The Internet Corporation for Assigned Names and Numbers

ICANN

STAFF MEMORANDUM TO THE GNSO RAA WORKING GROUP   Date: 14 April 2010

RE: Implementation of new RAA amendments

1.   Background

The GNSO RAA Working Group has requested Staff to investigate and advise it on the available implementation options under the new GNSO bicameral voting structure to amend the RAA.

2.   The RAA amendment process

The process for amending the current Registrar Accreditation Agreement (RAA) as set out within the RAA itself is unchanged from the last round of RAA amendments approved by the Board in May 2009.

Section 5.4 contemplates that updated forms of the RAA (which will apply to renewing accreditations) may be 'adopted' by ICANN using the process under Section 4.3. Section 4.3 outlines certain requirements typical to the usual policy cycle including outreach and soliciting a range of stakeholder inputs, preparing and posting a written report for public comment and requiring a 'two-thirds vote' of the GNSO Council.   The 2009 RAA amendments followed this process.   This process is similar to, but is not identical to, the process outlined in Annex A for the development of policies by the GNSO Council.

Although the RAA does not require a negotiation with the Registrars, the process adopted for the 2009 round of amendments included multiple rounds of negotiations between Staff and Registrars followed by public comment periods. Including a negotiation process with the Registrars enabled ICANN to understand how the Registrars would be impacted by the proposed amendments.

Appendix 1 sets out extracts of the relevant RAA sections.

3.   Development of the new form of RAA.

The form of the RAA that may be approved by the GNSO Council may include topics that are within the scope of "Consensus Policies" as specified under Section 4.2 of the RAA as well as other possible topics.   Notwithstanding the broad nature of amendments that can be included in the new form of the RAA, Staff recommends that the RAA Drafting Team evaluate whether a proposed amendment topic is more appropriately addressed through a formal PDP on the specific topic rather than through the existing RAA amendment process.   If the issue reflects a new policy position rather than clarification of existing language or obligations,   the RAA Drafting Team should consider

recommending that it be addressed through a separate PDP process to allow all of the stakeholders affected by the issue to properly analyze and debate it as a new policy recommendation.

4. The GNSO voting to approve RAA amendments

Under the GNSO Council's new bicameral voting structure, Article X, Section 3.9 of the bylaws was amended to specifically require a GNSO Supermajority vote with respect to an affected contract party (e.g. registrars) where the GNSO is to approve a PDP recommendation that would impose new contractual obligations on that contracting party (registrars) and where the contract required "a two-thirds vote of the council" to demonstrate consensus (i.e. as stated under Section 4.3.1 of the RAA).

A GNSO Supermajority is defined as "…an affirmative vote of more than 75% of one House and a majority of the other house."[1]

Translating this to the current bicameral seating structure would mean that a successful GNSO Council vote would require either (A) at least 6 affirmative votes in the Contracted Parties House (75% x 7 seats = 5.25) and at least 7 votes in the Non-Contracted Parties House (50% x 13 = 6.5), or (B) at least 4 affirmative votes in the Contracted Parties House (50% x 7 seats = 3.5) and at least 10 votes in the Non-Contracted Parties House (75% x 13 = 9.75).

Appendix 2 sets out extracts of the relevant bylaws.

5. Implementing the new RAA

Assuming the criteria and approval steps outlined in (2) - (4) are complete, newly approved registrars for accreditation will simply execute the new RAA. Implementation of the new RAA for adoption by registrars contracted under the current RAA is possible by various concurrent means.

(i) <u>On renewal of expired RAA:</u> Section 5.4 of the RAA provides for mandatory execution of the then-current RAA at the time of registrar accreditation renewal.

(ii) <u>Voluntary Acceptance</u>: Section 5.4 also contemplates voluntary election by a registrar to sign a new RAA (version posted on ICANN's website) in place of the existing RAA and deemed to have commenced on the date of the existing RAA. Naturally, to encourage voluntary adoption by registrars, the various potential incentives to adopt should be communicated. These may include: adoption of/compliance with the latest 'best practices'; and community and peer support for the new RAA.   Fee incentives were also used in the last 2009 RAA amendment round. Any decision to encourage early adoption or provide incentives would be decided following adoption of the new RAA.

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[1] http://www.icann.org/en/general/bylaws.htm#X-3.9.c

[Note: Italics and emphasis added]
…

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.

…

5.4 Term of Agreement; Renewal; Right to Substitute Updated Agreement. This Agreement shall be effective on the Effective Date and shall have an initial term running until the Expiration Date, unless sooner terminated. Thereafter, if Registrar seeks to continue its accreditation, it may apply for renewed accreditation, and shall be entitled to renewal provided it meets the ICANN-adopted specification or policy on accreditation criteria then in effect, is in compliance with its obligations under this Agreement, as it may be amended, and *agrees to be bound by terms and conditions of the then-current Registrar accreditation agreement (which may differ from those of this Agreement) that ICANN adopts in accordance with Subsection 2.3 and Subsection 4.3.* In connection with renewed accreditation, Registrar shall confirm its assent to the terms and conditions of the then-current Registrar accreditation agreement by signing that accreditation agreement. *In the event that, during the Term of this Agreement, ICANN posts on its web site an updated form of registrar accreditation agreement applicable to Accredited registrars, Registrar (provided it has not received (1) a notice of breach that it has not cured or (2) a notice of termination of this Agreement under Subsection 5.3 above) may elect, by giving ICANN written notice, to enter an agreement in the updated form in place of this Agreement. In the event of such election, Registrar and ICANN shall promptly sign a new accreditation agreement that contains the provisions of the updated form posted on the web site, with the length of the term of the substituted agreement as stated in the updated form posted on the web site, calculated as if it commenced on the date this Agreement was made, and this Agreement will be deemed terminated.*

[note: The reference to Subsection 2.3 imposes an obligation on ICANN to be open and transparent, promote competition, act fairly and provide adequate appeal procedures with respect to any actions involving registrars.]

Article X, Section 3.9. 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:*
…

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"*);
…

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.*