



Tuesday, October 21
4:30 pm-6:00 pm

705 Nonprofit Mergers & Acquisitions

Robert L. Brandfass

Vice President and General Counsel
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James J. Holmberg III

Architect Attorney
Greystone Housing Foundation, Inc.

Suzanne Ross McDowell

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Faculty Biographies

Robert L. Brandfass

Robert L. Brandfass serves as general counsel of West Virginia United Health System, a 4-hospital, 976-bed health system, as well as vice president and general counsel of its flagship institution, West Virginia University Hospitals, a 522-bed academic medical center.

He was previously a partner in the law firm of Kay Casto & Chaney, Charleston, West Virginia. Mr. Brandfass was a member the law firm's management committee and chair of its health care practice group.

Mr. Brandfass is a member of the West Virginia State Bar Association, the American Health Lawyers Association, and ACC.

Mr. Brandfass earned his JD from the Case Western Reserve University School of Law and graduated cum laude with an AB from Ripon College.

James J. Holmberg III

James J. Holmberg, III, AIA is the general counsel and architect for Greystone Housing Foundation, Inc. in San Diego, California. A nonprofit organization that he founded with several other professionals in the low income housing industry to develop low income projects for seniors and young adults. In addition, he is vice president of GreyStone, Inc., a manufacturing company in Columbus, Nebraska.

Prior to Greystone Housing Foundation, Mr. Holmberg was with Father Joe's Villages in San Diego, California. His responsibilities included providing legal counsel to the organization and its sister organizations of St. Vincent de Paul Village, Inc., Martha's Village & Kitchen, Inc., Toussaint Youth Villages, Inc., San Diego Health & Faith Alliance, Inc., Marillac Homes, Inc., and the National AIDS Foundation. In addition to the legal services, Mr. Holmberg provides design and management services for the construction and maintenance of the organizations' facilities. Prior to joining Father Joe's Villages, Mr. Holmberg was in private architectural and legal practice. He also served as business manager for the Diocese of San Diego and as an architect for the US Army Corps of Engineers.

He was a founding board member of Fresh Start Surgical Gifts, Inc. He has provided pro bono legal work through the Regional Task Force on the Homeless and Homeless subcommittee of the San Diego Bar Association. He also volunteers with the US Coast Guard Auxiliary.

Mr. Holmberg received his BA the University of Notre Dame and is a graduate of the Creighton University School of Law.

Suzanne Ross McDowell

Suzanne Ross McDowell is a partner in the Washington office of Steptoe & Johnson LLP, where she focuses on the law of tax-exempt organizations with particular emphasis on tax, corporate governance, and commercial transactions.

She has extensive experience with the nonprofit sector including representation of exempt organizations on a broad spectrum of matters as a private practitioner; service at the US Treasury Department where she was responsible for all legislative and regulatory issues affecting exempt organizations; and work as senior vice-president and deputy general counsel for the National Geographic Society where she developed cost-effective practical solutions for a wide variety of complex legal and business issues.

Ms. McDowell is a frequent speaker at conferences and is the author of several papers. She currently serves on the advisory board of the Exempt Organization Tax Review and the Journal of Taxation of Exempt Organizations. She co-authors Steptoe's Exempt Organizations Advisory.

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Today's Program

- I. Why Merge?
- II. Alternatives to Merger
- III. Prior to Merger
- IV. Legal and Tax Issues
- V. Conclusion

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Restructuring Methods and Terminology

- Introduction
- Dissolution is most extreme
 - For 501 (c)(3) organizations, all assets of the organization may be considered as held in Charitable Trust and subject to supervision by the Attorney General
- Acquisition by another Organization
- Merge with another Organization
 - Surviving Organization and Disappearing organization
 - Entering into transaction effecting fundamental corporate change

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Why Merge

- Introduction
 - Types of nonprofit organizations
 - Public Benefit Organizations (501(c)(3))
 - Mutual Benefit Organizations (501(c)(6))
 - Contextual history, sizes, position in the community and other factors of the organizations
 - How long have the organizations been established
 - The size of the organizations both generally and compared to each other
 - What is their persona's in the community the Good Will

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Reasons for Restructuring

- Financial reasons
 - Funding of the organization's programs is dwindling
 - New programs or missions require additional capital basis and expertise
 - Major donor or public entity may force smaller organization to join forces with another organization to continue funding
 - Long time and broad base donations may continue if the organization still has life



- **Business reasons**

- Purpose of organization is no longer relevant or needed
- Performance of its mission may require additional programs or services not available
- Sustainability of Leadership
 - Difficult finding new board members
 - Founding members and organizational leadership wanting to retire with no successors available



Consolidation

- A “consolidation” occurs when two existing entities combine to create a new corporate entity
- Both “merger” and “consolidation” authorized by model nonprofit law



Merger

- A “merger” occurs when one existing entity merges with and into another existing entity
- The latter “surviving” entity succeeds to all assets and liabilities of the disappearing entity by operation of law



Acquisition

- In an asset acquisition, one organization purchases all or substantially all of the assets of another organization
- The selling organization does not disappear or dissolve as a matter of law
- Acquiring organization does not assume obligations and liabilities of seller as a matter of law

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Dissolution

- An organization distributes all of its assets to another organization and ceases to exist as a separate entity

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Common Corporate Parent (cont'd)

- Elect and remove any member of the governing boards
- Approve amendments to their articles of incorporation and by-laws
- Approve any mergers
- Direct capital contributions to the parent
- Approve all budgets

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Common Corporate Parent

- Both existing entities remain
- New parent is created
- Parent becomes sole corporate member of each existing entity
- Parent given certain retained powers regarding existing entities
- Powers reflected in articles/bylaws of existing entities and parent

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Common Corporate Parent (cont'd)

- Direct inter-company fund transfers
- Approve non-budgeted acquisitions, purchases, sales or other asset dispositions in excess of a set dollar amount
- Approve the incurrence of material debt
- Approve key affiliations between entities and third parties



Common Corporate Parent (cont'd)

- Each existing entity selects an agreed upon proportion of the board seats...or
- Composition of all three boards...new parent and two existing entities...is identical
- Same people are directors for each entity



Joint Venture

- Two or more organizations form a new organization
 - Typical structure would be LLC
 - Each organization is a member
 - Operating Agreement provides terms for operation
- Programmatic Joint Ventures
 - Share risks
 - Reduce competition
- Administrative Joint Ventures
 - Management service organization
- Exempt organizations may also enter into joint ventures with non-exempt entities
 - May affect exempt status
 - Unrelated business taxable income issues



Common Corporate Parent (cont'd)

- Typically done via an affiliation agreement
- Agreement sets out terms & conditions
- Includes representations and warranties
- Includes the retained powers of parent
- Due diligence performed
- Approvals obtained
- Deal consummated with revision of articles/bylaws



Administrative Consolidation

- Contractual arrangement to combine some functions
- Objective usually to achieve cost efficiencies
- May involve collectively contracting with a third party, e.g., management company
- Examples
 - Accounting, financial management, information technology, etc.
 - Fundraising
 - Mailing lists

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Collaboration

- Contractual arrangement between two or more organizations to work together
- Examples
 - Joint purchasing
 - Program coordination

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Prior to Merger — Confidentiality

- First step to any due diligence inquiry is a binding confidentiality agreement between/among the parties. Concerns that should be addressed:
 - Avoid language that suggests the parties are agreeing to do more than explore a potential combination;
 - Include specific provisions prohibiting or limiting duplication and limiting the scope of permission to review the documents to select individuals (all the more important with electronic documents).

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Prior to Merger

- Introduction
 - Due diligence is commonly understood to be a necessary first step before mergers and other significant corporate combinations.
 - It is also the most important step — if something goes wrong after the fact, it's often difficult to obtain redress.
 - Form checklists are helpful, but don't stop there; look to the unique situations of the transaction and tailor your inquiries to address those situations.

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Due Diligence — Documents to Review

- Corporate documents (charter, bylaws, policies and procedures, board minutes, executive committee minutes, organizational charts, etc.)
- Administrative filings (state corporate filings, lobbying disclosure filings, all licenses, permits, etc.)
- Membership issues (membership lists, dues solicitations, notices and forms, etc.)
- Financial Reports and Related Documents (audited financials, letters and reports from independent accountants, internal financial statements, budgets, loans outstanding, UCC filings, etc.)



Due Diligence — Documents to Review (continued)

- Tax filings (recent Forms 990 and Forms 990-T, correspondence from tax counsel on disputed matters (FIN 48), all state tax forms, Form 1023 or 1024 and applicable attachments, etc.)
- Employee benefits (Forms 5500, copies of all plans and programs, etc.)
- Employment matters (manuals, employee contracts, non-compete agreements/policies, etc.)
- Insurance policies
- Legal matters (litigation, audit response letters from outside counsel, judgments, etc.)



Due Diligence — What are We Looking For?

- Liability: Environmental/real property contamination
- Debt: UCC filings and other obligations
- Existing Contracts: Assignment provisions, length of term
- Employee Benefits: Compliance/compatibility issues
- Insurance and Tort Liability: Recent/pending litigation, high risk activities
- Regulatory approvals
- Antitrust



Due Diligence — Documents to Review (continued)

- Real estate and equipment (list of offices, copies of leases, zoning violation reports, restrictions, mortgage documents, material contracts, environmental issues)
- Intellectual property (copyrights, trademarks, correspondence related to infringement, etc.)
- Other material contracts and arrangements
- Description of all material programs, activities of the organization



Potential Regulatory Notifications/Approvals

- IRS
 - Changes to organizational structure or operations must be promptly communicated to IRS
 - May need to file 1023 if new entity created
- Bonds
 - Review covenants; may need to notify bond trustee and or modify bond indentures
- What state are you in?

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Life in Pennsylvania (and various other states)

- Office of Attorney General, as *parens patriae*, must review
 - Why? To insure charitable assets are fully protected
 - Triggers
 - Entering into transaction effecting fundamental corporate change

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Detailed Review Protocol

- Notice prior to consummation
- Provision of documents
 - Articles, bylaws, transactional, financial, valuations, tax related, ongoing litigation
- AG may retain outside experts
- AG will give notice to public

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Fundamental Change

- Transfer of ownership or control of charitable assets regardless of form
 - Sale, merger, consolidation, lease, option, conveyance, exchange, transfer, joint venture, affiliation, management agreement, collaboration agreement or other method of disposition

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Detailed Review Protocol (cont.)

- AG may:
 - oppose
 - try to enjoin or void
 - not object
 - request parties to seek approval of Orphans' Court
- AG will maintain post transaction oversight

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Certificate of Need (CON)

- Is this a healthcare transaction?
- Does the state have a CON process?
- If so, will probably require approval through the CON process
- Why? Will be considered a "new institutional health service" which usually requires a CON

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Hart-Scott-Rodino Act (HSR)

- For any covered transaction, significant information must be provided to both federal antitrust agencies
- Parties must delay consummating the transaction until completion of a waiting period
- Period begins to run after the requested information is provided

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Antitrust

- Enforcers
 - DOJ
 - FTC
- Both enforce section 7 of Clayton act
 - Prohibits mergers which may substantially lessen competition or tend to create a monopoly

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HSR (cont.)

- HSR filings required whether or not the entities compete.
- Size Matters
- Size determines whether a filing is necessary

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HSR (cont.)

- Does **not** apply to any transaction less than \$50 million
- **Does** apply to all transactions involving more than \$200 million, regardless of the size of the parties
- Does apply to transactions greater than \$50 million but not greater than \$200 million if
 - either the acquired entity or the acquiring entity, with its controlled parents and commonly controlled affiliates, had \$10 million or more in annual net sales or assets in its most recent fiscal year
 - and the other entity, with its controlled parents and commonly controlled affiliates, generated \$100 million or more in net sales or possessed \$100 million or more in assets in its most recent fiscal year.

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HSR (cont.)

- After the filing, there is an initial "waiting period," during which the transaction may not close.
- Period lasts 30 calendar days
- Antitrust agencies whether to challenge it prior to consummation

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HSR (cont.)

- If covered, must submit voluminous info
- Includes section 4(c) information
 - "all studies, surveys and reports which were prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets."

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Post Merger Review

- FTC Hospital Merger Retrospective Review
 - Evanston Northwestern
 - Competitive harm due to increase leverage in managed care negotiations
 - Did not order "unmerger"
 - Did order separate managed care negotiations



Corporate Law

- Laws of state(s) of incorporation of the merging or consolidating corporations govern
- District of Columbia law is typical and used for illustration here
- Some states, e.g., NY and CA, require attorney general approval



Articles of Merger or Consolidation

- Executed in duplicate by each corporation by president or vice president
- Must state as to each corporation with voting members
 - Date of meeting, that quorum was present, that plan received approval by two-thirds of members (or approved by written unanimous consent)
- Must state as to each corporation without voting members
 - That the corporation has no voting members, the date of meeting of Board, and that plan was approved by majority of directors
- File Articles in duplicate with the Department of Consumer and Regulatory Affairs, Corporations Division (Secretary of State in many states)
- DC issues a Certificate of Merger or Certificate of Consolidation, with Articles of Merger or Consolidation attached, to surviving corporation
 - Date on Certificate is effective date



Procedure for Approval of Merger or Consolidation

- If organizations have no voting members, board of directors approves plan of merger or consolidation by vote of majority of directors in office
- If organizations have members, Board adopts resolution approving proposed plan
- Plan must be submitted to members for approval
- Must give members notice
- Must be approved by two-thirds vote of members entitled to vote
- Members may vote by proxy
- Plan may be abandoned prior to filing upon conditions stated in plan
- Also check Articles of Incorporation and Bylaws of parties for additional requirements consistent with state law



Effect of Merger or Consolidation

- Parties to the plan are a single corporation—the surviving corporation in a merger or the new corporation in a consolidation
- Separate existence of parties to plan ceases except for surviving or new corporation
- Surviving or new corporation has all rights, privileges, etc. of D.C. nonprofit corporation
- Surviving or new corporation has all rights, privileges, immunities, and franchises of each of the parties to plan



Effect of Merger or Consolidation (cont'd)

- All property, debts, choses in action and interests of parties to plan are deemed transferred to new or surviving corporation without need for a deed or other act
- Surviving or new corporation responsible and liable for liabilities and obligations of the parties to the plan
- Articles of Incorporation of surviving corporation deemed to be amended to extent changes are stated in the Articles of Merger
- Articles of Incorporation of new corporation are deemed to consist of statements in Articles of Consolidation that are required or permitted to be set forth in Articles of Incorporation



California

Merger

- California law does not provide for consolidations involving public benefit corporations
- Without prior written consent from the Attorney General, a public benefit corporation may only merge with another public benefit corporation, a religious corporation, or a foreign nonprofit corporation whose articles provide that its assets are irrevocably dedicated to charitable, religious, or public purposes
- At least 20 days prior to a merger or consolidation, the Attorney General must be given copy of the agreement or merger or consolidation
- California has similar rules for mutual benefit corporations and religious corporations
- Public benefit corporations



Domestic and Foreign Corporations

- DC corporation(s) comply with DC law
- Foreign corporations comply with laws of state or country in which incorporated
- Surviving or new corporation must comply with laws of state or country in which incorporated



Delaware

Merger or Consolidation

- Nonprofits can merge with either domestic or foreign for-profit entities
- A charitable nonstock corporation cannot merge into either a nonstock or stock corporation if such charitable nonstock corporation would thereby have its charitable status lost or impaired
- When a Delaware nonstock corporation merges or consolidates with a non-US nonstock corporation the surviving or resulting corporation must be a Delaware corporation
- Charitable nonstock corporations can merge or consolidate with either domestic or foreign for-profit entities

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New York

Merger or Consolidation

- Where any not-for-profit corporation involved in a merger or consolidation is, or would be, a Type B or C not-for-profit corporation, the Supreme Court must approve the plan or merger or consolidation and authorize the filing of the certificate before it is filed with the department of state
- Corporations that are, or would be, a Type A or C not-for-profit corporations can merge with a foreign or domestic business corporation
- If the purpose of a not-for-profit corporation would require the approval or consent of any governmental body or officer or any other person or body, such approval or consent must be endorsed and annexed to the certificate before it is filed

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Dissolution – District of Columbia

- Procedure for approval by Board and members of dissolution similar to procedure for merger and consolidation
- Upon approval of resolution to dissolve, corporation ceases to conduct its affairs except for winding up
- Corporation adopts Plan of Distribution for assets approved by Board and members
- Statutory order for distribution of assets
 - Notification and payment of creditors first
 - Return of any assets held under conditions requiring return upon dissolution
 - Transfer of assets that may be used only for charitable purposes to organizations engaged in substantially similar activities
 - Other assets distributed in accordance with Articles of Incorporation or Bylaws
 - Remaining assets distributed as specified in plan of distribution

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Acquisitions

- Good alternative if concerned about liabilities, known or unknown, of selling corporation
- Procedure for approval by Board and members for corporation selling or transferring substantially all assets is similar to procedure for merger or consolidation
- However, Board of corporation with voting members may abandon an approved plan without approval of members

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Dissolution - District of Columbia

- May revoke resolution to dissolve prior to issuance of Certificate of Dissolution
- File Articles of Dissolution in duplicate, stating
 - All debts, liabilities and obligations paid or provided for
 - All remaining property and assets distributed in accordance with statute
 - No suits pending or adequate provision has been made for judgment
- DC Corporations Division issues Certificate of Dissolution with Articles of Dissolution attached
 - Existence of corporation ceases, except for purpose of suits and other permitted proceeding



Dissolution - California

- The Attorney General must be given 30 days notice prior to a dissolution
- If the public benefit corporation is a charitable corporation it may not dispose of its assets upon dissolution without either the advance written consent of the Attorney General or court approval
 - The consent must be attached to the certificate of dissolution filed with the Secretary of State
- California has similar rules for mutual benefit corporations and religious corporations



Dissolution - New York

- Charitable and similar organizations (Type B, C or D) with (1) no assets or liabilities or (2) having assets of \$25,000 or less for the purpose of paying ordinary and necessary expenses of winding up its affairs and liabilities of \$10,000 or less need not obtain court approval, but must:
 - File the plan of dissolution with the Attorney General within ten days of authorization for approval,
 - Obtain the Attorney General's approval of the certificate of dissolution, after the plan of dissolution is carried out,
 - Obtain approval of the Department of Taxation after the Attorney General approves the certificate, and
 - Obtain the Department of Taxation's consent to the dissolution before the certificate is filed with the Department of State
- If consent of a government agency was required to form the corporation, consent from that agency is required for dissolution



Dissolution - New York

- Dissolutions of charitable and similar organizations (Type B, C or D) require that:
 - The Supreme Court approve the plan of dissolution,
 - Notice of court's approval must be given to the Attorney General within ten days of approval,
 - The Attorney General approves the certificate of dissolution after the plan is completed,
 - The Attorney General approves of the certificate of dissolution, after the plan of dissolution is carried out, and
 - The Department of Taxation must consent to the dissolution before the certificate is filed with the Department of State
- If consent of a government agency was required to form the corporation, consent from that agency is required for dissolution



Contracts — Assignment and Duplication

- If significant written approval of assignment from other contract parties is necessary, centralize the process to ensure that all necessary permissions are obtained.
- Due diligence should identify agreements that would be duplicative once the corporate combination is achieved and identify best approaches to minimize such duplication.

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Intellectual Property

- Types of Intellectual Property
 - Trademarks and Tradenames
 - The brand or identity of the Organization
 - Serve to carry the good will
 - Copyrights
 - Ownership of any written, drawn, composed materials
 - Patents
 - Any invention owned by the organization
 - Trade Secrets
 - Donor lists, recipes

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- Copyrights
 - Recording the ownership and assignment with the U.S. Copyright office
 - Written agreement transferring ownership required 17 USCA § 204(a)
- Patents
 - Written agreement transferring ownership required 35 USCA § 261
 - Assignment documents recorded in the (PTO) 37 CFR §§ 3.1-3.41 procedure
 - Due diligence must be performed to assure that the organization actually has ownership of the patent and not the individual inventor
 - Due diligence for any break in title chain

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Issues at the transfer of ownership

- Trademarks and Tradename
 - Keeping the registration current, 5 year proof of use renewal
 - Written agreement transferring ownership required 15 USCA § 1060(a)
 - The assignment has to contain both the trademark and good will to be valid
 - Recorded in in the U.S. Patent and Trademark Office (PTO)

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Trademarks (continued)

- Trade Secrets
 - No Federal or State protection
- General
 - Federal recordation is similar to county recorder for real property



Contract Assignment and Duplication

- Rights and obligations of pre-merger entity become the rights and obligations of the merged entity by operation of law
- Similar concept for consolidation
- Not so in dissolution-and-asset-transfer transactions and in joint venture relationships
- Regardless of whether rights and obligations transfer, specific agreements may have restrictions on assignment that apply even to mergers and consolidations



Federal Tax Issues

Tax Exempt Status

- New organization in a consolidation must file Form 1023, Application for Recognition of Tax-Exempt Status, to be exempt under Section 501(c)(3)
- Filing Form 1024 is optional for non-501(c)(3)s
- Surviving organization in a merger must report changes on annual return
 - Must analyze combined activities to determine if continue to qualify for tax-exempt status under same section or new section
 - Must determine if continue to qualify as public charity
- May request a ruling from IRS on tax-exempt status prior to merger or consolidation



Federal Tax Concerns—Notifying IRS

- Exempt organizations that are required to file an annual return must report structural and operational changes to IRS
- Merger
 - Surviving corporation must attach state-certified copies of Articles of Merger to annual return



Notifying IRS (cont'd)

- Consolidation
 - New corporation may file application for exempt status
 - Other corporations notify IRS of consolidation by sending letter to EO Determinations with state-certified copy of Articles of Consolidation
- Dissolution
 - Send letter to EO Determinations with state-certified Articles of Dissolution
 - List of last officers or trustees and daytime telephone numbers
 - If a Section 501(c)(3) organization, a statement signed by officer detailing final distribution of assets to permissible recipient, *i.e.*, another 501(c)(3) organization or government



Final Returns

- The final return of organizations that are liquidated, dissolved, or terminated are due by the 15th day of the 5th month after the liquidation, dissolution, or termination
- Organization must check the "Final Return" box



Abatement of the Termination Tax

- The IRS can abate the termination tax if:
 - The private foundation distributes all of its assets to one or more charitable organizations described in IRC § 509(a)(1) that have been in existence and so described for at least sixty months; or
 - The IRS receives effective assurance through corrective action taken in state proceedings that assets dedicated to charitable purposes will, in fact, be used for charitable purposes



Termination of Private Foundation

- Private foundations may terminate by sending the Manager, Exempt Organizations Determinations a statement of the foundation's intent to terminate its status.
 - The statement must include detailed computations of the amount of the private foundation termination tax
 - Unless the foundation requests abatement, it must include payment of the termination tax with the statement




Avoidance of the Termination Tax

- A private foundation may avoid the termination tax by transferring its assets to another private foundation and then commencing the voluntary termination procedure
- The foundation pays no termination tax because it has no assets

PRELIMINARY DUE DILIGENCE CHECKLIST

The following items must be checked with regard to each entity:



Termination of Private Foundation Status

- An organization may terminate its private foundation status if the organization meets the requirements of public charity status for at least sixty continuous months
 - The organization must notify the IRS that it is terminating its private foundation status before the beginning of the sixty month period
 - At the end of the sixty months, the organization must establish that it meets the requirements of public charity status (IRC § 509(a)(1), (2), or (3))

Person Responsible	Item #	Activity
	1	Articles of Incorporation and amendments thereto of all entities
	2	Bylaws of all entities
	3	Member list and list of owners/corporate members of all entities
	4	Corporate minutes of all entities (last 3 years)
	5	Certificates of good standing
	6	Material contracts of all entities
	7	Filings with all governmental agencies and correspondence related thereto (last 5 years)
	8	Statutory authority for corporations, if any
	9	A description of all oral contracts
	10	All contracts with a value in excess of \$
	11	Insurance information
	12	Governmental contracts, permits and franchises
	13	Guarantees of payment
	14	Employee benefit plans including pensions
	15	Labor and collective bargaining agreements
	16	Record of employee grievances/complaints and their resolution (last three years)
	17	Federal and state tax filings (last three years) and correspondence regarding questions raised
	18	Financing documents including loans, bond issues and letters of credit
	19	Policy manuals containing all administrative policies
	20	Deeds, deeds of trust and other documents affecting real property; title opinions and title insurance policies
	21	Franchises
	22	Partnership agreements and joint venture agreements
	23	Fiduciary and agency agreements
	24	Outstanding powers of attorney and letters of authorization regarding purchase orders or contracts
	25	Leases
	26	Non-competition agreements in which the institution agrees not to compete with any others
	27	Documents related to use of trademarks, copyrights or patents
	28	Contracts, agreements and or transactions between the institution and any of its directors, officers, employees or any institution in which the director, officer or employee has a 5% equity interest

PRELIMINARY DUE DILIGENCE CHECKLIST

The following items must be checked with regard to each entity:

Person Responsible	Item #	Activity
		(last 5 years)
	29	Rights-of-way
	30	Bank account agreements
	31	A list describing any agreement, instrument or document under which default has occurred or has claimed to have occurred
	32	Accreditation information (if applicable)
	33	Appraisals of any property or assets
	34	Pending litigation and claims
	35	Letters to accountants from attorneys (last 3 years)
	36	Representation letters or management letters from any certified public accountants in the last five years
	37	EPA- letters relating to the Environmental Protection Agency or comparable state or local agency
	38	OSHA – files related to the Occupational Safety and Health Act or any comparable state or local agency
	39	Compliance Plan
	40	HIPAA plans (if applicable)
	41	Other information – a list indicating any other agreement, instrument, document or other information relating to any affiliate where there is a substantial likelihood that a reasonable party to a transaction such as this would consider such agreement, instrument, document or other information important or material.
	42	Audited financial statements for entities
	43	Conflict of interest policy and forms (last 3 years)
	44	Executive Compensation Plans (retirement, severance, other)
	46	Listing of key employees, their age, area of specialty
	47	Board Executive Committee Minutes
	50	Investigations and complaints
	51	CEO contracts
	52	Employee Handbooks

PRIVILEGED AND CONFIDENTIAL

PROPOSED MERGER OF THE
 _____ AND

Due Diligence Review of _____: Document Request List

Please note that all references to the _____ (“_____”) include all direct and indirect subsidiaries and affiliates of _____. All responses must be inclusive of such subsidiaries and affiliates and must identify which entity the information provided describes.

A. Corporate Documents and Organization

A.1 Charters and By-laws of _____ including all current revisions and/or amendments; certificates of good standing; copies of annual reports and other state of incorporation filings for the last three years.

Status:

A.2 _____ organizational charts, including senior officers, board members and any committee structure. Copies of any committee charters.

Status:

A.3 Schedule showing jurisdictions where _____ is qualified to do business, and the name and address of _____’s registered agent in each jurisdiction.

Status:

A.4 Schedule of dividends, rebates or other payments made to members.

Status:

A.5 Description of _____’s ownership interest in direct and indirect subsidiaries and affiliates and description of business of each such subsidiary or affiliate.

Status:

B. Administrative Matters

B.1 Copies of _____’s administrative policies and procedures for internal use, including conflict of interest and antitrust policies, as well as operating policies, record retention policies, etc.

Status:

B.2 Minutes of, and all reports to, _____'s boards of directors and executive compensation (or personnel), audit, and other committees for the last 3 years, including minutes of annual meetings and annual reports. Include materials, if available, distributed to members of the boards of directors and committees of _____ in connection with such meetings.

Status:

B.3 List of _____'s currently held or pending licenses and permits.

Status:

B.4 All relevant _____ records, documents, filings, copies of solicitations for political action committee, honoraria paid, etc., and copies of lobbying registrations and/or licenses, if any, for the last three years. Include any and all lobbying reports filed.

Status:

B.5 All filings, reports, registration statements, correspondence, complaints, consent decrees, determinations, orders, etc., relating to federal regulatory agencies and all state and local agencies performing similar functions.

Status:

C. Membership

C.1 List of all current _____ members.

Status:

C.2 Copies of _____'s dues structures and dues notices and forms. Status of any outstanding receivables from members, including aging report.

Status:

D. Financial Reports and Other Documents

D.1 Copies of _____'s audited consolidated financial statements and notes thereto for the last 3 years.

Status: Have 2005 and 2006

D.2 Copies of all letters and reports from _____'s independent public accountants for the last 3 years.

Status:

D.3 Copies of the most recent internal financial statements prepared by _____.

Status:

D.4 Copies of any internal reports pertaining to material accounting matters prepared by _____.

Status:

D.5 Descriptions of all material contingent liabilities not indicated in financial statements or the notes thereto.

Status:

D.6 Copies of _____'s strategic plans, if any.

Status:

D.7 Copies of _____'s current internal budgets, operating and financial plans, and projections, together with assumptions used in preparing such documents.

Status:

D.8 Schedule of all of _____'s bank or brokerage accounts and current account statements.

Status:

D.9 Copies of all indentures, agreements, bank lines of credit, or other documents that constitute debt obligations of _____, including all connected amendments, consents, and waivers.

Status:

D.10 Copies of all other financing documents, guarantees, indemnifications, or loans by _____.

Status:

D.11 Any independent valuations of the assets and business of _____.

Status:

D.12 Description of any restrictions on _____'s funds (e.g., specially earmarked accounts).

Status:

E. Tax Filings

E.1 Copies of all federal, state and local tax returns (including Form 990, any unrelated business income tax returns, and so forth) for _____ for all "open" tax periods.

Status:

E.2 Correspondence from tax counsel (lawyers and accountants) related to contentious or disputed tax items with respect to _____, and opinions from tax counsel on significant or material potential tax issues.

Status:

E.3 List of all jurisdictions, foreign or domestic, in which _____ has, in any of the last 3 tax years, filed a tax return and copies of all such documents.

Status:

E.4 Copies of letter rulings issued by the Internal Revenue Service concerning the tax exempt status of _____.

Status:

F. Employee Matters

F.1 Schedule of all _____ employees and consultants, including each employee or consultant's salary and accrued benefits.

Status:

F.2 Copies of all _____ employee benefit plans and programs (e.g., bonus, incentive, compensation, severance, deferred compensation, retirement, medical reimbursement, life insurance, disability or similar plans, pension and profit sharing) entered into, contributed to, or maintained by the Company, including the following related documents and all amendments:

1. Trust agreements, insurance contracts, or other funding vehicles;
2. Summary plan descriptions;
3. Investment management agreements;
4. Annual reports (Form 5500 series), financial statements, and plan evaluations for the most recent plan year, including, in the case of pension plans, certified actuarial reports;
5. Valuations of plan assets and underfunding analysis;
6. SEC filings; and

7. Information relating to any litigation, proceeding, prohibited transaction or other unusual event relating to any plan, program, or arrangement described above.

Status:

F.3 Copies of _____'s annual reports (IRS/DOL Form 5500 with attachments) for the last 3 years for all employee benefit plans required to file such forms. Copies of actuarial reports for _____'s retirement plans.

Status:

F.4 Personnel manuals for _____ employees.

Status:

F.5 Copies of all employment (or, if applicable, consulting) agreements or contracts with employees, former employees (to the extent there are ongoing obligations), consultants, and former consultants (to the extent there are ongoing obligations) of _____.

Status:

F.6 List of understandings, agreements with, or obligations to employees, former employees, consultants and former consultants of _____ not reflected in items F.1 and F.5 above, and copies of any relevant documents and authorization. Copies of sample letters regarding the hiring and firing of employees.

Status:

F.7 Copies of indemnification contracts or arrangements with _____ officers or directors or third parties together with all correspondence relating to any claims or possible claims covered under such contracts or arrangements.

Status:

F.8 Copies of all non-competition, secrecy, confidentiality, and nondisclosure agreements with employees and third parties and all such similar agreements between employees, consultants, or third parties and their prior employers.

Status:

G. Insurance

G.1 Schedule of all material insurance policies maintained by _____, listed by insurer, policy number, property or risk covered, extent of coverage and annual premium.

Status:

H. Legal Matters

H.1 Schedule and status report of any litigation, administrative proceedings or governmental investigation or inquiry, pending or threatened, affecting _____ as plaintiff, defendant, or otherwise, including a description of all such pending or threatened litigation, proceedings, etc., the amount in controversy, and the law firm handling the matter.

Status:

H.2 Copies of all audit response letters from outside counsel to _____ or its independent public accountants for the last 3 years regarding material litigation, proceedings, or claims in which _____ may be involved.

Status:

H.3 Copies of any consent decrees, judgments, other decrees or orders, settlement agreements, or other agreements to which _____ is a party or is bound, for the last 5 years.

Status:

I. Real Estate and Equipment

I.1 A list of all offices and real property owned or occupied by _____, including such offices and real property's location and copies of all related leases, sub-leases, and deeds. Schedule of any zoning violations or restrictions in connection with _____'s owned real property.

Status:

I.2 Copies of all documents with respect to any mortgage or other encumbrance upon any real property listed in item I.1 above.

Status:

I.3 Copies of all material contracts, agreements, leases and subleases with respect to all equipment and personal property, including computers, copying machines, printers, facsimile machines, automobiles, trucks, and so forth.

Status:

I.4 Schedule of any pending, threatened, or known environmental problems with respect to owned or leased properties listed in item I.1 above, including a detailed description of the problem. Include any environmental report relating to such properties.

Status:

J. Intellectual Property

J.1 Schedule of all copyrights, service marks, trademarks, trade names, domain names, patents, licenses or intangible property, whether registered or unregistered and copies of all registrations and applications for registration of any of the above, U.S. and foreign. Include any assignments, transfers, or licensing of such intangible property (including computer software), and lists and sample copies of publications, such as books, magazines, newsletters, etc., sent to members.

Status:

J.2 Copies of all correspondence during the last 5 years dealing with actual or alleged infringement (either by _____ or another party) of patents, trademarks, or copyrights and misuse of trade secrets.

Status:

J.3 Schedule of all proprietary software either owned by _____ or licensed to _____ by a third party (excluding all off-the-shelf software) and all agreements relating thereto.

Status:

K. Other Material Contracts and Agreements

K.1 Copies of all material contracts or agreements of _____ to provide or obtain services, including intercompany agreements.

Status:

K.2 Copies of all documents that would require consent upon, or which would be triggered or otherwise affected by, a merger of _____.

Status:

K.3 Copies of all other material contracts and agreements of _____ not otherwise described herein, including hotel and conventions center contracts [and information about pending meetings (foreign and domestic) and conventions] and contracts with exhibitors.

Status:

K.4 Copies of all agreements relating to material acquisition or disposition of assets or stock or a merger, reorganization or consolidation.

Status:

K.5 Copies of all royalty, licensing, marketing, sales, sales agent, sales representative, broker, dealer, distributor, consignment, pricing, franchise, and participation agreements.

Status:

K.6 Copies of all agreements restricting _____ from carrying on its business anywhere in the world or granting exclusive rights to a third party to be a service provider to _____.

Status:

L. Association Programs

L.1 Any certification programs run or sponsored by association or affiliated organizations, with all relevant material, records of appeals or other controversies, and codes of ethics.

Status:

L.2 Records of any statistical or credit reporting programs of members.

Status:

L.3 Any joint research or development activities or other coalitions of industry or political nature.

Status:

GOALS OF DUE DILIGENCE.

It is critical that the individuals who will be conducting due diligence identify the goals of due diligence at the outset of the due diligence process. The goals of due diligence are derived from the structure of the transaction and the primary objectives of our client.

The primary goals of due diligence include the following:

- (1) To provide sufficient information to enable our client to decide whether or not to consummate the transaction.
- (2) To provide sufficient information to enable our client to determine the terms under which to consummate the transaction.
- (3) To verify the valuation of the assets acquired and liabilities assumed pursuant to the transaction.
- (4) To identify any legal or other issues which must be addressed in the transaction, such as:
 - (a) Obtaining consents, filing notices or taking other actions that are required by existing contracts.
 - (b) Amending agreements that would be breached by the transaction in the absence of such an amendment.
 - (c) Determining the regulatory compliance that the transaction requires, such as antitrust, tax, securities, certificate of need, licensure, accreditation and other state law requirements.
- (5) To enable our client to obtain a familiarity with the assets to be acquired and liabilities to be assumed in the transaction, for purposes of enabling our client's management to effectively operate the acquired assets after the transaction is completed.
- (6) To obtain necessary information which is needed to:
 - (a) Verify the accuracy of representations and warranties and to draft exceptions to the representations and warranties where needed.
 - (b) To prepare and support legal opinions that legal counsel are required by the Definitive Agreement to deliver at the closing.