

MERGER ESSENTIALS: PUBLIC RECORDS FILINGS FOR COMPANIES ENTERING INTO STATUTORY MERGERS



The statutory merger of two or more business entities is an extensive process involving due diligence, planning and filing activities. This article highlights key pre-planning actions for public filing requirements.

See Part 2 to learn about filing the primary merger documents and post-merger “clean up.”

Once a merger agreement has been reached and approved by shareholders, the legal teams for the merging entities face the complex process of completing the public records filings that will make the merger legally binding. They must also make sure the records in the relevant states of domestic organization and foreign qualification accurately reflect all of the changes to the business entity caused by the merger.

Neglecting to file any required document or failing to take one of the many other steps involved in this process can result in serious consequences. Incomplete filings may delay the effective date of the merger, cause the new entity to lose its naming rights, result in penalties for doing business without authority, or subject the entities to additional tax liability.

However, with good planning and organization, you can effect a successful merger. The goals of planning are to:

- Eliminate risks of rejected filings that could delay the merger date
- Manage the timing of required filings to preserve the target merger date
- Avoid missed or overlooked filings to help ensure that the merger is legally binding

PRE-MERGER PLANNING

First, know your starting and ending points. Establish a clear vision of what the business entity is before the merger, and what will happen to it as a result of the merger. To help understand this, answer the following questions:

- **What is the entity's state of formation?** This state's law will govern the procedure for effecting the merger. Filings will always be required here.
- **Which entity will be the surviving or disappearing entity in the merger?** Different documents must be filed and steps taken depending upon which entity will continue to exist or not.
- **In which states is the entity currently qualified to do business as a foreign business entity?** All states keep public records of their foreign business entities. When the information on file changes because of a merger, appropriate steps must be taken.
- **In which states will the post-merger entity be doing business?** If the answer includes states different from those listed in the question above, additional actions must be taken.
- **Will the surviving entity change its name following the merger?** If the answer is yes, then you will have to obtain and protect the entity's right to the desired name.

THREE MANAGEABLE PHASES OF THE MERGER FILING

Second, break down the merger into the following three manageable parts and analyze what must be done at each stage in the merger process.

1. **Pre-merger planning** — Steps that must be taken before the merger documents are filed.
2. **Primary filings** — Actions to take to effect the merger. *(See Part 2 of this series)*
3. **Post-merger clean-up** — Actions that must be taken after the merger is effective. *(See Part 2 of this series)*

BEST PRACTICES FOR PRE-MERGER PLANNING

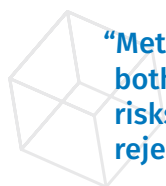
Among the actions that must, or should, be taken before the merger documents are filed, are:

1. **Confirm good standing status.** Virtually all states will reject filings for business entities that are not in good standing. Therefore, always verify if the entity is in good standing in its formation state and in each state in which it is qualified to conduct business as a foreign business entity. If the entity is not in good standing, take any necessary steps to restore its good-standing status.
2. **Check tax status and determine if tax clearance is required.** The parties to a merger must be up-to-date in their tax payments. This is particularly true for the discontinuing entity, as states will not allow businesses to withdraw or dissolve while still owing taxes. Some states require a tax clearance, which can take a long time to obtain. Determine if one is necessary well in advance, as failure to do so can delay the merger filing.
3. **Search for name conflicts.** States will reject documents that would result in a domestic or qualified foreign entity having a name that conflicts with a name already on record with the state's filing office. Check if the desired new name is available in its state of formation, in each state in which it will be qualified, and any new states the new entity will qualify to do business in, post-merger.
4. **Reserve a name.** An available name should be reserved by filing an application for reservation with the appropriate domestic and foreign states. This will protect against having another business entity take the name before the merger documents are filed. Reservation periods are typically no more than 120 days and not all states allow renewals. Be mindful of timing the reservation filing so that the reservation period does not expire before the effective date of the merger.

5. **Qualify the survivor entity.** If the surviving entity will be transacting business in new states after the merger, it will have to qualify to do business in those states. Qualifications can be made before the merger, timed to go into effect at the same time as the merger, or in some cases, after the merger.

Qualifying generally requires filing an application for authority, which usually has to be accompanied by a certificate of good standing from the formation state.

In many states, the certificate of good standing cannot be dated for more than a short period of time before the date that the application for authority is filed. Therefore, take care not to order this certificate too far in advance.



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6. **Withdraw the non-survivor and/or survivor.** If, following the merger, either business entity will no longer conduct business in one or more states where it had been qualified, they will have to be withdrawn from those states. This can be done before the merger as long as the business entity will not be doing business after the withdrawal filing is effective. Taking care of this in the pre-merger stage protects the entity from being subject to franchise tax and annual reporting requirements once the business entity withdraws.

CONCLUSION

Laying the groundwork for a merger helps in-house and outside legal teams handle the myriad details in a timely and effective manner. The pre-merger plan starts with establishing a clear view of both the merging entities' current statutory characteristics and the desired state of the new entities after the merger. Meticulous planning helps the legal teams both meet merger deadlines and avoid the risks that can result from incomplete and rejected filings.

For best practices for filing the primary merger documents and post-merger considerations, see Part 2 of this series.

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