

Memorandum 76-46

Subject: Study 77.110 - Nonprofit Corporations (Merger and Consolidation)

Attached to this memorandum is a staff draft of Chapter 11 (Merger and Consolidation) of the General Nonprofit Corporation Law. Also attached are provisions from the nonprofit corporation laws of New York and Pennsylvania, to which reference will be made in the following discussion.

I. General Approach to Drafting Chapter 11

The draft is based in large part on Sections 1100-1109 of the new General Corporation Law. Hence, where the new law simplifies the procedures applicable under Sections 4100-4124 of the old General Corporation Law, the draft follows the new law. There are, however, three major departures from the approach of the new General Corporation Law:

1. The draft retains the consolidation procedure whereas the new General Corporation Law has eliminated consolidation. The comments in a consultant's memorandum to the committee when it was considering this subject, contains the following explanation:

Consolidation, a method of combining two or more corporations into a new corporation, is a dated procedure created during the time when corporate charters were granted by special act of the Legislature. Such a procedure avoided the complex process required to form a new corporation within which to merge previously existing corporations. Currently, consolidation is seldomly used, if at all, and given the relative ease of forming a new corporation for the purpose of combining the assets and businesses of other corporations, the Committee may wish to eliminate this procedure. If not, present § 4100 is satisfactory and its retention is recommended.

Consolidation is more important in the context of nonprofit corporations than it apparently is in the context of business corporations.

Most combinations of nonprofit corporations take the form of a consolidation rather than a merger. Usually, existing members become attached to their organization and in any combination of nonprofit groups resentment may occur if the members feel their organization has

been swallowed up by another. It is easier for them to accept a combination of forces and operation as a new entity. The wise lawyer will point out the psychological benefits of consolidation at an early stage of the negotiations for the reorganization, because elimination of factions with the new organization can be a real contribution to its future success. [Davis, Reorganization and Termination, in California Nonprofit Corporations § 9.18 at 325 (Cal. Cont. Ed. Bar 1969).]

The staff recommends the retention of consolidation because it is useful.

Retaining the procedures presents no difficulty in drafting nor does it add significantly to the bulk of the statute. In addition, consolidation saves on filing fees over a procedure which achieves the same end, that is, setting up a new corporation and merging the others into it.

2. The draft does not provide special procedures for merger of a subsidiary corporation into a parent corporation (see Section 1110 of the new General Corporation Law) or for the merger of close corporations (see Section 1111 of the new General Corporation Law).

3. The law currently applicable to mergers or consolidations of nonprofit corporations, namely the provisions applicable to business corporations under the old General Corporation Law except with a few variations provided in Sections 9700 to 9703, does not provide for any involvement of the Attorney General. The staff proposes to add provisions requiring notice to the Attorney General where a charitable corporation or a nonprofit corporation holding assets on charitable trust is involved in a proposed merger or consolidation. (See discussion of Section 6142, infra.)

II. Discussion of Particular Sections

CHAPTER 1. DEFINITIONS

§§ 5159, 5161, 5165, 5190. Definitions of consolidated, constituent, disappearing, and surviving nonprofit corporations

With the exception of the definition of "disappearing nonprofit corporation," these provisions are substantively the same as old and new law. In

order to make the drafting more precise and consistent, however, "disappearing nonprofit corporation" has been defined to include all corporations involved in a merger or consolidation other than the consolidated or surviving corporation, i.e., all the corporations whose existence ceases when the merger or consolidation becomes effective. In the case of a consolidation, this means that the disappearing and the constituent corporations are the same, but this presents no real difficulty.

CHAPTER 11. MERGER AND CONSOLIDATION

Article 1. Agreement of Merger or Consolidation

§ 6110. Merger or consolidation of nonprofit corporations

The provisions of the new General Corporation Law concerning merger appear to apply only to mergers of business corporations, whether domestic or foreign. (See definition of "corporation"--Section 162.) Under the old General Corporation Law, it may have been possible for nonprofit corporations to merge with business corporations, although the staff has not discovered any mention of such an occurrence in cases or treatises; mergers and consolidations between two nonprofit corporations are rare enough. Section 6110 makes clear that Chapter 11 applies only to mergers and consolidations where the constituent corporations are nonprofit corporations. At some time, we may have to deal with at least de facto mergers between nonprofit and business corporations because the chapter on sales of assets is not restricted to sales of assets to nonprofit corporations.

The staff does not propose to permit mergers between nonprofit and business corporations. However, the Commission may want to look at the New York provision for merger or consolidation where the surviving or consolidated corporation is to be a business corporation. (See Section 908 in Exhibit I, attached hereto.) The Revisers' Notes to Section 908 of the New York law explain its purpose as follows:

This section is confined to mergers and consolidations which involve a transformation from not-for-profit into profit in recognition of the rapidly expanding use of not-for-profit corporations, many times as other than permanent entities, for socially desirable objectives in urban communities.

Hence, investors interested in urban development activities may form not-for-profit corporations and operate in that way

until the corporation has attained a solid footing. Once it has established itself, the corporation, by virtue of Section 908, can be merged or consolidated with a business corporation thereby satisfying the goals of its original investors while still serving the needs of the community. [7 White, New York Corporations, Not-for-Profit Corporation Law ¶ 908.1 (13th ed. B. Prunty 1974)(footnote omitted).]

§§ 6111, 6115. Contents of agreement of merger or consolidation; distribution of charitable assets forbidden

Subdivision (e) of Section 6111 provides that the agreement of merger or consolidation must provide the manner of converting the memberships of the constituent nonprofit corporations into memberships in the surviving or consolidated corporation, and it provides for the distribution of cash, property, or rights as well. In order to avoid the implication that charitable assets may be distributed to members upon a merger or consolidation, subdivision (b) has been added to Section 6115 to make clear that a policy forbidding such distribution, analogous to that applicable on dissolution, applies here. We have not gone to the extreme of forbidding any monetary compensation for membership on merger or consolidation, although it might be argued that that would be more consistent with the policy against distribution of dividends..

Article 2. Approval of Agreement by Boards and Members

§ 6126. Notice of approval of agreement

Section 4109 of the old General Corporation Law provided that, after the board and the shareholders had approved the agreement of merger or consolidation, each shareholder was to be given notice. The new General Corporation Law has

eliminated this requirement. Notice is required to be sent only to shareholders who have dissenters' appraisal rights under Sections 1300 and 1301. We have preserved the concept of the old law in Section 6126 at least until Chapter 13 on dissenters' appraisal rights is drafted and considered. If a right of action to attack a fraudulent or manifestly unfair merger or consolidation is provided in Chapter 13, we may wish to retain this notice provision. However, even if such a right is provided, it may be desirable to dispense with this notice requirement since it may be presumed that the member has received notice of the proposed merger or consolidation and that, if he is interested, he can be expected to make the necessary inquiry concerning the disposition of the proposal.

Article 4. Filing Agreement and Certificate; Effect of Filing

§ 6142. Notice to Attorney General; assets held on trust or by charitable corporation

Mergers and consolidations of nonprofit corporations under existing law (and, of course, mergers of business corporations under the new General Corporation Law) do not require court approval. (Compare the provisions of Section 907 of the New York law, set out in Exhibit I, applicable to charitable, religious, scientific, and cultural corporations (Type B) and not-for-profit corporations formed for any lawful business purpose to achieve a lawful public or quasi-public objective (Type C), and Section 909.) However, the problem of protecting assets held on charitable trust and in furthering the purpose of charitable nonprofit corporations seems to require some sort of protective procedure. The least burdensome procedure which the staff believes would be effective is to require charitable corporations or nonprofit corporations holding assets on charitable trust to give notice to the Attorney General of the proposed merger or consolidation by sending the Attorney General a copy

of the agreement. Section 6142 provides that the merger or consolidation is not effective until a copy of the agreement is filed with the Attorney General. We have not gone as far as requiring a certificate of waiver, such as is provided by Section 7034 regarding dissolution, because merger and consolidation are viewed as being a less serious change than dissolution and because there is no general requirement of court approval of the merger or consolidation. However, the notice does give the Attorney General the information upon which to act if there is abuse of a charitable trust.

Article 5. Mergers and Consolidations Involving Foreign Nonprofit Corporations

§ 6155. Filing of papers filed in other state

Where the surviving or consolidated nonprofit corporation is to be a foreign nonprofit corporation, certain provisions of California law apply to constituent domestic nonprofit corporations under old and new law. Sections 6153, 6154, and 6155 continue this policy. Section 6155(b) makes clear that the agreement filed under the law of the foreign jurisdiction must be filed with the Attorney General where charitable assets are involved in order for the merger or consolidation to become effective regarding any constituent domestic nonprofit corporation. (Compare Section 909 of the New York law set out in Exhibit I.)

III. Related Problems for Consideration in the Future

1. De Facto Merger Doctrine

Chapter 12 of the New General Corporation Law is intended to codify the "de facto merger" doctrine which treats reorganizations (defined in Section 181 of the new law) involving sales of assets as mergers for the purposes of shareholder approval requirements and dissenters' appraisal rights. While

there may no doubt be de facto mergers involving nonprofit corporations, it remains to be seen whether this doctrine should be codified in a manner analogous to the new General Corporation Law. In part, this question will depend on the nature of dissenters' rights (Chapter 13).

2. Dissenting Members' Appraisal Remedy

Shareholders who dissent from a merger (or consolidation) have the right to be compensated for the value of their interests. This makes sense where the interest is financial; however, in the nonprofit corporation context, the concept of dissenters' appraisal rights is not as clearly desirable. At the June 1974 meeting, the Commission indicated its inclination to eliminate the appraisal remedy in favor of a provision permitting an action by a member, director, or the Attorney General to prevent a merger or consolidation that would defraud the members or the public at large or that is manifestly unfair to a nonprofit corporation involved. We just note this problem for now. The subject will be more fully considered in a later memorandum.

3. Statutory Provisions for Other Forms of Reorganization

It may be useful to provide procedures for the conversion of a nonprofit corporation into a business corporation or to permit the division of a nonprofit corporation into two or more nonprofit corporations. Of course, under existing law, the same ultimate results can be achieved by more circuitous means.

Pennsylvania provides for the division of nonprofit corporations into two or more nonprofit corporations. See Sections 7941, 7946 in Exhibit II. The staff does not perceive any particular need for such provisions, but we mention them here in case the Commission thinks they would be desirable. Under California law, the same result could be achieved by incorporating a new nonprofit

corporation and then transferring assets and, perhaps, amending the articles of the original nonprofit corporation.

Pennsylvania law also contains provisions for converting a nonprofit corporation into a business corporation and vice versa. (See Sections 7951-7956 in Exhibit II.) Of course, in California, such conversions may be accomplished indirectly by setting up a new corporation and selling the assets of the old corporation to it and then dissolving. If the Commission is interested in providing for conversion, the staff will investigate this subject in more detail.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT I

[New York Not-For-Profit Corporation Law §§ 907-909]

§ 907. Approval by the supreme court.

(a) Where any constituent corporation or the consolidated corporation is, or would be if formed under this chapter, a Type B or a Type C corporation under section 201 (Purposes) of this chapter, no certificate shall be filed pursuant to section 904 (Certificate of merger or consolidation; contents) or section 906 (Merger or consolidation of domestic and foreign corporations) until an order approving the plan of merger or consolidation and authorizing the filing of the certificate has been made by the supreme court, as provided in this section. A certified copy of such order shall be annexed to the certificate of merger or consolidation. Application for the order may be made in the judicial district in which the principal office of the surviving or consolidated corporation is to be located, or in which the office of one of the domestic constituent corporations is located. The application shall be made by all the constituent corporations jointly and shall set forth by affidavit (1) the plan of merger or consolidation, (2) the approval required by section 903 (Approval of plan) or paragraph (b) of section 906 (Merger or consolidation of domestic and foreign corporations) for each constituent corporation, (3) the objects and purposes of each such corporation to be promoted by the consolidation, (4) 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 such corporation, (5) whether any votes against adoption of the resolution approving the plan of merger or consolidation were cast at the meeting at which the resolution was adopted by each constituent corporation, and (6) facts showing that the consolidation is authorized by the laws of the jurisdictions under which each of the constituent corporations is incorporated.

(b) Upon the filing of the application the court shall fix a time for hearing thereof and shall direct that notice thereof be given to such persons as may be interested, including the attorney general, any governmental body or officer and any other person or body whose consent or approval is required by section 909 (Consent to filing), in such form and manner

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as the court may prescribe. If no votes against adoption of the resolution approving the plan of merger or consolidation were cast at the meeting at which the resolution was adopted by any constituent corporation the court may dispense with notice to anyone except the attorney-general, any governmental body or officer and any other person or body whose consent or approval is required by section 909 (Consent to filing). Any person interested may appear and show cause why the application should not be granted.

(c) If the court shall find that any of the assets of any of the constituent corporations are held for a purpose specified as Type B in paragraph (b) of section 201 or are 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 court may, in its discretion, direct that such assets be transferred or conveyed to the surviving or consolidated corporation subject to such purpose or use, or that such assets be transferred or conveyed to the surviving or consolidated corporation or to one or more other domestic or foreign corporations or organizations engaged in substantially similar activities, upon an express trust the terms of which shall be approved by the court.

(d) If the court shall find that the interests of non-consenting members are or may be substantially prejudiced by the proposed merger or consolidation, the court may disapprove the plan or may direct a modification thereof. In the event of a modification, if the court shall find that the interests of any members may be substantially prejudiced by the proposed merger or consolidation as modified, the court shall direct that the modified plan be submitted to vote of the members of the constituent corporations, or if the court shall find that there is not such substantial prejudice, it shall approve the agreement as so modified without further approval by the members. If the court, upon directing a modification of the plan of merger or consolidation, shall direct that a further approval be obtained from members of the constituent corporations or any of them, such further approval shall be obtained in the manner specified in section 903 (Approval of

plan) or section 906(b). (Merger or consolidation of domestic and foreign corporations) of this chapter.

(e) If it shall appear, to the satisfaction of the court, that the provisions of this section have been complied with, and that the interests of the constituent corporations and the public interest will not be adversely affected by the merger or consolidation, it shall approve the merger or consolidation upon such terms and conditions as it may prescribe.

§ 908. Merger or consolidation of business and not-for-profit corporations.

(a) One or more domestic or foreign corporations which is, or would be if formed under this chapter, a type A or type C corporation under section 201 (Purposes) may be merged or consolidated into a domestic or foreign corporation which is, or would be if formed under the laws of this state, a corporation formed under the business corporation law of this state if such merger or consolidation is not contrary to the law of the state of incorporation of any constituent corporation. With respect to such merger or consolidation, any reference in paragraph (b) of section 901 of this article or paragraph (b) of section 901 of the business corporation law to a corporation shall, unless the context otherwise requires, include both domestic and foreign corporations.

(b) With respect to procedure including authorization by shareholders or approval by members, each domestic business corporation shall comply with the business corporation law, each domestic not-for-profit corporation shall comply with the provisions of this chapter and each foreign corporation shall comply with the applicable provisions of the law of the jurisdiction under which it is incorporated.

(c) The plan of merger or consolidation shall set forth all matter required by section 902 of the business corporation law or section 902 of this chapter and the terms and conditions of the proposed merger or consolidation, including the manner and basis of converting shares, membership or other interest in each constituent corporation into shares, bonds or other securities of the surviving or consolidated corporation, or the cash or other consideration to be paid or delivered in exchange for shares, membership or other interest in each constituent corporation, or a combination thereof.

(d) After adoption of the plan of merger or consolidation by the board and members or shareholders of each constituent corporation, unless the merger or consolidation is abandoned in accordance with paragraph (b) of section 903 (Approval

by members*) and paragraph (b) of section 903 (Authorization by shareholders) of the business corporation law, a certificate of merger or consolidation, entitled "Certificate of merger (or consolidation) of and into (names of corporations) under section 908 of the Not-for-Profit Corporation Law," shall be signed and verified on behalf of each constituent corporation and delivered to the department of state.

(1) If the surviving or consolidated corporation is, or is to be, a domestic corporation such certificate shall set forth the statements required by section 904(a) of the business corporation law or section 904(a) of this chapter and, as to each constituent foreign corporation the jurisdiction and date of its incorporation and the date when its application for authority to conduct activities or do business in this state was filed by the department of state or, if no such application has been filed, a statement to such effect.

(2) If the surviving or consolidated corporation is, or is to be formed under the law of any jurisdiction other than this state such certificate shall set forth:

(A) The statements required by subparagraphs (a) (1) and (2) of section 902 of the business corporation law or subparagraphs (a) (1) and (2) of section 902 (Plan of merger or consolidation) of this chapter, and the manner in which the merger or consolidation was authorized with respect to each constituent domestic corporation.

(B) The jurisdiction and date of incorporation of the surviving or consolidated foreign corporation, the date when its application for authority to do business in this state was filed by the department of state or, if no such application has been filed, a statement to such effect and that it is not to do business in this state until an application of such authority shall have been filed by such department.

(C) The date when the certificate of incorporation of each constituent domestic corporation was filed by the depart-

* This is an apparent reference to Section 903 of the Not-for-Profit Corporation law (Approval of plan).

ment of state and the jurisdiction and date of incorporation of each constituent foreign corporation, other than the surviving or consolidated foreign corporation, and, in the case of each such corporation authorized to do business or conduct activities in this state, the date when its application for authority was filed by the department of state.

(D) An agreement that the surviving or consolidated foreign corporation may be served with process in this state in any action or special proceeding for the enforcement of any liability or obligation of any domestic corporation or of any foreign corporation, previously amenable to suit in this state, which is a constituent corporation in such merger or consolidation, and for the enforcement, as provided in the business corporation law, of the rights of shareholders of any constituent domestic business corporation to receive payment for their shares against the surviving or consolidated corporation.

(E) An agreement that, subject to the provisions of section 623 of the business corporation law, the surviving or consolidated foreign corporation will promptly pay to the shareholders of each constituent domestic business corporation the amount, if any, to which they shall be entitled under the provisions of the business corporation law relating to the right of shareholders to receive payment for their shares.

(F) A designation of the secretary of state as his agent upon whom process against it may be served in the manner set forth in paragraph (b) of section 306 (Service of process), in any action or special proceeding described in subparagraph (D) and a post office address, within or without the state, to which the secretary of state shall mail a copy of the process in such action or special proceeding.

(e) The department of state shall not file a certificate delivered to it under subparagraph (d), 2) unless the consent of the state tax commission to the merger or consolidation is attached thereto.

(f) Where any constituent corporation is, or would be if formed under this chapter, a Type C corporation under section 201 (Purposes), no certificate shall be filed pursuant to this

section until an order approving the plan of merger or consolidation and authorizing the filing of the certificate has been made by the supreme court, as provided in section 907 (Approval by the supreme court).

(g) Upon the filing of the certificate of merger or consolidation by the department of state or on such dates subsequent thereto, not to exceed thirty days, as shall be set forth in such certificate, the merger or consolidation shall be effected.

(h) The surviving or consolidated domestic or foreign corporation shall thereafter cause a copy of such certificate, certified by the department of state, to be filed in the office of the clerk of each county in which the office of a constituent corporation, other than the surviving corporation, is located, and in the office of the official who is the recording officer of each county in this state in which real property of a constituent corporation, other than the surviving corporation, is situated.

(i) When such merger or consolidation has been effected:

(A) If the surviving or consolidated corporation is, or is to be, formed under the law of this state, it shall be subject to the business corporation law and the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations under section 906 (Effect of merger or consolidation) of the business corporation law, except that in subparagraph (b)(3) of such section the word "shareholder" shall be read to include the word "member" as the latter is defined in this chapter.

(B) If the surviving or consolidated corporation is, or is to be, incorporated under the law of any jurisdiction other than this state, the effect of such merger or consolidation shall be as provided in subparagraph (A), except insofar as the law of such other jurisdiction provides otherwise.

§ 909. Consent to filing.

If the purposes of any constituent or consolidated corporation would require the approval or consent of any governmental body or officer or any other person or body under section 404 (Approvals and consents) no certificate of merger or consolidation shall be filed pursuant to this article unless such approval or consent is endorsed thereon or annexed thereto.

EXHIBIT II

Pennsylvania Corporation Not-for-profit Code
§§ 7941-7946 (Division), 7951-7956 (Conversion)

SUBCHAPTER C

DIVISION

Sec.	
7941.	Division authorized.
7942.	Proposal and adoption of plan of division.
7943.	Articles of division.
7944.	Filing of articles of division.
7945.	Effective date of division.
7946.	Effect of division.

§ 7941. Division authorized

(a) **Division of domestic corporation.**—Any domestic nonprofit corporation may, in the manner provided in this subchapter, be

divided into two or more domestic nonprofit corporations incorporated or to be incorporated under this article, or into one or more such domestic nonprofit corporations and one or more foreign corporations not-for-profit to be incorporated under the laws of another jurisdiction or jurisdictions, or into two or more of such foreign corporations not-for-profit, if the law or laws of such other jurisdictions authorized such division.

(b) **Division of foreign corporation.**—Any foreign corporation not-for-profit may, in the manner provided in this subchapter, be divided into one or more domestic nonprofit corporations to be incorporated under this article and one or more foreign corporations not-for-profit incorporated or to be incorporated under the laws of another jurisdiction or jurisdictions, or into two or more of such domestic nonprofit corporations, if such foreign corporation not-for-profit is authorized under the laws of the jurisdiction under which it is incorporated to effect such division.

(c) **Surviving and new corporations.**—The corporation effecting a division, if it shall survive the division, is hereinafter designated as the surviving corporation. All corporations originally incorporated by a division are hereinafter designated as new corporations. The surviving corporation, if any, and the new corporation or corporations are hereinafter collectively designated as the resulting corporations.

§ 7942. Proposal and adoption of plan of division

(a) Preparation of plan.—A plan of division shall be prepared, setting forth:

(1) The terms and conditions of the division, including the manner and basis of:

(i) the reclassification of the membership interests or shares or obligations of the surviving corporation, if there be one; and

(ii) the disposition of the membership interests or shares and obligations, if any, of the new corporation or corporations resulting from the division.

(2) The mode of carrying the division into effect.

(3) A statement that the dividing nonprofit corporation will, or will not, survive the division.

(4) Any changes desired to be made in the articles of the surviving corporation, if there be one, including a restatement of the articles.

(5) The articles of incorporation required by subsection (b) of this section.

(6) Such other details and provisions as are deemed desirable.

(b) Articles of new corporations.—There shall be included in or annexed to the plan of division:

(1) Articles of incorporation, which shall contain all of the statements required by this article to be set forth in restated articles, for each of the new domestic nonprofit corporations, if any, resulting from the division.

(2) Articles of incorporation, certificates of incorporation, or other charter documents for each of the new foreign corporations not-for-profit, if any, resulting from the division.

(c) Proposal and adoption.—The plan of division shall be proposed and adopted, and may be terminated, by a domestic nonprofit corporation in the manner provided for the proposal, adoption and termination of a plan of merger in Subchapter B of this chapter (relating to merger, consolidation and sale of assets) or, if the dividing corporation is a foreign corporation not-for-profit, in accordance with the laws of the jurisdiction in which it is incorporated.

(d) Special requirements.—If any provision of the bylaws of a dividing domestic nonprofit corporation adopted before January 1, 1972 shall require for the adoption of a plan of merger or consolidation or a plan involving the sale, lease or exchange of all or substantially all of the property and assets of the corporation a specific number or percentage of votes of directors, members, or members of an other body or other special procedures, the plan of division shall not be adopted without such number or percentage of votes or compliance with such other special procedures.

§ 7943. Articles of division

Upon the adoption of a plan of division by the corporation desiring to divide, as provided in this subchapter, articles of division shall be executed under the seal of the corporation by two duly authorized officers thereof, and shall set forth:

(1) The name and the location of the registered office, including street and number, if any, of the dividing domestic corporation, or, in the case of a dividing foreign corporation, the name of such corporation and its domiciliary jurisdiction, together with either:

(i) if a qualified foreign corporation, the address, including street and number, if any, of its registered office in this Commonwealth; or

(ii) if a nonqualified foreign corporation, the address, including street and number, if any, of its principal office under the laws of such domiciliary jurisdiction.

(2) The statute under which the dividing corporation was incorporated and the date of incorporation.

(3) A statement that the dividing corporation will, or will not, survive the division.

(4) The name and the address, including street and number, if any, of the registered office of each new domestic nonprofit corporation or qualified foreign corporation resulting from the division.

(5) If the plan is to be effective on a specified date, the hour, if any, and the month, day and year of such effective date.

(6) The manner in which the plan was adopted by the corporation.

(7) The plan of division.

§ 7944. Filing of articles of division

The articles of division shall be filed in the Department of State. No certificate from any department evidencing the payment of taxes and charges shall be required.

§ 7945. Effective date of division

Upon the filing of articles of division in the Department of State, or upon the effective date specified in the plan of division, whichever is later, the division shall become effective. The division of a domestic nonprofit corporation into one or more foreign corporations not-for-profit or the division of a foreign corporation not-for-profit shall be effective according to the laws of the jurisdictions where such foreign corporations are or are to be incorporated, but not until articles of division have been adopted and filed, as provided in this subchapter.

§ 7946. Effect of division

(a) Multiple resulting corporations.—Upon the division becoming effective the dividing corporation shall be subdivided into the distinct and independent resulting corporations named in the plan of division and, if the dividing corporation is not to survive the division, the existence of the dividing corporation shall cease. The resulting corporations, if they are domestic corporations, shall not thereby acquire authority to engage in any business or exer-

cise any right which a corporation may not be incorporated under this article to engage in or exercise. Any resulting foreign corporation which is stated in the articles of division to be a qualified foreign corporation shall be a qualified foreign corporation under this part and the articles of division shall be deemed to be the application for a certificate of authority and the certificate of authority issued thereon of such corporation.

(b) Property rights.—Except as otherwise provided by order, if any, obtained pursuant to section 7549(b) of this title (relating to nondiversion of certain property), all the property, real, personal, and mixed, and franchises of the dividing corporation, and all debts due on whatever account to it, including subscriptions for membership and other choses in action belonging to it, shall be taken and deemed without further act or deed to be transferred to and vested in the resulting corporations on such a manner and basis and with such effect as is specified in the plan of division, or per capita among the resulting corporations, as tenants in common, if no such specification is made in the plan. The resulting corporations shall each thenceforth be responsible as separate and distinct corporations only for such liabilities and obligations as each corporation may undertake or incur in its own name, but shall be liable inter se for the debts and liabilities of the dividing corporation in the manner and on the basis specified in the plan of division. No liens upon the property of the dividing corporation shall be impaired by the division. One or more, but less than all, of the resulting corporations shall be free of all the liabilities and obligations of the dividing corporation to the extent, if any, specified in the plan, if no fraud of corporate creditors or members without voting rights and if no violation of law shall be effected thereby, and if all applicable provisions of Article 6 of the Uniform Commercial Code¹ (relating to bulk transfers) and all other applicable provisions of law are complied with. Otherwise, the liability of the dividing corporation, or of its members, directors, or officers, shall not be affected by the division, nor shall the rights of the creditors thereof or of any person dealing with such corporation be impaired by such division, and, except as otherwise provided in this section, any claim existing or action or proceeding pending by or against such corporation may be prosecuted to judgment as if such division had not taken place, or the resulting corporations may be proceeded against or substituted in its place as joint and several obligors on such liability, regardless of any provision of the plan of division apportioning the debts and liabilities of the dividing corporation.

(c) Taxes.—Any taxes, penalties and public accounts of the Commonwealth, claimed against the dividing corporation, but not settled, assessed or determined prior to such division, shall be settled, assessed or determined against any of the resulting corporations, and, together with interest thereon, shall be a lien against the franchises and property, both real and personal, of all such corporations. The Department of Revenue may, upon the application of the dividing corporation, release one or more, but less than all, of the resulting corporations from liability for all taxes, penalties and public accounts of the dividing corporation due the Commonwealth or any other taxing authority for periods prior to the effective date of the division, if the Department of Revenue is satisfied that the public revenues will be adequately secured.

(d) Articles of surviving corporation.—The articles of incorporation of the surviving corporation, if there be one, shall be deemed to be amended to the extent, if any, that changes in its articles are stated in the plan of division.

(e) Articles of new corporations.—The statements which are set forth in the plan of division with respect to each new domestic corporation and which are required or permitted to be set forth in restated articles of incorporation of corporations incorporated under this article, shall be deemed to be the articles of incorporation of each such new corporation.

(f) Directors and officers.—Unless otherwise provided in the plan, the directors and officers of the dividing corporation shall be the initial directors and officers of each of the resulting corporations.

(g) Automatic designation of agent for process.—If any of the resulting corporations is a nonqualified foreign corporation, the articles of division shall constitute a designation of the Department of State and any successor agency as the true and lawful attorney of such corporation upon whom may be served all lawful process in any action or proceeding against it for enforcement against it of any obligation of the dividing corporation for which it may be liable or any obligation arising from the division proceedings, and an agreement that the service of process upon the Department of State or its successor shall be of the same legal force and validity as if served on such corporation and that the authority for such service of process shall continue in force as long as any of the aforesaid obligations remain outstanding in this Commonwealth.

SUBCHAPTER D

CONVERSION

Sec.

- 7951. Conversion authorized.
- 7952. Proposal and adoption of plan of conversion.
- 7953. Articles of conversion.
- 7954. Filing of articles of conversion.
- 7955. Effective date of conversion.
- 7956. Effect of conversion.

§ 7951. Conversion authorized

(a) **Business to nonprofit.**—Any business corporation may, in the manner provided in this subchapter, be converted into a nonprofit corporation, hereinafter designated as the resulting corporation.

(b) **Nonprofit to business.**—Any nonprofit corporation may, in the manner provided in this subchapter, be converted into a business corporation, hereinafter designated as the resulting corporation.

(c) **Exceptions.**—

(1) This subchapter shall not authorize any conversion involving:

(i) A cooperative corporation.

(ii) Beneficial, benevolent, fraternal or fraternal benefit societies having a lodge system and a representative form of government, or transacting any type of insurance whatsoever.

(iii) Any corporation which by the laws of this Commonwealth is subject to the supervision of the Department of Banking, the Insurance Department or the Pennsylvania Public Utility Commission.

(2) Paragraph (1) of this subsection shall not be construed as repealing any statute which provides a procedure for the conversion of a nonprofit corporation into an insurance corporation.

§ 7952. Proposal and adoption of plan of conversion

(a) **Preparation of plan.**—A plan of conversion shall be prepared, setting forth:

(1) The terms and conditions of the conversion.

(2) The mode of carrying the conversion into effect.

(3) A restatement of the articles of the resulting corporation, which articles shall comply with the requirements of:

(i) the Business Corporation Law,¹ if the resulting corporation is to be a business corporation; or

(ii) this article, if the resulting corporation is to be a nonprofit corporation.

(4) Such other details and provisions as are deemed desirable.

(b) **Proposal and adoption.**—The plan of conversion shall be proposed and adopted, and may be terminated, in the manner provided for the proposal, adoption and termination of a plan of merger in Article IX of the Business Corporation Law² (relating to merger and consolidation), in the case of a business corporation which proposes to convert into a nonprofit corporation, or in Subchapter B of this chapter (relating to merger, consolidation and sale of assets), in the case of a nonprofit corporation which proposes to convert into a business corporation.

(c) **Rights of dissenting shareholders.**—If any shareholder of a business corporation which adopts a plan of conversion into a nonprofit corporation shall object to such plan of conversion and shall comply with the provisions of section 515 of the Business Corporation Law³ (relating to rights of dissenting shareholders), such shareholder shall be entitled to the rights and remedies of dissenting shareholders therein provided, notwithstanding anything to the contrary in subsection L of said section. There shall be included in, or enclosed with, the notice of meeting of shareholders of the business corporation called to act upon the plan of conversion a copy or a summary of the plan and a copy of this subsection and of section 515 of the Business Corporation Law.

¹ 15 P.S. §§ 1901 to 2203.
² 15 P.S. §§ 1801 to 1909.
³ 15 P.S. § 1515.

§ 7953. Articles of conversion

Upon the adoption of a plan of conversion by the corporation desiring to convert, as provided in this subchapter, articles of conversion shall be executed under the seal of the corporation by two duly authorized officers thereof, and shall set forth:

(1) The name of the corporation and the address, including street and number, if any, of its registered office.

(2) The statute under which the corporation was incorporated and the date of incorporation.

(3) If the plan is to be effective on a specified date, the hour, if any, and the month, day and year of such effective date.

(4) The manner in which the plan was adopted by the corporation.

(5) The plan of conversion.

§ 7954. Filing of articles of conversion

The articles of conversion shall be filed in the Department of State.

§ 7955. Effective date of conversion

Upon the filing of articles of conversion in the Department of State, or upon the effective date specified in the plan of conversion, whichever is later, the conversion shall become effective.

§ 7956. Effect of conversion

(a) **Business to nonprofit.**—Upon the conversion becoming effective the corporation, if theretofore a business corporation, shall be deemed to be a nonprofit corporation for all purposes, shall cease to be a business corporation and shall not thereafter operate in any manner resulting in pecuniary profit, incidental or otherwise, to its members or shareholders. The corporation shall remain liable for all existing obligations, public or private, taxes due the Commonwealth or any other taxing authority for periods prior to the effective date of the conversion, and, as such nonprofit corporation, it shall continue to be entitled to all assets therefore pertaining to it as a business corporation.

(b) **Nonprofit to business.**—Upon the conversion becoming effective the corporation, if theretofore a nonprofit corporation, shall be deemed to be a business corporation for all purposes, shall cease to be a nonprofit corporation, and may thereafter operate for a purpose or purposes resulting in pecuniary profit, incidental or otherwise, to its members or shareholders. The corporation shall issue share certificates to each shareholder entitled thereto. The corporation shall remain liable for all existing obligations, public and private, taxes due the Commonwealth or any other taxing authority for periods prior to the effective date of the conversion, and, as such business corporation, it shall continue to be entitled to all assets theretofore pertaining to it as a nonprofit corporation except as otherwise provided by order, if any, obtained pursuant to section 7549(b) of this title (relating to nondiversion of certain property).

Rough Outline

GENERAL NONPROFIT CORPORATION LAW

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§ 5159. Consolidated nonprofit corporation

5159. "Consolidated nonprofit corporation" means the new nonprofit corporation into which two or more other nonprofit corporations are consolidated.

Comment. Section 5159 is based on a portion of former Section 4101. See Section 5161 ("constituent nonprofit corporation" defined).

§ 5161. Constituent nonprofit corporation

5161. "Constituent nonprofit corporation" means a nonprofit corporation which is merged or consolidated with one or more other nonprofit corporations and, in the case of a merger, includes the surviving nonprofit corporation.

Comment. Section 5161 is based on Section 161 of the General Corporation Law and former Section 4102. See Section 5190 ("surviving nonprofit corporation" defined). It should be noted that, in the case of a consolidation, the constituent nonprofit corporations and the disappearing nonprofit corporations are the same. See Section 5165 ("disappearing nonprofit corporation" defined).

§ 5165. Disappearing nonprofit corporation

5165. "Disappearing nonprofit corporation" means a nonprofit corporation involved in a merger or a consolidation which is not the surviving nonprofit corporation or the consolidated nonprofit corporation.

Comment. Section 5165 is based in part on Section 165 of the General Corporation Law. It should be noted that, in the case of a consolidation, the constituent nonprofit corporations and the disappearing nonprofit corporations are the same. See Section 5161 ("constituent nonprofit corporation" defined). The existence of disappearing nonprofit corporations ceases when the merger or consolidation becomes effective. See Sections 6143 (effect of merger) and 6144 (effect of consolidation).

§ 5190. Surviving nonprofit corporation

5190. "Surviving nonprofit corporation" means a nonprofit corporation into which one or more other nonprofit corporations are merged.

Comment. Section 5190 is based on Section 190 of the General Corporation Law and a portion of former Section 4101.

CHAPTER 11. MERGER AND CONSOLIDATION

Article 1. Agreement of Merger or Consolidation§ 6110. Merger or consolidation of nonprofit corporations

6110. Two or more nonprofit corporations may be merged into one nonprofit corporation, or consolidated into a new nonprofit corporation, as provided in this chapter.

Comment. Section 6110 is similar to former Section 4100. Under this chapter, nonprofit corporations may be merged only with other nonprofit corporations and not with business corporations. Similarly, nonprofit corporations may consolidate only with other nonprofit corporations and the resulting consolidated corporation must be nonprofit. Former Section 9700 incorporated the merger and consolidation provisions of the General Corporation Law except to the extent modified by the provisions of former Sections 9701-9703. Chapter 11 (commencing with Section 1100) of the General Corporation Law no longer provides for consolidation of business corporations. See Article 5 (commencing with Section 6150) for special provisions applicable where one of the constituent nonprofit corporations is a foreign nonprofit corporation. See Sections 5159 (defining "consolidated nonprofit corporation"), 5161 (defining "constituent nonprofit corporation"), 5165 (defining "disappearing nonprofit corporation"), and 5190 (defining "surviving nonprofit corporation").

§ 6111. Contents of agreement of merger or consolidation

6111. An agreement of merger or consolidation shall be prepared which states the following:

(a) The terms and conditions of the merger or consolidation.

(b) If the agreement is for a merger, the amendments to the articles of the surviving nonprofit corporation to be effected by the merger, if any.

(c) If the agreement is for a consolidation, the matters required to be stated in the articles by Section 5250.

(d) The name of the surviving or consolidated nonprofit corporation and the name and place of incorporation of each disappearing corporation.

(e) The manner of converting the memberships in each of the constituent nonprofit corporations into memberships in the surviving or consolidated nonprofit corporation and, where permissible, if any memberships of a constituent nonprofit corporation are not to be converted solely into memberships in the surviving or consolidated nonprofit corporation, the cash, property, or rights that the holders of such memberships are to receive in exchange for such memberships.

(f) Other details and provisions as are desired, if any.

Comment. Section 6111 is derived from Section 1101 of the General Corporation Law and former Sections 4103 and 4105. Upon filing, the agreement of merger has the effect of amending the articles of the surviving nonprofit corporation in accordance with the statements prescribed by subdivision (b). See Section 6112. Similarly, in the case of a consolidation, the statements required by subdivision (c) become the articles of the consolidated nonprofit corporation upon the filing

of the agreement. See Section 6113. The name of the surviving or consolidated nonprofit corporation to be specified as provided in subdivision (d) may be the same as or similar to the name of a constituent nonprofit corporation. See Section 6114. As provided in subdivision (e), the agreement may provide for both the conversion of memberships of a constituent nonprofit corporation into the memberships of a surviving or consolidated nonprofit corporation and the compensation of members for memberships that are not so converted. This may be particularly desirable where fractional memberships in the constituent nonprofit corporation are involved. It should be noted, however, that memberships in a charitable corporation may not be compensated with money or property. See Section 6115. Similarly, assets subject to a charitable trust may not be used to compensate members in a merger or consolidation. Id.

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§ 6112. Amendment of articles by agreement

6112. If, in the case of a merger, the agreement provides for an amendment to the articles of the surviving nonprofit corporation, the amendment shall satisfy the requirements of Articles 1 (commencing with Section 5910) and 3 (commencing with Section 5930) of Chapter 9.

Comment. Section 6112 is the same in substance as a portion of subdivision (b) of Section 1101 of the General Corporation Law and the first paragraph of former Section 4105. An amendment may change the name of the surviving corporation. See Section 6114.

§ 6113. Articles of consolidated nonprofit corporation

6113. In the case of a consolidation, the matters required to be stated by subdivision (c) of Section 6111 shall be the articles of the consolidated nonprofit corporation.

Comment. Section 6113 is the same in substance as a portion of former Section 4104. The agreement of consolidation is required to include all the matters normally required to be stated in the articles by Section 5250. See Section 6111(c).

§ 6114. Name of surviving or consolidated nonprofit corporation

6114. The name of the surviving or consolidated nonprofit corporation may be the same as or similar to the name of a constituent nonprofit corporation, whether domestic or foreign and regardless of whether any such foreign nonprofit corporation is qualified to carry on activities in this state, subject to Sections 5241, 5242, 5243, and 5244.

Comment. Section 6114 is the same in substance as a portion of subdivision (b) of Section 1101 of the General Corporation Law.

§ 6115. Equal treatment of memberships; distribution of charitable assets forbidden

6115. (a) Each membership of the same class shall be treated equally with respect to any distribution of cash, property, or rights unless all members of the class consent to an unequal distribution.

(b) Notwithstanding subdivision (a), assets held by a nonprofit corporation on a charitable trust and all assets held by a nonprofit corporation organized for charitable purposes shall not be distributed to the members of a constituent nonprofit corporation upon merger or consolidation.

Comment. Subdivision (a) of Section 6115 is the same in substance as a portion of Section 1101 of the General Corporation Law. Subdivision (b) is new. It applies the principles governing the disposition of the assets of a charitable corporation or of assets held by a nonprofit corporation on a charitable trust when a dissolution occurs to the situation of a merger or consolidation. Compare Section 7034.

Article 2. Approval of Agreement By Boards and Members

§ 6120. Approval of agreement by boards of constituent nonprofit corporations

6120. The board of each constituent nonprofit corporation in a merger or a consolidation shall approve the agreement of merger or consolidation. Upon approval, the agreement shall be signed on behalf of each constituent nonprofit corporation by (1) its chairman of the board, president, or a vice president and (2) its secretary or an assistant secretary.

Comment. Section 6120 is the same in substance as a portion of Sections 1101 and 1102 of the General Corporation Law and a portion of former Section 4103.

§ 6121. Approval of agreement by members of constituent nonprofit corporations

6121. (a) Except as provided by Section 6122, the members of each nonprofit corporation seeking to merge or consolidate shall approve the agreement of merger or consolidation by a resolution adopted by the members entitled to exercise a majority of the voting power or by the written consent of members entitled to exercise two-thirds of the voting power.

(b) Subdivision (a) is applicable regardless of any limitations or restrictions on the voting power of any class of membership entitled to vote.

Comment. Subdivision (a) of Section 6121 continues the substance of the first two sentences of former Section 9701. Compare Section 1201(a)(General Corporation Law). Subdivision (b) continues the substance of the last sentence of former Section 9701. Subdivision (b) makes clear that only memberships entitled to vote may vote on the proposed merger or consolidation. Compare Section 152 (definition of "approved by (or approval of) the outstanding shares" for the purposes of General Corporation Law).

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§ 6122. Greater percentage or fraction of voting power required; prohibition against merger or consolidation forbidden

6122. (a) The articles may require the vote or written consent of a greater percentage or fraction of the voting power than would otherwise be required under Section 6121.

(b) The articles may not prohibit a merger or consolidation authorized by this chapter.

Comment. Section 6122 continues the substance of former Section 9703.

§ 6123. Approval by vote of members at meeting; notice

6123. Where the members act on the resolution to approve the proposed agreement of merger or consolidation, the votes shall be cast at a meeting duly called upon notice of the time, place, and purpose thereof, duly given to each member at least 20 days prior to the date of the meeting. A statement of the general terms of the proposed agreement shall accompany the notice of the meeting.

(b) Notwithstanding subdivision (a), notice of the meeting may be waived as provided in Section 5627.

Comment. Section 6123 continues the substance of former Section 9702.

§ 6124. Member's approval before or after board approval

6124. The approval of the agreement of merger or consolidation by the members may be given either before or after the approval of the agreement by the board.

Comment. Section 6124 is the same in substance as the first sentence of subdivision (f) of Section 1201 of the General Corporation Law and former Section 4108.

§ 6125. Execution of certificate of approval; contents

6125. (a) After the agreement of merger or consolidation has been approved by the board and members of each constituent nonprofit corporation, the officers of each constituent nonprofit corporation shall execute an officers' certificate of approval.

(b) The officers' certificate of approval shall set forth the following:

(1) A statement that the agreement of merger or consolidation was approved by the board of that nonprofit corporation.

(2) A statement that the agreement of merger or consolidation was approved by the vote of the members of that nonprofit corporation which equaled or exceeded the vote required.

Comment. Section 6125 is the same in substance as a portion of Section 1103 of the General Corporation Law and is comparable to former Section 4110. After being executed, the officers' certificates of approval are filed separately or along with the certified copy of the agreement of merger or consolidation as provided by Section 6140. See Section 5173 ("officers' certificate" defined).

§ 6126. Notice of approval of agreement

6126. When the agreement of merger or consolidation has been approved by the board and the members of a nonprofit corporation, each constituent nonprofit corporation shall mail notice of the approval to each of its members.

Comment. Section 6126 continues the substance of former Section 4109.

Article 3. Amendment and Abandonment of Agreement
of Merger or Consolidation

§ 6130. Amendment of agreement

6130. (a) An amendment to the agreement of merger or consolidation may be adopted and approved in the same manner as the original agreement.

(b) If the amendment is approved, the agreement as amended shall be signed and acknowledged and the approval of the board and the members certified in the manner provided by Section 6125 for an original agreement.

Comment. Section 6130 is the same in substance as Section 1104 of the General Corporation Law and former Section 4111.

§ 6131. Abandonment of merger or consolidation

6131. The board of a constituent nonprofit corporation may, in its discretion, abandon a merger or consolidation, subject to the contractual rights of third parties, including other constituent nonprofit corporations, without any action by the members of such nonprofit corporation, at any time before the merger or consolidation has become effective.

Comment. Section 6131 is the same in substance as Section 1105 of the General Corporation Law and former Section 4112.

Article 4. Filing Agreement and Certificates;

Effect of Filing

§ 6140. Filing copy of agreement and officers' certificates

6140. (a) A copy of the agreement of merger or consolidation and the officers' certificates of approval of each constituent nonprofit corporation shall be filed. In the case of a merger, the nonprofit corporation that is to be the surviving nonprofit corporation shall file the copy of the agreement of merger and the officers' certificates of approval from all the constituent nonprofit corporations.

(b) Except as provided in Sections 6141 and 6142, and subject to Section 5121, the merger or consolidation is effective upon filing the copy of the agreement and the officers' certificates of approval.

(c) The Secretary of State may certify a copy of the agreement of merger or consolidation separate from any officers' certificates attached thereto.

Comment. Section 6140 is based on portions of Section 1103 of the General Corporation Law. Compare former Sections 4110 and 4113. See Sections 6111 (agreement of merger or consolidation), 6125 (officers' certificates of approval). As subdivision (b) makes clear, the merger or consolidation is effective upon filing, subject to a delayed effective date as provided in Section 5121 and subject to the requirements of Sections 6141 (Franchise Tax Board certificate of satisfaction) and 6142 (notice to Attorney General).

§ 6141. Franchise Tax Board certificate of satisfaction

6141. Each disappearing nonprofit corporation which is subject to the Bank and Corporation Tax Law shall file a certificate of satisfaction of the Franchise Tax Board to the effect that all taxes imposed by the Bank and Corporation Tax Law have been paid or secured. Until the certificate of satisfaction is filed, the filing of the agreement or merger or consolidation and the officers' certificates of approval has no effect.

Comment. Section 6141 is the same in substance as a portion of Section 1103 of the General Corporation Law and former Section 4113. See Section 5165 ("disappearing nonprofit corporation" defined).

§ 6142. Notice to Attorney General; assets held on trust or by charitable corporation

6142. Where a constituent nonprofit corporation holds assets on a charitable trust or is organized for charitable purposes, a copy of the proposed agreement of merger or consolidation shall be filed with the Attorney General before the agreement is filed with the Secretary of State or, if the agreement is filed with a delayed effective date pursuant to Section 5121, before such date. An officers' certificate of such filing with the Attorney General, where required, shall be filed with the Secretary of State and, until such certificate is filed, the merger or consolidation has no effect.

Comment. Section 6142 is new. By providing for notice to the Attorney General of the proposed merger or consolidation of a charitable corporation or a nonprofit corporation holding assets on charitable trust, Section 6142 seeks to provide the Attorney General with the information needed to enforce the supervisory responsibilities over charitable trusts. See Section [5556]; Govt. Code § 12580 et seq. (Uniform Supervision of Trustees for Charitable Purposes Act). Where more than one constituent nonprofit corporation holds assets on charitable trust or is organized for charitable purposes, Section 6142 requires only one copy of the agreement of merger or consolidation to be filed with the Attorney General and one certificate of filing to be filed with the Secretary of State.

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§ 6143. Effect of merger

6143. Upon merger pursuant to this chapter:

(a) The separate existence of the disappearing nonprofit corporation ceases.

(b) The surviving nonprofit corporation succeeds, without other transfer, to all the rights and property of each of the disappearing nonprofit corporations.

(c) The surviving corporation is subject to all the debts and liabilities of each disappearing nonprofit corporation in the same manner as if the surviving nonprofit corporation had itself incurred them.

Comment. Section 6143 is the same in substance as subdivision (a) of Section 1107 of the General Corporation Law and the first paragraph of former Section 4116.

§ 6144. Effect of consolidation

6144. Upon consolidation pursuant to this chapter:

(a) The separate existence of each of the disappearing nonprofit corporations ceases.

(b) The consolidated nonprofit corporation succeeds, without other transfer, to all the rights and property of each of the disappearing nonprofit corporations.

(c) The consolidated nonprofit corporation is subject to all the debts and liabilities of each disappearing nonprofit corporation in the same manner as if the consolidated nonprofit corporation had itself incurred them.

Comment. Section 6144 continues the substance of the first paragraph of former Section 4116. It should be noted that, in the case of a consolidation, all the constituent nonprofit corporations are disappearing nonprofit corporations.

§ 6145. Rights of creditors and liens preserved

6145. Rights of creditors against, and liens upon the property of, each of the disappearing nonprofit corporations are preserved unimpaired. A lien upon the property of a disappearing nonprofit corporation is limited to the property affected thereby immediately prior to the time the merger or consolidation becomes effective.

Comment. Section 6145 is the same in substance as subdivision (b) of Section 1107 of the General Corporation Law and the second paragraph of former Section 4116.

§ 6146. Effect on pending actions or proceedings

6146. An action or proceeding pending by or against a disappearing nonprofit corporation may be prosecuted to judgment, which binds the surviving or consolidated nonprofit corporation, or the surviving or consolidated nonprofit corporation may be proceeded against or substituted in place of such disappearing nonprofit corporation.

Comment. Section 6146 is the same in substance as subdivision (c) of Section 1107 of the General Corporation Law and the last paragraph of former Section 4116.

§ 6147. Evidentiary effect of agreement

6147. A copy of an agreement of merger or consolidation, certified by an official having custody thereof, has the same force in evidence as the original and, except as against the state, is conclusive evidence of the performance of all conditions precedent to the merger or consolidation, the existence on the effective date of the surviving or consolidated nonprofit corporation, and the performance of the conditions necessary to the adoption of any amendment to the articles of the surviving nonprofit corporation contained in the agreement of merger.

Comment. Section 6147 is the same in substance as Section 1106 of the General Corporation Law and former Section 4115.

§ 6148. Effect of recording agreement

6148. Where a merger or consolidation takes place under the laws of this state or under the laws of a state or place providing substantially that the making and filing of the agreement of merger or consolidation vests in the surviving or consolidated nonprofit corporation all the real property of the disappearing nonprofit corporation, the filing for record in the office of the county recorder of a county in this state in which real property of the disappearing corporation is located of either (1) a certificate prescribed by the Secretary of State or (2) a copy of the agreement of merger or consolidation, certified by the Secretary of State or other authorized public official of the state or place pursuant to the laws of which the merger or consolidation is effected, evidences record ownership in the surviving or consolidated nonprofit corporation of all interest of the disappearing nonprofit corporation in the real property located in that county.

Comment. Section 6148 is the same in substance as Section 1109 of the General Corporation Law. Compare former Sections 4114 and 4122.

Article 5. Mergers and Consolidations Involving
Foreign Nonprofit Corporations

§ 6150. Merger or consolidation of domestic nonprofit corporation with foreign nonprofit corporation

6150. The merger or consolidation of a domestic nonprofit corporation with a foreign nonprofit corporation may be effected if the foreign nonprofit corporation is authorized by the laws under which it is formed to effect a merger or consolidation.

Comment. Section 6150 is the same in substance as the first sentence of subdivision (a) of Section 1108 of the General Corporation Law and the first paragraph of former Section 4113.

§ 6151. Law governing surviving nonprofit corporation

6151. In the case of merger of a domestic and a foreign nonprofit corporation, the surviving nonprofit corporation may be any one of the constituent nonprofit corporations and continues to exist under the laws of the state or place of its incorporation.

Comment. Section 6151 is the same in substance as the second sentence of subdivision (a) of Section 1108 of the General Corporation Law and the second sentence of the second paragraph of former Section 4118.

§ 6152. Law governing consolidated nonprofit corporation

6152. In the case of consolidation of a domestic and a foreign nonprofit corporation, the consolidated nonprofit corporation may be a nonprofit corporation organized under the laws of the state or place under which any one of the constituent nonprofit corporations is incorporated.

Comment. Section 6152 continues the substance of the first sentence of the second paragraph of former Section 4118.

§ 6153. Law controlling merger or consolidation

6153. (a) If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a domestic nonprofit corporation, the merger or consolidation proceedings with respect to such nonprofit corporation and any disappearing domestic nonprofit corporation shall conform to the provisions of this chapter.

(b) If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a foreign corporation, the merger or consolidation proceedings may be in accordance with the laws of the state or place of incorporation of the surviving nonprofit corporation or of proposed incorporation of the consolidated nonprofit corporation. The requirements of Section[s] 6121 [and 6127] and subdivision (l) of Section 6155 shall be satisfied with respect to any disappearing domestic nonprofit corporation.

Comment. Section 6153 is the same in substance as subdivision (b) of Section 1103 of the General Corporation Law and the third paragraph of former Section 4118. Subdivision (b) makes clear that, even where the merger or consolidation is to be governed by the law of another state, the provisions concerning membership approval (Section 6121)[, and dissenters' rights (Section 6127)] continue to apply to a disappearing domestic nonprofit corporation, and the papers filed in the other state must also be filed in this state pursuant to subdivision (b) of Section 6155.

Note. Section 6127, a cross-reference section concerning dissenters' rights, will be drafted along with Chapter 13 (Dissenters' Rights).

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§ 6154

§ 6154. Filing of agreement where surviving or consolidated domestic nonprofit corporation; surrender of foreign nonprofit corporations' right to conduct intrastate activities

6154. (a) If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a domestic nonprofit corporation, the agreement of merger or consolidation and the certificate of approval of each constituent domestic nonprofit corporation shall be filed. Except as provided in Sections 6141 and 6142, and subject to Section 5121, the merger or consolidation is effective as to the domestic nonprofit corporation upon filing.

(b) Upon such filing, a disappearing foreign nonprofit corporation which has qualified to conduct intrastate activities surrenders such right.

Comment. Section 6154 is based on subdivision (c) of Section 1108 of the General Corporation Law and a portion of the first paragraph of former Section 4119. Subdivision (a) makes clear that the Franchise Tax Board certificate of satisfaction and an officers' certificate of notice to the Attorney General may be required. See Sections 6141 and 6142.

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§ 6155. Filing of surrender of right to conduct intrastate activities; filing of papers filed in other state

6155. If the surviving nonprofit corporation or the consolidated nonprofit corporation is to be a foreign nonprofit corporation:

(a) A disappearing foreign nonprofit corporation which has qualified to conduct intrastate activities in this state shall file a certificate of surrender of such right prescribed by Section [].

(b) A copy of the agreement of merger or consolidation and of the officers' certificates of approval or other document filed by the surviving or consolidated foreign nonprofit corporation in the state or place of its incorporation shall be filed as to a disappearing domestic nonprofit corporation. The copy shall be certified by the public officer having official custody of the original or, in lieu thereof, an executed counterpart of such agreement, certificate, or other document. Except as provided by Sections 6141 and 6142, and subject to Section 5121, the merger or consolidation is effective as to the domestic nonprofit corporation upon filing.

Comment. Section 6155 is based on subdivision (d) of Section 1108 of the General Corporation Law and a portion of the second paragraph of former Section 4119. Subdivision (b) makes clear that the Franchise Tax Board certificate of satisfaction and an officers' certificate of notice to the Attorney General may be required. See Sections 6141 and 6142.