

MERGER ESSENTIALS: COMPLETING THE PUBLIC RECORDS FILINGS



The statutory merger of two or more business entities is an extensive process involving due diligence, planning and filing activities. This article highlights the primary merger document filings and post-merger “clean up.”

See Part 1 to learn about pre-planning best practices for public records filing requirements.

Completing a statutory merger involves a staggering number of details for the merging entities’ legal teams to manage. As noted in Part 1 of this series, neglecting any of the public records filings that make the merger legally binding can result in serious consequences, from delaying the effective date of the merger, to exposing the entity to penalties, additional tax liability and loss of naming rights.

Organizing any statutory merger into three phases is an effective strategy to clarify what has to be done. This article describes best practices for the second and third phases — effecting the merger, and post-merger “clean up” filings. For a discussion of pre-merger planning, see Part 1 of this series, *Merger Essentials: Public Records Filings for Companies Entering into Statutory Mergers*.

FILING THE PRIMARY MERGER DOCUMENTS

Ensure Accurate Articles of Merger. In the pre-merger stage, a plan of merger is drafted. After the management and ownership of each business entity involved in the merger approves the plan, a document — generally called the articles of merger — is filed in the state of formation for the new entity. This filing makes the merger effective.

The required content of the articles of merger depends upon a number of factors, including:

- ▶ State of formation and/ or qualification
- ▶ Type of entity
- ▶ Whether the merger involves only domestic entities or domestic and foreign entities
- ▶ Whether it involves only like entity types or different entity types
- ▶ Whether the survivor will be a domestic or foreign entity
- ▶ Whether a parent and a subsidiary are involved

Be sure to use the proper merger forms, otherwise the filing will be rejected. Some states provide official merger forms that must, or may, be filed. In other states, the lawyers must draft the merger documents based on the statutory provisions.

Manage the Effective Date. The merger will become effective upon the filing of the articles of merger unless a delayed effective date is used. Most states allow merger documents to set forth a date and time in the future when the merger will go into effect. The time period is generally limited to 90 days or less.

The use of a future effective date can be beneficial in order to:

1. Make sure the merger will be effective on the same day in all the different states in which the articles of merger are filed
2. Determine when pre-merger actions, such as reserving a name or ordering a certificate of good standing, must be taken, and
3. Avoid unexpected delays in the effective date due to filing office backlogs.

POST-MERGER “CLEAN UP” FILINGS

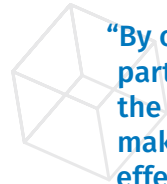
After the merger documents have been filed, a few “clean-up” filings remain. These include:

Name change filings. If the surviving entity’s name has changed, make filings to change its name on the records of the states in which it had qualified under the old name. This typically requires an amended application for authority or a certificate of change of name. A certificate from the formation state evidencing the name change will probably have to be ordered, as many states require this to be submitted as well.

As for the state of formation, in most cases the name change will be set forth in the articles of merger. If so, no further action would be necessary there. However, if the change is not set forth in the merger document, the formation document would have to be amended.

Post-merger qualifications. The surviving entity can qualify after the merger becomes effective as long as it does not start doing business before then. Some lawyers prefer to wait until the post-merger stage in case the deal falls through, which would make the qualification unnecessary.

Post-merger withdrawals. Withdrawals can also be handled post-merger. No penalty would be assessed on the survivor for remaining qualified after it stopped doing business. Nevertheless, you will probably want to withdraw the entity as soon as possible so that it will no longer be subject to the requirements imposed on qualified entities.



“By organizing the merger into manageable parts, and knowing what questions to ask, the legal teams for the merging entities can make sure all steps are taken in a timely and effective manner.”

The discontinuing business entity may be withdrawn post-merger. Consult the state statute because some laws require the withdrawal of a merged entity to be made within a certain period of time after the effective date of the merger.

CONCLUSION

As you can see, completing a statutory merger involves numerous steps. Many forms must be drafted and filed, many documents must be ordered, much information must be gathered, and much more.

However, by organizing the merger into manageable parts, and knowing what questions to ask, the legal teams for the merging entities can make sure all steps are taken in a timely and effective manner.

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