



RE: Consensus Policy Voting Requirements

Background:

The PDP Work Team has requested clarification regarding voting thresholds applicable to creating Consensus Policies that are to be enforceable against registrars and registries. This clarification is intended to inform the PDP Work Team in its deliberations as it drafts new policy development procedures for use by the restructured GNSO Council.

1. Adoption of Consensus Policies under the RAA and Certain Registry Agreements.

To adopt a Consensus Policy to be enforceable against the registrars under the Registrar Accreditation Agreements, the RAA provides as follows:

4.1 Registrar's Ongoing Obligation to Comply With New or Revised Specifications and Policies. During the Term of this Agreement, Registrar shall comply with the terms of this Agreement on the schedule set forth in Subsection 4.4, with

4.1.1 new or revised specifications (including forms of agreement to which Registrar is a party) and policies established by ICANN as Consensus Policies in the manner described in Subsection 4.3...,”

4.3 Manner of Establishment of New and Revised Specifications and Policies.

“4.3.1 "Consensus Policies" are those specifications or policies established based on a consensus among Internet stakeholders represented in the ICANN process, as demonstrated by (a) action of the ICANN Board of Directors establishing the specification or policy, **(b) a recommendation, adopted by at least a two-thirds vote of the council of the ICANN Supporting Organization to which the matter is delegated, that the specification or policy should be established, and** (c) a written report and supporting materials (which must include all substantive submissions to the Supporting Organization relating to the proposal) that (i) documents the extent of agreement and disagreement among impacted groups, (ii) documents the outreach process used to seek to achieve adequate representation of the

views of groups that are likely to be impacted, and (iii) documents the nature and intensity of reasoned support and opposition to the proposed policy.”
[emphasis added]

This RAA provision clarifies that a vote of at least two-thirds of the GNSO Council that the specification or policy should be established is sufficient to deem the policy a “Consensus Policy” enforceable against Registrars. However, because this RAA language predates the GNSO’s current Bicameral House voting structure, it is unclear how to apply this contractual language to the current GNSO.

From a numerical standpoint, two-thirds of the GNSO Council’s voting members would require an affirmative vote of at least 14 members. However, Section 3.9 of Article X of the ICANN Bylaws was recently updated as part of the restructuring process to eliminate entire GNSO council votes, and to require additional voting thresholds as follows:

“Except as otherwise specified in these Bylaws, [Annex A](#) hereto, or the GNSO Operating Procedures, the default threshold to pass a GNSO Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO actions:

- a. Create an Issues Report: requires an affirmative vote of more than 25% vote of each House or majority of one House;
- b. Initiate a Policy Development Process (“PDP”) Within Scope (as described in [Annex A](#)): requires an affirmative vote of more than 33% of each House or more than 66% of one House;
- c. Initiate a PDP Not Within Scope: requires an affirmative vote of more than 75% of one House and a majority of the other House (“GNSO Supermajority”);
- d. Approve a PDP Recommendation Without a GNSO Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation;
- e. Approve a PDP Recommendation With a GNSO Supermajority: requires an affirmative vote of a GNSO Supermajority; and
- f. Approve a PDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN contract provision specifies that “a two-thirds vote of the council” demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded with respect to any contracting party affected by such contract provision.

Thus, under Section 3.9.f., to impose Consensus Policies on Registrars and other contracting parties containing similar requirements (such as in the .PRO Registry Agreement), a GNSO Supermajority affirmative vote should be obtained.

2. Adoption of Consensus Policies under the Registry Agreements.

With regard to registries whose agreements do not specify that a 2/3 GNSO Council vote demonstrates a consensus, a different analysis is required. For example, the .ORG Agreement provides that:

“3.1(b)(i) At all times during the term of this Agreement and subject to the terms hereof, Registry Operator will fully comply with and implement all Consensus Policies found at <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with ICANN's Bylaws and as set forth below.

“3.1(b)(ii) "Consensus Policies" are those specifications or policies established (1) pursuant to the procedure set forth in ICANN's Bylaws and due process, and (2) covering those topics listed in Section 3.1(b)(iv) below. The Consensus Policy development process and procedure set forth in ICANN's Bylaws may be revised from time to time in accordance with ICANN's Bylaws, and any Consensus Policy that is adopted through such a revised process and covering those topics listed in Section 3.1(b)(iv) below shall be considered a Consensus Policy for purposes of this Agreement.”

“3.1(b)(iv) Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs.”

For registries whose registry agreements include language similar to the .ORG Agreement, the required vote is not specified. Instead it requires compliance with the Bylaws procedures. The recently updated Bylaws include several voting thresholds that could be applicable to these registries: the GNSO Supermajority (discussed above) and the following additional threshold under Section 3.9.d:

d. Approve a PDP Recommendation Without a GNSO Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

Thus, a Consensus Policy might be considered to be binding on certain registries without a GNSO Supermajority Vote, but would not be applicable to all registries (such as the .PRO Registry). However, while these registry agreements do not include a specific voting threshold (such as the two-thirds vote requirement found in the RAA or the .PRO Agreements), they state that “Consensus Policies” should be supported by a “consensus.” Specifically, many registry agreements include language similar to the following:

"Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including the operators of gTLDs."

Since there is no definition of what "consensus" means in these Registry Agreements, the PDP Work Team should consider whether it is appropriate to impose a "Consensus Policy" on these registries without at least the presence of a GNSO Supermajority Vote.

Given that it may not be desirable to have different voting thresholds applicable among the registries (from a contract management or compliance point of view), the PDP-Work Team should consider in its deliberations recommending further amendments to the Bylaws to standardize all of the voting requirements for all registries and all registrars in order to adopt Consensus Policies that would be enforceable against them. Staff proposes that the GNSO Supermajority Vote apply in all instances where the GNSO Council intends to adopt consensus policies to be enforceable against all registrars and registries.