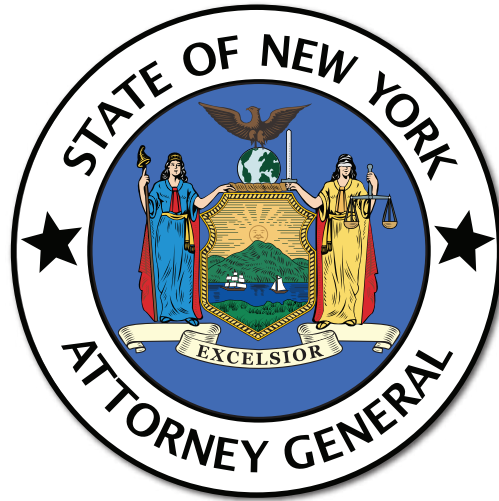


GUIDE TO MERGERS AND CONSOLIDATIONS OF NOT-FOR-PROFIT CORPORATIONS UNDER ARTICLE 9 OF THE NEW YORK NOT-FOR-PROFIT CORPORATION LAW



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A GUIDE TO MERGERS AND CONSOLIDATIONS OF NOT-FOR-PROFIT CORPORATIONS UNDER ARTICLE 9 OF THE NEW YORK NOT-FOR-PROFIT CORPORATION LAW

Introduction

This booklet has been prepared to assist not-for-profit corporations and their attorneys who plan to seek approval of the Attorney General or the Court to merge or to consolidate with other organizations pursuant to Article 9 of the Not-for-Profit Corporation Law (“N-PCL”).

A well-run charitable organization and its board may consider a merger or consolidation with another where circumstances make it appropriate. Competing organizations with similar missions may separately have higher administrative expenses, a smaller donor pool, and lesser impact on their desired objectives. Government agencies, legislators, donors, volunteers, or members may prefer one organization as advocate, grantee, or dues recipient. The original goals of the organization may have been largely accomplished, or the existing leadership may be close to retirement..

In a merger or consolidation, the parties must negotiate a variety of details, and the Not-For-Profit Corporation Law permits the parties to reach mutual agreement. Although senior managers will have responsibility for recommending and implementing a merger or consolidation, board members and volunteer leadership play a very important role in considering a merger or consolidation, assessing merger or consolidation partners, conducting due diligence, reviewing the merger or consolidation agreement, assuring compliance with governing approval requirements, and envisioning the future mission, leadership, and finances of the entities. Capable and experienced professional advisors and counsel are usually necessary to plan, negotiate, and implement a successful merger or consolidation.

Board members and senior leadership should also involve other stakeholders in the discussion of a possible merger or consolidation at an early stage and keep them informed and advised throughout the process.

In New York, every merger or consolidation of a not-for-profit charitable organization must be approved by the Attorney General and/or a court. The Attorney General has been given this role in order to protect the interests of the donors to the charity and the beneficiaries of the charity, and to prevent private inurement (appropriation of assets of a charity to benefit one individual).

The procedures described reflect amendments to the N-PCL that were included in the Nonprofit Revitalization Act of 2013 (“the Act” or “NPRA”). Those amendments make changes to the procedures for seeking approval of the merger or consolidation of New York not-for-profit corporations. Those procedures give corporations the option of submitting a verified petition for approval of a merger or consolidation to either the Attorney General or the Court, on notice to the Attorney General.

As more fully described below, the Attorney General may determine that court review of a particular application is appropriate. In such cases the verified petition must be submitted to the Court on notice to the Attorney General. However, if the Attorney General has no objection to the merger or consolidation, but nevertheless determines that court review is appropriate, the Attorney General will typically waive statutory service of the Petition since the papers have already been submitted to and reviewed by the Office of the Attorney General.

Each merger or consolidation is governed by its own facts and is reviewed, on a case-by-case basis, by the Attorney General’s Charities Bureau in New York City or Albany or an Assistant Attorney General in the regional office to which the application should be submitted. A list of the offices of the Attorney General, their contact information and the New York counties they serve is in Appendix F.

The information in this booklet is not a substitute for legal advice from an attorney but has been drafted to provide guidance to those preparing applications to merge or consolidate not-for-profit corporations.

Definitions

Merger and consolidation are procedures required by law when two or more corporations (“constituent” corporations) become a single corporation. In a merger, the resulting corporation, called the surviving corporation, is one of the merging corporations. In a consolidation, the resulting entity is a new corporation, called the consolidated corporation.

Quick Statutory Reference Guide	
Definitions of merger, consolidation, constituent corporation, surviving corporation, and consolidated corporation	N-PCL § 901

Since, in the experience of the Office of the Attorney General, mergers are more common than consolidations, for the sake of simplicity, the term “merger” will be used for both mergers and consolidations, and the term “surviving corporation” for both surviving and consolidated corporations, unless the context requires that merger and consolidation be discussed separately.

Mergers Requiring Approval of the Attorney General or the Court

N-PCL Article 9 governs mergers of New York not-for-profit corporations. Approval of the Attorney General or the Supreme Court¹ is required for any merger or

¹ At any time, including if the Attorney General concludes that court review is appropriate or the Attorney General does not approve an application for approval of a merger or consolidation, the applicant may apply to the Court for such approval.

consolidation in which any constituent corporation or the consolidated corporation is a charitable² corporation or would be a charitable corporation if formed under the N-PCL.

A corporation planning to merge or consolidate has the option of seeking approval of either the Attorney General or the Supreme Court. If court approval is sought, the application must also be submitted to the Attorney General. The Attorney General's office has found that it is more efficient if applicants submit *drafts* of their papers for court approval to the Attorney General for review prior to submission to the Court. That procedure allows an opportunity to resolve concerns raised by the Attorney General *prior* to submitting the papers to the Court. Likewise, applications to the Attorney General should be submitted in *draft* form initially.

Quick Statutory Reference Guide	
Definitions of Charitable and Non-charitable Corporations	N-PCL §§ 102 (a)(3-a) and (3-b)
Approval of mergers and consolidations by the Supreme Court	N-PCL § 907-a
Approval of mergers and consolidations by the Attorney General	N-PCL § 907-b

In addition to mergers of New York charitable corporations, approval of the Attorney General or the Court is required for mergers if:

- (i) one or more New York charitable corporations merges with one or more foreign (non-New York) corporations, if any constituent corporation is a charitable corporation or would be such if formed under the N-PCL;
- or**
- (ii) one or more religious corporations (formed pursuant to the Religious Corporations Law) merges with one or more corporations formed for religious purposes to which the N-PCL applies by virtue of N-PCL §103(a).

Quick Statutory Reference Guide	
Merger of domestic (New York) charitable corporations	N-PCL § 901
Merger or consolidation of a New York corporation and foreign (non-New York) corporations	N-PCL § 906
Merger or consolidation of a religious corporation with a not-for-profit corporation formed for religious purposes	N-PCL § 910

² The Nonprofit Revitalization Act of 2013 eliminated corporate Types A, B, C and D and replaced them with two categories of not-for-profit corporations, "Charitable" and "Non-Charitable."

In addition to securing approval of the Attorney General or the Supreme Court, merging and consolidating corporations must secure the approval or consent of any government body, officer, or person whose approval or consent was required to form such corporations.

Quick Statutory Reference Guide	
Required approvals and consents	N-PCL §§ 909, 404

Approval is not required for mergers where all constituent corporations are non-charitable corporations. However, mergers of trade or business associations, typically formed in New York as non-charitable corporations, formerly formed as Type A corporations, must be reviewed by the Attorney General's Antitrust Bureau.

Quick Statutory Reference Guide	
Required approvals and consents for trade or business associations	N-PCL § 404(a)

Although court approval may be required for mergers where all constituent entities are corporations formed pursuant to the Religious Corporations Law, notice to the Attorney General is not required and the Attorney General is not a party to such court proceedings. *See* “Mergers of Religious Corporations With Other Religious Corporations,” below.

Role of the Attorney General

The Attorney General is a statutory party to any proceeding seeking court approval of a merger or consolidation where any constituent corporation or the consolidated corporation is, or would be if formed under the N-PCL, a charitable not-for-profit corporation. *See* N-PCL § 907-a. The N-PCL provides that upon the filing of the application, the Court shall fix a time for a hearing and direct that notice be given to interested persons, including the Attorney General and any governmental body or officer whose consent or approval is required. *See* N-PCL §907-b (b).

Whether the petition seeks approval of a merger from the Court on notice to the Attorney General, or from the Attorney General alone, the Charities Bureau in New York City or Albany or the appropriate regional office of the Attorney General reviews the papers to make sure that statutory requirements are met, all necessary documents are included as exhibits to the application, and that any questions raised by the Attorney General's office have been answered. A sample Petition for court approval of a merger is in Appendix A, a sample Petition for Attorney General's approval is in Appendix B and a checklist of required documents and information is in Appendix C.

Where court approval is sought, the procedure preferred by the Charities Bureau and most courts is for the petitioner to submit the draft petition and exhibits, including the proposed plan of merger and proposed certificate of merger, to the Charities Bureau or

the appropriate regional office for review in advance of filing with the Court. This enables the Attorney General to review the papers to ensure that all statutory requirements are met, all necessary documents are included as exhibits, and any questions of the Attorney General are answered before the application is submitted to the Court. Substantively, the Attorney General's review assists the Court to determine whether all statutory requirements have been met and whether the interests of the constituent corporations and the public interest will not be adversely affected by the merger, as required by N-PCL § 907(e).

Whether approval is sought from the Attorney General alone or the Court, on notice to the Attorney General, the Charities Bureau or an Assistant Attorney General in a regional office reviews the purposes of each corporation and whether they are compatible and consistent, or whether any restrictions on future use of funds may be necessary. The review includes an analysis of the financial condition of each constituent corporation, including its short-term and long-term indebtedness, to assess the likely effect of the merger on all constituent corporations and the surviving corporation. With respect to hospital mergers, for example, the constituent hospitals will be asked to provide information as to any reduction in services, facilities or hospital bed counts that would result from the merger. The Charities Bureau may consult with the Attorney General's Health Care and Antitrust Bureaus.

The Attorney General also reviews endowment and other restricted funds held by each of the constituent corporations to ensure that funds held for a particular purpose will continue to be used for the specified purpose after the merger. In instances where the continued use of funds for a specific purpose will become impossible or impracticable after the merger, the Attorney General will seek to ensure that an appropriate modification of the restriction is ordered by the Court in conjunction with its approval of the merger.

After the Attorney General's review is complete, if the Attorney General has no objection to the proposed merger, the Attorney General will, in the case of application to the Attorney General for approval of the merger, provide the petitioner's attorney with written confirmation in the form of an Attorney General Approval. In the case of an application to the Court, on notice to the Attorney General, if the Attorney General has no objection to the merger, the petitioner's attorney will be provided with written confirmation by means of a "No Objection" endorsement. Such endorsement, typically stamped on the proposed order approving the Certificate of Merger, will waive statutory service of the Petition since the papers have already been submitted to and reviewed by the Office of the Attorney General. The petition can then be submitted to the Court and, if a hearing or other court proceeding is scheduled, the Petitioner must give notice of such proceeding to the Attorney General. In addition, a copy of the Certificate of Merger, with a copy of the Court's order, must be submitted to the Attorney General when the Certificate is filed with the Department of State.

If the Attorney General does not approve the Petition or there are other parties that object to the merger and wish to be heard by the Court, the application must then be

made to the Court, on notice to the Attorney General and any other appropriate parties, for an order approving the merger.

Circumstances in which the Attorney General may determine that court approval is appropriate, include:

- There is opposition to or complaints about the merger by members of a constituent corporation or members of the public.
- The Attorney General does not object to the merger but, in his discretion, determines that court review is appropriate because, for example, the merger will have a significant impact on the public or, the merger raises conflicts of interests.
- The Attorney General does not object to the merger, but, in his discretion, determines that court approval is necessary because assets of a merging corporation are held for a specific purpose requiring court approval pursuant to N-PCL § 907-a (c).
- The Attorney General has objections to the merger which have not been resolved after discussion and, if the petitioner wishes to proceed, court review is necessary.

Plan of Merger

The first step in a merger is adoption of a plan. The board of each corporation proposing to merge must adopt a plan of merger or consolidation which must set forth the following:

- The name of each constituent corporation and the name of the surviving corporation. If any constituent corporation was formed under a different name, the name under which it was formed.
- For each constituent corporation, a description of the membership and holders of any certificates evidencing capital contributions or subventions, including their number, classification and voting rights, if any. If there are none, a statement to that effect.
- The terms and conditions of the proposed merger, including the manner and basis of converting membership or other interest in each constituent corporation into membership or other interest in the surviving corporation, or the cash or other consideration to be paid in exchange for membership or other interest in each constituent corporation.
- In the case of a *merger*, a statement of any amendments or changes that the merger will effect in the certificate of incorporation of the surviving corporation.

- In the case of a *consolidation*, all statements required to be included in a certificate of incorporation for a corporation formed under the N-PCL, except statements of facts not available at the time the plan of consolidation is adopted.
- In the case of a merger of New York and foreign (non-New York) corporations, a statement of any agreements required by N-PCL 906(d)(2)(D) confirming that any surviving foreign corporation may be served with process in New York and that the surviving foreign corporation may be sued in New York as required by the N-PCL.

Quick Statutory Reference Guide	
Contents of plan of merger or consolidation	N-PCL §§ 902(a)(1) - (5)
Agreement concerning service of process on non-New York constituent corporations	N-PCL § 906(d)(2)(D)

Board and Membership Approval of a Plan of Merger

The plan of merger must be approved by the board of each constituent corporation.

If a constituent corporation has members with voting rights, the plan of merger must also be approved by the members.

For any constituent corporation that has members, notice of a meeting at which a vote on the merger shall take place must be given to each member, whether or not entitled to vote, with a copy of the plan of merger or an outline of the plan. The plan of merger must be approved by a two-thirds vote of the members at a meeting where a quorum is present, provided that the "yes" votes are at least equal to the quorum.

If any constituent corporation has no members entitled to vote, a plan of merger is approved when it is adopted by the board of such corporation.

Quick Statutory Reference Guide	
Approval of plan of merger or consolidation by the board	N-PCL § 903(a)
Notice of meeting to members	N-PCL §§ 605 and 903(a)(1)
Submission of plan of merger or consolidation to members	N-PCL § 903(a)(1)
Approval of the plan of merger or consolidation by members	N-PCL §§ 903(a)(2), 613(c)

Certificate of Merger

After the plan of merger or consolidation is approved, a certificate of merger or consolidation must be signed on behalf of each constituent corporation. The certificate of merger must set forth the following:

- The name of each constituent corporation and, if the name of any constituent corporation has been changed, the name under which it was formed.
- The name of the surviving corporation.
- For each constituent corporation, a description of the membership and holders of any certificates evidencing capital contributions or subventions, including their number, classification and voting rights, if any. If there are none, a statement to that effect.
- In the case of *merger*, a statement of any amendments or changes in the certificate of incorporation of the surviving corporation to be effected by the merger.
- In the case of a *consolidation*, all statements required to be included in a certificate of incorporation for a corporation formed under the N-PCL except statements as to facts not available at the time the plan of consolidation was adopted by the board.
- The effective date of the merger or consolidation if other than the date of filing of the certificate of merger or consolidation by the Department of State.
- The date when the certificate of incorporation of each constituent corporation was filed by the Department of State or, in the case of constituent corporations created by special law, the chapter number and year of passage of such law.
- The manner in which the merger or consolidation was authorized with respect to each constituent corporation, including the date of the meeting of the directors or members and whether the approval was by a vote at a meeting or by unanimous written consent.

/Quick Statutory Reference Guide	
Contents of certificate of merger or consolidation	N-PCL § 902(a)(1), (2) and (4) and § 904(a)
Approvals by government agencies	N-PCL §§ 404 and 909
Effective date of the certificate of merger or consolidation	N-PCL § 904(a)(2)
Statement required in certain certificates of <i>consolidation</i>	N-PCL § 904(a)(3)
Date when each constituent corporation's certificate was filed and the chapter number and year of any law that created any constituent corporation	N-PCL § 904(a)(4)
Manner in which each corporation authorized the merger or consolidation	N-PCL § 904(a)(5)

Approvals by Government Bodies or Officers

If the purposes of any constituent or consolidated corporation would require the approval or consent of any governmental body or agency to the filing of its certificate of incorporation, the approval or consent of such governmental agency must be attached to the certificate of merger or consolidation before filing with the Department of State.

Quick Statutory Reference Guide	
Approvals required for filing a certificate of incorporation	N-PCL §§ 404, 909

Registration with the Attorney General's Charities Bureau

If any constituent corporation is required to register with the Attorney General pursuant to Executive Law Article 7-A ("Article 7-A") or Estates, Powers and Trusts Law § 8-1.4 ("EPTL"), it should be registered and its annual reports should be up to date prior to the merger.

If any such corporation is required to register but has not, or if its reports are delinquent, the Office of the Attorney General will generally require the corporation to register and file all required annual financial reports before completing its review.

Certain corporations, such as religious corporations, may be exempt from registration. A detailed summary of the registration and reporting requirements for charitable organizations and a list of statutory exemptions are posted at www.charitiesnys.com.

Quick Statutory Reference Guide	
Registration of corporations holding assets in New York	EPTL § 8-1.4
Registration of corporations soliciting contributions in New York	Executive Law, Article 7-A

Procedure for Approval of the Merger by the Attorney General or the Court, on Notice to the Attorney General

Venue

An application to obtain Supreme Court approval of the proposed merger may be made in the judicial district in New York in which the principal office of the surviving or consolidated corporation is to be located or in which the office of one of the domestic constituent corporations is located.

An application to obtain the Attorney General's approval of the proposed merger must be submitted to the Charities Bureau in New York City or Albany or to the appropriate regional office of the Attorney General.

Quick Statutory Reference Guide	
Application for approval of the Court	N-PCL §§ 907 and 907-a
Application for approval of the Attorney General	N-PCL §§ 907 and 907-b

Verified Petition to the Attorney General or the Supreme Court

The parties to a proposed merger must prepare a joint affidavit, signed on behalf of both corporations, or a verified petition to the Attorney General or the Court seeking approval of the merger. The following documents must be submitted by the constituent corporations in their application to the Attorney General alone or the Court, on notice to the Attorney General:

- The plan of merger must be attached as an exhibit.
- Certificates of incorporation, by-laws and any other governing instruments, including any amendments for each constituent corporation and any proposed amendments or changes to the certificate of incorporation or by-laws of the surviving corporation as a result of the merger and, for non-New York corporations, a certificate of good standing from the jurisdiction of incorporation, must be attached as an exhibit.
- For each constituent corporation, a statement that the plan of merger was approved by a vote of the directors in accordance with law, at a meeting duly called and held. Include a statement of the total number of directors, the number of the directors present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the board resolution, certified by the secretary, should be attached as an exhibit.
- If there were members entitled to vote, for each such constituent corporation, a statement that the plan of merger was approved by a vote of the members in accordance with law, at a meeting duly called and held. Include a statement of

the total number of members, the number of the members present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the membership resolution, certified by the secretary, should be attached as an exhibit.

- The objects and purposes of each corporation that will be promoted by the merger. Include a description of the purposes and activities of each constituent corporation, an explanation of why the corporations are merging, and how their purposes will be promoted by the merger.
- A statement describing all property held by the constituent corporations and the manner in which it is held; and a statement of all liabilities and the amount and sources of the annual income of each constituent corporation, usually provided in the form of financial statements and IRS Form 990 for each corporation, which should be attached as exhibits.
- A statement whether any votes against adoption of the resolution approving the plan of merger were cast at the meeting of members or directors at which the resolution was adopted by each constituent corporation.
- A statement of the facts confirming that the merger is authorized by the laws of the jurisdiction in which each of the constituent corporations was formed. Provide the citation for any jurisdiction outside New York.
- A statement whether or not any of the constituent corporations has restricted funds. If there are restricted funds, an exhibit should be annexed which identifies for each such restricted fund (a) the amount of the fund, (b) the historic dollar value of any endowment fund, (c) the nature of the restriction and whether the restriction is temporary or permanent, (d) the gift instrument or other document(s) containing the restriction and (e) the provisions of any applicable reversionary or remainder provision. The affidavit or petition should state that no restricted funds will be required to be returned, transferred or conveyed to any third party by reason of the merger except as specifically identified therein. The affidavit or petition may and should seek *cy pres* relief pursuant to N-PCL §907(c) with respect to restrictions which have become obsolete or which would become impossible or impracticable after the merger. The facts and circumstances supporting *cy pres* relief, and the precise nature of the relief requested, should be set forth in detail (*see also* “*Cy Pres* Relief in Connection with Merger,” below).
- All required consents and approvals of any governmental body or officer should be attached as exhibits.
- If the application is to the Attorney General for approval, a statement as to whether anyone raised, or has a reasonable basis to raise, objections to the merger or consolidation, the names and addresses of such persons, the nature of their interest, and a description of their objections.

Quick Statutory Reference Guide	
Application for approval of the supreme court	N-PCL §§ 907(a), 907-a(a)
Application for approval of the attorney general	N-PCL §§ 907(a), 907-b(b)

In addition, the affidavit or petition should include:

- A list of the names of the directors (sometimes called trustees) of each constituent corporation, and any anticipated changes in the membership or directors of the constituent corporations that would result from the merger; as well as any changes in the membership or directors of any such corporation that have already occurred in connection with pre-merger governance and organizational changes. Copies of supporting documentation should be attached as exhibits.
- Any letter of intent and any other agreements entered into by any constituent corporation in connection with the proposed merger. A copy should be attached as an exhibit.
- A description of all governance or organizational changes made by the constituent corporations in advance of the merger, including changes to or restructuring of their boards of directors and executive management, with supporting documentation attached as an exhibit.

The Office of the Attorney General may request additional documents and information needed in order to review the application, such as IRS form 1023 or the IRS letter of determination of exempt status.

Proposed Order of the Court or Attorney General Approval

If the application is made to the Court, it must be accompanied by a proposed order which should include the following provisions:

- A finding that the interests of the constituent corporations and the public interest will not be adversely affected by the merger.
- Any proposed terms and conditions for the merger that the Court has discretion to impose.
- One or more paragraphs granting *cy pres* relief with respect to assets that require such relief (*see “Cy Pres Relief in Connection with Merger,”* below)
- Direction that copies of (a) the order as signed and (b) the certificate of merger as filed by the Department of State shall be served on the Attorney General.

If the application is made to the Attorney General, it must be accompanied by a proposed Attorney General Approval including the following:

- A finding that the interests of the constituent corporations and the public interest will not be adversely affected by the merger.
- Any proposed terms and conditions for the merger that the Attorney General in his discretion may prescribe
- Direction that a copy of the certificate of merger as filed by the Department of State shall be served on the Attorney General.

Quick Statutory Reference Guide	
Order of the Supreme Court	N-PCL § 907-a(e)
Approval of the Attorney General	N-PCL § 907-b(f)

Cy Pres Relief in Connection with Merger

If any assets of any of the constituent corporations are held for a charitable purpose or if any assets are required to be used for a particular purpose, but not upon a condition requiring return, transfer or conveyance because of the merger, the Court may, in its discretion, direct that such assets be transferred or conveyed to the surviving corporation or to one or more other New York or foreign corporations or organizations engaged in substantially similar activities, upon an express trust the terms of which shall be approved by the Court. N-PCL § 907-a(c); *see also* N-PCL § 513, which generally provides that a charitable corporation holds “full ownership rights” in any assets held by a corporation “in trust for, or with a direction to apply the same to, any purpose specified in its certificate of incorporation, and shall not be deemed a trustee of an express trust of such assets.”

Notice to Interested Persons and Entities

If the application is made to the Court, after the petition is filed, the Court shall direct that notice of the application be given to interested persons, including any governmental body or officer and any other person or body whose consent or approval is required by N-PCL § 909. If the Attorney General believes that any individual or body should receive such notice, he will so inform the petitioners in connection with his review of the proposed merger.

If application is made to the Attorney General alone, the office may also direct that notice be given to interested individuals or entities or may conclude that court approval of the application is necessary.

Quick Statutory Reference Guide	
Attorney General may require notice of application to interested parties and government agencies	N-PCL § 907-b(c)
Notice to Interested Parties	N-PCL §§ 907-a(b), 909

Approval by the Attorney General

Upon completion of the review of the application for approval of the plan and certificate of merger or consolidation, the Attorney General may provide approval of the application on the Attorney General Approval, a sample of which is Appendix E.

Quick Statutory Reference Guide	
Attorney General's approval of the application	N-PCL § 907-b
Disapproval or conditional approval of the Attorney General	N-PCL § 907-b(e)
Attorney General may conclude that court review is required	N-PCL § 907-b(h)

Hearing by the Court

If court approval of the merger is sought, the Court will set a time for a hearing and direct the applicants to give notice to any interested party, including the Attorney General, any governmental body or officer and any other person or entity whose consent to filing is required. However, as noted above, the procedure preferred by the Attorney General and most courts is for a *draft* petition and required attachments to be submitted to the Attorney General *prior* to submission to the Court.

If the Court finds that the applicants have complied with provisions of law applicable to mergers, and that the interests of the constituent corporations and the public interest will not be adversely affected by the merger, it will grant an order approving the plan and certificate of merger. A certified copy of the court order must be attached to the certificate of merger when it is filed with the office of the Secretary of State.

If the Court finds that the interests of non-consenting members are or may be substantially prejudiced by the proposed merger, the Court may disapprove the plan or may direct a modification of it. In the event of a modification, if the Court shall find that the interests of any members may be substantially prejudiced by the proposed merger as modified, the Court must direct that the modified plan be submitted to a vote of the members of the constituent corporations, or if the Court finds that there is no substantial prejudice, it shall approve the agreement as so modified without further approval by the members. Any further vote of members must be obtained in the same manner as the original vote of the members.

Filing the Certificate of Merger

After the Supreme Court or the Attorney General has approved the merger, the certificate of merger must be filed with the Department of State. If the certificate has been approved by the Attorney General, the Attorney General's written approval must

be attached to the certificate. If the Supreme Court has approved the certificate, a certified copy of the court's order must be attached to the certificate.

After the certificate of merger is filed by the Department of State, the surviving corporation must file a certified copy of the certificate with the county clerk of each county in which the office of a constituent corporation, other than the surviving corporation, is located, and with the office of the recording officer in each county in which real property of a constituent corporation, other than the surviving corporation, is situated.

A copy of the certificate of merger must also be filed with the Office of the Attorney General.

Quick Statutory Reference Guide	
Delivery of Certificate to Department of State with information concerning constituent foreign corporations	N-PCL §§ 904 and 906(c)
Filing Certificate with Secretary of State with supreme court order or the Attorney General Approval	N-PCL § 907(a)
Filing of Certificates of religious corporations	RCL § 3

Effective Date and Legal Effects of Merger

Effective Date. A merger becomes effective upon the filing of the certificate of merger by the Department of State, or on a later date, as stated in the certificate of merger, which may not be more than 30 days after such filing.

Legal Effects of Merger or Consolidation. The legal effects of merger and consolidation are set forth in the N-PCL § 905(b). In brief, the surviving corporation, in a manner consistent with its certificate of incorporation, acquires all of the assets, rights and privileges, and assumes all of the obligations, liabilities and penalties, of each of the constituent corporations, including but not limited to all debts owed to creditors.

In the case of a *merger*, the certificate of incorporation of the surviving corporation is automatically amended to the extent, if any, that changes in its certificate of incorporation are set forth in the plan of merger and certificate of merger.

In the case of a *consolidation*, the statements set forth in the certificate of consolidation and which are required or permitted to be set forth in a certificate of incorporation of a not-for-profit corporation formed under the N-PCL constitute the certificate of incorporation of the consolidated corporation.

Quick Statutory Reference Guide	
Effect of Merger or Consolidation - Date	N-PCL § 905(a)
Effects of Merger or Consolidation - certificate, property, liabilities	N-PCL § 905(b)

Mergers of Domestic and Foreign Corporations

The N-PCL also covers mergers and consolidations in which one or more of the constituent corporations or the surviving corporation is a foreign corporation. With respect to procedure, including the requirement of approval by members, each New York corporation must comply with the provisions of the N-PCL relating to merger or consolidation of domestic corporations, and each foreign corporation must comply with the laws of the jurisdiction under which it is incorporated.

If the surviving corporation is a New York corporation, the certificate of merger must be delivered to the New York Department of State as provided in N-PCL (*see* “Certificate of Merger,” above). In addition, the certificate must set forth the jurisdiction and date of incorporation of each constituent foreign corporation and the date when its application for authority to conduct activities in New York was filed by the Department of State, and its fictitious name used in this state, if applicable, or, if no such application has been filed, a statement to that effect.

If the surviving corporation is a foreign corporation, it must comply with the provisions of the Article 13 of the N-PCL relating to foreign corporations. It must also deliver to the Department of State a certificate of merger which sets forth the information required by N-PCL:

(A) The name of each constituent corporation and the name of the surviving corporation. If any constituent corporation was formed under a different name, the name under which it was formed;

(B) For each constituent corporation, a description of the membership and holders of any certificates evidencing capital contributions or subventions, including their number, classification and voting rights, if any. If there are none, a statement to that effect;

(C) The jurisdiction and date of incorporation of the surviving foreign corporation, the date when its application for authority to conduct activities in New York was filed by the Department of State and its fictitious name used in this state, or, if no such application has been filed, a statement to that effect and that it is not to conduct activities in this state until an application for such authority has been filed by the Department of State;

(D) The date when the certificate of incorporation of each constituent New York corporation was filed by the Department of State and the jurisdiction and date of incorporation of each constituent foreign corporation, other than the surviving foreign

corporation, and, in the case of each such corporation authorized to conduct activities in this state, the date when its application for authority was filed by the Department of State;

(E) An agreement that the surviving corporation may be served with process in this state in any action or proceeding for the enforcement of any liability or obligation of any domestic corporation or of any foreign corporation, previously amenable to suit in this state, which is a constituent corporation in the merger, and an agreement that the surviving foreign corporation may be sued in New York in respect of any property transferred or conveyed to it as provided in N-PCL § 907(c), or the use made of such property, or any transaction in connection therewith;

(F) A designation of the New York Secretary of State as its agent upon whom process against it may be served and a post office address within or without New York to which the Secretary of State shall mail a copy of the process in such action or special proceeding; and

(G) The manner in which the plan of merger was approved with respect to each constituent domestic corporation and that the merger is permitted by, and is in compliance with, the laws of the jurisdiction of each constituent foreign corporation, and

(H) The effective date of the merger if other than the date of filing of the certificate of merger by the Department of State.

If the surviving corporation is a domestic corporation, the effect of the merger of one or more foreign and domestic corporations is the same as in the case of a merger of domestic corporations. If the surviving corporation is a foreign corporation, the effect is the same as in the case of a merger of domestic corporations, except insofar as the law of the foreign jurisdiction provides otherwise.

Quick Statutory Reference Guide	
Merger or consolidations of domestic and foreign corporations	N-PCL § 906(a)
Contents of certificate or merger or consolidation	N-PCL §§ 904 and 906(d)(2)
Foreign Corporations	N-PCL Article 13

Mergers of Religious Corporations with Not-for-Profit Corporations

A corporation formed under the Religious Corporations Law (“RCL”) may merge with a not-for-profit corporation with religious purposes. Each constituent corporation must comply with the procedures applicable to mergers of not-for-profit corporations. *See* "Procedure for Approval of the Merger by the Attorney General or the Court, on Notice to the Attorney General" above.

The certificate of merger must be filed with the Department of State or, if the surviving corporation is a religious corporation, with the county clerk of the county where the corporation maintains its principal office. N-PCL § 910(c), (d); RCL § 3.

Quick Statutory Reference Guide	
Merger or consolidation of religious corporations and not for profit corporations formed for religious purposes	N-PCL § 910
Filing of certificate of merger	N-PCL § 910(c)(d) and RCL § 3

Mergers of Religious Corporations with Other Religious Corporations

The Attorney General does *not* review mergers or consolidations of incorporated churches and other corporations formed under the Religious Corporations Law. Mergers and consolidations of such corporations are governed by the applicable provisions of the RCL.

Although Supreme Court approval is required for certain mergers and consolidations of religious corporations, notice to the Attorney General is not required and the Attorney General does not play a role in such proceedings (unless requested to do so by the Court).

Quick Statutory Reference Guide	
Consolidation of incorporated churches	RCL §§ 13
Consolidation of incorporated presbyteries	RCL §15-a
Consolidation or merger of incorporated Presbyterian and Lutheran synods	RCL 15-b
Trusts for Shakers and Friends	RCL § 202
Consolidation of Jewish congregations	RCL §§ 208-209
Merger and consolidation of Unitarian and Universalist Societies Unitarian and Universalist Societies	RCL § 412

Mergers and Consolidations of Corporations Chartered by the Regents under the Education Law

Mergers and Consolidation of corporations chartered by the Regents of The University of the State of New York are governed by Education Law and Article 9 of the N-PCL (except § 907). The Attorney General does not review such consolidations.

Quick Statutory Reference Guide

Application of the not-for-profit corporation law to education corporations

Education Law §§ 216-a(4) and 223

Conclusion

If you have any questions about the information in this booklet or about the procedures for obtaining Attorney General review and/or court approval of a proposed merger or consolidation, you may contact the Attorney General’s Charities Bureau by email to charities.bureau@ag.ny.gov or any of the Attorney General’s Regional Offices for assistance. The addresses and telephone numbers of the Attorney General’s regional offices may be found in Appendix F.

Additional guidance and information for charities as well as forms and instructions for registration are posted at www.charitiesnys.com.

APPENDIX A - Sample Petition for Court Approval of Merger

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

In the Matter of the Application of

(NAME OF CORPORATION and NAME OF CORPORATION)

:
:

VERIFIED PETITION

Index No.

For an Order Approving Their Plan of Merger Under :
Section 907-a of the Not-for-Profit Corporation Law :
and Authorizing the Filing of a Certificate of Merger :
under Section (904/906) of the Not-for-Profit :
Corporation Law :

-----X

TO: THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Petitioners, (NAME OF CORPORATION and NAME OF CORPORATION) by (NAME AND TITLE OF OFFICER OF EACH CORPORATION) for their Verified Petition herein respectfully allege:

TEXT OF THE PETITION

WHEREFORE, petitioners request an order of this Court, pursuant to Section 907-a of the Not-for-Profit Corporation Law, approving the Plan of Merger attached as Exhibit ___ and authorizing the filing of a Certificate of Merger, a copy of which is attached as Exhibit ___, and for such other and further relief as may be appropriate.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed this ___ day of ____, 20___ by

(Name of Officer and Title)

(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

APPENDIX B - Sample Petition for Attorney General Approval of Merger

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

In the Matter of the Application of

(NAME OF CORPORATION and NAME OF CORPORATION)

VERIFIED PETITION

For Approval of Their Plan of Merger Under
Section 907-b of the Not-for-Profit Corporation Law
and Authorizing the Filing of a Certificate of Merger
under Section (904/906) of the Not-for-Profit
Corporation Law

-----X

TO: OFFICE OF THE ATTORNEY GENERAL

(Street Address)

(City/Town), New York (Zip Code)

Petitioners, (NAME OF CORPORATION and NAME OF CORPORATION) by
(NAMES AND TITLES OF OFFICERS) for their Verified Petition herein respectfully
allege:

TEXT OF THE PETITION

WHEREFORE, Petitioners request that the Attorney General, pursuant to Section 907-b
of the Not-for-Profit Corporation Law, approve the Plan of Merger attached as Exhibit __
and authorizing the filing of a Certificate of Merger, a copy of which is attached as
Exhibit __, and for such other and further relief as may be appropriate.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed
this ___ day of ___ (Month), 20___ by

(Name of Officer and Title)

(Name of Officer and Title)

APPENDIX C - Checklist for Documents and Information Required to be Submitted to the Attorney General in Connection with an Application for the Attorney General's or the Court's Approval of a Merger

Following is a checklist of documents required by the Attorney General, whether the application is submitted to the Attorney General or the Court:

Verified Petition or Joint Affidavit to the Attorney General or the Court

____ Petition or joint affidavit (initial submission should be in draft form)

Attachments to Petition

____ Plan of merger

____ Proposed certificate of merger, including the effective date if other than the date it is filed with the Secretary of State

____ Copies of certificates of incorporation, by-laws and any other governing instruments for the constituent corporations and any surviving corporation, and certificate of good standing for foreign corporations.

____ Board, committee and membership minutes and resolutions, certified by the secretary, relating to the merger and any governance or organizational changes that have already taken place or are under consideration.

____ Any letter of intent and any other agreements entered into by any constituent corporation in connection with the proposed merger.

____ IRS Form 990 and audited financial statements for the past year for each constituent corporation.

____ A list of the endowments or other restricted funds of each constituent corporation; for each fund, specify the fund's purposes, the amount in the fund, the historic dollar value of any endowment funds, the name and address of the custodian, whether any portion of the fund has been pledged or otherwise used to secure loans or other indebtedness, and the provisions of any applicable reversionary clause; identify funds for which *cy pres* relief is sought, including any funds which have not been used for three years or more.

____ Copies of all approvals or consents of governmental bodies or officers whose approval or consent is required for the merger pursuant to N-PCL §§ 909 and 404.

____ A list of the names of the directors (sometimes called trustees) of each constituent corporation, and any anticipated changes in the membership or directors of the constituent corporations that would result from the merger; as well as any changes in

the membership or directors of any such corporation that have already occurred in connection with pre-merger governance and organizational changes.

____ Any letter of intent and any other agreements entered into by any constituent corporation in connection with the proposed merger.

____ Documents supporting all governance or organizational changes made by the constituent corporations in advance of the merger, including changes to or restructuring of their boards of directors and executive management.

Court Order or Attorney General Approval

____ If a court order approving the merger is sought, a proposed Order.

____ If the Attorney General's approval is sought, a proposed Attorney General Approval.

APPENDIX D - Sample Order Approving Merger

At the Supreme Court of
the State of New York,
held in and for the County of
on the ___ day of (Month), 20__.

P R E S E N T :
HON.
Justice.

-----X
In the Matter of the Application of :
(NAME OF CORPORATION and NAME OF CORPORATION) : ORDER
For an Order Approving Their Plan of Merger : Index No.
under Section 907-a of the Not-for-Profit Corporation :
Law and Authorizing the Filing of a Certificate of
Merger under Section (904/906) of the Not-for-Profit :
Corporation Law :
-----X

ADD BODY OF ORDER WITH RECITATIONS

AND DECRETAL PARAGRAPHS, including

ORDERED, that a signed copy of this Order shall be sent to the New York State
Attorney General’s office; and it is further

ORDERED, that a copy of the Certificate of Merger as filed with the Department of State
of New York shall be sent to the New York State Attorney General’s office.

E N T E R:

Justice of the Supreme Court

Date

APPENDIX E - Sample Attorney General's Approval of Merger

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

In the Matter of the Application of _____ :
(NAME OF CORPORATION and NAME OF CORPORATION) : ATTORNEY GENERAL
CORPORATION) : APPROVAL

For an Approval of Their Plan of Merger
under Section 907-b of the Not-for-Profit Corporation :
Law and Authorizing the Filing of a Certificate of
Merger under Section (904/906) of the Not-for-Profit :
Corporation Law

-----X

1. By Petition verified on (Date), (NAMES OF CORPORATIONS) applied to the
Attorney General pursuant to Article 9 of the Not-for-Profit Corporation Law for
approval of an application to (MERGE OR CONSOLIDATE)

2. The name of the (SURVIVING OR CONSOLIDATED) corporation is (NAME OF
CORPORATION)

ADD RECITALS AS WOULD APPEAR IN ORDER

Based on a review of the Petition and the exhibits thereto (and the additional documents
and information requested by the Attorney General), and the verifications of
(NAMES OF CERTIFIERS), the Attorney General has determined that the petitioners
have complied with the provisions of Article 9 the Not-for-Profit Corporation Law
applicable to the merger of not-for-profit corporations, and neither the Petitioners nor
any third party having raised with the Attorney General any objections to the proposed
merger, and it appearing to the satisfaction of the Attorney General that the interests of
the constituent corporations and the public interest will not be adversely affected by the
merger, the Plan of Merger is approved and the Certificate of Merger is authorized to be
filed with the Department of State.

A copy of the Certificate of Merger, as filed with the Department of State shall be sent to
the Attorney General's office within 10 days of its filing.

Eric T. Schneiderman
Attorney General of the State of New York

By: _____
Assistant Attorney General

Date: _____

Appendix F –

**Offices of the New York State Attorney General
and the counties covered by each:**

ALBANY -

Charities Bureau
The Capitol
Albany, NY 12224-0341
518-776-2160

Counties: Albany, Columbia, Fulton, Greene, Hamilton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie, Warren and Washington (note: Sullivan and Ulster for trusts and estates matters only)

BINGHAMTON REGIONAL OFFICE

44 Hawley Street, 17th Floor
Binghamton, NY 13901-4433
607-251-2770

Counties: Broome, Chemung, Chenango, Delaware, Otsego, Schuyler, Tioga and Tompkins

BUFFALO REGIONAL OFFICE

Main Place Tower - Suite 300A
Buffalo, NY 14202
716-853-8400

Counties: Allegheny, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming

NASSAU REGIONAL OFFICE

200 Old Country Road, Suite 240
Mineola, NY 11501-4241
516-248-3302

Counties: Nassau (note: trusts and estates matters are handled by NYC)

NEW YORK CITY

Charities Bureau
Transactions Section
28 Liberty Street
New York, NY 10005
212-416-8401

Counties: Bronx, Kings, New York, Queens and Richmond (note: NYC also handles Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester – trusts and estates matters only)

PLATTSBURGH REGIONAL OFFICE

70 Clinton Street - Suite 700
Plattsburgh, NY 12901-2818
518-562-3288

Counties: Clinton, Essex and Franklin

POUGHKEEPSIE REGIONAL OFFICE

One Civic Center Plaza - Suite 401
Poughkeepsie, NY 12601-3157
845-485-3900

Counties: Dutchess, Orange, Sullivan and Ulster (note: Dutchess and Orange County trusts and estates matters are handled by NYC; Sullivan and Ulster County trusts and estates matters are handled by Albany)

ROCHESTER REGIONAL OFFICE

144 Exchange Boulevard
Rochester, NY 14614-2176
716-546-7430

Counties: Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates

SUFFOLK REGIONAL OFFICE

300 Motor Parkway
Hauppauge, NY 11788-5127
631-231-2424

Counties: Suffolk (note: trusts and estates matters are handled by NYC)

SYRACUSE REGIONAL OFFICE

615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
315-448-4800

Counties: Cayuga, Cortland, Madison, Onondaga and Oswego

UTICA REGIONAL OFFICE

207 Genesee Street, Room 508
Utica, NY 13501-2812
315-864-2000

Counties: Herkimer and Oneida

WATERTOWN REGIONAL OFFICE

Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3744
315-523-6080

Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER REGIONAL OFFICE

44 South Broadway
White Plains, NY 10601
914-422-8755

Counties: Putnam, Rockland and Westchester (note: trusts and estates matters are handled by NYC)