

# LAYING *the* GROUNDWORK

*Filing Basics for Successful Mergers and Acquisitions*



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# MERGERS *and* ACQUISITIONS

## Terminology

### General terms

**Mergers and acquisitions:** The purchase, sale, division, or act of otherwise combining different companies and entities.

**Acquisition:** The outright purchase by one company of another company (or a division of that company).

**Merger:** The combination of two or more companies.

### Merger categories

**Full-blown merger:** A merger in which there is no common ownership between or among the companies. For a full-blown merger to move forward, the shareholders of all the constituent companies must approve it.

**Parent-subsidary merger:** Occurs when one company owns all or substantially all (usually 90% or greater, depending on the jurisdiction) of the shares of the other constituent companies. Shareholders don't need to approve a parent-subsidary merger; instead, the board of directors of the parent company can act alone.

**Upstream merger:** A parent-subsidary merger in which the parent company survives.

**Downstream merger:** A parent-subsidary merger in which a subsidiary company survives.

**Primary merger:** The merger that occurs in the domestic states of the merging entities.

**Surviving entities:** Entities that continue to exist after a merger.

**Non-surviving entities:** Entities that are absorbed by a surviving entity.



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Mergers and acquisitions are among the most powerful growth tools available to companies. The oft-repeated maxim that “one plus one makes three” sums it up: Thanks to the synergies created when legal entities combine, mergers facilitate growth that’s seldom attainable on a year-over-year, organic basis. While deals principally seek to create shareholder value, successful mergers can accomplish much more than that. They can extend corporate power, increase market share, aid in diversification, and enhance a company’s likelihood of obtaining future financing.

Along with their financial rewards, though, mergers and acquisitions come with a number of thorny compliance challenges. They’re some of the most complex transactions that arise during the corporate life cycle, and place considerable demands on everyone who is involved with them. With recent trends favoring more aggressive deal timelines, the likelihood that stakeholders will overlook key compliance requirements is growing all the time. In the overheated atmosphere of a deal, even experienced legal teams may let some of the underappreciated, but no less important, jurisdictional filings slip by.

The good news is that with a little planning you can take care of your deal-related filings in a timely, comprehensive fashion. In the following sections, we’ll look at the filings, both pre-deal and post-deal, that mergers and acquisitions typically call for, and offer a few tips on how to take care of them.





## Sizing up your filings

When planning for the filings a deal requires, be sure to examine the big picture. It's not enough to take care of your filings in the affected entities' home jurisdictions and hope the rest sorts itself out. You've got to look beyond the primary merger to all the other jurisdictions in which the entities are registered.

Take foreign qualification for example. Let's say you have a Delaware entity that is merging into another Delaware entity. Is the non-surviving entity qualified to do business in states outside of Delaware? If so, you'll need to update those states with evidence of the merger or file a withdrawal if required. (Sure, you may have completed your Delaware filings, but don't forget to notify other states that the non-surviving entity is no longer in existence.) How about the surviving entity? Is it qualified in those states where the non-surviving entity currently exists? If it isn't, does it need to be? These are the kinds of questions you should be asking.

You also need to consider assumed name filings. If the non-surviving entity has DBAs and the surviving entity wants to hold on to those names, name reservations or name changes will be a necessary part of the merger.

The risks posed by missed filings vary. They range from unsettling, like a surprise notice from the secretary of state that the non-surviving entity still exists in a foreign jurisdiction, to punitive. The state of Arizona, for example, charges a \$100 fine if a name change is not filed within 60 days of a merger. While this might seem like pocket change in light of the millions of dollars passing hands during a typical deal, money is money, and it's an expenditure—and embarrassment—that can be easily avoided with careful planning and execution.

## ? Pre-merger questions

When you start planning, run through the following questions:

What are the names and states of organization and qualification of all the constituent entities?

What are the relationships between the entities (e.g., parent to subsidiary)?

What is the merger's effective date?

Which entity will survive the merger?

When do filings have to be accomplished?

Are the entities in good standing?

## A few filings you should be thinking about pre-deal:

**Agreement of merger:** A full-blown merger may require either an Agreement of Merger or a Plan of Merger and Articles/Certificate of Merger. Requirements vary by jurisdiction; in several jurisdictions, including Delaware, the directors of the companies approve an Agreement of Merger between the companies and submit it to the shareholders of each company for approval. Depending on what jurisdiction you're in and the types of entities involved, different forms may apply. Delaware, for instance, offers different forms according to surviving entity type.

**Qualifications:** If, before the merger, the surviving entity is qualified in all states where the business of the non-surviving entity will continue to operate, this allows for a continuous presence in those jurisdictions. Pre-merger qualification may also facilitate—or eliminate the need for—tax clearance, and may make the post-merger filing process easier.

**Name availability:** If the surviving entity will change its name as part of the merger, the new name must be reserved in every jurisdiction where operations will continue after the merger. (Note: Name availability is also a critical piece of the Qualifications scenario above.)

**Amendment:** A company may change its name, increase its authorized capital, or amend any other portion of its Articles/Certificate of Incorporation in the merger document. Companies are usually restricted to a name change only when filing a Certificate of Ownership.

**Post-merger filings:** These filings are made in qualified foreign jurisdictions as a result of a domestic merger. They can include filing evidence of merger and formal withdrawals of non-surviving entities.

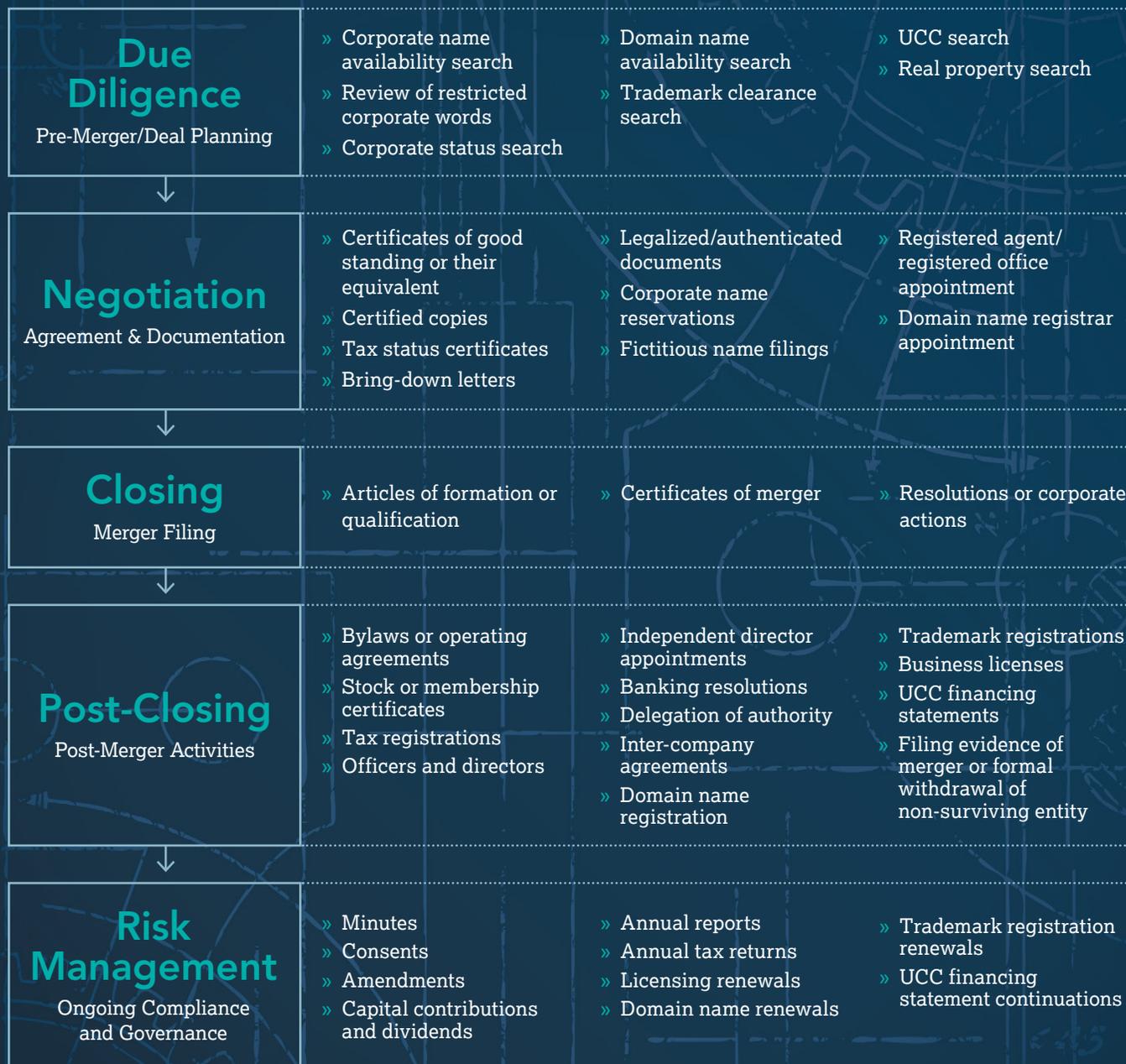
**Tax clearances:** A tax clearance is written confirmation from the jurisdiction that an entity is up to date with its tax payments and not in arrears. Many jurisdictions have tax clearance requirements that must be completed before the withdrawal of a non-surviving entity will become effective. Depending on the type of entity and the jurisdictional requirements, the tax clearance process can take months to be completed.

**Pre-clearance:** Delaware offers a service for pre-clearance of mergers that can ensure that the merger will be effective on the date desired.

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## *The Life Cycle of a Deal*

An outline of a deal's major phases and a sampling of the actions and filings that may be required.



**Note:** Every activity listed here requires close management of documents and records in a centralized and secure location.

### Timing is everything

Keep in mind that most deal-related filings take time and require a significant amount of internal coordination. For one, filings should be timed to take advantage of any favorable tax situations. Post-filing effective dates allow the merger to be effective on the same date in different jurisdictions. For certain filings, pre-clearances and expedited filings may be available at the jurisdiction, but it's prudent not to lean too heavily on that possibility. You should anticipate, too, that required tax clearances may delay your filings. With mergers and acquisitions, as with so much in life, a little planning goes a long way.



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