



# How to Merge Your Nonprofit

(with Sample Agreement and Plan of Merger and Board Resolution)

Nonprofits make vital decisions every day, from finding the right business structure to day-to-day management and operations. One of the most important decisions is whether a nonprofit should join efforts and merge with another nonprofit corporation or association.

## What is a merger?

A merger is a corporate transaction where the governance of one or more organizations is combined. The terms merger and consolidation generally refers to the joining of assets (and liabilities) from multiple entities into a single entity.

## Why merge with another organization or business?

Nonprofits merge for many reasons. The most common objectives are to reduce duplicative fundraising efforts, consolidate services, improve financial performance, and reduce risks and liabilities. Nonprofit mergers are most successful when the parties share a common mission of service, each bringing with it a unique competency or function. A nonprofit can merge with another to form a completely new nonprofit entity, or it can end its legal existence, with assets and obligations taken over by the surviving nonprofit. A nonprofit can join forces with a for-profit entity only if the nonprofit still exists when the merger is complete.

## What does a merger do?

When a nonprofit merges with another entity, the non-surviving, or “merging” entity ceases to exist. The real estate and property of the merging entity are allocated to the surviving entity according to the merger plan. Liabilities are allocated in the same manner. If the merger document is silent on allocation of rights and interests, any unallocated property is deemed owned by the surviving organization. Legal proceedings involving the merging entity will continue with the surviving entity. This is one reason why is critically important for the parties to be aware of any active or potential legal liability and outstanding debts of each before signing a merger agreement.

Governing documents must be amended as provided by the plan of merger. If two organizations consolidate under merger into a single new organization, a separate certificate of formation must be included as part of the merger plan.

## What are the legal requirements for a merger?

Each state has its own procedural requirements for merger. In Texas, the requirements are set forth in the Texas Business Organizations Code (BOC).<sup>1</sup>

### Special Requirements for Merging Nonprofits

Texas nonprofits are subject to additional requirements and restrictions for mergers:<sup>2</sup>

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<sup>1</sup> BOC Title 1 Chapter 10, Subchapter A

<sup>2</sup> BOC §10.010.

- A nonprofit cannot merge if doing so would cause it to lose or impair its charitable status.
- A nonprofit may not merge with a foreign for-profit entity if the nonprofit does not survive.
- One or more nonprofits may merge into one or more foreign nonprofits that continue to survive.

### Written Merger or Consolidation Plan

An organization must provide a written plan that includes the names of each party, the surviving organization and the name of any newly formed organization. Each party must approve and act on the plan of merger by obtaining an Approval of Plan of Merger or a Certificate of Merger from the Texas Secretary of State (SOS). The merger takes legal effect at the time stated in the merger plan or on the date approved by the SOS.<sup>3</sup> The following must be included in the plan of merger:

*Attachment/Exhibits* –The following must be included in or attached to the organization’s plan of merger:

- Certificate of formation for any new domestic entity created by the plan;
- Governing documents for any created domestic entity; and
- Governing documents of any non-code organization to survive or created by the merger.

*Multiple Successor Requirements* - If the merger plan creates multiple new or surviving organizations, it must include:

- The manner and basis for allocating property of the surviving or new entity;
- The names of surviving/new entities obligated for fair value payment of membership interests of a member subject to dissenter’s rights; and
- The manner and basis for allocating liability of each entity, or sufficient plans for payment of liability among the surviving organizations.

*Optional Provisions* – The plan of merger may include:

- Any amendments and/or restatements to the governing documents of the surviving entities. These may include a certificate of amendment, a restated certificate of formation without amendment, or a restated certificate of formation containing amendments;
- Provisions relating to interest exchange, including a plan of exchange, if any; and
- Any other provisions relating to the merger not required by the BOC.

*Additional Documentation:*

- Certificate of Merger (Form 624)
- Amended and Restated Certificate of Formation
- Bylaws

## **How will the merger approved by the organization?**

Approval of a merger is set forth in Section 22.253 of the Texas Business Organizations Code. Voting on the approval of a merger is a “fundamental action” that requires special voting requirements.<sup>4</sup>

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<sup>3</sup> BOC Subchapter D

<sup>4</sup> BOC §22.164

*Non-membership organization* - If a party has no members or no members with voting rights, it must be approved by the board of directors at an annual, regular or special meeting as provided in the bylaws. Approval is by an affirmative vote by the majority of directors holding office.<sup>5</sup>

*Membership organization* - For a membership organization (management of affairs is vested in an organization's members) the merger plan must be submitted for a vote and approved an annual, regular, or special meeting of the members. If the organization has members with voting rights, the board of directors must adopt a resolution approving the plan of merger then submit it to the members for a vote. Unless otherwise provided in the governing documents, the following voting requirements apply:

- If the organization has no members or no members with voting rights, approval requires a vote of the majority of directors in office.
- If the organization has members with voting rights, at least two-thirds of the voters must approve the action by voting in person or by proxy.
- If management is vested in the organization's members, at least two thirds of the members present at the action meeting must approve the action.

## **What steps are required to complete a merger?**

### Texas Secretary of State

The Texas Secretary of State (SOS) has its own set of forms and rules for nonprofit mergers. Read the SOS's [Frequently Asked Questions](#) about mergers. To find the forms, go to The SOS page for [Business/Nonprofit Forms](#). This will take you to a list of merger forms. The form you need and the information required depends on the type of merger sought. Most nonprofits use Form 624, Certificate of Merger for Nonprofit Corporation.

- Form 622—Combination Merger - used to effect a merger that combines one or more Texas entities with one or more organizations.
- Form 623 - Parent-Subsidiary – used to effect a merger of a parent organization with a subsidiary organization when the parent is to survive the merger.
- Form 624 - Nonprofit Corporation - Form used to effect a merger when each party to the merger is a nonprofit corporation.

### *Filing with the Secretary of State*

You can submit the forms and attachments by mail, fax or online using [SOSDirect](#). Call 512-463-5555 or go to [www.sos.texas.gov](http://www.sos.texas.gov) for more information. SOS usually processes within three business days of receipt. If you need a faster turnaround, request an expedited filing, which comes with a \$25 fee per document in addition to the filing fee. If you use [SOSDirect](#) to expedite, documents are usually processed by the next business day.

### Texas Comptroller

Texas law requires a merging entity to prove that its franchise taxes have been paid, or state in the SOS form that the tax liability will be assumed by the surviving entity. The [Texas Comptroller](#) has step-by-

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<sup>5</sup> BOC §22.251

step instructions on how to satisfy all requirements to terminate, withdraw, merge or reinstate an entity.<sup>6</sup>

### *Terminating, Withdrawing or Merging your Entity*

1. File any Annual Franchise Tax and (Public or Ownership) Information Report forms.
2. Pay any tax, penalty and interest payments due.
3. File a Final Franchise Tax Report to report your entity's accounting data starting the day after its last annual report accounting period ended to within 60 days of the entity's termination date.

Steps 1–3 must be completed before continuing to Step 4.

4. Complete and submit [Form 05-359, Request for Certificate of Account Status](#) to terminate an entity, or request the certificate online using [WebFile](#). Next, submit these items to the Secretary of State on or before closing time the last business day of the year (usually Dec. 31) that your entity will terminate, withdraw or merge.
5. After you receive Form 05-305 (Certificate of Account Status to Terminate Texas Registration) from the Comptroller, you must file it with SOS filing Form 624, Certificate of Merger. The Comptroller's Form 05-305 Certificate is valid only through Dec. 31 of the year issued. If the SOS filing does not require a copy Form 05-305, you must state in the SOS filing instrument that one or more of the surviving organizations is liable for the franchise taxes.
6. Complete and submit the appropriate SOS Form and attachments, if required. (See Filing with the SOS below)
7. Pay SOS filing fees.

### *Reinstating Your Entity*

1. File any Annual Franchise Tax and (Public or Ownership) Information Report forms.
2. Pay any tax, penalty and interest payments due.

Steps 1 and 2 must be completed before continuing to Step 3.

3. Complete and submit [Form 05-391, Tax Clearance Letter Request for Reinstatement](#) (PDF), via mail or online using WebFile.
4. Submit Form 05-377, Tax Clearance Letter, once you receive it from the Comptroller's office.
5. Submit SOS reinstatement forms.
6. Pay SOS filing fees.

### Reporting the Merger to the IRS

Tax-exempt organizations that terminate operations through a merger with another exempt organization must inform the IRS. This can be done on the annual return, [IRS Form 990, 990-EZ or e-Postcard \(990-N\)](#). The type of IRS Form 990 to file depends on the organization's [gross annual receipts and assets](#). The merging party must attach certified copy of its merger and any resolutions or plans of merger along with its completed Form 990 or 990-EZ. The return and attachments must be filed no later than four months and 15 days after the date of merger.

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<sup>6</sup> Use the Comptroller's online [WebFile](#) system for a faster turnaround.

# Sample Plan of Merger

## AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER (this “**Agreement**”) is dated as of [DATE] by and between [Entity A], a Texas nonprofit corporation (“**Merging Corporation**”), and [Entity B], a Texas nonprofit corporation (“**Surviving Corporation**”).

### AGREEMENT

1. The Merger. At the Effective Time (as hereinafter defined) and upon the terms and subject to the conditions contained herein and the applicable provisions of the Texas Business Organization Code (the **TBOC**), Surviving Corporation and Merging Corporation hereby agree that Merging Corporation shall be merged with and into Surviving Corporation, whereupon the separate existence of Merging Corporation shall cease and the Surviving Corporation shall continue on as [Entity B] (the **Merger**).

2. Effective Time. At the Effective Time, the parties hereto shall cause the Merger to be consummated by the filing of a Certificate of Merger in the form attached hereto as Exhibit A (the **Certificate of Merger**) with the Secretary of State of the State of Texas in accordance with the relevant provisions of the TBOC. The Merger shall become effective at the time that the Certificate of Merger is filed and accepted by the Secretary of State of the State of Texas (the **Effective Time**).

3. Effects of the Merger. The corporate identity, existence, purposes, powers, rights, and immunities of Merging Corporation shall be merged into and vested in Surviving Corporation and, except as specifically provided for in this Agreement, including attachments, the corporate identity, existence, name, purposes, powers, rights, and immunities of Surviving Corporation shall continue unaffected and unimpaired by the Merger. Surviving Corporation shall be subject to all Merging Corporation’s debts, liabilities, and trust obligations in the same manner as if Surviving Corporation had itself incurred them, and all rights of creditors and all liens and trust obligations on or arising from the property of each constituent corporation shall be preserved unimpaired, as long as such liens and trust obligations on the property of Merging Corporation, if any, shall be limited to the property affected by such liens and obligations immediately before the Effective Time.

4. Corporate Name; Articles and Bylaws. From and after the Effective Time, and until changed in accordance with the Surviving Corporation’s Certificate of Formation and Bylaws and the TBOC, the name of Surviving Corporation shall be [Entity B]. Surviving Corporation’s Certificate of Formation shall be amended and restated as of the Effective Time in the form attached hereto as Exhibit B (the **Certificate of Formation**) and Surviving Corporation’s Bylaws shall be amended as of the Effective Time in the form attached hereto as Exhibit C (the **Bylaws**).

5. [Entity B] Board of Directors. As of the Effective Time, Surviving Corporation’s Board of Directors shall consist of \_\_\_\_\_ (together, and after the Effective Time, the **Board**). The initial members of the Board shall initially serve the remainder of their current term or until each such director’s earlier death, resignation or removal in accordance with the TBOC, the Certificate of Formation and Bylaws. Thereafter the initial members of the Board may serve an additional \_\_\_\_\_ year term.

6. Executive Director. The current Executive Director of [Entity B] shall continue to serve as the Executive Director of the Surviving Corporation until his death, resignation or removal.

7. Post-Merger Operations. The following actions shall be implemented by the Surviving Corporation in connection with the Merger:

a. Membership Transition. As soon as practicable following the Effective Time, Merging Corporation members will be given membership in the Surviving Corporation and shall receive all benefits of membership in the Surviving Corporation at their respective current donation levels.

b. Membership Database. As soon as practicable following the Effective Time, Surviving and Merging Corporations shall merge their respective member databases.

8. Board Meeting. The first meeting of the Board shall occur within thirty (30) days after the Effective Time.

9. Tax Exempt Status. Both Merging Corporation and Surviving Corporation have been determined by the Internal Revenue Service to be organizations described in the Internal Revenue Code (the "**Code**") Section 501(c)(3), and the parties intend that following the Merger, the Surviving

Corporation shall continue to operate in furtherance of the exempt purposes of both the Merging Corporation and the Surviving Corporation so that the Surviving Corporation will continue to be described in the Code Section 501(c)(3).

10. Amendments to Agreement. This Agreement may be amended by agreement of the boards of directors of the constituent corporations, including the members of the Merging Corporation, as applicable, at any time before the Effective Time.

11. Governing Law. This Agreement, and any dispute arising from the relationship between the parties to this Agreement, shall be governed by Texas law.

12. Entire Agreement. This Agreement constitutes the entire agreement of the parties, superseding any prior written or oral agreements between them on the same subject.

13. Counterparts. This Agreement may be executed in any number of counterparts and each such counterpart shall be deemed to be an original instrument, but all of them together shall constitute only one Agreement.

14. Further Acts. Merging Corporation shall from time to time, as and when requested by Surviving Corporation, execute and deliver all such documents and instruments and take all such action necessary or desirable to evidence or carry out the Merger. Surviving Corporation shall from time to time, as and when requested by Merging Corporation, execute and deliver all such documents and instruments and take all such action necessary or desirable to evidence or carry out the Merger.

[SIGNATURE PAGE TO AGREEMENT AND PLAN OF MERGER]

IN WITNESS WHEREOF, the parties have executed this Agreement on [Date]. [Entity B], a Texas nonprofit corporation

By: \_\_\_\_\_  
[Name, Title (Ex: President, CEO)]

[Entity A], a Texas nonprofit corporation

By: \_\_\_\_\_  
[Name, Title]

# Sample Board Resolution

**RESOLUTION OF THE BOARD OF DIRECTORS OF [ENTITY A]  
[Date of Resolution]**

WHEREAS, the Board of Directors of [Entity A], a Texas non-profit corporation, has determined that merging of the corporation would be in its best interests. Accordingly, the following resolution has been approved by the Board:

BE IT RESOLVED, that

1. The Board of Directors of [Entity A] recommend that [Entity A] merge with [Entity B].
  2. [Entity A] shall not survive the merger and its operations shall be continued under [Entity B].
- Notice will be given accordingly.

IN WITNESS WHEREOF, the undersigned members of the Board of Directors of [Entity A] have signed their names to this Resolution as of the date given above.

**Board of Directors:**

\_\_\_\_\_ [Signature]

\_\_\_\_\_ [Typed Name]

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