

RrSG response to Proposed Changes to the RrSG Charter

The Registrar Stakeholder Group (RrSG) is pleased to have the opportunity to comment on the changes to the RrSG charter (“New Charter”).

Our comments below are intended to, once again, address ICANN org’s concerns over §2.2.3 of the New Charter, notwithstanding our previous attempt to do so. See:

- [Cover letter from RrSG addressing ICANN Org’s fiscal concerns](#)
- [ICANN Org fiscal concerns provided to RrSG](#)

§2.2.3 deems certain RrSG members ineligible to become a voting member, if they are non-profit organizations, their main business is a registry operator or if they are operated/controlled by governments. This restriction is in addition to where a member elects to vote through a different Stakeholder Group or Constituency in the GNSO, as such member would be ineligible to become a voting member per §6.1.2.j of the GNSO Operating Procedures (“Procedures”).

ICANN Org is concerned that the operation of §2.2.3 of the New Charter has the ability to exclude, on an unpredictable basis, a group of registrars from voting in the RrSG; which in turn may impact ICANN’s ability to enforce its bylaws and contracts/ICANN consensus policies.

There are approximately 500 distinct registrars or families of registrars, with around 100 of them belonging to the RrSG. Two of the top 10 largest registrars (together, they manage more than 10 million gTLD domains) and many other ICANN-accredited registrars are not members.

Once one recognises the voluntary nature of RrSG membership and the fact many ICANN-accredited registrars, large and small, choose not to join the RrSG, it should be obvious that ICANN Org’s concerns are unfounded. Otherwise, it would be incumbent upon ICANN Org to explain why these legal and fiduciary concerns do not apply to those non-member registrars.

Background of the New Charter

A considerable amount of time (approximately 2 years) and effort were devoted to developing the New Charter. Although the bulk of the work was done by a small team of RrSG Member representatives, with exceptional and much appreciated support from ICANN staff, the full membership were given numerous opportunities to review, discuss and propose amendments to multiple drafts and the final

documentation titled RrSG Charter (6.0). In June 2018 the RrSG held a membership vote; 97.7.% voted in favour of supporting the New Charter.

Subsequently, the New Charter was adopted as the new governance document of the RrSG and since then, the RrSG has been operating under the New Charter, including elections held in July 2018 for its current Officers, GNSO Council Representative and Nominating Committee Representative.

The RrSG would again address the four issues raised in the public comment description and explanation as follows:

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

§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. 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.

2. Lack of representation at the Council level: there is no ability for these otherwise eligible entities to have votes raised at the Council level.

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.

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.

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.”

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. 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).

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.

Conclusion

It should be abundantly clear from the New Charter that the RrSG is committed to the ICANN multi-stakeholder model and decision making methodology by consensus. However, it is inevitable that conflicts of interest may arise in the RrSG as the domain ecosystem evolves. The RrSG firmly believes §2.2.3 of the New Charter is prudent and necessary.

In the spirit of a bottom-up governance environment in ICANN, each group is empowered to determine its charter, including rules around admission and voting rights. Considering that the New Charter has been duly approved by the RrSG members in June 2018 and has been in operation since, we urge ICANN Board to recognize the proposed charter amendments as reflected in the New Charter.

Sincerely,

Graeme Bunton
RrSG Chair