

To: Organizational Effectiveness Committee  
Date: 14 December 2018  
From: Samantha Eisner, Deputy General Counsel

ICANN Legal provided the following information to the Registrar Stakeholder Group Charter Drafting Team, which was presented to the OEC for its 4 December 2018 meeting:

ICANN org has reviewed the updates to the RrSG proposed charter. We note that some of the concerns previously raised in our review of potential legal or fiduciary concerns have been addressed through the update. However, some of the concerns previously raised by ICANN org persist in this update, specifically, as it relates to the development of a grouping of registrars that have no voting status within the RrSG even if they are not exercising a vote in any other part of the GNSO, as set out in Section 2.2.3. As previously noted, these concerns do not apply where an otherwise eligible member elects to vote through a different SG in the GNSO, or is part of a registrar family.

The persisting legal and fiduciary concerns we have with this are:

(1) May not be aligned with the clarity required under GNSO operating procedures, particularly where there is significant discretion provided to making such a determination as to who can vote and may not (see terms such as "non-exhaustive list" "entities whose primary business activity derives from an accredited TLD registry or registry operator" "entities who are directly or indirectly operated/owned by governments");

(2) Lack of representation at the Council level:

If the Registrar Stakeholder Group is going to maintain its practice of reaching a voting position (as noted on recently filed GNSO Council Abstention Forms), then there is no ability for these otherwise eligible entities to have votes raised at the Council level. If otherwise eligible registrars are not allowed to have their voice considered during Council votes on items such as consensus policies, ICANN org is concerned with how that might impact the future applicability of those policies and the ability to enforce against disenfranchised registrars. In addition, ICANN org is concerned with how this disenfranchisement may impact Council votes on the exercise of Empowered Community powers.

(3) Lack of clarity on non-voting participation in consensus calls on policy statements/voting positions. Further, if non-voting members do not support a consensus call, they then automatically excluded from any simple majority vote on the policy statements issued in the name of the group of which they are members. (See Item (2) above)

(4) Lack of clarity in how the otherwise eligible non-voting members will participate in Empowered Community processes originating within the RrSG (prior to the Council votes).

ICANN org understands that the RrSG is interested in moving the proposed Charter to the OEC for further consideration. As noted in our prior communication, we'll provide the OEC with a copy of this note for consideration along with the Charter.

The OEC requested further information on the specific sources that ICANN org flagged as part of its review of potential legal or fiscal concerns.

The Registrar Stakeholder Group is defined in the ICANN Bylaws, Section 11.4(b), as "representing all registrars accredited by and under contract to ICANN."

The GNSO Operating Procedures are available at:

<https://gns0.icann.org/en/council/op-procedures-18jun18-en.pdf/>

Item (1) above focuses on the potential lack of clarity in the definition of non-voting registrars, through the inclusion of language granting significant discretion in defining which entities might be deemed non-voting. such as "non-exhaustive list" "entities whose primary business activity derives from an accredited TLD registry or registry operator" or "entities who are directly or indirectly operated/owned by governments".

The clauses that ICANN org relies upon out of the Operating Procedures regarding this lack of clarity include:

7.1.1a (Participation Principles): "These rules and any other rules governing participation should be objective, standardized and clearly stated."

7.1.2b (Membership): "All Groups should abide by rules governing membership, which are based on common principles. All Group members should have rights, duties and responsibilities and in particular, rights to vote as applicable as per Group membership rules."

7.1.2e (Membership): "Admission criteria should be predictable and objective and not arbitrary or discretionary."

Item (2) above discusses the potential impacts to ICANN's ability to enforce Consensus Policies on registrars that are excluded from developing a voting position in the event the Registrar Stakeholder Group cannot reach consensus and takes the issue to an internal vote. While the Drafting Team suggests this is not really an issue for concern, there remains the possibility for there to be disagreement on the impact of a proposed Consensus Policy amongst those with voting rights and those without, and for that disagreement to force a vote within the Registrar Stakeholder Group's internal processes in which the non-voting registrars couldn't participate. Because those registrars also are not participating in any other part of the GNSO, they would effectively not have the ability to participate in a decision on whether to

support a Consensus Policy, and seems likely to give rise to a challenge against enforcement. ICANN's ability to uniformly enforce Consensus Policy is essential.

The ability for ICANN to enforce consensus policies arises through the Registrar Accreditation Agreement (<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>) and Bylaws, which require Consensus Policies to be approved through a GNSO Supermajority vote, which is defined as: "(A) two-thirds (2/3) of the Council members of each House, or (B) three-fourths (3/4) of the Council members of one House and a majority of the Council members of the other House." (Article 11.3 (i)(xix)). The three Council Members appointed by the Registrar Stakeholder Group sit alongside three from the Registry Stakeholder Group and a Nominating Committee appointee to form the Contracted Parties House.

Item (2) also discusses similar issues with allowing ICANN understanding the scope of support at the Council level for Empowered Community actions, if there is underlying ability for the Registrar Stakeholder Group to require a vote on internal voting positions or actions supporting the powers of the Empowered Community, as defined within the Bylaws.

Items (3) and (4) are inherently related to the items already discussed above.