

# **STRUCTURING A NEWSROOM MERGER**

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This document outlines the range of options for combining two newsrooms and the legal documents involved. This document serves as an overview. Legal Counsel should be retained in completing binding agreements in connection with a Newsroom Merger.

## **STRUCTURES**

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### **1. Task-Focused Partnership**

In a task-focused partnership between two non-profits, the newsrooms collaborate on specific joint stories, with each newsroom providing resources. Via a Memorandum of Understanding (MOU), or other formal agreement such as a Term Sheet, the allocation of revenues and expenses, responsibilities for research, promotion/social media engagement and other relevant roles/tasks are outlined and agreed to by the participants. If the partnership is between a for-profit and non-profit entity, then the activities, and the allocation of revenues and expenses should be clearly defined to show that such activities either help advance the mission of the non-profit or are unrelated to the non-profit's mission and, therefore, subject to unrelated business income tax, or "UBIT". UBIT applies to income derived from a regularly carried on trade or businesses that is unrelated to the performance of the organization's tax-exempt (e.g., charitable) functions.

### **2. Joint Venture**

In a joint venture, two non-profits agree to undertake an economic activity together. This can be completed by entering into a Joint Venture Agreement that clarifies roles, financial, legal, and other responsibilities or by creating a separate legal entity. An example of this type of structure was Classical Public Radio Network (CPRN), a joint service provided by KUSC (licensed to University of Southern California) and Colorado Public Radio (CPR). CPR and KUSC set up a non-profit, limited-liability corporation (LLC) to streamline their classical music operations and to enable multiple distribution opportunities in broadcast, cable, satellite, and Internet. CPR and KUSC both had a 50% interest in the corporation. A MOU can be created to outline the intended joint venture, and if a legal entity such as an LLC is formed, an operating agreement for the LLC will need to be created. In addition, the LLC will need to be established on the state and federal level (1023 filing for a new 501c3).

Although the agreements for nonprofit-for-profit joint ventures and mergers are similar, such transactions can be complicated as they may have tax implications and create a risk to the non-profit's tax-exempt status. Advertising revenues and sales of products and services might be considered unrelated business income by the IRS. Such mergers and joint ventures are typically structured through subsidiaries to shield the non-profit.

### **3. Merger**

In a merger, two organizations agree to combine their operations. Depending upon the agreed upon structure, it could be that an entirely new organization is established to which both organizations will contribute their existing assets. Or it could be decided that one organization merges into the other

organization. From a governance perspective, a merger generally provides for the combining of the existing boards, and a consensus and agreement regarding the how the merged organization will operate in the future. Legal agreements in connection with a merger often involve the transfer of assets from one organization to another without compensation under a Merger Agreement. While mergers between non-profit and for-profit entities are structured similarly, there may be unique state law requirements and IRS requirements imposed on non-profits because of their tax-exempt status.

#### **4. Acquisition**

In non-profit acquisitions, one organization agrees to acquire the assets of another organization (as opposed to the stock of a corporation). The acquisition terms may include fixed assets, intellectual property, assumption of obligations (leases, debt, etc.), commitments regarding personnel, board positions, etc. Generally, via an independent appraisal/valuation, a purchase price is established, and the acquiring entity agrees to pay a sum of money to the organization selling its assets. Legal agreements in connection with an acquisition include the Purchase Agreement. The seller would generally dissolve its company or agree to a non-compete agreement for a period of time.

An acquisition might also involve a non-profit acquiring the assets of a for-profit or vice versa. The agreements used in these transactions are similar to those in non-profit to non-profit acquisitions and include a description of the assets being transferred, the liabilities being assumed, and appropriate representations and warranties regarding such assets and liabilities and the parties. In the case of a sale from a for-profit to a non-profit, the seller has options regarding the purchase price, receiving it in the form of cash, a note receivable, or considering the transfer of the assets as a donation, possibly resulting in a tax deduction.

### **FORMAL AGREEMENTS**

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When structuring a newsroom merger there are number of formal agreements that may be part of the process.

#### **1. Letter of Intent (LOI)**

- The LOI documents that the two parties are committed to negotiating in good faith with one another.
  - Ideally it clarifies that the negotiation is confidential, exclusive and is for a set period of time (which can be extended if both parties agree).
- Most clauses within a LOI are not legally binding and are negotiable; however, points included should generally reflect the terms each party requires.
- Typical points addressed:
  - Assets (real property, equipment, intellectual property, contracts, etc.);
  - Cash and non-cash Consideration and method of payment;

- Subject to execution of definitive agreement with customary representations, warranties and covenants;
- Due diligence rights;
- Exclusivity;
- Confidentiality;
- Escrow deposit; and
- Termination date and other "outs"

## **2. Memorandum of Understanding (MOU)/Term Sheet**

- The MOU documents the terms that the parties are agreeing to, and under the first three structures, may serve as the legally binding agreement.
- The MOU generally sets out the parties involved, includes recitals as to the background and the reason for entering into the MOU.
- Typical points include:
  - Term;
  - Roles and responsibilities;
  - Accounting and sharing of revenues and expenses;
  - Governance matters;
  - Customary representations, warranties and covenants;
  - Reporting requirements;
  - Access to records;
  - Due diligence rights;
  - Exclusivity;
  - Confidentiality;
  - Termination date and other "outs"

## **3. Merger Agreement**

- The Merger Agreement documents the terms of the merger.
- Agreed upon legal structure of merged entity, including governance oversight and composition.
- Included and excluded assets being merged.
- Assumption of Liabilities and Obligations
- Representations and Warranties of the Parties

- Covenants
- Conditions to Closing
  - Conditions and obligations of the Parties
  - Liability for damages if there is a breach of representations and warranties and failure to close
- Closing
  - Scheduling
  - Closing deliveries
- Termination Rights
  - Terminating events; "drop-dead" date
  - Liquidated damages
  - Specific performance
- Survival of Representations; Indemnification
- Other Provisions
  - Commissions and brokerage fees
  - Filing fees, legal fees
  - Assignment
  - Governing law

#### **4. Purchase Agreement**

- The Purchase Agreement documents the terms of the acquisition.
- Included and excluded assets in asset acquisitions
  - Included: real property and tangible personal property, licenses, copyrights, trademarks & other intangibles, assumed contracts
  - Excluded: cash on hand and cash equivalents, insurance policies, certain books and records, employment agreements & benefit plans
  - Accounts receivable
  - Purchase Price
  - Adjustments to purchase price: prepaid revenues, rent, utilities, taxes and other prorations; accounts receivable; specific liabilities
  - Earnest money escrow: liquidated damages
- Assumption of Liabilities and Obligations

- Representations and Warranties of Seller/Buyer
- Pre-Closing Covenants
  - Seller's affirmative covenants
  - Seller's negative covenants
  - Joint covenants
- Conditions to Closing
  - Conditions to Buyer's obligations
  - Conditions to Seller's obligations
  - Contrast failure to close due to breach of representations and warranties (liability for damages) with failure of closing condition to occur
- Closing
  - Scheduling
  - Closing deliveries
- Termination Rights
  - Terminating events; "drop-dead" date
  - Liquidated damages
  - Specific performance
- Survival of Representations; Indemnification
- Other Provisions
  - Commissions and brokerage fees
  - Filing fees, legal fees
  - Assignment
  - Governing law

## OTHER ELEMENTS

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### 1. Documents/Steps that may be needed for Closing

- The closing memorandum
- Governmental filings and other governmental approvals
- Third-party consents; assignment of contracts and leases
- UCC, lien and judgment searches and releases

- Title commitments, surveys and environmental reports
- Conduct of business in ordinary course and preservation of assets
- Additional due diligence: access to and review of information
- Authorizing resolutions
- Closing schedule updates
- Circulation of closing documents

## **2. Closing**

- Standard closing documents
- Prorations: prepaid revenues, rents, taxes, utilities, contractual obligations, barter contracts
- Notification to governmental authorities (if applicable) and other third parties
- Use of closing or side agreements to handle problems at closing
- Closing of purchase financing (if applicable) and waiting for the wire; placing documents in escrow if wire fails to arrive or if there are other obstacles to closing