

Considerations for Establishing a Certification Board

Q: What issues should an association consider before establishing a certification board?

A: Before an association establishes a certification board, it should understand the difference between its own role and that of the certification board in the certification process. It also should recognize the potential risks to the association in setting up a board.

Certification boards are formed for many reasons. Members of an industry or profession may wish to provide a means to identify competent professionals; confirm that facilities meet the standards required to manufacture quality products; or verify that sample products meet established performance tests. A certification board also can create additional visibility for a trade or profession as well as generate income and prestige.

By its nature, a certification board that undertakes to measure individuals, facilities, or products against minimum standards has the effect of excluding certain competitors from the marketplace. An association, however, must represent and promote an entire industry or profession, and it has an incentive to design standards that include or favor its members. Given the differing roles of an association and a certification board, antitrust law principles suggest that a certifying body should be independent, particularly for policy-making functions and individual credentialing decisions, if it is to establish and administer a fair certification program. Thus, while an association and its members may participate in certification activities, particularly as a readily available source of information concerning the industry or profession, the actual evaluation and certification of individuals, facilities, and products should be conducted by a certification board that is autonomous with respect to substantive certification issues.

To maintain that autonomy, the association and the certification board may,

but need not, be legally separate entities. Some associations create separately incorporated certification boards with which they maintain no formal relationship. More often, associations establish a separately incorporated certification board, but preserve ties with the board by retaining the authority under the board's bylaws to nominate or appoint one or more members of its board of directors. Other sponsoring associations elect to establish autonomous, but not legally separate, certification committees within the framework of their existing corporate organizations. Under that arrangement, the association can provide input regarding the appropriate policies and procedures for operation of the certification program, as long as the ultimate authority regarding substantive certification matters lies with the certification committee. Regarding administrative matters, separately incorporated associations and certification boards may enter into a written, arm's-length, service agreement under which the association provides administrative services to the certification board. An association maintaining a certification committee can effect a comparable arrangement through written policy.

In choosing whether to create a certification committee or establish a separately incorporated certification board, the sponsoring association should consider its tax-exempt status. Although certain exceptions exist, certification boards typically are classified under current IRS rules as exempt under Section 501(c)(6) of the Internal Revenue Code. Thus, an association exempt under Section 501(c)(3) or Section 501(c)(4) should consider whether operation of a certification board could jeopardize the association's tax status.

The sponsoring association also should consider how it intends to manage its financial relationship with the certification board. While a certification board can generate significant revenue

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from examination and maintenance of certification fees, it also will incur potentially substantial start-up costs. Sponsoring associations that create certification committees within their own corporate structure can usually expect to recoup the start-up costs over time. Those that establish separately incorporated certification boards may enter into a loan agreement with the new board or, if the association desires, make a grant to the new board to cover start-up expenses. While both options are acceptable, neither is required.

Finally, any association thinking of establishing a certification board should understand the potential liability associated with certification activities. The association could incur antitrust liability if the certification board is not sufficiently autonomous. Moreover, depending on the nature of the relationship between the two organizations, a certification board could subject an association to a variety of other claims. For example, those denied certification could allege an antitrust violation, a denial of fundamental fairness, a breach of contract rights, or a violation of the Americans With Disabilities Act. In addition, those allegedly harmed by a certified product or individual could assert a claim of negligent credentialing. Generally, as a sponsoring association's control over a certification board increases, its responsibility for the acts of the board and its potential liability similarly increase. That said, the risks are relatively remote and generally can be mitigated provided that a fair and impartial certification board is established and those responsible for managing the board and its activities exercise reasonable judgment. ■

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.