

In These Tough Times, Does A Merger Make Sense For Your Non-Profit?

The year 2008 will be remembered for historic economic instability. Governments at all levels across the country face severely lower tax revenue. In this difficult economic climate, substantial new financial burdens have been placed on non-profit organizations from the constituents they serve. The faltering economy has exacerbated the problem for groups competing for the same pool of donors and volunteers. As a reaction to this confluence of events, it might be prudent for non-profit organizations to consider the possibility of combining their programs and finances with another similarly situated group. Consolidation, if structured properly with the right partner, can increase efficiency and reduce financial strains through economies of scale. As organizations contemplate these issues, they will need to understand the regulatory environment overseeing non-profit mergers and the scope of work all parties will need to undertake to complete the transaction. There are a number of key operational and financial issues to address, and due diligence to complete, before merging organizations should proceed. With the proper legal guidance, however, it could be a path worth taking.

The legal requirements with respect to non-profit mergers in New York State are found in Article 9 of the New York Not-for-Profit Corporation Law. Initially, the boards of directors of the two merging organizations must develop a plan through negotiation, mapping out the terms and conditions of the merger. Then the "plan of merger" must be approved by a two thirds, rather than the standard majority, vote of the governing bodies of both organizations.

Before the merger can be consummated, the State of New York requires regulatory and judicial approval of the proposal through the preparation and filing of a Certificate of Merger. Before approval can be obtained, the organizations must submit their proposal to the Charities Bureau of the New York Attorney General's office for their consent. Often, that office will instruct the merging entities to amend provisions in the plan. Once the Attorney General is satisfied with the proposal, it must then be filed with the New York State Supreme Court for approval. If the board approval is unanimous, and all required documentation is provided, the court will decide the matter *ex parte*. While awaiting approval from the Attorney General and the court, the organizations must seek consent from any state agency that has supervisory power of their organization, for example the Departments of Health or Education. Such consent is necessary before the merged corporations can file a certificate of merger or consolidation with New York's Department of State.

Conclusion & Advisory Note

Mergers can be an enormously useful tool for non-profits. Merging organizations can improve business efficiency, enabling each merging organization to reduce overhead expenses so that they can devote more of their assets to program services. However, if a non-profit considers such a move, it must remember that it can be a lengthy and intricate process which must be undertaken carefully to ensure a successful outcome. An example of the challenges of completing a successful merger can be found in reviewing the merger between the Minneapolis and St. Paul chapters of the Red Cross. According to Jan McDaniel, CEO of the now-Twin Cities Red Cross, the national organization approved the merger in December 2005 but the merger was not completed until June 2006. During that time, the organizations needed to agree on issues such as which headquarters to use and the structure of the new board. They needed to merge “two very different administrative systems... [and] organizational cultures.” According to a study by the Stanford Project on the Evolution of Nonprofits, organizations “need to save a lot more money, budget a lot more time, and get to know each other a lot better before walking down the aisle.” As is evident, non-profit mergers present a number of logistical and legal difficulties in order to achieve successful results. In the end, however, merging a non-profit organization with another could be of significant benefit to the organizations’ mission and ability to deliver enhanced program services.

In undertaking such a major change for a nonprofit organization, it is helpful to consult with an experienced non-profit attorney who is qualified to provide the appropriate legal advice. The Tax Exempt Organizations Group at Duval & Stachenfeld has successfully guided a number of nonprofit organizations through successful merging transactions. If you would like more information about non-profit mergers, or if you are intending to move forward with a planned merger, we encourage you to contact the Tax Exempt Organizations Group at Duval & Stachenfeld.

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