


PUBLIC RECORDS FILINGS IN MERGER TRANSACTIONS: A COMPLIANCE PRIMER



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Merger activity continually changes. And while this is especially true for corporate mergers, it also applies to merger transactions involving LLCs and other entities. The number and value of mergers rise and fall from year to year and decade to decade. The structures of merger transactions and the reasons they are entered into change as well.

One thing that does not change, however, is that the completion of a merger can involve a staggering number of details, both before and after the decision is made to enter into the transaction.

Before the decision is made to enter into a merger, the constituents engage in a process called due diligence. It is during this process that the parties decide whether they want to enter into the proposed merger transaction.

Then, once it has been decided that a business entity should enter into a merger, another complicated process begins — planning and completing the filings that will make the transaction legally binding and that will make the records in the state business entity filing offices accurately reflect all of the changes to the constituents caused by the merger.

And while the due diligence process tends to receive a lot of attention, the public records filing process is every bit as important. Neglecting to file any required document or neglecting to take one of the other steps involved in this process, can have serious consequences. These can include delaying the effective date of the merger, causing the survivor to lose the right to its name, causing it to be penalized for doing business in foreign states without authority, or subjecting it to additional tax liability.

This white paper will discuss the filings and other compliance-related requirements of the state business entity laws that the corporations, LLCs, and other entities involved in a merger must be aware of in order to properly complete the transaction. Compliance, in this white paper, is divided into three stages: 1) the pre-merger stage, 2) the effecting the merger stage, and 3) the post-merger “clean up” stage.

STAGE 1: PRE-MERGER STAGE FOR CORPORATE MERGERS (AND MERGER TRANSACTIONS INVOLVING OTHER ENTITIES)

The pre-merger stage is the time period between approval of the decision to enter into the merger and the filing of the documents that make the transaction effective. There are a number of actions that should be taken during this stage, including those detailed below.

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A. Checking entity status

1. Importance of checking good standing

One step that should be taken before filing the documents to effect a merger is to check if all of the constituents are in good standing in their formation states and in the foreign states in which filings will be made. States will reject filings for corporations, LLCs, and other business entities that are not in good standing.

A corporation, LLC, or other entity may fall out of good standing for a number of reasons. The most common reason is the failure to file an annual or biennial report and/or failure to pay franchise taxes. The failure to comply with the requirement to maintain a Registered Agent and registered office is another reason under some business entity laws.

2. Remedying the problem

If a constituent corporation, LLC, or other entity is not in good standing, steps may be taken to restore it to good standing status. If the constituent is suspended but has not yet been dissolved or revoked, good standing may be restored by filing all delinquent reports and paying all taxes and penalties due.

However, if the constituent has been dissolved or revoked, it may not only have to comply with the delinquent requirement and pay penalties and interest, but it may also have to apply to the state for reinstatement. Although a reinstated entity may resume carrying on business as if the gap in its good standing never existed, some business entity statutes provide that if the business entity loses its rights to its name during the period of administrative dissolution or revocation, it will not regain those rights by reinstating and will, in fact, have to change its name in order to be reinstated.

B. Checking tax status

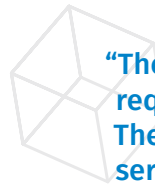
1. The importance of tax status

Another step that should be taken before filing the documents to effect a merger is to determine whether the constituents are up-to-date in their state tax payments. This is particularly important for any entities that will no longer exist after the merger as the states do not want entities disappearing while still owing taxes.

2. Tax Clearances

Some states simply require a business entity to be current in its state tax payments.

However, other states require a tax clearance. A tax clearance is a certificate stating that a business entity has no taxes due. To obtain a tax clearance, a request is made to the appropriate tax department or departments. Tax clearances can sometimes take a long period of time to obtain. Therefore, it is important to determine, in advance, if one is necessary. A failure to do so can delay the filing.



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C. Name issues

1. How name availability issues arise in merger transactions

Name availability issues often arise in merger transactions. For example, the surviving entity may choose to take the name of the discontinuing entity or combine the entities' names. Almost every business entity law provides that a domestic or foreign entity's name must be available — that is, that the name does not conflict with a name already on record in the state.

It is therefore advisable to make sure the new name is available for use in the survivor's home state and in all foreign states in which it will be qualified to do business after the merger goes into effect.

2. Name Reservation

If the merger survivor finds that the name it wants is available, the next step should be to protect the name. This is to make sure that no other entity takes the name before the survivor can file the document that makes the name its own.

The most commonly used mechanism to protect a name is a name reservation. Most business entity statutes permit the reservation of a name for a short period of time. The period generally ranges from 30 days to one year depending upon the statute, although 120 days is a commonly seen period. A name is reserved by filing an application for reservation with the state filing official. Not all states permit an entity to renew a reservation when the reservation period expires. As a result, care must be taken to time the name reservation filing so that it will not expire before the constituent files the document giving it rights to the name.

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3. Name Registration

If the merger survivor anticipates qualifying in a foreign state in the future — say in the next year or two — it may be able to protect its legal name in that foreign state through a name registration.

A name is registered by filing an application for registration with the foreign state. A certificate of existence from the formation state generally has to accompany the application. While the registration is in effect, no other entity may take the name. Name registrations are intended to provide long-term protection. They are generally effective for one year and are renewable indefinitely.

D. Pre-merger qualifications

1. What is foreign qualification?

If a merger will result in the survivor doing business in a foreign state where it was not doing business previously, then that constituent will have to qualify in that state. Qualification is the process by which a statutory business entity receives authority to do business in a state other than its state of organization. (This process is also sometimes referred to as registration, particularly in the case of unincorporated entities.)

2. Deciding when to qualify

Once it has been determined that the survivor must qualify, a decision must be made as to when. Depending upon the specific transaction, it may be possible to qualify in the pre-merger stage at the time the merger goes into effect or in the post-merger stage.

(If the decision is made to qualify in the post-merger stage, care should be taken not to do business in the foreign state until the qualification is effective.)

3. What to file

The documents that have to be filed to qualify a foreign entity are prescribed by the business entity laws. Generally, they require the filing of a document known by various names, including an application for certificate of authority, application for registration, or statement of foreign qualification. Most laws require the application to be accompanied by a certificate of existence or good standing from the organization state.

E. Timing issues in merger transactions

One of the main problems facing legal professionals who handle merger filings is timing all of the pre-merger steps.

However, there are several mechanisms available to help with this problem.

1. Delayed effective dates

One possible technique is to start with a projected effective date and determine when to do the pre-merger work based on that date. One problem with this technique is that documents delivered for filing on a certain day may not actually be filed until days or weeks later due to filing office backlogs or filing rejections. To better the chances of multiple documents being effective on the same day, a filer may set forth a delayed effective date in the documents. This can allow for more certainty in timing the pre-merger steps, such as reserving names and ordering supporting documents.

2. Preclearance

Pre-clearing documents is another way to avoid the delays caused by unanticipated rejections. For a fee, some filing offices will review documents in advance of filing and determine whether or not they are acceptable.

3. Expedited filings

Many filing offices, for an additional fee, will expedite the handling of filed documents. Depending upon the state, this means that the documents will be reviewed within a few hours or days after receipt. This is a useful device to avoid backlog problems.

4. Tax considerations

Another timing consideration is the impact of the filings on the constituents' tax liability. Business entities may be subject to, or may be able to avoid, certain tax and reporting requirements, depending upon the date they exist as a domestic or qualified foreign entity in the state. These dates should be considered in determining when filings should be made.

F. Abandoning the merger transaction

It is possible that a business entity's managers will decide not to go through with a merger after it has already been approved by the owners. The statutes generally state that a business entity may abandon a merger that has already

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been approved, but that has not gone into effect yet, without having to obtain the owners' approval of the abandonment. If the abandonment occurred after filing the merger documents, but before the delayed effective date occurred, articles of abandonment will have to be filed.

STAGE 2: EFFECTING A CORPORATE MERGER (OR MERGER TRANSACTION INVOLVING OTHER ENTITIES)

A. Drafting the plan of merger

In order to effect the merger, a plan of merger needs to be drafted. The required contents of the plan of merger are set forth in the statutes. Generally, the plan of merger must contain the name of each business entity planning to merge and the name of the surviving entity into which the others will merge; the terms and conditions of the merger; and the manner and basis of converting the ownership interests of each business entity into ownership interests in the survivor or any other business entity, cash, or other property.

The next step in most cases is to submit the plan of merger to the owners for their approval. How approval is to be obtained generally differs depending upon the entity type and the specifics of the transaction.

B. File articles of merger

1. Required content

Following approval of the plan of merger, a document generally known as articles of merger is filed with the filing office in each constituent's state of organization. The required contents of the articles of merger differ from state to state and entity to entity.

However, in general, this document will have to set forth at a minimum the name, jurisdiction of organization, and entity type of the constituents and the survivor, any amendments to the formation document of a domestic survivor, and a statement that the plan of merger was duly approved by each constituent, that the plan is being kept on file by the survivor at a named location, and that the plan will be furnished by the survivor to owners of constituents.

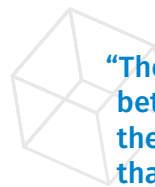
2. File the proper form

Some states have official forms or templates that can be used while others require the articles of merger to be drafted by the constituents based on the statutory requirements. In addition, some of the states that provide documents have

separate ones depending on whether the merger is between domestic entities only or domestic and foreign entities, whether it involves different entity types, whether it involves a parent and subsidiary, how it was approved, or other factors. Care must be taken to file the proper document for the specific merger transaction.

STAGE 3: POST-MERGER "CLEAN-UP" STAGE FOR CORPORATE MERGERS (AND MERGER TRANSACTIONS INVOLVING OTHER ENTITIES)

After the articles of merger have been filed, and the transaction has gone into effect, there may still be some details — or "clean-up" steps — to take care of. These clean-up steps consist mainly of filings needed to make sure the business entity filing office records reflect the changes resulting from the transaction.



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A. Name change filings in foreign states

If the surviving business entity's name will change following the merger, filings will have to be made to make sure the records in the foreign states where it is, and will remain qualified, reflect the name change. This generally requires the filing of an application to amend the qualification document or a certificate of name change. That may have to be accompanied by a document from the home state evidencing the name change.

B. Foreign withdrawal filings

In every merger there will be at least one constituent that will no longer exist as a result of the transaction. If the disappearing constituents were qualified to do business in one or more foreign states, a filing will have to be made in those states. This filing will notify the filing offices that the foreign constituent has been discontinued due to a merger, and that it should be removed from the state's records.

In general, a disappearing foreign entity is required to enter into a process known as withdrawal. Withdrawal generally requires the filing of a document that may be called an application for withdrawal, an application for termination, an

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application for surrender, or another name, depending upon the state and entity type. The foreign entity must also pay all taxes due. Tax clearances are required in some states before the withdrawal can become effective.

In addition, some business entity laws provide that whenever a qualified foreign entity is a survivor in a merger, it must file evidence of the merger. In some states, this evidence is a certified copy of the articles of merger. In others, it is a certificate of fact. Some of these laws also require the filing to be made within a certain period of time after the effective date of the merger.

C. Correcting documents

Sometimes the documents filed to complete a merger contain an incorrect statement. If so, it may be possible to correct the document in the post-merger clean-up stage by the filing of articles of correction.

Articles of correction generally have to describe the document, or a copy of the document has to be attached, specify the

inaccuracy to be corrected, and correct the inaccuracy. Some statutes restrict the type of information that may be corrected in this manner.

Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

CONCLUSION

The successful completion of every merger requires a number of public records filings. The failure to make these filings can have serious, negative consequences.

However, dividing the process into three stages — pre-merger, effecting the merger, and post-merger cleanup — can help make the task less intimidating and ensure a positive result for the constituents.

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