

Merging May Help NY Charities Survive COVID-19

By **Lauren Boglivi, Amanda Nussbaum and Grant Darwin** (October 6, 2020)

As of September 2019, 61,691 public charities and 11,529 private and public foundations were registered in New York, and one could expect that such numbers have increased in the wake of the COVID-19 pandemic and widespread protests against systemic racism.[1]

Most charities are community-based and focus on local needs. The pandemic has put immense strain on the resources of many charitable nonprofits[2] at a time when their services are most desperately needed.

Faced with the prospect of shutting or drastically reducing operations, nonprofits — particularly those that provide overlapping or complimentary services — may consider combining as a means to survive this turbulent moment.

This article first identifies some of the key issues facing nonprofits due to the COVID-19 pandemic and the resulting economic downturn. Second, we outline how a merger or consolidation could benefit nonprofits in the current climate, and we provide a high-level overview of the steps involved in executing a merger or consolidation of New York nonprofits.

Issues Facing Nonprofits in the Wake of COVID-19

The pandemic has severely impacted nonprofits' ability to fundraise or generate revenue. In one survey conducted by Charity Navigator and Reuters, 83% of the respondents stated that their organizations were suffering financially due to the pandemic.[3] Approximately 75% of respondents to that same survey had to cancel fundraising events. According to the Association of Fundraising Professionals, the number of overall donors dropped by an average of 5.3% and the donor retention rate fell by 16.4% during the first quarter of 2020.[4]

Nonprofits generally shared the sentiment that the funding decline will continue in the near future. In a series of surveys by CAF America of more than 400 nonprofits, 93.57% of respondents in early May expected significant depletion of financial resources (with 50% expecting a 20%+ decline in contributions) in the next 12 months,[5] and one-fourth of the respondents in early September expected to close down in the next 12 months.[6]

If the decline in charitable contributions continues at the same rate, the Association of Fundraising Professionals predicts a \$25 billion loss in contributions by the end of 2020 as compared to 2019.[7]

Where donors continue to give, unsurprisingly, funds are being directed toward COVID-19 research and relief — including high-profile donations from the likes of Google Inc. and the Bill and Melinda Gates Foundation.[8] Beyond contributions, many nonprofits derive revenue from billing for services and government contracts.[9]

COVID-19 and the resulting lockdowns have hindered the ability for nonprofits to provide



Lauren Boglivi



Amanda Nussbaum



Grant Darwin

revenue-generating services, e.g., thrift shops, nonprofit museums or venues. State and local budget crisis spurred by the pandemic and the inevitable cuts to follow are expected to put government funding at risk.[10]

Unlike their for-profit counterparts, many nonprofits have seen a marked increase in the demand for services at the same time as they have suffered a revenue decline.[11]

A prime example is the spike in demand at food banks and soup kitchens. A June 9 report by the Food Bank for New York City indicated that 75% of New York City's food pantries and soup kitchens experienced an increase in April as compared to January and February.[12] Ninety-one percent of those food pantries and soup kitchens surveyed reported an increase in first-time visitors. The average number of individuals served in April was more than double the 2,000 monthly pre-COVID-19 average.

Like their for-profit counterparts, nonprofits have been forced to cut services and reduce overhead. A survey of more than 750 nonprofits nationwide conducted in March and April revealed that at that time 18% of nonprofits had furloughed or laid off staff, with 44% anticipating more layoffs to come.[13]

A more recent survey by Ernst & Young and Independent Sector[14] in May and June reported that 67% of respondents had furloughed employees and 51% had laid off employees.

That survey further found that 71% of polled charities, foundations and corporate philanthropy programs expected to cut back services or operations. Locally in New York City, of the 125 agencies surveyed by the Human Services Council of New York, 66% indicated that they will have to reduce services to those most in need as a result of budget shortfalls and 70% expected to lay off staff.[15]

With increasing unemployment and economic uncertainty keeping the wallets of individual donors shut, state and local budgets in turmoil, and a further federal stimulus package in limbo, it is reasonable to expect that the current perilous climate for nonprofits is going to persist for the foreseeable future. Consequently, a route less traveled by nonprofits may offer a path to survive this crisis and continue to service the communities to which they are dedicated: merger or consolidation.

Benefits of a Merger or Consolidation

Mergers and consolidations are two technically different methods of achieving the same goal: combining two nonprofits. A combination, when executed through clear communication of mission, interest and goals between or among the parties, may alleviate the near and long-term issues arising from COVID-19. Among other benefits, the combination of nonprofits may yield the following:

Funding Consolidation

Nonprofits that combine will be able to aggregate the remaining revenue they have, adding to their durability and ability to survive the pandemic. The combination of nonprofits — particularly those servicing overlapping issue-areas/communities — will concentrate the existing fundraising pool thereby mitigating the dispersion of financial support.

Network Concentration

A combination of nonprofits precipitates the merging of nonmutual relationships. Each participant nonprofit gains access to the other's network. To maximize the potential benefits, a nonprofit exploring a combination would be well served to identify peer organizations that will afford access to relationships with synergistic value for the post-combination organization.

The post-combination organization may not only have expanded financial support, but also access to sponsors and individuals, e.g., board members, with the expertise necessary to manage through the pandemic.

Cost Efficiency

Combined nonprofits can create financial efficiency. A combination can reduce duplicative overhead costs, e.g., office space, utilities and third-party expenses. In the for-profit world, a merger also precipitates a reduction in overhead through layoffs of employees that perform redundant jobs.

However, the increased financial security of a combined organization may enable the parties to preserve jobs of existing employees that might otherwise be lost to the COVID-19-driven economic downturn and perhaps even employ a larger workforce to address an increased demand for services.

Survival and Growth

Most importantly, where the nonprofits participating in a combination are faced with the prospect of shutting down absent drastic action, a combination may be a critical path toward ensuring that the communities that depend on the nonprofits continue to be served. A well-executed combination may enable the combined nonprofit to not only survive, but to expand services and impact by leveraging its broadened resources and the expertise of the united management team.

How to Merge or Consolidate New York Charitable Nonprofits

Article 9 of the New York Not-for-Profit Corporation Law^[16] provides two pathways for nonprofits to combine: a merger and a consolidation.^[17] The two initial nonprofits are each referred to as a constituent corporation.

In a merger, one constituent corporation merges with and into the other, with only one of the constituent corporations continuing to exist following the merger. The entity whose existence continues is referred to as the surviving corporation.

In a consolidation, each constituent corporation is dissolved and reforms together as a new nonprofit. The statutory process to merge or consolidate is substantially the same. The below steps describe the process required to merge or consolidate two or more New York nonprofits. We refer below to a constituent nonprofit, surviving nonprofit and consolidated nonprofit.

1. Preadoption of a Plan of Merger or Consolidation

Before the parties commence with the formal process of approving a merger or consolidation,^[18] each should, among other activities, (1) engage in mutual financial and legal due diligence, even if only focused on material issues due to exigent circumstances created by COVID-19;^[19] (2) negotiate the transaction terms, including a definitive

transaction agreement; and (3) most importantly, agree upon the mission and management/governance of the post-transaction nonprofit.

It is imperative that the parties have a clear understanding of the finances of the post-transaction nonprofit. Throughout the negotiation process, the management of each constituent nonprofit will want to hold formal board meetings and regularly update board members as to the progress and material transaction terms.

2. Adoption of a Plan of Merger or Consolidation

Once negotiations and documentation are finalized, management will deliver to the board for approval a plan of merger or consolidation.[20] The plan must be adopted by the board of each participating nonprofit.

The Not-for-Profit Corporation Law specifies certain items that must be included in the plan, including: (1) the names of the constituent nonprofits; (2) a description of the membership (if any) and any voting rights of the members of the constituent nonprofits; (3) the terms of the proposed merger or consolidation agreement, and (4) the substance of the certificate of incorporation of the surviving or consolidated nonprofit.

3. Approval of a Plan of Merger or Consolidation

Following adoption by the board, if either or both of the constituent nonprofits have members with voting rights, the plan of merger or consolidation must be submitted to the membership for approval at a duly noticed meeting.[21] Generally, the plan must be approved at a meeting of the members by a two-thirds vote. If a constituent nonprofit does not have members, the plan is deemed approved when it is adopted by the board.

4. Approval by the Applicable New York Supreme Court or New York Attorney General

A merger or consolidation involving a nonprofit must be approved[22] and the filing of the certificate or merger/consolidation authorized by either (1) an order of the New York Supreme Court located in the judicial district in which the principal office of the surviving or consolidated nonprofit is to be located or in which the office of one of the constituent nonprofits is located,[23] or (2) the New York Attorney General's Office.[24][25]

An application to obtain the New York attorney general's approval must be submitted to the Charities Bureau in New York City or Albany or to the appropriate regional New York attorney general office.[26] The decision whether to petition the approval of the applicable New York Supreme Court or the New York attorney general is at the discretion of the constituent nonprofits.[27]

Court Approval Process

The constituent nonprofits must jointly petition the New York Supreme Court's approval[28] by submitting an application that includes by affidavit:

- The plan of merger/consolidation;

- The approval by the boards of the constituent nonprofits, and, if applicable, their respective members;
- The objects and purposes of each constituent nonprofit to be promoted by the merger or consolidation;
- A statement of all property, and the manner in which it is held, and of all liabilities and of the amount and sources of the annual income of each constituent nonprofit, typically financial statements and Internal Revenue Service Form 990;
- Whether any votes against adoption of the resolution approving the plan were cast at the meeting at which the resolution was adopted by each constituent nonprofits; and
- Facts showing that, in the case of two New York charitable corporations, that the consolidation is authorized by the Not-for-Profit Corporation Law.[29]

Notice of an application to the New York Supreme Court for an order approving the merger or consolidation must also be delivered to all interested persons, expressly including the New York attorney general. [30] Any interested person may appear and show cause as to why the application should not be granted.

The court will approve the merger/consolidation on such terms and conditions as it may prescribe if it determines that the parties have complied with the Not-for-Profit Corporation Law and that the interests of the constituent nonprofits and the public interest will not be adversely affected by the merger/consolidation.

New York Attorney General Approval Process

If the constituent nonprofits decide to petition the approval of the New York attorney general,[31] the application should include substantively the same materials as must be delivered to the court.

The application must also include (1) all consents/approvals required under the Not-for-Profit Corporation Law from any other governmental body or officer — as is the case for nonprofits operating in specific spaces such as child or adult care facilities, health care or education — and (2) a statement as to whether any persons have raised, or have a reasonable basis to raise, objections to the merger or consolidation, including a list of names and addresses of such persons, the nature of their interest, and a description of their objections.

As with the court, the New York attorney general will approve the merger/consolidation on such terms and conditions as it may prescribe if it determines that the parties have

complied with the Not-for-Profit Corporation Law and that the interests of the constituent nonprofits and the public interest will not be adversely affected by the merger/consolidation.

The New York attorney general may at any time conclude that court review is appropriate.[32] If the New York attorney general does not approve the merger or consolidation, the parties may still seek court approval on notice to the New York attorney general.

As a practical matter, given that the New York attorney general must either directly approve the merger or consolidation or, as an interested party in the New York Supreme Court approval process, have an opportunity to review and opine on the proposed transaction, the New York Attorney General's Office recommends submitting drafts of the petition and accompanying documentation to the New York attorney general for review prior to formal submission.[33]

This will enable the New York attorney general to work with the applicants to resolve any concerns in advance of a court filing or formal submission to the New York attorney general. If following its review, the New York attorney general has no objection, it will allow the constituent nonprofits to deliver a no objection endorsement to the court. This process suggests that first seeking New York attorney general approval, rather than a court order, may be most prudent.

5. Certificate of Merger or Consolidation

After adoption and approval of the plan of merger or consolidation, a certificate of merger or consolidation must be signed by each constituent nonprofit and filed with and certified by the New York State Department of State.

Along with the certificate, the parties must deliver to the New York Department of State the requisite court order or the New York attorney general approval and any other approval or consent of any governmental body or officer required under the Not-for-Profit Corporation Law for a nonprofit of the kind that the surviving or consolidated nonprofit is or will be.[34]

The surviving or consolidated nonprofit must file a certified copy of the certificate with: (1) the county clerk of each county in which the office of each of the constituent nonprofits, other than a surviving nonprofit, is located; and (2) the office of the recording officer in each county in which real property of a constituent nonprofit, other than a surviving nonprofit, is located. A copy of the certificate must also be filed with the New York attorney general.

Lauren Boglivi is a partner and co-head of the M&A and private equity group at Proskauer Rose LLP.

Amanda Nussbaum is a partner at the firm.

Grant Darwin is an associate at the firm.

Proskauer associate Seok Whee (Jason) Nam contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This

article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] State Profile – New York, Independent Sector (September 2019), <https://independentsector.org/resource/state-profile-new-york/>.

[2] New York law distinguishes between two categories of not-for-profit corporations: "Charitable" and "Non-Charitable." This article focuses on mergers or consolidations involving charitable not-for-profit corporations. A "charitable corporation" means any not-for-profit corporation formed for one or more of the following purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animal. N.Y. Not-For-Profit Corporation Law § 102.

[3] Charity Navigator, Impact of the Pandemic & Economic Shutdown on the Nonprofit Sector (April 17, 2020), <https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=7900>.

[4] AFP Global, Nonprofits Hit by 6% Decline in Giving Due to COVID-19 (June 22, 2020), <https://afpglobal.org/nonprofits-hit-6-decline-giving-due-covid-19>.

[5] See CAF America, Volume 2: The Voice of Charities Facing COVID-19 Worldwide, available at (survey conducted between April 30 and May 6, 2020), available at https://www.cafamerica.org/wp-content/uploads/2_CV19_Report_VOL2.pdf.

[6] See CAF America, Volume 5: The Voice of Charities Facing COVID-19 Worldwide, available at (survey conducted between August 25 and September 2, 2020), available at https://www.cafamerica.org/wp-content/uploads/5_CV19_Report_9_22.pdf. Additional volumes of such surveys conducted by CAF America are available at <https://www.cafamerica.org/covid19report/>.

[7] See AFP Global, *supra* Note iv.

[8] Betsy Morris, While Covid-19 Donations Soar, Other Charities See a Big Hit to Funds, Wall Street J. (August 8, 2020), <https://www.wsj.com/articles/while-covid-19-donations-soar-other-charities-see-a-big-hit-to-funds-11596913200>.

[9] Nicholas Kulish, Providing a Pandemic Safety Net, Nonprofits Need Their Own, N.Y. Times (July 24, 2020), <https://www.nytimes.com/2020/07/24/business/economy/nonprofits-coronavirus-economy.html>.

[10] Stan Litow, Hard-Hit Nonprofits Face Rising Demand, Less Funding, Barron's (July 23, 2020), <https://www.barrons.com/articles/hard-hit-nonprofits-face-rising-demand-less-funding-51595528236>.

[11] See Kulish, *supra* Note iv; see also Betsy Morris, Nonprofits Face Bleak Future as Revenue Dries Up Amid Coronavirus, Wall Street J. (May 11, 2020), <https://www.wsj.com/articles/nonprofits-face-bleak-future-as-revenue-dries-up-amid-coronavirus-11589223487>; Emily Griffin, Local Charities See Unprecedented Demand for Help, WWNY (April 8, 2020), <https://www.wny.com/2020/04/08/local-charities-see-unprecedented-demand-help/>.

[12] See Food Bank For New York City, Fighting More than COVID-19. Unmasking the State

of Hunger in NYC During a Pandemic, (June 9, 2020), https://1giqgs400j4830k22r3m4wqg-wpengine.netdna-ssl.com/wp-content/uploads/Fighting-More-Than-Covid-19_Research-Report_Food-Bank-For-New-York-City_6.09.20_web.pdf (reporting the surge in the number of visitors to food pantries and soup kitchens since the beginning of the pandemic while a third of the soup kitchens and food pantries were closing due to economic shutdown); see also, Sarah Amandolare, et al., Essential Yet Vulnerable: NYC's Human Services Nonprofits Face Financial Crisis During Pandemic, Center for an Urban Future (May 2020), <https://nycfuture.org/research/essential-yet-vulnerable> (explaining that non-food assistance organizations have also been experiencing a rise in demand).

[13] Chris Strub, Survey: 44% Of Nonprofits Anticipate Further Staff Cuts Due To Coronavirus, *Forbes* (May 25, 2020), available at <https://www.forbes.com/sites/chrisstrub/2020/05/25/layoffs/#c2c113c50d4e>.

[14] Independent Sector, The Impact of COVID-19 on Large and Mid-Sized Nonprofits, (June 15, 2020), <https://independentsector.org/resource/covid19-survey/>.

[15] Litow, *supra* Note v.

[16] The NPC also permits the merger or consolidation of a New York Nonprofit with a Nonprofit of another state or jurisdiction if the laws of such jurisdiction likewise allow such a merger or consolidation. The foreign (non-New York) entity will be required to also comply with the merger/consolidation laws of its jurisdiction. Further, the NPC specifies additional steps where the surviving or consolidated corporation is or is to be formed under the laws of jurisdiction other than New York.

[17] See N.Y. Not-For-Profit Corporation Law § 901 et seq; see also Office of the New York State Attorney General Charities Bureau, Guide to Mergers and Consolidations of Not-for-Profit Corporations Under Article 9 of the New York Not-for-Profit Corporations Law (June 23, 2014), available at https://www.charitiesnys.com/pdfs/mergers_and_consolidations.pdf (the "NY AG Not-for-Profit Merger Guide"). This article is not a substitute for a careful and thorough review of the NPC and related guidance, including the NY AG Not-for-Profit Merger Guide.

[18] N.Y. Not-For-Profit Corporation Law §§ 902 and 903.

[19] Essential due diligence items would include confirming compliance with governing documents, the NPC and federal tax laws governing Nonprofits, and identifying any debt including any Paycheck Protection Program loans, any outstanding litigation, any material contractual arrangements and required approvals (particularly grants/government contracts

[20] N.Y. Not-For-Profit Corporation Law §§ 902 and 903.

[21] N.Y. Not-For-Profit Corporation Law § 903.

[22] For a comprehensive list of documents (and the information to be included in such documents) to be submitted either in connection with a petition to the applicable New York Supreme Court or to the NY AG for approval of a proposed merger or consolidation see NY AG Not-for-Profit Merger Guide at 12-14.

[23] N.Y. Not-For-Profit Corporation Law § 907-A.

[24] N.Y. Not-For-Profit Corporation Law § 907-B.

[25] N.Y. Not-For-Profit Corporation Law § 901.

[26] NY AG Not-for-Profit Merger Guide at 12. The NY AG does not review mergers or consolidations (i) of corporations formed under the New York Religious Corporations Law or (ii) of corporations chartered by the Regents of The University of the State of New York, which are governed by the New York Education Law. See NY AG Not-for-Profit Merger Guide at 19-20.

[27] In connection with the approval of the NY AG or the applicable New York Supreme Court, if any assets of any of the constituent Nonprofits are held for a charitable purpose or are assets received for a specific purpose and legally required to be used for a particular purpose, but not upon a condition requiring return, transfer or conveyance by reason of the merger or consolidation, the NY AG or the court may direct that such assets be transferred or conveyed to the surviving or consolidated Nonprofit subject to such purpose or use. N.Y. Not-For-Profit Corporation Law §§ 907-A(c) and 907-B(d).

[28] N.Y. Not-For-Profit Corporation Law § 907-A.

[29] N.Y. Not-For-Profit Corporation Law § 907-A(a). Where a non-New York Nonprofit is a constituent corporation to the merger or consolidation, the affidavit must provide facts showing that the consolidation is authorized by the laws of the jurisdictions under which each of the constituent corporations is incorporated.

[30] N.Y. Not-For-Profit Corporation Law § 907-A(b). In addition the NY AG, notice must be delivered to any other governmental body or officer whose consent or approval is required under N.Y. Not-For-Profit Corporation Law § 909.

[31] N.Y. Not-For-Profit Corporation Law § 907-B.

[32] See NY AG Not-for-Profit Merger Guide at 8.

[33] See NY AG Not-for-Profit Merger Guide at 6-7.

[34] N.Y. Not-For-Profit Corporation Law §§ 909 and 404.