

Hello,

Please find below an official comment from Dyn on the CCWG-Accountability proposal.

Any questions, please do not hesitate to contact me.

Thank you for this opportunity.

Adam

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Dyn appreciates the opportunity to comment on the Internet Corporation for Assigned Names and Numbers (ICANN) Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability, henceforth "CCWG") second Draft Report (henceforth, "the report"). Dyn thanks the CCWG and its participants for its enormous work to date, and for its important contribution to the issue of ICANN accountability.

Dyn appreciates that this round of effort is to have been, to a large extent, driven by the needs of the possible transition of the Internet Assigned Numbers Authority (IANA) stewardship transition away from the United States Government (under the terms of an agreement with the National Telecommunications and Information Administration, or NTIA). Dyn is, in general, supportive of that transition, and believes it should happen. Dyn also understands that the draft is supposed to contain the minimum accountability changes necessary to achieve the goals of that transition. That is why the IANA Transition Coordination Group's transition proposal is dependent on the report. Because of that dependency, Dyn has some reservations about the report, and believes it could use significant enhancement. Therefore, Dyn provides the following answers to the questions asked by the CCWG:

Do you agree that the CCWG-Accountability proposal enhances ICANN's accountability? No, Dyn does not. Details below.

Are there elements of this proposal that would prevent you from approving its transmission to Chartering Organizations? Yes, there are. Details below.

Does this proposal meet the requirements set forward by the CWG-Stewardship? It appears to, but in doing so it destabilizes the system that has been operating for about 15 years. Details below.

It is not possible to construct an accountability and enforcement system that cannot be attacked or (worse) taken over by sufficiently interested parties. The remedy for that risk has ever been, and remains, sufficient participation by a broad base of interested parties such that taking over the system is too hard to do discreetly, and too brazen to do in public. That remedy is what the multi-stakeholder approach to governance is all about. Dyn is sorry to conclude that the report's recommendations are not, in Dyn's opinion, adequately supportive of that multi-stakeholder approach. In theory, the report is supportive exactly as one would like. In practice, however, it narrows the base of participation in unacceptable

ways.

The biggest problem, in Dyn's assessment, is the Community Mechanism as Sole Member Model (henceforth, "the sole-member model"). There is much to be admired in this proposal. The sole-member model nicely evades the problem of incorporating all the various stakeholder groups of the ICANN community under California (or any other national or state) law. At the same time, it delivers the many benefits of membership-type public benefit corporations under California law. The benefit of this approach is not something Dyn criticises lightly.

Yet, the approach does not solve the underlying problem. Organizations and groups that could not see their way to becoming legal persons under California law cannot realistically, either, be unincorporated associations subject to the same law. The problem is not merely the mechanism of recognition; it is instead the very legitimacy of some state or national law to regulate the terms of participation in these decision-making procedures. The upshot of this is effectively recognized in the report, where the likely participants in the sole-member mechanism are outlined: many of those most urgently needed to ensure global legitimacy of the approach are not listed as likely participants. Important groups of stakeholders, including national governments and large swathes of the technical community, appear to be unwilling to join this model. The report disposes of this issue by noting that existing constituencies in ICANN could signal their participation later. But if the point of the change in governance model is supposed to be that accountability is improved prior to the IANA transition, it is very hard to see a way it is achieved by narrowing participation in that governance at the outset.

Worse, while the report claims it can support changes to the power arrangements by creation of new SOs or ACs, such changes would be subject to veto by the existing SOs and ACs. SOs and ACs have an institutional incentive to oppose such additions, so given the new accountability proposals it is hard to see how such a new SO or AC would ever get created in the case of a divided community. In the case of a community that is already functioning, it is hard to see how the new mechanism offers any improvement from the existing ICANN Board arrangement. So, the report either recommends something that does not actually solve a problem anyone has, or else it creates more opportunity for ICANN's corporate interest to drift away from the interests of the Internet as a whole. Neither result seems to provide advantage.

Worse yet, the report admits that, while its mechanism for improved accountability depends entirely on ACs and SOs (some of which are declining to participate), it has not studied the accountability mechanisms within those ACs and SOs. The sole-member model is designed to replace an accountability mechanism that exists but that is admittedly flawed. All of the ICANN Board can be replaced in time, but only on the order of years; otherwise, the Board has to defend itself in public but can decline to change its mind even in the face of strong community opposition. But the new model provides less accountability: the Board can be replaced at any time, but by a small group of interested constituencies whose own accountability mechanisms are not understood.

The report's answer to that understood accountability is to study it later, after the IANA transition. But this brings us to the worst part of all the sole-member model: the first implementation has to be perfect,

because it will be impossible to change once it is implemented. Any change that could be needed would need to be expressed in new ICANN bylaws. But the sole member will be, after it is put in place, the one agent that could foil any such bylaw change. Replacing the flawed but working ICANN, including its entire corporate structure and its governance, with a new model that has not been tried but whose details all must be perfect on the first try is simply too risky.

There are other, more peripheral concerns with the report that Dyn could accept, with or in some cases without minor modifications. It seems the CCWG wants to wander into some issues where the relevance to ICANN is at least obscure. The mission statements that are to be enshrined as Fundamental Bylaws seem over-broad and look to be an effort to make ICANN more central to the Internet than it ever should be. ICANN has only two jobs: to make policy for the DNS root zone and to perform the IANA functions (perhaps by an affiliate). It is odd to see ICANN's powers being strictly enumerated in its Mission while yet having Core Values that extend to the entire Internet. It is jarring that the document seems to want to make ICANN into a sort of mini-government, complete with legislative, executive, and judicial branches. Finally, it is really hard to see why the various appeal and reconsideration functions cannot be streamlined into a single mechanism that ordinary humans could understand. Dyn understands, however, that the perfect should not be the enemy of the good, and that consensus often means that nobody thinks the answer is just right, so we might otherwise be willing to live with these flaws.

But the sole member model as currently proposed is a danger to the Internet. It moves accountability from a Board (and Board selection mechanism) that is far from perfect in design into a much narrower portion of the Internet community; and a portion whose accountability measures are little understood. The report's proposal, if implemented as outlined, will be impossible to change if there are any problems with it, because the new mechanism is precisely designed to foil bylaw changes that would be needed to fix it. It would be no improvement in accountability at all to create an unaccountable organization that cannot be removed.

It would be much better to find ways that would allow the effective exercise of community power over the ICANN Board, and leave the existing ICANN structure intact. If there were shorter Board appointments, or if the community could recall Board members at any time with some sufficient threshold, the effective power to make the Board act in line with community will would be achieved, even if the community did not get the legal powers of enforcement the report seeks. Dyn urges the CCWG to consider such smaller reforms as could be undertaken to provide that effective power without throwing away the existing organization structure or needing a mechanism that must be perfect at creation.