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The Ins and Outs of Alliances and Affiliations

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Q: We are considering an affiliation, combination, or possible merger, with another organization. What options do we have?

A: There is a wide array of ways in which nonprofit associations can combine, affiliate or otherwise come together. Some involve a complete integration of programs, activities, membership, leadership, and staff, while some provide for maintaining varying degrees of separateness and autonomy. A summary of several options is below.

Merger. Nonprofit corporations can fully and completely integrate their programs, functions, and membership by merging. When two nonprofit entities merge, one entity legally becomes part of the surviving entity and effectively dissolves. The surviving corporation takes title to all of the assets, and assumes all of the liabilities, of the non-surviving entity.

Benefits. By merging, associations may combine their assets, reduce costs by eliminating redundant administrative processes, and provide broader services and resources to their members. Furthermore, members who paid dues and fees to participate in the formerly separate associations are often able to reduce their membership dues and the costs and time demands of association participation by joining a single, combined organization. Finally, merger may allow associations participating within the same field or industry to offer a wider array of educational programming, publications, advocacy and other services to a larger constituency in the public arena.

Mechanics. To merge with another organization, each organization must follow the procedures mandated under the nonprofit corporation law of its state of incorporation, as well as any specific procedures in its governing documents. While nonprofit corporation statutes differ by state, the laws governing merger typically set forth certain core procedures. The board of directors of each precursor organization must develop and approve a plan of merger according to the requirements set forth in the nonprofit corporation statute of the state, or states, where the organizations are incorporated. The plan of merger also must be submitted to the voting members, if any, of each organization for their approval. While the conditions for member approval vary from state to state, statutes generally require a vote of two-thirds to effectuate the plan merger – a number that can be difficult to reach for practical and political reasons.

Acquisition of a Dissolving Corporation's Assets. Another legal mechanism is the dissolution and distribution of assets of a target association. While the dissolving entity must adhere to specific statutory procedures, a dissolution is much less onerous on the entity that acquires the dissolving entity's assets (the "successor" entity) than a merger. Because the successor entity is merely absorbing the assets of another organization, a vote of the membership and accompanying state filings are typically not required for that corporation.

Benefits. An asset transfer may be strategically preferable for combining organizations when one organization is of a much smaller size than the other, or the "successor" entity is only acquiring discrete programs or assets of the dissolving entity. Another benefit is that the successor organization is typically shielded from its predecessor's debts and liabilities, though an asset transfer always poses some risk of successor liability, particularly if adequate provision has not been made for pre-existing liabilities.

Mechanics. Like a merger, an asset transfer must follow the applicable state nonprofit corporation laws and each entity's governing documents. The procedure for dissolution and asset distribution is fairly simple for the successor entity. Member approval for such a transaction is typically unnecessary unless the organization's bylaws require otherwise. The process is more complicated, however, for the dissolving entity. In most instances, the nonprofit corporation statute of the dissolving entity's state of incorporation requires approval by both the board and any members having voting rights:

Other Types of Strategic Alliances. Mergers and asset acquisitions involve a substantial level of commitment, but associations need not go so far in order to engage in alliances with one another. Nonprofit corporations may enter into other strategic alliances that are temporary or permanent, and allow both entities to "test the waters" before binding themselves to a more involved or permanent arrangement.

Joint Venture. For example, in a joint venture, two or more associations lend their efforts, assets, and expertise in order to carry out a common purpose. The associations involved may develop a new entity (such as a limited liability company or a partnership) to carry out the endeavor. One example is joint trade shows.

A well-structured joint venture is codified in a written agreement that details the precise obligations and allocation of risk between the associations involved. Joint ventures can be permanent, set to expire on a given date or after the accomplishment of a certain goal, or structured with an increasingly overlapping set of commitments and an eye towards an eventual merger. Although the bylaws of an organization might specify otherwise, joint ventures do not usually require the approval of the general membership.

In the event that a contemplated joint venture would involve a taxable entity or an organization that is exempt under a different section of the tax code, there are additional precautions that may need to be taken in order to protect your organization from incurring taxable income or jeopardizing its exempt status.

Joint Membership Programs. Joint membership programs typically allow individuals to join two associations for a reduced fee. These initiatives allow the members of one organization to become more familiar with another, and are usually conducted in the context of other jointly run programs and activities. Programs in this vein are designed to bring associations closer together, often as a precursor to a more formal alliance, but allow the entities to modify the arrangement or disengage altogether if circumstances or expectations change.

Conclusion. There is an array of possible mechanisms for combinations and alliances that available to associations. The selection of an appropriate structure is heavily dependent on fully identifying the goals of the transaction and the potential ramifications for both groups.

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