

# Merging Non Member Not-for-Profit (Chapter 180) Corporations

February 2, 2021 //

0

This blog is about business corporations. In my practice, however, I also do work with not-for-profit corporations. I recently worked on a merger of two not-for-profits. Since I found a number of unusual issues in this transaction, I thought it might be helpful if I set forth the steps and attached forms of the plan of merger and directors' resolution adopting the plan.

Merging Massachusetts not-for-profit corporations can be a little different in a couple of respects. In Massachusetts, Chapter 180 of the general laws governs not-for-profit corporations. The corporate law revision in 2004, which adopted a new business corporation statute, however, did not address the plethora of specific acts covering particular types of corporations, such as those governing insurance companies, many types of banking corporations, and yes, not-for-profit corporations. Chapter 180, which few operative provisions, makes applicable many provisions, *not* of the current corporate statute, but of the prior corporate statute, Chapter 156B to govern the corporation's workings. One must therefore use care as Chapter 156B and current statute often conflict.

To effect a merger, Chapter 180 requires a vote of at least 2/3 of the members. One will, however, encounter many not-for-profits without members. How then to deal with the requirement of member adoption? As described below, Chapter 180 has a "fix" for this.

I will go through the steps necessary to merge two "memberless" Chapter 180 corporations. I will thereafter set forth the necessary forms I have used.

FIRST: Although It is not necessary or required by statute or regulation, as a courtesy and because the Attorney General has jurisdiction over "public charities," it is wise to notify the Attorney General ((617) 727-2200 x 2101) of the upcoming merger. This will turn up any issues the Attorney General may have with respect to the merger.

SECOND: One should check with the corporate records of each of the corporations to discover whether consents or notifications are required (or maybe prohibitions to the transaction appear) under any of the corporation's licenses, leases, contracts or the like as a result or the merger.

THIRD: An "Agreement of Merger" should be drafted. Section 10 (b) of Chapter 180 requires that the agreement contain:

1. the names of the corporations merging and the survivor thereof, or the name of the resulting corporation,<sup>[1]</sup>
2. the purposes of the survivor or resulting corporation,
3. the terms of the transaction,
4. The manner of fixing the effective date of the transaction, and

5. other provisions which could have been included in the articles of organization or other provisions deemed necessary.

Note that if one of the merging corporations is a “public charity,” the surviving corporation must be a “public charity.”

FOURTH: Directors *authorize* an “Agreement of Merger.” [2] With respect to authorization, M. G. L. c. 180, § 10 (b) requires that the Agreement of Merger must be signed by an “authorized” officer. Typically, in a business or not-for-profit corporation, the directors authorize an officer to sign on behalf of the corporation. I therefore recommend that the board of directors authorize the signing officer, though this is not explicit in the statute.

FIFTH: Chapter 180 requires that the Agreement of Merger be adopted by a 2/3 vote of all members.[3] As mentioned above, many not-for-profit corporations do not have members and in such a case, the statute allows that the board of directors may adopt the agreement by the same percentage vote as would otherwise have been required by the members (at least 2/3) if the not-for-profit corporation had members. This can (and should) be done in the same meeting as the authorization in 4 above.

SIXTH: Articles of Merger are filed with the Corporations Division of the Secretary of State.

SEVENTH: The survivor files a certified copy of the articles of merger on each registry where any real estate is located, but need not file if the survivor owned that property.

FINALLY: The Attorney General’s website requires a copy of the articles within 30 days of the filing. I would file a copy certified by the Secretary of State.

## FORMS

### VOTE OF DIRECTORS

VOTED: That the board of directors hereby adopts the Plan and Agreement of Merger of YYYYYY, Inc. with and into XXXXXX, Inc. (“Agreement”) substantially in the form attached hereto, and further

VOTED: To authorize, ratify and confirm the execution and delivery of the Agreement on behalf of the Corporation by the president, and further

VOTED: To ratify and confirm all that each of the officers of the Corporation has done in connection with the Agreement and the transactions contemplated thereby, and further

VOTED: To approve and adopt, pursuant to M. G. L. c. 180, § 3, the Agreement and the merger (“Merger”) contemplated by the Agreement, there being no members of the Corporation, and further

VOTED: That the officers of the Corporation are authorized to execute, deliver and file all such other documents and other instruments as any of them deems necessary, proper or convenient to carry out the transactions contemplated by the Agreement and the Merger and take such further action as any of such officers deems necessary proper or appropriate to effectuate the foregoing.

### PLAN AND AGREEMENT OF MERGER

## PLAN AND AGREEMENT OF MERGER OF XXXXXX, INC. WITH AND INTO YYYYYY, INC.

AGREEMENT ("Agreement") entered into as of \_\_\_\_\_, 2020 by XXXXXX, Inc. ("XX") and YYYYYY, Inc. ("YY").

WHEREAS, XX is a corporation formed under M. G. L. c. 180 and having its principal office at \_\_\_\_\_, Blackacre, MA 00000, and

WHEREAS, YY is a corporation formed under M. G. L. c. 180 and having its principal office at \_\_\_\_\_, Whiteacre, MA 00000, and

WHEREAS, Section 10 of Chapter 180 of the General Laws of The Commonwealth of Massachusetts permits a merger of any two or more corporations organized under said Chapter 180, and

WHEREAS, YY and XX deem it advisable and to the advantage, welfare and best interests of each of said corporations, subject to the authorization, approval and adoption of, this Agreement, by the directors of each, to merge XX with and into YY, pursuant to M. G. L. c. 180, § 10, upon the terms herein set forth; and

WHEREAS, Since neither YY nor XX have members, M. G. L. c. 180, § 3 permits any member action, including adoption and approval of this Agreement, to be taken by directors by action of the same percentage of directors of each of YY and XX.

NOW, THEREFORE, in consideration of the premises and of the mutual agreements and promises of the parties, the undersigned corporations hereby enter into and adopt this Agreement, as follows:

1. Pursuant to the provisions of M. G. L. c. 180, § 10, XX, as the terminating corporation, shall be merged with and into YY, and YY shall be the surviving corporation. The separate existence of XX shall cease as of the effective date, in accordance with M. G. L. c. 180, § 10. The name of "YYYYYY, Inc." shall remain unchanged after said effective date.

2. The articles of organization of YY, as the same shall be in force and effect as at the effective date of the merger herein provided for, shall continue to be the articles of organization of said surviving corporation, until the same may be amended pursuant to the provisions of M. G. L. c. 180.

3. The by-laws of YY, as the same shall be in force and effect as at the effective date of the merger herein provided for, shall continue to be the by-laws of said surviving corporation, until the same may be amended pursuant to the provisions of M. G. L. c. 180.

4. In accordance with the existing articles of organization of YY, unless and until subsequently amended, the purposes of YY shall remain as follows:

To organize a corporation under the provisions of Massachusetts General Laws 180, Section 4(a),

\_\_\_\_\_  
\_\_\_\_\_; and any and all other purposes authorized under the Massachusetts General Laws Chapter 180; and shall operate as a Federally designated tax exempt organization under the provisions of Section 501 (c) (3) of the United States Internal Revenue Code.

5. YY and XX each agree that they shall execute, file and/or record Articles of Merger any

other document or documents required by The Commonwealth of Massachusetts and each shall perform all necessary acts within The Commonwealth of Massachusetts and elsewhere in order to effectuate the merger herein contemplated.

6. The terms and conditions of the merger are that on the effective date of the merger XX shall be merged with and into YY and that thereafter XX's independent existence shall cease.

7. The president, clerk and each other officer of YY and XX are each individually hereby authorized, empowered and directed to make, execute, deliver, file and record any and all instruments, papers and documents which shall be or become necessary, proper or convenient to carry out or effect any of the provisions of this Agreement or the merger hereby contemplated.

8. The effective date on which the merger herein shall become effective shall be the date the Articles of Merger are filed with the Secretary of The Commonwealth of Massachusetts.

IN WITNESS WHEREOF, this Agreement is hereby signed, on behalf of the constituent corporations, by an authorized officer thereof.

XXXXXX, INC.

By \_\_\_\_\_

\_\_\_\_\_, president,

duly authorized

YYYYYY, INC.

By \_\_\_\_\_

\_\_\_\_\_, president,

duly authorized

---

[1]. Note that M. G. L. c. 180, § 10 permits the constituent corporations to consolidate as well as merge. A consolidation is the combination of the constituent corporations into a new corporation—the “resulting” corporation. A consolidation is no longer permitted in a business corporation governed by M. G. L. c. 156D.

[2] Or for a consolidation, an agreement of consolidation, of course describing a *resulting* corporation rather than the survivor.

[3] The statute is poorly written and should read “the vote of at least 2/3 of the members.” The drafters did not intend to require a vote of exactly 2/3 of the members but a minimum vote of 2/3 for adoption.

Categories Uncategorized

0 Comments

**[Blog at WordPress.com.](#)**

**[Back to the top](#)**