GNSO Council; and
- The request sent to the GNSO Council was not accompanied by an opinion of the ICANN General Counsel.

Section 4 (and by reference Sections 7 and 8) describe the manner in which a PDP shall be initiated. The process has been deficient in the following, among other, respects:

- There is no public posting of the minutes of the GNSO Council meeting that allegedly took place on 1 April 2004 authorizing the creation of the “Subcommittee,” notwithstanding the fact that under the Bylaws those minutes should have been posted by 22 April; and
- There does not appear to be any public record of a vote by the Council.

Sections 5-7 describe the composition and selection of task forces, their role and the collection of information, and the public notification of the PDP. The process has been deficient in the following, among other, respects:

Section 5

- There has been a lack of involvement of the ICANN Staff Manager; and
- There has been a lack of transparency in requesting appointment of representatives to the Subcommittee.

Section 6

- The first request for public comment did not occur upon initiation of the PDP but rather 57 days later.

Section 7(b)

- There is no evidence of a charter created by the GNSO Council; and
- No specific directions to the “Subcommittee” were published by the GNSO Council, nor were any specific guidelines developed, to assure that the Subcommittee does not deviate from instructions of the GNSO Council.

Section 7(d)

- The constituency statement previously submitted failed to contain even the minimum disclosures required by Section 7(d) for the Subcommittee’s consideration of those statements (i.e., voting results, how the constituency arrived at its position in the statement, dissenting or opposing positions of constituency members to the position

submitted as the consensus position in the constituency statement, any analysis of time or impact on the constituency, etc.).

Section 7(e)

- The Final Report does not contain most of the disclosures or information required; and
- None of the following dates were met:
 - The Preliminary Report was due not later than 12 May;
 - A Final Report was due not later than 17 May;
 - The Final Report was supposed to be posted by 22 May; and
 - The GNSO Council should have called for a meeting of the full Council to consider the Final Report by 2 June 2004.

Section 8 describes the procedure if no task force is formed. The process has been deficient in the following, among other, respects:

- GNSO constituencies did not appoint representatives within 10 days;
- Representatives generally did not solicit comments from their constituencies;
- Constituency statements were not received from all the constituencies as required. And the statements which were received were wholly deficient in that it is reasonable to assume that statements received by the GNSO Council should contain disclosures similar to those required of constituency statements submitted to a task force; and
- The ICANN Staff Manager did not compile an Initial Report and post it within 50 days of the PDP initiation.

Section 11 describes the process by which the Final Report and the GNSO Council's deliberations are to be reported to the Board. The process is deficient in the following, among other, respects:

- There is no evidence that the required Board Report was submitted to the Board within five days after the GNSO Council's adoption of the Final Report.

In light of the above deficiencies in the process, ICANN needs to act now to remedy the prejudice to the process of selection. In addition, in light of the proceedings to date, including the lack of transparency in the process, it is imperative that ICANN require the identification of all conflicts of interests of GNSO members participating in the process.

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I look forward to receiving your response. If you have any questions, please do not hesitate to contact me.

John Jeffrey, Esq.
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Sincerely,

Kevin C. Golden
Vice President, Associate General Counsel
VeriSign, Inc.