Public Comments Issue Tracking Checklist (v3.0)

Forum Title: Proposed Changes to the RrSG Charter

Open Date:	18 December 2018	**Close Date:**	5 February 2019

A total of 4 issues, suggestions, and recommendations were offered by ICANN Org during the Charter Amendment Process and responded to by the RrSG during the Public Comment Proceeding. These items are documented in this Checklist. They are grouped into four categories as follows:

- Category A: GNSO Operating Procedures Alignment

- Category B: Representation at GNSO Council Level

- Category C: Non-Voting Member Participation within RrSG

- Category D: Non-Voting Member Participation in Empowered Community

The following table shows the original disposition by Status category as of 7 February 2019 after a thorough review of ICANN Org's concerns, extensive dialogue with ICANN Org and a written response provided to ICANN Staff via the public comment proceeding by Graeme Bunton, Chair of the Registrar Stakeholder Group (RrSG) on behalf of the RrSG.

Status	Number of Issues 7 Feb. 2019
Resolved	0
Under Review	4
Deferred/Postponed	0
Unknown	0
Needs Clarification	0
Total	**4**

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1) Category A: GNSO Operating Procedures Alignment		
Issue/Suggestion/Recommendation – ICANN Org	**Status**	**Comments/Disposition**
1.1 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"); 1.2 Item 1.1 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."	**Under Review**	**RrSG Response:** §2.2.3 of the new Charter reads: 2.2.3 Non-Voting Members: The following is a non-exhaustive list of entities which, although they meet the primary membership eligibility requirements in 2.2.1, are considered eligible for membership only as Non-Voting Members: a. Not-for-profit entities excepting trade associations or coalitions representing for- profit entities; b. Entities whose primary business activity derives from an accredited TLD registry or registry operator; and c. Entities who are directly or indirectly operated/owned by governments. Determination of a, b or c will be a fact-based exercise so the issue of "significant discretion" should not arise. With regard to the language "non-exhaustive list", such term and other similar terms ("including but not limited to" or "including but without limitation") are commonly used in governance documents and contracts in order to preserve certain degree of discretion for any unforeseeable circumstances. Our cursory look reveals that these terms appear in the Procedures, ICANN Bylaws, the ICANN Registry Agreement, Registrar Accreditation Agreement, just to name a few.

	Under Review	No one can predict with absolute certainty how the domain market may evolve or change in the future, thus, we consider the term "non-exhaustive list" used in §2.2.3 not only prudent but essential. §2.2.3 of the New Charter was discussed at great length within the RrSG to ensure it is "fit for purpose" - i.e. to prevent entities that may have a conflict of interest through their affiliation with other business or government interests from being able to vote. §2.2.3 is intended to allow the Executive Committee ("ExCom") the means and flexibility to make an appropriate determination on voting status. As noted in our prior communications with ICANN Org, our reading of the GNSO Operating Procedures do not preclude a group from developing its own rules around voting rights. Thus, we do not believe the criteria and rules around admission and voting rights in the New Charter are inconsistent with the Procedures.

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2) Category B: Representation at GNSO Council Level		
Issue/Suggestion/Recommendation – ICANN Org	**Status**	**Comments/Disposition**
2.1 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. 2.2 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 abilty to participate in a decision on whether to 3 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.	**Under Review**	**RrSG Response:** GNSO Council Representatives of the RrSG vote as directed by the RrSG ExCom, who in turn are informed by discussion within membership and, as pointed out above, voting and non-voting Member registrars participate on equal footing in policy discussions. The RrSG therefore does not see §2.2.3 non-voting status as a barrier to having votes raised at the Council level. Furthermore, one of the important changes reflected in the New Charter is to allow non-voting Members' representatives to stand for election and serve as GNSO Council Representatives. We reiterate it is not mandatory for ICANN-accredited registrars to join the RrSG. ICANN's ability to enforce Consensus Policies is based on contract (the RAA), regardless of whether a registrar is a member or non-member of the RrSG and voting or non-voting member status has no bearing whatsoever.

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The ability for ICANN to enforce consensus policies arises through the Registrar Accreditation Agreement (https://www.icann.org/resources/pages/approvedwith-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.	**Under Review**	

3) Category C: Non-Voting Member Participation within RrSG

Issue/Suggestion/Recommendation – ICANN Org	Status	Comments/Disposition
3.1 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) Items (3) and (4) are inherently related to the items already discussed above.	**Under Review**	**RrSG Response :** With regard to policy-related matters, §6.3 of the New Charter requires that the RrSG endeavors to seek general consensus from membership. §6.3 further mandates: "All members should be given the opportunity to review the draft statement, discuss any required amendments and come to a consensus on the final version."

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	Under Review	From the above, it is clear that for the purposes of consensus call, voting or non-voting members and their views are treated equally. While a vote by a simple majority is one of the two "last resort" options if there is continuing dissent, no policy statements/voting positions were subject to a membership vote under the previous charter in the last 5 years or under the New Charter to date. Surveys and questionnaires are instead often used to gather opinion and identify the preference of the majority.

4) Category D: Non-Voting Member Participation in Empowered Community

Issue/Suggestion/Recommendation – ICANN Org	Status	Comments/Disposition
4.1 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). 2 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	**Under Review**	**RrSG Response:** The Empowered Community processes are relatively new and the RrSG is yet to develop a process to receive and evaluate petitions originated within the RrSG. However, we note the GNSO Council has recently called for volunteers to form a "GNSO Drafting Team to Further Develop Guidelines and Principles for the GNSO's Roles and Obligations as a Decisional Participant in the Empowered Committee". The RrSG will closely monitor the progress the GNSO Drafting Team's work and outputs and we plan adopt or adapt those as appropriate. It is our intention to ensure that, regardless of voting or non-voting status, all members of the RrSG will be able to submit a petition.

Notes:

Categories: Use as many separate topic groupings as needed to organize the issues; insert/delete rows as appropriate.

Status may include: Under Review, Closed, Active, Resolved, N/A, or other classification pertinent to the issue.