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Mergers and Asset Sales

Part 1: Options for Tough Times

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Mission of
Pro Bono Partnership of Atlanta:

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals.

We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

Pro Bono Partnership of Atlanta Eligibility & Other Information

- In order to be a client of Pro Bono Partnership of Atlanta, an organization must:
  - ✓ Be a 501(c)(3) nonprofit.
  - ✓ Be located in or serve the greater Atlanta area.
  - ✓ Serve low-income or disadvantaged individuals.
  - ✓ Be unable to afford legal services.
- *Visit us on the web at* www.pbpatl.org
- We host free monthly webinars on legal topics for nonprofits
  - ✓ To view upcoming webinars or workshops, visit the Workshops Page on our website
  - ✓ Join our mailing list by emailing rla@pbpatl.org

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Legal Information

✓ **Focus of webcast is nonprofit organizations combining with other nonprofit organizations**.

✓ This webcast presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Agenda

- ➢ Circumstances that Raise Nonprofit Mergers
- ➢ Overview of Process for a Merger – 12 Steps!
- ➢ Merger & Other Combination Options - Legal
- ➢ Challenges and Lessons Learned

Definition of Merger

A combination of two things into one.

Changing Nonprofit Environment

- Rapid growth in the number of nonprofits – increasing competition.
- Increasingly complex and expanding needs.
- Increasing government devolution.
- Lack of corresponding increases in funding.
- Increasing funder pressure to collaborate.
- Difficulty in retaining staff and board leadership.
- Increasing public scrutiny, including the press
- COVID

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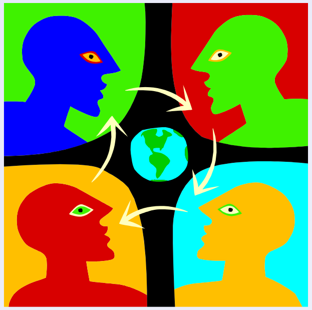
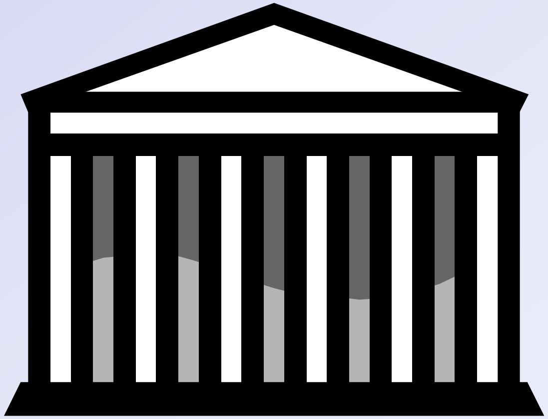
Some Benefits of Mergers

- Create more strategic funding sources.
- Create a broader continuum of services.
- Create more career opportunities for staff.
- Create operational economies of scale and efficiency.
- Gain greater public visibility and awareness.
- Larger market share and better market positioning.
- Integrate services.
- Greater political voice and influence.

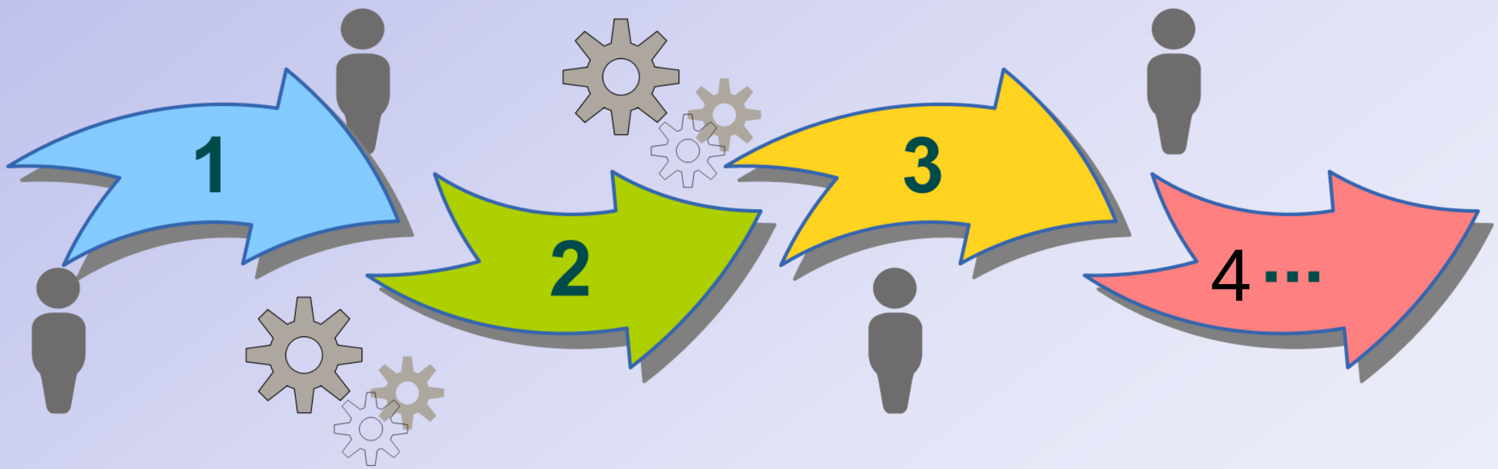


Architecture for Successful Merger

- Solid foundation in place
- Sound relationships among partners
- Worthwhile results
- Constituency for collaboration
- Collaborative leadership and principles



MORE FORMAL MERGER PROCESSES



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Merger Process

- Phase 1 – Feasibility/Assessment Study

- Phase 2 – Negotiate a Merger
- Phase 3 - Plan for Restructuring & Legal Steps
- Phase 4 – Implementation of business combination

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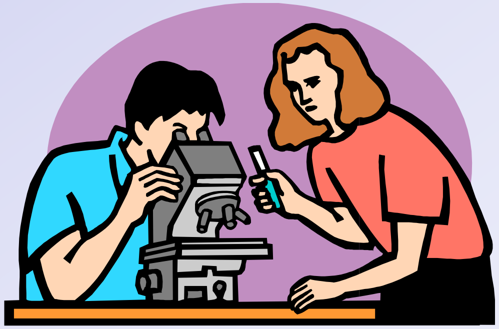
Getting Started

- Know your competitive advantage – pair down to your core mission
- Is the timing and reason right?
- Are you internally prepared for a merger assessment?
- What is the purpose?
- What is the best partner to meet the purpose?
- Is a merger feasible?

Phase 1 - Feasibility/Assessment

- Step 1 – Define the current internal and external situations; assess needs and opportunities
- Step 2 – Partner assessment for merger potential – limited due diligence
- Step 3 – Determine merger purpose and commit to negotiation



Internal Situation Analysis

- Purpose of the merger
  - ✓ Help your Theory of Change - Client or organizational issues to address through a merger
  - ✓ Outcomes desired from the merger
  - ✓ Criteria for partners and a successful merger
- Do you meet internal key success factors?
- Consensus on key issues and outcomes
- What you bring to the table – strengths – how does your partner benefit

Internal Key Success Factors

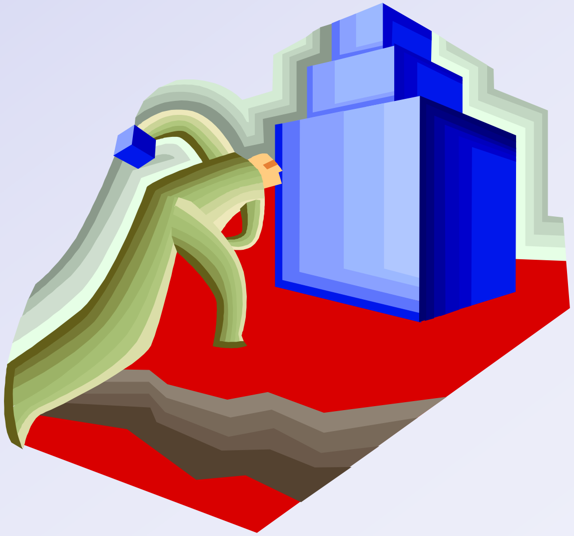
- Staff/board member champions the process – preferably board
- Positive past collaboration experiences
- Board support/encouragement
- Organizational risk taking
- Growth orientation
- Positive board-ED relationship

Partner Assessment

- ID potential partners based on your purpose
- Communicate interests
- Evaluate
  - ✓ Past experiences
  - ✓ Degree of trust
  - ✓ Complementary Partner strengths and weaknesses

Purpose and Good Faith

- ➢ Develop a Merger Task Force
- ➢ Board Authorization/resolution to negotiate
  - ✓ Timeframe
  - ✓ Purpose of merger
  - ✓ Key partnership criteria
  - ✓ Commitment to communication
  - ✓ Nondisclosure agreement



Merger Legal Steps

- Nondisclosure agreement
- Letter of Intent
- Legal Due Diligence
- Plan of Merger
- Articles/Certificate of Merger
  - May include revisions to articles of incorporation and bylaws of surviving entity

Nondisclosure Agreements

- Protects confidential business information
- Don't share business practices, donor contacts, financials, trade secrets, etc. without an NDA
- Sooner these are in place, the better; Early in Phase 1

Phase 2 – Negotiate a Merger

- Step 4 – Complete due diligence and enter into Letter of Intent (Legal Counsel)
- Step 5 – Merger Task Force negotiates key issues.
- Step 6 – Socialize the recommendations with entire board & key stakeholders.
- Step 7 – Merger Task Force develops a Plan and MOU voted on by boards. (Legal Counsel)

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Legal Counsel

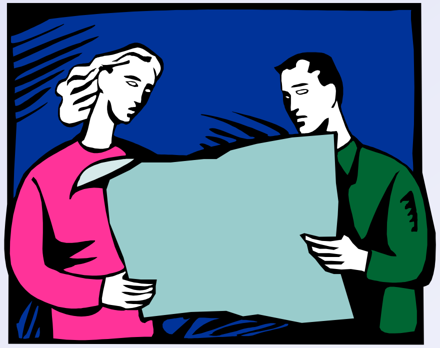
- Once initial high-level due diligence is complete, meet with legal counsel
- Discuss merger options
- Prepare Letter of Intent
  - Nonbinding (regarding the terms of the merger, but binding regarding confidentiality)
  - Limited time
  - Ultimate goal
- Legal due diligence
- Finalize merger options and attorneys prepare appropriate resolutions, documents and filings
  - Each entity needs its own legal counsel

Common Issues

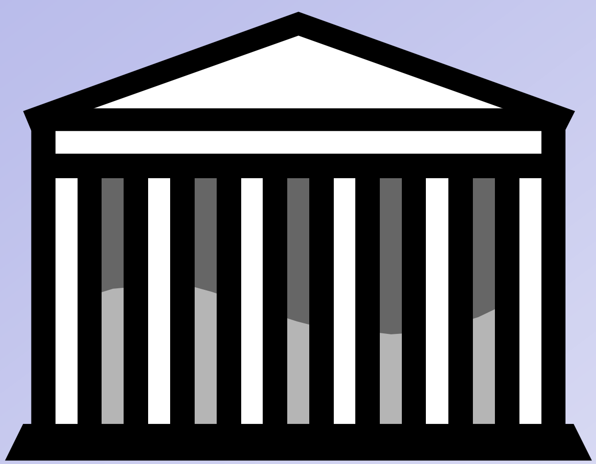
- Governance Issues – control
- Financial Issues
- Program Issues
- Human Resources Issues
- Capital Issues
- Communication Issues

Phase 3 - Plan for Merger

- Step 8 – Develop the merger implementation plan
- Step 9 – Develop structures and processes for implementation
- Step 10 – Complete merger - finalize transaction documents



Phase 3 Details



- Refine legal structure
- Develop governance structure
- Create a Transition Team
- Create need Board/staff Working Task Forces
- Create merger legal documents depending on structure

Phase 4 - Implementation

- Step 11 –Implementation and cultural integration
  - ✓ Board & organizational Integration
  - ✓ Working Task Forces meeting regularly
  - ✓ Transition Team to oversee/coordinate implementation
  - ✓ Cultural integration - jointly create new values/norms
- Step 12 – Monitor and evaluate
  - ✓ Measure/evaluate outcomes
  - ✓ Celebrate successes

Merger Structure Options

- Asset Transfer (not a true merger)
- Consolidation – both entities merge into new entity
- Parent – Subsidiary relationship created
- Merger of entities

Asset Transfer

- Entity A's assets transferred to Entity B (following which Entity A typically dissolves)
- Entity B can select assets and liabilities it acquires – Avoiding being burdened with liabilities of Entity A
- May need assignments of revenue-generating contracts
- Employment issues to be addressed

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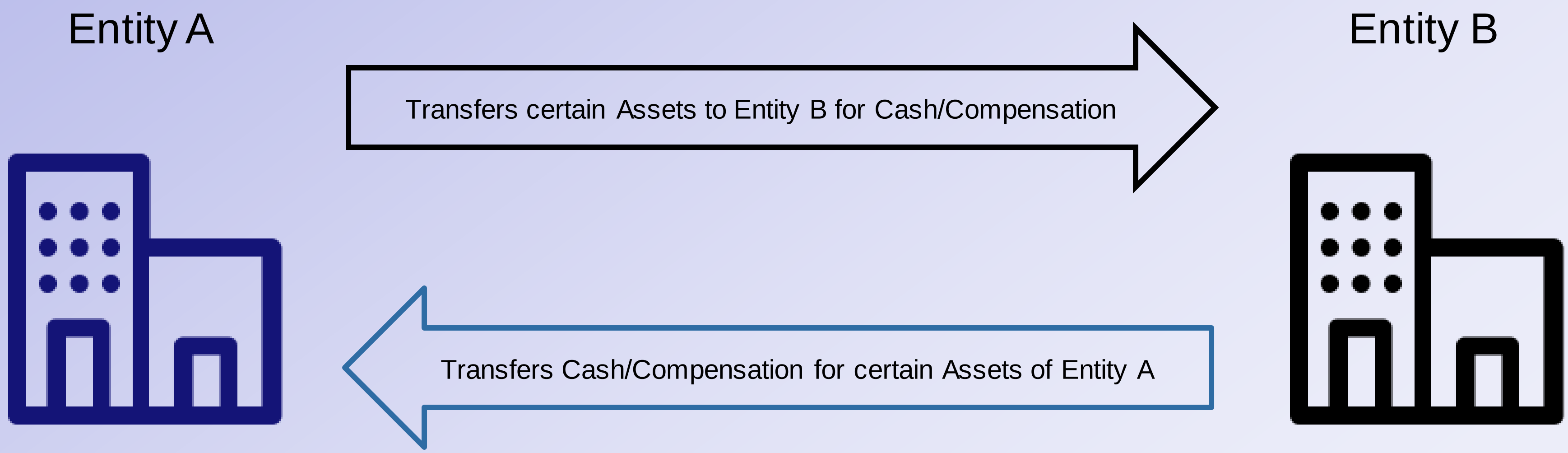
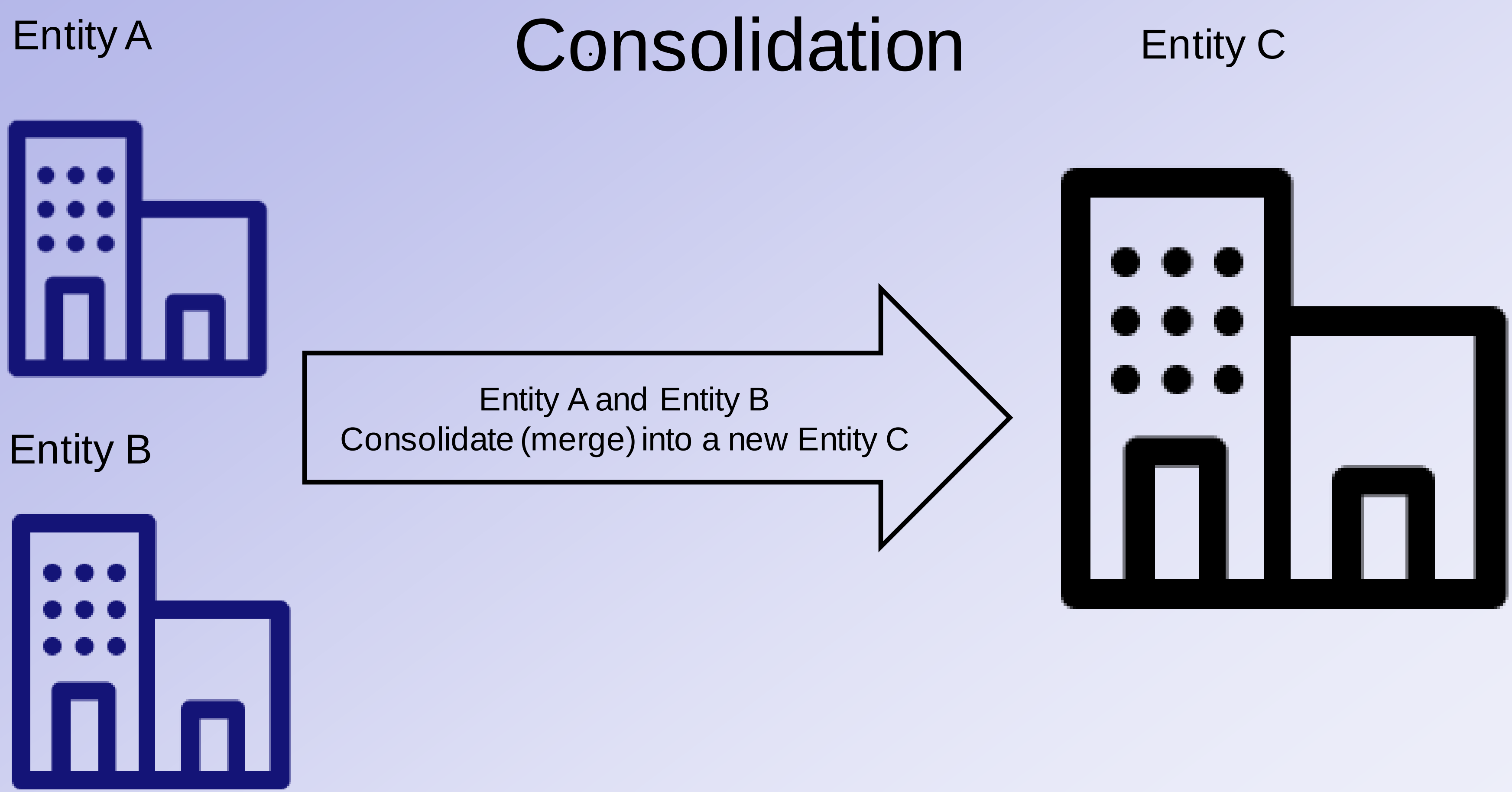
Asset Transfer



Consolidation

- Entity A & Entity B merge into newly created Entity C
- Entity C must obtain § 501(c)(3) status first
- All assets and liabilities of Entities A & B are part of Entity C
- Bequest, devise, gift, grant, or promise in a will or other instrument of donation, subscription, or conveyance transfers to Entity C unless instrument says otherwise
- Entities A & B disappear in consolidation
- Fresh start = new board, new employee structure, etc.

Consolidation



Parent – Subsidiary

- A CONTROL CHANGE
- Revise Entity A’s Articles of Inc. making Entity B sole member of Entity A
- Board of Entity A replaced with directors or officers of Entity B
  - ✓ Entity A becomes a subsidiary of Entity B
  - ✓ Each entity intact
  - ✓ Assets and liabilities remain in each entity
  - ✓ Employees remain in each entity

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Parent – Subsidiary Relationship

Entity A

Board of Directors Appointed by Entity A

Entity B

Entity A is the sole member of Entity B

Merger

- Entity A mergers into Entity B
  - ✓ All assets & liabilities of A transferred/assumed by B
  - ✓ No need to dissolve A; disappears throughs merger process
  - ✓ Difficult to unwind

MERGER

Corporation A

Corporation B

Corporation A merges into Corporation B
with Corporation B surviving

Corporation B
(includes all assets/liabilities of Corporation A, which has now been "merged into" Corporation B)

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Merger – Legal Issues

- Full combination
- Full due diligence!
- Liabilities
- Corporate structure – members and directors
- Tax status of remaining entity
- Employment alignment
- Restricted funds
- Contract restrictions
- Regulatory approvals

Merger Legal Steps

- Nondisclosure agreement
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Funders Perspective

- 53% of <u>all</u> foundations report rarely or never supporting collaboration; only 13% often or always
- Nonprofits report that foundations currently play a limited role in most collaborations
- Foundations report supporting all types of collaboration
- As CEOs, foundations' appetite is relatively higher for the more integrated forms of collaboration
- Foundations report that most collaborations are successful for grantees
- Foundations see joint programs as the most successful; nonprofits see it as the least successful
- Foundations report nonprofits aren't asking for help

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Common Merger Mistakes

- Conducting formal discussions without board approval.
- Merger negotiations without purpose clarity.
- Lack of resources invested in the process – including someone dedicated to implementation/integration.
- Lack of clearly defined roles, responsibilities and boundaries.
- Not acting like equals.
- Not addressing the key issues/concerns- including fear of job loss, control, impact to programs/clients, & culture differences.
- Withholding organization information from other entity.
- Allowing the process to take too long/ or too much inactivity between meetings.
- Inadequate number of engaged key stakeholders, especially staff.
- Not involving third-party neutral assistance.

Keys to Successful Merger

- Strong, solid and honest relationship among the CEO/EDs and then the Partnership Task Force members (Board)
- Develop a shared vision of a consolidated organization
- Collaborations or partnerships between organizations prior to merger
- Inclusion and support of all staff not, just leadership, planning and implementation
- Sufficient opportunities for funders and supporters to participate and give feedback in the merger process
- Use of experts, including Consultants

Other Lessons Learned

- Mergers take time and resources – but investing proper time/resources up front makes implementation more successful
- People issues more important than tasks - human integration is harder than system integration
- Progress more rapidly and effectively when people focused on mission/purpose than their own organization
- Merging does not require loss of brand & control
- Funders have a critical role to play in the process - Language of collaboration/partnership is confusing
- Can be a highly effective capacity-building tool
- Provide an incredible bang for the buck

Questions?

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For More Information:

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