

## **Discussion document -- Issues regarding proxy voting**

**Prepared by Liz Gasster and Dan Halloran, 19 December, 2007**

The GNSO Council has asked ICANN legal and policy staff to further consider the implementation issues associated with proxy voting. John Jeffrey has twice been asked to comment on this issue, in a 17 February 2006 e-mail to Bruce Tonkin, previous Chair of the GNSO Council, and in a memo of 16 October 2007 to Avri Doria. Both times he has raised a number of concerns about proxy voting. The purpose of this memo is to further explore these concerns and to suggest how proxy voting might be implemented in light of these concerns.

It is important to note that employment of proxy voting by the GNSO Council would require Board approval of policy and structural changes to ICANN's bylaws. Currently no other organization within ICANN uses proxy voting, so adopting proxy voting by the GNSO Council would be a substantial change. While staff provides a suggested approach to implementation below, ICANN's Board and/or General Counsel may have further concerns about potential risks or abuses.

### **A) In what circumstances would proxies be used?**

If proxy voting were adopted by the GNSO Council, it could be used in every instance in which the Council voted (subject to the limitation applicable to conflicts of interest, discussed further below). Staff recommends that proxies not be used in the context of Task Forces or Working Groups.

### **B) How would a proxy be addressed when there is a conflict of interest?**

As a general rule, staff notes that a councilor who otherwise has a conflict of interest should not be allowed to circumvent the recusal requirement by allowing another to cast his or her vote by proxy. An exception could be made in a case where a constituency has a documented consensus position. In addition, for this rule to be effective, each proxy should state whether the individual has a direct financial interest in the vote(s) being cast.

**C) What happens to the requirement for the presence of members, for instance should they be required to be active in some part of the voting discussion?**

Staff suggests that the GNSO Council and community stakeholders consider how to assure the active participation on the part of absent councilors who are voting by proxy.

**D) How would a majority be reached with the use of proxies, also supermajorities? What would constitute a valid quorum?**

Staff suggests that proxy votes could be counted towards a majority and supermajority just as votes are tabulated today. However staff recommends that a proxy not be used toward determination of a quorum.

**E) Who would be entitled to hold a proxy and should there be a limit to the number they can hold?**

Today the bylaws limit all action of and votes by the GNSO Council to members of the GNSO Council "and not persons who are not members". Thus, if proxy voting were to be adopted, staff notes that a proxy may only be given to another GNSO Councilor.

Given the need for recusal when there is a conflict of interest, staff suggests that absent councilors who choose to vote by proxy be required to do so separately, and in writing, for each GNSO meeting (no "standing" proxy).

**F) If a significant number of members were not present, could only a few members hold all proxies and vote?**

Staff notes that a quorum must still be present to proceed with a vote of the GNSO Council.

**G) How would 'weighted voting' on the Council work via proxy?**

Staff notes that weighted voting could work as it does today. If proxy voting were to be adopted, staff suggests that use of a proxy transfers the right to vote all of an individual's votes to another. Thus, in the case of weighted voting, the use of a proxy would transfer all of the votes to another in a block (proxy votes could not be apportioned among others).

## **H) Other options in lieu of proxy voting**

As the Council considers the goals of proxy voting, it may also want to consider other options that might achieve a comparable result.

For example, if the Council is considering proxy voting as a means of assuring that every GNSO Councilor's vote "counts" even if the individual is unavailable to participate in a particular vote, one alternative option might be to consider extending the period of time by which a Council member could vote following a call for a vote, thereby providing more time during which a vote could occur. For example, the Council could engage in debate on a motion and call for a vote during a meeting in which one or more Councilors might be absent. Votes from councilors would be accepted for some set period following, such as 72 hours, allowing time for each councilor to review the discussion electronically and cast a vote.

## **Conclusion**

It is important to consider that as with any council or board, attendance at meetings is a commitment GNSO members make when they accept appointment to the Council. John Jeffrey previously noted the historical legal requirement that directors be "present" for voting (including by teleconference) to enable all members to benefit from the discussion and be fully informed prior to voting. Typical state laws governing directors of public benefit corporations, such as the following example, include a duty of due care, which is described as both:

- Active participation. A director must actively participate in the management of the organization including attending periodic meetings of the board, evaluating reports, reading minutes and reviewing the performance of the executive director.
- Reasonable inquiry. Directors should request and receive sufficient information so that they may carry out their responsibilities as directors. When a problem exists or a report

on its face does not make sense, a director has a duty to inquire into the surrounding facts and circumstances.

Today, teleconferencing and electronic document collaboration are used widely throughout all ICANN structures to enable participation not only face-to-face, but also through electronic means. While these alternatives may not always be optimal (issues such as accommodating time zones, inconsistent transmission quality, the intangible benefits of in-person interaction), they do facilitate the "presence" and active participation required of Council members, an issue that should be further considered if proxy voting were adopted.

In considering whether changes should be made to allow proxy voting by the GNSO Council, the Board and the broader ICANN community would consider the benefits and drawbacks of proxy voting by the GNSO. The Board would also consider the effects of "GNSO Improvements" currently under development by the Board Governance Committee. In addition, the Board would consider whether changing the bylaws applicable to the GNSO would have greater implications if implemented more broadly within ICANN.