

# **PLI Advising Nonprofit Organizations 2026: Nonprofit Mergers, Acquisitions, and Strategic Collaborations**

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# Introduction

This session will explore legal considerations when nonprofits “join forces,” whether through formal merger or through any of the many intermediate forms of strategic collaboration.

After completing this session, participants will be better able to:

- Understand why, when, and how nonprofits pursue combinations and collaborations
- Identify applicable state legal and regulatory frameworks and potential implications for federal tax-exempt status
- Conduct due diligence, navigate negotiations, and anticipate common issues
- Consider the full spectrum of collaboration and combination options in pursuing organizational goals

## Introductory Poll

- Have you ever been at an organization when it went through a merger?
- Have you ever advised a nonprofit client on a merger?
- Do you think there should be more mergers and consolidations between nonprofits?

# Common Contexts for Combinations and Collaborations

Common circumstances that lead organizations to pursue a strategic combination include:

- Funding shortages
- Competition
- Loss of relevancy
- Founders' fatigue
- Elderly leadership/Board members
- Fights among controlling stakeholders
- Evolution in mission

## Common Contexts for Combinations and Collaborations (cont'd)

- Complementary assets/needs
  - Curriculum + Teachers
  - Product + Network/Relationships with Audience
  - Service + Delivery Platform
  - Investable Idea + Capital
  - Human Capital + Management/Operations

## Overview of Structures for Combinations

- **Merger:** A merges into B, after which only B exists.
- **Consolidation:** A and B merge to form new entity C, after which only C exists.
- **Asset Transfer/Sale**
  - A transfers all of its assets to B
  - If B is a for-profit, it also pays A fair market value.
  - After transfer, A typically dissolves.
  - Variation: A transfers only specific assets, programs or lines of business to B.
- **Change in Control:** A designates B as its sole member or appoints a majority/all of the directors of B as A's directors.

# Legal and Regulatory Considerations for Combinations

- State law procedural requirements
  - Plan/Agreement of Merger/Consolidation/Transfer/Sale
  - Approval by Board
  - Approval by Members (if any)
  - Effectuation by filing with state authority
    - Merger/consolidation generally takes effect as of date on which Certificate (or Articles) of Merger (or Consolidation) is accepted for filing by the relevant Secretary of State (unless the parties specify a different date).
    - Changes in Control may require amendment of organizational documents.

## Legal and Regulatory Considerations for Combinations (cont'd)

- State regulatory approvals
  - Transaction may require special approval of Attorney General or other similar state authority overseeing nonprofit entities
    - e.g., by filing a joint petition for approval to merge with the Charities Bureau in New York
  - Requirements vary widely across states
    - Many states do not require any special approval by charities regulator (Delaware).
    - In some states that require approvals, the process is ministerial. In other states, the process involves a more substantive review by state authorities.
  - Some states may require additional state or city agency approvals for organizations in certain sectors or industries.
    - Common for hospitals and universities

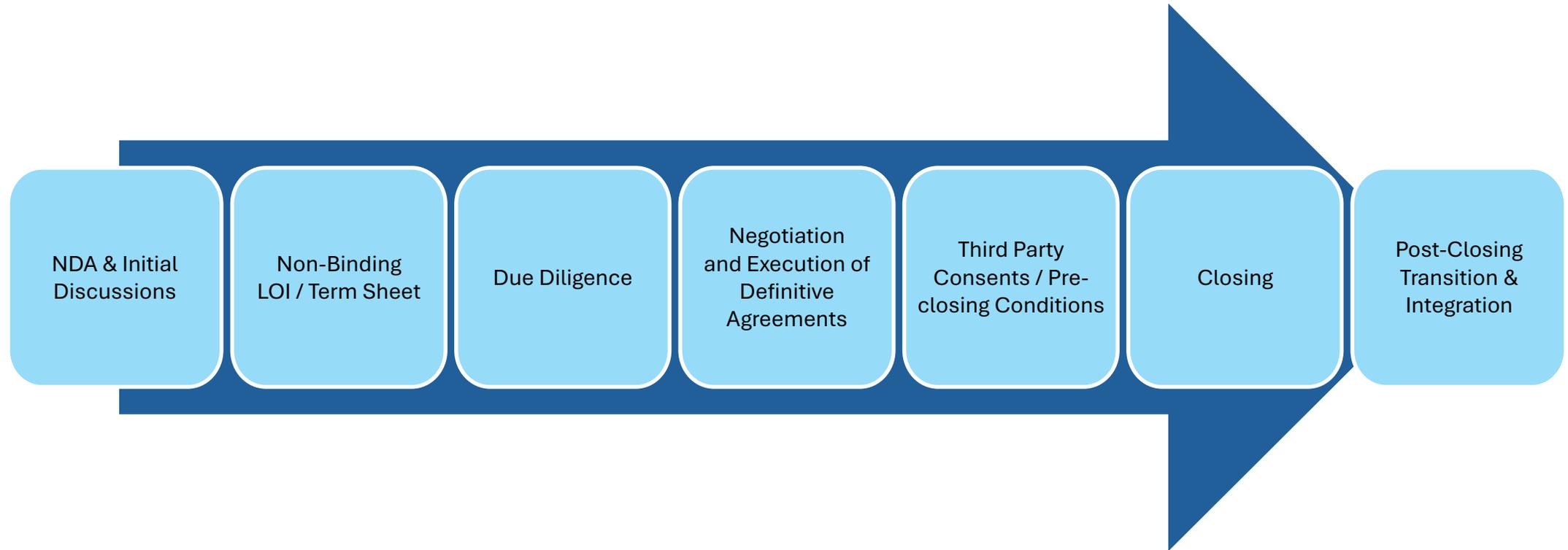
## Legal and Regulatory Considerations for Combinations (cont'd)

- Federal exempt status issues
  - No IRS approval requirements
  - Surviving entity in a merger will retain its tax-exempt status
  - If transaction results in a new entity (e.g., a consolidation), new entity will need to reapply
    - New EIN = New 1023 application (Rev. Proc. 2018-15)
- Antitrust / Hart Scott Rodino (HSR)
  - There is no nonprofit exception to the antitrust laws

## Legal and Regulatory Considerations for Combinations (cont'd)

- HSR Notice
  - 2026 Notification Thresholds
    - Transactions with a value of \$133.9 million or more if one party has at least \$267.8 million in annual net sales or total assets and other has at least \$26.8 million
    - All transactions with a value of \$535.5 million or more
  - Changes made in 2024 to the form and filing fees made HSR notice significantly more time-consuming and expensive

# Deal Process



## Deal Process (cont'd)

- Choice of structure will be informed by overall organizational goals/priorities
  - In addition to organization- or transaction-specific goals, common goals/priorities include:
    - Control / Independence
    - Simplicity / Complexity
    - Cost
    - Flexibility
    - Durability of structure
  - Determining the best structure is an iterative process, and the intended structure at the LOI stage may evolve or change following due diligence.

## Deal Process (cont'd)

- In NFP mergers, most negotiation often occurs pre-diligence.
  - This phase often involves the most work and is critical to ensuring the organizations are on the same page.
  - A “term sheet” (or LOI) should be a detailed non-binding agreement describing transaction goals, structure, and timing; not just an intent to discuss.
  - Avoid ugly surprises at later stages
  - Each side to consider cost of merger and available budget; may impact scope/depth of diligence and decisions about “smart” risks

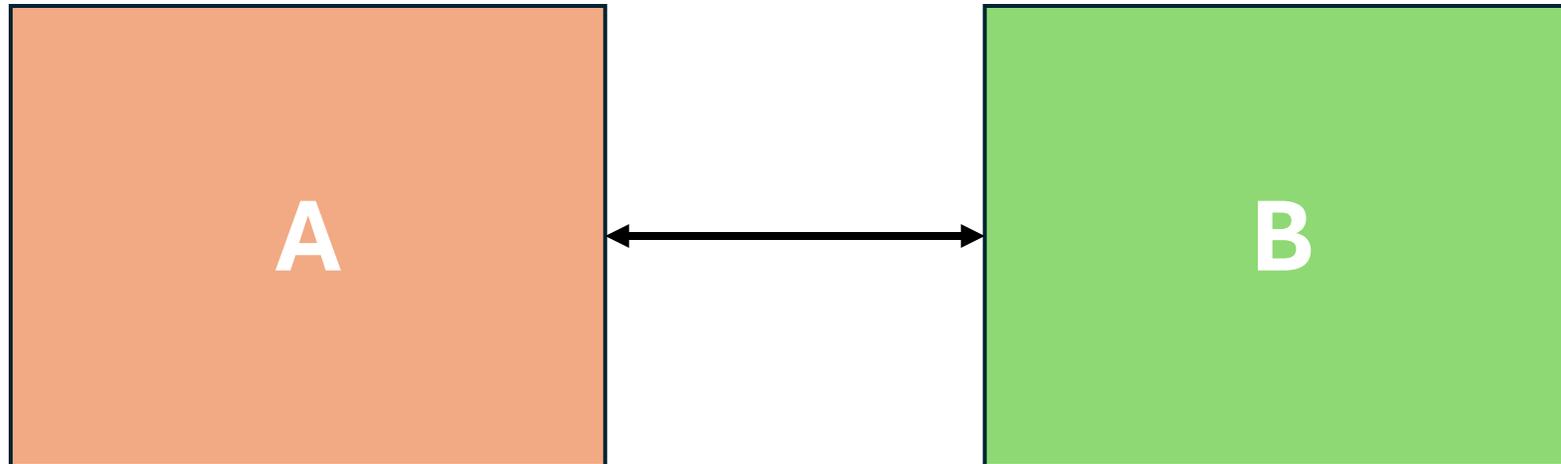
## Deal Process (cont'd)

- Important due diligence considerations
  - Corporate structure and governance; geography/international
  - Tax exempt status and regulatory compliance
  - Financial condition
  - Internal controls
  - Restricted assets
  - Employment matters (key persons, comparative pay, pension/benefits, unions)
  - Liabilities, litigation & risk exposure
  - IP
  - Key contracts and third party consents to assignment
  - Don't overlook culture and norms

## Deal Process (cont'd)

- In addition to screening for material risks, due diligence should be tailored and focused based on organization's priorities and objectives
  - Make sure you are getting what you want

## Contractual Relationship: Affiliation Agreement



## Contractual Relationship: Affiliation Agreement (cont'd)

- **Description:**

- a. Contractual arrangement specifying ways in which the parties will integrate their operations, share or provide resources or services, and/or otherwise collaborate.
- b. Contract may also be referred to as a memorandum of understanding, shared services agreement, collaboration agreement, or other similar names.
- c. A wide spectrum of arrangements is possible, ranging from collaboration on a discrete project to extensive integration of operations.
- d. In addition to an option for a long-term relationship, this type of contractual relationship may be a stepping stone to a merger or other formal combination, and it can be a good way for two organization to “get to know” one another.

## Contractual Relationship: Affiliation Agreement (cont'd)

- **Pros:**

- a. Minimal cost.
- b. Simple to implement and unwind.
  - i. A matter of contract negotiation, implementation, and termination.
- c. Does not require regulatory notices and approvals.
- d. Provides a “test period” before committing to a more integrated structure.

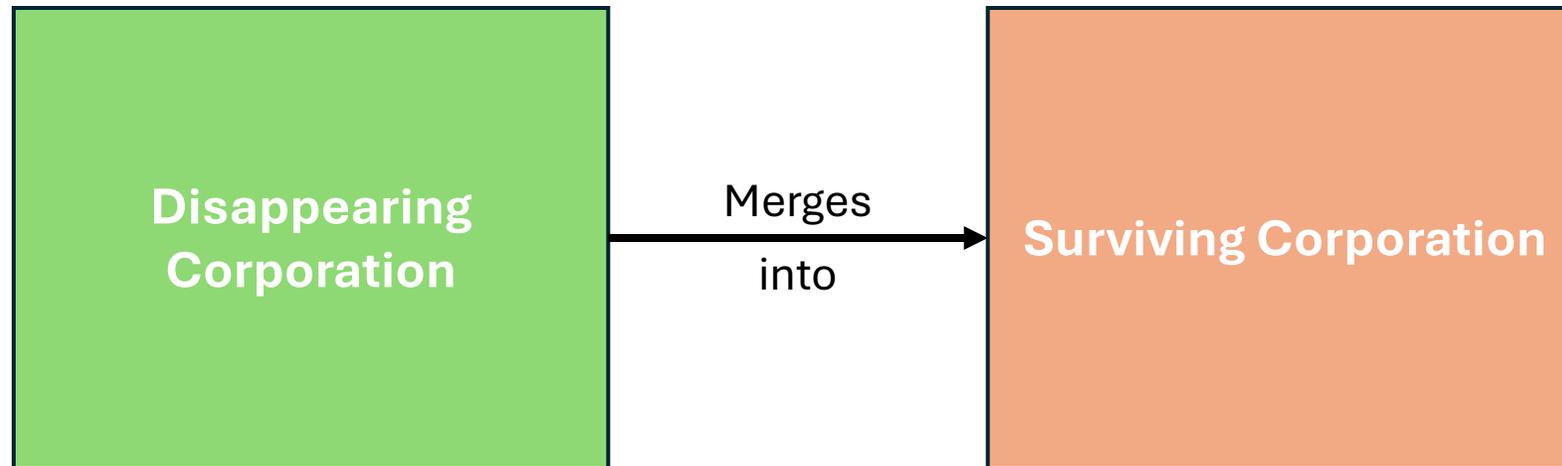
- **Cons:**

- a. Minimal integration
- b. Time and expense of maintaining separate nonprofit corporations.

- **Other considerations**

- a. Charitable solicitation (e.g., if A will fundraise for B)
- b. Joint employer liability

## Full Integration: Merger



## Full Integration: Merger (cont'd)

- **Description:**

- a. The “disappearing corporation” merges with and into the surviving corporation
- b. All debts, liabilities, and assets of the disappearing corporation become those of the surviving corporation by operation of law
- c. Can amend the surviving corporation’s governing documents as part of the merger to address post-merger combined governance

- **Pros:**

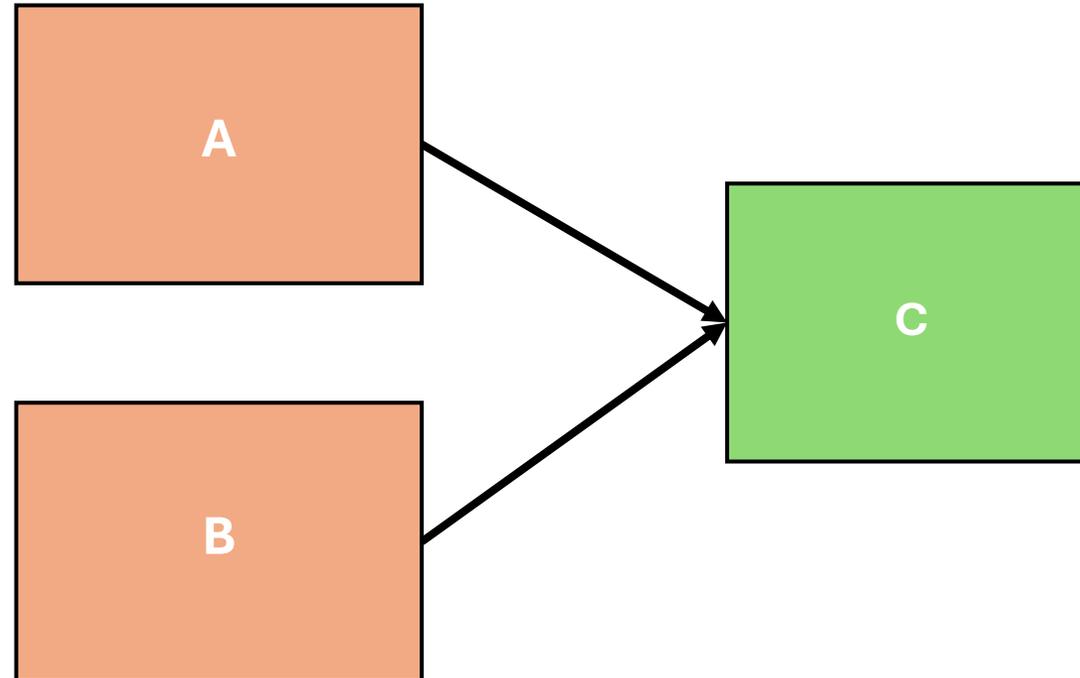
- a. Complete integration of governance and activities
  - i. Single corporation, board, management, policies, etc.
  - ii. Simplifies federal tax reporting and other compliance obligations, e.g., one IRS Form 990, one annual corporate report
- b. Achieves centralization and economies of scale

## Full Integration: Merger (cont'd)

- **Cons:**

- a. Significant transaction costs
- b. No shielding from other party's liabilities
- c. No easy way to unwind
- d. Surviving corporation may not be allowed to assume disappearing corporation's advantageous contracts
- e. Potential regulatory/licensing issues and approvals

## Full Integration: Consolidation

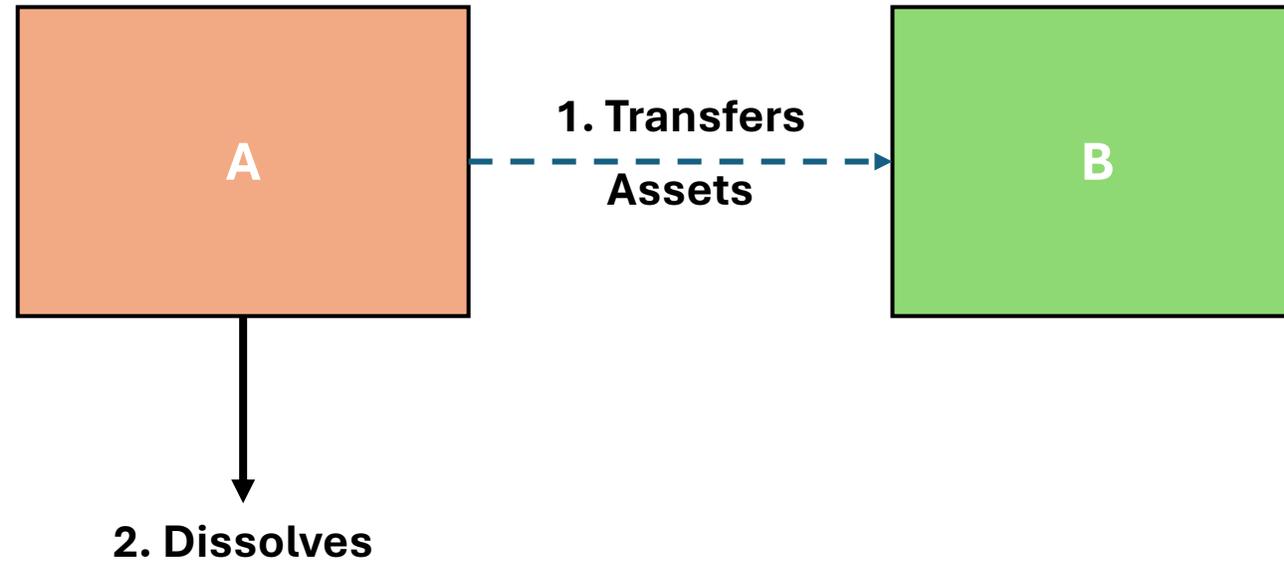


## Full Integration: Consolidation (cont'd)

- **Comparison to Merger:**

- True “merger of equals”
- Organizational reset
- May have symbolic and reputational benefits

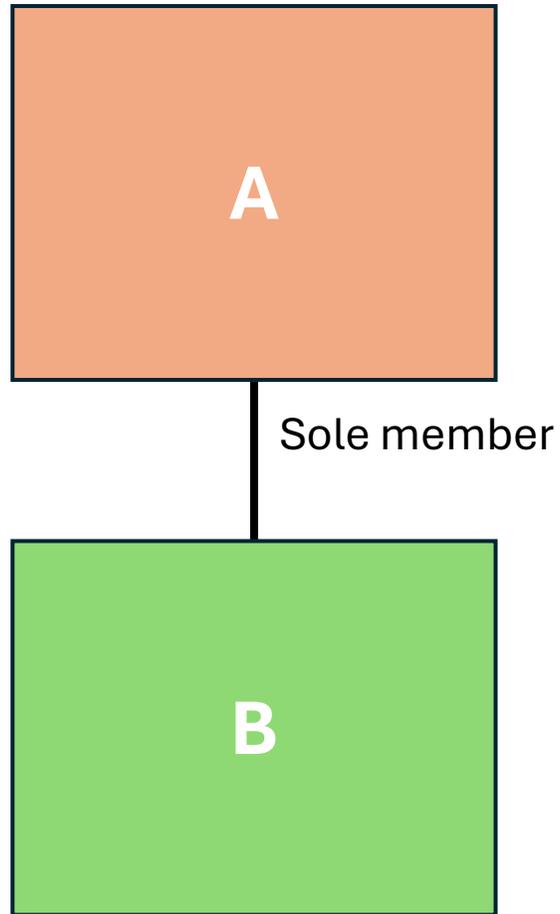
## Full Integration: Asset Transfer/Sale



## Full Integration: Asset Transfer/Sale (cont'd)

- **Comparison to Merger:**
  - Liability isolation (potential)
  - Merger of non-equals
  - May have easier regulatory path
  - Easier to “stage” over time

# Integrated Governance: Parent-Subsidiary Model



## Integrated Governance: Parent-Subsidiary Model (cont'd)

- **Description:**

- a. One organization becomes the sole corporate member (the parent) of the other (the subsidiary).
  - i. Sole member/parent nonprofit typically would have authority to appoint the sub's board and certain approval rights over major corporate transactions.
- b. Each party retains its status as a separate nonprofit corporation with its own assets, liabilities, employees, etc.
  - i. May result in consolidation of financials for accounting purposes, though each will always file its own Form 990.
  - ii. Ringfencing sub's liability within sub can be an important factor in parties' choice to use this structure rather than merger

## Integrated Governance: Parent-Subsidiary Model (cont'd)

- c. To integrate governance, the parent nonprofit would appoint boards with partially overlapping constituencies or, for complete integration, a “mirrored board,” i.e. the same individuals would serve as directors of both nonprofits
- d. Each nonprofit’s board would elect that nonprofit’s officers
  - i. To increase integration, could have partially or completely overlapping officers for both nonprofits

## Integrated Governance: Parent-Subsidiary Model (cont'd)

- **Pros:**

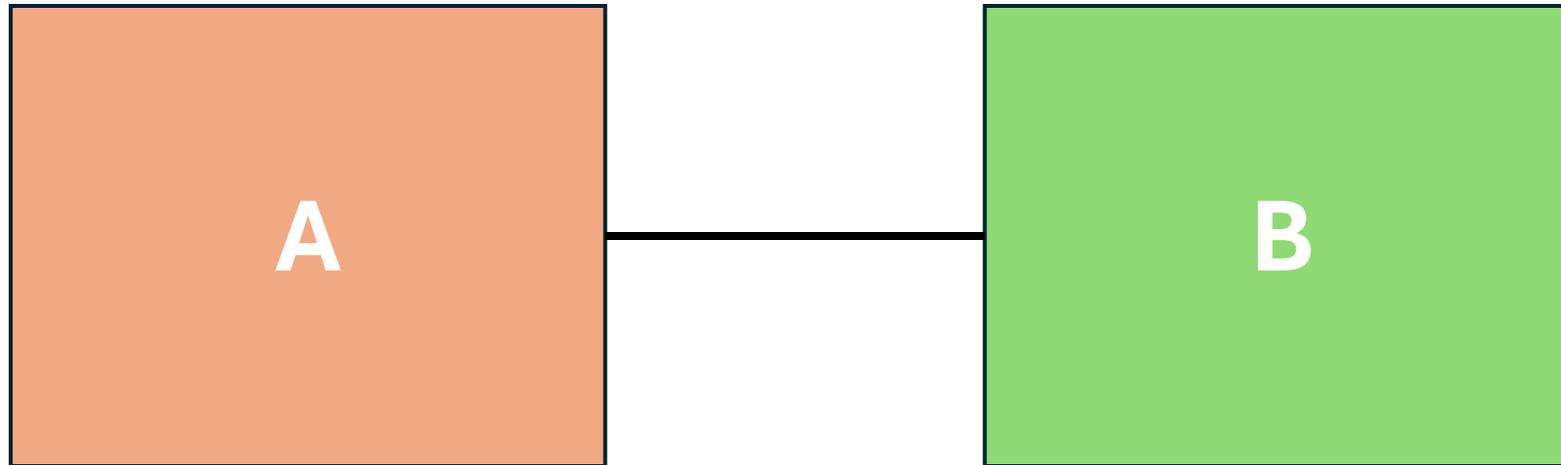
- a. Lower cost relative to merger.
- b. Relatively simple to implement and unwind legal structure/documentation.
  - i. Requires amending the sub's governing documents, and in the case of unwinding, reestablishing separate directors and officers
  - ii. Level of parent control over/autonomy of sub can be tailored up front or changed over time
- c. Facilitates shared services.
- d. Could serve as an interim step to a more integrated structure.
- e. Less likely to require regulatory approvals than true merger.

## Integrated Governance: Parent-Subsidiary Model (cont'd)

- **Cons:**

- a. Time and expense of maintaining separate nonprofit corporations.
- b. Alter ego/piercing the corporate veil concerns.
- c. Joint employer issues.
- d. May delay realizing economies of scale.

# Integrated Governance: Brother-Sister Model



## Integrated Governance: Brother-Sister Model (cont'd)

- **Description:**

- a. The parties amend their governing documents to provide for mirrored boards consisting of the same individuals.
- b. Each nonprofit's board elects its officers.
  - i. Could have partially or completely overlapping officers for both nonprofits.
- c. Each party retains its status as a separate nonprofit corporation with its own assets, liabilities, employees, etc.
  - i. May result in consolidation of financials for accounting purposes, though each will always file its own Form 990.

## Integrated Governance: Brother-Sister Model (cont'd)

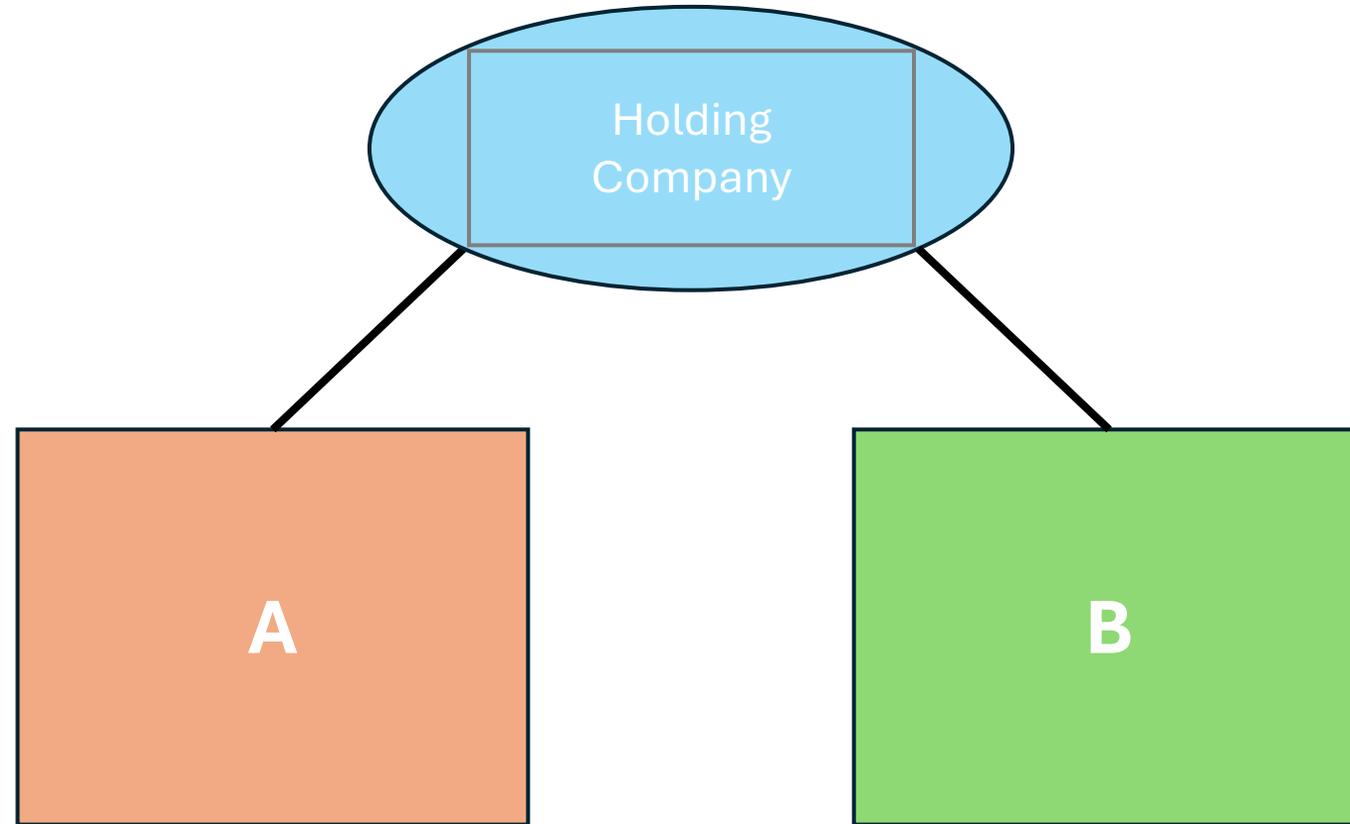
- **Pros:**

- a. Relatively lower cost.
- b. Relatively simple to implement and unwind.
  - i. Requires amending each party's governing documents and, in the case of unwinding, reestablishing separate directors and officers
- c. Facilitates shared services.
- d. Could serve as an interim step to a more integrated structure.
- e. No regulatory notices or approvals required.

- **Cons:**

- a. Time and expense of maintaining separate nonprofit corporations.
- b. Alter ego/piercing the corporate veil concerns.
- c. Joint employer issues.
- d. May delay realizing economies of scale.

# Integrated Governance: Holding Company Model



## Integrated Governance: Holding Company Model (cont'd)

- **Description:**

- a. Create a new nonprofit “Holding Company” to serve as the sole corporate member of both organizations.
  - Holding Company appoints boards for subsidiaries and has certain approval rights (e.g., major decisions).
- b. Could appoint partially overlapping or mirrored boards of the same individuals for the subsidiaries.
  - Same individuals could serve as directors for all three entities.
- c. Each nonprofit’s board elects its officers.
  - Could have partially or completely overlapping officers for both nonprofits.
- d. Each party retains its status as a separate nonprofit corporation with its own assets, liabilities, employees, etc.
  - May result in consolidation of financials for accounting purposes, though each will always file its own Form 990.

## Integrated Governance: Holding Company Model (cont'd)

- **Pros:**

- a. Because each party remains in existence, still relatively easy to unwind
  - Requires amending each party's governing documents and reestablishing separate directors and officers
- b. Ability to consolidate managerial and administrative functions at the Holding Company while maintaining some autonomy for each subsidiary
- c. Facilitates shared services
- d. Could serve as interim step to more integrated structure
- e. Less likely to require regulatory approvals than true merger

## Integrated Governance: Holding Company Model (cont'd)

- **Cons:**

- a. Time and expense to form and qualify a new nonprofit, tax-exempt organization as the Holding Company
- b. Complications around services and support to another charity as a 501(c)(3) eligible mission
- c. Time and expense of maintaining separate nonprofit corporations
- d. Alter ego/piercing the corporate veil concerns
- e. Joint employer issues

# Joint Ventures

- Not a legal term, but generally refers to:
  - Permanent side hustle
  - Structured as a separate legal entity
  - Often with a for-profit partner
- Common JV scenario involves commercialization of NFP intellectual property with capital/expertise from for-profit partner(s)
- IRS guidance provides framework for analyzing federal tax implications:
  - NFP decision-making control over exempt purpose aspects of JV is critical to determining whether activity is related/furtheres exempt purposes of NFP. In the event of a conflict between exempt and non-exempt purposes, the former should control.
    - Enshrine these principles into constitutive documents/policies wherever possible.

## Joint Ventures (cont'd)

- If unrelated → UBTI (ancillary) and potential loss of exemption (substantial)
- See Rev. Rul. 98-15 (Whole Hospital Joint Ventures) and Rev. Rul. 2004-51 (Ancillary Joint Ventures)
- Key structuring considerations
  - Entity type: Limited liability company, limited partnership, taxable corporation
  - Form(s) of NFP contribution: capital contribution, license, services agreement

# THANK YOU. QUESTIONS?

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