



This article presents general guidelines for Ohio nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Considerations for Nonprofit Partnership and Consolidation

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When nonprofits consider a new partnership or even combining forces in a more integrated way, understanding the options for structuring a nonprofit combination can help shape discussions and pose important considerations for boards. This article outlines common types of combinations and offers some important considerations and next steps.

Strategic Alliance

In a strategic alliance, both nonprofits remain separate nonprofit corporations but partner on an initiative or common project. Generally, an alliance is a viable approach when it allows the two entities to increase the overall effectiveness and reach of a specific program or effort. A few important considerations:

- Each entity must ensure that the goals and activities of the strategic alliance are substantially related to the exempt purposes stated in their formation documents and applications for federal tax-exempt status.
- Although a strategic alliance allows each organization to keep its separate existence, focus, and donor base intact, it also provides more opportunities for misunderstandings and disagreements.
- Accordingly, nonprofits forming a strategic alliance would be wise to put in place an alliance agreement that documents items like:
 - What assets each entity will contribute to the alliance (such as cash, real property, intellectual property, and personnel), both initially and ongoing
 - How the alliance will be managed and governed
 - Objectives and success metrics
 - Process for distributing compensation or revenue from the alliance's activities (which is generally done in proportion to each partner's contribution or interest)
 - Term for the alliance, including exit strategies and early termination rights

Joint Venture

In a joint venture, the partnering nonprofits remain separate nonprofit corporations (at least initially) but enter into a Joint Venture ("JV") Agreement to more formally establish a new nonprofit entity to carry out a specific program. Unlike a strategic alliance, a joint venture creates a new nonprofit entity, so the existing nonprofits should carefully consider whether the new program or initiative truly requires the more independent operation and governance that a joint venture affords. A joint venture can, however, also provide the basis for an eventual merger or consolidation, allowing two nonprofits to work together more formally under a JV Agreement until a desired condition exists or a triggering event occurs. In developing a JV Agreement, the nonprofits should consider and work with counsel to document items like:



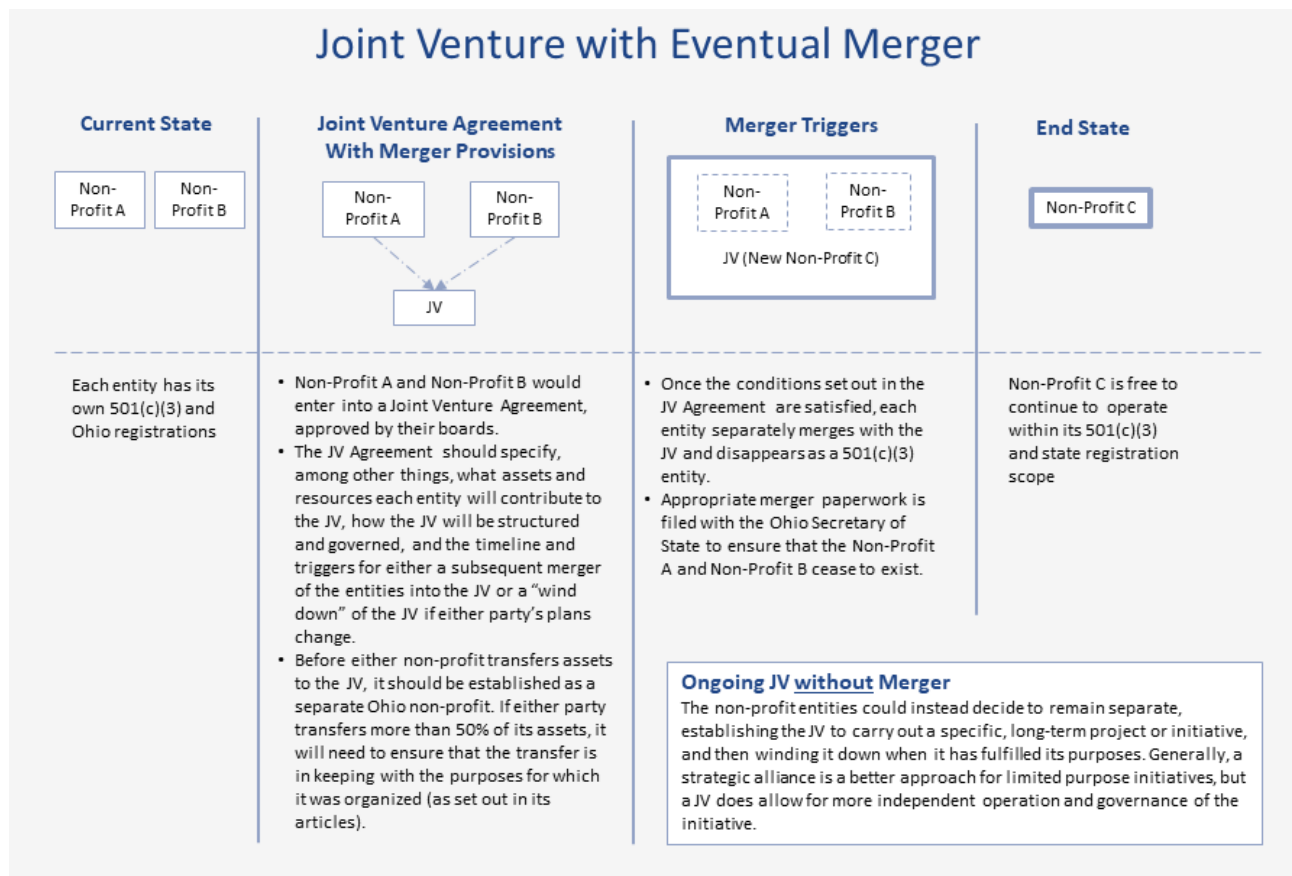
- Which entity or person will legally establish the new nonprofit entity
- How the new entity board and management will be structured and staffed
- What assets or resources each existing entity will contribute to the JV
- How revenues from the JV will be distributed back to the founding entities
- The timeline for winding up or terminating the JV
- If desired, the timeline for a subsequent merger of one or both of the existing nonprofits into the new JV

The directors and any voting members of each entity will need to approve the JV. In addition, if either existing nonprofit will transfer more than half of its assets into the JV, it will need to confirm that:

- the transaction is in accordance with the purpose or purposes for which each was organized (as set out in each organization’s articles), and
- that the receiving entity (i.e., the newly established JV) is a public benefit corporation.

If this is not the case, the transaction may require approval by the relevant county’s Court of Common Pleas, with notice to the Ohio Attorney General’s Office.

See Chart #1 below.





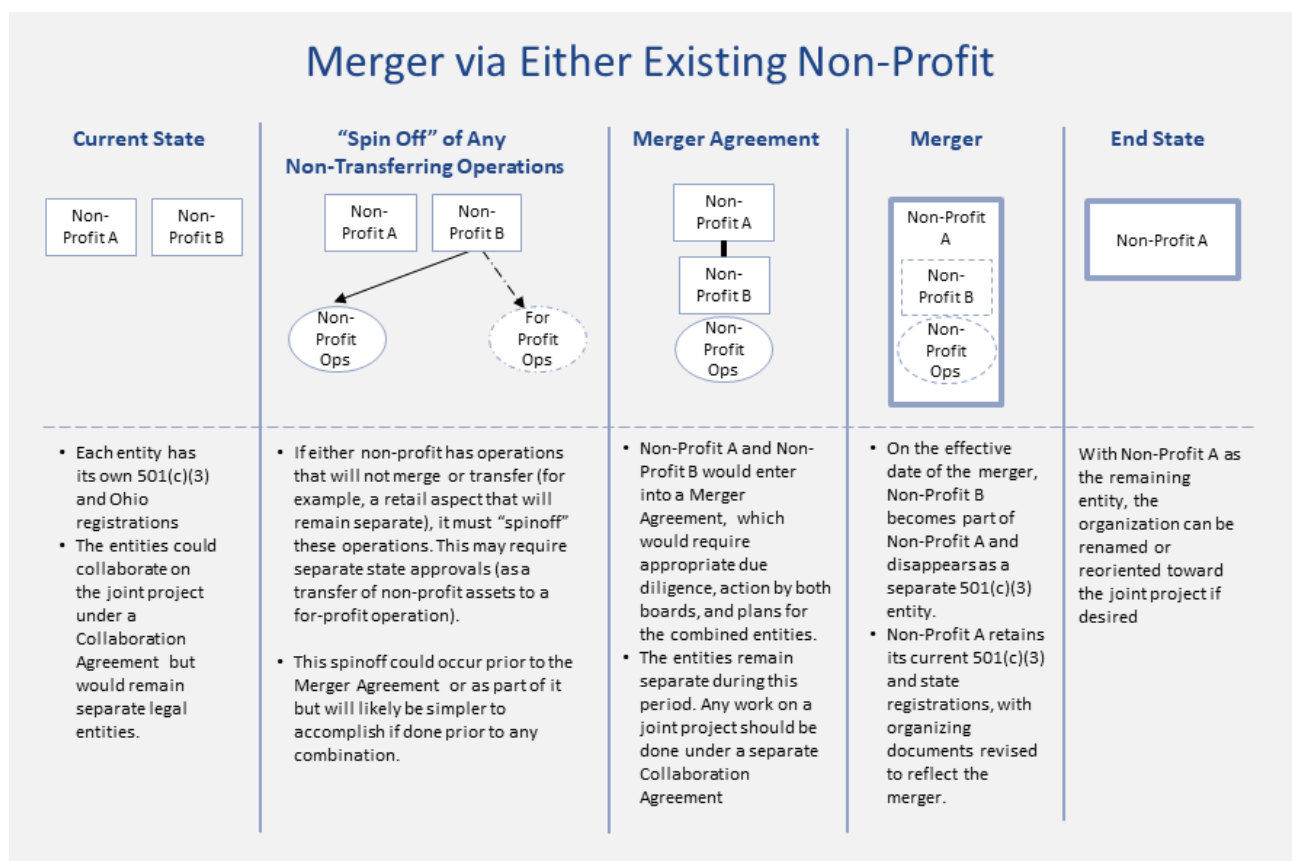
Merger/Consolidation

Alternatively, two nonprofits looking to partner on a significant new project or area of focus could choose to merge or consolidate. This approach differs from a strategic alliance or joint venture because in this case, at least one of the existing nonprofits ceases to exist. Specifically, in a merger, one of the nonprofit entities absorbs the other, leaving one existing nonprofit as the surviving nonprofit. In a consolidation, both nonprofits combine to form a new third entity and then “dissolve” into it, leaving neither existing nonprofit as a surviving entity.

Benefits of a Merger vs. Consolidation

- Avoids the time and cost of setting up an entirely new nonprofit entity
- Allows the surviving entity to use the name and donor recognition it currently has to benefit the new endeavor, transitioning to a new name later if appropriate
- Depending on their terms, certain grants or gifts may be “transferrable” in the context of a merger that would not be transferrable in a consolidation

See Chart #2 below.

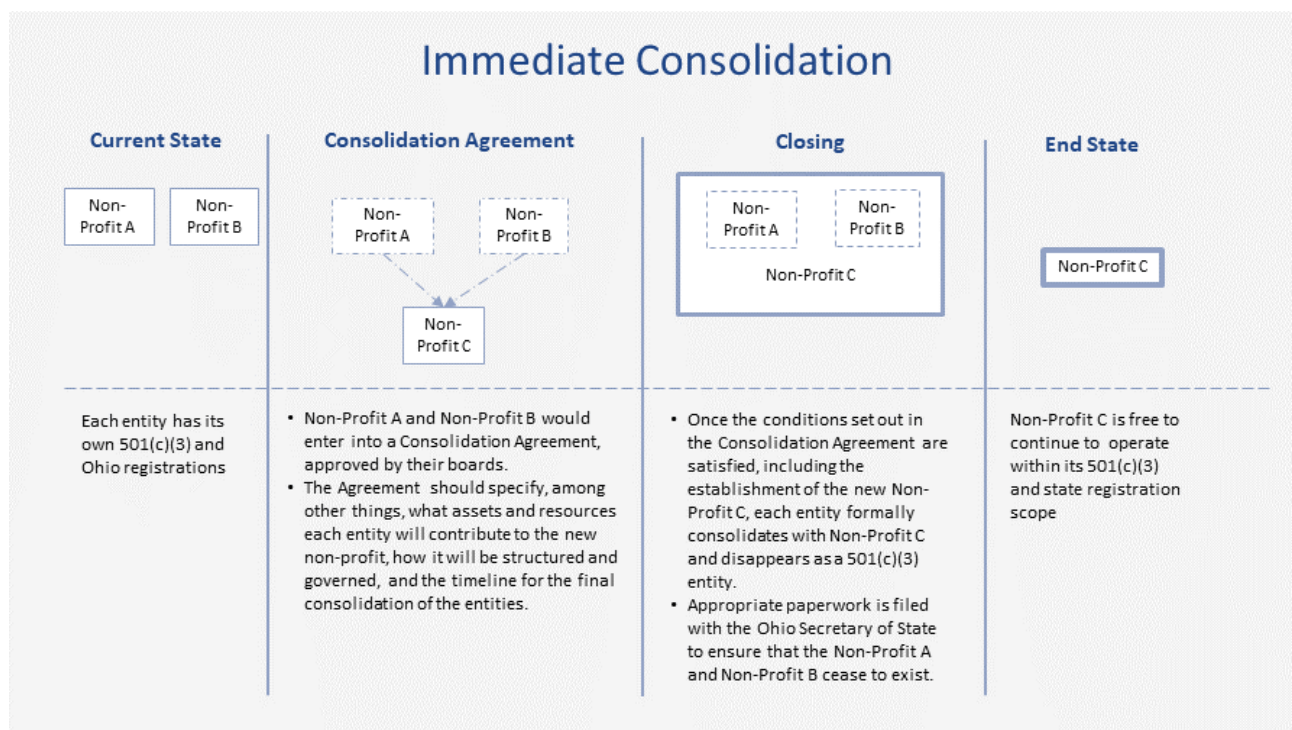




Benefits of a Consolidation vs. Merger

- Allows the entities to have a “fresh start” immediately under a new entity name, with a new board, employment structure, etc.
- May expand fundraising opportunities to the degree the new entity presents a new idea or concept for potential donors

See Chart #3 below.



General Process and Key Considerations

In general, the due diligence required ahead of a merger or consolidation is more significant than that required in forming a strategic alliance, and entities considering such an approach should consult with counsel early in the process to help identify any unique issues or challenges that may need to be addressed.



General Process for an Ohio Nonprofit Merger/Consolidation

Assessment	
Feasibility Review	<ul style="list-style-type: none"> • Is each organization internally prepared for a merger? • Will a merger strengthen the impact of each organization? • How will a merger impact current financials and grants and future fundraising? • How will the organizations address the cost of the combination process? • Is each organization clear on the desired outcome?
Merger Team	<ul style="list-style-type: none"> • Consider who from each entity will be responsible for reviewing the information, negotiating the merger terms, and planning for the ultimate implementation. • Will this include any directors?
Intent to Merge	<ul style="list-style-type: none"> • The boards of each entity should pass an “intent-to-merge” resolution (or something to that effect) that allows the organizations to explore the terms of a merger more formally, exchange confidential information, inform their constituents, and even raise funds to support the costs. • It may also be helpful to have two or three directors from each entity involved in the merger process • Enter into a Non-Disclosure Agreement prior to the exchange of any confidential information
Negotiation	
Due Diligence	<ul style="list-style-type: none"> • Exchange and review of corporate documents, financial information, board/membership information, fundraising/grant information, personnel policies and data, etc. • Appropriate diligence is important for ensuring the directors of each nonprofit are fulfilling their duties in assessing and approving any final merger agreement.
Outline of Key Terms + Negotiation	<ul style="list-style-type: none"> • Memorialize key points of agreement and key items requiring further negotiation • Assess the timeline for completing due diligence and the transition period once the agreement is signed (i.e., the time between the agreement to merge and the actual merger effective date)
Agreement to Merge/Consolidate	<ul style="list-style-type: none"> • Complete due diligence and negotiate final terms. • Have legal counsel draft a final Merger or Consolidation Agreement, covering key items like: <ul style="list-style-type: none"> ○ Timeline ○ Executive leadership ○ Initial Board composition and control ○ Financing ○ Staffing/HR concerns ○ How the surviving entity’s articles/bylaws/etc. will be amended to reflect the combined structure (if merging) or what the new entity’s articles/bylaws will say (if consolidating) ○ Responsibility for filing updated documents with the state and federal government • Directors of each entity must approve the agreement and have it signed by the board chair/president and secretary <ul style="list-style-type: none"> ○ No member or director of either organization may receive or keep anything as a result of the merger, other than membership or directorship in the new or surviving nonprofit. • Merger or Consolidation Agreement must be filed with the Ohio Secretary of State • In parallel, draft new/revised articles and regulations covering the merged or consolidated entity.



Execution

Integration Plan	<ul style="list-style-type: none"> • Each organization should develop a plan for integrating its structures and processes once the merger is final. • Confirm steps required to transfer existing agreements, grants, or other third-party arrangements if required.
Governance & Legal Documents	<ul style="list-style-type: none"> • Finalize new/revised articles and regulations as negotiated. • Updated or new filings with the IRS, including formation of a new 501(c)(3) in the case of a consolidation • Updated or new registration filings with Ohio Secretary of State

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