

As standards initiatives develop, a fork in the road that many hit is the question on whether to formally incorporate the entity or continue operating informally under a more informal structure, often referred to as a “promoter-adopter” model.

While no one likes to pay legal fees, the reality is that incorporation carries with it significant benefits for an organization, and the process of establishing a corporate structure is fairly easy. For those considering whether to incorporate, here are some reasons why it's typically a good idea:

Liability protection: A properly structured corporate entity will shield participants from individual liability. Absent a corporate structure, liability falls back directly on individuals participating in an initiative. This becomes particularly important for any organization planning to undertake testing or certification activities of any type, which tend to pose particular risks to non-incorporated entities.

Outward appearance: Incorporating the entity sends a message that the members mean business, and also provides a more established impression to commercial partners. Moreover, a corporate structure is a familiar mechanism for most potential members to be part of, and will likely reduce barriers to participation.

Taxes: A corporation can apply for tax-exempt status with the IRS--most standards setting organizations are established as non-profit corporations.

Finances: An incorporated consortium can open and maintain bank accounts. Otherwise, a member must always cut a check, or a third party must be hired to hold the funds of all (in which case they will subject to loss if that company goes bankrupt).

Contracts: An incorporated consortium can sign contracts. For an unincorporated group to even to hire a service provider, every member must sign the contract, or one member must sign the contract for all, but bear full legal and financial liability under the contract.

Flexibility: Promoter/Adopter agreements themselves are straightforward, but if an organization wishes to have multiple classes of membership, doing so in an unincorporated structure becomes quite challenging. A corporate model can easily accommodate multiple member classes.

Clear (and clean) ownership: In the promoter-adopter model, the various participants tend to “own” various pieces of the organization. One member might register the web domains. Another might file for trademark protections on the logo and brand. A third member might host the organization’s website on its own servers. While such arrangements can work, they can also go badly when and if one of those members departs the organization. (And in competitive consortia, members don’t always leave on friendly terms.) Having the corporation itself “own” these pieces is usually the safest and most stable approach.

Insurance: A consortium or association has a number of insurance needs covering everything from director’s and officer’s liability to general liability protection that is often required to participate in trade shows or contract with hotels. This type of insurance is not available to unincorporated entities.

Intellectual Property: Without an entity, any intellectual property can only be owned by an individual member (requiring licenses to the other members), or by all members (with the attendant compromises and complications of joint ownership) or placed in the public domain (with loss of control). Control of copyright of an organization’s deliverables is also streamlined through incorporation.

Interfacing with other organizations: It’s fairly natural in the course of work for a standards-setting or technology-focused organization to want to (or need to) work in partnership with other organizations within or outside their area of focus. Formal liaison agreements are an ideal way to formalize such relationships, and are commonplace among tech consortia. Without a corporate structure, though, such agreements are nearly impossible to put together.

Moving forward with incorporation doesn’t have to break the bank. Whether it’s creating bylaws or filing paperwork with the relevant Secretary of State’s offices, Virtual—and our partner law firms—can help. In fact, incorporating a consortium is typically cheaper than any other approach, since it uses template documents that are familiar from past use. Setting up an unincorporated entity requires custom drafting and compromise solutions that take more time and drive up costs.

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